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Executive Summary

1. In this submission, we argue that the Human Rights Act 1998 (HRA) strikes the appropriate balance between the legislature, executive and judiciary. The HRA harnesses and capitalises on the strength of each institution to work together to protect individual rights under the European Convention on Human Rights (ECHR), to which the government has reaffirmed its commitment.

A Holistic Reading of the UK

2. The central aim in enacting the HRA was two-fold. This first was to enable individuals to enforce their rights in the UK courts. Bringing rights home means that individuals no longer need to incur the expense and delays in taking claims to Strasbourg but can have their individual rights vindicated in UK courts. The second was to provide a mandate for UK courts to develop a distinctive UK understanding of the ECHR. Sections 2 and 3 allow UK courts to develop ECHR

jurisprudence in a way that takes full account of the UK constitutional and legal framework. The various provisions in the HRA draw a careful balance to achieve these aims while ensuring that Parliament retains primary responsibility for compliance with the Convention.

Judicial Dialogue Between UK Courts and the European Court of Human Rights

3. Section 2 of the HRA allows UK courts to take account of European Court of Human Rights (ECtHR) jurisprudence. In application, the UK courts have used section 2 in a flexible manner that harmoniously promotes institutional dialogue with the ECtHR and enables the development of a distinctive UK human rights culture.

4. The UK courts can deviate from ECtHR jurisprudence where the ECtHR standard does not incorporate an adequate reference to particular features of the regulated scenario; or when deviating from the ECtHR will promote dialogue between UK courts and the ECtHR on the nature and scope of human rights protection. There is also increasing support for UK courts to exceed or go beyond ECtHR jurisprudence. When confronted with a novel situation, where there are no clear ECtHR standards, UK courts will adjudicate the claim based on ECtHR principles along with the principles of UK law and the constitution.

The Impact of the HRA on the Relationship Between the Judiciary, Executive and Legislature

5. The HRA supports and enhances the separation of powers. The two cornerstone provisions, Sections 3 and 4, represent an attractive approach to the protection of rights that upholds the central role of parliamentary sovereignty in the UK constitutional framework.

6. Section 3 provides a strong form mandate from Parliament that requires UK courts to interpret legislation as far as possible to guarantee compliance with the Convention. In applying section 3, the courts have adopted a principled approach to interpretation that allows them to adjudicate the individual case

before them and supply appropriate remedies for breach of Convention rights, while at the same time respecting Parliament's fundamental choices. According to these principles, courts will not use section 3 in a manner that is inconsistent with the fundamental features of relevant legislation or where the solution to a problem concerning human rights is best left to Parliament, given its institutional competences or the courts' lack thereof. The interpretive power of courts under section 3 comes against the ongoing background principle that Parliament is always free to overturn judicial understandings of particular statutes. At the same time, the interpretive provision provides an important vehicle to protect individual rights pending parliamentary action. Given the sensitivity with which the courts have approached section 3, the most obvious and immediate effect of the repeal or amendment of the section would be to transfer the limited remedial work associated with protecting rights under this part of the HRA to Parliament, at the cost of an immediate remedy for the claimant.

7. In exercising their discretion in issuing section 4 declarations of incompatibility, courts are respectful of the boundaries of their institutional role in human rights protection. The principles developed by courts to guide the exercise of their discretion under section 4 give due weight to Parliament's primary role in rights protection. If section 4 were to be considered as part of the initial process of remedying human rights violations, the proper exercise of their discretion under this provision would still require courts to determine whether the legislation could be interpreted compatibly with the Convention, and therefore whether it is appropriate to issue a declaration of incompatibility. The current balance between sections 3 and 4 is therefore appropriate and gives a clear structure to courts to guide the exercise of their powers under the HRA and their role in relation to Parliament. By setting out the court's role clearly through a statutory framework, the HRA both facilitates the courts' role in adjudicating rights and acts as a constraint on their powers.

8. The current framework of the HRA enables Parliament and the courts to robustly protect human rights *cooperatively*. The HRA does not place the courts and Parliament in an antagonistic relationship where each competes to stamp its own vision on the development of human rights. Both institutions are fora where

the concrete meaning of human rights can be deliberated. The HRA creates institutional space for each to articulate its understanding of human rights while at the same time giving priority to Parliament.

9. A robust democratic liberal state should embrace a human rights framework that is able to protect rights and uphold parliamentary sovereignty at the same time, as both are significant aspects of a democratic constitutional framework.

Public Authorities and Section 6 of the HRA

10. The experience of the operation of the HRA shows that courts do not over-judicialise public administration. Section 6 obligations have been understood in a positive manner that draws public authorities into the UK human rights dialogue and furthers a human rights culture. The courts have been acutely aware of, and given due weight to, the expertise and competence of public authorities in contributing to the realisation of human rights.

Devolution and the HRA

11. In limiting devolved competences to within Convention standards, the Westminster Parliament intended for the human rights of those living in the devolved regions of the UK not to suffer any diminution. The courts across the UK have played a welcome, important and commendable role in fulfilling Parliament's will that the HRA should be enjoyed by all across the UK. This should be a central consideration in considering the future of the HRA.

Designated Derogation Orders and the HRA

12. The ECHR permits derogation from certain rights, under certain conditions, in times of war or public emergency threatening the life of the nation. Sections 1(2) and 14 of the HRA allow the Secretary of State to designate a derogation order.

13. It is critical, during times of conflict and emergency when derogation can be called into aid by a State to curtail people's human rights, that the courts remain

accessible and able to afford effective remedies to those whose rights have been interfered with disproportionately and without justification. As Baroness Hale put it, in her Romanes Lecture: 'The rights set out in the European Convention, protected in UK law by the [HRA], provide an essential framework for thinking about the role of law in a time of crisis... And if the law does have a protective role, as I believe it does, then there have to be accessible courts, staffed by independent and impartial judges, able to supply the answers… That is perhaps the only absolute: the one thing no crisis should do is to close down the courts.'[1]

14. If the protection of human rights is to be practical and effective, part of those 'answers' to be supplied by the courts must include remedies such as quashing orders capable of disposing with designated derogation orders if and when they reflect unjustified interferences with human rights.

[1] Baroness Hale, 'Law in a Time of Crisis' <https://www.ox.ac.uk/news-and-events/The-University-Year/romanes-lecture> accessed 17 February 2021 (emphasis added).

Introduction: A Holistic Reading of the HRA

15. In responding to the current review of the HRA, it is worth recalling its two foundational principles: to preserve the core constitutional principle of parliamentary sovereignty, while enabling individuals to enforce breaches of their rights under the ECHR in domestic courts. Allowing people to enforce their Convention rights in courts in the UK has obviated the delays and expense in taking a case to the ECtHR in Strasbourg. Equally importantly, enabling courts in the UK to rule on the application of the Convention has meant that judges in the UK have been able to make a distinctive contribution to the development of human rights both in the UK and in Europe. Moreover, the HRA has provided a democratic mandate to courts to adjudicate on claims of individual breaches of Convention rights.[2] By setting out the court's role clearly through a statutory framework, the HRA both facilitates the courts' role in adjudicating rights and acts as a constraint on their powers.

Effective Recourse in Courts in the UK and a Distinctive Contribution by UK Courts to Human Rights in Europe

16. The careful balance between the different sections of the HRA was deliberately chosen to address these two basic principles. Different parts of the Act were carefully designed to work together, so that Parliament retains the primary responsibility for compliance with the Convention, but individuals are able to enforce their rights effectively too. Indeed, the omission of Article 13 ECHR, which states that 'everyone whose Convention rights are violated shall have an effective remedy before a national authority', was premised on the creation of remedial avenues before national courts and Parliament through the HRA. While it has always been clear that giving courts the power to strike down legislation is incompatible with parliamentary sovereignty, it is also clear that a weak interpretive provision, such as that in New Zealand,[3] would not achieve the

[2] *A and Others v Secretary of State for the Home Department, X and Another v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 [42] (Lord Bingham); see text to fn 42.
[3] Section 6 of the New Zealand Bill of Rights: 'Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning should be preferred to any other meaning.'

objective of providing effective recourse for individuals in UK courts for breach of their rights. Weaker formulations were therefore rejected in favour of the requirement in section 3 that legislation must be read and given effect ‘so far as it is possible to do so’ in a way which is compatible with the Convention rights. Section 3 was specifically phrased to go beyond the then current rule, which limited the role of the Convention to resolving an ambiguity in a legislative provision.

17. As well as providing effective recourse for individuals for breach of their human rights in UK courts, this formulation also achieves the objective of weaving a distinctively UK contribution into the development of the jurisprudence of human rights in the ECtHR. Section 3 is complemented by section 2(1), which opens up further opportunities for judges in the UK to contribute to the dynamic and evolving interpretation of the Convention by providing that domestic courts must ‘take into account’ decisions of the ECtHR but are not bound by them. The role of courts in the UK is especially important in relation to rights such as Articles 8 – 11 of the ECHR, which permit the State to justify interferences with rights where necessary in a democratic society.

18. The aim of effective recourse in UK courts under sections 2 and 3 is further accomplished by section 6, which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. This enables individuals to effectively protect their Convention rights when breached by public authorities in domestic courts, rather than having to embark on the long-running process of an application to the ECtHR after having exhausted all domestic remedies. Section 6 also promotes clarity for public authorities who would otherwise have to wait for a drawn-out process to be complete before being clear as to what is lawful. Section 6 provides for a strict legality-based review of the decisions of public bodies other than Parliament and makes clear, by way of contrast, the special respect afforded to the decisions of Parliament under the HRA. While the decisions of public bodies may be struck down by the courts, the decisions of Parliament cannot.

Reaffirming Parliamentary Sovereignty

19. At the same time as mandating adjudication of Convention rights in courts in the UK, the HRA strongly reaffirms parliamentary sovereignty. The interpretive power of courts under section 3 comes against the ongoing background principle that Parliament is always free to overturn judicial understandings of particular statutes. At the same time, the interpretive provision provides an important vehicle to protect individual rights pending parliamentary action. Courts applying section 3 are further constrained by the 'so far as possible' formula. When a court cannot interpret a provision compatibly, it cannot overturn the provision, but returns the responsibility to Parliament by a declaration of incompatibility under section 4.

20. The reaffirmation of parliamentary sovereignty is reinforced by other provisions augmenting Parliament's primary role in respecting, protecting and fulfilling Convention rights. Under Section 19, the relevant Minister must make a statement before the Second Reading of any Bill either that the provisions of the Bill are compatible with Convention rights, or that the Minister is unable to make such a statement, but the Bill will nevertheless proceed. Section 19 makes clear that the task of protecting human rights is one both for the courts and Parliament working in tandem; it is in Parliament that the question of the compatibility of legislation with rights is always first considered, with review under sections 3 and 4 following after, if at all. It is worth noting that the courts have taken account of section 19 declarations in their own decisions about the compatibility of legislation with Convention rights.[4]

21. Finally, the Act as a whole should be understood in the context of the activities of the Joint Committee of Human Rights, which consists of members of both Houses and has the task of examining human rights matters within the UK and of scrutinizing every government Bill for its compatibility with human rights.

[4] See *R (Animal Defenders) v Culture Secretary* [2008] UKHL 15 [13]-[33].

The Relationship Between Domestic Courts and the ECtHR: Section 2 and Judicial Dialogue

22. It is our submission that the obligation under section 2 HRA to 'take into account' ECtHR jurisprudence has not been interpreted by the UK courts as requiring rigid transposition of that jurisprudence, but rather allows for:

(i) flexibility in circumstances where beneficial;

(ii) the promotion of judicial dialogue with the ECtHR;

(iii) a recognition of the legislature's democratic pedigree; and

(iv) a distinctive UK human rights culture within the Convention and at common law.

The Principle in R (Ullah) v Special Adjudicator

23. The starting point for the domestic implications of the section 2 'take into account' obligation is Lord Bingham's principle in *R (Ullah) v Special Adjudicator*: that, in the absence of special circumstances, 'the duty of national courts is to keep pace with the Strasbourg [ECtHR] jurisprudence as it evolves over time: no more, but certainly no less'.[5] The development of this principle has, however, demonstrated considerable flexibility by courts in the UK in order to provide a distinctive contribution to the interpretation of Convention rights which is appropriate for the domestic context.

24. The application of section 2 can be discussed with reference to three situations:

(i) where the ECtHR has already determined whether an issue constitutes a breach of a Convention right and there is no space for the margin of appreciation;

[5] *R (Ullah) v Special Adjudicator* [2004] UKHL 26 [20] (Lord Bingham).

(ii) where a domestic incident falls within the margin as determined by the ECtHR; and

(iii) where there is no clear ECtHR rule that applies to the given incident. In the former two situations, the domestic courts have recognised 'special circumstances' that warrant tempering of the *Ullah* principle.

ECtHR Has Already Made a Determination

25. Where there is a clear ECtHR determination of scope of the right in question and/or the permissibility of a limitation, the *Ullah* principle combines two conditions warranting separate analysis:

(i) the "no less" (lower limit) whereby domestic courts should not provide narrower Convention protection than given by the ECtHR; and

(ii) the "no more" (upper limit) whereby domestic courts should not give more generous Convention protection than the ECtHR (although they may do so under the common law).

26. There is some earlier support for the lower limit as rigid: where the ECtHR outlines minimum standards, the UK court cannot go below them.[6] However, later case law has developed at least two related circumstances in which the lower limit may be more flexible than the *Ullah* principle implies, where:

(i) there is a perceived 'failure' on the part of the ECtHR to examine a particular matter when outlining the lower limit; and

(ii) there is the potential for 'dialogue' between the domestic courts and the ECtHR which could render more appropriate standards for the UK context.

[6] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28 [98] (Lord Rodger).

27. The first tempering of the lower limit comes about where the domestic courts view an ECtHR standard as having been set without adequate reference to particular features of the regulated scenario. On this basis, the Supreme Court has rejected the ECtHR rule against convictions grounded decisively in hearsay evidence, on the ground that the ECtHR, in formulating the rule, did not consider the fair trial safeguards inherent in the adversarial trial system.[7] This reasoning was also used by the Supreme Court to support excluding adjudication of housing entitlements from the scope of Article 6, on the basis that the ECtHR had not sufficiently appreciated the risk of consequent 'welfare over-judicialisation' raised in domestic proceedings.[8]

28. The second tempering is grounded in the promotion of 'dialogue' between the UK courts and the ECtHR, with the aim of developing more appropriate Convention standards for the UK.[9] Importantly, the first and second reasons for lower limit flexibility can be viewed as conceptually linked: the 'dialogue' sought is the ECtHR consideration of those factors which the domestic courts believe have been overlooked. Such a dialogic approach links to the broader question of the role of the Convention vis-à-vis the UK: the degree of pluralism that can exist within a regional system of human rights. Allowing domestic standards to go below the lower *Ullah* limit, to encourage dialogue and ensure domestic appropriateness, reflects a more pluralistic view of human rights.

29. The strength of the upper limit is uncertain. Whilst there is some support for a rigid upper limit,[10] this characterisation of the UK-ECtHR interplay has been challenged as incorrect.[11] The rigidity of the upper limit has not seen a large volume of litigation, probably as litigants would be unlikely to try and make claims explicitly ruled out by the ECtHR. Nevertheless, there is some support for going beyond the upper limit where the ECtHR jurisprudence is seen as out of date.[12] Furthermore, the HRA does not preclude the development of common

[7] *R v Horncastle* [2009] UKSC 14 [107] (Lord Phillips).
[8] *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36 [33], [37] (Lord Carnwath).
[9] See *Horncastle* (n 6) [11] (Lord Phillips); *Poshteh* (n 7) [36] (Lord Carnwath).
[10] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 [106] (Lord Brown).
[11] *In re P* [2008] UKHL 38 [50] (Lord Hope); *Ambrose v Harris* [2011] UKSC 43 [129] (Lord Kerr).
[12] *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45 [43] (Lord Wilson).

law fundamental rights, which may be informed by the Convention (though are not subject to section 2 HRA).[13]

Falls within the Margin as Determined by the ECtHR

30. Where a situation falls within the margin of appreciation as determined by the ECtHR, the domestic courts can still determine compatibility with the Convention.[14] This compatibility is to be determined exclusively through *domestic* jurisprudence, albeit within the confines of the margin as established by the ECtHR.[15] However, if there is incompatibility in a margin of appreciation situation, the courts nevertheless will be cautious to issue a declaration of incompatibility under section 4 HRA, in light of the constitutional and institutional competence of the legislature as a democratically elected body.[16]

31. Nevertheless, even where the limits of the margin have been established by the ECtHR, the domestic courts have demonstrated some willingness to go beyond those limits. For example, although the ECtHR had established that an absolute ban on televised political advertising violated Article 10,[17] the House of Lords upheld a similar domestic ban on the basis that the full range of arguments, concerning the operation of television advertising on democratic processes, had not been considered by the ECtHR.[18] This echoes the discussion above, whereby inadequate ECtHR reference to material factors tempers the limits set by that Court.

No Clear ECtHR Determination

32. Where there is no clear ECtHR determination on scope or permissibility, the domestic courts have developed a basic proposition: the courts must 'work the answer out for [them]selves…taking into account, not only the [ECtHR

[13] *Osborn v Parole Board* [2013] UKSC 61 [57]-[63] (Lord Reed); *Kennedy v The Charity Commission* [2014] UKSC 20 [46] (Lord Mance).
[14] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 [66] (Lord Neuberger).
[15] *In re P* (n 10) [120] (Baroness Hale).
[16] *Nicklinson* (n 13) [116] (Lord Neuberger); [191] (Lord Mance).
[17] *VgT v Switzerland* (2002) 34 EHRR 4 (European Court of Human Rights).
[18] *Animal Defenders International* (n 3) [29] (Lord Bingham).

principles], but also the principles of [the UK's] own law and constitution'.[19]

33. This statement is open to at least two possible interpretations, both of which find support.

(i) This may direct the domestic courts to determine what the ECtHR *would* have decided if the case had gone to the Chamber.[20]

(ii) This may direct the domestic courts to determine what the ECtHR *should* include within the questions of scope and/or permissibility.[21]

34. Through this lens, the first interpretation reflects an approach that values uniform application of the Convention throughout the Council of Europe (subject to the margin of appreciation). Such an approach would support the separate development of common law rights where appropriate (which may themselves be informed by Convention jurisprudence). The second interpretation reflects a more pluralist system in which the Convention and common law rights overlap and inform one another (though potentially at the cost of uniformity).[22]

The Impact of the HRA on the Relationship Between the Judiciary, Executive and Legislature

35. Sections 3 and 4 mark the cornerstone of the HRA, and a central way rights are made effective in the context of legislative decision-making. We submit that neither should be amended or repealed and that, when understood in context, these sections represent an attractive approach to the protection of rights. It is an approach consistent with parliamentary sovereignty, the separation of powers, the wider balance of political and legal aspects of the constitution and the commitment to protect individual human rights which come as part and parcel of the UK commitment to the ECHR. Sections 3 and 4 embody, in other

[19] *Moohan v Lord Advocate* [2014] UKSC 67 [53] (Lady Hale).
[20] *Rabone v Pennine Care NHS Trust* [21] (Lord Dyson): the exercise is to discover the "essential features" of the cases that have been decided, and to infer accordingly.
[21] ibid [112] (Lord Brown); the UK courts may take the "further step".
[22] This uniformity value was identified in *Ullah* (n 4) [20] (Lord Bingham).

words, a uniquely UK approach to the protection of rights and should be recognised as such.

36. As the Terms of Reference note, the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The structure of sections 3 and 4 of the HRA enables Parliament, public authorities and the courts to shape, and contribute to, the overall UK constitutional and human rights frameworks in a balanced and meaningful manner. The principles of judicial independence and the separation of powers inform all these relationships. Whilst courts should not over-reach by adjudicating on specific political and policy questions, they have the duty to apply the law in a way that is consistent with the rule of law and Convention rights. Furthermore, the values of judicial independence and the rule of law are codified in statute in the Constitutional Reform Act 2005. The HRA is a significant piece of legislation that not only makes a contribution to the UK constitution in and of itself, but in its current form, also works in a complementary fashion with other constitutional sources.

Section 3 and Parliamentary Sovereignty

37. As mentioned above, section 3 provides that legislation must be interpreted 'so far as it is possible' in a way that is consistent with the rights protected by the HRA. If this is not possible, the courts move to consider issuing a non-binding declaration of incompatibility under section 4. Section 3 represents a strong form interpretive obligation and has been understood as such by the courts, requiring them, in some cases, to read down express wording in legislation.[23] This represents a departure from the prior position at common law where the courts would use human rights as an aid to interpretation only in the context of vague or ambiguous legislation.[24] It might be suggested that, in this regard, section 3 marks a departure from deference to the sovereignty of Parliament. This, however, is a misunderstanding: it is precisely because Parliament *is* sovereign

[23] *R v A* [2001] UKHL 25; *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[24] *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696, 747-48.

that it has the capacity to create powers or impose duties on other institutions to modify what would otherwise be the effect of its own legislation, for example through the bestowal of Henry VIII powers on the executive, or through the imposition of interpretive duties on the courts. The move beyond the common law position is therefore not only consistent with parliamentary sovereignty but functions as a vindication of it: only Parliament has the power under the constitution to institute such a mechanism for review. Section 3 also represents a more attractive approach to the protection of rights than that available at common law. Replication of the latter would entail sporadic enforcement of rights and an unnecessary transfer of remedial work associated with defending human rights from the courts to Parliament.

Section 3 and the Separation of Powers

38. As the Terms of Reference make clear, the central issue in relation to section 3 is whether it has been understood by the courts in a way that respects the appropriate division of responsibilities between the judiciary and Parliament. Two aspects of the courts' jurisprudence are particularly relevant to this question. First, although the courts have understood section 3 to require them to depart from the precise wording of statutes, they will not use it in a way which is 'inconsistent with a fundamental feature of [the relevant] legislation.'[25] This principled limitation on the courts' interpretive power allows them to carry out important remedial work in protecting rights (for example, by reading clauses in rent protection legislation to apply to same sex couples as well as those 'living as husband and wife'[26]) whilst at the same time respecting Parliament's fundamental choices. Second, the courts will not use their interpretive powers in a context where the appropriate solution to a problem concerning human rights is best left to Parliament given its institutional competences, or the courts' lack thereof.[27] These two limitations function together to make sure that the courts do not overstep their constitutional role while at the same time ensuring effective protection of the rights of litigants.

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[25] *Ghaidan* (n 22) [33].
[26] ibid.
[27] *Bellinger v Bellinger* [2003] UKHL 21 [34]-[37].

39. Given the sensitivity with which the courts have approached section 3, the most obvious and immediate effect of the repeal or amendment of the section would be to transfer the limited remedial work associated with protecting rights under this part of the HRA to Parliament, at the cost of an immediate remedy for the claimant.[28] It is worth recognising in this regard that if Parliament disagrees with the interpretation provided by the courts of a particular aspect of its legislation under section 3 it is always open to it to amend the law, making clear its preferred approach.

The Relationship between Section 3 and Section 4

40. The HRA creates a delicate ecosystem designed to achieve meaningful human rights accountability in a manner that respects the institutional roles of Parliament and the courts. The interpretation and application of sections 3 and 4 by the courts demonstrate a high degree of sensitivity to concerns about institutional role and competence. As was demonstrated above, section 3 places a clear limit on the court. It cannot go beyond what is possible in re-interpreting legislation. Judicial restraint is embedded into the exercise of section 3.[29]

41. Should the courts be unable to interpret legislation compatibly with rights, they have the power, but not a duty, to issue a declaration of incompatibility under section 4. If the court concludes that the legislation is incompatible with Convention rights 'it *may* make a declaration of that incompatibility.' The Supreme Court has observed that the 'circumstances in which such self-restraint [under section 4 may be used] have not been comprehensively catalogued.'[30] However, there is jurisprudence which holds that deference to Parliament is a relevant factor to guide courts in deciding whether to issue a declaration of incompatibility, particularly to ensure that the court does not foreclose imminent Parliamentary debates.[31] Notably, there are contexts in

[28] Section 4 declarations having no immediate remedial consequences for the parties to a given case.
[29] *In Re G* [2009] 1 AC [130].
[30] *Steinfeld and Keidan v Secretary of State for International Development* [2018] UKSC 32 [57].
[31] *Nicklinson* (n 13) [113]-[118].

which the courts have chosen—out of respect for Parliament's role—not to issue a section 4 declaration despite there being a strong case that the relevant legislation breaches convention rights.[32] This again emphasizes the court's cognizance of institutional competence in relation to claims under the HRA. Should section 4 be considered as part of the initial process of interpretation, this aspect of discretion might be lost.

42. Section 4 declarations are, of course, an important way for the court to signal to Parliament the existence of a rights issue while leaving to it the decision as to whether to act and if so in what way.[33] Indeed, the courts have acknowledged that where a court issues a declaration of incompatibility it 'does not oblige the government or Parliament to do anything.'[34]

43. In practice, courts have regularly and constructively used section 4 declarations of incompatibility. As of December 2020, there had been forty-three declarations of incompatibility.[35] Recently, there have been high-profile uses of section 4, including in the context of heterosexual couples entering civil partnerships[36] and in access to abortion in Northern Ireland.[37] In both of these cases, the courts only considered the applicability of section 4 remedies. There was no attempt to interpret the legislation to be consistent with the Convention under section 3. This suggests that in areas where there are reasonable disagreements on the development of human rights, the Court is highly cognizant of the limits of its role. Thus, it is incorrect to imply that courts through section 3 are overtaking the role of Parliament in the development and application of Convention rights. Moreover, an examination of the circumstances in which section 4 tends to have been used by the courts – in divisive aspects of human rights including national

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[32] ibid [114]-[118].
[33] A remedial order under section 10 of the Human Rights Act being available as an alternative to the use of legislation to affect the relevant change.
[34] *Steinfeld and Keidan* (n 29) [60].
[35] Lord Chancellor and Secretary of State for Justice, 'Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights' (2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944857/responding-to-human-rights-judgments-2020_pdf.pdf> accessed 8 February 2020.
[36] *Steinfeld and Keidan* (n 29).
[37] The UKSC found the restrictions on access to abortion were incompatible with the Convention but concluded that the Northern Ireland Human Rights Commission did not have standing to bring the claim; *Re Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27.

security and social justice – also indicates that the judiciary is highly sensitive to the need to respect the role of democratically elected decision-making bodies.

44. It might be suggested that greater reliance on section 4, and comparatively less reliance on section 3, would increase dialogue between the courts and Parliament. To the extent that there has been dialogue between the two, however, this has been achieved first through the mechanism of section 19 and the important work of the Joint Committee on Human Rights, and second through the courts' sensitivity in deciding *whether* to issue a section 4 declaration.

45. Moreover, regardless of whether the court concludes it can remedy legislation through interpretation or whether it concludes it is beyond its institutional role to do so, the judicial process of *considering* section 3 remedies is of immense value. Under section 3 the court is directed to balance potential interpretations of the legislation that could bring it in line with Convention rights against the need for deference to the decisions of Parliament. In evaluating the applicability of section 3, the court can sharpen its analysis on the extent, magnitude or severity of human rights violations, and it can also untangle and map out potential competing remedial routes for Parliament to consider.[38] Section 3 draws the judiciary into a more deliberative relationship with Parliament and the executive.[39] This should be seen as one of the vital strengths of section 3 as it allows courts to reflect in an open, value-based, dispassionate and transparent manner on the development of human rights. This in turn can positively sharpen debates within Parliament when deliberating on human rights. Through its engagement with section 3, courts are also able to determine when a case is more suited to fall within the expertise of Parliament and therefore within the remit of section 4 and not section 3. The current balance between sections 3 and 4 ensure this possibility.

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[38] *Bellinger* (n 26) [34]-[49].

[39] Sandra Fredman 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Right to Vote' in Murray Hunt, Hayley Hooper and Paul Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015).

46. As regards delegated legislation, despite arguments that the courts have taken an interventionist approach a recent study has shown that few challenges to delegated legislation under the HRA have been successful.[40] Moreover, since less time and resources are available to Parliament to scrutinize delegated legislation (as compared with primary legislation), the ability of the courts to assess the Convention compatibility of delegated legislation provides 'not infrequently the first substantial scrutiny' that such secondary legislation receives.[41] Thus, courts' ability to review delegated legislation for ECHR compliance fills a gap in parliamentary resource and enables Parliament's time to be used most effectively, while ensuring that legislation made by the executive under statutory powers adheres to the UK's commitment to protect human rights.

47. It is worth emphasizing that in undertaking review of primary or delegated legislation for compatibility with the rights set out in the ECHR, the courts are not usurping the role of the legislature or the executive, but rather giving effect to the duties placed upon them by Parliament. Sections 3 and 4 of the HRA are finely balanced, enabling the courts to ensure that human rights are adequately protected, while respecting the authority of the sovereign legislature.

48. The democratic nature of the role of courts in this task has been astutely articulated by Lord Bingham: 'The function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself… Parliament has expressly legislated in [the HRA] to [require the courts] so far as possible, to give effect to Convention rights... The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is

[40] Joe Tomlinson, Lewis Graham and Alexandra Sinclair, 'Does Judicial Review of Delegated Legislation Under the Human Rights Act 1998 Unduly Interfere with Executive Law-Making?' <https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/> accessed 22 February 2021.
[41] ibid.

unaffected... The 1998 Act gives the courts a very specific, wholly democratic, mandate.'[42]

The Need for Co-operative Human Rights Dialogue

49. The current framework of the HRA enables Parliament and the courts to robustly protect human rights *cooperatively*. The HRA does not place the courts and Parliament in an antagonistic relationship where each competes to stamp its own vision on the development of human rights. Both institutions are forums where the concrete meaning of human rights can be deliberated. Taken together, sections 3 and 4 recognise that courts and Parliament may have divergent understandings of how human rights should best evolve and develop. The HRA creates institutional space for each to articulate its understanding of human rights while at the same time giving priority to Parliament.

50. Going forward, it can reasonably be expected that human rights claims will increase in their complexity, and therefore, a form of 'task sharing' is desirable given the limits of each institution. Parliament and government are unable to foresee every potential human rights issue. This means that the courts have an important role within the human rights framework. The legal expertise and experience that the courts are able to draw upon highlight their added-value in the process of institutional co-operation. The framework of the HRA offers an important lens through which multi-faceted human rights issues can be deliberated. It allows Parliament and the courts, through the existing mechanisms, to address human rights claims appropriately, so that the resolution of competing interests and rights benefits from a democratic dialogue. At the same time, any risk of over-judicialising public administration is removed by the limits placed on the courts by the constitutional balance of power, the HRA and by the courts themselves, who have policed the boundaries of their own role by upholding the principle of parliamentary sovereignty and through exercising deference. Therefore, the current human rights framework enables

[42] *A v SSHD* (n 2) (emphasis added).

the UK courts to draw on legal expertise in a way that is nuanced, politically sensitive and upholds key constitutional values.

51. A robust democratic liberal state should embrace a human rights framework that is able to protect rights and uphold parliamentary sovereignty at the same time, as both are significant aspects of a democratic constitutional framework.

HRA's Application to Public Authorities

52. The Terms of Reference ask whether the current approach risks "over-judicialising" public administration and an improper involvement of the courts in questions of policy. A number of important reasons tell against such a conclusion.

53. As mentioned above, it is unlawful for public authorities to act in a way that is incompatible with the HRA (section 6(1)). But, more positively, and as recognized during the introduction of the HRA, public authorities are, and should remain, key contributors to the UK's human rights dialogue.[43] As Eleonor Roosevelt famously remarked, after all, human rights begin in small places, close to home: "they are the world of the individual person; the neighbourhood he [or she] lives in; the school or college he [or she] attends; the factory, farm, or office where he [or she] works."[44] Public authorities are crucial to the realization of human rights in their everyday decisions, policies and practices. Local councils, schools, police services and hospitals offer distinct skills, resources and experience which make them especially well-placed to detect how the human rights of specific individuals or groups, at particular times or places, might be unduly impacted by seemingly benign policies or initiatives. So too are frontline decision-makers especially able to consider, evaluate and explain how competing human rights might be best balanced amidst the various operational contexts that animate the modern state.

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[43] See, most notably, L Irvine, *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays* (Hart 2003) 23.
[44] Eleanor Roosevelt, '*Where Do Human Rights Begin?'* Speech to the United Nations, 1958.

54. The courts have been acutely aware of the competence of public authorities in contributing to the realization of human rights. The courts have established a clear and principled position that ensures human rights are protected without over-judicializing the work of public authorities. The Supreme Court has consistently held that an authority's failure to reason its way to a conclusion using the Convention is no basis for unlawfulness under section 6(1) of the HRA.[45] This marks a significant steer *away* from the over-judicialisation of public administration. As made clear by the Supreme Court, 'Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows.'[46] Given the competence of public authorities, where an authority is conscious of, or addresses its mind to, the Convention in arriving at its decision, the court 'will give due weight to such judgments' and 'a challenger's task will be the harder where the authority has 'conscientiously paid attention to all human rights considerations.'[47] So too have the courts been sensitive to the situational exigencies frontline public administrators can find themselves in. In the context of policing, for instance, the Supreme Court has made clear that 'a definite area of discretionary judgment must be allowed the police. And a judgment on what is proportionate should not be informed by hindsight.'[48]

55. In addition, the courts' recognition of the above issues has also shaped their interpretation of section 2 HRA, concerning the duty to "take into account" the jurisprudence of the ECtHR.[49]

Devolution and the HRA

56. The Terms of Reference mention that the HRA is a protected enactment under the devolution settlements. It is crucial that the Review take into account the fact that the HRA is an integral part of the competence of the devolved legislatures

[45] *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420.
[46] *R (SB)* (n 44) [68] (Lord Hoffmann).
[47] ibid [31] (Lord Bingham).
[48] *Re DB's Application* [2017] UKSC 7 [76] (Lord Kerr).
[49] As discussed above at para 25 of this submission.

in Belfast,[50] Edinburgh[51] and Cardiff[52] before recommending any change in the current structure. In limiting devolved competences to within Convention standards, the Westminster Parliament intended for the human rights of those living in the devolved regions of the UK not to suffer any diminution. As observed by Beirne, 'Devolution has built into the various constitutional arrangements explicit reference to the European Convention... Tampering with the Convention, or its outworkings in the form of the Human Rights Act, risks unravelling hard won political and constitutional battles in devolved territories.'[53] Both the law officers and courts across the UK have played a welcome, important and commendable role in fulfilling Parliament's will that the HRA should be enjoyed by all across the UK.

57. A number of recent decisions illustrate how the Supreme Court has acted consistently to ensure devolved regions do not go beyond the competences, with respect to human rights, that Parliament granted them.

58. The Welsh Assembly, for example, sought to enact legislation that would impose liability for NHS treatment of those suffering from asbestos-related diseases on persons liable to pay compensation to those victims. The Supreme Court held that such legislation was retrospective in nature and without special justification, and thus infringed Article 1 of the first protocol of the ECHR.[54]

59. In Northern Ireland, legislation that would have prevented the adoption of children by unmarried couples was held by the Supreme Court to infringe Article 14 of the ECHR, which prohibits discrimination.[55] More broadly, though, the Supreme Court has been crucial in securing women's reproductive rights in Northern Ireland, finding that legislation that criminalized abortion in situations

[50] Northern Ireland Act 1998, s 6(2)(c).
[51] Scotland Act 1998, s 29(2)(d).
[52] Government of Wales Act 2006, s 81(1).
[53] Maggie Beirne, 'A Response to the Lecture by Shami Chakrabarti: Human Rights or Citizen's Privileges: The Great Bill of Rights Swindle' (2012) 83(3) The Political Quarterly 466, 467.
[54] *Recovery of Medical Costs for Asbestos Diseases (Wales) (Bill) (Reference by the Counsel General for Wales)* [2015] UKSC 3.
[55] *Re P* (n 10).

of rape, incest and fatal foetal abnormality breached the right to private life, protected by Article 8 of the ECHR.[56]

60. In Scotland, legislation that would have mandated that a 'named person' be assigned to all children for child protection purposes, and that private information be shared amongst named individuals, was held to be contrary to Article 8 of the ECHR, because it failed to protect privacy.[57]

61. In decisions such as these, across a variety of areas of law, the court has sought to fulfil Parliament's intent that those in the UK should enjoy the same core human rights protections, regardless of which of the four regions they happen to live in.

Remedies Available for Designated Derogation Orders

62. Article 15 ECHR states that, in times of war or other public emergency threatening the life of the nation, a State may take measures derogating from certain Convention obligations to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with the State's other obligations under international law.[58] Derogations are to be notified at the international level under Article 15(3) of the ECHR. The effect of a valid derogation (one made in accordance with the requirements of Article 15 of the ECHR) is that the derogating State is able, compatibly with the Convention, to interfere with certain ECHR rights to an extent which it would not be able to do without violating its obligations under the Convention in the absence of a valid derogation.

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[56] *Re Northern Ireland Human Rights Commission* (n 36).
[57] *Christian Institute v Lord Advocate (Scotland)* [2016] UKSC 51.
[58] Article 15(1) of the ECHR. No derogation is permissible in respect of certain 'non-derogable' rights; see Article 15(2) of the ECHR. These include Article 2, except in respect of deaths resulting from lawful acts of war, Articles 3, 4(1) and 7.

At the Domestic Level: Designated Derogation Orders under section 14 of the HRA

63. The dualist approach taken to treaties in the UK's constitutional order means that action taken at the international level requires legislation for domestic implementation.[59] In the words of the Joint Committee on Human Rights: 'In international law, the United Kingdom's power to derogate from treaty obligations is exercised by virtue of the Royal Prerogative. The Human Rights Act 1998 provides a procedure for translating the notification of a derogation into United Kingdom law.'[60]

64. Section 1(2) of the HRA enacts that a number of ECHR Articles shall 'have effect for the purposes of this Act subject to any designated derogation'. The designation of derogations for the purposes of the HRA is governed by section 14 of the HRA. It defines a 'designated derogation' as 'any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State'. Section 14 thereby confers an order-making power, enabling the Secretary of State to designate a derogation notified at the international level as a designated derogation for the purposes of the HRA.

65. What does it mean for a derogation to be 'designated for the purposes of' the HRA? The consequence of designation is that the Convention Articles referred to in section 1 of the HRA are given effect in domestic law only to the extent that they are not subject to a designated derogation in an order made under section 14 of the HRA.[61] So, where a Convention right that would normally be given effect in UK law through section 1 is the subject of a designated derogation, the right will <u>not</u> take effect in domestic law (to the extent of the derogation), since

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[59] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[60] Joint Committee of Human Rights, 'Continuance in Force of Sections 21 to 23 of the Anti-Terrorism, Crime and Security Act 2001' (2003) Fifth Report of Session 2002-2003 HC 462 [30]. The 'translation procedure' is under s. 14 HRA, governing designated derogation orders.
[61] *A v SSHD* (n 2) [225]: 'The rights defined in the Convention have become rights in United Kingdom law by virtue of the Human Rights Act; but section 1(2) provides that the rights defined in the Convention articles shall have effect subject to any 'designated derogation'.'

the operation of section 1 is precluded co-extensively with any order made under section 14.

Guidance on Remedies: A v SSHD *and the 2001 Derogation Order*

66. There has only been one derogation notified by the UK since the HRA came into force,[62] and there has only been one designated derogation order made under section 14 of the HRA: The Human Rights Act 1998 (Designated Derogation) Order 2001/3644 (the Derogation Order). The legislative scheme underlying this order was challenged in *A v Secretary of State for the Home Department*.[63]

67. Following the 9/11 attacks in the US, Parliament enacted the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act), Part 4 of which allowed the Home Secretary to certify certain persons as suspected international terrorists.[64] If a certified person was subject to immigration control, they were liable to be removed from the UK and could be detained pending removal.[65] If removal could not proceed within a reasonable time,[66] the 2001 Act permitted their detention for an indefinite period.[67] Anticipating that such detention would have fallen foul of Article 5(1)(f) of the ECHR,[68] the Government notified the Secretary General of the Council of Europe of a derogation under Article 15 of the ECHR that, in its view, the measures in the 2001 Act constituted a justified derogation from the UK's obligations under Article 5 (the right to liberty and security of person). In addition, the Home Secretary issued the Derogation Order, designating the derogation so notified for the purposes of the HRA. This was designed to 'allow courts in the UK to interpret Article 5 as subject to that derogation when giving effect to the [HRA]'.[69]

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[62] Council of Europe, 'Search on Treaties' <https://www.coe.int/en/web/conventions/search-on-treaties> accessed 17 February 2021.
[63] *A v SSHD* (n 2).
[64] Section 21 of the 2001 Act.
[65] Sections 22 and 23 of the 2001 Act.
[66] For example, because of a risk that removal would render the deportee liable to treatment contrary to Article 3 of the ECHR following *Chahal v United Kingdom* (1997) 23 EHRR 413 (European Court of Human Rights).
[67] Section 23 of the 2001 Act.
[68] *Chahal* (n 66) [113].
[69] D Feldman, 'House of Lords on Anti-terrorism, Crime and Security Act 2001 in *A and others v Secretary of State for the Home Department* and *X and another v. Secretary of State for the Home*

68. In *A v SSHD*, a number of individuals detained under the 2001 Act challenged the lawfulness of their detention, arguing that the 2001 Act regime did not meet all of the conditions under Article 15(1) of the ECHR.[70]

69. Section 30 of the 2001 Act gave the Special Immigration Appeal Commission (SIAC) exclusive jurisdiction in respect of 'derogation matters,' which were defined by reference to the designation under section 14 HRA of a derogation made to permit the detention of a person under the 2001 Act scheme.[71] Under section 30(2), a 'derogation matter' could only be questioned in legal proceedings before SIAC, subject to a right of appeal on a point of law.[72] Section 30(2)(a) designated SIAC as the appropriate tribunal for the purpose of section 7 HRA,[73] and section 30(2)(b) empowered SIAC to hear proceedings which could, but for section 30(2), be brought in the High Court. Section 30(3)(c) authorised SIAC, in respect of the latter kind of proceedings, to 'do anything which the High Court [could] do'. Thus, section 30 of the 2001 Act provided a special statutory scheme for taking legal proceedings in respect of a 'derogation matter', to challenge a derogation and a designated derogation order made in respect of the 2001 Act regime.

70. SIAC held that the detention measures under the 2001 Act discriminated unjustifiably between UK and foreign national terrorist suspects.[74] Exercising its powers under section 30(2)(b) and (3)(c) of the 2001 Act, SIAC made an order quashing the Derogation Order on the grounds that it was outside the Secretary of State's powers.[75] SIAC also issued a declaration of incompatibility under

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Department, decision of 16 December 2004. Terrorism, Human Rights and their Constitutional Implications' (2005) 1(3) ECL Review 531, 532.

[70] *A v SSHD* (n 2) [3].

[71] Section 30(1) of the 2001 Act.

[72] Appeals were covered by s. 30(5) of the 2001 Act, which permitted an appeal to the 'appropriate appeal court' as defined in s. 7 of the Special Immigration Appeals Commission Act 1997. This provision designated the Court of Appeal as the appropriate appeal court and specified that an appeal may be brought on any question of law material to SIAC's final determination: s. 7(1).

[73] Section 7 governs proceedings to challenge the lawfulness of action by a public authority under section 6 of the HRA.

[74] *A v Secretary of State for the Home Department* [2002] HRLR 45 [95].

[75] *A and Others v Secretary of State for the Home Department, X and Another v Secretary of State for the Home Department* [2002] EWCA Civ 1502; [2003] 2 WLR 564 [136].

section 4 of the HRA in respect of Part 4 of the 2001 Act which set out the discriminatory detention regime.[76]

71. Under section 30(5) of the 2001 Act, an appeal from SIAC's determination could be brought only on a point of law to the 'appropriate appeal court'.[77] The Court of Appeal held (contrary to SIAC) that the distinction made between UK and foreign nationals in the legislative scheme was justified.[78] However, the Court of Appeal's conclusion was subsequently overturned by the House of Lords.

72. A majority of the House of Lords concluded (8:1) that the detention regime in the 2001 Act did not satisfy the requirements of Article 15 ECHR. Although Lord Scott found it puzzling that the compatibility of the Derogation Order should be assessed under Article 15, given that the latter is itself not incorporated into the HRA,[79] the Attorney General accepted that the Derogation Order would not be within the Home Secretary's powers if it provided for a derogation which was not permitted under Article 15 ECHR.[80] Consequently, the House of Lords evaluated the 2001 Act regime against the criteria in Article 15.

73. Lord Hoffmann would (with the majority) have allowed the detainees' appeal, but on the basis that there was 'no public emergency threatening the life of the nation'.[81] The other seven majority judges also concluded that the scheme was incompatible with Article 15, but on different grounds. They accepted that there was a public emergency threatening the life of the nation, but held that the regime under the 2001 Act was disproportionate and discriminatory.[82] Lord Walker, the sole dissenting judge, considered that the 2001 detention regime

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[76] *A v SSHD* (n 74) [96].
[77] See explanation at (n 72) above. Under s. 7(3)(a) of the Special Immigration Appeals Commission Act 1997, the 'appropriate appeal court' was the Court of Appeal.
[78] See *A v SSHD* (n 75) [52], [132], [134].
[79] *A v SSHD* (n 2) [151]-[152]; Joint Committee on Human Rights, 'Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism' (2008) Thirteenth Report of Session 2007-08 HC 380 [95]-[98]; Tom Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68 Morden Law Review 655, 662.
[80] *A v SSHD* (n 2) [151], [160].
[81] ibid [95].
[82] ibid [44], [68], [85], [139], [159], [189], [219], [240].

was proportionate.[83] However, pursuant to the majority decision, the House of Lords made a declaration of incompatibility under section 4 of the HRA in respect of the relevant part of the 2001 Act, and issued an order quashing the Home Secretary's Derogation Order.[84]

74. So far as remedies are concerned, then, the first quashing order in *A v SSHD* was made under the special statutory scheme granting SIAC the power to decide 'derogation matters', which gave it the power to hear proceedings in place of the High Court and to do 'anything which the High Court [could] do'.[85] The appeal court was permitted to do 'those things which it could … do in an appeal brought from the High Court in proceedings for judicial review'.[86] The statutory scheme thus indicated the remedies available to SIAC and the appellate courts.

75. What would the position have been in the absence of the special statutory scheme? The Prevention of Terrorism Act 2005 (the successor to the 2001 Act) permitted the making of 'derogating control orders',[87] but was not accompanied by the sort of statutory scheme incorporated in the 2001 Act.[88] No such orders were in fact made.[89] In *A v SSHD*, SIAC stated: 'Since it is contained in a statutory instrument, the designated derogation would have been open to challenge by means of judicial review. In addition, it might have been contended by anyone who was detained that that action was unlawful because it was incompatible with his human rights. So it was that section 30 of the 2001 Act [provided] that any challenge must be made to SIAC and [gave] to SIAC all the powers which would otherwise be exercisable by the High Court'.[90]

76. It appears, therefore, that had the 2001 Act not provided for legal proceedings concerning a 'derogation matter' to proceed only before SIAC (and the appellate

[83] ibid [217]-[218].
[84] ibid.
[85] Sections 30(1), 30(2)(b) and 30(3)(c) of the 2001 Act.
[86] Section 30(5) of the 2001 Act.
[87] Section 1(2) of the Prevention of Terrorism Act 2005.
[88] *A v SSHD* (n 1) [101]-[102].
[89] Terrorism Prevention and Investigation Measures Act 2011, Explanatory Notes [5].
[90] *A v SSHD* (n 74) [9] (emphasis added).

courts), the Derogation Order would have been challengeable by way of an application for judicial review. It is necessary, next, to set out the remedies available under this cause of action.

Remedies in Judicial Review

77. Under section 31(1) of the Senior Courts Act 1981, the High Court may award the following forms of relief in respect of an application for judicial review: a mandatory, prohibiting or quashing order; an injunction; or a declaration.[91]

78. Where the exercise of a statutory power is flawed, the normal remedy will be a quashing order: see e.g. Lord Hoffmann in *R (on the application of Edwards and another) v Environment Agency and others*: 'It is well settled that "the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary" … But the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it'.[92]

Summary: Remedies Available to Courts Considering Challenges to Designated Derogation Orders

79. The remedy concerning the Derogation Order in *A v SSHD* was a quashing order, made initially by SIAC under the special statutory scheme in section 30 of the 2001 Act and ultimately re-made by the House of Lords. In the absence of a special statutory scheme, it appears that, as an exercise of a statutory power, a designated derogation order would be open to challenge by way of judicial review.[93] The remedies available to domestic courts considering challenges to designated derogation orders should, in those circumstances, therefore be the remedies available in applications for judicial review. As noted above, where the executive action under review is flawed (as would be the case

[91] The Court may also, in limited circumstances, award damages: see s. 31(4) of the Senior Courts Act 1981.
[92] [2008] UKHL 22 [63] (internal citation removed).
[93] See text to (n 90).

for a designated derogation order giving effect to a purported derogation that does not meet the requirements under the Convention), the most appropriate remedy will usually be a quashing order.[94]

80. It is critical, during times of conflict and emergency when derogation can be called into aid by a State to curtail people's human rights, that the courts remain accessible and able to afford effective remedies to those whose rights have been interfered with disproportionately and without justification. As Baroness Hale put it, in her Romanes Lecture: 'The rights set out in the European Convention, protected in UK law by the [HRA], provide an essential framework for thinking about the role of law in a time of crisis... And if the law does have a protective role, as I believe it does, then there have to be accessible courts, staffed by independent and impartial judges, able to supply the answers… That is perhaps the only absolute: the one thing no crisis should do is to close down the courts.'[95]

81. If the protection of human rights is to be practical and effective, part of those 'answers' to be supplied by the courts must include remedies capable of disposing with designated derogation orders if and when they reflect unjustified interferences with human rights.

Conclusion

82. The HRA brings rights home and in doing so created the necessary institutional space for crafting a uniquely UK approach to the protection of human rights. The architecture of the Act creates a careful and well-thought-out institutional balance between the courts and Parliament, all the while protecting the primary role of Parliament in the development of human rights. The constitutional dialogue that is fostered by the distribution of tasks is a core strength of the HRA and should be maintained.

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[94] See text to (n 92).
[95] Baroness Hale, 'Law in a Time of Crisis' <https://www.ox.ac.uk/news-and-events/The-University-Year/romanes-lecture> accessed 17 February 2021 (emphasis added).