Evidence to the Independent Human Rights Act Review
Human Rights Centre, Durham Law School
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Introduction

1. This response to the Call for Evidence for the Independent Human Rights Act Review ('IHRAR') has been prepared by the following members of the Human Rights Centre at Durham Law School, University of Durham: Dr Benedict Douglas; Professor Helen Fenwick; Dr Eleni Frantziou; Dr Dimitrios Kagiaros; Dr Elizabeth O'Loughlin; Professor Roger Masterman; Dr Anashri Pillay.

2. The authors are experts in various fields of public law and human rights. They have put together the response based on their independent academic views and have no conflicts of interest in respect of the outcome of the Review. The response has been developed through original data collected following the issuance of this Call for Evidence, as well as by drawing upon the authors' unpublished and previously published research, and particularly: H. Fenwick and R. Masterman, 'The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality?' (2017) 80 *Modern Law Review* 1111; R. Masterman, *Supreme, Submissive or Symbiotic? United Kingdom Courts and the European Court of Human Rights* (London: Constitution Unit, 2015).

3. The response addresses both of the overarching themes of the Review as listed in the Call for Evidence (Theme I: The relationship between domestic courts and the European Court of Human Rights; Theme II: The impact of the HRA on the relationship between the judiciary, the executive and the legislature). Each theme is addressed by first providing an analysis of the overarching questions that it raises and then by addressing some of the more specific sub-questions indicated in the Call. For ease of reference, paragraph numbering and cross-references are internal to each Theme, unless otherwise mentioned.

4. In respect of Theme I, all of the sub-questions are addressed. In respect of Theme II, the response does not address sub-questions (b) and (d), which concern designated derogation orders and the extraterritorial application of human rights, respectively, as the complex character of these topics means that they cannot be meaningfully addressed within the word limit of the Call (12,500 words).

5. In summary, we respond to the two themes of the Call as follows:
    - Theme I: No change is required to s.2 HRA because
        - the increasing erosion of the 'mirror principle' has meant that domestic courts are able to develop an autonomous human rights jurisprudence, thus contributing to effective dialogue between the UK and Strasbourg courts.
    - Theme II: No change is required to the relationship between s.3 and s.4 HRA because
        - the courts' case law has given effect to parliamentary intention and has resulted in a thoughtful balance between the duties of public authorities to observe human rights, the interpretation of legislation consistently with human rights, and the declaration of incompatibility mechanism;
        - any reversal or major change to this structure could expose the UK to increased litigation before the Strasbourg court, which the HRA has been successful in minimising.
        - However, we would welcome minor updates to the Act, e.g., to ensure interim remedies where a s.4 declaration is made and to address delays in responding to s.4 declarations of incompatibility.

Theme I: The relationship between domestic courts and the European Court of Human Rights

Overarching questions

Under the HRA, domestic courts and tribunals are not bound by the case law of the ECtHR, but are required by section 2 HRA to "take into account" that case law (in so far as it is relevant) when determining a question that has arisen in connection with Convention right. How is the relationship between domestic courts and the ECtHR working? What are the strengths and weaknesses of the current approach and what recommendations for change would you make, if any?

1. The governing provision of the Human Rights Act 1998 – s.2(1) – provides:

> A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

2. The wording of s.2(1) appears to impose only a weak obligation on domestic courts determining issues relating to the Convention rights; as Lord Irvine of Lairg QC has observed, the statutory wording 'take into account' suggests that a court should '"have regard to", "consider", "treat as relevant" or "bear in mind"' the Convention case law.[1]

3. There is evidence in the parliamentary debates on the Human Rights Bill that imposing a stronger obligation on domestic courts was not intended. In the face of Conservative calls to replace the words 'take into account' in clause 2 of the Bill with the words 'shall be bound by',[2] the then Lord Chancellor responded by suggesting that use of the word 'binding' would impose precedential obligations which would go 'further … than the Convention itself requires.'[3]

4. In practice however, domestic courts initially accorded s.2(1) a rather more specific meaning than the language of the provision might naturally suggest. Rather than using the Strasbourg jurisprudence to inform the development of the law under the HRA, the approach of the courts tended towards treating the Convention case law as the law to be applied in the application of the Act. As such, the argument has been made that – contrary to the apparent wording of the Act and of governmental intent[4] – the Convention jurisprudence was taken as being tantamount to binding on domestic courts.[5]

5. As Lord Slynn outlined in *Alconbury*:

> Although the Human Rights Act 1998 does not provide that a national court is bound by … decisions [of the Strasbourg organs] it is obliged to take account of them so far as they are relevant. In the absence of special circumstances it seems to me that the

[1] Lord Irvine of Lairg QC, 'A British Interpretation of Convention Rights' [2012] PL 237, 238.
[2] See HL Debs, Vol.583, Col.514, 18 November 1997 (Lord Kingsland); HC Debs, Vol.313, Cols.397-398, 3 June 1998 (Edward Leigh MP).
[3] HL Debs, Vol.583, Col.514, 18 November 1997.
[4] The White Paper stated that, 'our courts will be required to take account of relevant decisions of the European Commission and Court of Human Rights (although these will not be binding)' – *Rights Brought Home: The Human Rights Bill*, Cm.3782 (October 1997), paragraph 2.4.
[5] R. Masterman, 'Section 2(1) of the Human Rights Act: Binding Domestic Courts to Strasbourg?' [2004] PL 725.

> court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.[6]

6. The initially prevailing approach to the interpretation of s.2(1) demonstrated a strong collective presumption on the part of the judiciary that relevant Strasbourg authority should be applied. The development and application of this so-called 'mirror principle'[7] gave life to the suggestion that the Strasbourg authority 'creat[ed] legal precedent for the UK (sic)'[8] and is best illustrated in the House of Lords decision in the deportation case of *Ullah*. In that case, Lord Bingham, then Senior Law Lord, said the following:

> … a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention Right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.[9]

7. This hugely influential passage not only conditioned the courts' approach to the specific construction and application of s.2(1) of the HRA, but came to be seen as a rather more pervasive indicator of the purpose and function of the Act as a whole.[10]

8. As the domestic courts gradually reconciled themselves to their obligations under the HRA it is perhaps understandable that a presumption in favour of the application of relevant Strasbourg case law emerged. The HRA was, after all, designed to provide litigants with remedies from the domestic courts which – in its absence – could only have been secured following a hearing at the European Court of Human Rights.[11] This reflects the development of a special relationship between regional human rights courts and national courts - a feature of both the European and Inter-American human rights systems.[12] Judgments of these courts are accorded a special status, above the norms that emanate from UN international human rights bodies like the Human Rights Council or the human rights treaty committees.

9. However, the precedential approach initially taken under s.2 also conveyed a sense that the judiciary viewed the Strasbourg jurisprudence as a 'straitjacket from which there is no escape.'[13] In turn, this judicial attitude fed popular and political perceptions that the European

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[6] *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [26].

[7] The phrase 'mirror principle' is Jonathan Lewis': J. Lewis, 'The European Ceiling on Rights' [2007] PL 720. See also: R. Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Domestic Law' in H. Fenwick, G. Phillipson and R. Masterman, eds., *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007).

[8] The Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), p.5.

[9] *R (on the application of Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 AC 323, [20] (Lord Bingham).

[10] T. Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010), pp.3-40.

[11] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing* [2005] UKHL 57, [34].

[12] European Commission for Democracy Through Law (Venice Commission) Report on the Implementation of Human Rights Treaties in Domestic Legislation in Domestic Law and the Role of Courts', 8 December 2014, paragraph 99.

[13] *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173, [50]. *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 AC 269, [98].

Convention jurisprudence was enjoying a disproportionate influence over domestic law by virtue of the HRA.[14] A further problem associated with this somewhat slavish (if resented) approach to the Strasbourg jurisprudence was that the courts at times applied jurisprudence that had been influenced by the margin of appreciation doctrine, without recognising that that was the case;[15] although they also recognised a 'discretionary area of judgment' as a domestic doctrine, it appeared to have its roots in the margin of appreciation doctrine.[16]

10. Lord Kerr was among the first of the senior judiciary to lament the inhibiting effects of the presumption that domestic human rights law should simply track and mimic its Strasbourg counterpart. In *Ambrose v Harris*, Lord Kerr observed that:

> … some judges in this country have evinced what might be described as an *Ullah*-type reticence. On the basis of this, it is not only considered wrong to attempt to anticipate developments at the supra national level of the Strasbourg court, but there is also the view that we should not go where Strasbourg has not yet gone.[17]

11. In the light of the fact that, under the Convention system, not all questions relating to the Convention rights could – as a matter of 'practical reality' – possibly be addressed in the Strasbourg jurisprudence, Lord Kerr recognised that 'many claims to Convention rights will have to be determined by courts at every level in the UK without the benefit of unequivocal jurisprudence from the European court.' Although the 'no less, no more' encapsulation of the courts' role suggested a deferential approach to the Strasbourg jurisprudence, Lord Kerr argued in favour of a more positive duty to:

> … ascertain 'where the jurisprudence of the Strasbourg court clearly shows that it currently stands' but [also] to resolve the question of whether a claim to a Convention right is viable or not, even where the jurisprudence of the Strasbourg court does not disclose a clear current view.[18]

12. In the absence of a rather more critical stance towards the Strasbourg case law, the 'much vaunted' dialogue between national courts and the European Court of Human Rights would – Lord Kerr argued – amount to naught.[19]

13. In parallel with the judicial development of an interpretation of the requirements of s.2(1) which admits of greater flexibility in the translation of Strasbourg jurisprudence into domestic law, the UK Supreme Court has also pointed towards the further development of the common law as a distinctly national source of rights protection, reiterating – in a series of recent decisions – the potential utility of the common law as a tool of rights protection.[20] Appealing to the doctrine

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[14] R. Masterman, 'A Tale of Competing Supremacies' UK Const L. Blog, 30th September 2013.
[15] Thus, *R v Perrin* [2002] EWCA Crim 747 applied *Handyside v UK* (1976) 1 EHRR 737, a decision heavily influenced by the margin conceded to the UK.
[16] In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, [381B], Lord Hope said: '... difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.' See also *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, [153].
[17] *Ambrose v Harris* [2011] UKSC 3; [2011] 1 WLR 2435, at [126]. See also: Lord Kerr, 'The UK Supreme Court – The Modest Underworker of Strasbourg?', Clifford Chance Lecture, 25 January 2012; *R (on the application of Children's Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34, at [62]-[64] (Laws LJ).
[18] *Ambrose v Harris*, ibid, [129]. Cf. [18]-[20] (Lord Hope).
[19] ibid, [130].
[20] For discussion see: R. Masterman and S. Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] EHRLR 57.

of subsidiarity, the Supreme Court has argued that the HRA did not necessarily 'supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon judgments of the European court.'[21]

14. The steady dilution of the 'mirror principle' which the above developments have precipitated has seen the grounds on which domestic courts might depart from the Strasbourg line articulated with greater confidence and clarity, for instance, where:

    - It is 'reasonably foreseeable' that the European Court of Human Rights would now come to a different conclusion than in the available authorities;[22]

    - a margin of appreciation would be likely to be afforded, or has already clearly been accorded, rendering the question to be resolved one for domestic authorities to 'decide for themselves';[23]

    - the area is governed by common law and the court is minded to exercise its discretion to depart from the Strasbourg line;[24]

    - the court attaches 'great weight' to a parliamentary (legislative) decision which determines the balance to be struck between rights and interests in a way which might be interpreted as being inconsistent with Strasbourg authority;[25]

    - the Strasbourg case-law has been overtaken by events or otherwise rendered out of date;[26]

    - the Strasbourg authorities do not disclose a clear and coherent approach capable of offering guidance to the domestic court,[27] or relevant authorities are only partially analogous to the instant dispute, which relates to very specific domestic circumstances, and therefore the court must, to an extent, decide on the application of the relevant rights for itself.[28]

15. The Supreme Court decision in *Pinnock* provides, in summary, clear evidence of a more nuanced approach. In that decision, Lord Neuberger, with whom the eight other Supreme Court Justices agreed, said:

> This court is not bound to follow every decision of the European Court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the

[21] *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115, [57].
[22] *R (on the application of Gentle) v Prime Minister* [2008] UKHL 20; [2008] 1 AC 1356, [53].
[23] *In Re G* (n 13), [31]. In *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38 it was found: 'In a case such as this [where the Court had already found that the matter was within the member states' margin of appreciation] the national courts therefore must decide the issue for themselves, with relatively unconstraining guidance from the Strasbourg court…', [70]. Also, on a linked issue, the approach of the Strasbourg Court to the margin of appreciation need not be followed domestically. In *Steinfeld and Keidan v Secretary of State for International Development* [2018] UKSC 32 it was found, '…the approach of the ECtHR to the question of what margin of appreciation member states should be accorded is *not mirrored* by the exercise which a national court is required to carry out in deciding whether an interference with a Convention right is justified' ([28], emphasis added).
[24] *Rabone v Pennine Care Foundation NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, [113].
[25] *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, [33].
[26] *R (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 48; [2012] 1 AC 621, [43].
[27] *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [90].
[28] *Steinfeld and Keidan v Secretary of State for International Development* [2018] UKSC 32, [40].

> ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law… Of course, we should usually follow a clear and constant line of decisions by the European court … but we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber … section 2 of the HRA requires our courts to 'take into account' European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.[29]

16. Lest it should be thought that the *Pinnock* approach is little more than a modest refinement of the mirror principle, the Supreme Court decision in *Horncastle* confirms that Strasbourg authorities – even when taken by the Grand Chamber of the European Court and amounting to 'a clear statement of principle … in respect of the precise issue' before the domestic court – will *not* be regarded as being binding in domestic proceedings.[30]

17. The growing evidence of 'exceptions' to the mirror principle reflects the pragmatic acceptance that the Strasbourg jurisprudence does not provide determinative authority for every arising human rights dispute,[31] and that an uncritical stance towards the European Court's case-law effectively inhibits dialogue initiated by national courts.[32] This acceptance appears to be symptomatic of a judicial response to the political disquiet surrounding the disempowerment of national institutions supposedly prompted by the enactment of the HRA. In embracing an approach to the application of Strasbourg jurisprudence which is contextual, occasionally critical and eschews the precedential approach which characterised the early years of the HRA's application, the domestic judiciary is moving towards a position in which the main objections to the impact of s.2 are being neutered.

18. The current UK judicial practice in respect of s.2 accords with a broader tendency of national courts to see their role as more active in considering what the protection of human rights norms requires. It is reminiscent of the counter-limits on the Strasbourg Court's interpretations of the Convention developed elsewhere in Europe, such as in Austria,[33] Germany,[34] and Italy.[35] In each of these states, courts have emphasised the primacy of the national constitution and the national constitutional courts' duty to assess the parameters of the *application* of Strasbourg case law within the domestic legal system, especially where the Strasbourg jurisprudence is not settled.

19. This move towards a more dialogic approach can also be observed in other regional contexts, and especially in the Inter-American human rights system,[36] but it is important to note that the position under the ECHR remains more deferential and less hierarchical by comparison. For example, in keeping with the 'often extremely open and human rights-friendly' constitutions in that region, a number of states had already conferred constitutional status on the American Convention on Human Rights (ACHR) when the Inter-American Court's jurisprudence interpreting the Convention started to emerge.[37] Courts within the system have tended to follow

[29] *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, [48].
[30] *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373, [11] (Lord Phillips).
[31] *Ambrose v Harris* (n 17), [129].
[32] *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, [48].
[33] Constitutional Court of Austria, B 267/86, 14 October 1987, VfSlg 11.500/1987=EuGRZ 1988, 166.
[34] Federal Constitutional Court of Germany, *Görgülü*, BVerfGE 14 October 2004, 2 BvR 1481/04.
[35] Constitutional Court of Italy, Judgment no. 49/2015 of 26 March 2015, ECLI:IT:COST:2015:49.
[36] *Almonacid Arellano v Chile*, IACHR Series C No 154, judgement of 26 September 2006.
[37] R. Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts' (2019) 30 EJIL 1129, p.1141.

the IACtHR's interpretation of the treaty. However, a more dialogical relationship is evident in recent years. The Inter-American Court of Human Rights has now emphasised: a) that the commitment to regional human rights should not result in more limited human rights protection than the national constitution provides; and b) that regional control over national courts will remain 'obviously within the framework of their respective competences and the corresponding procedural regulations'.[38] Nevertheless, unlike the ECtHR, the IACtHR 'obliges domestic judges to check whether domestic legislation conforms to the ACHR as interpreted by the Court and, if not, to disapply it.'[39] There is thus some debate about the extent to which a 'true dialogue' exists in the sense of a give-and-take between the IACtHR and national courts.[40] This is much more clearly present in the ECHR context, through the margin of appreciation principle and the occasional contestation of ECtHR judgments at the national level.

Specific questions

(a) (i) How has the duty to "take into account" ECtHR jurisprudence been applied in practice?

20. As indicated above, especially at paragraphs 16 and 17, the courts have now rejected the stance taken in the early post-2000 cases, in particular *Ullah* (see paragraph 6), which can be characterised as showing a near-slavish adherence to the Strasbourg jurisprudence. As indicated in paragraphs 1-3, the wording of s.2 quite accurately reflected the intention underlying the inclusion of the section in the HRA – not to impose a stronger obligation on the domestic courts which would in effect demand that they follow relevant Strasbourg jurisprudence. The stance that the courts are *now* taking – as summed up in paragraph 17 above – therefore reflects accurately the wording of the section and the original intention underlying that wording.

(a) (ii) Is there a need for any amendment of section 2?

21. No. The courts have now had 20 years' experience of responding to s.2 and of considering the Strasbourg jurisprudence in relation to disputes concerning relevant or arguably relevant jurisprudence. They have familiarised themselves over that period with the limitations of the Strasbourg jurisprudence, in particular the influence that the margin of appreciation has had on it and instances where the jurisprudence does not provide a clear answer in relation to the dispute the court is considering (see paragraph 14 above). Thus, once the HRA had been in force for around 10 years, the judges embarked on developing a domestic ECHR jurisprudence (see paragraphs 10-12) which demonstrated that they felt a growing confidence in rejecting the idea that they needed to take the lead from Strasbourg. So, given the current judicial stances as to s.2, which reflect the wording of the section, no amendment is needed.

(b) (i) 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?

22. Where a margin of appreciation would be likely to be afforded or has already clearly been accorded to the member states in a relevant decision, the domestic courts have recently found that the question to be resolved is one for the domestic authorities to 'decide for themselves' (see paragraph 14 above, text to fn 23 and fn 23 itself). If it is reasonably clear that the decision to be made does fall within the margin that the Court has decided to leave to the member states, the domestic court need not be constrained in its decision by any relevant jurisprudence, although it might seek some guidance – if any was available – from such jurisprudence.

[38] Ibid.
[39] Ibid, p.1135.
[40] A.E. Dulitzky, An Inter-American Constitutional Court - The Invention of the Conventionality Control by the Inter-American Court of Human Rights (2015) 50 Texas International Law Journal 45, p.76.

23. As to their general approach to jurisprudence influenced by the margin of appreciation, their approach in more recent cases (compare fn 15 with fn 23) has been to find that if the relevant Strasbourg jurisprudence is influenced by conceding a margin of appreciation to the state, it will not be determinative.

(b) (ii) Is any change required?

24. No. The courts are currently (see (b)(i)) showing greater confidence in deciding for themselves where the decision is one that is or appears to be within the UK's margin of appreciation. Therefore, since that trend is only likely to strengthen, no change is required.

25. Further, in the earlier cases following the introduction of the HRA, the courts at times applied Strasbourg jurisprudence that had been influenced by the margin of appreciation doctrine, without recognising that that was the case (see fn 15). Therefore, in effect, in some instances they imported an international law doctrine into domestic law. However, in a number of the more recent cases, as set out in (b)(i) above, that approach has been rejected. It follows that it is not necessary to, for example, include an express amendment to the effect that jurisprudence influenced by the margin conceded to the state should be disregarded.

(c) (i) 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?

26. Yes, the current approach does enable them to do that, within the context of a specific case – see paragraphs 12, 14, 15 and 16 above, where the jurisprudence in various respects does not provide a good fit with domestic circumstances. See in particular fn 25, 26, 27, 28 in paragraph 14.

(c) (ii) How can such dialogue best be strengthened and preserved?

27. It may be noted that a dialogic approach will be promoted by Protocol No. 16 ECHR (not yet in force in respect of the UK) which allows the highest courts and tribunals of a High Contracting Party to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. But the establishment of a dialogue at the domestic level is already occurring; see paragraph 15 above. The signs from the changes that have already occurred in the approach to s.2, as set out in paragraphs 1-17 above, as well as the broader tendencies in respect of the developments of this dialogue comparatively within the CoE and other regional human rights frameworks (see further paragraphs 18-19 above), already indicate that the dialogue is only likely to continue to strengthen; therefore no new amendment to s.2 is needed in order to achieve that result.

Theme II: The impact of the HRA on the relationship between the judiciary, the executive and the legislature

Overarching questions

How are the roles of the courts, Government and Parliament balanced in the operation of the HRA? Does the current approach risk "over-judicialising" public administration by drawing domestic courts unduly into questions of policy? What are the strengths and weaknesses of the current approach and what recommendations for change would you make, if any?

1. While the UK participated in the drafting of the ECHR to protect against the recurrence of totalitarianism on the continent,[41] within the UK individuals lacked a direct way to enforce the state's duty to respect Convention rights and freedoms until the creation of the HRA. With its very purpose being to 'bring rights home' and to render them more accessible to individuals in the UK, the HRA changed the relationship between the courts and both government and Parliament, to protect and reflect the status of individuals as citizens, not subjects.[42] Nevertheless, the main operative provisions of the HRA, Sections 3 and 4, have ensured that this fundamental change to the place of the individual within our constitution did not undermine the core structural features of it: parliamentary sovereignty, the rule of law and the separation of powers. After briefly discussing the provisions and foundational case law pertaining thereto, we will highlight this strength of the current framework, by reference to both comparative and empirical considerations.

2. In keeping with the tenor of s.2, the system set up by ss.3-4 HRA amounts to what is known as 'weak form review', whereby courts do not have the final say on the constitutionality of primary legislation.[43] Instead, they primarily use interpretive techniques to ensure the compatibility of legislation and policy with human rights.[44] The current relationship between the two provisions can be summarised as a structural priority for s.3 HRA, with a s.4 declaration of incompatibility being issued in cases where s.3 cannot be used. The overall application of human rights is further underpinned by an explicit duty set out in s.6 HRA for all public authorities (including the courts) to respect human rights in their actions.

3. By assuming this scheme, the HRA embeds Convention rights in domestic decision-making and renders their realisation a common task for all three branches of government. The courts use the powers in s.3 and s.4 HRA to protect the individual against unjustified infringements of their freedom, and alert Parliament where the infringement is an unavoidable interpretation of legislation. However, in doing so the courts have tended to show restraint and deference in the exercise of their powers, respecting the expertise and democratic legitimacy of government and Parliament in making decisions as to how to balance competing policy concerns. For example, in the context of assisted suicide for terminally ill people, the courts have declined to use either their powers under s.3 or s.4, even though a majority in the Supreme Court found the continued blanket ban infringes the Convention rights of individuals.[45] The courts have

[41] G. Marston, 'The United Kingdom's part in the preparation of the European Convention on Human Rights, 1950' (1993) 42(4) ICLQ 796; E. Wicks, 'The United Kingdom Government's perceptions of the European Convention on Human Rights at the time of entry' [2000] PL 438.
[42] See further B. Douglas, 'Too attentive to our duty: The fundamental conflict underlying human rights protection in the UK' (2018) 38 *Legal Studie*s 360, pp.335-336.
[43] M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009), p.831; A. Kavanagh, 'What's so weak about "weak-form review"? The case of the UK Human Rights Act 1998' (2015) 13:4 ICON 1008, p.1011.
[44] J. Lavapuro, T. Ojanen, and M. Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' 9:2 ICON 505, p. 518.
[45] *Nicklinson* (n 23), [111], [118].

consistently recognised that the lack of consensus in society over *whether* the law should be changed makes it a matter for Parliament, and have therefore refused to use s.3 or s.4 to bring about change.[46]

4. The application of s.3 is consistent with the importance the rule of law gives to legal certainty, as the courts have refused to adopt interpretations of legislation so strained that they could not be anticipated. As the courts have defined it, 'the modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.'[47] In the human rights context, as is widely known, the purposive approach towards statutory interpretation was set out in *Ghaidan v Godin-Mendoza*. It is worth reproducing some of the key passages from this case, which highlight how the courts will give effect to parliamentary intent. As Lord Nicholls had put it,

> The interpretative obligation decreed by Section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, Section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting Section 3.[48]

5. Crucially, the ruling in *Ghaidan* also clarified that parliamentary intention does not necessarily turn on the text of the legislation. Rather,

> the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention compliant interpretation under Section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But Section 3 goes further than this. It is also apt to require a court to *read in* words which change the meaning of the enacted legislation so as to make it Convention compliant. In other words, the intention of Parliament in enacting Section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.[49]

6. It follows that, while *Ghaidan* had set out the extensive reach of s.3 in principle, it should not be taken to mean that the courts will depart from parliamentary intent *altogether*, but from what may have been *textually* construed as the intention of – usually an earlier – Parliament, combined with the presumed intention to protect human rights generated by s.3 HRA itself. One of the key reasons for taking this approach is that, whereas in other legal systems this commitment is expressly written into the constitution (as further highlighted at paragraph 13 below), courts in the UK generally presume that Parliament intends to comply with its international obligations and not to reduce human rights, except where it does so explicitly.[50]

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[46] Ibid and *R (Conway) v Secretary of State for Justice* [2018] UKSC (unreported), [7]-[8].
[47] *Uber BV and others v Aslam and others* [2021] UKSC 5, [70] (Lord Leggatt); *UBS AG v Revenue and Customs Comrs* [2016] UKSC 13, [61-68] (Lord Reed).
[48] *Ghaidan v Godin – Mendoza* [2004] UKHL 30, [30] (Lord Nicholls).
[49] Ibid, [32].
[50] *33R (SG & Ors) v Secretary of State for Work and Pensions* [2015] UKSC 16, [235] (Lord Kerr); *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [27] (Lord Bingham).

7. This approach is consistent with an internationally observable tendency for domestic courts to 'begin with a presumption or principle of interpretation that, so far as its wording allows, legislation should be read in a way which is consistent with the state's international obligations,' even in the absence of ambiguity.[51] As Franck and Thiruvengadam point out, in addition to the UK, 'courts in Italy,[...] India and the U.S., through inventive use of principles of statutory interpretation, have attempted to prevent conflict with later statutes, for example by presuming an intent not to override prior treaty commitments unless a contrary intent is expressly stated.'[52]

8. Moreover, *Ghaidan* serves as authority for the limits of statutory interpretation, which turn precisely upon the significance of parliamentary intent and the separation of powers. As Lord Nicholls noted, 'Parliament cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation.'[53] Further, Lord Nicholls, Lord Steyn and Lord Rodger all accepted that there would be occasions when the courts could not adopt a compatible interpretation (as opposed to issuing a Section 4 declaration of incompatibility), if that would embroil the courts in policy choices beyond their remit, or where a consistent reading would have severe practical implications for private parties.[54]

9. Overall, as we highlight by reference to empirical data at paragraphs 23-31 below, s.3 HRA appears to have only had a limited impact on domestic case law. Whilst comparative analysis within the CoE (see further paragraph 12 below) confirms that the model set up by the HRA is generally successful in securing human rights at the national level, neither the terms nor the application of s.3 have substantially extended traditional mechanisms of statutory interpretation in practice.

10. In contrast to s.3, a declaration of incompatibility is a discretionary and exceptional course of action for the courts. A s.4 declaration does not have any immediate legal effect for the parties and is simply a prompt for Parliament to remedy the incompatibility. As Lord Kerr put it in *Nicklinson*, 'under the scheme of the Human Rights Act 1998 it is open to Parliament to decide to do nothing.'[55]

11. Despite the fact that a s.4 declaration is not binding on Parliament and has no immediate impact on the parties, the courts have recognised its symbolic significance within the UK constitution and it is clear that they take s.4 declarations very seriously, having made just 43 declarations of incompatibility throughout the lifetime of the HRA.[56] The courts have also emphasised that mere disagreement with the merits of a piece of legislation does not mean that it must be declared incompatible.[57] In *Christian Institute v Lord Advocate*, Lady Hale noted that 'if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference […] in all or almost all cases, the legislation itself will not be incompatible with Convention rights'.[58] In fact, the reasoning of the courts in the three most recent cases where a declaration of incompatibility

[51] K. Keith, '"International Law is part of the law of the land" True or false?' (2013) Leiden Journal of International Law 351, p.364.
[52] T.M. Franck and Arun K. Thiruvengadam 'International Law and Constitution-Making' (2003) 2 Chinese Journal of International Law 467, p.518.
[53] *Ghaidan* (n 48), [33].
[54] Ibid, at [33-35] (Lord Nicholls); [49] (Lord Steyn); [115] (Lord Rodger).
[55] *Nicklinson* (n 23), [343].
[56] MoJ, 'Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020', December 2020, CP 347, p.30 (Annex A).
[57] *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [56-57] (Lord Neuberger).
[58] [2016] UKSC 51, [88] (Lady Hale). See also *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, [69] (Lord Hodge).

was made was that the legislation in question had been 'manifestly without reasonable foundation'.[59]

12. The extent to which the provisions of the HRA secure human rights without resulting in over-judicialisation can be further appreciated when these provisions are placed in a comparative context within the CoE framework. As Lord Irvine had noted at the time of the HRA's creation, before the entry into force of the HRA, the UK found itself in an internationally perilous position, as the second most frequent violator of the Convention before the Strasbourg Court, after Italy.[60] Similarly, international human rights law, whilst generally non-prescriptive of the way in which states give effect to human rights, had also started to place increasing emphasis upon the importance of incorporation through legislation.[61] Against this background, the HRA has been a highly successful effort of aligning respect for the UK's key human rights obligations with a parliamentary sovereignty model, with cases going to Strasbourg having been drastically reduced since the Act's entry into force. While statistics for 2020 have not been issued at the time of writing, in 2019 only five cases against the UK were heard by the Strasbourg Court (although a violation was found in all five).[62] Despite the fact that there are several countries that still outperform the UK (e.g. in the eight cases lodged against Germany in 2019, no violation of the Convention was found), the UK is now on the low end of Convention violators, and is on a par with or better positioned than similarly sized member states, such as France, Italy, and Spain.

13. Furthermore, a textual review of the other 46 member states' constitutions, accessed via the 'Constitute Project' database,[63] suggests that, without any exception, all constitutions contain clauses that require compliance with the Convention to an extent, albeit that they differ in their manner of doing so. Most constitutions (e.g. Germany, Greece, Italy, France) enumerate constitutional rights that include Convention provisions, while some also make specific reference to universal human rights, such as the UDHR, on which the ECHR was based (e.g. Portugal, Spain). Fewer, but usually more recent, constitutions explicitly constitutionalise the Convention (e.g. Albania, Bosnia and Herzegovina, Sweden). For the 27 CoE member states which are also member states of the European Union, the Convention is protected as a minimum standard by Article 6 TEU and Article 52 of the EU Charter of Fundamental Rights. In addition to references to human rights, all member states refer to some degree to their obligation to comply with international law, to which some constitutions ascribe primacy over national law, as is the case, e.g., in France and the Netherlands. Thus, unlike the HRA, most contracting states offer a degree of supra-legislative protection to Convention rights.

14. This supra-legislative protection is usually associated with strong judicial remedies. For example, interpretive techniques such as that found in s.3 HRA have been explicitly embraced by the constitutions of other CoE member states, such as the Constitution of Romania, the Portuguese Constitution and the Spanish Constitution.[64] But the practice of most member states' courts is not confined to interpretation and usually also includes stronger mechanisms of constitutional review. For example, while there have been instances where contextual counter-limits on the case law of the Strasbourg Court were imposed by the national

[59] *Jackson and Others v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin), [46] (Holman J); *In re McLaughlin* [2018] 1 WLR 4250, [34] (Lady Hale); *R (on the application of the Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin), [123] (Spencer J).
[60] HL Debs, Vol.582, Col.1227, 3 November 1993 (Lord Irvine).
[61] See, e.g., Y. Shany, 'How Supreme Is the Supreme Law of the Land - Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts', (2006) 31 Brook Journal of International Law 341, p.354.
[62] ECtHR, 'Violations by Article and by State - 2019', accessed 25 February 2021.
[63] The database can be accessed at: https://constituteproject.org/constitutions?lang=en. The search has been conducted through English-language translations only.
[64] Venice Commission Report (n 12), paragraph 91.

constitutional courts of, e.g., Austria, Germany, and Italy (further discussed under Theme I), these counter-limits were based upon the domestic courts' strong constitutional review mandates, which allow them to strike down human-rights-incompatible legislation based on the national constitution. A comparison with such models, albeit instructive about the variety of approaches towards the role of courts across Europe,[65] may not provide transposable insights for the question of judicialisation within the UK's stricter parliamentary sovereignty paradigm. However, it is noteworthy from this perspective that other systems of weak form review within the Convention framework also tend to allow greater judicial powers than the HRA. This is highlighted by a closer look at the Dutch and Nordic legal systems, which have been previously presented as useful comparators for the UK, as they follow similar parliamentary sovereignty models and do not normally allow the judicial review of legislation.[66]

15. Par excellence a monist state, pursuant to Article 94 of its Constitution, the Netherlands affords direct effect to international treaties, so that any incompatibility between national legislation and the ECHR must be resolved in favour of the latter. This primacy of the Convention is actionable before domestic courts. In the event that consistent interpretation is impossible, domestic courts can disapply domestic incompatible statutes, including constitutional provisions, and apply Convention rights directly *vis-à-vis* the parties (although the courts do not have the right to strike down incompatible legislation).[67] The constitutional position in The Netherlands has been nuanced by the Dutch Supreme Court, which has sought to preserve as much as possible the non-reviewability of national law by domestic courts, by finding that disapplication of national law should not be based solely on domestic courts' interpretation of the ECHR, but that it should follow rulings of the Strasbourg Court.[68]

16. Whilst limited, therefore, the Dutch approach towards judicial review in cases that involve the ECHR is less deferential than the HRA, whereby a declaration of incompatibility constitutes simply an invitation for Parliament to enact new legislation or for ministerial amendments to be made pursuant to s.10 of the Act, but has no effect for the parties. Rather, the Dutch system can be paralleled with the position that was followed in the UK for human rights provided for in EU law, for which disapplication was similarly possible.[69] The Supreme Court emphasised this remedial difference between EU law and the ECHR in *Benkharbouche*, where it noted that, in contrast with EU law, there is no possibility to disapply domestic legislation which is incompatible with the ECHR and that, where interpretive means fail, the only 'remedy in the case of inconsistency with […] the Human Rights Convention is a declaration of incompatibility.'[70]

17. The academic literature posits the 'Nordic counter-narrative' as the leading example of well-functioning weak form constitutional review.[71] The five Nordic states[72] can indeed provide an interesting comparison for the HRA and its remedies as, like the UK, they all take a dualistic approach towards international law, emphasise political decision-making, and generally avoid the judicial review of legislation. Nevertheless, Nordic states have consistently displayed a high

[65] See further: Council of Europe, 'Comparative study on the implementation of the ECHR at the national level' Belgrade 2016.
[66] D. Oliver, 'Parliamentary Sovereignty in Comparative Perspective', UK Const. L. Blog 2 April 2013, accessed 25 February 2021.
[67] N.S. Efthymiou and J.C. De Wit, 'The Role of Dutch Courts in the Protection of Fundamental Rights' (2013) 9:2 Utrecht Law Review 75, pp.78-79.
[68] Supreme Court of the Netherlands, 10 August 2001, NJ 2002, 278, annotated by J. de Boer, legal ground 3.9; see also HR 19 October 1990, NJ 1992, 129 annotated by E.A. Alkema and E.A.A. Luijten, legal ground 3.4, cited in Efthymiou and De Wit, ibid, p.79.
[69] *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs; Libya v Janah* [2017] UKSC 62.
[70] Ibid, [78] (Lord Sumption).
[71] R. Hirschl, 'The Nordic Counternarrative: Democracy, Human Development and Judicial Review' 9(2) ICON 449.
[72] Iceland, Denmark, Norway, Sweden, and Finland.

level of adherence to human rights enshrined in both national and international law[73] and this is illustrated in all of their constitutions. For example, Article 92 of the Norwegian Constitution provides for the respect by state authorities of 'human rights treaties that are binding on Norway', in addition to the rights enumerated in the constitution. Article 19 of the Swedish Constitution provides that 'no act or law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms'. Beyond these binding constitutional undertakings for the legislator, Nordic states have in place significant pre-legislative scrutiny mechanisms that help prevent the need for judicial review later on.[74]

18. In terms of judicial remedies, a comparative overview by the CoE suggests that the approach employed in the Nordic countries is indeed closer in principle to the model envisaged by ss.3-4 HRA, in that 'the Supreme Courts of the Nordic countries have acknowledged the ECHR law's special role. They have accorded to this regime a sort of interpretative priority, and used consistent interpretation and indirect effects doctrines to avoid constitutional conflicts between national and supranational law.'[75] However, the reluctance of the courts of Nordic countries to employ judicial review is waning, and has been giving way to a stricter judicial review model since the 1990s.[76] Crucially, courts in Iceland, Norway, Denmark, Sweden and Finland (following a constitutional reform in 1999), do have the right to set unconstitutional legislation aside, even though they cannot invalidate it.[77] And, as Smith highlights, it is a common feature of all five Nordic constitutions that courts are not just empowered, but obliged to conduct constitutional review on human rights grounds, even if this option has only rarely been exercised due to the strength of their interpretive and pre-legislative scrutiny methods.[78]

19. There are thus two key features of Nordic judicial review on human rights grounds that differentiate it from the HRA, even though there is a common emphasis on interpretation and parliamentary supremacy. The first is the existence of judicially enforceable alternatives to consistent interpretation, whereas a s.3 interpretation is the only option that produces a legal effect between the parties. The second is the compulsory character of judicial review of incompatibilities (and disapplication of incompatible statutes in concrete cases), which exceeds the discretionary power given to UK courts under s.4 HRA and the lack of legal effects for this section in the concrete case.

20. It follows from the foregoing analysis that parliamentary supremacy is not only sufficiently preserved by the wording of s.3 and 4 and by the meaning that the Supreme Court has ascribed to these provisions but also that, far from posing risks of over-judicialisation, the structure of the current system can be considered highly deferential, when it is compared with other weak review models in the CoE system. Repealing or amending the current system could lead individuals to persuade the courts to adopt more strained interpretations or engage in judicial activism through the common law to protect their freedom.[79]

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[73] There are further specificities in each Nordic constitution, which have influenced the level of respect and reservations regarding certain human rights. See: T. Ojanen, 'Human Rights in Nordic Constitutions and the Impact of International Obligations' in H. Krunke and B. Thorarensen, *The Nordic Constitutions: A Comparative and Contextual Study* (Hart 2020) 133, pp.146-148.

[74] Oliver (n 66); Lavapuro, Ojanen and Scheinin (n 44), pp.509-510; T. Bull, 'Institutions and Division of Powers' in Krunke and Thorarensen (n 73) 43, pp.56-57.

[75] CoE comparative study (n 65), p.20.

[76] M. Wind and A. Follesdal, 'Nordic Reluctance Towards Judicial Review Under Siege' (2009) 27:2 *Nordic Journal of Human Rights* 131.

[77] E. Smith, 'Judicial Review of Legislation' in Krunke and Thorarensen (n 73) 107, pp.109-115.

[78] Ibid, p.119.

[79] *R (Jackson) v Attorney General* [2005] UKHL 56, [102].

Specific questions

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

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

21. No. As noted above at paragraphs 4-8, parliamentary intent remains the key consideration that the courts will look at to establish 'what is possible' under s.3. The fact that the intention of Parliament is interpreted purposively, by reference to the fundamental features of the legislation, rather than to specific words (except where those words are in themselves fundamental features) does not undermine this. The reason why the courts were able to read words into the statute in *Ghaidan v Godin-Mendoza* was that the purpose of the legislation was to afford protection from eviction to the surviving partner. As such, there was no incompatibility with parliamentary intention in the courts' finding that this protection extended to homosexual couples. This is confirmed by instances where the courts have taken a more deferential view of the applicable statute.[80]

22. This approach has previously found favour with the executive. Aileen Kavanagh has usefully listed a range of cases in which government lawyers have asked the courts to give effect to the legislation's true intention by rectifying any incompatibility by way of s.3, rather than a s.4 declaration.[81] In his Lord Alexander lecture, Lord Phillips expressed the same view:

> Ministers do not like declarations of incompatibility. Provided that the main thrust of their legislation is not impaired they have been happy that the courts should revise it to make it Convention-compliant, rather than declare it incompatible. In my experience, Counsel for the Secretary of State usually invites the court to read down, however difficult it may be to do so, rather than make a declaration of incompatibility.[82]

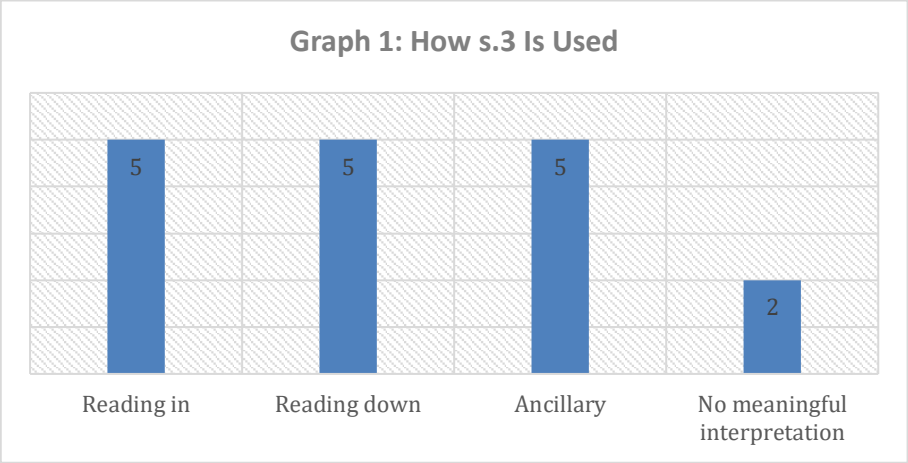
23. The view that there is no reason to change the current approach because parliamentary intention has been respected in the application of s.3 is also supported by empirical evidence. To account for the way in which the courts presently understand and discharge their duty under s.3 and determine whether, contrary to the analysis in paragraphs 1-22 above, the *Ghaidan* duty has been subsequently over-used or misused, we carried out a systematic empirical study of judgments in the High Court of England and Wales from 1 January 2011 to 31 December 2020. In order to understand how the s.3 obligation is presently functioning, there is a need to focus not just on appellate-level and strong precedent-setting cases.[83] It is accepted that a focus on the High Court does not sufficiently capture all s.3 usage, as the study does not cover relevant judicial decision-making in tribunals, and in Northern Ireland and Scotland. The sample selection is nonetheless justified, as the amount of decisions reviewed is not insignificant, and

[80] See paragraph 4 above. See also, e.g., *Bellinger v Bellinger* [2003] UKHL 21.
[81] Kavanagh, 'Weak- form review' (n 43), pp.1022-23. See further: *R (Hammond) v Secretary of State for the Home Department*, [2005] UKHL 69, [17], [29]*; R (Clift) v Secretary of State for the Home Department*, [2007] 1 AC 484 (HL) [40]; *Secretary of State for the Home Department v M.B.*, [2008] 1 AC 440 (HL); *Secretary of State for the Home Department v AF (No. 3)* [2009] 3WLR 74 (H.L).
[82] Lord Phillips, The First Lord Alexander of Weedon Lecture, *The Art of the Possible: Statutory Interpretation and Human Rights* (Apr. 22, 2010), accessed 25 February 2021.
[83] See R. Kirkham and E.A. O'Loughlin, 'Judicial Review and Ombuds: A Systematic Analysis' [2020] PL 680, pp.683-684.

the decisions selected 'hold essentially equal value' and are therefore 'similarly weighted'.[84] In addition, to counter any claim that a focus upon High Court decision-making excludes meaningful uses of s.3 at appellate-level, we traced the appeal route of each case.

24. We conducted a systematic content analysis of the cases selected.[85] In order to produce our dataset, we searched and recorded all cases where a reference to s.3 was made, by searching for various terms[86] in the case databases British and Irish Legal Information Institute (BAILII) and Westlaw. Our dataset therefore consists of 112 judgments between 1 January 2011 and 31 December 2020. This dataset will likely not have captured a full record of every time s.3 was mentioned in the High Court in England and Wales between 2011 and 2020, but will have captured the vast majority of cases. We examined challenges to both primary and secondary legislation and we coded to capture: the Convention rights in relation to which s.3 was invoked; whether s.3 was used; if s.3 was used, how it was used[87]; if s.3 was not used, why it was not used.[88]

25. In our dataset of cases mentioning s.3, there were only 17 out of 112 cases in which the interpretive obligation was engaged by the court, which amounts to 13%. This is a low but not insignificant amount, and so we recorded the way in which s.3 was used in each case to understand the context and consequences this may have for parliamentary intention. Our overall findings are highlighted in Graph 1 below.



26. In five of the cases, s.3 was used to read in extra provisions or qualifications to render a scheme Convention-compliant.[89] For example, in the Family Division case of *Warren v Care Fertility*, the words 'was, or may have been likely to become prematurely infertile' were read into section 4(3)(b) of The Human Fertilisation and Embryology (Statutory Storage Period for Embryos

[84] M.A. Hall and R.F. Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California L Rev 63, p.66.
[85] Kirkham and O'Loughlin (n 83), p.685.
[86] Search terms included "section 3 of the Human Rights Act"; "section 3(1) of the Human Rights Act"; "s 3 Human Rights Act"; "s3(1) Human Rights Act"; "s3 HRA"; "s3(1) HRA".
[87] We found that s.3 was used in four ways: to read down legislation; to read extra terms into legislation; to provide support to a finding based on ordinary statutory interpretation; and finally, sometimes s.3 did not play a meaningful role in interpretation.
[88] There are a number of reasons why the court declined to use s.3: the right(s) was not engaged; there was no violation; s.3 was merely mentioned and did not play a part in the outcome of the case; to use s.3 to render the provision convention-compliant would go 'against the grain' or against a fundamental feature of the legislation.
[89] R (*G.R.) v Director of Legal Aid Casework & Anor* [2020] EWHC 3140 (Admin); *The Financial Conduct Authority v Da Vince Invest Ltd* [2015] EWHC 2401 (Ch); *Warren v Care Fertility (Northampton) Ltd & Anor* [2014] EWHC 602 (Fam); *R (Omar) v Secretary of State for the Home Department (Rev 1)* [2012] EWHC 3448 (Admin); *Topworkmen.Com Ltd v Billscutter Ltd* [2011] EWHC B20 (QB).

and Gametes) Regulations 2009, to ensure that sperm of the deceased husband of the applicant could be stored for longer than 10 years.[90] This rendered the regulations compliant with the article 8 rights of the applicant, and the judge specifically found that such an interpretation was consistent with parliamentary intention under The Human Embryo and Fertilisation Act 1990.[91]

27. In another five cases, the s.3 obligation was used to read down a strict interpretation of a provision in order to achieve compatibility.[92] In *Daniels v Nursing and Midwifery Council*, Article 29(10) of the Nursing and Midwifery Order 2001, providing a strict time limit for appealing a sanction imposed by the Council, was read down in order to give the court discretion to extend the time limit in exceptional circumstances, where Article 6 required it.[93] This followed the approach to strict time limits in the Supreme Court in *Pomiechowski v District Court of Legunica Poland*.[94] It should be noted that *Daniels* was overturned on appeal, with the Court of Appeal disagreeing that the circumstances of the applicant were so exceptional as to require the strict appeal time limit to be read down in this instance.[95] Further, in two of these five cases, the High Court explicitly set out that while they were using their s.3 power to read down the relevant provision, they could have come to the same finding by applying 'ordinary principles of statutory interpretation.'[96]

28. In a further five cases, the s.3 obligation was used only briefly, and primarily in an ancillary or supportive fashion, commonly buttressing a finding that there had been some error of law.[97] By way of illustration, in *Punch Partnerships v The Highwayman Hotel*, there was a finding in arbitration proceedings that the Office of the Pubs Code Adjudicator had exercised a power they did not have under Small Business, Enterprise and Employment Act 2015 and the Pubs Code etc Regulations 2016, and so had made an error of law. It was, however, mentioned that the award the Adjudicator had made requiring the applicant to offer a lease period of a pub for at least 5 years also interfered with the applicant's fundamental right to dispose of their property as they choose under Article 1 Protocol 1.[98]

29. Finally, two cases did not fit well into the categorisation of s.3 uses. In *Calver v Adjudication Panel for Wales*, it was found that the Adjudication Panel had disproportionately interfered with the Article 10 rights of a Councillor by imposing censorship sanctions upon them. The court found that s.3 required that a Community Council's Code of Conduct must be 'read and given effect' in a Convention compatible way by both the Panel and the court, informing the court's finding that there was a disproportionate interference.[99]

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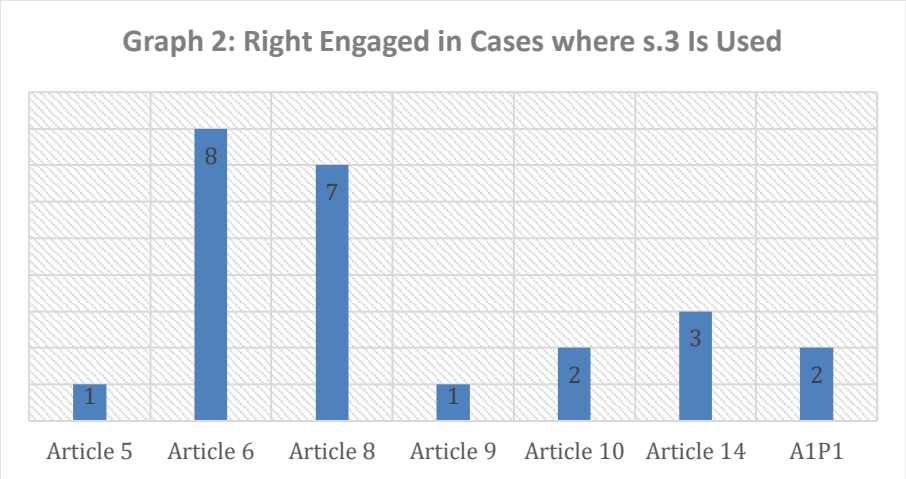
[90] *Warren v Care fertility* (n 89), [142].
[91] Ibid, [136].
[92] *A (A Child: Adoption Time Limits S44(3)) (Rev 1)* [2020] EWHC 3296 (Fam); *R (Elmes) v Secretary of State for Communities and Local Government* [2018] EWHC 2055 (Admin); *X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam); *Daniels v Nursing and Midwifery Council* [2014] EWHC 3287 (Admin); *R (Stern) v Horsham District Council* [2013] EWHC 1460 (Admin).
[93] *Daniels v Nursing and Midwifery Council* (n 92), [39].
[94] [2012] UKSC 20.
[95] *The Nursing and Midwifery Council v Daniels* [2015] EWCA Civ 225.
[96] *R (Stern) v Horsham District Council* (n 10) [52]. See also *X (A Child) (Surrogacy: Time Limit)* (n 92) [57]-[58].
[97] *The London Steam-Ship Owners' Mutual Insurance Association Ltd v Spain (M/T "PRESTIGE")* [2020] EWHC 1582 (Comm); *Punch Partnerships (PTL) Ltd & Anor v The Highwayman Hotel (Kidlington) Ltd* [2020] EWHC 714 (Ch); *R (EG) v The Parole Board of England and Wales* [2020] EWHC 1457 (Admin); *Secretary of State for the Home Department v LF* [2017] EWHC 2685 (Admin); *Rahmatullah v The Ministry of Defence* [2014] EWHC 3846 (QB).
[98] *Punch Partnerships v The Highwayman Hotel* (n 97) [84].
[99] *R (Calver) v The Adjudication Panel for Wales (Rev 2)* [2012] EWHC 1172 (Admin) [85]. See also *Erskine 1948 Trust, Re* [2012] EWHC 732 (Ch), interpreting 'statutory next of kin' in a trust settlement to include adopted next of kin, so as to eliminate the discrimination of the settlement against adopted children.

30. In these cases, then, it becomes clear that while s.3 may be used to read in extra criteria or to read down the strictness of certain provisions, the courts do so in a way that sits within parliamentary intention. Indeed, in these 17 cases, 8 related to the interpretation of secondary legislation, requiring the provisions be read consistently with the constitutive Act of Parliament. This demonstrates the central role parliamentary intention plays in these cases. Further, a close look at the subject matter of these cases reveals that many relate to the more procedural aspects of Convention rights. For example, the most prevalent right engaged in cases where s. 3 is used is article 6. Further, cases related to article 8 and article 5 focussed upon removing procedural hurdles to give effect to the right.[100] As such, the data shows that judicial interventions do not necessarily give rise to a dramatic overturning of parliamentary intention, but rather that the courts are using their institutional expertise.[101] Finally, it is worth noting that s.3 use does not automatically aid the litigant who raises it in argument.[102] The overall distribution of rights engaged in s.3 cases is highlighted in Graph 2 below (please note that, in some cases, more than one right had been engaged).

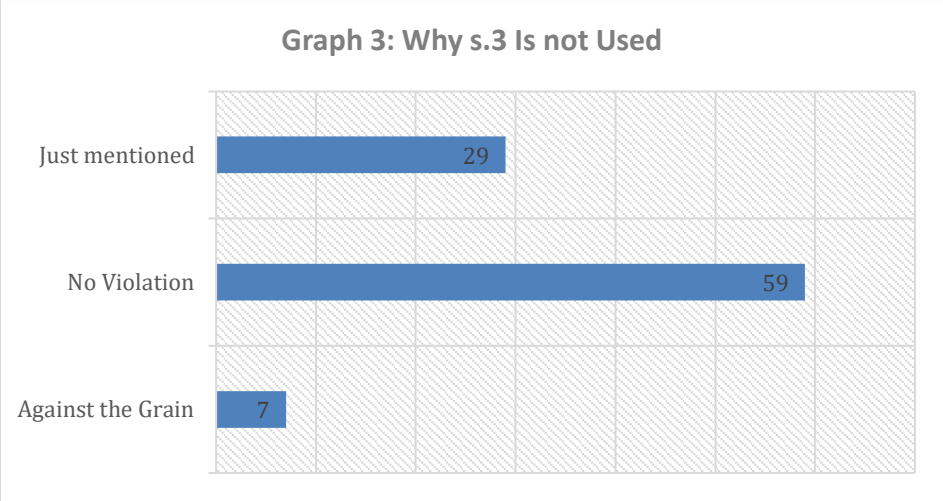


31. The cases in the dataset where s.3 was not used (see further Graph 3 below) also reveal that, even where the court is invited to use s.3, they commonly do not have to resort to the obligation, as there has either been no violation of a right, or the right raised in argument is not significantly engaged. The dataset therefore shows that the courts do not commonly need to engage in a question of whether to wield their s.3 obligation. When they do, however, parliamentary intention is central to their analysis.

[100] For example, in *A (A Child: Adoption Time Limits S44(3)) (Rev 1)* (n 92) s.3 was used to extend application time limits in an adoption application to give effect to the applicant's Article 8 right. In *R (EG) v The Parole Board of England and Wales* (n 92), the Parole Board Rules 2019 were interpreted as requiring the Parole Board to appoint a litigation friend where necessary in order to give the applicant effective participation of their parole board hearing (Articles 5(4), and 14 engaged).

[101] On Article 6 being 'within the traditional decision-making expertise of the courts', see A. Kavanagh, 'Statutory interpretation and human rights after Anderson: a more contextual approach' [2004] PL 537, p.539.

[102] See *The Financial Conduct Authority v Da Vince Invest Ltd* (n 89), where using s.3 to read in a statutory defence under section 129 Financial Services and Markets Act 2000, did not prevent the court from finding that the allegation of market abuse had been proven by the Financial Conduct Authority.



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

32. Since section 3 HRA is effective in giving effect to parliamentary intent, there is no need to repeal or amend section 3. If, in any event, section 3 were amended or repealed, this should be strictly prospective and should not apply to prior section 3 interpretations, as this would have two undesirable consequences. First, it would create significant uncertainty for private parties who have relied or are seeking to rely on authoritative interpretations of fundamental rights to understand their rights. Secondly, it would upset the judicial hierarchy by undermining the authoritative value of precedent. This would be particularly obstructive for the operation of lower courts and would incentivise appeals on settled human rights issues.

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

33. No. The reversal of the Section 3 and 4 process would result in unnecessary delays for cases in which minor variations in accordance with the intention of Parliament are necessary, which would be beneficial neither for litigants nor for the legislator (see further paragraph 22 above).

34. Any reversal of the structure of the Act would require a stronger-form review than that which is currently envisaged, in order to avoid findings of ineffectiveness of UK remedies by the Strasbourg court, such as the possibility of disapplication in individual cases or the creation of interim remedies. Article 13 ECHR requires access to an effective remedy at the national level and, in its current form, s.4 HRA has been recognised by the Strasbourg court as deficient in this regard.[103] A further emphasis on s.4 declarations would thus expose the UK to closer scrutiny by the Strasbourg court. This is especially relevant in light of the delays that addressing a declaration of incompatibility can incur, as detailed in respect of question (e) below.

35. There is also evidence that the present approach of the courts to s.4 declarations takes account of the role of Parliament. In the course of the systematic study we conducted in relation to s.3 (further discussed at paragraphs 23-31 above), the data captured ten cases in which a declaration

[103] See *Burden and Burden v UK*, Application No 13378/05, ECtHR 29 April 2008, paragraphs 40-44.

of incompatibility was considered. Only three of the cases finally resulted in declarations.[104] In four cases, the court declined to issue a declaration of incompatibility because no violation was found.[105] In one of these cases, concerning electoral law, the court averred that to assess whether the primary legislation in question was compatible would draw the court into 'a range of complex practical and conceptual questions with which the court is not remotely equipped to deal with and… these are not proper issues for the court to debate and determine.'[106] In one case, the High Court was constrained by precedent from issuing a declaration.[107] In two cases the court found violations, declined to use s.3 because to do so would go against clear parliamentary intention, and still declined to use s.4, leaving the matter for the parties.[108] This study therefore provides an indicative snapshot of the restrained approach that the courts take to their s.4 power, with the courts already striking a balance between the powers to ensure the centrality of parliamentary intention.

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?

36. Subordinate legislation is intended to further detail the parameters of primary legislation, rather than expressing parliamentary intent. In light of this, the HRA draws a clear distinction between statute and subordinate legislation, as is evident from sections 3(2)(c), 6(2)(a), and 6(2)(b) thereof. On the basis of these provisions, public authorities should read subordinate legislation consistently with human rights as far as possible and, failing that, refrain from giving effect to subordinate legislation that is incompatible with human rights, unless the incompatibility flows from primary legislation. Since they are also designated as public authorities under section 6(1) HRA, disapplying or not giving effect to provisions of subordinate legislation that are incompatible with human rights is an obligation for national courts. As the House of Lords had put the matter in *In Re G (Adoption)*:

> The courts are free simply to disregard subordinate legislation which cannot be interpreted or given effect in a way which is compatible with the Convention rights. Indeed, in my view, this cannot be a matter of discretion. Section 6(1) requires the court to act compatibly with the Convention rights if it is free to do so.[109]

37. It is now settled authority, which has been recently reaffirmed by a unanimous Supreme Court in *RR v Secretary of State for Work and Pensions* that, rather than reading the subordinate legislation up or down so as to render it compatible with human rights in the same way as with primary legislation (i.e. by following the *Ghaidan v Godin-Mendoza approach*), the courts will disregard the subordinate legislation and hold that the public authority should have acted in a Convention-compatible manner in accordance with the primary legislation, in line with s.6

[104] *R (Aviva Insurance Ltd & Anor) v The Secretary of State for Work and Pensions* [2020] EWHC 3118 (Admin); *K (A Child) v The Secretary of State for the Home Department* [2018] EWHC 1834 (Admin); *Z (A Child) (No 2)* [2016] EWHC 1191 (Fam).
[105] *R (Ali & Anor) v Minister for the Cabinet Office the Statistics Board* [2012] EWHC 1943 (Admin); *Chief Constable of Lancashire v Wilson & Ors* [2015] EWHC 2763 (QB); *Tovey & Ors v Ministry of Justice* [2011] EWHC 271 (QB); *Cope v Returning Officer for the Basingstoke Parliamentary Constituency* [2015] EWHC 3958 (Admin).
[106] *Cope v Returning Officer for the Basingstoke Parliamentary Constituency* (n 105), [30].
[107] *R(T) v Greater Manchester Police & Anor* [2012] EWHC 147 (Admin). The Supreme Court ultimately issued a declaration of incompatibility in this case: [2014] UKSC 35.
[108] *R (Johnson) v The Secretary of State for the Home Department* [2014] EWHC 2386 (Admin) (this case ultimately resulted in a s.4 declaration in the Supreme Court: [2016] UKSC 56); *R (Boots Management Services Ltd) v The Central Arbitration Committee* [2014] EWHC 65 (Admin).
[109] *In Re G* (n 13), [116] (Lady Hale).

HRA.[110] In practical terms, this means that the remedy for claimants will be to be placed in the situation in which they would have been if the subordinate legislation had not been in place.

38. Nevertheless, despite the fact that the courts have been prepared to disapply subordinate legislation where they do find an incompatibility with the HRA, the standard of judicial review remains deferential in respect of making such a finding.[111] In fact, recent empirical research has found the courts' impact on subordinate legislation to have been 'marginal', identifying only fourteen instances of disapplication of subordinate legislation under the HRA in the last seven years.[112] Our own dataset only captured one case in which subordinate legislation was disapplied by the High Court.[113]

39. In our view, the current approach appropriately reflects the constitutional difference between subordinate legislation and primary legislation, as well as the statutory duty of every public authority independently to ensure the compatibility of its acts with human rights under s.6 HRA. We propose no changes to this approach.

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?

40. The remedial order process laid down in s.10 HRA currently gives ministers wide-ranging powers to amend, repeal, or vary legislation to ensure compatibility with the Convention, including with retrospective effect. Yet, despite being premised upon extensive ministerial powers, parliamentary oversight is secured in the s.10 process. Remedial orders must be laid before Parliament both in draft and in full for non-urgent cases (Sch.2(2) and 2(3) HRA) and in full for urgent cases (Sch.2(2) and 2(4) HRA). Further, a convention is emerging whereby Parliament will normally respond to a declaration of incompatibility through legislation, rather than through s.10.

41. While the process for remedying declarations of incompatibility works well overall, in non-urgent cases, delays in taking action have been a long-recognised problem. As King notes, the 'parliamentary record displays an attitude that has been predominantly accepting of and collaborative with the courts' role, though also minimalist in some responses and on the whole manifesting delays by the Government that have no principled defence.'[114] The UK has been comparatively slower than France and Germany,[115] while the Joint Committee on Human Rights has repeatedly expressed concern over the timescales for addressing incompatibilities which, in some cases, still far exceed its recommended six months.[116] The revision of legislation through a new Act of Parliament can be particularly slow. For example, despite a declaration of incompatibility on aspects of the SIA having been made final in 2017 in *Benkharbouche*, at the time of writing in February 2021 the incompatibility has not yet been addressed.

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[110] *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [20-22] (Lady Hale); see also *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; *In Re G* (n 13).
[111] See, e.g., *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58.
[112] 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?', UK Const L Blog (22nd Feb 2021), accessed 28 February 2021.
[113] *R (Elmes) v Secretary of State for Communities and Local Government* (n 92).
[114] J. King, 'Parliament's Role Following s4 Declarations of Incompatibility' in M. Hunt et al (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Bloomsbury 2015) 165, p.167.
[115] Ibid, p.170.
[116] Joint Committee on Human Rights, 'Sixteenth Report of Session 2006-07; Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights', HL Paper 128/HC 728, paragraph 114; See also Joint Committee on Human Rights, 'Seventh Report of Session 2001-02; Making of Remedial Orders', HL Paper 58/HC 473.

42. It would therefore be beneficial to provide statutory clarity on when a declaration of incompatibility must be addressed by Act of Parliament, rather than by remedial order. Further clarity on timeframes is also needed, both for remedial orders and for Acts of Parliament that seek to address an incompatibility.

43. A way forward could be for an amendment to the schema of s.4/s.10/Schedule 2 HRA inspired by the Victoria Charter of Human Rights and Responsibilities, which comprises a similar mechanism ('declaration of inconsistency'). The Victoria Charter provides at s.37 that the relevant minister must prepare a written response with the proposed action and present it to Parliament within six months of a declaration. A similar stipulation could be built into the HRA, e.g., by requiring that where action has not been taken within a six-month timeframe, the minister responsible for taking action must provide a written account to Parliament of the reasons for the delay.

Conclusion

1. On the whole, we feel that the Human Rights Act has been and remains successful, in that it continues to achieve its main aim of 'bringing rights home', as shown by a consistently low number of cases against the UK before the Strasbourg Court in recent years.[117]

2. While we have recommended clarifications and adjustments, e.g., in respect of timeframes, the operative provisions of the Act do not require amendment. Our analysis has shown that, over the years, the relationship between the domestic courts and the ECtHR as set out by s.2 HRA has consolidated into a dialogical and mutually respectful approach. Similarly, ss.3-4 HRA have successfully set out minimum judicial guarantees for human rights within the UK, whilst not unduly altering ordinary methods of interpretation and continuing to preserve parliamentary sovereignty more than other similarly structured constitutional systems in Europe.

[117] MoJ, 'Responding to human rights judgments' (n 56), pp 8-9.