



Public Law Project

**Independent Human Rights Act Review (IHRAR)**  
**Response to Call for Evidence**

March 2021

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## **Theme One**

1. The Call for Evidence asks a number of questions relating to the duty upon domestic courts to “take into account” Strasbourg jurisprudence, including whether it sufficiently facilitates inter-judicial dialogue, whether domestic courts can sufficiently communicate their concerns to Strasbourg, and whether any change is needed. We consider that the answer to these questions becomes clear once it has been established how the duty upon domestic courts to “take into account” Strasbourg jurisprudence has been applied in practice. In our view, the current domestic framework sufficiently accommodates the concerns raised, and there is no strong case for amending or otherwise changing section 2 of the HRA.

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

2. The modern position adopted by UK courts in this respect is liable to misinterpretation and misunderstanding.<sup>1</sup> It is true that some accounts of how section 2 operates in practice would suggest that domestic courts must follow Strasbourg jurisprudence in a manner akin to precedent, with no real room for disagreement or dialogue. Whilst at certain points senior domestic courts did indeed follow Strasbourg decisions quite closely, the idea that the UK operates as some kind of “Strasbourg surrogate” has never really been an accurate picture of judicial practice, and even if it was, it is certainly no longer true and has not been for some time.
3. The application of section 2 HRA is often associated with the so-called *mirror principle*: when Strasbourg adopts a position on a given matter, the domestic courts should usually adopt the same one, “no more and certainly no less”.<sup>2</sup> Although the position was never quite as absolute as it is sometimes suggested,<sup>3</sup> this approach did suggest that where a Strasbourg pronouncement would clash with a domestic authority, the domestic court should *ordinarily*

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<sup>1</sup> Sections of the following part of our response are taken from Graham, “The Modern Mirror Principle”, *Public Law*, forthcoming.

<sup>2</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26 at [20]. See also *N v Secretary of State for the Home Department* [2005] UKHL 31 at [24]-[25] and *R. (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15 at [53].

<sup>3</sup> In early cases Lord Bingham implied that domestic courts may decline to follow Strasbourg if there existed “strong reasons” (*R (Ullah) v Special Adjudicator* [2004] UKHL 26 at [20]) or “good reasons” (*Anderson v Secretary of State for the Home Department* [2002] UKHL 46 at [18]) for doing so. In another case, Lord Bingham opined that where “an English court considers that the ECtHR has misunderstood or been misinformed about some aspect of English law, it may wish to give a judgment which invites the ECtHR to reconsider the question”: *R. v Lyons* [2002] UKHL 44 at [46]. In *Doherty v Birmingham City Council* [2008] UKHL 57 Lord Scott said that when considering Strasbourg decisions which “appear to be based on an imperfect understanding of domestic law or procedure, they need not, and in my opinion should not, be followed” at [88]. These *obiter* statements were confirmed authoritatively in *R v Horncastle* [2009] UKSC 14 at [11].

“mirror” the Strasbourg position.<sup>4</sup> Yet courts soon established a number of circumstances under which a departure from Strasbourg could be justified.<sup>5</sup> Whilst it was the case – *and continues to be the case* – that following the Strasbourg position was generally considered to be a good idea, the House of Lords, and subsequently the Supreme Court, confirmed that it was not obliged to follow Strasbourg jurisprudence which “lacks its customary clarity”<sup>6</sup> or sends “mixed messages”.<sup>7</sup> Only cases which form a “clear and constant”<sup>8</sup> set of authorities would ordinarily be followed, which usually required a point of law to be set out consistently across multiple cases, or to be endorsed by the Grand Chamber.<sup>9</sup>

4. In a number of cases, domestic courts also departed from Strasbourg where they considered that its authority had been mired by a misunderstanding of some aspect of domestic law or practice. In the case of *Horncastle*,<sup>10</sup> the UKSC considered that Strasbourg had misunderstood the domestic law on hearsay evidence and declined to follow it. Subsequently, Strasbourg changed course on the matter, largely as a result of the clarification provided in the domestic court’s judgment.<sup>11</sup>
5. From around 2014 onwards, certain members of the Supreme Court began to depart from the Strasbourg case law under still wider circumstances. Now, a practice has emerged where domestic judges will refuse to follow Strasbourg if its reasoning is considered to be unconvincing or faulty; when it is felt that the outcome Strasbourg arrived at is incorrect; or when adopting Strasbourg’s position would have significant adverse consequences for the domestic legal system.
6. In a recent case, the Supreme Court confirmed that “refusal to follow a decision of the ECtHR, particularly of its Grand Chamber, is no longer regarded as... always inappropriate”.<sup>12</sup> A clear and constant line of authority is now just “one

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<sup>4</sup> Although lower courts were still required to follow any superior national precedent over Strasbourg decisions: *Leeds City Council v Price* [2005] EWCA Civ 289 at [33]; *Kay v Lambeth LBC* [2006] UKHL 10 at [43]; *Secretary of State for the Home Department v Onuorah* [2017] EWCA Civ 1757 at [37]; *AM (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 64 at [30].

<sup>5</sup> The most authoritative expositions come from two early decisions of the UK Supreme Court, *R v Horncastle* [2009] UKSC 14 and *Manchester City Council v Pinnock* [2011] UKSC 6.

<sup>6</sup> *N v Secretary of State for the Home Department* [2005] UKHL 31 at [14].

<sup>7</sup> *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29 at [199].

<sup>8</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26 at [20]; *R. (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [26].

<sup>9</sup> *Anderson v Secretary of State for the Home Department* [2002] UKHL 46 at [18]; *Cadder v HM Advocate* [2010] UKSC 43; *R (Chester) v Secretary of State for Justice* [2013] UKSC 63 at [27].

<sup>10</sup> *R v Horncastle* [2009] UKSC 14

<sup>11</sup> *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23

<sup>12</sup> *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 at [34]

<sup>13</sup> *Poshteh v Kensington RLBC* [2017] UKSC 36 at [32] and [36].

“possible view” in the “continuing debate” over the application of the ECHR to consider.<sup>13</sup> The following are some examples of cases (mostly, but not

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exclusively, decided by the UKSC) where applicable Strasbourg case law was not followed due to doubts over its reasoning or conclusions, or where the consequences of applying it were considered unacceptable.

7. In *Kaiyam* the Supreme Court undertook its own evaluation of how human rights obligations in relation to prisoner rehabilitation should operate. In departing from Strasbourg’s “over-expanded and inappropriate” case law, Lords Mance and Hughes criticised the reasoning employed in those cases as superfluous, unprincipled and mired by activist tendencies, and reasoned that following it would lead to intolerable consequences such as the release of prisoners or arbitrary detention.<sup>13</sup>
8. In *Hicks* the Supreme Court chose not to apply an important Strasbourg judgment concerning police powers, breaches of the peace and the right to liberty. Lord Toulson, speaking for a unanimous Court, explained that he thought that the Strasbourg court had reached the wrong overall conclusion on the facts, had employed poor reasoning in reaching it, and feared that adopting the Strasbourg position domestically would have unacceptably negative consequences for policing in practice. After analysing the relevant case law for himself, and relying on his own view of the language and purpose of the Convention, he rejected the Strasbourg position and aligned himself with a view the majority of the Strasbourg court had explicitly rejected.<sup>14</sup>
9. In *Poshteh*, a case on whether the safeguards in the Convention ought to apply to homelessness appeals, Lord Carnwath (with the backing of all other members of the Court) chose to depart from a Strasbourg case which, in his view, was based on weak and unconvincing reasoning, had not satisfactorily engaged with the Supreme Court’s previous arguments, and had taken domestic dicta out of context. He voiced considerable concern about the implications of adopting the Strasbourg position without “full consideration of its practical implications for the working of the domestic regime” particularly in relation to the effects its adoption might have on the allocation of public funds.<sup>15</sup>

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<sup>13</sup> *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66 at [27], [28], [30], [33], [34], [35]. The Court departed from *James, Lee and Wells v United Kingdom* (2012) 56 EHRR 399, despite the fact that the UK had already (unsuccessfully) challenged the authority of *James: Dillon v United Kingdom* Application No 32621/11, Decision of 4 Nov 2014; *Thomas v United Kingdom* Application No 55863/11, Decision of 4 Nov 2014.

<sup>14</sup> *R (Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9 at [24], [29], [30], [34], [37], [38], [39]. The Court departed from *Ostendorf v Germany* (2013) 34 BHRC 738.

<sup>15</sup> *Poshteh v Kensington RLBC* [2017] UKSC 36 at [23], [29], [33], [34] and [36].

10. The most direct example of domestic judges rejecting Strasbourg authority is the case of *Hallam*. The majority of the Supreme Court rejected the view of the Grand Chamber of the European Court relating to the application of Article 6 in the context of miscarriages of justice. Various domestic judges criticised the Strasbourg court harshly for many reasons, including for its use of vague

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justifications, lack of engagement with previous authorities and repetitive and unengaging reasoning, resulting in a line of authority replete with arbitrary distinctions, uncertainties, “hopeless and irretrievable confusion” and a position at odds with the purpose of the Convention. The domestic judges also thought that following Strasbourg would result in unjustifiably negative consequences for the domestic regime, throwing long-standing rules into disarray, and hampering police investigations.<sup>17</sup>

11. Other cases in which at least some judges exhibit this approach include *McLaughlin*,<sup>18</sup> *T*,<sup>19</sup> *Stott*,<sup>20</sup> *DSD*,<sup>16</sup> *Abdurahman*<sup>17</sup> and *Hafeez*.<sup>23</sup>
12. These cases demonstrate that UK judges do not see the Strasbourg jurisprudence as anything like the straightjacket it is sometimes depicted as. At the same time, it is important that the duty to “take into account” the relevant Strasbourg case law should not be abandoned entirely. Its flexibility means that UK courts can continue to consider the Strasbourg case law and follow it in cases when it is considered sensible and proper to do so. UK courts have, for example, recently followed Strasbourg law in relation to police investigation duties<sup>18</sup> and state obligations towards criminals who are extremely ill,<sup>19</sup> not because they were bound to do so by section 2, but because UK judges

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<sup>17</sup> *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2 at [38], [46] [61] [71], [72] and [77] (Lord Mance); [85], [86] and [90] (Lord Wilson); [109], [119], [126] and [129] (Lord Hughes); [132] and

<sup>16</sup> *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, in which Lord Hughes came to the same overall conclusion as his colleagues, but rejected the reasoning they, and Strasbourg, had adopted, because it was, in his view, overly simplistic ([117]-[119], [121], [126]), too expansive ([114]) and based on underdeveloped reasoning ([114], [116], [124], [125], [126]). He also feared that following it would hamper policing in practice ([129]-[134]).

<sup>17</sup> *R v Abdurahman* [2019] EWCA Crim 2239, in which the Court of Appeal described Strasbourg as endorsing an unfair and unworkable standard ([116]) which was not based on sound reasoning ([111]) and was not followed. See Graham, *R v Abdurahman (Ismail)* (2020) Criminal Law Review 453. <sup>23</sup> *Hafeez v US* [2020] EWHC 155 (Admin), in which the High Court refused to follow a case which had been reached without “any proper reasoning” ([57]) and was out of step with underlying “principle” of the relevant provisions of the Convention ([56]). A similar approach was adopted in *Sanchez v US* [2020] EWHC 508 (Admin). See Graham, “Extradition, Life Sentences and the European Convention” (2020) 3 *Judicial Review* 228 and Graham, “Life Sentences under the Convention: Law or Politics?”, UK Constitutional Rights Association Blog, 3 April 2020.

<sup>18</sup> see the view of the majority judges, particularly Lord Neuberger, in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11

<sup>19</sup> *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17

[134][137] (Lord Lloyd-Jones). The Court departed from *Allen v United Kingdom* (2016) 63 E.H.R.R. 10 in favour of retaining the position it had previously adopted in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18.

<sup>18</sup> *Re McLaughlin* [2018] UKSC 48, where Lord Mance departed from Strasbourg case law which did not feature satisfactory reasoning ([49]) and which, in his view, lacked nuance ([51]).

<sup>19</sup> *R (T) v Secretary of State for the Home Department* [2014] UKSC 35, in which Lord Wilson resisted following *MM v United Kingdom*, Times, January 16 2013 because he considered it to be fundamentally incorrect, having, in his view, improperly elided concepts of legality and proportionality: [32], [37]-[38]. <sup>20</sup> *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, in which Lord Carnwath expressed dissatisfaction with the court's reasoning which, in his view, was unprincipled ([175]), "hard to follow" ([176]) and replete with irrelevant considerations ([175]), and in which the judges went beyond what the

"authors of the Convention intended" ([179]).

considered Strasbourg to have adopted a convincing and workable position which was directly applicable to the domestic context.

13. It is both logical and desirable that UK judges often (but not always) do this; not least because an individual who is unsuccessful at the domestic level can subsequently lodge a case before Strasbourg (and an adverse finding at that level will give rise to obligations in international law to implement it). This approach also properly reflects the intention of the HRA itself, which is to ensure that breaches of the Convention can be remedied at a domestic level, and to ensure that rights are "brought home". It is better for individuals whose human rights have been breached to be able to obtain an effective remedy in the domestic courts.

14. Overall, we think that the obligation under section 2 HRA, whereby domestic courts must consider the Strasbourg jurisprudence, but are under no requirement to endorse or follow it, allows for an ideal situation where rights standards are interpreted and applied in a harmonious manner where possible, but tailored to the requirements of the domestic situation where necessary.

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

15. As has been set out above, the flexibility inherent in section 2 HRA allows for the margin of appreciation permitted to states under the Strasbourg case law to be taken into account when dealing with a case under the Human Rights Act. UK judges have frequently acknowledged that when it comes to certain subjects, the Convention permits a significant degree of variation between the approach adopted by different contracting states, which has guided the domestic approach to topics such as assisted suicide and abortion.<sup>20</sup>

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<sup>20</sup> See e.g. *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; *Re Northern Ireland Human Rights Commission* [2018] UKSC 27.

16. Sometimes the language of “margin of appreciation” is used to refer not to the approaches of different contracting states under the European Convention, but to the discretion afforded by courts to the executive or the legislature when dealing with controversial topics, or areas lacking a broad consensus. Lord Hope summarised this position in *AXA*:

“The doctrine by which a margin of appreciation is accorded to the national authorities is an essential part of the supervisory jurisdiction which is exercised over state conduct by the international court. It is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts too the Convention should be seen as an expression of fundamental principles which will involve questions of balance between

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competing interests and issues of proportionality... in some circumstances, such as where the issues involve questions of social or economic policy, the area in which these choices may arise is an area of discretionary judgment. It is not so much an attitude of deference, more a matter of respecting, on democratic grounds, the considered opinion of the elected body by which these choices are made”<sup>21</sup>

17. As can be seen, domestic courts are acutely aware of the “margin of appreciation” to be afforded to decision-makers in this respect. Nothing in the approach taken to section 2 outlined above calls this into question in any way.

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

18. Regarding whether the current approach “permit[s] domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK”, the answer is clearly ‘yes’, based on our answer to the above questions.
19. Effective “dialogue” between domestic courts and the ECtHR requires the former to have a degree of flexibility when it comes to applying Strasbourg jurisprudence; we think that current practice, as set out above, allows ample room for this, and for dialogue channels to be established where necessary. This is especially likely to occur where the national courts take care to explain their concerns, if any, with the Strasbourg jurisprudence or its domestic application, and if they remain open to hearing Strasbourg’s response.

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<sup>21</sup> *AXA General Insurance v Lord Advocate* [2011] UKSC 46 at [32]



20. Examples of this ‘dialogue’ operating in practice include the series of cases involving the compatibility of the UK’s life sentences regime. After Strasbourg handed down an initial judgment which held that the apparently irreducible whole-life sentences served by a number of UK prisoners breached the Convention,<sup>22</sup> the Court of Appeal disagreed with certain aspects of the court’s reasoning, considering it to have misunderstood certain aspects of the domestic law. It then explicitly set its own understanding of the domestic position.<sup>23</sup> In a subsequent case, Strasbourg not only accepted that it had construed the domestic law incorrectly, but, on the basis of the Court of Appeal’s clarification, went on to accept that the UK sentences regime was compatible with the rights under the Convention.<sup>24</sup>

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21. Whilst ‘dialogue’ can sometimes lead Strasbourg to modify its stance, sometimes it can also operate to assist the domestic courts in understanding and applying the Convention. Following the heavy criticism of its case law in *Kaiyam* (set out above), Strasbourg developed and clarified a number of the issues raised by the domestic judges.<sup>25</sup> In a later case, the Supreme Court confirmed that some of its previous concerns had fallen away in light of Strasbourg’s more recent clarification, and that its thinking had developed so that its previous judgment in *Kaiyam* should no longer be followed, once again aligning the domestic and Strasbourg positions.<sup>26</sup>

22. As such, effective ‘dialogue’ is dependent on much more than the legal provisions in the HRA, and requires a willingness on the part of judges, both in the UK and Strasbourg, to be open and receptive to new arguments and to shift and adapt their position where necessary. That being said, as far as legislative provisions are concerned, section 2 allows for this dialogue to be facilitated so far as possible.

**Finally, the consultation asks whether there is a case for changes being made to section 2.**

23. Based on the above assessment of current judicial practice, we do not see any need for any amendment to section 2 HRA. It strikes an appropriate balance between allowing complaints that human rights have been breached to be remedied in the domestic courts, without the need to go to Strasbourg, and

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<sup>22</sup> *Vinter v United Kingdom* (2016) 63 EHRR 1

<sup>23</sup> *R v McLoughlin* [2014] EWCA Crim 188

<sup>24</sup> *Hutchinson v United Kingdom* (2016) 43 BHRC 667

<sup>25</sup> *Kaiyam v United Kingdom* (2016) 62 EHRR SE13

<sup>26</sup> *Brown v Parole Board for Scotland* [2017] UKSC 69

allowing UK courts to take account of domestic circumstances or engage in dialogue with Strasbourg where warranted.

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## Theme Two

24. This theme asks a number of questions about the operation of the Human Rights Act at the domestic level and whether it upsets the relationship between the executive, legislature and judiciary. Our view is that the provisions of the HRA strike a sophisticated and largely successful balance between the constitutional fundamentals of respect for democratic legitimacy and securing fundamental rights for all.
25. We set out our responses to the specific issues raised below, but we would highlight at the outset that the Human Rights Act has a significant – and in our view positive - effect on public administration across the board,<sup>27</sup> most of which has developed without any judicial involvement whatsoever. Public bodies involved in fields such as social care, policing, housing and mental health services and support have taken the Human Rights Act on board, and human rights considerations are now routinely considered and synthesised into their work.<sup>28</sup> Any assessment of the impact of the HRA on public administration and policy should be made against this background.

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<sup>27</sup> See e.g. Martin, “A Culture of Justification? Police Interpretation and Application of the Human Rights Act 1998” in Varhaus and Wilson Stark, *The Frontiers of Public Law* (Hart, 2019)

<sup>28</sup> A useful, if somewhat dated, overview can be found at “How the act has affected different public sectors” The Guardian, 2 July 2009. See also e.g. Care Quality Commission, “Human rights approach for our regulation of health and social care services”, February 2019, available at <https://www.cqc.org.uk/guidance-providers/all-services/our-human-rights-approach>; Equality and Human Rights Commission, “Guidance for social housing providers”, 19 February 2019, available at

**Theme Two asks whether the current approach risks “over-judicialising” public administration and draws domestic courts unduly into questions of policy.**

26. In the UK constitutional framework, it is the function of the judiciary to scrutinise the lawfulness of government action, whether through secondary legislation or the implementation of policy. The courts’ function includes being the final arbiter of the interpretation and application of legislation, both primary and secondary. This necessarily involves consideration at times of questions of policy; but the courts’ role is not to decide whether the policy choice made by the democratically elected branch is the right one: its role is to scrutinise its lawfulness. So too with the HRA: the courts’ role is to scrutinise the compatibility of policy choices with the rights protected by the HRA, not to decide whether the policy is desirable or the ‘right’ one. This function of the courts in ensuring that government acts within the law is an essential element of the rule of law in a functioning democracy.
27. Consideration of policy issues may arise during the process of assessing human rights compliance under the HRA. For example, many of the rights

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under the HRA are qualified and require courts to examine the proportionality of a measure when an interference with that right is alleged, or to determine whether the interference in a protected right is a proportionate means of achieving a legitimate aim. Courts will almost always accept the public body’s purported “legitimate aim” (i.e. the policy objective being pursued) in this respect, and will very often defer to their assessment of the proportionality of the measure, whether it is due to their relative expertise, or the democratic legitimacy of their decisions.<sup>29</sup> Courts have been particularly careful to show caution and deference when they are being asked to review policies which the judiciary is particularly ill-suited to evaluate, such as decisions relating to economic policy, national security or defence matters. In decisions relating to social welfare policies, courts have adopted an even stricter test than ‘regular’ proportionality, interfering in the decision of the executive in this respect *only* where it is considered to be “manifestly without reasonable foundation”.<sup>30</sup> This pays appropriate respect to the executive’s responsibility for policy formulation, while ensuring that policies which interfere with fundamental rights must pursue

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<https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-social-housing-providers>; Otter, “Rights in the balance – a framework for good policing” *The Guardian*, 2 July 2009.

<sup>29</sup> See e.g. King, “Institutional Approaches to Judicial Restraint” (2008) 28 OJLS 409; Young, “In Defence of Due Deference” (2009) 72 MLR 554.

<sup>30</sup> *R (Joint Council for the Welfare of Immigrants) v National Residential Landlords Association* [2020] EWCA Civ 542; *R (DA and DS) v Secretary of State for Work and Pensions* [2019] UKSC 21; *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16

a legitimate purpose and that there should be a reasonable basis for the policy choice.

28. As such, whilst courts may on some occasions be required to evaluate the lawfulness of policy, their job is not to dictate policy of their own. Sections 3 and 4 of the Human Rights Act ensure that this remains the case. Courts have interpreted their obligation to interpret legislation in line with the Convention only “so far as it is possible to do so” as meaning that an interpretation is offlimits if it is just one of many possible readings which give effect to different policy objectives.<sup>31</sup> Section 4 offers a more direct guard against judicial policymaking, reserving to Parliament the ability to decide whether, and if so, how, to rectify any declaration of incompatibility issued by a court.

29. By and large, rather than *encouraging* undue intervention into policy areas, the mechanics of the HRA *limit* the power of the judiciary in this respect.

**Theme Two also asks how the roles of the courts, government and Parliament are balanced in the operation of the Human Rights Act.**

30. We consider that the roles of these institutions are well-balanced under the HRA. Indeed, the HRA framework was designed to facilitate co-operation,<sup>32</sup> and there is good evidence that this is frequently happening in practice. If there

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is conflict between the three organs of government, under the HRA it is Parliament which ultimately prevails,<sup>39</sup> being able to pass valid primary legislation even if it is considered to be incompatible with the Convention. In our view therefore, the HRA strikes the appropriate balance of ensuring respect for the sovereignty of Parliament while enabling individuals to secure effective protection of their human rights. Both of these points are evident when assessing the operation of sections 3 and 4 of the HRA in practice.

31. Starting with section 4, the most important point is that declarations of incompatibility do not affect the validity of legislation; rather, they operate as “a signal to Parliament that legislation, while remaining in force, contains provisions that are contrary to Convention rights”;<sup>40</sup> it is then open to Parliament to decide how to respond. At the same time, the vast majority of declarations made have resulted in legislative change.<sup>33</sup> We suggest that this is positive, and

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<sup>31</sup> A kind of ‘structural deference’ per Alexy, *A Theory of Constitutional Rights* (OUP, 2002).

<sup>32</sup> Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, 2009) at 310-313

<sup>33</sup> Ministry of Justice, “Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2019-2020”, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf) and see King, “Parliament’s Role following

shows the co-operative vision underpinning the HRA working in practice. It is also inaccurate to characterise this as anything like judicial supremacy: a remedial response from the legislature does not (and never has) flowed automatically from a declaration of incompatibility. Some incompatible legislation remained in place for many years, with amendment proposals being rejected outright by multiple successive governments.<sup>34</sup> Even when a declaration is remedied relatively quickly, this does not mean that Parliament did not seriously engage with it. For example, the high-profile *Belmarsh* decision, in which the House of Lords declared provisions of the Anti-Terrorism, Crime and Security Act 2001 incompatible with the Convention, triggered extensive Parliamentary debate regarding what, if anything, ought to be done in response.<sup>35</sup> It is clear from the comments of various ministers and MP's that they were under no impression that remedying the incompatibility was mandatory.<sup>36</sup> It is true, therefore, that "even in those cases where [declarations]

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<sup>39</sup> Bellamy, "Political constitutionalism and the Human Rights Act" (2011) 9(1) *IJCL* 86

<sup>40</sup> Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, 2009), 10

were controversial, it is too simplistic to say that the political branches merely endorsed the judicial viewpoint, and were doing the will of the courts".<sup>37</sup>

32. Notwithstanding their non-binding nature, courts have still proceeded very carefully when it comes to declarations of incompatibility. The number of cases in which a declaration is issued is relatively low; according to the Ministry of Justice, which very helpfully publishes annual updates on the number of recorded declarations of incompatibility,<sup>38</sup> 43 were made prior to July 2020, although it should be noted that ten of these were overturned on appeal,

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Declarations of Incompatibility under the Human Rights Act" in Hooper, Hunt and Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015).

<sup>34</sup> E.g. the 'blanket ban' on prisoner voting – declared incompatible in *Smith v Scott* [2007] *CSIH* 9 – was not remedied until 2017. See Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg" 14(3) *HRLR* 503.

<sup>35</sup> *A v Secretary of State for the Home Department* [2004] *UKHL* 56. This is despite the government's claim that they "responded immediately" to the declaration by repealing the legislation: *Burden v United Kingdom* (2008) 47 *EHRR* 38 at [24]

<sup>36</sup> amongst many other examples, see e.g. Charles Clarke: "It is ultimately for Parliament to decide whether and how we should amend the law. The Part 4 provisions will remain in force until Parliament agrees the future of the law" (Written Statements, 16 December 2004, col.151WS); Charles Clarke: "Let me reaffirm that ... as the Human Rights Act 1998 makes clear, Parliament remains sovereign and it is ultimately for Parliament to decide whether and what changes should be made to the law (HC Deb, 20 December 2004, col.1911); Baroness Scotland: "Parliament will always be the final arbiter on what our law is" (HC Deb, 20 December 2004, col.1594); Hazel Blears: "The House of Lords has decided that that is incompatible with the European convention on human rights, although it has not decided that it

<sup>37</sup> Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP, 2012) at 135; a range of responses are detailed at 142-156.

<sup>38</sup> Ministry of Justice, "Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020", available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf)

resulting in a figure of 33 (final) declarations over 20 years.<sup>39</sup> There are far more applications for declarations rejected than there are approved; something which had led some scholars to take the view that the courts have adopted quite a “reluctant” approach to s4 in practice.<sup>40</sup>

33. In a sense, section 3 HRA is the ‘stronger’ of the two sections. But as with section 4, this power is subject to considerable limitations, and fundamentally, is not so strong as to prevent Parliament from disagreeing with a court’s ruling and legislating to reverse its decision. In this sense, section 3, like section 4, both respects sovereignty and encourages dialogue.<sup>41</sup> Moreover, adopting a section 3 interpretation of legislation allows courts to give effect to the protection of Convention rights required under the HRA by adopting an interpretation which respects those rights. This is consistent with the intention of the HRA – bringing rights home – and with ensuring the effective protection of rights and that individuals can obtain an effective remedy for any breaches.

34. Section 3 HRA allows for a “Convention-compliant interpretation to be adopted only “where possible”; when considering this section, courts are mindful of this limitation and often explicitly reference the importance of preserving the

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is unlawful” (HC Deb, 8 February 2005, col.1416-1417); Bill Cash: “The 1998 Act can be overridden... if we were to legislate inconsistently, unclearly and ambiguously, contrary to the 1998 Act, we could do so.” (HC Deb, 28 February 2005, col.740); Lord Kingsland: “It is quite clear that the declaration of incompatibility...does not prevent the Government legally extending the 2001 Part 4 legislation” (HL Deb, 1 March 2005, col.212).

legislative function to Parliament.<sup>42</sup> They have distinguished “judicial interpretation”, a legitimate exercise under section 3, from “judicial vandalism”, which is not,<sup>43</sup> and have used various terms and aphorisms to define and describe this boundary.<sup>52</sup> Interpretive red lines in this respect include departing from “a clear and prominent feature” of legislation<sup>44</sup>, acting “inconsistent[ly] with

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<sup>39</sup> Of these, 5 were issued in relation to legislation which, at the time of the judgment, was no longer in force.

<sup>40</sup> see e.g. Wilson-Stark, “Facing facts: judicial approaches to section 4 of the Human Rights Act 1998” (2017) 133 LQR 631. Some academics have argued that the court should be more proactive in its consideration of s4 HRA, and that its approach has been, if anything, too deferential: Young, “Ghaidan v Godin-Mendoza: avoiding the deference trap” [2005] Public Law 23.

<sup>41</sup> Clayton, “Judicial deference and democratic dialogue: the legitimacy of judicial intervention under the Human Rights Act 1998” [2004] PL 33 at 46; Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, 2009) at 129-130; Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, 2009) at 10.

<sup>42</sup> See e.g. *Re S* [2002] UKHL 10 at [9] (Lord Nicholls): “the Human Rights Act reserves the amendment of ... legislation to Parliament”.

<sup>43</sup> *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 at [30] (Lord Bingham)

<sup>52</sup> Lord Bingham summarises many of them in *Sheldrake v DPP* [2004] UKHL 43 at [28].

<sup>44</sup> *Re Z* [2015] EWFC 73 at [36] (Munby P).

[its] scheme”<sup>45</sup> or undermining a “fundamental” aspect of it.<sup>46</sup> Examples of this principle include a case where the High Court felt unable to interpret a legislative requirement that “two people” must apply for a parental order in the context of surrogacy as allowing for just one person to do so.<sup>47</sup> In another case, the courts felt they could not treat the straightforward blanket ban on prisoner voting as being open to interpretation under section 3.<sup>48</sup>

35. Usually, although section 3 *can* be used even in the absence of any lexical ambiguities in the statute, courts *will* pay heed to the language used in the statute, in order to assess whether it would be possible for certain words to be read into it, or for certain words to be ignored. The majority of cases in which section 3 is used involve such ‘additions’ or ‘subtractions’ to the existing statutory scheme, rather than some wholesale restructuring of provisions. Courts are also restricted to reading in those changes which are “essential” or “necessary” for compliance.<sup>49</sup> Often, for example, courts will limit themselves to “reading in” an implied exception that a statutory power is not to be exercised in a manner which would be incompatible with the Convention.<sup>50</sup>

36. Research suggests that in a majority of instances where section 3 is used, no adverse legislative amendment follows.<sup>51</sup> As with section 4, this could be viewed as an example of fruitful dialogue in practice, where Parliament accepts the judiciary’s view of the law, even though it has the full power to legislate contrary to it. Indeed, whilst it is difficult to find a case where Parliament considers the view adopted by courts under s3, disagrees with it, and “tightens” the provision as a result, positive engagement with section 3 can be seen by the fact that sometimes legislation has been amended to explicitly put the ‘section

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3 interpretation’ adopted by the courts into clear and explicit wording, suggesting approval of the court’s view.<sup>52</sup>

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<sup>45</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [121] (Lord Rodger)

<sup>46</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [33] (Lord Nicholls)

<sup>47</sup> *Re Z* [2015] EWFC 73

<sup>48</sup> *Smith v Scott* [2007] CSIH 9

<sup>49</sup> *R (Aviva Insurance) v Secretary of State for Work and Pensions* [2021] EWHC (Admin) at [28] and [36].

<sup>50</sup> e.g. *Connolly v DPP* [2007] EWHC 237 (Admin) at [18] (Dyson LJ); *Lukaszewski v Poland* [2012] UKSC 32 at [39] (Lord Mance); *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46 at [72];

<sup>51</sup> Crawford, “Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998” (2014) *King’s Law Journal* 34

<sup>52</sup> e.g. following the judgment of the House of Lords in *R (O) v Crown Court* [2006] UKHL 42, the Criminal Justice and Public Order Act 1994 was amended to include the specific wording read in by the judges. After *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, TPIMs were established to replace control orders, which included specific provisions protecting against breaches of Art 6; the Damages (Scotland) Act 2011 replaced provisions of the Fatal Accidents Act 1976 in line with the approach in *McGibbon v McAllister* (2008) CSOH 4

37. Taking sections 3 and 4 together, we agree that the provisions of the HRA are well-balanced and, as one commentator has observed, that they represent “a delicate balancing act between the models of parliamentary and constitutional democracy. They aim to protect human rights while respecting parliamentary legislative supremacy, instituting a model of constitutional dialogue between Parliament and the courts”.<sup>53</sup>

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

38. When considering the relationship between Parliament and section 3 HRA, it is worth emphasising at the outset that section 3 was of course passed by Parliament itself – in applying section 3, courts are therefore acting in pursuit of their obligation to interpret and apply the provisions of primary legislation.

39. It is clear that section 3 does allow courts to go ‘beyond’ the traditional boundaries of statutory interpretation. Judicial dicta has confirmed that, in the appropriate circumstances, the provision can be used in order to effect construction which departs from Parliament’s strict intention.<sup>54</sup> That said, the power is far from unlimited, and, as set out above, judges have been careful to distinguish between the act of interpretation on the one hand and re-writing or legislating on the other. Courts can depart from the specifics of a statute, but not against the ‘grain’ of it, or where its meaning is “unequivocal”,<sup>55</sup> considered as a whole. As judges have noted, sometimes interpretation under section 3 can look very similar to the kind of ‘regular’ purposive interpretation employed by courts.<sup>56</sup>

40. Further, it should not be presumed that courts are acting against the wishes of Parliament when applying section 3. In certain cases, courts may well be

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dealing with “blind spots” which Parliament had not contemplated at the time of the passage of the provision in question,<sup>57</sup> and ‘updating’ the legislation to

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<sup>53</sup> Young, “Ghaidan v Godin-Mendoza: avoiding the deference trap” [2005] PL 23 at 33

<sup>54</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [30] (Lord Nicholls)

<sup>55</sup> *AS (Somalia) v Entry Clearance Officer* [2009] UKHL 32

<sup>56</sup> *Jet2 v Denby*, UKEAT/0070/17/LA (25 October 2017) at [47]; *R (E) v Islington LBC* [2017] EWHC 1440 at [138]-[139]; *The Pharmacists’ Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66 at [61]-[62].

<sup>57</sup> *Lukaszewski v Poland* [2012] UKSC 32 at [39] (Lord Mance); Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, 2009) at 116; Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (OUP, 2012) at 42-43



afford protection in a manner compatible with the HRA. Parliament may not always be hostile to the position effected through a section 3 interpretation; as was set out above, it has very rarely legislated to correct any section 3 interpretations it has been unhappy with. Also, as is set out further below, in some cases the government (and indeed often the same government which introduced the legislation being considered by the courts) specifically argues *for* the use of section 3 HRA.

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

41. PLP does not consider that amendment or repeal of section 3 is warranted. For the reasons set out above, sections 3 and 4 together strike the correct balance between respect for Parliamentary sovereignty and the effective protection of human rights. If courts go beyond what Parliament regards as appropriate, it can legislate to reverse the effect of judicial decisions: there is little evidence in practice of it having done so.
42. If, contrary to our primary position, amendment or repeal of section 3 is proposed, we would strongly oppose any changes of the kind contemplated by this question. Not only would re-opening previous judicial decisions take a sledgehammer to legal certainty, but a measure to invalidate section 3 interpretations, presumably undertaken in the name of restoring sovereignty, seriously risks undermining it. Parliament has always been able to pass legislation in precise terms so as to 'over-rule' any judicial decision relating to section 3. The fact that, by and large, it has not done so suggests that Parliament has been content to adopt the courts' interpretation in these cases, some of which have now been in operation for decades. It is vastly preferable that in the event that the legislature disagrees with a substantive position adopted by the courts, it should respond carefully to the specific decisions raising an issue on a principled basis, rather than through some blanket provision applicable to all section 3 decisions.
43. There are also serious practical difficulties with any proposal to modify the effect of past judgments involving section 3 - the use of this section is not always signalled clearly by judges, and is sometimes adopted as an alternative to, or as a means to augment, more traditional approaches to interpretation. As a result, data relating to the application of this provision is not recorded and

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tracked in the same manner as the use of section 4. To compile some list of

“previous section 3 interpretations” would be difficult; to work out how to ‘reverse’ or ‘disapply’ them, especially given that in many cases the law and policy around the case has since changed significantly, would be impossible.

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

44. It is common to conceptualise section 3 HRA as the ‘stronger’, ‘primary’ mechanism by which a breach of the Convention can be remedied, with a declaration under section 4 acting as a fall-back, ‘secondary’ consideration (or, as the consultation puts it, a “matter of last resort”). However, although often considered together, section 3 and section 4 are distinct remedies, and each may be considered a more appropriate choice in certain circumstances.<sup>67</sup>

45. Indeed, there are good reasons as to why section 3 should be used over and above section 4 in at least some cases. It provides an immediate remedy to an incompatible provision; even when Parliament is committed to complying with a declaration, it can take a significant amount of time for it to do so— sometimes many years – before changes come into effect. Unlike with section 4, a court using section 3 can grant a remedy to the parties involved in the case, with the interpretation adopted being applied immediately to their circumstances. The HRA-compliant interpretation will subsequently be applied by the public body concerned to other cases. This means that HRA-compliant interpretation, within its proper limits, can be a vital tool for the effective protection of human rights.<sup>58</sup>

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<sup>67</sup> Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, 2009) at 129-130: section 3 and section 4 put in place “a model that focuses on the different institutional features of the legislature and the judiciary. Section 3 is more suited to situations where the judiciary is more likely to reach a correct conclusion as to the scope and application of Convention rights. Section 4 is more suited to cases where the legislature is more likely to reach a correct conclusion concerning the scope and application of Convention rights.” See also Lord Hobhouse in *Bellinger v Bellinger* [2003] UKHL 21 at [78]. There is some evidence of this happening in practice; as almost all of the early cases in which section 3 was used concerned Article 6 (right to a fair trial), an obvious context where a judicial resolution may be considered particularly appropriate; although it is difficult to put together a definitive list of cases in which section 3 was used, courts applied it in order to remedy a problem with Article 6 in at (at least) 15 cases from the HRA coming into power in October 2000 to January 2003. During that time, the only use of section 3 with respect to other Convention articles that we could identify were *R v Offen (No 2)* [2000] (relying on Articles 3 and 5) and *Thomas v News Group Newspapers* [2001] EWCA Civ 1233 (relying on Article 10, use of section 3 confirmed in *Carina Trimingham v Associated Newspapers Limited* [2012] EWHC 1296 (QB) at [53]). The court relied on Article 5 in *R (DPP) v Havering Magistrates Court* [2001] but this was in conjunction with Article 6. In addition, *Havering* is one of a number of cases in which it

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<sup>58</sup> In addition, there exist some ambiguities relating to whether a declaration of incompatibility constitutes a sufficiently effective remedy for the purposes of the Convention. It seems to be the case that a declaration under section 4 is not considered an ‘effective remedy’ for the purposes of Article 35: applicants bringing a case before Strasbourg must show that they have “exhausted domestic remedies” before making their application, but Strasbourg has consistently held that applicants do not need to

is difficult to tell whether the court relied on section 3 to interpret the statute or whether it was just presented as an alternative possibility for reaching the court's conclusion.

46. Section 3 also acts as something of a pragmatic safeguard when legislative provisions are challenged in other contexts. For example, during the passage of legislation, the Joint Committee on Human Rights has in the past given its approval to bills raising certain human rights concerns, on the basis that any provisions which interfere with human rights could be 'read down' by courts so as to be applied in a Convention-compliant manner in practice. Another benefit is that section 3 can help to insulate provisions against adverse findings by the European Court of Human Rights; when reviewing our law, Strasbourg has accepted that certain provisions which may result in a breach of a Convention right do not so do in practice thanks to the duty to read and apply them in a Convention-compatible manner under section 3.<sup>59</sup>

47. We would draw the panel's attention to the fact that in a surprisingly high number of cases, it is public bodies, including central government, who have argued *for* the use of section 3 rather than another remedy.

48. For example, in the seminal case of *Ghaidan* the government argued for the use of section 3 to modify the Rent Act so as to include same-sex partners in those able to benefit from succession rights under a tenancy; it also did so in the case of *Hammond*,<sup>60</sup> a case demonstrating perhaps the most radical use of section 3, allowing the court to order an oral hearing in circumstances which, read literally, would be blocked off by statute.<sup>61</sup> In *Pomiechowski*, the government advocated for a reading of the Extradition Act which allowed time limits prescribed therein to be extended by the court in exceptional circumstances.<sup>62</sup> There are many other such cases.<sup>63</sup>

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<sup>59</sup> *Hutchinson v United Kingdom* (2016) 43 BHRC 667, relying on an interpretation of the UK's "lifer's manual" provided in *R v McLoughlin* [2014] EWCA Crim 188. Although less explicit, Strasbourg seems to have accepted a similar argument in *Unuane v United Kingdom*, Application No 80343/17, Judgment of 24 November 2020, relying on an interpretation of the Immigration Rules provided in *Ali v Secretary of State for the Home Department* [2016] UKSC 60.

<sup>60</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30

<sup>61</sup> *R (Hammond) v Secretary of State for the Home Department* [2005] UKHL 69. Certain members of the House of Lords, most notably Lord Rodger, expressed significant reservations about the use of section 3 in this manner, but agreed to it because both parties to the case had argued for it.

<sup>62</sup> *Pomiechowski v Poland* [2012] UKSC 20

<sup>63</sup> Cases in which the government argued for the use of section 3, and in which the court did use section 3 include: *R v Holding* [2005] EWCA Crim 3185; *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; *Principal Reporter v K* [2010] UKSC 56; *TTM v Hackney* [2011] EWCA Civ 4 and *HM's Application for Judicial Review* [2014] NIQB 43. Cases in which the government argued for the use of section 3, but the court used section 4, include *R (H) v Mental Health Review Tribunal for North and East London Region* [2001] EWCA Civ 415; *International Transport Roth v Secretary of State for the Home Department* [2002] EWCA Civ 158; *R (D) v Secretary of State for the Home Department* [2002] EWHC 2805 and *R (Wright) v Secretary of State for Health* [2009] UKHL 3. The government has also argued for the use of section 3 when the alternative is the quashing of secondary legislation e.g.

seek a declaration under section 4 before bringing a case because such a declaration would not constitute an effective remedy: *Burden v United Kingdom* (2008) 47 EHRR 38 at [42]-[44].

On the other hand, the court has rejected arguments that section 4 does not constitute an effective remedy under the free-standing right to a remedy Article 13, because that article does not require contracting states to put in place measures by which individuals can challenge the validity or primary legislation: *Greens and MT v United Kingdom* (2011) 53 EHRR 21 at [83] and [90]-[92].

49. Further, far from frustrating the wishes of the government, the courts have overwhelmingly followed the government's preferences when it comes to remedies in Human Rights Act cases. Baroness Hale acknowledged this before the Joint Committee on Human Rights, saying that she could not "remember a case that I was involved in where we did not do whichever [remedy] Government asked us to do".<sup>64</sup>

50. To suggest that a declaration of incompatibility under section 4 should always be considered before an interpretation under section 3 presents the relationship between these two provisions in an inaccurate light. Section 3 is a more appropriate remedy in certain circumstances, whereas section 4 is more appropriate in others. To require the court to give primacy to section 4 would risk requiring the adoption of an inappropriate remedy, and closing off, from all parties, the many important benefits of an interpretation under section 3. As a result, we do not think there is a case for change.

**In light of the above, the consultation asks whether change should be made to sections 3 and 4 of the Human Rights Act.**

51. Based on our answers to the above, we consider that there is no case for changes to be made to these sections.

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

52. Because derogation under section 14 happens so rarely in practice, it is difficult to establish what judicial practice looks like in this area. However, in our view, being secondary legislation, derogation orders should be reviewable by courts just like any other such legislation, so that the executive can be held accountable for their actions. There is no reason to think that this would not

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<sup>64</sup> Baroness Hale of Richmond, Oral Evidence to Joint Committee on Human Rights, Inquiry into the Government's Independent Human Rights Act Review, HC 1161, 3 February 2021. As was shown in fn 71, this is not quite correct, as Lady Hale sat on the bench in *R (Wright) v Secretary of State for Health* [2009] UKHL 3, where the court rejected the government's argument that it should use s3, and issued a declaration of incompatibility instead.

*Re King* [2002] NICA 48 and *R v Greenaway* [2002] NICC 7. Finally, there are many other reported cases in which the government “accepted” or “agreed” on the use of section 3 (although it is unclear based on the judgment whether this was their preferred remedy or whether they acquiesced on this point): *R (Sim) v Parole Board* [2003] EWCA Civ 1845; *R v Keogh* [2007] EWCA Crim 528; *Authority Reporter v S* [2010] CSIH 45; *R v Waya (Terry)* [2012] UKSC 51; *R (Omar) v Secretary of State for the Home Department* [2012] EWHC 3448 (Admin); *Re Z* [2015] EWCA Civ 34 and *British-American Tobacco (Holdings) Ltd v HMRC* [2017] UKFTT 0167 (TC).

happen in practice under the current framework,<sup>75</sup> and as such there seems to be no compelling case for any change in this respect.

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

53. Despite suggestions that the HRA is being “misused” to invalidate swathes of secondary legislation,<sup>65</sup> the judicial approach to claims relating to the Convention-compatibility of subordinate legislation has been modest in practice.<sup>66</sup>

54. In quantitative terms, the total number of final decisions<sup>67</sup> handed down by the High Court and Court of Appeal of England and Wales, as well as the UK Supreme Court, between 2014 and 2020, in which the lawfulness of delegated legislation<sup>68</sup> was challenged successfully on human rights grounds runs to a total of just 14 cases. This figure not only represents a small number of cases by itself, but it must also be put in the context of the volume of delegated legislation that is made. The number of UK statutory instruments made each year has increased significantly in recent decades, consistently running into the thousands and peaking at 4,150 in 2001.<sup>69</sup> In this context, the role of the courts in ruling delegated legislation unlawful under the HRA is marginal.

55. The scrutiny a piece of delegated legislation receives when it is judicially reviewed is not infrequently the first substantial scrutiny it has ever received, and almost always the most rigorous scrutiny. When it is being made, delegated

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<sup>65</sup> Judicial Power Project, *Protecting the Constitution* (Policy Exchange, 2019)

<sup>66</sup> Sections of this part of our response are adapted from Tomlinson, Graham and Sinclair, “Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive lawmaking?”, UK Constitutional Law Association Blog, 22 February 2021, available at <https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/>

<sup>67</sup> Where cases involved appeals, we included the final judgment.

<sup>68</sup> We were only concerned with challenges to orders and regulations, rather than for example, to policy guidance or working practices, and only identified those cases where the delegated legislation itself was the subject of legal challenge, rather than the exercise of discretion or power granted in an instrument.

<sup>69</sup> HC Library Research Briefing, “Acts and Statutory Instruments: the volume of UK legislation 1950 to 2016”, 21 April 2017. See also Tomlinson and Sinclair, *Plus ça change? Brexit and the flaws of the delegated legislation system* (Public Law Project, 2020)

legislation is subjected to weak scrutiny processes.<sup>70</sup> For example, the government of the day has control over whether debates on negative procedure

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<sup>75</sup> The Human Rights Act (Designated Derogation) Order 2001 was successfully challenged in *A v Secretary of State for the Home Department* [2004] UKHL 56. The result was that the derogation order was quashed, allowing the court to assess the lawfulness of the primary legislation (in the event, a declaration of incompatibility was issued). As secondary legislation, courts presumably have discretion as to whether to quash the derogation order or to issue another public law remedy as appropriate.

statutory instruments occur, and there is regularly insufficient parliamentary time to afford delegated legislation proper scrutiny.<sup>71</sup> Generally, statutory instruments also face no realistic prospect of defeat within Parliament—only 17 have been rejected in the last sixty-five years, and none in the Commons since 1979. For this reason, whilst courts do recognise that delegated legislation has the *technical* approval of Parliament, meaning that “caution” should be shown when reviewing it<sup>72</sup> they have also recognised that the level of parliamentary involvement is often only very slight, weakening the case for judicial deference. This is particularly true in relation to legislation passed under the negative resolution procedure; 6 of the 14 successful challenges noted above concerned delegated legislation which was passed in this way.

56. Decision-making in this context is generally characterised more by judicial deference than over-reach. Not only are there many more unsuccessful challenges to delegated legislation than there are successful ones, but courts often grant the executive significant leeway when considering economic and social welfare policy—frequent subjects of delegated legislation. In many cases<sup>84</sup> the courts are also careful to restrict the scope of their ruling to the specific aspects of the scheme which fail to pass scrutiny.

57. Some types of claim are more common in HRA review of delegated legislation. Ten of the 14 successful challenges relied on Article 14 (freedom from discrimination), most often with respect to Article 8 (right to private life) or Article 1 of the First Protocol (right to property). This pattern suggests that courts are not attacking delegated legislation from all angles but are being confronted with provisions which breach the Convention in broadly similar ways. This is further supported by the fact that the impugned statutory instruments across the 14 cases were passed under just eight different parent acts.<sup>73</sup> Ultimately, this can be taken to suggest that the problem may lie with the human rights dimensions of certain types of legislative schemes rather than an over-zealous judiciary.

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<sup>70</sup> Fox and Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, 2014)

<sup>71</sup> by way of example, the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 are 619 pages long and were debated in the Commons for 52 minutes and the Lords for 51 minutes.

<sup>72</sup> *Hurley v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin) at [55], per Collins J. <sup>84</sup> such as *R (Carmichael & Others) v Secretary of State for Work and Pensions* [2016] UKSC 58

<sup>73</sup> Four cases involved challenges to different regulations made under the Welfare Reform Act 2012.

58. It is important to highlight that even when the courts do find delegated legislation incompatible with the HRA, it does not necessarily mean that it is inevitably “struck down.” The quashing of statutory instruments is an important power but it is a discretionary power that is rarely used. Of the 14 cases in which human rights challenges to delegated legislation succeeded, the court quashed or otherwise disapplied the offending provisions in just four of them. Usually, the court simply declares that the offending legislation violates human rights, either in abstract or with respect to the specific claimant in the case. Such a declaration does not affect its continuing validity. Judges are evidently aware

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that a quashing order can have significant and disruptive effects, and that it is often desirable for government to have space to respond to an adverse decision.<sup>74</sup>

59. Overall, courts apply a very cautious approach when it comes to assessing the validity of delegated legislation under the HRA. At the same time, there are a range of compelling reasons why the present approach ought to be retained.

60. At its core, the power of courts to invalidate secondary legislation is a straightforward application of the principle of parliamentary sovereignty: primary legislation passed by the legislature (including the Human Rights Act) should always trump secondary legislation passed by the executive.

Declarations of incompatibility do not affect the validity of primary legislation for reasons of democratic legitimacy. This clearly does not apply to secondary legislation, which is open to judicial review on a number of long-established grounds. To weaken the reviewing powers of the courts in this context only because HRA is involved would create a constitutional oddity. It is, of course, always open to Parliament to pass primary legislation emulating any impugned provision. But before that is done, invalidating secondary legislation when considered necessary to do so, can ensure that rights are not breached in the interim period, and policies which have a serious disparate impact on a large number of people can be stayed whilst the legislature considers its response. Practice has shown that quashing secondary legislation is not undertaken lightly by the judiciary, but it is vital that it remains open for them to do this.

61. We have seen no clear justification for such an exception in the case of the HRA and it would run against the general recognition in the common law that

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<sup>74</sup> This was demonstrated in *R (TD) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618, where after declaring that certain regulations gave rise to a breach of the claimant’s rights, Singh LJ said: “it will be a matter for the Secretary of State to decide how to respond to a declaration by this Court that there has been a violation of these Appellants’ rights... that may or may not lead to a scheme being designed which benefits other people, who are not before this Court, but the design of any such scheme will in the first instance be for the Secretary of State.”

fundamental rights issues ought to attract enhanced judicial scrutiny.<sup>75</sup> In our view, the claim that the HRA is a hindrance to delegated law-making is largely unjustified, and proposals which would reduce safeguards against abuse of executive power should be strongly resisted.

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

62. Whilst recognising that the HRA has some degree of extra-territorial application, courts have been anxious to set limits on this jurisdiction, recognising it only in

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“exceptional circumstances”, with jurisdiction remaining “primarily territorial”.<sup>76</sup> In practice, jurisdiction has been extended beyond the state’s de jure territory only where it has been recognised a state holds de facto public powers or has effective control or authority over people and territory.<sup>77</sup>

63. Even if jurisdiction is established, courts have interpreted obligations arising in the extra-territorial context carefully. In *Serdar Mohammed*, for example, the Supreme Court adopted a flexible position regarding the detention of combatants;<sup>78</sup> in *Tomanovic* the High Court roundly rejected a complaint that the UK was responsible for the actions of a member of the Kosovo prosecution service even though he was a member of the Foreign Office stationed there at the time.<sup>79</sup> Whilst it has been recognised that certain circumstances may trigger an obligation for the UK to investigate deaths or ill-treatment occurring outside of its territory<sup>80</sup> judges have explicitly taken into account the difficulties involved in such an endeavour, and have imposed practical limits on such obligations in practice. For example, no duty to investigate suspicious deaths will arise in the extra-territorial setting if such deaths only come to the attention of the state after a long period of time, if it is likely to be particularly difficult to establish credible evidence in relation to its cause, or where such an investigation would not be considered to serve a useful purpose.<sup>81</sup>

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<sup>75</sup> see e.g. *R v Ministry of Defence ex parte Smith* [1996] QB 517.

<sup>76</sup> *Chagos Islanders v United Kingdom*, Application No 35622/04, Decision of 11 December 2012 at [70]; *Khan v United Kingdom*, Application No 11987/11, Decision of 28 January 2014 at para 25.

<sup>77</sup> *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 at [130]-[142]

<sup>78</sup> *Mohammed v Ministry of Defence* [2017] UKSC 2

<sup>79</sup> *Tomanovic v Foreign and Commonwealth Office* [2019] EWHC 3350 (QB)

<sup>80</sup> *Al-Skeini v United Kingdom* (2011) 53 EHRR 18

<sup>81</sup> *Al-Saadoon v Secretary of State for Defence* [2016] EWHC 773 (Admin) at [158]-[161], [197]-[202], [218]-[220], [228], [248]-[249]; see also Strasbourg cases e.g. *Hanan v Germany*, Application No 4871/16, Judgment of 16 February 2021 [GC]; *Palic v Bosnia and Herzegovina*, Application No 4704/04, Judgment of 15 February 2011.



64. That being said, we consider that it is both necessary and positive to recognise extra-territorial jurisdiction in appropriate contexts. The Baha Mousa<sup>82</sup> and AISweady<sup>83</sup> inquiries into the conduct of British soldiers in Iraq were each set up following judicial decisions relying on the extra-territorial application of the HRA.<sup>84</sup> Those inquiries have served an important purpose by shining a light on deplorable behaviour, publicly exonerating of the innocent and instigating short- and long-term change in culture and practice. That the UK should be held to account for its actions in circumstances where it truly does have effective control over another area is necessary if the state is to fully respect human rights and comply with the rule of law. The state should not be treated as unaccountable and free to act with impunity simply because its actions fall outside of its territorial borders.

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65. Although Public Law Project has limited experience of the extra-territorial jurisdiction of the Human Rights Act, we do not see a compelling case for changes at this stage.

**e) 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?**

66. The remedial order process allows Government to remedy incompatibility in primary legislation without bringing forward fresh primary legislation, and where there is not an existing power to amend the problematic legislation through a delegated power. The remedial process under section 10 used to be used only very rarely with respect to declarations of incompatibility issued by domestic courts, with just one remedial order being laid before Parliament during the first decade following the coming into force of the HRA.<sup>85</sup> However, their use has since become more popular, with four orders being laid before Parliament between 2018 and 2020.<sup>86</sup> The government has also committed to remedying two further incompatibilities through remedial orders.<sup>87</sup> The remedial process

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<sup>82</sup> <https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report>.

<sup>83</sup> <https://www.gov.uk/government/publications/al-sweady-inquiry-report>

<sup>84</sup> *R (Al-Skeini) v Secretary of State for the Defence* [2005] EWCA Civ 1609 and [2007] UKHL 26; *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387.

<sup>85</sup> Mental Health Act 1983 (Remedial) Order 2001, remedying the incompatibility identified in *R (H) v Mental Health Review Tribunal for North and East London Region v Secretary of State for Health* [2001] EWCA Civ 415.

<sup>86</sup> Remedial orders were laid before Parliament in 2001, 2011, 2012, 2018 (two orders), 2019 (addressing two declarations) and 2020.

<sup>87</sup> Ministry of Justice, "Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020", available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf)

has also been used to make changes in response to decisions of the European Court of Human Rights.<sup>88</sup>

67. Remedial orders are somewhat troubling because they allow for the modification of legislation, including primary legislation, through secondary legislation. These so-called Henry VIII clauses are problematic as they allow the executive to modify laws passed by the legislature, a problem further aggravated by the general lack of scrutiny involved in their passage.

68. However, remedial orders must be passed via the affirmative resolution procedure, inviting at least *some* engagement with Parliament. Indeed, it has been claimed that remedial orders do receive significant scrutiny, at least when compared to that received by the vast majority of secondary legislation.<sup>89</sup> The Joint Committee on Human Rights also typically scrutinises any proposed remedial orders.

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69. Beyond this, amendments made through the remedial order process can sometimes proceed at a slow pace; for example, despite having committed in July 2020 to introducing such an order to remedy the incompatibility identified by the courts in 2018 in relation to Widowed Parent's Allowance,<sup>90</sup> the government has yet to introduce any actual proposals. They are not, however, necessarily more sluggish than other remedial options – the government is still “considering options for addressing the declaration of incompatibility” some four years after the decision of the Supreme Court in *Benkharbouche*.<sup>91</sup>

70. To be effective, any remedial process must strike a balance between utility and timeliness - making sure that changes can be put into place quickly and effectively so that victims of human rights breaches are not left wanting – and thoroughness – allowing for effective scrutiny, which in turn leads to better lawmaking and heightened legitimacy.

71. On balance, our view is that legislative changes are not required at this point; rather, we call upon the government to take its consideration of human rights judgments seriously, and to remedy outstanding human rights declarations so as to ensure that gaps in human rights protection are filled without delay.

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<sup>88</sup> e.g. the Marriage Act 1949 (Remedial) Order 2007, passed following the decision in *B v United Kingdom* (2006) 42 EHRR 11; the Terrorism Act 2000 (Remedial) Order 2011, passed following the decision in *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45, and the Human Rights Act 1998 (Remedial) Order 2020, passed following the decision in *Hammerton v United Kingdom* (2016) 63 EHRR 23.

<sup>89</sup> Wilson-Stark, “Facing facts: judicial approaches to section 4 of the Human Rights Act 1998” (2017) 133 LQR 631, 648-649

<sup>90</sup> Mims Davies, Response to Written Question (HC Deb, 28 July 2020, cW)

<sup>91</sup> *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62

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## Conclusions

72. We are glad to see that the government has shown a commitment to remaining in the European Convention and is not proposing the substantive amendment of any of the rights under Schedule 1 of the HRA. Our considered position, based on all available evidence, is that the Human Rights Act is working well and that there is no strong case for change at this point. Many of the concerns about the HRA appear exaggerated or misconceived, and reducing the scope of the HRA would not only seriously risk reducing the level of human rights protection afforded to everyone in practice,<sup>104</sup> but would give rise to a host of other potential problems, including significant issues relating to the devolution settlement.<sup>105</sup>
73. The HRA is a carefully crafted legislative scheme which strikes the correct balance between the different arms of the state – Parliament, the executive and the courts – as well as between the between domestic courts and Strasbourg. It requires UK courts to consider the Strasbourg case law, without binding them to its application. It allows our judges to hold the executive to account, and has contributed to its legislative objective of ‘bringing rights home’, whilst facilitating discretion and deference and where appropriate. Ultimately, it succeeds in enshrining vital human rights protections, whilst maintaining respect for the role

of Parliament. We strongly recommend against any changes to this vital piece of legislation.

Public Law Project  
2 March 2021

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<sup>104</sup> See, for example, Article 39, Written evidence to Joint Committee on Human Rights, Inquiry into the Government's Independent Human Rights Act Review, HC 1161 (HRA0017), available at <https://committees.parliament.uk/writtenevidence/22958/pdf/>, Just Fair, Written evidence to Joint Committee on Human Rights, Inquiry into the Government's Independent Human Rights Act Review, HC 1161 (HRA0019), available at <https://committees.parliament.uk/writtenevidence/22962/pdf/> and Equality and Human Rights Commission, Written evidence to Joint Committee on Human Rights, Inquiry into the Government's Independent Human Rights Act Review, HC 1161 (HRA0025), available at <https://committees.parliament.uk/writtenevidence/23024/pdf/>.

<sup>105</sup> It has been submitted, for example, that adverse changes to the HRA pose "significant risks to stability and peace in Northern Ireland": Human Rights Centre, School of Law, Queen's University, Belfast, Written evidence to Joint Committee on Human Rights, Inquiry into the Government's Independent Human Rights Act Review, HC 1161 (HRA0005), available at <https://committees.parliament.uk/writtenevidence/22598/html/>