



House of Commons  
House of Lords

Joint Committee on Human  
Rights

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# Proposal for a draft Human Rights Act 1998 (Remedial) Order 2019

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**Fifteenth Report of Session 2017–19**

*Report, together with formal minutes  
relating to the report*

*Ordered by the House of Commons  
to be printed 14 November 2018*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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[Ms Harriet Harman QC MP](#) (*Labour, Camberwell and Peckham*) (Chair)

[Fiona Bruce MP](#) (*Conservative, Congleton*)

[Ms Karen Buck MP](#) (*Labour, Westminster North*)

[Alex Burghart MP](#) (*Conservative, Brentwood and Ongar*)

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Evidence relating to this report is published on the relevant [inquiry page](#) of the Committee's website.

### Committee staff

The current staff of the Committee are Eve Samson (Commons Clerk), Simon Cran-McGreehin (Lords Clerk), Eleanor Hourigan (Counsel), Samantha Godec (Deputy Counsel), Katherine Hill (Committee Specialist), Shabana Gulma (Specialist Assistant), Miguel Boo Fraga (Senior Committee Assistant) and Heather Fuller (Lords Committee Assistant).

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## Summary

Judicial immunity underpins the independence of the judiciary and therefore is a key part of the UK constitutional structure. However, like other immunities, its extent should be limited to what is necessary and proportionate for its purposes. Judicial immunity does not mean that a person whose human rights have been breached should be left without an effective remedy. It is therefore right that in those cases where there is no other effective remedy, a person should have access to damages (financial compensation) for a breach of their rights under the European Convention on Human Rights, 1950 [ECHR]—even where this breach is the result of a judicial act made in good faith. However, under the current law in the UK, there is no access to damages in these circumstances.

The European Court of Human Rights (ECtHR) found, in the case *Hammerton v United Kingdom*,<sup>1</sup> that it was a violation of Article 13 ECHR (right to an effective remedy) for a person not to have recourse to damages (financial compensation) for a violation of a Convention right if there was no other effective remedy. The circumstances of the case involved a person, Mr Hammerton, who had been committed to prison for contempt of court for a longer period of time than he would otherwise have been, due to a judicial act which did not allow him rights under Article 6 (right to a fair trial)—including depriving him of legal representation for his committal hearing.<sup>2</sup> The reason that damages (financial compensation) was not available in this case was due to the operation of section 9(3) of the Human Rights Act 1998 [“HRA”], which is a statutory bar to an award of damages where there has been a breach of the ECHR that is due to a judicial act done in good faith. In the case of *Hammerton v UK*, this ultimately led to a violation of Article 13 of the ECHR.

Section 9(3) HRA prevents damages (financial compensation) from being awarded where a judicial act has resulted in a violation of a person’s Convention rights—except where this is required by Article 5(5) ECHR relating to the right to liberty and security. In most cases where a judicial act violates an individual’s Convention rights, there will be a possibility of appeal and this normally will be sufficient to provide an effective remedy for the violation. However, in some cases there will be no adequate redress possible and therefore no effective remedy possible other than damages (financial compensation). In the absence of an ability for the courts to award damages in the rare cases where this is required, this can lead to a breach of Article 13 ECHR (right to an effective remedy).

The proposed draft Human Rights Act 1998 (Remedial) Order 2018 seeks to remedy that incompatibility in the HRA (section 9) with the UK’s human rights obligations arising from the Convention. In our view, the proposed Remedial Order does meet the procedural requirements of section 10 and Schedule 2 HRA necessary to use the power to make a Remedial Order. However, it does so in a very narrow manner. It only remedies this problem where it relates to a judicial act in contempt of court proceedings, in which

<sup>1</sup> *Hammerton v United Kingdom* 2016 (Application No. 6287/10).

<sup>2</sup> In a contempt of court case, a committal hearing is the hearing at which the judge determines whether or not the individual is in contempt of court, for example for breaching a court order, and also determines if the person should be committed to prison for a period of time as a consequence.

a person was unfairly deprived of legal representation (contrary to their Convention rights), and where this led to them serving longer in prison than they would otherwise have done.

There is a reasonable likelihood that there are other circumstances in which judicial acts made in good faith could cause a similar breach of a person's Convention rights and where section 9(3) HRA would similarly deprive them of an effective remedy. Whether or not other cases could suffer the same problem as with the *Hammerton* case will be a question as to the degree of maltreatment of the applicant in that particular case. However, it seems likely, rather than merely fanciful, that other cases could suffer these same problems, as demonstrated in the helpful evidence from the Howard League for Penal Reform. In our view, whilst the proposed Remedial Order would therefore remedy the very specific facts of Mr Hammerton's case, it is likely that it will not be sufficient to remedy the incompatibility identified in *Hammerton v UK*. It is therefore likely that s. 9(3) HRA will remain incompatible with Article 13 ECHR and consequently subject to further challenge in the Strasbourg Court. For these reasons, in our view, the proposed draft Remedial Order does not do enough to remedy the overall risk of incompatibility of the s.9(3) HRA with Article 13 ECHR and the right to an effective remedy.

The Government has taken a very narrow reading of the *Hammerton* judgment and its powers under section 10(1)(b) and 10(2) HRA which allow the Minister "having regard to a finding" of the ECtHR to make "such amendments... as he considers necessary to remove the incompatibility" with an "obligation of the UK arising from the Convention". Such an amendment could easily have remedied the incompatibility of s. 9(3) HRA with Article 13 ECHR by allowing judges the ability to award damages in the rare cases where this was the only effective remedy. We invite the Government to consider whether alternative drafting could give better effect to removing the incompatibility in s. 9(3) HRA with Article 13 ECHR.

# 1 Introduction

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## The Issue that the proposed draft Order addresses

1. This proposed Remedial Order concerns the right of a person whose human rights have been breached to have an effective remedy for that breach (Article 13 ECHR). In many cases, the right to an effective remedy will not require the payment of damages—an effective remedy could for example consist in having an appeal, in being released from prison, or in having the Court make a declaration. However, on some occasions where other remedies are not available, damages could be the only remedy that would be effective. Normally in the UK damages are available as a remedy (where appropriate) for a breach of a person’s human rights. However, where a human rights breach is the result of a judicial act done in good faith, then damages currently are not available due to the operation of s. 9(3) HRA.

2. The proposed Remedial Order arises from a judgment of the ECtHR, *Hammerton v UK*, in which the ECtHR found that Mr. Hammerton’s inability to receive damages in the UK Courts in the particular circumstances of his case led to a violation of Article 13 ECHR (right to an effective remedy). Mr Hammerton was denied legal representation at his committal hearing, when the judge was determining whether or not Mr Hammerton was in contempt of court and should be committed to prison as a consequence. This was a breach of Article 6 ECHR (right to a fair trial). As a result, Mr Hammerton spent longer in prison than he would have done if represented. But Mr Hammerton could not receive damages for the time spent in prison because section 9(3) of the Human Rights Act bars the award of damages in respect of a judicial act done in good faith.

3. The justification for s. 9(3) HRA is to preserve the principle of judicial independence through ensuring judicial immunity for judicial acts done in good faith. However, there is a valid question as to whether judicial independence is really prejudiced by an award of damages, in cases where a court has found a judicial act breaches an individual’s human rights, and has found that no other remedy is effective, (particularly as such damages are payable by the State and not the judge personally).

4. The proposed draft Remedial Order seeks to amend section 9(3) HRA so that damages would be available in specific circumstances where in proceedings for contempt of court, a person did not have legal representation (in breach of Article 6 ECHR), and that person was committed to prison and spent longer in prison than they would have done because of that breach of Article 6 ECHR.

**5. The Committee welcomes the Government’s action in proposing the draft Remedial Order to amend the Human Rights Act 1998 to remedy its incompatibility with the right to an effective remedy under Article 13 of the ECHR.**

## Role of the Joint Committee on Human Rights

6. The HRA provides that where it appears to a Minister having regard to a finding of the ECtHR in proceedings against the UK, that a provision of legislation is incompatible with an obligation of the UK arising from the ECHR, Ministers may amend the legislation to correct that incompatibility through a “Remedial Order”, and may use such an Order to

amend primary legislation.<sup>3</sup> There are special provisions to ensure that this power is not used inappropriately. In the non-urgent procedure (which is being used here), a proposal for a draft has to be laid before Parliament for 60 days, during which representations may be made. If the Government decides to proceed, it will then lay a draft Order, accompanied by a statement responding to the representations and explaining what changes, if any, have been made to the draft in consequence. In order to be made, the draft Order must be approved by each House of Parliament, a further 60 days after laying.<sup>4</sup>

7. A proposal for a draft Human Rights Act 1998 (Remedial) Order 2018, together with the required information,<sup>5</sup> was laid before both Houses on 16 July 2018.

8. The Standing Orders of the Joint Committee on Human Rights (JCHR) require us to report to each House our recommendation as to whether a draft Order in the same terms as the proposal should be laid before Parliament, and we may also report on any matter arising from our consideration of the proposal.<sup>6</sup> The Committee reports on the technical compliance of any Remedial Order with the HRA and notes whether the special attention of each House should be drawn to the Order on any of the grounds specified in the Standing Orders relating to the Joint Committee on Statutory Instruments (JCSI).

9. We issued a call for evidence on the Government's proposal on 16 March 2018.<sup>7</sup> We are grateful to those who responded to our call for evidence or drew our attention to other relevant information, which has been very useful. A list of those who contributed is included at the back of this Report and all written submissions we received can be found on our website.<sup>8</sup> We have also been in contact with officials from the Ministry of Justice who have been helpful throughout. Further, on 6 September 2018, the Chair wrote a letter to the Justice Secretary seeking further clarifications as to certain elements relating to the proposed Human Rights Act 1998 (Remedial) Order 2018, in particular relating to the relationship between judicial immunity and the right to an effective remedy as well as enquiring as to the Government's view as to whether the Human Rights Act 1998 would now give full effect to Article 13 ECHR. On 25 September 2018 Edward Argar MP, the Parliamentary Under-Secretary of State for Justice, replied to the Chair by letter.<sup>9</sup>

## Matters for consideration

10. In order to consider the proposed order adequately, the Committee generally asks:

- Have the conditions for using the Remedial Order process (section 10 and Schedule 2 HRA) been met?

3 See Human Rights Act 1998, [section 10](#) & [schedule 2](#)

4 There is also an urgent procedure, in which the Minister may lay a made order, but there is a period of 120 days (divided in two 60-day periods) during which representations may be made and responded to. In both cases, each House of Parliament must then approve the Order if it is to have effect (or continuing effect in the case of the urgent procedure).

5 "Required information" means (a) an explanation of the incompatibility which the (proposed) order seeks to remove, including particulars of the relevant declaration, finding or order; and (b) a statement of the reasons for proceeding by way of Remedial Order and for making an order in those terms (See Human Rights Act 1998, Schedule 2, [para 5](#)).

6 House of Commons, Standing Orders, Public Business 2017, HC 4, [152\(B\)](#), and The Standing Orders of The House of Lords relating to Public Business 2016, HL Paper 3, [72\(c\)](#).

7 Joint Committee on Human Rights, Proposal for a Draft Human Rights Act 1998 (Remedial) Order 2018 – [call for evidence](#)

8 Joint Committee on Human Rights; [submissions](#)

9 See Appendices, which contains both letters.

- Are there “compelling” reasons for the Government to remedy the incompatibility by Remedial Order?
- Is the procedure adopted (non-urgent in this case) appropriate?
- Has the Government produced the required information and effectively responded to other requests for information from the Committee?
- Does the proposed order remedy the incompatibility with Convention rights and is it appropriate? For example, is any additional provision contained in the proposed order appropriate and *intra vires*—and does the proposed order omit additional provisions which it should have contained?
- Are the criteria of technical propriety applied by the JCSI satisfied?

11. The relevant grounds on which the JCSI can draw a statutory instrument to the special attention of each House are:<sup>10</sup>

- that it imposes a charge on the public revenues or requires payments to be made to a public authority;
- that there appears to have been unjustifiable delay in the publication or laying of the Order before Parliament;
- that there appears to be a doubt whether it is *intra vires* or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
- that for any special reason its form or purport calls for elucidation;
- that its drafting appears to be defective; or
- on any other ground which does not impinge on its merits or the policy behind it.

## Legislative context

12. Section 8 HRA provides that, in relation to any act of a public authority which a court or tribunal finds is unlawful, it may grant such relief or remedy within its powers as it considers just and appropriate—and this includes damages. On the surface this provision (taken with other remedies within the justice system) would seem to grant sufficient effect to Article 13 ECHR by enabling an adequate remedy to be found for a breach of a person’s Convention rights.

13. However, section 9(3) HRA provides that “in proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention”. (Article 5(5) ECHR requires that “Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation”).

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10 House of Commons, Standing Orders No. [151\(1\)\(B\)](#).

14. The Ministry of Justice explained the thinking behind section 9(3) HRA in its required information:

“The current limitation in the HRA on the availability of damages in proceedings in respect of a judicial act done in good faith is there to preserve the principle of judicial immunity, while ensuring that there is an enforceable right to compensation for breach of Article 5 as required by the ECHR. Judicial immunity is a key aspect of judicial independence. An independent and impartial judiciary is one of the cornerstones of a democracy and one of the practical ways in which this is given effect is by giving judges immunity from prosecution or civil proceedings for any acts they carry out in performance of their judicial function. Individuals involved in any kind of case before the courts need to be sure that the judge dealing with their case cannot be influenced by an outside party or by the judge’s own personal interests, such as a fear of being sued for damages.”<sup>11</sup>

15. Sections 8 and 9(3) HRA therefore seek to find an acceptable balance by both giving effect to the right to an effective remedy for a breach of an individual’s human rights and by respecting the principle of judicial independence, which is in part given effect by granting judicial immunity. Indeed, most of the time section 9(3) will not act as a barrier to a remedy as most instances where a person’s human rights could be breached by a judicial act done in good faith can be resolved adequately by appeal to a higher court, or by other means. It is only in very rare cases where damages would be the only effective remedy for such a breach.

16. As the Parliamentary Under-Secretary of State set out in his response to the Committee (see Appendix 2):

“The UK provides an effective remedy for victims of violations of the ECHR through the Human Rights Act 1998 (HRA) as a whole, which gives individuals the ability to bring proceedings to enforce their Convention rights or rely on those rights in other proceedings; and through the ability under section 8 HRA for courts and tribunals to grant any relief or remedy within their powers as they consider just and appropriate. This relief or remedy need not be damages; indeed, damages are often not necessary to afford just satisfaction for breaches of Convention rights.”<sup>12</sup>

17. We note that s. 9(3) HRA does not affect the types of litigation that could be brought—this section only acts as a statutory bar once a court has already determined that a judicial act done in good faith has breached an individual’s human rights. It is also worth noting here that the extent to which judicial immunity is preserved in s. 9(3) HRA is quite wide. For example, a judicial act “done in good faith” is a broad category which could include reckless or negligent actions. Importantly, any damages that might be awarded in the rare cases where this is permitted would be paid by the State, so there is no risk of a judge personally being pursued for payment of damages.

11 Ministry of Justice, [A proposal for a Remedial Order to amend the Human Rights Act 1998](#), July 2018, at page 9.

12 Appendix 2, Letter from the Parliamentary Under-Secretary of State for Justice to the Chair, dated 25 September 2018, at page 1.

## Litigation history

18. The present concern is the breach of Article 13 ECHR caused by the operation of section 9(3) HRA. However, the facts of the case relate to contact proceedings and to committal proceedings for contempt of court which involved a breach of Article 6 ECHR (the right to a fair trial). It was the lack of remedy for this breach of Article 6 ECHR that led to the subsequent breach of Article 13 (lack of an effective remedy for a breach of a Convention right).

19. The context of the *Hammerton* case relates to contact proceedings between the applicant and his former wife concerning contact with their children. In sum, Mr Hammerton had given an undertaking, in December 2004, to the County Court not to contact or communicate with his former wife except through his own solicitors. This was followed by a further injunction granted by the County Court in February 2005 preventing him from using or threatening violence towards her. In July 2005, his former wife applied for him to be committed to prison for breach of the undertaking and the injunction. Meanwhile, at some point following their divorce in August 2004, Mr Hammerton's legal aid certificate was withdrawn and this was due to be reviewed at a panel in early August—this impacted his legal representation (or lack thereof).

20. In July 2005, the judge decided to hear the application for contact at the same time as the proceedings for committal for contempt. Mr Hammerton was unrepresented (the applicant's legal aid certificate having been withdrawn) and the judge made no enquiries as to why he was unrepresented or whether he wished to have representation. The judge made an order for indirect contact and committed Mr Hammerton to three months in prison for contempt of court (given the breach of the undertaking and the injunction). The applicant sought to instruct lawyers from prison to appeal his committal but they failed to assist him (for which he has already received compensation).

21. The applicant appealed his committal and in March 2007 the Court of Appeal quashed the finding of contempt and the sentence imposed. The Court of Appeal found that there had been a number of breaches of Article 6 ECHR (the right to a fair trial). The Court recalled the well-established case-law that in proceedings for committal for contempt, a defendant benefits from the right to legal assistance (which he was not afforded in this case), a right against self-incrimination (of which he was not informed in this case) and that the burden of proving guilt lay with the person seeking committal (which seems to have been confused in this case by the judge hearing two different applications at the same time). Moreover, the Court of Appeal found that there were further flaws given the lack of legal representation and opportunity for mitigation at the sentencing stage. The Court concluded that the defects in this case and notably the lack of legal representation would have made a difference. Lord Justice Wall (at paragraph 52) noted “No Magistrate's Court would impose a custodial sentence on an unrepresented defendant, and in my judgment, no family court should send a litigant in person to prison for contempt without first making arrangements for that litigant to be legally represented.”<sup>13</sup>

22. Mr Hammerton then sought damages under the common law for the tort of wrongful imprisonment and under the HRA. In February 2009, the High Court dismissed his claim, whilst noting and reiterating the breaches of Article 6 ECHR that had been found by the Court of Appeal. In respect of the false imprisonment claim, the High Court noted

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13 *Hammerton v Hammerton* [2007] EWCA Civ 248, paragraph 52.

that there was immunity from suit for a claim based on alleged errors of a circuit judge of competent jurisdiction that resulted in detention in the absence of bad faith. Moreover, the operation of section 9(3) HRA precluded damages in respect of a judicial act done in good faith, with the exception of damages required by Article 5(5) ECHR. In particular, having considered the Article 5 case-law, the High Court did not consider that the breaches of Article 6 (right to a fair trial) had led to a breach of Article 5 (deprivation of liberty) in this case, as the Court considered that these breaches of Article 6 were better categorised as an erroneous exercise of judgment, than as something which rendered the subsequent detention “not in accordance with the law” or “arbitrary”—which would be the threshold for an Article 6 violation leading to a violation of Article 5. However, even though the Court found that there were no grounds for damages (and no violation of Article 5 which could have allowed for damages under the HRA), the judge nevertheless explained that without the Article 6 violations, a finding of contempt would have been inevitable in Mr Hammerton’s case, but that whilst custody would have been the most likely outcome, the sentence would have been significantly shorter (approximately fourteen days). The applicant sought leave to appeal which was refused so he then brought the case to the ECtHR in Strasbourg.

23. Much of the ECtHR’s judgment in *Hammerton v UK* relates to the question as to whether or not the breaches of Article 6 in Mr Hammerton’s case (as set out above) led to a breach of Article 5 ECHR (for which damages could be available). There is also some analysis explaining why committal proceedings for contempt should be subject to the safeguards in what is normally referred to as the “criminal” limb of Article 6 ECHR. In particular, the ECtHR was clear that a finding of a violation of Article 6 ECHR does not automatically lead to a violation of Article 5 ECHR and moreover held (albeit by a narrow margin of 4:3) that in Mr Hammerton’s case there was no breach of Article 5 since there was no gross and obvious irregularity nor was there a flagrant denial of justice sufficient to render Mr Hammerton’s detention arbitrary. However, the Court did find a violation of Article 6 ECHR (in keeping with the findings of the Court of Appeal and the High Court) and a breach of Article 13 ECHR given the lack of any effective remedy for the breach of Article 6 in the circumstances of Mr Hammerton’s case (a lack of legal representation which led to Mr Hammerton spending a longer time in custody).

24. The breach of Article 13 ECHR identified by the ECtHR in *Hammerton v UK* specifically relates to the non-availability of damages as an effective remedy under the HRA for a breach of Article 6 ECHR that was due to a judicial act done in good faith. This therefore relates specifically to section 9(3) HRA. It is also noteworthy that in its judgment the ECtHR specifically referenced the impact of the prejudice suffered in the form of lengthened deprivation of liberty and that this was the result of the absence of legal representation in the applicant’s case. The ECtHR held (at paragraph 152) that:

“the Court cannot but conclude that the domestic remedies available to the applicant in relation to his complaint under Article 6 were not fully “effective” for the purposes of Article 13, since they were not capable of affording adequate redress for the prejudice suffered by him in the form of the lengthened deprivation of liberty caused by the absence of legal representation in his case”.<sup>14</sup>

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14 *Hammerton v United Kingdom* 2016 (Application No. 6287/10), at para 152.

## 2 Procedural Requirements

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### Compelling Reasons and Use of the Remedial Power

25. A Minister may only use the remedial power under the HRA to amend primary legislation if that Minister considers that there are “compelling reasons” to do so. The Government’s reasons for using a Remedial Order are set out in the statement of required information in the Paper which accompanies the proposed draft order.

26. The “compelling reasons” cited by the Government include the need to implement judgments of the ECtHR swiftly, the nature of the breach, the fact that this breach requires an amendment to primary legislation and that the current legislative programme offers no prospect of a suitable primary legislative vehicle (meaning that waiting for a Bill would be likely to cause significant delay).

27. We are grateful for the information provided by the Ministry of Justice as part of the “required information”<sup>15</sup> and overall consider that these are indeed good compelling reasons to proceed by Remedial Order.

### Use of the Non-Urgent Procedure

28. Remedial Orders can be made by urgent or non-urgent procedure. The Government’s reasons for proceeding by way of the non-urgent procedure are set out in the information accompanying the proposed draft Order.

29. The Government notes that it is not aware of any individuals who are affected by the incompatibility which this proposed Remedial Order seeks to remove and do not anticipate any similar cases in the near future. This seems to be despite a couple of cases against the United Kingdom raising Article 13 issues that are pending before the ECHR at present, including the case referred to in the evidence submitted by the Howard League for Penal Reform.<sup>16</sup>

30. The information provided by the Ministry of Justice is helpful in relation to the use of the non-urgent procedure. Balancing the significance of the rights, the impact on the individuals affected, the small number of individuals affected and the need to legislate in an open and transparent manner that allows appropriate opportunity for debate and discussion, the Government considers that the non-urgent process is most appropriate. These reasons are persuasive.

**31. Overall, we are satisfied that there are compelling reasons to proceed by Remedial Order and that this is a valid use of the remedial power.**

**32. More specifically, Committee considers that the non-urgent procedure strikes a reasonable balance between the competing considerations of the need to avoid undue delay in remedying the incompatibility with human rights standards and the need to afford a proper opportunity for parliamentary scrutiny of changes to primary legislation. However, in its response to this Report, it would be useful for the Government to explain why it does not consider other individuals to be affected by the**

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<sup>15</sup> As required by [paragraph 3](#) of Schedule 2 to the Human Rights Act 1998.

<sup>16</sup> Howard League for Penal Reform ([RHA0001](#)), at paras 4.6 and 5.1.

**incompatibility and does not anticipate other similar cases in the near future. This is of particular interest given separate information received that other similar cases are being brought to the ECtHR in relation to the non-availability of adequate effective remedies for breaches of rights under the ECHR (Article 13 ECHR), including by other types of judicial acts made in good faith.**

### 3 Does the proposed Order address the incompatibility & does the proposed Order omit additional provisions which it should have contained

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33. As set out in the required information, the proposed Remedial Order only makes a very targeted amendment to the HRA to address the very specific circumstances that arose in Mr Hammerton’s case. Therefore, the exemption allowing for damages to be paid where a person’s human rights have been breached by a judicial act done in good faith would only apply where:

- a) This judicial act was made in the context of proceedings for contempt of court;
- b) The person did not have legal representation in those committal proceedings (in breach of the criminal limb of Article 6 ECHR);
- c) The person is committed to prison; and
- d) The breach of Article 6 results in the person either spending more time in prison than they would otherwise have spent, or causes them to be committed to prison when they would not otherwise have been so committed.

34. Technically, this does address the specific finding by the ECtHR in the case of Mr Hammerton and therefore, to the extent of the very specific facts in Mr Hammerton’s case, is sufficient to address this incompatibility. However, the terms of the Order are drawn so tightly that one naturally must ask whether this is but a technical fix to the problem identified by the ECtHR which will not do enough to prevent future similar violations of Article 13 ECHR (right to an effective remedy) by the operation of section 9(3) HRA. It would be open to the Government to go further. We note that this power can be used where, “having regard to a finding” of the ECtHR in proceedings against the UK, it appears that “a provision of legislation is incompatible with an obligation” of the UK arising from the ECHR (s. 10(1)(b) HRA). In such cases, an order may be used to make such amendments to the legislation as are considered necessary to remove the incompatibility (s. 10(2) HRA).

35. The reasons given by the Ministry of Justice for this very restrictive approach seem broadly to be grouped into three themes.

- Firstly, the Ministry of Justice argues that the HRA should be considered to give sufficient effect to Article 13 ECHR and notes that there would be a very small number of cases where damages would ever be required to address the requirements of Article 13 following a breach of an individual’s Convention right by a judicial act done in good faith.
- Secondly, the Ministry of Justice seems to argue that the principle of judicial immunity is too important to justify looking more closely at whether Article 13 is given full effect by the HRA—and therefore that this falls within the margin of appreciation to be accorded to the UK.

- Thirdly, the Ministry of Justice argues that the remedial power should be used restrictively and therefore confined to the specific facts of the *Hammerton* case.

### **Can the HRA be considered to give sufficient effect to Article 13 ECHR: Is there an effective remedy available in the UK to enforce the human rights of those whose rights have been breached by a judicial act done in good faith?**

36. Firstly, it is worth noting that the wider question of whether the HRA as a whole adequately gives effect to Article 13 ECHR is too broad to be fully addressed in this Report. It is also beyond the scope of this Report to consider whether s 9(1) HRA hinders an individual's ability to bring domestic proceedings in respect of a human rights violation arising from a judicial act, where, for example, an individual had neither a right of appeal nor a right of judicial review and therefore had no effective domestic remedy or means to challenge such a judicial act other than by recourse to the ECtHR in Strasbourg. We will focus here solely on whether sufficient effect is given to Article 13 ECHR in ensuring the availability of an effective domestic remedy in relation to human rights breaches arising from judicial acts done in good faith.

37. In relation to this group of arguments, the Ministry of Justice makes some valid points which are also reflected in the case-law of both the domestic Courts and the ECtHR, illustrating that Article 13 ECHR allows States a certain margin of appreciation in determining how best to provide an effective remedy for a breach of a Convention right. As is noted in the letter from the Parliamentary Under-Secretary of State:

“The [ECtHR] has been clear that States enjoy a certain margin of appreciation in the implementation of Article 13. Article 13 does not require incorporation of the ECHR into domestic law; nor does it require that individuals should be able to challenge legislation on the ground *per se* of being contrary to the Convention (e.g. *James and Others v UK*). What it does require is that the substance of the rights in the ECHR is secured to those in the state's jurisdiction; and that an effective remedy is available to enforce those rights in whatever form they are secured.”<sup>17</sup>

38. We agree. This means that the heart of the matter here is whether there is an effective remedy available in the UK to enforce the rights of those whose human rights have been breached by a judicial act done in good faith.

39. In the UK, the HRA performs a special role in ensuring that an effective remedy is available domestically for a human rights breach, without needing recourse to the Strasbourg Court. The letter from the Parliamentary Under-Secretary of State recalls that:

“The UK provides an effective remedy for violations of the ECHR through the [HRA] as a whole, which gives individuals the ability to bring proceedings to enforce their Convention rights or rely on those rights in other proceedings; and through the ability under section 8 HRA for courts and tribunals to grant any relief or remedy within their powers as they

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<sup>17</sup> Appendix 2, Letter from the Parliamentary Under-Secretary of State for Justice to the Chair, dated 25 September 2018, at page 1.

consider just and appropriate. This relief or remedy need not be damages; indeed, damages are often not necessary to afford just satisfaction for breaches of Convention rights.

[ ... ] in any situation where an arguable breach of Convention rights has arisen as the result of a judicial act done in good faith, sections 7 to 9 HRA ensure that it is possible for an individual to bring proceedings or rely on a Convention right or rights in any legal proceedings, and that proceedings may be brought by way of an appeal or an application or petition for judicial review.”<sup>18</sup>

40. As the Ministry of Justice notes, it is only very rarely that Article 13 ECHR would require the payment of damages in order for a remedy to be “effective” for the purposes of Article 13. In the majority of cases in which there is a judicial act, done in good faith, which leads to a violation of an individual’s Convention rights, this can readily be remedied by an appeal and other forms of relief (e.g. release from custody, declaratory relief). Therefore it will only be on very rare occasions when the statutory bar in section 9(3) will constitute a barrier to an effective remedy under Article 13 ECHR.

41. We note the non-legislative steps in place to try to ensure that the justice system has adequate measures in place to seek to avoid, where possible, human rights violations arising from a judicial act.<sup>19</sup> However, it is concerning that the Ministry of Justice should seem to suggest that since a problem will not arise in many cases, it does not need to look further into a clear risk of injustice arising in other cases. It is not acceptable to justify a situation that allows human rights violations to persist merely by claiming that there are unlikely to be many such violations. Therefore, even though we agree with the Ministry of Justice that section 9(3) HRA is only seldom likely to be a bar to an effective remedy under Article 13 ECHR, we do not agree that this is any sort of adequate justification for keeping in place statutory barriers to an individual’s ability to enforce their human rights.

42. Whilst it is true that the ECtHR seemed to specifically note that Mr Hammerton had served longer in prison than he would have done had he been represented, it seems a leap to suggest that these are the only circumstances where section 9(3) Human Rights Act 1998 could cause a similar breach of Article 13 ECHR.

43. Indeed, we received evidence and information to suggest that this concern is not theoretical. As the Howard League for Penal Reform states in its evidence:

“The proposal for a draft Order does not sufficiently “*remove the incompatibility*” identified by the ECtHR in *Hammerton*. Although the facts of the case arose in connection with a failure to afford legal representation before committal [ ... ] it was the fact of a violation of Article 6, in conjunction with the operation of s. 9(3), which gave rise to an arguable Article 13 ECHR claim.”<sup>20</sup>

18 Appendix 2, letter from the Parliamentary Under-Secretary of State for Justice to the Chair, dated 25 September 2018, at page 1–2.

19 See, for example, Appendix 2, the information provided at page 3 of the letter from the Parliamentary Under-Secretary of State for Justice to the Chair dated 25 September 2018.

20 Howard League for Penal Reform ([RHA0001](#)), at para 4.3.

44. Further, they give an example of another case where a similar difficulty has arisen concerning an Article 6 claim in a challenge to extra days imposed on a prisoner by an independent adjudicator [*R (MA) v Independent Adjudicator* [2014] EWHC 3886 (Admin)]. They note that:

“Beyond committal, there remain a range of scenarios where a judicial error—albeit in good faith—might amount to a violation of Article 6 and the imprisonment of an individual.”<sup>21</sup>

45. The Howard League goes on to conclude that:

“[ ... ] section 9(3) will remain incompatible with Article 13 and subject to further challenge in the Strasbourg Court. The young person in our example... is currently contesting the imposition of additional days in an application to the [ECtHR]. This application includes a challenge to the operation of s. 9(3) on Article 13 grounds... [this] illustrates that there are other situations beyond that in *Hammerton* where a remedy is required to ensure accountability and confidence in the system. By maintaining the wide bar in HRA s. 9(3), domestic courts are prevented from considering when damages might be required by ECHR Article 6 and any question of an effective remedy is deferred to Strasbourg.”<sup>22</sup>

46. Thus it seems clear that there is a real risk that the proposed amendment may not fully remedy the incompatibility of s. 9(3) HRA with Article 13 ECHR.

**47. Article 13 requires that the UK to ensure that an effective remedy is available domestically for a violation of a Convention right. This proposed draft Order seeks to remedy the incompatibility of s. 9(3) HRA with Article 13 ECHR. Whilst it may be that the bar on the payment of damages in s. 9(3) HRA might only very rarely result in a person being deprived of an effective remedy in the UK for a breach of a Convention right, it remains unacceptable to allow such a situation to persist.**

**48. It seems likely that situations will arise, albeit rarely, where s. 9(3) HRA, even if amended as proposed, would deprive an individual of an effective remedy for a breach of a Convention right. It is difficult to understand why the Ministry of Justice has omitted to make provision in this Order to remedy this incompatibility fully. For example, this could have been achieved by providing that damages may be payable in respect of a violation of a Convention right arising from a judicial act done in good faith where there is no other remedy available that would be effective for the purposes of Article 13 ECHR and where a judge has considered it just and appropriate to award damages.**

**49. We recommend that the Minister consider whether alternative drafting could give better effect to removing the incompatibility in s. 9(3) HRA with Article 13 ECHR.**

21 Howard League for Penal Reform ([RHA0001](#)), at para 4.5.

22 Howard League for Penal Reform ([RHA0001](#)), at para 5.1.

## Is the balance correctly struck between judicial immunity and the protection of human rights?

50. It is clear that the concern to protect the principle of the independence of the judiciary is at the heart of the desire of the Ministry of Justice to make the amendments to s. 9(3) HRA as limited as feasible.

51. Judicial independence is a cornerstone of any justice system and a critical component of the rule of law in the United Kingdom. Indeed, judicial independence is itself key to ensuring effective enforcement of human rights. We therefore understand and support measures to ensure that judicial independence is preserved; it is necessary for the health of the justice system.

52. Judicial immunity is a key tool in ensuring the independence of the judiciary. As the Parliamentary Under-Secretary of State notes in his letter:

“[ ... ] giving judges immunity from prosecution or civil proceedings for any acts they carry out in performance of their judicial function ensures that they cannot be influenced by an outside party or by their own personal interests, such as a fear of being sued for damages. As Lord Denning stated in *Sirros v Moore* [1975] QB 118:

‘[ ... ] That apart, however, a judge is not liable to an action in damages. The reason is not because the judge has any privilege to make mistakes or do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden CJ in *Garnett v Ferrand* (1867) 6 B&C 611 625:

“This freedom from action or question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.””

53. The principle underlying the modern justification of the principle of judicial immunity is set out in *Re McC (a minor)* [1985] AC 528 at 540. This judgment focuses more on risks around opening up avenues for people to bring cases against judges, than on issues around the State paying damages where a judge has already found that a judicial act violated an individual’s human rights:

“The principle underlying this rule is clear. If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of the party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety-nine honest judges should be harassed by vexatious litigation alleging malice in the proper exercise of their jurisdiction”.<sup>23</sup>

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23 *Re McC (a minor)* [1985] AC 528 at 540.

54. In the required information the Ministry of Justice explains the thinking behind s. 9(3) HRA and notes that their approach taken to the proposed Remedial Order is heavily influenced by the importance of preserving the principle of judicial immunity:

“The current limitation in the HRA on the availability of damages in proceedings in respect of a judicial act done in good faith is there to preserve the principle of judicial immunity while ensuring that there is an enforceable right to compensation for breaches of Article 5 as required by the ECHR. Judicial immunity is a key aspect of judicial independence. An independent and impartial judiciary is one of the cornerstones of a democracy and one of the practical ways in which this is given effect is by giving judges immunity from prosecution or civil proceedings for any acts they carry out in performance of their judicial functions. Individuals involved in any kind of case before the courts need to be sure that the judge dealing with their case cannot be influenced by an outside party or by the judge’s own personal interests, such as a fear of being sued for damages.”<sup>24</sup>

55. We fully agree with the central importance of the independence of the judiciary to our constitutional system, and the importance of preserving judicial immunity to the extent necessary to serve this purpose. However, even setting aside any analysis of the distinctions at play here between a judge acting in bad faith, a judge acting in good faith and a judge acting recklessly or negligently, it is difficult to understand why the requirements of judicial independence should mean that in a case where a judge has made sufficient errors to violate an individual’s human rights, that individual should be deprived of an effective remedy from the State. It is worth recalling here, that the question is not about an individual having a means to bring proceedings to challenge the violation; that is already available. There is also no question of the judge, himself or herself, being personally liable. The question is merely whether, in a rare case where it has been found that a judicial act violated an individual’s human rights, a judge could order damages to be payable by the State if there were no other remedy available which would be effective for the purposes of Article 13 ECHR.

56. As the evidence from the Howard League for Penal Reform notes:

“Giving judges the discretion to decide when damages are needed to meet other violations of Article 6 arising from judicial error is unlikely to result in any judicial enthusiasm to stray beyond the bounds of the case law from Strasbourg. *Hammerton* makes clear that Article 6 violations requiring damages by way of just satisfaction may be rare (see paragraphs [134]—[137]). Leaving individuals without any effective remedy in our courts is unjust, unnecessary and a waste of public resources.”<sup>25</sup>

**57. We share the Ministry of Justice’s concern to ensure the utmost respect for the principle of judicial independence, and therefore to maintain judicial immunity where this is required. We are not convinced that judicial immunity requires UK judges to be deprived of the ability to award damages against the State in the very rare circumstances where no other remedy would be effective for the purposes of Article 13 ECHR in order to remedy a human rights violation.**

<sup>24</sup> Ministry of Justice, [A proposal for a Remedial Order to amend the Human Rights Act 1998](#), July 2018, at page 9.

<sup>25</sup> Howard League for Penal Reform ([RHA0001](#)), at para 6.3.

## Is the remedial power used correctly: Does the proposed draft Order omit provisions it should have contained?

58. The Parliamentary Under-Secretary of State explains as follows his approach of giving a narrow reading of the incompatibility flowing from the *Hammerton* judgment and therefore a limited approach to the remedial power:

“This Remedial Order addresses the particular circumstances of *Hammerton v UK*. We do not think it is necessary or appropriate to broaden the power to award damages under section 8 HRA further at this stage... Nor do we think that doing so by way of a Remedial Order would be suitable use of the power under section 10(2) HRA. Before using this power, the Government is required to have compelling reasons to make such amendments as are considered necessary to remove the relevant incompatibility. Remedial Orders were intended to be used in specific circumstances to allow primary legislation to be amended by way of secondary legislation and care must be taken to ensure they are used appropriately.”<sup>26</sup>

59. The Howard League for Penal Reform disagrees:

“Where a judgment identifies a legal barrier to an effective remedy in the application of a general immunity or a procedural bar, it appears illogical to conclude that there are compelling reasons *only* to fast-track reform in one specific set of facts, in this case, committal proceedings. This fails to deal with other types of cases where a person may be awarded damages for a violation of ECHR Article 6 in Strasbourg but remains barred by the reformed s.9(3) in proceedings at home. There is nothing in the reasoning of the ECtHR in *Hammerton* that means the impact of the judgment in Article 13 need be so confined.”<sup>27</sup>

60. **We do not share the Ministry of Justice’s very restrictive reading as to the incompatibility of s. 9(3) HRA with Article 13 ECHR that arises from the judgment of *Hammerton v UK*. Nor do we consider that the remedial power requires an amendment to be restricted to the specific facts of a case. Indeed, where the use of a remedial power is restricted so that it fails to remedy the incompatibility identified except in relation to the very specific facts of a given case, this would seem to omit provisions that the Remedial Order should have contained in order to adequately remedy the incompatibility. As such this proposed draft Order risks offending the Committee criterion “Does the proposed order remedy the incompatibility with Convention rights ... and does the proposed order omit additional provisions which it should have contained?”.**

61. **We think it is more logical to remedy this incompatibility in a way which enables judges to award damages in those rare cases where no other remedy would be effective for the purposes of Article 13 ECHR. This would ensure that an effective remedy would be available in domestic courts without needing recourse to the ECtHR in Strasbourg.**

26 See Appendix 2, letter from the Parliamentary Under-Secretary of State for Justice to the Chair dated 25 September 2018, at page 3.

27 Howard League for Penal Reform ([RHA0001](#)), at para 4.4.

***62. We recommend that the Minister reconsider the drafting in the proposed draft Remedial Order to allow domestic UK judges to award damages in the rare cases where there is no other effective remedy available for a violation of human rights caused by a judicial act. We recommend that the Government, having reconsidered the drafting in light of this, then lay a draft Remedial Order before both Houses.***

# Conclusions and recommendations

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## Introduction

1. The Committee welcomes the Government's action in proposing the draft Remedial Order to amend the Human Rights Act 1998 to remedy its incompatibility with the right to an effective remedy under Article 13 of the ECHR. (Paragraph 5)

## Procedural Requirements

2. Overall, we are satisfied that there are compelling reasons to proceed by Remedial Order and that this is a valid use of the remedial power. (Paragraph 31)
3. More specifically, Committee considers that the non-urgent procedure strikes a reasonable balance between the competing considerations of the need to avoid undue delay in remedying the incompatibility with human rights standards and the need to afford a proper opportunity for parliamentary scrutiny of changes to primary legislation. However, in its response to this Report, it would be useful for the Government to explain why it does not consider other individuals to be affected by the incompatibility and does not anticipate other similar cases in the near future. This is of particular interest given separate information received that other similar cases are being brought to the ECtHR in relation to the non-availability of adequate effective remedies for breaches of rights under the ECHR (Article 13 ECHR), including by other types of judicial acts made in good faith. (Paragraph 32)

## Does the proposed Order address the incompatibility & does the proposed Order omit additional provisions which it should have contained

4. Article 13 requires that the UK to ensure that an effective remedy is available domestically for a violation of a Convention right. This proposed draft Order seeks to remedy the incompatibility of s. 9(3) HRA with Article 13 ECHR. Whilst it may be that the bar on the payment of damages in s. 9(3) HRA might only very rarely result in a person being deprived of an effective remedy in the UK for a breach of a Convention right, it remains unacceptable to allow such a situation to persist. (Paragraph 47)
5. It seems likely that situations will arise, albeit rarely, where s. 9(3) HRA, even if amended as proposed, would deprive an individual of an effective remedy for a breach of a Convention right. It is difficult to understand why the Ministry of Justice has omitted to make provision in this Order to remedy this incompatibility fully. For example, this could have been achieved by providing that damages may be payable in respect of a violation of a Convention right arising from a judicial act done in good faith where there is no other remedy available that would be effective for the purposes of Article 13 ECHR and where a judge has considered it just and appropriate to award damages. (Paragraph 48)

6. *We recommend that the Minister consider whether alternative drafting could give better effect to removing the incompatibility in s. 9(3) HRA with Article 13 ECHR. (Paragraph 49)*
7. We share the Ministry of Justice's concern to ensure the utmost respect for the principle of judicial independence, and therefore to maintain judicial immunity where this is required. We are not convinced that judicial immunity requires UK judges to be deprived of the ability to award damages against the State in the very rare circumstances where no other remedy would be effective for the purposes of Article 13 ECHR in order to remedy a human rights violation. (Paragraph 57)
8. We do not share the Ministry of Justice's very restrictive reading as to the incompatibility of s. 9(3) HRA with Article 13 ECHR that arises from the judgment of *Hammerton v UK*. Nor do we consider that the remedial power requires an amendment to be restricted to the specific facts of a case. Indeed, where the use of a remedial power is restricted so that it fails to remedy the incompatibility identified except in relation to the very specific facts of a given case, this would seem to omit provisions that the Remedial Order should have contained in order to adequately remedy the incompatibility. As such this proposed draft Order risks offending the Committee criterion "Does the proposed order remedy the incompatibility with Convention rights ... and does the proposed order omit additional provisions which it should have contained?". (Paragraph 60)
9. We think it is more logical to remedy this incompatibility in a way which enables judges to award damages in those rare cases where no other remedy would be effective for the purposes of Article 13 ECHR. This would ensure that an effective remedy would be available in domestic courts without needing recourse to the ECtHR in Strasbourg. (Paragraph 61)
10. *We recommend that the Minister reconsider the drafting in the proposed draft Remedial Order to allow domestic UK judges to award damages in the rare cases where there is no other effective remedy available for a violation of human rights caused by a judicial act. We recommend that the Government, having reconsidered the drafting in light of this, then lay a draft Remedial Order before both Houses. (Paragraph 62)*

# Appendix 1: Letter from the Chair to Parliamentary Under-Secretary of State for Justice

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Dear Edward,

## **Proposed Draft Human Rights Act 1998 (Remedial) Order 2018**

I am writing in relation to the proposed draft Human Rights Act 1998 (Remedial) Order 2018. The Committee welcomes the Government's efforts to remedy the areas of the statute book that are not compatible with the UK's human rights obligations. Moreover, the Committee is grateful for the useful information contained in the Ministry of Justice's paper of July 2018 that accompanies this proposed Order, in the paper entitled "A proposal for a Remedial Order to amend the Human Rights Act 1998".

The case to which this Remedial Order relates (*Hammerton v UK* 2016) arose in the context of contempt of court proceedings. However, the incompatibility arises from the fact that the Human Rights Act 1998 restricts the availability of damages for judicial acts done in good faith. The Committee would like to have some assurance that this Remedial Order is not drafted so narrowly that there may be other circumstances in which this very same provision of the Human Rights Act results in breaches of Article 13 ECHR (right to an effective remedy) for the very same reason (i.e. because it prevents an effective remedy for breaches of rights which occur through judicial acts done in good faith), such that future cases also have to go to the Strasbourg Court for resolution.

We would appreciate some clarifications, to supplement the information provided and to assist in our consideration of this Order. In particular, under Schedule 2 of the Human Rights Act 1998 the Minister is required to include, with the proposed draft Remedial Order, a statement as to the reasons for making the Order in those terms. In this light we would like to understand better the Minister's understanding of the scale of the problem and his choice in framing the Order so narrowly in Article 2 of the draft Order. In particular:

Is the Justice Secretary satisfied that Article 13 ECHR (right to an effective remedy) is given effect adequately in UK law? Could the Justice Secretary please explain his position and reasoning?

Can the Justice Secretary reassure the Committee that there are not any other circumstances where a judicial act could, even when made in good faith, violate a person's Convention rights, in circumstances where there might be no effective remedy in the absence of damages?

In particular, can the Justice Secretary please explain to the Committee why the proposed draft Remedial Order is limited to proceedings for contempt of court? Does the Justice Secretary consider that there are no other proceedings in which a judicial act could (in good faith) breach a person's human rights?

Can the Justice Secretary please explain to the Committee why the proposed draft Remedial Order is limited only to breaches of Article 6 that relate to a lack of legal representation?

Does the Justice Secretary consider that other breaches of Article 6 ECHR are less serious? What other reason is there for considering that other breaches of Article 6 ECHR would not ever need to be remedied by an award of damages in order for there to be an effective remedy?

Can the Justice Secretary please explain to the Committee why the proposed draft Remedial Order is limited only to breaches that lead to a person being committed to prison (or committed to prison for a longer period)? Does the Justice Secretary consider that only Convention breaches that lead to a person serving time in prison would ever need damages as an effective remedy?

I would appreciate a reply by Friday 21 September.

Yours sincerely

Rt Hon Harriet Harman MP, Chair

## Appendix 2: Response from the Parliamentary Under-Secretary of State for Justice

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Dear Harriet

### **Proposed Draft Human Rights Act 1998 (Remedial) Order 2018**

Thank you for your letter of 6 September asking for further information in relation to the proposed draft Human Rights Act 1998 (Remedial) Order 2018.

Article 13 of the European Convention on Human Rights (ECHR) (right to an effective remedy) provides that everyone whose rights and freedoms as set forth in the ECHR are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. Article 13 is only engaged if there has been an arguable breach of another provision of the ECHR (e.g. *Powell and Rayner v UK*).

The European Court of Human Rights (ECtHR) has been clear that states enjoy a certain margin of appreciation in the implementation of Article 13. Article 13 does not require incorporation of the ECHR into domestic law; nor does it require that individuals should be able to challenge legislation on the ground per se of being contrary to the Convention (e.g. *James and Others v UK*). What it does require is that the substance of the rights in the ECHR is secured to those in the state's jurisdiction; and that an effective remedy is available to enforce those rights in whatever form they are secured.

The effective remedy need not be a judicial remedy (*Leander v Sweden*) and Article 13 can be complied with by an accumulation of remedies (*Al-Nasif v Bulgaria*).

The UK provides an effective remedy for victims of violations of the ECHR through the Human Rights Act 1998 (HRA) as a whole, which gives individuals the ability to bring proceedings to enforce their Convention rights or rely on those rights in other proceedings; and through the ability under section 8 HRA for courts and tribunals to grant any relief or remedy within their powers as they consider just and appropriate. This relief or remedy need not be damages; indeed, damages are often not necessary to afford just satisfaction for breaches of Convention rights.

More specifically, in any situation where an arguable breach of Convention rights has arisen as the result of a judicial act done in good faith, sections 7 to 9 HRA ensure that it is possible for an individual to bring proceedings or rely on a Convention right or rights in any legal proceedings, and that proceedings may be brought by way of an appeal or an application or petition for judicial review.

For example, where an individual contends that the conduct of a judge during a trial has resulted in a violation of a Convention right, the individual will be able to appeal and the appeal court may quash a criminal conviction or set aside the relevant judicial findings. Often this will be appropriate and sufficient redress. There is no requirement under the

ECHR for states to provide compensation to those who have had convictions overturned, or those who have been subject to adverse and unwarranted judicial findings in good faith and who have been able to have those adverse findings overturned by the judge.

Parliament has already legislated - under section 9(3) HRA - to exclude the availability of damages for judicial error made in good faith (save for those who are due to be compensated for a breach of Article 5(5) ECHR). The scope of damages determined by Parliament to be paid in such circumstances falls within the appropriate margin of discretion as to how to remedy judicial shortcomings.

Parliament's intention was that the HRA should both preserve the important constitutional principle of judicial immunity and satisfy the requirement under Article 5(5) for an enforceable right to damages for those who have been victims of arrest or detention in contravention of the provisions of Article 5.

As explained in the information accompanying the draft of our proposed Remedial Order, giving judges immunity from prosecution or civil proceedings for any acts they carry out in performance of their judicial function ensures that they cannot be influenced by an outside party or by their own personal interests, such as a fear of being sued for damages. As Lord Denning stated in *Sirros v Moore* [1975] QB 118:

‘ ... That apart, however, a judge is not liable to an action in damages. The reason is not because the judge has any privilege to make mistakes or do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden CJ in *Garnett v Ferrand* (1867) 6 B&C 611 625:

“This freedom from action or question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.”

Our proposed amendment to the HRA preserves the approach of the original legislation by setting out a further limited circumstance relating to detention in which it is possible for victims to receive damages in relation to a judicial error done in good faith, alongside that for breaches of Article 5.

In its judgment in *Hammerton v UK* the ECtHR did not hold that all judicial error creating a violation of Article 6 ECHR will result in a right to damages. Rather:

“152. The Court has held that the applicant can still claim to be a “victim” of a violation of Article 6 insofar as he did not receive any redress in the form of financial compensation for the prejudice caused to him by that violation, namely a lengthened deprivation of liberty (see paragraphs 136 to 137 above). Translating that finding into the terms of Article 13, the Court cannot but conclude that the domestic remedies available to the applicant in relation to his complaint under Article 6 were not fully “effective” for the purposes of Article 13, since they were not capable of affording adequate redress for the prejudice suffered by him in the form of the lengthened deprivation of liberty caused by the absence of legal representation in his case. There has accordingly been a violation of Article 13 in the present case.”

The particular prejudice that required damages to be payable in this case was the 'lengthened deprivation of liberty' caused by the absence of legal representation.

This Remedial Order addresses the particular circumstances of *Hammerton v UK*. We do not think it is necessary or appropriate to broaden the power to award damages under section 8 HRA further at this stage, in light of the considerations set out above. Nor do we think that doing so by way of a Remedial Order would be suitable use of the power under section 10(2) HRA. Before using this power, the Government is required to have compelling reasons to make such amendments as are considered necessary to remove the relevant incompatibility. Remedial Orders were intended to be used in specific circumstances to allow primary legislation to be amended by way of secondary legislation and care must be taken to ensure they are used appropriately.

Further, the facts of *Hammerton v UK* are unusual given the safeguarding measures that are in place relating to access to legal aid and representation in England and Wales. Since the events which gave rise to the breach identified in *Hammerton v UK*, the MoJ and the Legal Aid Agency (LAA) have acted to standardise access to legal representation in committal hearings. Public funding is available to individuals facing a committal application through the criminal legal aid scheme, and this is not means-tested for hearings in the High Court, Family Court or County Court. Supporting guidance on how to apply for criminal legal aid for a committal application was issued to solicitors by the LAA in 2015.

Finally, we consider that the justice system has appropriate structures in place to prevent such situations arising. Fair and equal treatment is regarded as a fundamental principle of administering justice and one which is embedded in the judicial oath, therefore making it a judicial responsibility. The judicial oath provides: 'I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will.' In taking this oath, the judge acknowledges that he or she is primarily accountable to the law which he or she must administer. There is guidance available to the judiciary to support them in ensuring this. For example, the Judicial College has published an Equal Treatment Bench Book which builds upon judges' understanding on the important aspects of fair treatment, making some suggestions as to steps that judges may wish to take, in different situations, to ensure that there is fairness for all those who engage in legal proceedings in our courts and tribunals. I hope this information is helpful.

Edward Argar MP

# Declaration of Interests<sup>1</sup>

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## **Baroness Hamwee**

- No relevant interests to declare

## **Baroness Lawrence of Clarendon**

- No relevant interests to declare

## **Baroness Nicholson of Winterbourne**

- Former Member of the European Parliament Committees dealing with or addressing Human Rights

## **Baroness Prosser**

- No relevant interests to declare

## **Lord Trimble**

- No interests declared

## **Lord Woolf**

- No special disclosure over and above what is in the Register and to my previous judicial offices.

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<sup>1</sup> A full list of Members' interests can be found in the Register of Lords' Interests: <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/register-of-lords-interests/>

# Formal minutes

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**Wednesday 14 November 2018**

Members present:

Rt Hon Harriet Harman MP, in the Chair

Fiona Bruce MP	Baroness Lawrence of Clarendon
Ms Karen Buck MP	Baroness Nicholson of Winterbourne
Jeremy Lefroy MP	Lord Trimble
	Lord Woolf

Draft Report (*Proposal for a draft Human Rights Act 1998 (Remedial) Order 2019*), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 62 be read and agreed to.

Summary agreed to.

A paper was appended to the Report as Appendix 1 and 2.

*Resolved*, That the Report be the Fifteenth Report of the Committee.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

[Adjourned till 21 November 2018 at 3.00pm]

## Published written evidence

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The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

RHA numbers are generated by the evidence processing system and so may not be complete.

- 1 The Howard League ([RHA0001](#))
- 2 The Law Society of Scotland ([RHA0002](#))

## List of Reports from the Committee during the current Parliament

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All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2017–19

First Report	Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis	HC 774 HL 70
Second Report	Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 645 HL 86
Third Report	Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill	HC 568 HL 87
Fourth Report	Freedom of Speech in Universities	HC 589 HL 111
Fifth Report	Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018	HC 926 HL 146
Sixth Report	Windrush generation detention	HC 1034 HL 160
Seventh Report	The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards	HC 890 HL 161
Eighth Report	Freedom of Speech in Universities: Responses	HC 1279 HL 162
Ninth Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill	HC 1208 HL 167
Tenth Report	Enforcing Human Rights	HC 669 HL 171
Eleventh Report	Second Legislative Scrutiny Report: Counter-Terrorism and Border Security Bill	HC 1616 HL 195
Twelfth Report	Legislative Scrutiny: Mental Capacity (Amendment) Bill	HC 1662 HL 208
Thirteenth Report	Proposal for a draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018	HC 1451 HL 209
Fourteenth Report	Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 1547 HL 227
First Special Report	Human Rights and Business 2017: Promoting responsibility and ensuring accountability: Government Response to the Committee's Sixth Report of Session 2016–17	HC 686
Second Special Report	Mental Health and Deaths in Prison: Interim Report: Government Response to the Committee's Seventh Report of Session 2016–17	HC 753

Third Special Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill: Government Response to the Committee's Ninth Report of Session 2017-19	HC 1578
Fourth Special Report	Windrush generation detention: Government Response to the Committee's Sixth Report of Session 2017-19	HC 1633