The Independent Human Rights Act Review – Executive Summary

Presented to Parliament
by the Secretary of State for Justice
by Command of Her Majesty

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Executive Summary

Chapter One – Introduction

Background

1. The UK's contribution to the development of human rights law is immense. It is founded in the common law tradition, dating back hundreds of years, and in Parliament's development of positive rights. It is something of which the UK can be proud. Part of that contribution was the instrumental role it played in the drafting and promotion of the *European Convention on Human Rights* (the Convention), which it acceded to in 1951. Since that time the UK has been bound to comply with its provisions.

2. Until the enactment of the Human Rights Act (the HRA) in 1998 the rights set out in the Convention were not directly enforceable in the UK. To enforce them it was necessary to apply to the *European Court of Human Rights* (the ECtHR) in Strasbourg. The HRA ensured that the Convention rights were now directly enforceable. The Convention and the UK's membership of it is quite separate from and predated its membership of the European Union, the rights and obligations arising from which had been incorporated into UK law by the European Communities Act 1972.

IHRAR

3. In December 2020 the Lord Chancellor and Secretary of State for Justice, the Rt. Hon. Robert Buckland QC MP announced the creation of the Independent Human Rights Act Review (IHRAR)[1]. IHRAR was asked to review the operation of the HRA, which by then had been in force for 20 years. Specifically, it was asked to consider two key themes[2].The first, *Theme I*, concerns the relationship between domestic courts and the ECtHR. The second, *Theme II*, concerns the impact of the HRA on the relationship between the Judiciary, the Executive (Government) and the Legislature. It particularly focuses on what might be termed the impact that the HRA has had on the *'constitutional balance'*[3] that exists between them. IHRAR's Report would be published, as would the Government's response.

1 See Independent Human Rights Act Review Report, Annex II, for the Written Ministerial Statement issued by the Lord Chancellor and Secretary of State for Justice.
2 See Independent Human Rights Act Review Report, Annex III, for IHRAR's Terms of Reference.
3 Sir John Laws, *The Constitutional Balance* (Hart, 2021).

4. In approaching its task IHRAR was to consider the two themes, and the specific questions under them, set out in its Terms of Reference (ToR), thoroughly and independently. It was to put forward options for reform to be considered by the Lord Chancellor. Those options are set out in three discrete categories. Reform options that have been considered and rejected. Those that have been considered and are not recommended by IHRAR's Panel. And, those that have been considered and are recommended. A summary of recommendations is set out in **Annex** of this Executive Summary.

5. IHRAR has three features of paramount importance. First, it is an independent review. Secondly, its Panel is also independent. Each member was selected based on *'... their wealth of experience, coming from senior legal and academic backgrounds. They have the breadth and depth of expertise required to consider the issues highlighted within the Terms of Reference effectively...'*[4]. Thirdly, IHRAR's ToR were expressed in neutral terms, neither begging the question nor suggesting preconceived or predetermined answers. There were none.

6. It is necessary to underline both what *is* and what *is not* within IHRAR's scope:

(1) IHRAR has been informed by the Government's commitment to the UK remaining a party to the Convention; this commitment served as a fixed premise for IHRAR.

(2) An examination of substantive Convention rights fell outside IHRAR's scope. IHRAR's focus has been on the operation of the HRA, the domestic statute.

(3) IHRAR is UK-wide and therefore concerned with England and Wales, Scotland and Northern Ireland. The Panel has been, throughout, very much alive to devolution issues and determined to take proper account of all parts of the UK.

7. From the outset, openness and transparency have been hallmarks of IHRAR:

(1) Its Chair made this clear in 38 conversations with interested parties at the time of IHRAR's launch.

(2) Its Call for Evidence (*CfE*) encouraged responses from individuals and organisations, wherever they might be on the spectrum of opinion, and received upwards of 150 responses. Almost all were published on IHRAR's website[5]. IHRAR is most grateful to everyone who responded. Its website now contains an exceptional store of knowledge and learning on the HRA[6].

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4 See Independent Human Rights Act Review Report, Annex II.
5 Save for a very few, as explained in the body of the Report.
6 See https://www.gov.uk/guidance/independent-human-rights-act-review

(3) Though constrained to carry out much of its work online by reason of Covid restrictions, IHRAR held[7]:

- thirteen online *Roundtables*, by way of smaller meetings involving targeted engagement with interested parties.
- one online *Roundtable*, with individuals who had personal experience of relying upon the HRA in order to give effect to their Convention rights.
- seven online *Roadshows*, in lieu of town-hall-style meetings, generously facilitated by Universities around the UK.
- Online *meetings* with Judges of the ECtHR, the German Constitutional Court and the Irish Supreme Court.
- Minutes of the Roundtables and meetings are set out in **Annex VIII** of the Report. Recordings of the Roadshows were published on the IHRAR website. IHRAR is most grateful to all who facilitated the Roundtables, Roadshows and meetings and those who gave their time to engage with the Review.

8. The Panel met regularly online and later in person, working its way through the issues raised in the ToR. It did so without preconceptions and subject of course to further thought, reflection and revision of any preliminary impressions, once it had absorbed the evidence, Roundtables and Roadshows. The Panel was excellently supported throughout by independent legal advisers: Dr John Sorabji; Mr Gethin Thomas; and, Ms Rachel Jones, together with a Secretariat provided by the Ministry of Justice.

9. The Panel rejects the view, expressed in some quarters, that no review of the HRA was appropriate because it was working well. The HRA is an important part of our legal landscape; it would be surprising if, after twenty years of operation, there was nothing to review. IHRAR's task has been to inquire into the operation of the HRA to ascertain how it has been operating. Complacency is unwarranted, ignoring, as it does, a continued level of hostility to the HRA, which is in need of addressing. In the event, the Panel's work has revealed that though, overall, the HRA has been a success, there is clear room for a coherent package of reforms carrying both domestic and international benefits.

Enacting the HRA

10. Following the 1997 General Election, the Government of the day introduced the *Human Rights Bill*. It became law, for some purposes on 9 and 24 November 1998, and came generally into force on 2 October 2000. It did not incorporate the Convention directly into UK domestic law. Instead, it created domestic rights in the same terms as Convention rights[8]. Contemporaneous discussion and debate demonstrate that the objectives of the HRA included:

7 Full details of Roadshows and Roundtable appear from the body of the Report.
8 Section 1 of and Schedule 1 to the HRA.

(1) *'Bringing rights home'*. This meant that individuals in the UK would be able to enforce their Convention rights in UK Courts. They would be able to do so without the delay and cost of having to proceed before the ECtHR.

(2) The creation and further development of a 'rights culture' within the UK and, in particular, in Government.

(3) To enable UK Courts to contribute to and help shape ECtHR case law, making a distinctive British (UK) contribution to it.

11. As reflected in the powers given to the Judiciary, the enactment of the HRA was not intended to affect the constitutional principle of Parliamentary Sovereignty, except in so far as it permitted UK Courts to review legislation to assess its compatibility with Convention rights, but not to themselves declare such legislation ineffective.

12. Further domestic effect to the Convention rights was later provided by the Northern Ireland Peace Agreement[9] (the Good Friday or Belfast Agreement). Convention rights were additionally given effect within the legislation establishing devolution throughout the UK. In carrying out its review, the Panel has borne in mind the potential adverse impact of reform options on devolution arrangements.

Guiding Principles

13. When considering its recommendations, the Panel developed certain principles, based on the work done further to the ToR:

- Respect for the common law tradition of human rights protection;
- Respect for the separation of powers and Parliamentary Sovereignty;
- Respect for the Convention as a subsidiary system of rights protection;
- Acknowledgment of the importance of certainty and predictability in the law;
- Openness to comparative approaches to incorporating the Convention;
- Realism in the recommendations proposed, in keeping with the common law tradition, together with an evidence-focused consideration of issues;
- Subjecting recommendations to a risk/benefit analysis;
- Consistency within the Report; we seek to present a coherent package of reforms.

9 The formal title of the Agreement as deposited with the United Nations.

General Considerations

14. A number of recurring, general considerations informed the Panel's thinking. Those were:

(i) *The UK commitment to remaining a party to the Convention:* This commitment underlines the interest in broad *consistency* between decisions in the UK Courts and those of the ECtHR, not least to reduce the prospect of UK Court decisions placing the UK in breach of its international obligations – albeit that this interest may be outweighed by other considerations.

(ii) *The UK as the primary forum for rights protection:* In accordance with the principle of subsidiarity, each Convention State is the primary forum for rights protection, with the Convention and ECtHR serving as a longstop.

(iii) *Bringing rights home:* This consideration, one of the original objectives of the HRA, tells against significant gaps emerging between rights protection before UK Courts and the ECtHR, as such gaps would run counter to it.

(iv) *The common law and the Judiciary:* A further consideration for IHRAR has been the centrality of the common law and case law generally throughout the UK. The UK has one of the oldest and most successful of the world's legal systems, and the UK Judiciary is central to the development of it. Collectively, they are distinctive strengths of UK law, both domestically and internationally. In the IHRAR context, the common law and UK case law has protected individual rights for centuries. Putting them centre stage is, amongst other things, a matter of real significance to the promotion of public acceptance and ownership of the HRA. It is also an important element of giving effect to the principle of *subsidiarity*[10] and to securing the HRA's aim of enabling Convention rights to be enforced domestically.

(v) *Parliament's role:* A safety valve is built into the UK Constitution where development of the common law is concerned: Parliament may legislate to overrule common law or case law developments by UK Courts or, indeed, set a different legislative direction. The position is not nearly so straightforward with regard to decisions of the ECtHR. An important question for IHRAR was the extent to which effective political ownership and responsibility for rights protection could be and was taken by Parliament, and how this might be enhanced.

10 See below.

(vi) *Perceptions and the HRA:* The vast majority of submissions in response to the *CfE* spoke strongly in support of the HRA, emphasising that it was not to be viewed through the prism of a few high-profile cases; what happened outside the courtroom was every bit as important, a telling example being the impact of the development of a human rights culture on the provision of care in care homes. Conversely, the fact and persistence of hostility to the HRA in other quarters was noteworthy, suggesting much needs to be done to dispel this negative perception of the HRA and increase a sense of public ownership. Two strands of thought stood out. First, that human rights belong to everybody; human rights abuses can affect anyone. Developing the necessary level of settled acceptance requires majority ownership of the HRA and its concepts. Secondly, a markedly stronger and more positive public perception of the HRA was noted in Northern Ireland, Scotland and Wales than was apparent in England.

(vii) *Public ownership of rights – Public or Civic education:* The need for greater public or civic education concerning the HRA and rights more generally was repeatedly and cogently emphasised to the Panel. In principle, the Panel endorses these calls.

15. IHRAR strongly recommends to Government, for its consideration, a focus on civic, constitutional education on the HRA and rights more generally, including the difficult balances human rights questions often require, and on individual responsibilities.

16. Addressing concerns as to public ownership of the HRA and related civic education is a shared endeavour calling for the active involvement of all three branches of the State; it is not a matter for the Judiciary alone. IHRAR does not underestimate the challenges with regard to civic education and a sense of increased public ownership of the HRA but is of the clear view, in the interests of civil society, that these are issues which cannot sensibly be overlooked.

Chapter Two – Section 2 of the HRA

17. Question 1(a) of the ToR asks this:

How has the duty to 'take into account' ECtHR jurisprudence been applied in practice'? Is there a need for any amendment of section 2 [of the HRA]?

18. It has never been suggested that ECtHR decisions *bind* UK Courts. They do not. As ECtHR decisions do not form part of the hierarchy of UK Court decisions, the rationale of section 2 was to give guidance to UK Courts as to how they were to be considered. Much thought has since been directed towards the relationship between ECtHR case law and UK statute, common and case law. IHRAR is concerned that insufficient prominence has been given to UK statute, common law and case law.

19. One member of the Panel favoured introducing statutory guidelines to provide UK Courts with a clearer and more secure statutory foundation for balancing the objective of minimising the need for UK litigants to resort to the ECtHR against other considerations that would weigh against a stricter adherence to what that Court might be expected to decide if the case reached it. This would promote greater autonomy for UK courts in applying Convention rights. The majority of the Panel did not favour this approach.

20. IHRAR recommends amending section 2 HRA to clarify the priority of rights protection by making UK legislation, common law and other case law the first port of call before, if then proceeding to interpret a Convention right, ECtHR case law is taken into account. This recommendation, simply implemented, gives specific UK statutory rights protection, the common law[11], including Scots case law, greater prominence – *putting it centre-stage* – reflecting its centuries long protection of human rights. This would codify the approach taken by the Supreme Court in its decisions in *Osborn*[12] and *Kennedy*[13]. Addressing any concerns as to common law, or Scots case law, developments, these would be guided throughout by the principle of *judicial restraint*, where appropriate, (recently authoritatively underlined by Lord Reed in *Elgizouli*[14]). It would also be subject, as such developments always are, to Parliamentary Sovereignty. Such prioritisation of UK law is a natural approach, reflecting justified confidence in the common law and is intended to bolster domestic support for the HRA, and its settled acceptance.

21. Equally, this recommendation gives full and principled effect to the Convention principle of *subsidiarity*, i.e., that Convention States, not the ECtHR, have primary responsibility for human rights protections. It is an approach familiar to other Convention states, such as Ireland and Germany. The relationship with the ECtHR, involving the mature equilibrium that has been reached between it and UK Courts, is thus not only preserved, but importantly further reinforced by the developed *Ullah*[15] doctrine, recently reiterated and synthesised in *AB*[16], guarding against the development of free-standing Convention rights[17] unsupported by ECtHR case law.

11 Defined as above.
12 *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115.
13 *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455.
14 *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2 WLR 857.
15 *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 3 WLR 23.
16 *R (AB) v Secretary of State for Justice* [2021] UKSC 28.
17 As distinct from common law rights.

22. Careful balances need to be struck and tensions resolved under section 2 of the HRA. On the one hand, subjecting UK law to an ECtHR straitjacket was never intended. On the other hand, on the premise that the UK is committed to the Convention and to giving effect to Convention rights domestically, a significant gap between rights protection before UK Courts and the ECtHR is generally to be avoided – albeit that the HRA clearly contemplates and permits UK Courts from time to time to give decisions which would put the UK in breach of its international obligations (leaving the matter for inter-governmental political resolution). Concurrently, there is an important interest in developing a distinctive British (i.e., UK) contribution to Convention jurisprudence, while avoiding the risk of going too far ahead of ECtHR decisions on Convention rights, resulting in free-standing rights. That danger is not the same in respect of *common law and Scots case law* developments, which are always subject to judicial restraint, institutional respect and Parliamentary Sovereignty.

23. IHRAR's recommendation balances these interests and resolves these tensions, both domestically and internationally, so assisting in strengthening the foundation on which the HRA is based. No devolution concerns arise.

Chapter Three – the Margin of Appreciation

24. Question 1(b) in the ToR asks IHRAR to consider:

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?

25. Save for the amendment recommended in Chapter Two, all but one of the Panel members recommend no change to section 2 HRA in relation to the margin of appreciation.

26. The essence of the *Margin of Appreciation* is the recognition that while human rights are universal at the level of principle, they are national in application[18]; it is the means through which the Convention's high-level principles are given concrete effect domestically. Where a question concerning the interpretation or application of a Convention right falls within the margin of appreciation, a Convention state (such as the UK) can decide for itself how to give effect to that right, consistently with its own social, political and cultural traditions. In doing so, the state remains subject to the ECtHR's overarching supervisory authority, to ensure that the minimum standards set by the Convention are met. It follows that different Convention states may answer the same question concerning the application of Convention rights differently and that there is no requirement for a uniform interpretation of Convention rights across the Convention states.

27. The margin of appreciation is integrally linked to the principle of subsidiarity, recently reaffirmed in the *Brighton* and *Copenhagen* Declarations[19], namely, that the primary forums for rights protection are Convention states, rather than the ECtHR, which instead acts as a backstop. As the ECtHR has recognised, national authorities are better placed to do so. In this way, domestic legal traditions can continue to develop.

28. The margin of appreciation operates at an international level. When allocated to a Convention state, the ECtHR has nothing to say about how it is exercised as between the Branches of that state. That is a matter for national decision in accordance with each state's constitutional traditions. In the UK, the margin of appreciation has traditionally been shared between the three Branches of the State, subject to mutual respect, judicial restraint and Parliamentary Sovereignty.

29. The *domestic* UK concept of a margin of discretion is distinct from the (international) margin of appreciation. It refers to the respect, and weight, that UK Courts give domestic decision-making by the Government and Parliament when considering the application of Convention rights to such decisions. However, the concepts are similar in so far as the criteria which guide the width and application of both principles are similar. Thus, in areas such as national security, the allocation of economic resources and questions of social policy, especially where there is no social consensus, the margin of appreciation and the margin of discretion are both likely to be wide. On a sliding scale (or spectrum), the more political an issue, the more likely it will come within the margin of appreciation internationally and the less likely the UK Courts will interfere with the decision of the political Branches of the State domestically. The converse is true the more legal the issue in question.

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18 Lord Hoffmann in *Re G* [2008] UKHL 38; [2009] 1 AC 173 at [118]; Lord Hoffmann, *The Universality of Human Rights*, (JSB Lecture, 2009) at [43] <https://www.judiciary.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf>

19 European Court of Human Rights, *Reform of the Court* <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=>; Copenhagen Declaration (12-13 April 2018) at [28]-[31] <https://rm.coe.int/copenhagen-declaration/16807b915c>.

30. The pre-eminent case study for the application of the margin of discretion to an issue within the margin of appreciation, is *Nicklinson*[20]. Despite the painfully moving factual circumstances, at least a decisive majority of the Supreme Court maintained a careful focus on institutional competence.

31. All but one of the Panel rejects the proposal that the margin of appreciation should belong solely to Government and Parliament and that statutory guidelines should be provided to clarify how it should be applied. Instead, the majority of the Panel is of the view that the margin of appreciation should continue to be shared, as traditionally it has been, between Judiciary, Government and Parliament. The UK Courts have developed a careful and cautious approach to determining issues that fall within the margin of appreciation. They have shown proper consideration for their role, and the respective roles of Parliament and Government. They have done so consistently over the first twenty years of the HRA. Inevitably, there are individual decisions that can be questioned. Overall, however, the UK Courts have developed and applied a properly principled approach in this area, guided by judicial restraint.

Chapter Four – Judicial Dialogue

32. Question 1(c) of the ToR is in these terms:

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 be strengthened and preserved?

33. To this Question the majority of the Panel gives the straightforward answer that Judicial Dialogue, both formal and informal, should continue to develop organically. As underlined in the Copenhagen Declaration, dialogue between national Courts and the ECtHR is of central importance to the effective operation of the Convention.

34. The relationship between the UK Courts and the ECtHR is and is intended to be interactive and dynamic. Exchanges, comprising both formal and informal Judicial Dialogue, work to the mutual benefit of both Courts. Public understanding of the value of such Judicial Dialogue could be augmented by making the fact of informal dialogue better known.

20 *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657.

35. Overall, we have been struck by the high regard in which the UK Courts and Judiciary are held by the ECtHR and the beneficial influence this has, both domestically and for the ECtHR. The use made by the ECtHR of the *Denmark* case[21] (to which the UK was not a party), in which the ECtHR had regard to a judgment of a UK court interpreting an ECHR right, is but a striking example of this now mature relationship – mutual respect bringing mutual benefit. Judicial dialogue will be a most important element in further developing that relationship and maintaining the equilibrium it has achieved. With a view to public awareness (dealt with in Chapter One), it is important that the respect enjoyed by the UK Courts and Judiciary before the ECtHR and its receptiveness to UK judicial thinking, should be widely and better appreciated domestically. In a nutshell, this is a UK asset, currently undervalued domestically, and to be nurtured.

36. Successful examples of Judicial Dialogue between UK Courts and the ECtHR include:

- *Horncastle*[22]: the approach to hearsay evidence.
- *McLoughlin/Hutchinson*[23]: whole life sentences.
- *Rabone*[24]: ECtHR reconsidering its own case law, so making a British (UK) contribution to ECtHR jurisprudence.

37. The ECtHR's confidence in UK Courts and decisions, based on the calibre of UK Court judgments and their analysis of ECtHR jurisprudence is apparent from the width of the margin of appreciation accorded to the UK (*Ndidi*[25]) and the citation of UK Court decisions even in cases before the ECtHR not concerning the UK (the *Denmark* case, noted above).

38. Informal Judicial Dialogue, which includes exchanges between the UK Judiciaries and the ECtHR Judiciary, outside of judgments, is likewise well-developed and should be encouraged to develop organically.

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21 *S., V. and A. v Denmark – 35553/12 (judgment : no article 5 – right to liberty and security : grand chamber)* [2018] ECHR 856.
22 *R v Horncastle* [2009] UKSC 14; [2010] 2 WLR 47.
23 *R v McLoughlin (also known as Attorney General's Reference (No.69 of 2013))* [2014] EWCA Crim 188; [2014] 1 WLR 3964; *Hutchinson v The United Kingdom – 57592/08 – Chamber Judgment* [2017] ECHR 65; 43 BHRC 667.
24 *Rabone v Pennine Care NHS Foundation* [2012] UKSC 2; [2012] 2 AC 72.
25 *Ndidi v The United Kingdom – 41215/14* [2017] ECHR 781.

39. The ECtHR's readiness to consider Parliamentary debate is noteworthy, on occasions working in the UK's favour where account has plainly been taken in that debate of Convention considerations: see, *Shindler*[26] (restriction on the right to vote for non-resident UK citizens) and Animal *Defenders*[27] (prohibition of political advertising). The *Prisoners' Votes*[28] issue, which marked a low-point in relations, worked the other way and was ultimately resolved politically. The reality is that the ECtHR does take such Parliamentary debate into account, even though UK constitutional principles treat it as something that should not be considered or questioned in any court[29]. Resolution of this issue is itself likely to benefit from Judicial Dialogue.

40. The Panel was not attracted to the introduction of advisory opinions, whether from the ECtHR by way of Protocol 16 or from UK Courts.

41. At the conclusion of Theme One of the IHRAR ToR, the Panel underlines that its recommendations on Section 2 HRA, the margin of appreciation and Judicial Dialogue, dovetail well and form a coherent package. They all entail self-confident assertions of the strength of British (UK) law, so reinforcing the foundation domestically for the HRA's settled acceptance, coupled with preserving and strengthening the mature equilibrium reached between the UK Courts and the ECtHR, to their mutual benefit.

Chapter Five – Sections 3 and 4 of the HRA

42. Question 2(a) of the ToR, the first under Theme II dealing with the impact of the HRA on the constitutional balance, provides:

Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

- *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)?*
- *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?*

26 *Shindler v UK – 19840/09 – Chamber Judgment* [2013] ECHR 423; (2014) 58 EHRR 5.
27 *Animal Defenders International v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312; *Animal Defenders International v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312.
28 *Hirst v The United Kingdom (No. 2)* – 74025/01 [2005] ECHR 681; (2006) 42 EHRR 41.
29 *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428 at [163]-[185].

- *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?*

43. To these questions, the majority of the Panel answers:

- Arguably, there have been instances of legislation being interpreted inconsistently with the intention of the UK Parliament in enacting it, but we do not believe section 3 should be amended or repealed save for the amendment set out below.
- If section 3 were to be amended or repealed, that should be done prospectively only.
- Declarations of incompatibility should not be considered as part of the initial process of interpretation.

44. IHRAR's recommended reform options are as follows, listed individually:

- Amending section 3 to clarify the order of priority of interpretation. No other changes to sections 3 or 4 are recommended;
- Increased transparency in the use of section 3 by the creation of a judgments database;
- An enhanced role for Parliament in particular through the Joint Committee on Human Rights (the JCHR);
- The introduction of a discretion to make *ex gratia* payments where a declaration of incompatibility is made.

45. These options give effect to and reflect the conclusions of the majority of the Panel that: notwithstanding the unusual rule of interpretation contained in section 3, there is no substantive case for its repeal or amendment other than by way of clarification *or* for altering either the balance between sections 3 and 4 achieved by the HRA *or* the standing (*locus standi*) requirements for either section 3 or section 4; that any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage; furthermore, that, as a matter both of perception and reality, Parliament could and should take a more robust role in rights protection, a role which could sensibly be achieved via an enhanced role for the JCHR.

46. Further options give effect to and reflect the conclusions of the entire Panel: first, that there is a need to clarify, by way of amendment to section 3, the order of priority in which UK Courts apply the normal principles of interpretation and then the particular interpretative principle set out in section 3; secondly, the desirability of introducing a discretion to make *ex gratia* payments where a declaration of incompatibility is made.

47. As to the statutory architecture, the rationale for section 3 is to avoid an undue gap between rights protection available from the UK Courts and from the ECtHR, a gap which would undermine the objective of bringing rights home. The HRA constructed a careful balance between sections 3 and 4, with declarations of incompatibility providing a last resort, where interpretation in accordance with section 3 was not possible. Section 19 constituted an additional, important part of this architecture; the starting point for post-HRA legislation is that there will have been a section 19 compatibility statement, unless, knowingly Government has invited Parliament to proceed in circumstances where such a statement cannot be made.

48. There is no doubt that section 3 HRA contains an unusual rule of interpretation, going beyond ordinary rules of interpretation and conferring a power and imposing a duty on UK Courts to read and give effect to primary and secondary legislation, so far as it is *possible* to do so, in a way which is compatible with the Convention rights. The section 3 rule is not conditional on any ambiguity in the legislation interpreted. Though a Court giving effect to this rule is giving effect to the will of Parliament in enacting section 3 – a point too often overlooked – concern as to this rule is readily understandable, creating, as it does, the danger of Courts straying into territory more properly that of Parliament.

49. Making every allowance for such views, consideration of the evidence powerfully suggests defusing such concerns through a focus on the facts as to the actual practice of the Courts in deciding cases. The reality is that the high-water mark of alarm as to the use of section 3 hinges on a case now 20 years old[30]. That does not suggest a pattern, still less an enduring pattern, of misuse of the section.[31] Further, relatively settled, restraining, guidance as to the use of section 3 has stood for at least a decade[32], so that statutory amendment to narrow the section itself risks uncertainty.

50. Against this background, IHRAR's package of recommended options focuses on shedding light on the facts as to the actual practice of the Courts. In this way, clarity of analysis will be assisted, and pre-conceptions contrasted with evidence and fact. The proposed amendment to section 3, analogous to that proposed in respect of section 2, includes highlighting the occasions when the section 3 rule of interpretation is actually used. So too the judgments database. Such facts as to the use of section 3 will either allay concerns or justify targeted statutory intervention. Moreover, the Panel proposes an increased role for Parliament, through the JCHR in particular, in scrutiny of section 3 cases. We suggest no change to the current balance between sections 3 and 4, leaving section 4 as a rare, last resort. We do, however, think that section 4 should have an *ex gratia* mechanism attached.

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30 *R v A (Complainant's Sexual History)* [2001] UKHL 25; [2002] 1 AC 45.

31 The pragmatic advantages of the decisions most criticised, *R v A* and *Ghaidan v Godin-Mendoza* [2004] UKHL, [2004] 2 AC 557 should not be ignored.

32 *Ghaidan v Godin-Mendoza* [2004] UKHL, [2004] 2 AC 557; *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264.

51. Importantly, neither section 3 nor section 4 adversely affect Parliament's constitutional power to enact legislation as it sees fit. It does not therefore affect that, central, feature of Parliamentary Sovereignty. Sections 3 and 4 are clearly limited to a *statutory* review of legislation. Section 3, properly understood, confers an *interpretative* power – within the well-settled province of the Courts – not an amending power (the province of the legislature). There is no suggestion of either section 3 or section 4 encouraging *common law* review of the validity of primary legislation.

52. With regard to section 4, the Court has a discretion to grant a declaration of incompatibility, in keeping with the Court's general discretion to grant declaratory relief. *If* the Court makes a declaration of incompatibility, Parliament is not *obliged* to act on it. That is not to say a declaration of incompatibility is other than an important signal of the Court's view. It is to be expected that it will be carefully considered by Parliament, but Parliament has the last word.

53. Overall, once the law had settled down post-HRA, the Courts have been guided by judicial restraint and institutional respect. Against that background, the Panel proposes the package of recommended reforms.

54. It is to be noted – reflecting the real engagement of the Panel – that one member of the Panel held distinct views not shared by the majority. IHRAR's Report has room for and is grateful for all views. The minority view is to be found in the main body of the Report where it is clearly set out and discussed[33]. The majority differs from those views with respect and for the reasons there elaborated, including devolution concerns.

Chapter Six – Designated Derogation Orders under Section 14 of the HRA

55. Question 2(b) under Theme II of the ToR is in these terms:

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

56. As always, context is crucial. The premise is that the UK has derogated from its international obligations pursuant to article 15 of the Convention, *"in time of war or other public emergency threatening the life of the nation".* Article 15 Derogations operate in International law. To give effect to them domestically and disapply the relevant provisions of the HRA, a Designated Derogation Order is currently required, further to section 14 of the HRA.

33 See paragraphs 82, 138-143 and 163-171 of Chapter Five of the Report.

57. Self-evidently, this is a matter for Parliament and Government. The margin of discretion will be at its widest; respect for their respective institutional competence is obviously due from the Courts to Parliament and Government. But the Courts are able to step in, if for example, the Government of the day has dramatically over-reacted, with grave consequences for the liberty of individuals. It is against this background that, save for an amendment to the HRA to enable UK Courts to make suspended quashing orders where a challenge to a designated derogation order succeeds, the Panel recommends no change to section 14.

58. This option is intended to acknowledge the extreme pressures on Government and Parliament in such a crisis, together with the urgency of the situation. Nonetheless, as a democracy where the Rule of Law applies, it preserves for the UK, the availability of Court challenge – but with enough flexibility in the available remedies to accommodate the orderly remedying of defects in the measures taken by Government in the public interest.

59. There has only been one instance of a designated derogation order being challenged in the UK Courts: the decision in *Belmarsh*[34]. The Panel is, accordingly, cautious about generalising. *Belmarsh* does, however, contain illuminating observations from Lord Bingham on the different provinces of the Judiciary and Government. In particular, when considering the 'demarcation of functions' (i.e., the margin of discretion) between the Judiciary and Government and Parliament, there is a spectrum; the more political, the less likely it is that it will be a matter for the Judiciary; the more legal, the more likely it will be for the Judiciary. His speech included this passage:

'But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.'

Lord Bingham underlined, in addition, that neither section 3 nor 4 of the HRA overrode Parliamentary Sovereignty, a matter emphasised in our discussion in chapter 5.

60. In the event, in *Belmarsh*, the Government succeeded on whether there was a public emergency threatening the life of the nation; but the detainees succeeded on the Government's response failing to satisfy the relevant necessity, proportionality, rationality and non-discriminatory tests. The Designated Derogation Order was quashed. This decision had no effect on the international plane where, subsequently, the Government withdrew the article 15 derogation. The ECtHR upheld the House of Lords on both points.

34 *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

61. There are differing views as to whether the Court in other circumstances would be entitled or bound to assess the validity of the Designated Derogation Order by reference to the Art 15 derogation. That issue did not arise in *Belmarsh*, both because of section 30 of the *Anti-terrorism, Crime and Security Act 2001* and because of the Government's concession that it could do so. Article 15 of the Convention is not one of the articles of the Convention incorporated by section 1 of the HRA. Accordingly, the basis for Court scrutiny is uncertain.

62. Given, however, that only a single Designated Derogation Order has been considered by the UK Courts, IHRAR is content to adopt the option of 'wait and see' despite the uncertainty – but coupled with adding suspended quashing orders to the Court's armoury, recognising the context in which Designated Derogation Orders are likely to arise.

63. The Panel was not attracted to other views, including those either rendering Designated Derogation Orders effectively not open to challenge in the Court or (although one member of the Panel favoured this option) repealing section 14 while contending for the importance of replacement provisions (in primary legislation) to similar effect on each occasion a crisis of a comparable nature arises.

Chapter Seven – Subordinate Legislation

64. Question 2(c) of Theme II of the ToR is in these terms:

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?

65. Where an Act of Parliament is incompatible with Convention rights, UK Courts, as discussed in Chapter Five, may issue a declaration of incompatibility. UK Courts have no similar power where subordinate legislation is concerned. Instead, they have a broader discretionary power, which enables them to set aside (quash) such legislation. The question here is whether the current approach established by the HRA has created an imbalance in the Constitution.

66. The Panel's recommended options involve the introduction of an additional power to suspend quashing orders or make them prospective only, in this sphere as has been proposed for judicial review generally. It also recommends the introduction of a judgments database for judgments where subordinate legislation has been disapplied or quashed, which is intended to enhance Government and parliamentary scrutiny of Court judgments in this area.

67. The first of these options reflects the view of the majority of the Panel that subordinate legislation in the HRA context is to be viewed as a subset of subordinate legislation more generally. Accordingly, just as the introduction of suspended or prospective only quashing orders is contemplated in judicial review generally, so it should be here. Moreover, its introduction would promote legal certainty, the effective implementation of Convention rights and effective public administration not least by providing Government with an appropriate period of time within which to consider how best to rectify the defect identified in the legislation by the Court.

68. The second option mirrors the view taken by the Panel in respect of section 3 of the HRA (discussed in Chapter Five above), namely, that the means to defuse concern or justify targeted remedial action, is to shed light on the facts as to the actual practice of the Courts.

69. The research that is available, forming part of the evidence presented to IHRAR, reveals relatively few examples where challenges to subordinate legislation under the HRA have resulted in UK Courts setting it aside. Rather than, as some have suggested, UK Courts and tribunals adopting an expansive or activist approach to challenges to subordinate legislation[35], the overall picture is one of caution and respect for the differing institutional competences of Government and the Courts, telling against any imbalance in the Constitution. The figures presented to IHRAR, however, may not be definitive as, for example, they do not include Tribunals.

70. One Panel Member argued that such research, focused as it was on litigation, did not address a broader question, of what was happening outside the courtroom. There, it was suggested, the prospect of subordinate legislation being quashed for incompatibility with Convention rights might have an adverse impact – for example, providing an impetus for overly-cautious legislative drafting to minimise the prospect of 'politically-motivated' challenges to subordinate legislation. Thus, it was suggested, it might hinder effective policymaking. Equally, it might result in ambiguous drafting, which would reduce predictability and certainty in the law. In either event the effect would be detrimental to good governance. The majority of the Panel were not unsympathetic to these concerns, which underline that any future consideration of this issue would benefit from detailed evidence on the effect that arises in respect of this issue, if there is one, outside the courtroom. There is, otherwise, a danger here of being drawn into speculation.

35 R. Ekins, *Protecting the Constitution*, (Policy Exchange, 2019) at 21 <https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf>.

71. At all events, so far as concerns litigation, the approach of UK Courts to subordinate legislation in this area may be summarised as follows:

- UK Courts have rarely quashed subordinate legislation on the basis that it is not compatible with Convention rights. They will not quash such legislation unless it is incompatible in all or nearly all cases where it applies.
- UK Courts, as a starting point, ought to disregard subordinate legislation that is incompatible with Convention rights. However, they have been at pains to limit the impact of this option. As such, they may use their discretion under section 8 of the HRA to provide a remedy that is '*just and appropriate*' in the circumstances i.e., a declaration, disapplication of the subordinate legislation or a provision in it in a specific way to enable the provision to continue to apply in other cases where that would not be incompatible with Convention rights.

72. The Panel considered and rejected a proposal that the HRA should be amended to prevent subordinate legislation being quashed. Not the least of the objections to this proposal was that it would be curious if in the human rights sphere *alone* delegated legislation could not be quashed on well-established judicial review grounds.

73. It may be noted that introducing suspended or prospective only quashing orders mirrors existing legislation in Scotland, Wales and Northern Ireland.

Chapter Eight – Extra-Territorial and Temporal Scope

74. Question 2(d) under Theme II of the ToR concerns the extra-territorial effect of the HRA:

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?

The question is qualified by an acknowledgment that if there is a case for change it may require changes going outside IHRAR's ToR:

It is acknowledged that if the extraterritorial scope of the HRA were to be restricted, other legislative changes beyond the HRA may be required in order to maintain compliance with the UK's obligations under the Convention. As such changes would fall outside the scope of the Review, the panel is not asked to make specific legislative recommendations on this issue, but only to consider the implications of the current position and whether there is a case for change.

75. This chapter also considers the HRA's temporal scope, i.e., the extent to which it applies to acts of public authorities before and after it came into force. This issue is not the focus of a specific question within the ToR. However, the issue was repeatedly raised with IHRAR and cannot sensibly be ignored. Moreover, it overlaps to a degree with the issue of extra-territorial jurisdiction. Further still, an examination of the HRA's temporal scope is implicit in the ToR, if and to the extent that it concerns the general issue identified in Theme II of the ToR: namely, whether there is a risk of over-judicialisation of public administration through UK Courts being unduly drawn into questions of policy.

76. It should be noted, as emphasised to IHRAR by Lord Reed in his evidence to the *CfE*, that both the HRA's extra-territorial and temporal scope are areas where the HRA has had '*considerable impact*' on the relationship between the Judiciary and the Government in '*particularly sensitive areas of policy and state action*'[36]. Moreover, due to ECtHR case law developments, the scope of both have expanded in areas where it is '*doubtful*'[37] Parliament in 1998 when enacting the HRA intended it to go.

77. The Panel has no hesitation in answering Question 2(d), 'yes, there is a clear case for change'. The far more difficult issue is how best to do so. Its recommended reform option is as follows:

The current position of the HRA's extra-territorial application is unsatisfactory, reflecting the troubling expansion of the Convention's application. The territorial scope of the Convention ought to be addressed by a national conversation advocated to IHRAR during the Armed Forces Roundtable, together with Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR.

Equally, the temporal application of the HRA is now uncertain and unsatisfactory. Clarity is needed. The temporal scope of the Convention ought to be addressed at a political level by the UK and the other Convention states.

Future domestic developments, both legislative and judicial, will be informed by the progress and outcome of the national conversation and the inter-Governmental dialogue.

78. Future domestic developments, both legislative and judicial, cannot go on hold indefinitely; it would be wrong to speculate now as to their shape, but they will doubtless be informed by the progress and outcome of the national conversation and the inter-Governmental dialogue.

36 Lord Reed, *Submission to the Independent Human Rights Act Review Panel* at 12.
37 Lord Reed ibid.

The Convention's Extra-Territorial Scope

79. The expansion of the Convention's Extra-Territorial Jurisdiction (ETJ) beyond the borders of the UK has occurred in two principal ways: first, in the Convention now having a worldwide remit; secondly, in the Convention applying in times of active combat operations.

80. The second expansion raises the particular difficulty of the interplay between the Convention and International Humanitarian Law (IHL), the *lex specialis* in such situations. This matter remains problematic despite there being some movement to interpret the Convention having regard to the IHL context[38].

81. Lloyd-Jones LJ (as he then was), in *Al-Saadoon*[39] expressed strong concern as to the '*potentially massive expansion of the scope of application of the Convention'.* Criticism of the expanded ETJ of the Convention is not confined to UK Courts. Thus the ECtHR majority decision in *Hanan*[40] (a German airstrike in Afghanistan), holding that the procedural duty to investigate unlawful killings under article 2 of the Convention applied, attracted a powerful dissent.

82. Greater clarity and certainty could be achieved by a unilateral solution, for instance amending the HRA to eliminate or confine its ETJ. Such a solution would, however, risk serious harm to vital UK interests, as the UK would remain bound internationally to the Convention. There is a risk that the Armed Forces, Intelligence and Security Agencies and Police would be exposed to claims before the ECtHR without the benefit of their full consideration by UK Courts, including the use of Closed Material Procedures. IHRAR is opposed to recommending such a course.

The Convention's Temporal Scope

83. The Convention's obligations generally only apply to Convention states from the date on which the Convention is in force. That this should be the general rule is readily apparent; as Lord Hoffmann tellingly observed in respect of the HRA: were there no limits to its retrospective temporal scope, it would make it necessary '*in principle … to investigate the deaths by state action of the Princes in the Tower.*'[41]

38 *Hassan v The United Kingdom – 29750/09 – Grand Chamber Judgment* [2014] ECHR 936; (2014) 38 BHRC 358.
39 *R (Al-Saadoon) v Secretary of State for Defence* [2009] EWCA Civ 7; [2010] QB 486.
40 *Hanan v Germany – 4871/16 (Judgment : Remainder inadmissible: Grand Chamber)* [2021] ECHR 131.
41 *Re McKerr (Northern Ireland)* [2004] UKHL 12; [2004] WLR 807 at [69].

84. ECtHR case law has developed exceptions to the rule, some of which are understandable, including where an alleged breach began before the Convention was in force but is continuing and where prior events need to be taken into account in order to address properly a present alleged violation. Others are more problematic, for example, where an alleged unlawful killing has occurred before the Convention came into force but it may still be necessary under the Convention to carry out an investigation, linked to the procedural duty under article 2 of the Convention, and there is said to be a genuine connection between the death and the critical date[42] *or* if there is no genuine connection, it is necessary in extraordinary circumstances to carry out the procedural duty in order to give effect to the guarantees and underlying values of the Convention. The result is uncertainty as to the temporal scope of the HRA, overlapping with uncertainty as to the extent of the article 2 procedural duty and therefore the ETJ of the Convention and the HRA.

85. Again, there is no easy answer as unilateral amendment of the HRA would create a potentially damaging gap between the domestic statute and the Convention, with potentially adverse devolution consequences. The temporal scope of the HRA is of particular concern in respect of Northern Ireland, but its application there falls outside the scope of the inter-Governmental discussions recommended earlier.

Chapter Nine – Remedial Orders

86. Question 2(e) of Theme II of the ToR is in these terms:

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?

87. This question concerns the mechanism that the HRA provides to amend legislation, including the HRA itself[43], that has been held by the UK Courts not to comply with Convention rights. Inevitably controversially, the mechanism confers on Government, through the remedial order making power in section 10 of the HRA, a '*Henry VIII power*'[44] i.e., the ability to use subordinate legislation to amend or repeal primary legislation. Such remedial orders do, however, serve to remedy incompatibility more swiftly than if recourse was limited to the passing of primary legislation. Remedial orders comprise a discretionary measure. As noted in Chapter Five, where the Panel considered sections 3 and 4 of the HRA, neither Government nor Parliament is *bound* to amend legislation that has been held incompatible with Convention rights.

42 The critical date is either the date on which a Convention state became either subject to the Convention or to the right of individual petition to it from individuals in Convention states.
43 As it has been understood but see further below.
44 Whether or not strictly characterised as such.

88. The Panel recommends (1) amending section 10 of the HRA to clarify that remedial orders cannot be used to amend the HRA itself and (2) improving parliamentary scrutiny of remedial orders. These recommendations suggest principled improvement to the remedial order making power and potentially better use of the JCHR powers of scrutiny.

89. Put simply, remedial orders furnish the mechanism for more speedily remedying legislation incompatible with Convention rights (when Parliament chooses to remedy such incompatibility) than waiting for primary legislation. The intent, however, was that they should not be a used as a matter of routine and there should be a high bar before their use; remedial orders were not intended to supplant primary legislation. In this fashion, though approached with caution as a *Henry VIII power*, they serve a useful and proper purpose.

90. Remedial Orders have, however, on one occasion[45] been used to amend the HRA itself. In the Panel's view, that is a use too far. In the light of the status of the HRA as an Act with a wide-ranging impact across the statute book and implications for the constitutional relationship between different Branches of the State, together with the need for any amendment of the HRA to take proper account of devolution issues, particularly the Northern Ireland Peace Agreement, we consider it wrong in principle to amend it by way of remedial orders. The HRA ought, as a matter of principle, only to be capable of amendment by Act of Parliament.

91. With regard to Parliamentary scrutiny, we invite the JCHR to revisit its 2001 principles – devised to guide Government and Parliament's approach to the remedial order process – but to which it did not refer in any of the JCHR's materials available to IHRAR. In particular, the JCHR should consider if those principles need to be updated or expanded. The JCHR should also, in our view, consider the best way of ensuring that proper account of them is taken in future. Its conclusions on this issue could then be considered in due course, on their merits, by Government and Parliament.

45 Human Rights Act 1998 (Remedial) Order (SI 2020/1160).

Annex

Summary of Recommendations[46]

Chapter One: Introduction

- Serious consideration should be given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education. Such a programme should, particularly, focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities.

Chapter Two: Section 2 of the HRA

- Amend section 2 to clarify the priority of rights protection by giving statutory effect to the position developed in *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115 and *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455, therefore applying UK domestic statute and common/case law first before, if proceeding to interpret a Convention right, taking into account ECtHR case law.

Chapter Three: The Margin of Appreciation

- Other than the amendment recommended in Chapter Two, no change to section 2 in respect of the margin of appreciation. The UK Courts have, over the first twenty years of the HRA, developed and applied an approach that is principled and demonstrates proper consideration of their role and those of Parliament and the Government.

Chapter Four: Judicial Dialogue

- To continue to enable judicial dialogue, both formal and informal, to develop organically.

Chapter Five: Sections 3 and 4 of the HRA

- Amend section 3 to clarify the order of priority of interpretation, coupled with increased transparency in the use of section 3, an enhanced role for Parliament in particular through the JCHR, and the introduction of a discretion to make ex gratia payments where a declaration of incompatibility is made. Otherwise no changes to sections 3 and 4.

Chapter Six: Designated Derogation Orders under section 14 of the HRA

- Amend the HRA to enable UK Courts to make suspended quashing orders where a challenge to a designated derogation order succeeds. Otherwise no change to section 14.

46 As indicated in the body of the Executive Summary and that of the Full Report certain of these recommendations are by a majority of the Panel.

Chapter Seven: Subordinate Legislation

- The introduction of an additional power to suspend quashing orders or make them prospective only, in this sphere as with judicial review generally, and the introduction of a judgments database for judgments where subordinate legislation has been disapplied or quashed.

Chapter Eight: Extra-Territorial and Temporal Scope of the HRA

- The current position of the HRA's extra-territorial application is unsatisfactory, reflecting the troubling expansion of the Convention's application. The territorial scope of the Convention ought to be addressed by a national conversation advocated to IHRAR during the Armed Forces Roundtable, together with Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR.
- Equally, the temporal application of the HRA is now uncertain and unsatisfactory. Clarity is needed. The temporal scope of the Convention ought to be addressed at a political level by the UK and the other Convention states.
- Future domestic developments, both legislative and judicial, will be informed by the progress and outcome of the national conversation and the inter-Governmental dialogue.

Chapter Nine: Remedial Orders under section 10 of the HRA

- Amend section 10 of the HRA to clarify that remedial orders cannot be used to amend the HRA itself and improve parliamentary scrutiny of remedial orders.

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