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The Independent Human Rights Act Review

Call for Evidence – Response

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1: Introduction

1. This evidence is provided by the Centre for Public Law, a research group in public law based in the Faculty of Law at the University of Cambridge.
2. The following members of the Faculty of Law at the University of Cambridge have contributed to this document: Professor Alison Young, Dr Kirsty Hughes, Dr Stevie Martin, Dr Stephanie Palmer and Dr Martin Steinfeld. We were also assisted by Alexandra Allen-Franks, Guy Baldwin, Matthew Psycharis, Katherine Ollerenshaw, Konatsu Nishigai, Dora Robinson, and Aradhya Sethia, all of whom are current PhD students at the University of Cambridge.
3. This evidence draws on the knowledge and experience of the contributors who regularly teach and conduct research relating to the Human Rights Act 1998 (HRA).
4. The information provided in this submission is based on the law of England and the impact of the HRA on the Westminster Government and Parliament. Where relevant, mention has been made of the potential different impact of reform on the Governments and legislatures of Scotland, Wales and Northern Ireland.

2: Executive Summary

5. The Human Rights Act 1998 is a vital part of our constitutional framework that has achieved Parliament's intention to bring rights home. Over the last two decades it has dramatically limited the number of occasions on which the European Court of Human Rights (ECtHR or Strasbourg court) has found the UK to be in violation of its obligations under the Convention. We argue that the HRA operates effectively and that it must be preserved in its current form.
6. We argue that there is no case for modifying the duty that domestic courts should "take into account" ECtHR jurisprudence. Our domestic courts no longer consider themselves bound by

decisions of the ECtHR and have the freedom to depart from ECtHR jurisprudence in circumstances that facilitate effective judicial dialogue between domestic courts and the ECtHR. Requiring our courts to take ECtHR jurisprudence into account is essential to the intention of the HRA, namely, to bring rights home. Such a requirement is also in line with the Brighton Declaration and is a necessary component of subsidiarity in the relationship between domestic courts and the ECtHR. There is no need to modify section 2 HRA. We argue, however, that judicial dialogue would be more effective if only the Supreme Court could depart from a clear decision of the ECtHR when the justification for the departure is a criticism of the reasoning process of the ECtHR. This is even more so when the decision is one of the Grand Chamber, particularly when this is specifically addressed to the UK.

7. We also argue that there is no need to change the wording of section 3, or to change the order in which courts use section 3 and section 4. Although section 3 may read words into legislation, even when the legislative provision is not ambiguous, this does not mean that such interpretations undermine the intention of the legislature. Legislative intention is best understood in terms of the content and purpose of legislation. This includes a general intention of Parliament to uphold human rights found in the Convention and the common law. In addition, courts exercise their discretion to issue a declaration of incompatibility in a manner which respects both parliamentary sovereignty and the separation of powers between Parliament, the Government and the courts.
8. We argue that courts should have the power to strike down derogation orders made under section 14 HRA. Courts are generally deferential to the Government on issues of national security, meaning any strike down of a derogation will occur rarely. Moreover, Parliament can respond to any strike down, using fast-track procedures if required.
9. There is no need to change the remedies available for subordinate legislation which breaches Convention rights. Any change would upset the separation of powers, as well as potentially threatening the devolution settlement should courts have the power to strike down legislation of the devolved legislatures which contravene Convention rights but be unable to strike down

subordinate legislation. In addition, courts use their powers in a sensitive manner, often providing Convention-compatible interpretations of subordinate legislation or issuing declarations when subordinate legislation may generally comply with Convention rights but nevertheless harms Convention rights in its specific application.

10. There is no case for change to the extra-territoriality application of Convention rights. Any modification places the UK in breach of its obligations under the ECHR and may undermine the ability of the HRA to protect the Convention rights of soldiers deployed abroad.
11. We argue that there are changes that could be made to the remedial process to enhance the role of Parliament, particularly allowing both Houses to propose amendments that can be debated in Parliament rather than merely making recommendations to a Minister.

3: Theme One –The relationship between the domestic courts and the European Court of Human Rights (ECtHR).

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?

12. Section 2 of the HRA provides that “a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any” jurisprudence (which includes, *inter alia*, judgments, decisions, declarations, and opinions of the ECtHR) insofar as it is relevant to the proceedings.
13. We believe that section 2 has been applied by the courts in a manner that reflects the purpose of the HRA, namely to “bring rights home”. This legislative intention requires domestic courts to take account of ECtHR case law, so that they can, *where appropriate*, interpret the rights contained in the HRA compatibly with ECtHR jurisprudence ensuring that litigants do not have to go to Strasbourg, the home of the ECtHR, for a remedy. This does not, however, require our courts to blindly follow ECtHR case law, nor have they in fact done so.

14. We have given careful consideration to the question of whether section 2 requires amendment and have concluded that there is **no need to amend section 2**.
15. Much of the ‘suspicion’ surrounding judicial use of section 2 stems from the early case law in which Lord Bingham stated in *Ullah* that the “duty of national courts ... [is] to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”¹ This became known as the mirror principle and it was often understood as meaning that domestic courts would always follow a ruling of the ECtHR. Yet as courts have further articulated their role, it is evident that there are circumstances in which they depart from ECtHR authority.²
16. It is now clear that the domestic courts will not follow a particular judgment of the ECtHR if there is no clear and consistent authority from the ECtHR.³ Nor will domestic courts follow the ECtHR if they believe that the ECtHR has misunderstood particular aspects of our domestic law or process.⁴ There are also some suggestions that domestic courts will not follow the ECtHR if they believe that the jurisprudence of the ECtHR is wrong in principle.⁵
17. Two important cases that illustrate the fact that our courts have sometimes declined to follow ECtHR decisions are *Animal Defenders International*⁶ and *Hicks v Commissioner of the Police of the Metropolis*.⁷ In both cases the ECtHR subsequently followed the reasoning of the House of Lords/Supreme Court.⁸ This is indicative of how the current approach to section 2 facilitates

¹ *R (Ullah) v Special Adjudicator* [2004] UKHL 46, [2004] 2 AC 323 at [20]. Prior to *Ullah*, Lord Slynn in the House of Lords’ judgment in *R (Alconbury) v Secretary of State for the Environment* [2001] 2 All ER 929 had held that domestic courts should follow ‘clear and constant’ Strasbourg case law save where there were exceptional circumstances (at [26]).

² *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, at [48].

³ *R (Alconbury Developments Ltd)* [2001] UKHL 23 at [26], *Quila v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 at [43].

⁴ *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373, Lord Phillips, at [11].

⁵ *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279.

⁶ [2008] UKHL 15, [2008] 1 AC 1312.

⁷ [2014] EWCA Civ 3, [2014] 1 WLR 2152

⁸ *Animal Defenders v United Kingdom* (App. No. 48876/08) and *Eiseman Renyard v United Kingdom* (App. No. 57884/17)

dialogue with the ECtHR which has ensured effective protection of Convention rights while also respecting the particularities of domestic law.

18. To the extent that we have concerns about section 2, they in fact stem from situations in which domestic courts other than the Supreme Court have too readily departed from the ECtHR. For example, in the context of the whole life sentence regime,⁹ the High Court recently declined to follow the ECtHR decision of *Trabelsi* in the context of extradition to face a sentence of life without parole in the US.¹⁰ The High Court concluded:

*[w]e do not find any significant assistance in the decision... Insofar as it purports to reach a concluded view on the compatibility of life imprisonment without parole in the United States with Article 3, it does so without any or any proper reasoning. Insofar as it departs from the established ECHR jurisprudence on the application of Article 3 in relation to removal to a non-contracting state, we prefer the rationale as set out in *Harkins v UK*.¹¹*

19. This had the consequence of failing to bring rights home to an individual. Given that the High Court is bound by decisions of the Court of Appeal and the Supreme Court, it would have been better for the High Court to follow the clear and consistent case law from the ECtHR. If there are concerns with the reasoning of the ECtHR, these concerns can be used by the Government to lodge an appeal, providing an opportunity for the Court of Appeal or the Supreme Court to evaluate the reasoning of the ECtHR. Moreover, the ECtHR is more likely to engage with and give respect to the reasoning of a higher court when assessing whether to change its own case law.

20. It is important also to recognise that domestic courts remain bound by decisions of higher courts which they must follow, even when this contradicts a decision of the ECtHR. All domestic courts may do is give leave to appeal to a higher court.¹²

⁹ See, for instance, *Vinter v United Kingdom* (2013) 63 EHRR 1 contra *R v McLoughlin* [2014] 1 WLR 3964 and followed by *Hutchinson v United Kingdom* (2017) 43 BHRC 667.

¹⁰ *Trabelsi v Belgium* (2014) 60 EHRR 21.

¹¹ *Hafeez v Government of the United States of America* [2020] EWHC 155 (Admin), [2020] 1 WLR 1296, at [57]. Emphasis added.

¹² See *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, at [44] and *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] AC 311, at [59]-[67].

21. The final feature of section 2 that we need to consider is that “[o]n occasion our domestic courts may choose to go *further* in the interpretation and application of the ECHR than Strasbourg has done where they reach a conclusion which flows naturally from Strasbourg’s existing case law”.¹³
22. One example is the case of *Rabone*, where the domestic courts concluded that the State’s positive obligation to protect the right to life under Article 2 ECHR can, in appropriate cases, extend to patients who have been voluntarily admitted to hospital for treatment.¹⁴ This obligation clearly “flow[ed] naturally from Strasbourg’s existing case law” regarding positive obligations with respect to involuntary patients. In reaching that conclusion, Lord Dyson noted that “Strasbourg proceeds on a case by case basis” and in this particular context, “the jurisprudence [was] young. [The] boundaries [of the positive obligation to protect under Article 2 were] being explored by the ECtHR as new circumstances [were] presented to it for consideration.”¹⁵ Indeed, the ECtHR has since confirmed that the operational obligation does, in fact, extend to patients who have been hospitalised on a voluntary basis.¹⁶ Here, the Supreme Court has done precisely that which Lord Irvine foreshadowed when the Human Rights Bill was being debated in the House of Lords, namely, it gave “a successful lead to Strasbourg.”¹⁷
23. Similarly, the Supreme Court in *Limbuela* held that a failure to provide support to an individual seeking asylum in circumstances where the Secretary of State was aware that the individual was, or was likely to become, destitute violated Article 3. The Supreme Court reached that conclusion despite the absence of clear authority on the applicability of Article 3 in such circumstances from the ECtHR but having had regard to the ample authority from that Court regarding the nature and scope of the protections afforded by Article 3.¹⁸

¹³ *Moohan and Anor v Lord Advocate (Advocate General for Scotland Intervening)* [2014] UKSC 67, [2015] AC 901, at [13].

¹⁴ *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] UKSC 2, [2012] 2 AC 72.

¹⁵ *Ibid*, at [25].

¹⁶ *Fernandes de Oliveira v Portugal*, Grand Chamber (App No 78103/14), 31 January 2019.

¹⁷ *Ibid* at 514.

¹⁸ *R(Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

24. The prospect of going further than the ECtHR has not, however, been viewed by domestic courts as an open invitation to find incompatibilities with Convention rights in situations that otherwise fall within the margin of appreciation as was evident in the Supreme Court's judgment in *Nicklinson*.¹⁹
25. In considering this aspect of the role of our national courts it is important to keep in mind the nature of ECtHR jurisprudence. There is no equivalent to the concepts of *ratio decidendi* and *stare decisis* which play fundamental roles in our domestic legal order.²⁰ It is entirely appropriate, then, that domestic courts would have regard to, but would not be bound by, ECtHR case law.
26. It is also important that we keep the effect of the HRA in mind when considering section 2. While the HRA defines Convention rights in terms that mirror the Convention, it has indisputably created new rights within domestic law and, while clear and constant authority from the ECtHR illustrating the scope and application of Convention rights is of course relevant, domestic courts applying the HRA are applying a domestic statute.²¹
27. **Consequently, we believe that no amendment to section 2 is needed.** The development of the rights by the national courts is in keeping with what Parliament intended in drafting section 2. It is also in line with ECtHR jurisprudence which recognises that “[n]ational authorities are better able than Strasbourg to assess what restrictions are necessary in the democratic societies they serve.”²² The section, and the duty it contains, operate effectively to ensure that domestic courts keep abreast of ECtHR case law and are, where appropriate, guided by that jurisprudence, whilst also enabling domestic courts to depart from or step beyond such case law in appropriate circumstances. There is simply no evidence that section 2 has curtailed domestic judicial decision-making.

¹⁹ See, for instance, *R (Nicklinson) and Ors v Ministry of Justice and Ors* [2014] UKSC 38, [2015] AC 657.

²⁰ Lady Hale, ‘Argentoratium Locutum: Is the Supreme Court Supreme?’, Nottingham Human Rights Lecture, 1 December 2011 <https://www.supremecourt.uk/docs/speech_111201.pdf>, p 4.

²¹ *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 at [118], per Baroness Hale.

²² *Ibid.*

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?

28. When the ECtHR grants a margin of appreciation the UK has a degree of discretion as to how to protect rights, which may in some cases involve striking a balance between competing rights. Although there is evidence of our domestic courts sometimes providing greater protection of rights than the ECtHR, this is not a regular occurrence. Moreover, our courts are more likely to go beyond the ECtHR when this is in the direction of travel of decisions of the ECtHR. Indeed, if ECtHR case law is not already moving in this direction, then our courts may look to use the common law to provide additional protection of rights. In both contexts however it is evident that our courts operate with restraint and that they recognise that there can be good constitutional reasons for greater protection of rights to be provided by Parliament rather than the courts. **Consequently, we would argue that no change is required.**

29. In *Re P (Northern Ireland)*, for example, the House of Lords was prepared to go beyond decisions of the ECtHR concerning whether the right to adopt was within the scope of the right to private life (Article 8), such that the right against discrimination would be breached if there was unjustifiable discrimination as regards adoption rights.²³ The case concerned the position in Northern Ireland, where unmarried couples were unable to adopt.

30. Although the House of Lords was prepared to regard the right to adopt as falling within Article 8, despite the absence of a specific ECtHR case confirming this, it is important to recognise that there had been similar cases before the ECtHR and the House of Lords were of the opinion that, given this clear line of cases, the ECtHR would also see this as within the scope of Article 8. In addition, the law in Scotland, England and Wales allowed unmarried couples to adopt, providing indirect democratic support for providing a stronger protection of Convention rights.

²³ [2008] UKHL 38, [2009] AC 173.

31. There is also some evidence that domestic courts may prefer to develop the common law when dealing with access to justice cases. In *Kennedy*, it was argued that the refusal of the Charity Commission to accede to a freedom of information request, given its statutory immunity from such requests as concerns investigations by the Commission, breached the right to freedom of expression found in Article 10 ECHR.²⁴ Given the ECtHR did not specifically extend to include such situations, the Supreme Court preferred to rely on the fundamental common law right of access to the court, rather than the Convention right. Similarly, where the common law already provides a stronger protection of rights than that found in the ECHR, UK courts will rely on the stronger protection of rights found in the common law.²⁵
32. Courts are particularly reluctant to provide a greater protection of rights within the margin of appreciation when the case concerns complex issues of social or economic policy, or complex moral issues. They have adopted the test of “manifestly without reasonable foundation” when assessing whether welfare rights have given rise to discrimination, rather than applying a stricter test that would give less discretion to the Government or Parliament.²⁶ Moreover, courts have also been reluctant to provide a stronger definition of rights when dealing with issues of assisted dying, with some of their Lordships concluding that this issue could only be determined by Parliament.²⁷
33. Whilst it is impossible to say that courts always draw the line in the right place, it is also impossible to conclude that courts are overly willing to provide greater protection of rights than

²⁴ [2014] UKSC 20, [2015] AC 455.

²⁵ *Jalloh* [2020] UKSC 4, [2020] 2 WLR 418, concerning the deprivation of liberty.

²⁶ *R (Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550 and *R (Z) v Hackney London Borough Council* [2020] UKSC 40, [2020] 1 WLR 4327, where Lord Sales remarked, at [107], that “The margin of appreciation to be afforded to Parliament when it has sought to strike a balance between competing interests varies depending on context. Where, as here, Parliament has had its attention directed to the competing interests and to the need for the regime it enacts to strike a balance which is fair and proportionate and has plainly legislated with a view to satisfying that requirement, the margin of appreciation will tend to be wider. A court should accord weight to the judgment made by the democratic legislature on a subject where different views regarding what constitutes a fair balance can reasonably be entertained.”

²⁷ *R (Nicklinson) and Ors v Ministry of Justice and Ors* [2014] UKSC 38, [2015] AC 657

the minimum level of rights required to be protected by the ECtHR within a wide margin of appreciation. A stricter requirement for domestic courts preventing them from protecting rights which go beyond decisions of the ECtHR may merely result in a greater use of the common law to protect rights. This may come at the cost of legal certainty. If change is needed, it may be best achieved through ensuring there is greater opportunity for Parliament to engage with these issues. For example, in addition to carrying out thematic studies, the Joint Committee on Human Rights (JCHR) could write reports on salient issues within the margin of appreciation, perhaps also initiating debate. More time could also be given to Private Member's Bills which are designed to provide a UK specific response to an issue within a wide margin of appreciation in order for Parliament to discuss these issues.

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?

34. Judicial dialogue between domestic courts and the ECtHR can serve two purposes. First, it can help to define Convention rights, particularly within the margin of appreciation or when correcting potential errors. Second, it can serve to point out where either the domestic courts or the ECtHR have potentially strayed beyond the proper scope of their powers.
35. The first purpose is currently achieved in situations where domestic courts decline to follow a decision of the ECtHR based on that court's misunderstanding of domestic law or procedure and when domestic courts provide a more specific definition of a Convention right within the margin of appreciation. It may also be achieved indirectly as domestic courts develop common law protections of human rights. The second aim is best achieved through greater involvement of the Government, Parliament, and the Council of Ministers. Domestic courts may undermine effective dialogue when lower courts criticise the reasoning of the ECtHR or when domestic

courts fail to adhere to judgments of the Grand Chamber addressed to the UK, particularly when these decisions have taken the decisions of domestic courts into account.

36. Domestic courts can and do raise concerns about the application of ECtHR jurisprudence in the UK. As discussed above, they have pointed out where decisions of the ECtHR have failed to fully understand domestic law. This has resulted in the ECtHR changing its case law. In *Horncastle*,²⁸ for example, the Supreme Court declined to follow *Al-Khawaja v UK* in which the ECtHR concluded that the use of hearsay evidence as the sole or decisive justification for a criminal conviction breached Article 6 ECHR.²⁹ The Supreme Court held that the ECtHR had failed to recognise that circumstances could arise when Article 6 would not be breached and had taken insufficient account of further procedural protections surrounding the admission of hearsay evidence. When re-examining the issue in the Grand Chamber, the ECtHR took account of the Supreme Court's reasoning, determining that Article 6 would not be breached if there were strong procedural safeguards when hearsay evidence was the sole or decisive evidence on which a conviction was based.

37. Similarly, the Court of Appeal declined to follow a decision of the ECtHR that the imposition of whole life sentences breached Article 3 ECHR given the lack of a realistic prospect of release. The ECtHR had failed to recognise how a realistic prospect of release was provided through a combination of guidelines and the requirement that Ministers applying these guidelines must do so in a manner that complies with Convention rights.³⁰ When this issue returned to the ECtHR, the court concluded that Article 3 had not been breached. The ECtHR took account of the decisions of the UK courts, stating: “[w]here, following the Grand Chamber’s judgment in which it expressed doubts about the clarity of domestic law, the national court has specifically addressed those doubts and set out an unequivocal statement of the legal position, the Court must accept the national court’s interpretation of domestic law.”³¹

²⁸ *R v Horncastle* [2009] UKSC 14, [2010]2 AC 375.

²⁹ *Al-Khawaja v UK* [2011] ECHR 26766/05, (2009) 49 EHRR 1.

³⁰ *Attorney General’s Reference (No 60 of 2013)*, *R v McLoughlin*; *R v Newell* [2014] EWCA Crim 188; [2014] 3 All ER 73.

³¹ *Hutchinson v UK* [2015] ECHR 57592/08, para 25.

38. The courts have also developed a critical approach to the decisions of the ECtHR, refusing to follow decisions when the reasoning of the ECtHR is weak.³² There is also evidence of the ECtHR responding to this assessment. In *R (Hicks) v Commissioner of the Police for the Metropolis*, for example,³³ the Supreme Court declined to follow the reasoning of the majority in *Ostendorf v Germany*,³⁴ preferring to follow the minority judgments as to the application of Article 5 ECHR to preventive police detention. As the Supreme Court failed to conclude that rights had been breached, the applicants petitioned the ECtHR. The ECtHR took account of the reasoning of the Supreme Court and declared their application inadmissible.³⁵

39. There are also examples where the domestic courts' analysis of the ECtHR jurisprudence has led to the ECtHR developing Convention rights in the direction prompted by UK courts. For example, the relativist approach of the domestic court to Article 3 ECHR was later used by the ECtHR.³⁶

40. Where there are examples of difficulties in dialogue between the two courts, this often arises from misunderstandings as to the distinct way in which domestic courts and the ECtHR reason about rights, or the difficulties of applying definitions of Convention rights which suit a particular constitutional or legal system out of that context. This may explain, for example, the ongoing dialogue between domestic courts and the ECtHR concerning whether Article 6 ECHR, and its requirement of an independent and impartial tribunal, applies to the allocation of social welfare provisions. The UK Supreme Court concluded that Article 6 did not apply to the allocation of homes for those who were unintentionally homeless,³⁷ only for this to be reversed by a Chamber of the ECtHR.³⁸ Given concerns as to the reasoning by that Chamber, particularly the lack of

³² *Hicks*, [2014] EWCA Civ 3, [2014] 1 WLR 2152, *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2019] 2 WLR 440, *Hafeez* [2020] EWHC 155 (Admin), [2020] 1 WLR 1296 and *Sanchez v Government of the United States of America* [2020] EWHC 508 (Admin).

³³ [2014] EWCA Civ 3, [2014] 1 WLR 2152.

³⁴ (2013) 34 BHRC 738.

³⁵ *Eiseman-Reynard v United Kingdom* Application no 57884/17.

³⁶ *Ahmad v United Kingdom* (2013) 56 EHRR 1.

³⁷ *Ali v Birmingham City Council* [2010] UKSC 8, [2010] 2 AC 39.

³⁸ *Ali v United Kingdom* (2015) 63 EHRR 20.

detailed consideration of the apprehensions raised by members of the Supreme Court as to the consequences of including these welfare rights within the scope of Article 6, a later decision of the Supreme Court refused to follow the decision of the ECtHR.³⁹ It is important to note here that, despite disagreeing over whether Article 6 applied, the ECtHR confirmed that there had been no breach of Article 6 on the facts.

41. This suggests that, when dialogue is less successful, this arises not due to the scope of section 2, but rather from the resolution of complex issues across a range of different legal and constitutional systems, which in turn have different relative powers of courts, tribunals, local authorities and central Government. Problems may also arise when lower courts reject the reasoning of the ECtHR, rather than leaving these issues to the Supreme Court.

42. **Consequently, we would argue that the best way to improve judicial dialogue is not to modify the scope of section 2, but rather to encourage greater adherence to the Brighton Convention and the facilitation of more opportunities for judges from the ECtHR and domestic courts to meet to discuss Convention rights adjudication.**

43. As regards the second purpose, domestic courts have accepted that it may be possible for them to depart from a decision of the ECtHR if it is “inconsistent with some fundamental substantive or procedural aspect” of domestic law.⁴⁰ This provides the possibility for domestic courts to protect the proper constitutional role of the UK from improper intrusion by the ECtHR, although, to date, this threshold has not been reached.⁴¹

44. We would not argue in favour of a greater use of this justification to depart from decisions of the ECtHR. Rather, such limits are best enforced through dialogue which includes political, in addition to, judicial institutions. This can be illustrated by the various judgments regarding

³⁹ *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36, [2017] AC 624.

⁴⁰ *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, at [48].

⁴¹ In *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271, the Court rightly refused to accept that a complete ban on prisoner voting was a fundamental aspect of domestic law.

prisoner voting rights, where the ECtHR concluded that it was contrary to Convention rights to ban all prisoners from voting.⁴² The UK Government made representations to the ECtHR, intervening in cases concerning prisoner voting rights brought against other countries.⁴³ Moreover, the ECtHR demonstrated a greater willingness to conclude that rules restricting some prisoners from voting were compatible with Convention rights when these rules had received detailed democratic scrutiny by the legislature.⁴⁴

45. Any dialogue may also need to include the devolved Governments, given that, when an issue falls within an area of devolved competence, the devolved legislatures may adopt different solutions to ensure Convention-compliance.⁴⁵ These divergent solutions may give rise to future litigation. Moreover, more weight may be given in future to solutions adopted by the devolved legislatures as opposed to those implemented by the executive without democratic deliberation. Greater co-ordination and collaboration in resolving these complex issues would help facilitate better dialogue between the UK and the judicial and political institutions of the Council of Europe.

46. **Beyond that, we would argue that there is no case for change, particularly given the small number of cases in which the ECtHR finds against the UK and evidence of robust and detailed judicial dialogue.**⁴⁶

⁴² *Hirst v UK* (2006) 42 EHRR 41.

⁴³ *Scoppola v Italy (No 3)* (Application no. 126/05).

⁴⁴ *Scoppola v Italy (No 3)* (Application no. 126/05).

⁴⁵ In Scotland, prisoners serving a term of 12 months or less may vote in local elections and elections to the Scottish Parliament either through a postal or a proxy vote – Scottish Elections (Franchise Representation) Act 2020. Plans to allow Welsh prisoners serving a term of 4 years or less to vote in local elections and for the Senedd Cymru were eventually dropped from what is now the Senedd and Elections (Wales) Act 2020.

⁴⁶ Between 1966 and 2010, the ECtHR only found 3% of cases against the UK to be admissible: ‘Analysis of Statistics 2020’ (European Court of Human Rights 2020), 61, https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf. There is also evidence that the ECtHR has been increasingly ruling in favour of its Member States (see Mikael Rask Madsen, ‘Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?’ (2018) 9 *Journal of International Dispute Settlement* 199.) as well as being more prepared to give weight to the assessment of domestic courts when determining issues within the margin of appreciation.

4: Theme Two – Impact of the HRA on the relationship between the judiciary, the executive and the legislature.

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

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)?

47. The primary task of the courts is to give effect to the intention of Parliament, although this has been described as “a very slippery phrase”.⁴⁷ The primary indication of legislative intention is determined by the text. The courts increasingly use a purposive and contextual approach, rather than a literal one, and adopt greater latitude in the construction of statutes. According to Lady Hale, “The goal of all statutory interpretation is to discover the intention of the legislation ...from the words used by Parliament, considered in the light of their context and purpose.”⁴⁸ The search for the meaning of a statutory provision is assisted by the common law rules of statutory interpretation but there is no certain way of ascertaining the intention of Parliament.⁴⁹

48. Courts have also recognised broader constitutional principles which do not depend on statutory ambiguity. The underlying values of public law that give the UK constitution its continuing authority are deployed in the interpretation of any statutory issue. Some examples include the presumption that domestic law should conform to international law. Courts also assume, using “the principle of legality”, that Parliament has taken into account long-standing principles of constitutional law.⁵⁰ In cases involving statutes that conflict with common law or fundamental

⁴⁷ *Salomon v Salomon* [1897] AC 22, at 38 per Lord Watson ([the phrase] “properly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it.”

⁴⁸ *R (on the application of Black) v Secretary of State for Justice* [2017] UKSC 81, [2018] AC 215, at [36].

⁴⁹ F.A.R. Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford, 2009).

⁵⁰ *R v. Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115 at [131] per Lord Hoffman.

constitutional values, courts have used interpretation to avoid an offensive application of the statute.⁵¹

49. In addition, courts have acknowledged that some of the rights guaranteed by the ECHR are also common law constitutional rights that will receive protection. This is not a recent development: even before the HRA came into force, courts protected common law rights such as freedom of expression.⁵² The common law's abhorrence of torture was reiterated in a decision concerning the use of evidence that may have been obtained through torture. According to the court, the principles of common law were sufficient to compel the exclusion of third party torture evidence as unreliable, unfair and offensive to ordinary standards of humanity and decency.⁵³ Courts have vigorously protected the constitutional right of access to justice as part of the rule of law.⁵⁴ In the *Unison* judgment, Lord Reed considered the text of the statutory provision concerning the charging of court fees but added that the court must also consider "the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles."⁵⁵

50. Furthermore, this question must be considered within the context and settlement of the UK constitutional framework. The relationship between courts, Government and Parliament rests on a combination of constitutional principles: parliamentary sovereignty, the rule of law and the separation of powers. The HRA has readjusted this relationship. However, it was not intended to disrupt the orthodox understanding of parliamentary sovereignty. The HRA is not entrenched: it is not protected substantively or procedurally from express amendment or repeal. The HRA's framework gives "further effect" to Convention rights rather than directly incorporating them into domestic law and giving the Convention rights the "force of law".⁵⁶

⁵¹ See *R (on the application of Unison) v. Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409; *R (on the application of Privacy International) v. Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.

⁵² See e.g., *R v. Shayler* [2001] 1 WLR 2206 [40].

⁵³ *A v. Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221, at [51-52] per Lord Bingham.

⁵⁴ *Attorney-General v. Times Newspapers Ltd* [1974] AC 273, 310 per Lord Diplock; *Raymond v. Honey* [1983] 1 AC 1: *R v. Secretary of State or the Home Department, Ex p. Leech* [1994] QB 198.

⁵⁵ *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409, at [65].

⁵⁶ *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2003] 3 WLR 568, at [97] (Lord Hope).

51. The careful framework created by the HRA has established a balance that preserves parliamentary sovereignty while providing for the protection of Convention rights through an “ordinary” non-entrenched statute. The broad sweep of section 3 is a critical element of the working of the HRA as it is the means by which Parliament ensures that individuals can be afforded the benefit of their Convention rights “so far as it is possible” without any requirement of further intervention by Parliament, achieving the purpose of the Act of “bringing rights home”.
52. Nevertheless, the HRA has altered the approach of the courts to the interpretation of the legislation of the UK Parliament and subordinate legislation. The interpretative duty is the primary mechanism through which Convention rights are “brought home” and incompatibility with the ECHR is avoided. For these reasons, the interpretative obligation is strong and far-reaching. The obligation is deliberately stronger than the model of requiring a reasonable interpretation as provided for in the New Zealand Bill of Rights Act 1990.⁵⁷
53. In certain circumstances, section 3 enables the meaning of statutory provisions to be altered to achieve compliance with Convention rights. The application of the obligation does not depend upon the presence of ambiguity in legislation. Even if the legislation is clear, section 3 may require the legislation to be given a different meaning.⁵⁸
54. Section 3 goes further than the ordinary methods of interpretation deployed by the courts. It requires courts to find an interpretation that is Convention-consistent, “if possible”, even if this means that the given meaning is linguistically strained. However, it is important to recognise that this stronger form of interpretation is itself an expression of the will of Parliament in the HRA. Section 3(1) requires the courts to adopt a Convention-compliant interpretation to legislation, even if this appears to differ from what Parliament appeared to have in mind when enacting it, to ensure it complies with a further intention of Parliament that legislation be read, so far as possible, in a manner compatible with Convention rights.

⁵⁷ *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, at [44] per Lord Steyn.

⁵⁸ *Ghaidan v Godin-Mendoza* [2004] UKHL 43, [2004] 3 WLR 976, at [29].

55. This has not resulted in a radical transfer of power from the legislature to the judiciary. When faced with a submission that a statutory provision is incompatible with a Convention right, courts initially apply the “ordinary” principles of interpretation or use broader constitutional principles which do not depend on statutory ambiguity. In adopting this “ordinary” approach to interpretation, courts may conclude that a decision can be reached without resorting to section 3 as the meaning of a provision, so interpreted, now has no apparent incompatibility with the Convention. Such an approach serves to preserve the primacy of the legislature’s intention concerning the legal instrument under examination. If the application of the ordinary principles of statutory interpretation results in an apparent incompatibility between the meaning of the legal instrument and a Convention right, the court is then obliged to turn to section 3.

56. The use of the word “possible” clearly indicates that Parliament envisaged that not all legislation would be capable of being interpreted in a Convention-compliant manner. In exercising section 3 obligations, the role of the court is “interpretation not legislation”.⁵⁹ Courts are limited to a certain extent by the words used and the overall contextual setting. Courts have used various techniques such as “reading down”, “reading broadly”, and “reading in” in order to interpret statutory provisions in a Convention-compliant manner. Although these results may have been controversial, as courts have used section 3 to read in words which change the meaning of the legislation, it is always open to Parliament to reverse this interpretation through further primary legislation.

57. The breadth of the obligation can be seen from the decisions of the House of Lords in *R v A (No 2)* and *Ghaidan v Godin-Mendoza*. In *R v A (No 2)*, the House of Lords held that provisions of the Youth Justice and Criminal Evidence Act 1999, which reduced the use of evidence of a complainant’s prior sexual history in rape cases, should be read subject to the need to ensure a fair trial under Article 6 ECHR. *Ghaidan v Godin-Mendoza* concerned the interpretation of the Rent Act 1977. The House of Lords concluded that the clear distinction on the grounds of

⁵⁹ *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, at [109].

sexuality in determining succession to a protected tenancy did not pursue any legitimate aim. As the Act extended beyond traditional family structures, the definition of “spouse” should be read as extending to same-sex couples.

58. Although the wording in legislation has been changed by the courts, this does not mean that the will of Parliament has been thwarted. The courts are not bound solely by linguistic constraints, but also by ones of appropriateness in our constitutional structure, including ensuring that an interpretation does not undermine a fundamental feature of the legislation.⁶⁰ Courts are highly sensitive to their role which is one of interpretation and not legislation.

59. In *Sheldrake v DPP*, Lord Bingham summarised the explanations provided for the inability of courts to provide a Convention-compliant interpretation. A Convention-compatible interpretation is not possible if it “would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation.”⁶¹ In an earlier judgment, Lord Bingham commented that the courts do not engage in “judicial vandalism”.⁶²

60. Language can still limit whether the court is prepared to use the interpretative obligation. Recently, the Supreme Court stated that, even if it had been required to ensure Convention-compatibility, it would not have used section 3(1) to read a proportionality requirement into section 193(2)(b) of the Equality Act 2010. According to the court, where Parliament intended a

⁶⁰ *Ghaidan v Godin-Mendoza* [2004] UKHL 43, [2004] 3 WLR 976, at [27]. See also *R v Holding* [2005] EWCA Crim 3185, [2006] 1 WLR 1040 and *Gilham v Ministry of Justice* [2019] UKSC 44, [2020] 1 All ER 1.

⁶¹ *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 364, at [28].

⁶² *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2002] 2 AC 291, at [30]: “In s 1(2) of the Murder (Abolition of Death Penalty) Act 1965, Parliament was at pains to give judges a power to recommend minimum periods of detention, but not to rule. That was for the Home Secretary. To read s 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by s 3 of the 1998 Act (see *Re S (children: care plan)*, *Re W (children: care plan)* [2002] UKHL 10 at [41].”

proportionality requirement to apply in this legislative scheme, it clearly said so. To read in a proportionality requirement into this disputed section would make it redundant and ignore a deliberate choice made by Parliament.⁶³

61. The Government may also prefer to ask the court for a Convention-compatible interpretation to be adopted rather than the use of section 4. Any modification of section 3 may reduce the Government's choice to seek a particular Convention-compatible interpretation to resolve a breach of Convention rights. This may be more advantageous for the Government than waiting for Parliament to have the time to intervene or run the risk of facing a future adverse judgment from the ECtHR. See, for example, *Secretary of State for the Home Department v AF (No 3)*, where Lord Scott stated;

My Lords, I am not sure that, if the point had been taken on these appeals, I would have agreed with my noble and learned friend's reading-down of the statutory power to make control orders. It seems to me very well arguable that the detail in which and the precision with which the statutory procedure for the judicial hearings is laid down in the 2005 Act makes it impermissible to argue that compliance with the express statutory requirements is not enough to ensure the validity of control orders and that, in addition, other requirements of a "fair hearing" for article 6(1) purposes must also be met. This point, however, when put to Mr James Eadie QC, counsel for the Secretary of State, was received with no enthusiasm. The Secretary of State accepts, as I understand it, that unless the judicial procedure prescribed by the 2005 Act, with its involvement of special advocates, closed hearings and the like, results in a "fair hearing" for article 6(1) purposes, the control orders in question cannot be held to have been validly made, or, as the case may be, validly confirmed. Without the reading-down of the statutory power to make these orders proposed by Baroness Hale in *MB* that addition to the express statutory requirements could not, in my opinion, be accepted. Without that reading-down, the sovereignty of Parliament would, in my opinion, require the conclusion that where the express statutory requirements have been complied with the control orders would have been validly made, or confirmed, whether or not the judicial procedure involved a breach of the controlees' article 6(1) Convention rights. But the Secretary of State has accepted that the relevant statutory provisions should be construed with the words proposed by my noble and learned friend read into paragraph 4(3)(d) of the Schedule and with the consequence that valid control orders can be made only where they are accompanied by judicial proceedings that constitute a fair hearing for article 6(1) purposes. So be it.⁶⁴

⁶³ *R (on the application of Z and another) v Hackney London Borough Council* [2020] UKSC 40, [2020] 1 WLR 4327, at [111] per Lord Sales.

⁶⁴ [2009] UKHL 28, [2010] 2 AC 269, at [95].

62. Declarations of incompatibility provide Parliament with the final say over whether, and if so how, to amend legislation which breaches Convention rights. In addition to situations where it is not possible to read legislation to comply with Convention rights, courts will also prefer to make a declaration of incompatibility where the legislature is more suited to provide a remedy. For example, courts have made a declaration of incompatibility where there is a range of possible Convention-compatible interpretations and the choice between them may have policy implications, or where Convention-compatibility may require the creation of positive rights or administrative schemes.⁶⁵

63. Courts also have a discretion as to whether to issue a declaration of incompatibility. There is evidence of courts showing deference to Parliament, failing to issue a declaration of incompatibility when Parliament was already aware of a breach of Convention rights following a decision of the European Court of Human Rights,⁶⁶ or where Parliament was already in the process of debating a particular issue, or where some judges perceived that the issue was more suited for resolution by Parliament as opposed to the courts.⁶⁷

64. We would not recommend changes to sections 3 and 4. The carefully constructed scheme in the HRA serves the dual purpose of enhanced protection of Convention rights while preserving the framework of the UK constitution. The jurisprudence of the courts strongly indicates that parliamentary sovereignty and the separation of powers have been preserved as courts acknowledge their constitutional limits.

65. There are examples where the application of section 3 has changed the wording of legislation. However, we would argue that this does not mean that this Convention-compatible interpretation breaches the will of Parliament. Rather, it reflects the will of Parliament in the

⁶⁵ *Bellinger v Bellinger* [2003] 2 AC 467.

⁶⁶ *R (on the application of Chester) (Appellant) v Secretary of State for Justice (Respondent); McGeoch (AP) (Appellant) v The Lord President of the Council and another (Respondents) (Scotland)* [2013] UKSC 63, [2014] AC 217.

⁶⁷ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

HRA. Nor does it upset the proper constitutional balance between Parliament, Government and Courts. Courts rely on both linguistic and constitutional limits. Courts have exercised the powers given to them by Parliament in the HRA in a manner that is respectful of the relative constitutional roles of Parliament and the courts. Courts are mindful not to make policy choices that are best left to the legislature. This is exemplified not only when courts interpret legislation so as not to undermine fundamental features, or issue declarations of incompatibility to enable Parliament to make policy choices, but also when courts interpret the scope of Convention rights. In particular, courts defer to the choices of democratically elected institutions, giving weight to their assessment of proportionality. They also apply the test of proportionality less stringently when analysing complex social and economic issues, particularly those concerning issues of potential discrimination in welfare rights, further minimising the potential contradiction of the will of Parliament by respecting these controversial policy choices.⁶⁸

66. We are also not persuaded that a modification to section 3 would enhance the role of Parliament in the protection of rights. Parliamentary sovereignty is preserved, and it is still open to Parliament to reverse an interpretation with which it disagreed. In addition, the use of constitutional features by the court when deciding whether to make a declaration of incompatibility have preserved Parliament's role; for example, through enacting The Gender Recognition Act 2004 in response to the *Bellinger v Bellinger* decision and in providing Parliament with the primary role in assessing whether, and if so how, the law should be reformed in relation to assisted dying.⁶⁹

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?

⁶⁸ *R (Tigere) v Secretary of State for Business, Innovation and Skills (Just for Kids Law intervening)* [2015] UKSC 57, [2015] 1 WLR 3820.

⁶⁹ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.

67. We do not recommend amendment/repeal of section 3. However, if that course is taken, we would suggest not applying a change to the interpretation of legislation enacted before the amendment/repeal takes place for several reasons. First, this would cause even greater legal uncertainty and those advising and applying the law in this area are aware of the new interpretations. Second, some individuals will have acted on these interpretations and any retrospective aspect to amendment/repeal must be avoided. Finally, it may be difficult to separate out or determine when an interpretation under section 3 has been indirectly corrected by other legislation.⁷⁰

68. A preferable approach would be to carry out a piecemeal examination leading to a debate as to whether to change the law or retain the Convention-compliant interpretation of the courts. There could be some similarities with the mechanisms addressing retained EU law, but the use of Henry VIII clauses is not recommended.

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?

69. The terms of section 4, as set out in sections 4(2) and 4(4), make the interpretation of legislation an essential preliminary step to making a declaration of incompatibility. Given that the declaration of incompatibility offers no legal remedy, it makes sense to consider the declaration of incompatibility after a court is satisfied that it is not possible to interpret the legislation compatibly with convention rights. It is also illogical for a declaration to be made and the fast-track procedures or legislation to be set in motion, if it was possible to interpret the legislation in a Convention-compliant way.⁷¹

⁷⁰ For example, *Ghaidan v Godin Mendoza* [2004] UKHL 43, [2004] 3 WLR 976 and Marriage (Same Sex Couples) Act 2013.

⁷¹ *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2003] 3 WLR 568, at [15] (Lord Nicholls).

70. In practice, however, considering section 4 as part of the initial process of interpretation would make little difference to the approach of the courts. Courts are already aware of and sensitive to the role of Parliament in assessing their interpretative obligation and the declaration of incompatibility.

71. We would suggest that Parliament could do more to enhance its role in the protection of rights. This could be achieved through pre-legislative scrutiny of legislation protecting rights as well as post-legislative scrutiny of the operation of such legislation. Enhancing the role of the JCHR with more resources would have the benefit of enhancing rights protection and pre-empting any challenge in the courts. The use of primary legislation in response to a declaration of incompatibility is also the preferable approach, especially as the number of declarations is relatively limited.⁷²

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

72. We argue that the current remedies already available are sufficient, and no changes should be made.

73. Section 1(2) HRA provides that certain Articles of the ECHR, set out in Schedule 1 HRA, have effect for the purposes of the HRA “subject to any designated derogation or reservation”. “Designated derogation” means “any derogation by the [UK] from an Article of the Convention, or of any protocol ... which is designated for the purposes of this Act in an order made by the Secretary of State.”⁷³ Section 14(6) HRA provides that “a designation order may be made in anticipation of the making by the [UK] of a proposed derogation.” Assuming that both Houses

⁷² Fewer Declarations of Incompatibility have been issued by the Supreme Court than by the House of Lords. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf

⁷³ Human Rights Act 1998, s 14(1).

have approved the order,⁷⁴ it will cease to have effect at the end of the period of five years from the date it was made (unless withdrawn earlier).⁷⁵

74. Following a valid designated derogation order (DDO), the Convention right which has been derogated from (the derogated right) will not apply in the UK for the duration of the derogation.

This means that during this time:

- the court will be unable to declare⁷⁶ that a provision of primary legislation is incompatible with the derogated right;
- an act by a public authority which is incompatible with the derogated right will not be an unlawful act.⁷⁷

75. Although Article 15 of the Convention is not contained in Schedule 1 HRA, it must be relied on to determine whether a DDO is valid. As Lady Hale stated in *A v Secretary of State (Belmarsh)*, a DDO would not be within the Secretary of State's powers "if it provided for a derogation which was not allowed by the Convention."⁷⁸ In a case brought under section 7 HRA the court would have to turn to section 1 HRA to determine whether a "Convention right" is engaged. Section 1 provides that Convention rights set out in Schedule 1 "have effect for the purposes of this Act subject to any designated derogation".

76. The effect of Convention rights can only be "subject" to a designated derogation if it is valid (lawful). To determine whether the derogation is valid, we must turn to Article 15:

⁷⁴ Human Rights Act 1998, s 16(3).

⁷⁵ Human Rights Act 1998, s 16(1). However, the duration of the DDO may be extended by the Secretary of State for a further five years per s 16(2).

⁷⁶ Human Rights Act 1998, s 4.

⁷⁷ Human Rights Act 1998, s 6.

⁷⁸ *A v Secretary of State* [2004] UKHL 56, [2005] 2 AC 68, [225].

- there must be a “time of war or other public emergency threatening the life of the nation”;⁷⁹
- measures taken pursuant to the derogation must only be “to the extent strictly required by the exigencies of the situation”;
- The proposed measures must not be inconsistent with the state’s other obligations under international law;
- In terms of procedure, a contracting party must keep the Secretary General of the Council of Europe informed of the measures it has taken pursuant to derogation, and the reasons for them.

It is not possible to derogate from articles 2,⁸⁰ 3, 4(1) or 7.

77. To date, the UK has derogated under section 14 HRA once, in respect of Article 5(1).⁸¹ In the DDO, it was stated that a public emergency within the meaning of Article 15(1) existed in the UK, due to the threat of international terrorism. The measures taken to address the public emergency included an extended power to arrest and detain foreign nationals believed to pose a risk to national security and suspected of being international terrorists.⁸² As a result, a number

⁷⁹ This has been the subject of European Court of Human Rights jurisprudence. In *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, the Court held that Article 15(1) requires “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.” In *The Greek Case* (1969) 12 YB 1, the features of a qualifying emergency were said to be that it is actual or imminent, it affects the whole nation, the continuance of the organized life of the community is threatened, and the crisis or danger is exceptional in the sense that normal measures or restrictions which would be permitted by the Convention are plainly inadequate. Examples where such a situation has been found to exist include *Lawless v Ireland (No 3)* (public emergency due to terrorist activities of the IRA), *Ireland v United Kingdom* (1978) 2 EHRR 25 (public emergency due to terrorist activities of the IRA); *Brannigan and McBride v UK* (1993) 17 EHRR 539 (public emergency due to terrorist activities of the IRA), *Aksoy v Turkey* (1996) 23 EHRR 553 (public emergency due to terrorist threat from PKK), *A v United Kingdom* (public emergency due to terrorist threat following 9/11); *Sahin Alpay v Turkey* App no 16538/17 (ECtHR, 20 March 2018) and *Mehmet Hasan Altan v Turkey* App no 13237/17 (ECtHR, 20 March 2018) (public emergency due to attempted military coup).

⁸⁰ Except in respect of deaths resulting from lawful acts of war: article 15(2).

⁸¹ Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644), proposing derogation from Article 5(1) on 11/11/01; Human Rights Act 1998 (Amendment No 2) Order 2001 (SI 2001/4032).

⁸² As contained in the Anti-terrorism, Crime and Security Act 2001.

of individuals were detained pursuant to the Anti-terrorism, Crime and Security Act 2001 (ATCSA).

78. Section 30 of the ATCSA provided that the Special Immigration Appeals Commission (SIAC) was to have exclusive jurisdiction in “derogation matters”. The validity of the DDO was challenged before SIAC, and then considered by the Court of Appeal and the House of Lords.⁸³ The House of Lords agreed that the first limb of Article 15 was satisfied, but the second limb was not. As the measures taken did not rationally address the threat to security, the measures were a disproportionate response, and were not “strictly required by the exigencies of the situation”. Consequently, a majority of the House of Lords made a quashing order in respect of the DDO; a declaration under s 4 HRA that section 23 of the ATCSA was incompatible with Articles 5 and 14 of the Convention; and ordered the Secretary of State to pay the appellants’ costs. The House of Lords’ decision quashing the Derogation Order was handed down on 16 December 2004. The derogation was formally withdrawn in March 2005.⁸⁴

79. A further relevant case is *BP v Surrey County Council*.⁸⁵ There, Mr Justice Hayden purported to derogate from Articles 5 and 8 of the Convention based on the COVID-19 public health crisis. In our view, his Honour was wrong to do so – it is not possible for a court to unilaterally derogate from articles of the Convention through publication of a judgment.⁸⁶

⁸³ *A v Secretary of State for the Home Department* [2002] HRLR 45 (SIAC); *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 35; *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

⁸⁴ The Human Rights Act 1998 (Amendment) Order 2005 (SI 2005/1071).

⁸⁵ *BP v Surrey County Council* [2020] EWCOP 17.

⁸⁶ For a thorough explanation of the issues, see Stevie Martin, ‘A Domestic Court’s Attempt to Derogate from the ECHR on behalf of the United Kingdom: the implications of Covid-19 on judicial decision-making in the United Kingdom’ (*EJIL: Talk!* 9 April 2020) <<https://www.ejiltalk.org/a-domestic-courts-attempt-to-derogate-from-the-echr-on-behalf-of-the-united-kingdom-the-implications-of-covid-19-on-judicial-decision-making-in-the-united-kingdom/>> accessed 18 February 2021.

80. The JCHR has previously suggested that “the precise basis for any challenge in court to the lawfulness of a derogation is ... uncertain under the HRA.”⁸⁷ In the only example we have so far (*Belmarsh*), the ATCSA specifically provided that questions concerning the DDO were to be determined by SIAC (and provided for a closed hearing process). However, in the absence of a similar provision when considering a hypothetical future derogation, the validity of a DDO could nonetheless be considered by the courts (applying Article 15).

81. To provide a hypothetical example, if the UK were to derogate from Article 5 again, and detained people as a result, they would be able to challenge their detention using the current HRA framework, regardless of derogation. The hypothetical claimants could:

- (a) seek to rely on their Article 5 rights in seeking to judicially review the decision to make the DDO;
- (b) assert that any legislation permitting their detention was incompatible with a Convention right; and
- (c) assert that their detention was an unlawful act for the purposes of section 6 HRA, due to incompatibility with a Convention right.

82. In determining whether a Convention right is engaged for each of these purposes, the court would turn to section 1, providing that Convention rights “have effect for the purposes of this Act subject to any designated derogation”. There is no need for a provision like that contained in section 30 ATCSA – the issue of the DDO’s validity would be squarely before the court. Although specific provision for the courts to review the validity of a DDO could be included in section 14 HRA, we do not consider this is necessary. It would only be if there was some need for a closed hearing procedure to review the validity of the derogation that some control over

⁸⁷ Joint Committee on Human Rights ‘Thirteenth Report’ (*UK Parliament Publications & Records*, 8 October 2008) <<https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/172/17202.htm>> at [97]-[98], accessed 11 February 2021.

and above the normal court process might be needed, given that closed material proceedings are incompatible with the common law and can only be established by legislation.⁸⁸

83. Following on from the hypothetical example above, if the DDO was found to be in accordance with Article 15, the claim would fail.

84. Before turning to what would happen if the DDO was found to be invalid, it is important to emphasise that by this time, the DDO will have been approved by both Houses of Parliament,⁸⁹ so will have been subjected to some scrutiny. As shown by *Belmarsh*, the courts are deferential to the views of the Executive and Parliament regarding the existence of a public emergency,⁹⁰ so it would only be if there genuinely were no reasonable grounds for believing that such a situation existed that a DDO would be found to be invalid under the first limb of Article 15.

85. If the DDO was found to be invalid, the current position is that:

(a) the court could quash the DDO (as in *Belmarsh*);

⁸⁸ *Al-Rawi v The Security Service* [2011] UKSC 34, [2012] 1 AC 531 but see *R (on the application of Haralambous) v Crown Court of St Albans* [2018] UKSC 1, [2018] AC 236 in the context of judicial review.

⁸⁹ Section 16(3) HRA provides that the DDO will cease to have effect 40 days from the date the order was made, unless a resolution has been passed by each House approving the order.

⁹⁰ See for example the comments in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 from Lord Bingham at [29]: “great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment”; Lord Hope at [116]: “I am content ... to accept that the questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament”; Lord Rodger at [166]: “When examining the Government’s overall assessment of the situation, the courts must bear in mind that they do not have [the expertise of advisers to the government in respect of national security]”; Lord Walker at [196]: “The court should show a high degree of respect for the Secretary of State’s appreciation, based on secret intelligence sources, of the security risks...” and [208]: “Given the requirement (under article 15) for a strictly proportionate response to the emergency, there is no reason to set the threshold very high...”; Baroness Hale at [226]: “Assessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the Government and its advisers ... it would be very surprising if the courts were better able to make that sort of judgment than the Government.” Only Lord Hoffmann considered that a public emergency threatening the life of the nation was not present, and his Lordship’s approach was rejected by the Grand Chamber of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 625.

- (b) proceed to determine if legislation enacted pursuant to derogation could be interpreted consistently with the Convention,⁹¹ and consider issuing a declaration of incompatibility if not;⁹² and
- (c) consider whether the claimant was a victim of an unlawful act.⁹³

86. If the court did make an order quashing the DDO, this would take effect on the day the order was made, unless a later date was specified.⁹⁴ There is therefore a possibility that a public authority may have taken acts on the basis of a derogation which it thought were lawful at the time, which become unlawful as a result of the DDO being quashed. However, if those acts were taken in accordance with provisions of primary legislation, they would not be unlawful.⁹⁵

87. If the court's decision is appealed, the fact of an appeal will not stay the order quashing the DDO (unless a court orders otherwise).⁹⁶ In such a case, the appealing party would have to apply for a stay of the judgment/order.

88. One change which the Review might contemplate is the introduction of a bar on a court quashing a DDO, after determining that the DDO is invalid. In *Belmarsh*, Lord Scott expressed doubts about whether non-compliance with Article 15 *required* a DDO to be quashed.⁹⁷ In our view, quashing a DDO (which is not primary legislation) would be an appropriate step for courts to take at this point. If it were felt that a different balance should be struck based on the applicable public emergency and exigencies of the situation, the derogation could be included in primary legislation, with the subsequent greater political scrutiny by Parliament, which the courts would be unable to quash. In such circumstances, courts would only be able to declare the legislation incompatible with Convention rights, without affecting the validity of the legislation. The

⁹¹ Human Rights Act 1998, s 3.

⁹² Human Rights Act 1998, s 4.

⁹³ Human Rights Act 1998, ss 6 and 7.

⁹⁴ Civil Procedure Rules, r 40.7.

⁹⁵ Human Rights Act 1998, s 6(2).

⁹⁶ Civil Procedure Rules, r 52.16.

⁹⁷ *A v Secretary of State* [2004] UKHL 46, at [160].

claimant/s would then take their case to the ECtHR, which would be likely to find that the derogation was invalid due to inconsistency with Article 15 (particularly as the domestic courts will have already found this to be the case).

89. A further change which might be contemplated is the introduction of a requirement for a court to consider suspending or staying the operation of any order quashing a DDO. This might be thought necessary in circumstances of a genuine emergency threatening the life of the nation, but where measures have been taken which are more than strictly required, making the derogation invalid. If the DDO was quashed, the emergency would obviously still exist, but without any measures being available to address that emergency (unless contained in primary legislation). In our view, suspension/stay would be resisted by the courts,⁹⁸ and would be inappropriate in the circumstances of a finding that there either was not a public emergency threatening the life of the nation justifying the curtailing of Convention rights, or that the measures taken were more than strictly required by the exigencies of the situation. Again, it should be emphasised that courts are deferential in these matters. A judgment which is adverse to the government is likely to be rare, but if one was reached, it would be because fundamental rights have been or may be breached in circumstances which are not justified. This being so, the scrutiny of the courts at this stage is an important protection for rights. The better way for the government to deal with the ongoing emergency would be to quickly legislate to retrospectively fill the “gap” in protection left by the quashing of the DDO. In doing so, the government will benefit from the identification by the courts as to what measures went too far and why, as well as the added political scrutiny from Parliament.

⁹⁸ See *Her Majesty's Treasury v Ahmed (No 2)* [2010] UKSC 5, [2010] 2 AC 534.

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?

90. It is beyond the competence of all Ministers to exercise their powers in a manner which breaches Convention rights. However, this does not apply if a Westminster or Welsh Minister is required to act in a manner incompatible with Convention rights due to primary legislation.⁹⁹ This is not the case in Scotland and Northern Ireland.¹⁰⁰ Further limits are placed on the ability to enact subordinate legislation in Northern Ireland which discriminates against, or incites or aids discrimination, in terms of religious belief or political opinion.¹⁰¹

91. Under the current framework, subordinate legislation, which is incompatible with Convention rights must, so far as it is possible to do so, be read in a manner compatible with Convention rights.¹⁰² The Supreme Court recently confirmed that “where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded.”¹⁰³

92. **We argue that no change is required to the current framework, as this reflects the constitutional status of subordinate as opposed to primary legislation.** Courts can strike down subordinate legislation which is beyond the scope of the parent primary legislation. It would also upset the current devolution settlement if subordinate legislation which contravened Convention rights could not be quashed when primary legislation of the devolved legislatures which contravenes Convention rights can be quashed as beyond the scope of power of the devolved legislatures.¹⁰⁴

⁹⁹ Human Rights Act 1998, section 6(2) and Government of Wales Act 2006, section 81(2).

¹⁰⁰ Scotland Act 1998, section 57(2) and Northern Ireland Act 1998, section 24(1)(a).

¹⁰¹ Northern Ireland Act 1998, section 24(1)(c) and (d).

¹⁰² Human Rights Act 1998, section 3(1).

¹⁰³ *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430, at [30].

¹⁰⁴ Scotland Act 1998, section 29(2)(d); Government of Wales Act 2006, section 108A(2)(e) and Northern Ireland Act 1998, section 6(2)(c).

93. Courts read legislation empowering the enactment of subordinate legislation in line with fundamental common law rights and principles.¹⁰⁵ It would be a constitutional anomaly if courts were able to strike down subordinate legislation which contravened fundamental common law rights, but not that which contravened Convention rights, especially given Parliament's approval of Convention rights in the HRA. This is exacerbated by the relative lack of parliamentary scrutiny over subordinate legislation.

94. Second, no change is required as there are very few examples of courts striking down subordinate legislation which contravenes Convention rights.¹⁰⁶

95. Third, in situations in which subordinate legislation has been found to contravene Convention rights, courts have been sensitive to the potential consequences of a quashing order. In *Tigere*, for example, the Supreme Court preferred to grant a declaratory order, recognising that, whilst the subordinate legislation may contravene Convention rights when applied to the individual applicant, it may not do so in all situations.¹⁰⁷ In addition, when disapplying provisions of subordinate legislation that would contravene Convention rights, courts are sensitive to those situations in which disapplication would entail making a policy choice or would upset the legislative scheme.¹⁰⁸

96. Fourth, as is illustrated in cases where subordinate legislation is struck down, courts have taken measures to minimise the impact of these quashing orders on other decisions. In *TN (Vietnam)*, for example, following the quashing of the Tribunal Procedure (First-tier Tribunal) (Immigration

¹⁰⁵ *Her Majesty's Treasury v Ahmed (No 2)* [2010] UKSC 5, [2010] 2 AC 534.

¹⁰⁶ J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', U.K. Const. L. Blog (22nd Feb. 2021) (available at <https://ukconstitutionallaw.org/>)

¹⁰⁷ *R (Tigere) v Secretary of State for Business, Skills and Innovation* [2015] UKSC 57, [2015] 1 WLR 3820.

¹⁰⁸ *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430, *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250, *Burnip v Birmingham City Council* [2012] EWCA Civ 629 and *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303, [2006] 1 WLR 3202.

and Asylum Chamber) Rules 2014, which provided for a fast-track procedure, the question arose as to whether all decisions of the Tribunal which had been taken under this procedure should also be automatically quashed. The Court of Appeal concluded that, rather than all decisions being quashed, each individual whose status had been determined under the fast-track procedure, had the right to have their decision quashed if they could demonstrate that the fast-track procedure had given rise to procedural unfairness on the facts of their specific case.¹⁰⁹

97. To change the position could upset the current constitutional balance in the UK. Moreover, such a change is unnecessary given that, although a quashing order may be used, courts have discretion over when to quash or modify subordinate legislation, or when to use another more appropriate remedy. In addition, courts have been sensitive to the consequences of quashing orders on further decisions.

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?

98. The structure of the HRA combined with judicial application means that the HRA clearly has extraterritorial implications. In this respect section 6 HRA does not exclude the armed forces nor 'the Crown' more generally.¹¹⁰

99. The circumstances in which acts of public authorities taking place outside of the territory of the UK fall under the provisions of the HRA stem from the Grand Chamber Decision in *Al-Skeini v The United Kingdom* in which it was determined that Article 1 will apply where "the state through its agents exercises control and authority over an individual".¹¹¹ Thus, if the UK through its armed

¹⁰⁹ *R (TN (Vietnam)) v Secretary of State for the Home Department* [2018] EWCA Civ 2838, [2019] 1 WLR 2647 (currently on appeal to the Supreme Court).

¹¹⁰ In addition, whilst it is true to say s 22 HRA explicitly extends its remit to Northern Ireland and is silent on elsewhere, s 22(5) explicitly states that the Act 'binds the Crown' and does not appear to provide territorial and/or jurisdictional limitation.

¹¹¹ Application No.55721/07 (2011) 53 EHRR 18, [137].

forces as its agents or, indeed, any other agent of the Crown, exercises the effective control of an area outside of its ordinary national territory, Article 1 of the ECHR and thus the HRA applies.

100. The case law subsequent to *Al-Skeini* appears to retain *Al-Skeini* as a template. *Hassan v United Kingdom* established that the UK cannot simply claim that they are engaged in “active hostilities” in the context of “armed conflict” to prevent the application of the ECHR to the arrest and detention of civilians by UK troops.¹¹²

101. The implications of the current position are significant. In a sense, *Al-Skeini* and all the other ECtHR cases on Article 1 ECHR are not referring to the territory of the UK in a *de jure* sense. However, it is not as simple as suggesting that the ECHR position suggests that the HRA applies outside of the territory of the UK. In effect what *Al-Skeini* suggests is that the UK’s obligations under the ECHR arise when the UK has *de facto* control in the territory of another state.

102. Therefore, the UK government must carefully consider its behaviour and the behaviour of its troops or other personnel as its agents in any current or future interventions on the soil of another state over which it exercises effective control, which in turn gives rise to positive obligations under the ECHR to prevent rights abuses as well as negative duties not to harm Convention rights.¹¹³

103. The UK government’s perspective has consistently been to suggest that the behaviour of UK’s armed forces should be governed not by an extended understanding of territoriality understood in a *de facto* sense but by international humanitarian law.¹¹⁴ In this context the ‘case for change’ has already been made by the UK government in terms of the proposed Overseas

¹¹² Application No. 29750/09 [2014] 9 WLUK 388, [76] – [80].

Indeed, it is noticeable, in *Jaloud v Netherlands* that the Netherlands Royal Army maintained effective control over its own troops (and hence the treatment of others) notwithstanding the fact that ultimate territorial control was arguably vested in the UK by virtue of the ultimate commanding officer of a multinational force being British. Application No. 47708/08), [2014] 11 WLUK 610.

¹¹³ Application No. 16064/90 *Varnava v Turkey* 1 WLUK 65, [128] – [130].

¹¹⁴ See: <https://publications.parliament.uk/pa/bills/lbill/58-01/147/5801147en.pdf>

Operations Bill ('OOB') which, if it became law, would have a direct impact on the HRA itself. The UK Government's justification for the OOB is outlined in the explanatory notes; namely providing security and certainty for military personal for preventing the proliferation of what it terms "lawfare".¹¹⁵

104. The Bill purports to restrict the application of the HRA where the "alleged conduct...took place...outside the British Islands" and includes "overseas operations" which can include "peacekeeping operations" and operations "in the course of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance".¹¹⁶

105. This already appears to contradict the Grand Chamber ruling in *Hassan v United Kingdom* where the ECtHR determined that Article 1 ECHR should apply even in circumstances where the UK is engaged in "active hostilities".¹¹⁷

106. Part 2 of the OOB explicitly amends the HRA (in clauses 11-12). Clause 11 OOB purports to amend section 7(5)(b) HRA (by inserting a proposed new section 7A) by limiting the discretion of a Court to extend the ordinary one-year limitation on HRA claims brought against a public authority under s. 6 HRA. In relation to the armed forces a court or tribunal "must have particular regard" to, inter alia, the "cogency of evidence adduced" and the "likely impact on the proceedings on the mental health of any witness or potential witness" who is or was a member of the armed forces.

107. The ordinary discretion to extend the one-year limitation period under the HRA is subject to a new rule (s. 7A (4)) in which proceedings must either be brought within 6 years of the date on which the "act complained of took place" or within 12 months if a potential litigant "knew, or first ought to have known" of the act and that it was "committed by the Ministry of Defence or

¹¹⁵ Ibid.

¹¹⁶ Clause 1 (3) and (6).

¹¹⁷ Application No. 29750/09 [2014] 9 WLUK 388, [76] – [80].

Secretary of State for Defence”. The net effect of this would be to restrict considerably the ability for potential victims to bring a claim against the UK Government.

108. Clause 12 OOB proposes amending section 14 HRA imposing an obligation on the Secretary of State to consider a derogation under Article 15(1) ECHR “in relation to an overseas operation” that could be classified as “significant”. This appears to reverse the way in which Article 15 is meant to operate. Article 15 states that Contracting Parties “may” derogate and section 14 of the HRA as it is currently worded does not appear to change such a discretionary power. By contrast, the proposed section 14A would place the Secretary of State under a “duty to consider” (i.e., *must*) derogating from the ECHR and, by contrast with all our HRA claims, only in relation to claims in relation to “overseas operations”.

109. The criticisms of the OOB (in its attempt to restrict the application of the ECHR/HRA overseas) are numerous.¹¹⁸ Three major disadvantages will be outlined.

110. First, clause 12 OOB further divides the practical implications of non-derogable and derogable rights under the ECHR. With the latter, the UK government is now under an obligation to derogate from ECHR rights. This then creates disparities in the application of Article 1 ECHR. For instance, if UK troops subjected an individual to inhuman or degrading treatment, clause 12 would not apply. However, if the same individual were to be arbitrarily detained or separated from family members, the HRA could potentially not apply.

111. Second, even in relation to seemingly non-derogable rights, their application has arguably been significantly watered down. Allegations of widespread abuse (including torture) by UK

¹¹⁸ See for instance criticism by Amnesty International (<https://www.amnesty.org.uk/blogs/campaigns-blog/5-things-you-need-know-about-overseas-operations-bill>), Harriet Harman MP in Prospect Magazine (<https://www.prospectmagazine.co.uk/world/harriet-harman-overseas-operations-bill>) and Miranda Zeffman at the Oxford Human Rights Hub (<https://ohrh.law.ox.ac.uk/the-uks-overseas-operations-bill-licence-to-kill/>).

military personnel in overseas operations can often take many years to come to light.¹¹⁹ Individuals affected might not be aware of the ECHR/HRA, or be unable to communicate in English, or have any knowledge of the UK's legal and judicial system.

112. Imposing a six-year limitation at the expense of a court determining a limitation that would be "equitable having regard to all the circumstances" under section 7(5)(b) HRA is a significant legal change. In addition, an individual could be tortured, for instance, by a member of the armed forces and be time-barred beyond 12 months if she or he could be construed as knowing that the act was potentially a violation of the ECHR and committed by the MOD. In this respect, the phrasing "ought to have known" is particularly problematic.

113. Third, a moral point needs to be made in terms of the perception of the UK globally should such a *de facto* change to the territorial application of the HRA become law. Should the OOB become law and a significant set of allegations of further abuse from Iraq or Afghanistan emerge would the UK Government seek to rely on the proposed section 7A(4)(a) and dismiss the allegation entirely?

114. Alternatively, the UK Government could find itself facing a series of conflicts with the judiciary not only in terms of the interpretation of the legislative proposals themselves but also via judicial review. The proposed amendments under clause 11 only apply to HRA claims directly under section 7(1)(a). It does not prevent the judiciary potentially circumventing such limitations by virtue of applying ECHR in 'any legal proceedings' under section 7(1)(b).

115. Thus, the case for changing the circumstances in which HRA apply to acts of public authorities taking place outside the territory of the UK is, on balance, weak.

¹¹⁹ By way of illustration, in *Hassan v United Kingdom*, the Applicant was allegedly detained by British troops in April 2003 but yet the application to the ECtHR was made in June 2009 (i.e., over six years after the initial detention). Application No. 29750/09 [2014] 9 WLUK 388.

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?

116. Remedial Orders are currently used less frequently than primary legislation in response either to Declarations of Incompatibility under section 4, or adverse decisions of the ECtHR.¹²⁰ We agree that primary legislation should be the main means through which breaches of Convention rights are remedied as this provides for greater parliamentary scrutiny.

117. If a Minister believes there are “compelling reasons” to use a remedial order, the Minister lays a draft order before Parliament for 60 sitting days. Draft orders are accompanied by an explanatory note, setting out the justification for using a remedial order and explaining the content of the order. Both Houses may scrutinise the order and make representations and the JCHR may consider the order. At the end of this period, the Minister lays the draft order before Parliament. The Minister is required to report details of representations made and any changes made to the original draft order. There then follows a period of 60 days for further scrutiny. The JCHR also issues a report as to whether the draft order should be approved. Both Houses must agree to the Remedial Order. If there is no agreement within 120 days of the laying of the order, the order lapses. The urgent remedial process permits a Minister to make an order before laying it before Parliament. There are then 60 days in which representations may be made and, if the order is not approved after 120 days, it ceases to have effect.

118. The process could be improved further in the following ways. First, in a manner similar to the role of the sifting committees, the JCHR could, in the first 60-day period, make a recommendation as to whether the Convention breach in question is suited to resolution by a Remedial Order or is better suited to primary legislation.

¹²⁰ Ministry of Justice, “Responding to Human Rights Decisions: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2019–2020” CP 347, December 2020.

119. Second, remedial orders could require a stronger affirmative resolution procedure than that currently found in Schedule 2 of the HRA, empowering both Houses to suggest and debate amendments, as opposed to merely making representations to the Minister.
120. Third, in a manner similar to the powers of European Scrutiny Select Committee in the House of Commons under section 13A of the European Union (Withdrawal) Act 2018, it could be possible to empower the JCHR to raise an issue before the House if a Remedial Order has sufficient important constitutional consequences. It could also be possible for the JCHR to ask for the Remedial Order to be debated on the floor of the House, with a consequent duty on a Minister of the Crown to ensure that such a debate takes place within a reasonable period. This would ensure that there was time for debate in the House.
121. Finally, we would recommend that limits be placed on the scope of remedial orders, similar to other Henry VIII clauses. Remedial orders should not be able to modify the Human Rights Act 2018, the Equality Act 2010 or the legislation establishing devolution.