Section 19 of the Human Rights Act 1998
importance, impact and reform

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SECTION 19 OF THE HUMAN RIGHTS ACT 1998: IMPORTANCE, IMPACT AND REFORM

ELIN ELIZABETH WESTON

PhD

2013
Section 19 of the HRA 1998 (HRA) requires a Minister to make a statement to Parliament, before the second reading of a bill for which he is responsible, on the proposed legislation’s compatibility with Convention rights. This procedural mechanism is of central importance to the scheme of the Act, aiming to better protect Convention rights while preserving parliamentary sovereignty (Chapter 1).

The section 19 procedure accords with similar developments in a number of other Commonwealth jurisdictions which emphasise the importance of human rights standards being taken into account in the legislative process (Chapter 2). However, despite its domestic and international significance, the importance of section 19 within the scheme of the HRA was overshadowed during the Act’s parliamentary passage and in academic studies of its operation (Chapter 3).

Section 19 has resulted in the development of many positive practices relating to the preparation of legislation by central government (Chapter 4) and the scrutiny of legislation by Parliament (Chapter 5), notably the production of detailed guidance for the Executive and the work of the Joint Committee on Human Rights. However, a number of obstacles remain, such that section 19 has had a more limited impact than originally intended. Many of these limiting factors are illustrated in a case-study examination of the passage of section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Chapter 6).

This thesis proposes reforms to the section 19 system designed to alleviate a number of the problems identified, including transferring the obligation to make statements of compatibility to the Attorney-General and providing education and training on human rights issues to parliamentarians (Chapter 7). These and other measures discussed in this thesis would help ensure that the democratically accountable branches of government fully contributed to the protection of human rights in the United Kingdom.
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<td>ACT</td>
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<td>ECHR</td>
<td>European Convention on Human Rights 1950</td>
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The enactment of the HRA 1998 was the culmination of a long campaign to incorporate the rights contained in the ECHR into domestic law. This campaign started in earnest with the publication of Lester’s *Democracy and Individual Rights* in 1969,1 and gradually gained support from academics2 and members of the judiciary.3 The Labour Party added its support to this campaign under the leadership of John Smith,4 and the policy was maintained by Tony Blair5 following Smith’s death in 1994. As the 1997 general election neared this policy demonstrated a clear break with the politics of “old Labour”, and meant that ‘no one [would] ever be able to accuse Labour of being prepared to sacrifice individual rights on the altar of collectivist ideology’.6

A pledge to incorporate the ECHR was accordingly included in New Labour’s 1997 general election manifesto,7 and it became apparent that the commitment to “bringing rights home” was justified by mainly practical reasons. Both the Labour Party consultation paper8 and the White Paper9 highlighted that incorporation would allow individuals to enforce their rights before national courts and reduce the cost and delay involved in litigation before the ECtHR.10 Further the United Kingdom risked being left behind in a world in which many states provided domestic legal protection for human rights standards.11 This radical promise, which would ‘enable people to enforce their Convention rights against the State in the British courts’,12 was nevertheless

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1 (Fabian Society 1969)
5 Blair, ‘John Smith Memorial Lecture’ (February 1996)
6 Mandelson & Liddle, *The Blair Revolution: Can New Labour Deliver?* (Faber 1996) 196
10 ibid para 1.14
11 ibid para 1.13
12 ibid para 1.15
accompanied by staunch adherence to the principle of parliamentary sovereignty. The new Act would not grant to courts the power to set aside primary legislation for incompatibility with Convention rights because of ‘the importance which the Government attaches to Parliamentary sovereignty’. The HRA 1998 therefore would not prevent Parliament from legislating contrary to Convention rights.

Since its enactment, the HRA 1998 has become ‘deeply embedded in the political and legal fabric of the UK’, exercising ‘a magnetic force over the entire political and legal system’, and has been described as the ‘cornerstone of the new constitution’ that has emerged in recent decades. It is clear however that in preserving Parliament’s sovereignty the system of rights protection created by the HRA 1998 was designed to fit within, rather than revolutionise the United Kingdom’s constitutional arrangements. This chapter will argue that by encouraging Parliament and the Executive to play significant roles in the protection of human rights in the United Kingdom, within a constitutional system that continues to place importance on the concept of parliamentary sovereignty, the ministerial statement of compatibility required by section 19 of the 1998 is of central importance within the scheme of the HRA 1998 and within the constitution generally.

1. SECTION 19 WITHIN THE SCHEME OF THE HUMAN RIGHTS ACT 1998: OF CENTRAL IMPORTANCE

Section 19 facilitates consideration of the compatibility of proposed legislation with Convention rights by both the Executive and Parliament. As such it is of central importance within the scheme of the HRA 1998, which promotes the protection of human rights while preserving parliamentary sovereignty.

13 Dicey, Introduction to the Study of the Law of the Constitution (8th edn (reprint), Liberty Classics 1982) 3-4
14 Home Office, Rights Brought Home (n 9) para 2.13
15 Parliament has of course done exactly that in the years since 1998. A notorious example of such legislation is Part IV of the Anti-terrorism, Crime and Security Act 2001, which permitted the indefinite detention without charge or trial of certain foreign nationals suspected of terrorist offences. These rules were repealed by the Prevention of Terrorism Act 2005 following the declaration of incompatibility issued by the House of Lords in A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68. For further discussion of Parliament’s record in this respect see p 36-40 & 197-98
16 The Act received Royal Assent on 9 November 1998
17 Lester, Pannick & Herberg (eds), Human Rights Law and Practice (3rd edn, Butterworths 2009) para 1.47
18 Bogdanor, The New British Constitution (Hart 2009) 53
The section 19 statement of compatibility: nature and scope

Section 19 of the HRA 1998 states:

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill –

   (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or

   (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

This therefore requires a Minister before the second reading of a bill for which he is responsible to make either a ‘statement of compatibility’,\(^{19}\) demonstrating a belief that the bill’s provisions are compatible with Convention rights,\(^ {20}\) or a statement to the effect that although in his view the provisions of the bill are incompatible, the Government nevertheless wished to proceed with the bill.\(^ {21}\) The Act gives little guidance as to the formalities required in the making of such statements, providing only that the ‘statement must be in writing and be published in such manner as the Minister making it considers appropriate’.\(^ {22}\) Since the entry into force of section 19\(^ {23}\) ministerial statements have been published on the cover of every public bill introduced into Parliament. To date, only the Communications Act 2003 has been introduced with a statement made under section 19(1)(b).\(^ {24}\)

Although section 19 does not require the Minister to give reasons for his opinion as to a bill’s compatibility with Convention rights, Explanatory Notes have contained a passage describing the most significant human rights issues raised by Government bills since 1 January 2002.\(^ {25}\) Full reasons for the making of a statement of compatibility will

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19 HRA 1998, s 19(1)(a)
20 Convention rights are defined in HRA 1998, s 1(1) & sch 1
21 HRA 1998, s 19(1)(b)
22 HRA 1998, s 19(2)
24 For a discussion see Fenwick, *Civil Liberties & Human Rights* (Cavendish 2007) 208-11
not be disclosed unless accurate and persistent questioning during parliamentary debate compels the Minister to do so.\textsuperscript{26}  

The statement of compatibility is of negligible legal value. It is not binding on Parliament,\textsuperscript{27} it does not bind the courts\textsuperscript{28} and, if it were not made the resulting primary legislation would remain valid.\textsuperscript{29} However its form is inextricably linked to its conceived purpose: to encourage the Executive to assess its legislative proposals for compatibility with Convention rights and to provide a means of assisting ‘Parliament’s consideration of Bills by highlighting the potential implications for human rights’.\textsuperscript{30}

\textbf{The section 19 statement of compatibility: purpose and potential impact}

Section 19 envisages that both the Executive and Parliament have responsibilities to ensure the conformity of legislation with Convention rights. According to the Labour Party consultation paper, the Executive’s intended responsibility was to ‘ensure that new legislation brought forward does not breach human rights obligations,’ and Parliament’s to ‘scrutinise draft legislation for conformity with those obligations.’\textsuperscript{31} This dual responsibility would ‘reduce the risk of breaches.’\textsuperscript{32} These themes were reprised in the White Paper, which argued that it was:

highly desirable for the \textit{Government} to ensure as far as possible that legislation which it places before Parliament in the normal way is compatible with the Convention rights, and for \textit{Parliament} to ensure that the human rights implications of legislation are subject to proper consideration before the legislation is enacted.\textsuperscript{33}

\textsuperscript{26}The JCHR has persistently called for more detailed reasons to be given in support of section 19 statements: e.g. JCHR, \textit{The Human Rights Act: the DCA and Home Office Reviews} (2005-06, HL 278, HC 1716). See further p 182-84
\textsuperscript{27}The statement of compatibility is an opinion given by a member of the Executive. Parliament may accept or reject its contents, and reach its own conclusions as to a bill’s compatibility with Convention rights
\textsuperscript{28}In \textit{R v A (No 2) [2001] UKHL 25, [2002] 1 AC 45} Lord Hope stated that section 19 statements ‘are not binding on the court, nor do they have any persuasive authority.’ [69]
\textsuperscript{29}For a discussion of the effect of the statement of compatibility on the validity of primary legislation, see Barnforth ‘Parliamentary Sovereignty and the Human Rights Act’ [1998] PL 572
\textsuperscript{30}HC Deb 16 February 1998, vol 306, col 780 (Mr Jack Straw)
\textsuperscript{31}Straw & Boateng (n 8) 78
\textsuperscript{32}ibid 77
\textsuperscript{33}Home Office, \textit{Rights Brought Home} (n 9) para 3.1 (emphasis added)
The statement of compatibility thus sought to ensure that human rights standards were taken into consideration in the development of legislative proposals by Government, and to encourage open debate and scrutiny of proposed legislation in light of the Convention rights in Parliament.\textsuperscript{34}

The section 19 statement is therefore a political rather than a legal safeguard, a formality of parliamentary procedure, intended to concentrate the minds of the Executive and Parliament on the human rights implications of bills. It should mean that Parliament legislates with ‘informed consent’,\textsuperscript{35} after scrutinising legislation for conformity with Convention rights. This view is reinforced by the argument that if a statement of compatibility could not be made, the Government would be collectively responsible for any ensuing violations of Convention rights.\textsuperscript{36} Such political implications should ensure caution on the part of a Government seeking to legislate in a way which may affect the Convention rights of individuals.

It is evident therefore that if Government and Parliament are to play central roles in the system of human rights protection in the United Kingdom, as intended by the scheme of the HRA 1998, the effective working of section 19 is vital. The requirement to make statements of compatibility should ensure that human rights considerations are considered carefully during the development of proposed legislation within Government departments, and figure frequently in Parliament’s scrutiny of legislation. Acts of Parliament should accordingly be less likely to contain unjustifiable interferences with Convention rights, which in turn should reduce the incidence of human rights litigation both in the United Kingdom and before the ECtHR. Because of the importance it accords to the democratically accountable branches of government, and because of its potential significantly to reduce the risk of serious interferences with Convention rights, section 19 should be seen as central to the system created by the HRA 1998.

\textsuperscript{34} The intended effects of section 19 in respect of the Executive and Parliament are discussed in more detail below in chs 4 & 5

The HRA 1998 and section 19 should also be viewed in the wider context of the United Kingdom constitution, which currently seeks both to protect human rights and preserve parliamentary sovereignty.

The constitution and the protection of human rights

The HRA 1998 can be seen against a constitutional background of long-standing participation in and commitment to international human rights instruments by successive Governments, and protection of civil liberties and human rights in domestic law.

United Kingdom commitment to international human rights instruments

The United Kingdom’s involvement in and commitment to international human rights instruments can be traced to the birth of the modern human rights movement in the period immediately following the Second World War.\(^\text{37}\) The United Kingdom was one of the original 50 signatories to the Charter of the United Nations on 26 June 1945, one of the underlying purposes of which was ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women’.\(^\text{38}\) The United Kingdom also participated in the drafting of the UDHR,\(^\text{39}\) the text of which was adopted by the General Assembly of the United Nations on 10 December 1948. Although ‘not intended to create legal rights’, the UDHR was ‘drafted as an aspirational text’.\(^\text{40}\) It was a progressive instrument for the protection of human

\(^{37}\) For a general account, see Klug, Values for a Godless Age: the Story of the UK’s New Bill of Rights (Penguin 2000) ch 4
rights, and one in whose drafting and adoption the United Kingdom played an active role.

The drafting process for the ECHR began shortly after signature of the UDHR. The United Kingdom Government broadly supported the idea of a Convention for the protection of human rights, insisting that the rights it contained should be defined ‘with specific precision to form the subject of legal obligations’. Some have attributed the United Kingdom Government’s support for the Convention’s creation of enforceable legal rights to the ‘basically smug’ view that ‘there would be no question of the United Kingdom authorities’ violating any of its provisions’. Despite its support for the Convention the United Kingdom government opposed compulsory acceptance of individual petition to and the jurisdiction of the proposed ECtHR, which were eventually included as optional measures in the text of the Convention as adopted.

The ECHR was signed in Rome on 4 November 1950, and the United Kingdom was the first country to ratify the Convention on 8 March 1951. It entered into force on 3 September 1953 and on 23 October 1953 the United Kingdom government announced that it would extend the application of the Convention to the 42 overseas territories for whose international relations it was responsible. The United Kingdom eventually accepted the right of individual petition and recognised the compulsory jurisdiction of the ECtHR on 14 January 1966. Although this step was taken some years after the United Kingdom’s signature and ratification of the Convention, this right of individual petition was at the time a novelty, ‘a unique contribution to international law’, and it is therefore hardly surprising that it was treated with some circumspection. Further, the United Kingdom was one of the first major European powers to accept both optional

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42 Marston (n 41) 806
44 The reasons for this opposition are discussed in Wicks, ‘The United Kingdom Government’s Perceptions of the European Convention on Human Rights at the Time of Entry’ [2000] PL 438, 448-50
45 The declarations to this effect are reproduced in Simmonds, ‘The United Kingdom and the European Convention on Human Rights’ (1966) 15 ICLQ 539. They have been renewed every 5 years since the expiry of the first declarations.
46 Beddard, Human Rights and Europe (3rd edn, Grotius 1993) 27

23
clauses. France, for example, did not ratify the Convention until 3 May 1974,\footnote{<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG> accessed 27 May 2012} when it also accepted the jurisdiction of the ECtHR, and did not accept the right of individual petition until 2 October 1981. Since signature of the ECHR in 1950, the United Kingdom has also signed and ratified a number of optional Protocols adding further rights to the Convention.\footnote{The UK has signed and ratified Protocols 1, 6 and 13. It has signed but not ratified Protocol 4, and has neither signed nor ratified Protocols 7 and 12: <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG> accessed 27 May 2012} The United Kingdom’s current human rights obligations extend far beyond the auspices of the Council of Europe: it has signed or ratified a wide variety of international agreements covering many issues including children’s rights, women’s rights, genocide, slavery and torture.\footnote{<http://www.fco.gov.uk/resources/en/pdf/3706546/10773698/FCOTrHumanRights> accessed 27 May 2012}

Many of these international human rights treaties refer to the need to give effect to human rights standards in the domestic legal systems of States Parties. Although declaratory in nature, article 28 of the UDHR states ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised’. According to Robinson this establishes ‘the right of an individual to the implementation of the rights (…) in the Declaration by his right to an order which would serve best to realise those rights’.\footnote{Robinson, Universal Declaration of Human Rights: Its Origins, Significance and Interpretation (Institute of Jewish Affairs 1950) 77} In somewhat stronger terms article 2 of the ICCPR states ‘each State Party to the present Covenant undertakes to take the necessary steps (…) to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant’. Similarly, article 2 of the ICESCR reads:

Each State Party to the present Covenant undertakes to take steps (…) to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The Committee on Economic, Social and Cultural Rights has interpreted this article as requiring that ‘the norms themselves must be recognised in appropriate ways within the
domestic legal order’. Both Covenants also require States Parties to report on the way in which they have given effect in their domestic legal systems to the rights recognised in those instruments.

Article 1 of the ECHR requires member states to ‘secure to everyone within their jurisdiction the rights and freedoms’ guaranteed by the Convention, and article 13 requires the availability of effective remedies before national authorities for violations of the Convention. Although the ECtHR has ruled that these articles do not require incorporation of the Convention into domestic law, the Convention clearly expects that the rights it protects should be secured within domestic legal systems.

It can therefore be argued that within the United Kingdom’s current constitutional arrangements, where parliamentary sovereignty remains a central concept, the best available means of giving effect to the spirit and the letter of the abovementioned treaties would be to ensure that the rights recognised by them are considered during the development and scrutiny of legislation, thus recognising their fundamental importance. The HRA 1998 does just that in respect of Convention rights as a result of section 19, and therefore fits squarely within and furthers the historic commitment of the United Kingdom constitution to the protection of human rights through international agreements.

The protection of civil liberties and human rights under domestic law

Although the United Kingdom is a party to many international human rights agreements, the impact of these international obligations has been limited in domestic law. As a dualist state, ‘[w]hen new obligations are created by treaty, legislation is needed for them to become rules of national law’ in the United Kingdom. Accordingly, until the enactment of the HRA 1998 the ECHR did not form part of domestic law in the United Kingdom, and courts could not directly apply the provisions

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52 ICCPR, art 40; ICESCR, art 16
54 Bradley & Ewing, Constitutional and Administrative Law (15th edn, Longman 2011) 311
of the Convention in domestic cases.\textsuperscript{55} There was also no requirement that Parliament take account of such considerations when legislating.

The Convention nevertheless exerted a strong influence in the United Kingdom as a result of the judgments of the ECtHR. The United Kingdom was found to be in violation of at least one article of the Convention in 56 cases between 1960 and 3 November 1998.\textsuperscript{56} The Government’s responses to these adverse rulings undoubtedly affected the content of domestic law, and included: assurances that no violation would occur or that administrative practices would be changed; payment of compensation; issuing of guidance regarding judicial or quasi-judicial discretion; changes to subordinate legislation; and amendments to or the introduction of new primary legislation.\textsuperscript{57} The fact that a number of ECtHR rulings precipitated changes to primary legislation demonstrated the Convention’s ‘increasing impact on the development of English law’\textsuperscript{58} prior to the enactment of the HRA 1998.

Parliament has long been seen as having a significant role in the protection of liberty in domestic law. Dicey argued that liberty in the United Kingdom was protected through the twin pillars of parliamentary sovereignty and the rule of law.\textsuperscript{59} According to Dicey, parliamentary sovereignty meant that Parliament was free to make or unmake any law whatever, and that no person or body could set aside an Act of Parliament,\textsuperscript{60} subject only to the ‘external limit’ that Parliament’s authority to legislate was dependant on the willingness of the populace to obey its rulings,\textsuperscript{61} and the ‘internal limit’ imposed by the nature of the body itself, which was determined by the societal values of the day.\textsuperscript{62} Dicey’s understanding of the rule of law was that there could be no punishment other than for breach of the law as opposed to the exercise of arbitrary power.\textsuperscript{63}

\textsuperscript{55} For example \textit{R v Secretary of State for the Home Department, ex p Brind [1991] 1 AC 696} (HL).
\textsuperscript{58} Wadhams, Mountfield & Edmundson, \textit{Blackstone’s Guide to the Human Rights Act 1998} (3\textsuperscript{rd} edn, OUP 2003) 4
\textsuperscript{59} Dicey (n 13)
\textsuperscript{60} ibid 3-4
\textsuperscript{61} ibid 30-31
\textsuperscript{62} ibid 32
\textsuperscript{63} ibid 110
every person was subject to the jurisdiction of ordinary tribunals, and that the general principles of the constitution were the ‘result of judicial decisions determining the rights of private persons in particular cases brought before the Courts’.

The liberties enjoyed by the individual were therefore residual: every person could act as he pleased, as long as this was not prohibited by Acts of the sovereign Parliament, a question that would be determined by a judiciary applying all rules equally to all persons. Relying implicitly on organs of state that were considered to be responsible and benevolent, Dicey believed that positive declarations of rights were unnecessary in the United Kingdom. This common law approach has yielded some significant victories for civil liberties, and cases such as *Entick v Carrington* and *Beatty v Gillbanks* are clear examples of this. Nevertheless, Dicey’s approach can be questioned on grounds that it places too much power in the hands of an unaccountable and inherently conservative judiciary. In *Freedom under Thatcher*, Ewing & Gearty described many occasions during the Thatcher premiership on which the judiciary failed to protect civil liberties, concluding ‘the harsh reality is that we need to be protected by Parliament from the courts’. This reflects Griffith’s earlier arguments that ‘political decisions should be taken by politicians. In a society like ours this means by people who are removable’.

Whatever may be the correct interpretation of the value and effectiveness of the common law system of protecting civil liberties, prior to 1998 the following extensive list of fundamental rights and freedoms had been recognised at common law: right to life; freedom of expression; freedom of conscience; right to free assembly; right to personal privacy; right to be free from arbitrary entry, search or seizure; right to respect for private and family life; right to bodily integrity; right to personal liberty; right to freedom of movement; freedom of association; right to participate in government; right to the protection of the law; right to property; certain economic and social rights; and rights of access to the courts. In addition, from the 1970s onwards courts in the United

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64 ibid 114  
65 ibid 115  
66 (1765) 19 State Tr 1029  
67 (1881-82) 9 QBD 308  
69 Ewing & Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Clarendon 1990) 270-71  
70 Griffith, ‘The Political Constitution’ (1979) 42 MLR 1, 16  
Kingdom had begun to use the Convention to develop domestic law. In 1996 Lord Bingham set out the six principal ways in which the ECHR might influence domestic proceedings:

1. If a statute is capable of two interpretations, the courts presume that Parliament intended to legislate in accordance with the Convention;
2. If the common law is uncertain, unclear or incomplete, the courts will act compatibly with the Convention wherever possible;
3. If the domestic statute was enacted to fulfil a Convention obligation;
4. When exercising a judicial discretion the courts would try to comply with the Convention;
5. The courts might have regard to the Convention for guidance as to what British public policy requires;
6. In matters covered by EC law.\(^{72}\)

Although some research suggested that the true impact of the Convention in domestic law was limited,\(^ {73}\) these developments suggested that the ECHR had ‘achieved influence and importance in domestic law beyond that of a mere treaty’.\(^ {74}\)

According to Hunt, by 1997 the ‘English courts [had] asserted an indigenous, common law human rights jurisdiction in public law’.\(^ {75}\) This jurisdiction had asserted itself in a number of ways, revealing ‘judicial willingness to develop the common law in a way which provides recognition for and greater protection of fundamental rights’.\(^ {76}\) One such example was the refinement of the common law principles of judicial review, so as to lower the *Wednesbury*\(^ {77}\) threshold for unreasonableness, applying anxious scrutiny where decisions of the Executive affected fundamental rights recognised at common law.\(^ {78}\) The courts also developed a presumption that a statute granting wide powers to the Executive was presumed not to have intended to authorise any

\(^{72}\) HL Deb 3 July 1996, vol 573, cols 1465-67 (Lord Bingham)

\(^{73}\) See e.g. Bratza, ‘The Treatment and Interpretation of the European Convention on Human Rights by the English Courts’ in Gardner (ed), *Aspects of Incorporation of the European Convention on Human Rights into Domestic Law* (BIICL 1993), and Klug & Starmer, ‘Incorporation Through the Back Door?’ [1997] PL 223, which argued that of the 316 domestic cases citing the ECHR between 1975 and 1996, in only 2 had the Convention influenced the outcome

\(^{74}\) Blake, ‘Judicial Review of Discretion in Human Rights Cases’ [1997] EHRLR 391, 393

\(^{75}\) Hunt, *Using Human Rights Law in English Courts* (Hart 1997) 163

\(^{76}\) ibid 205

\(^{77}\) *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA)

\(^{78}\) For example *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA)
interference with such fundamental rights. As Lord Hoffman famously stated in *Simms*, if Parliament in its sovereign capacity sought to interfere with fundamental rights, it should ‘squarely confront what it is doing and count the political cost’.79

The HRA 1998 was therefore enacted against a constitutional background which featured a historic commitment to the protection of civil liberties and human rights, both through international agreements and domestic law. Parliament was central in this constitutional system, being required to pass legislation to give domestic effect to any international human rights standards, and expected to use its sovereign power to protect individual liberties. In providing a role for Parliament and the Executive in the protection of human rights in the post-HRA 1998 era, section 19 can be said to have continued these long-established traditions.

The modern constitution: increasingly legal nature, continued insistence on parliamentary sovereignty

As well as continuing the constitution’s historic commitment to human rights, section 19 can also be situated at the heart of the modern United Kingdom constitution which although becoming increasingly legal in nature, continues to insist on the centrality of parliamentary sovereignty.

The increasingly legal nature of the modern constitution80

It has been said that the period since 1997 has seen ‘the most radical change [to the United Kingdom constitution] in eighty years’.81 This change has been effected largely through the enactment of a raft of primary legislation on constitutional issues, suggesting a gradual shift from a “political”82 to a more “legal” constitution. Research by McDonald and Hazell demonstrated that between 1997 and 2006 Parliament enacted

79 *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) 131
80 For a discussion of the ‘juridification’ of the constitution since the 1970s see Bevir, ‘The Westminster Model, Governance and Judicial Reform’ (2008) 61 Parl Aff 559
82 Griffith (n 70)
40 statutes deemed to be of constitutional significance.\textsuperscript{83} This legislation reformed many institutions of the United Kingdom constitution. For example, the composition of the House of Lords has been changed by the removal of most hereditary peers,\textsuperscript{84} and the Constitutional Reform Act 2005 made fundamental changes to the role of the Lord Chancellor,\textsuperscript{85} instituted a new mechanism for judicial appointments,\textsuperscript{86} and created a Supreme Court for the United Kingdom.\textsuperscript{87} The Coalition Government\textsuperscript{88} has continued in this vein, introducing fixed-term Parliaments\textsuperscript{89} and changing the composition of the House of Commons\textsuperscript{90} via statute. The HRA 1998, providing statutory protection for Convention rights, is therefore a part of a wider movement to regulate a number of features of the constitution by statutory means.

In addition to greater statutory regulation of the constitution there has also been significant growth in the use of judicial review as a means of controlling the legality of Executive decision-making. The constitutional significance of judicial review ‘has increased during the last 25 years, both because of the number of cases coming to the courts and the content of the leading cases’.\textsuperscript{91} In 1981 there were 533 applications for judicial review, of which 376 were granted leave.\textsuperscript{92} By 2010 that figure had increased to 10,548 applications for judicial review, of which 1,100 were granted leave.\textsuperscript{93} This growth has resulted not only from the increasingly diverse statutory powers granted to government, but also from the courts’ willingness to review the exercise of prerogative powers\textsuperscript{94} and the performance of public functions by bodies neither created by statute nor exercising statutory powers.\textsuperscript{95} The HRA 1998 has contributed to this trend by

\textsuperscript{83} McDonald \& Hazell (n 81) 12-14
\textsuperscript{84} House of Lords Act 1999, s 1
\textsuperscript{85} Constitutional Reform Act 2005, pt 2
\textsuperscript{86} CRA 2005, pt 4
\textsuperscript{87} CRA 2005, pt 3
\textsuperscript{88} Formed following the General Election of May 2010 at which no party won an overall majority of seats in the House of Commons. For an account see Boulton \& Jones, 
\textit{Hung Together: The 2010 Election and the Coalition Government} (Simon \& Schuster 2010)
\textsuperscript{89} Fixed-term Parliaments Act 2011
\textsuperscript{90} Parliamentary Voting System and Constituencies Act 2011
\textsuperscript{91} Bradley \& Ewing (n 54) 605 (FN omitted)
\textsuperscript{92} ibid
\textsuperscript{93} Ministry of Justice, \textit{Judicial and Court Statistics 2010}
\textsuperscript{94} Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL) and more recently 
\textit{R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)} [2008] UKHL 61, [2009] 1 AC 435
\textsuperscript{95} \textit{R v Panel on Takeovers and Mergers, ex p Datafin Plc} [1987] QB 815 (CA)
creating new avenues for legal action where a public authority fails to act compatibility with Convention rights.96

More generally the increase in both legislation regulating constitutional matters and the significance of judicial review seems to have contributed to the growing prominence of the concept of the rule of law.97 One of the clearest indicators of this can be found in the dicta of Lords Steyn and Hope and Baroness Hale in R (Jackson) v Attorney General,98 all of whom suggested that in certain circumstances the rule of law would trump parliamentary sovereignty. Lord Steyn asserted that the traditional Diceyan view of parliamentary sovereignty was ‘out of place in the modern United Kingdom’.99 In his view ‘exceptional circumstances’ including attempts to abolish judicial review or the ordinary role of the courts might lead the courts to ‘consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish’.100 Lord Hope was even more explicit, stating ‘the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based’.101 Although not universally accepted,102 these statements are highly significant. They suggest that the United Kingdom constitution is gradually shifting from an insistence on the absolute supremacy of Parliament to an acceptance of the need for legal controls on the powers of all branches of government.

Section 19 and HRA 1998 accord with and have contributed to this development, by encouraging the Executive and Parliament to comply with legal standards. Jowell has argued that the ‘most important constitutional significance’ of the 1998 Act is that ‘it redefines democracy as being not only about majority rule but about the need for government to be limited in its power to violate human dignity and the rule of law’.103 In providing for legally enforceable, statutory protections for Convention rights the HRA 1998 ‘begins to shape a higher-order law’ which requires that ‘neither Parliament nor those exercising public functions may override certain positive rights

96 HRA 1998, ss 6, 7 & 8
97 CRA 2005, s 1 refers to an ‘existing constitutional principle of the rule of law’
98 [2005] UKHL 56, [2006] 1 AC 262
99 ibid [102]
100 ibid
101 ibid [107]
102 e.g. Ewing, Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law (OUP 2010) 280-81
that belong to everyone’. Indeed, in a recent discussion of the meaning of the rule of law today, Lord Bingham argued that that concept required that the law ‘afford adequate protection of fundamental human rights’.

It would seem therefore that the development of the United Kingdom constitution is being influenced by a form of legal constitutionalism, increasingly regulating constitutional actors by legal means. The shift ‘from a political to a principled constitution’ has been ‘invigorated’ by the HRA 1998, setting as it does statutory requirements for the protection of legally enforceable Convention rights. Indeed, if in the United Kingdom the constitution ‘is no more and no less than what happens’, then what is happening seems to be a growing emphasis on legal controls within the constitution and the increasing prominence of the rule of law. However, despite these trends it remains the case that parliamentary sovereignty continues to exert a pervasive effect throughout the constitution.

The continued insistence on parliamentary sovereignty

The United Kingdom has no codified constitution with supreme legal status which entrenches protection for human rights. Accordingly there is no framework of legislative competence within which Parliament must work, and no means for the courts to assess the constitutionality of legislation on human rights grounds. This can be contrasted with the situation in France for example, where Article 61 of the Constitution of 1958 gives the Conseil Constitutionnel the power to review bills for compatibility with the Constitution before they are promulgated. If a bill is declared unconstitutional it cannot pass into law (Article 62). Instead, the United Kingdom constitution continues to place Dicey’s theory of parliamentary sovereignty at its

\[\text{\textsuperscript{104}} \text{ibid}\]
\[\text{\textsuperscript{105}} \text{Bingham, The Rule of Law (Allen Lane 2010) 66}\]
\[\text{\textsuperscript{106}} \text{This development is not universally supported. Some authors believe that any move from a political to a legal constitution would be ‘a mistake’: Tomkins, Our Republican Constitution (Hart 2005) 10}\]
\[\text{\textsuperscript{107}} \text{Oliver, ‘The United Kingdom in Transition – From Where to Where?’ (Lecture at IALS, 30 January 2008)}\]
\[\text{\textsuperscript{108}} \text{Steyn, (n 40) 482}\]
\[\text{\textsuperscript{109}} \text{Griffith (n 70) 19}\]
\[\text{\textsuperscript{110}} \text{Including the 1789 Declaration of the Rights of Man and the Citizen, and the Preamble of the 1946 Constitution which refers to ‘fundamental principles of law recognised by the laws of the republic’}\]
heart.\textsuperscript{111} As explained above,\textsuperscript{112} this theory accords to Parliament absolute legislative supremacy. The HRA 1998 was not intended to displace this theory,\textsuperscript{113} but instead was expressly designed to preserve parliamentary sovereignty.

The continued insistence on parliamentary sovereignty is reflected in a number of features of the 1998 Act. For example, if a court is unable to read primary legislation so as to make it compatible with Convention rights\textsuperscript{114} and issues a declaration of incompatibility,\textsuperscript{115} the HRA 1998 states clearly that such a declaration ‘does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given’.\textsuperscript{116} Further, the duty for public authorities to act compatibly with Convention rights\textsuperscript{117} does not apply if ‘as a result of one or more provisions of primary legislation, the authority could not have acted differently’.\textsuperscript{118} Therefore, following enactment of the HRA 1998:

the essential characteristics of the constitution remain unquestioned; Parliament, and not the judiciary, remains the dominant law-making force in the constitution, while the primary role of the courts remains the interpretation and application of the law, not the design and implementation of policy.\textsuperscript{119}

Section 19 clearly complements these features of the HRA 1998. Although Parliament retains the ability to legislate contrary to Convention rights, this provision ‘may make it politically more difficult to do so by drawing parliamentary, media, and public attention to the intended violation’.\textsuperscript{120} Parliament has a pivotal role in the protection of Convention rights under the scheme of HRA 1998. It is expected to take account of those rights when legislating as a result of section 19, but is not bound by them if circumstances require legislation which is incompatible. As such, section 19 and the HRA 1998 can be said to fit squarely within the modern United Kingdom constitution which, although becoming increasingly legal in nature, continues to insist on the principle of parliamentary sovereignty.

\textsuperscript{111} A recent example of this mentality can be seen in the so-called “sovereignty clause” found in the European Union Act 2011, s 18
\textsuperscript{112} p 26-27
\textsuperscript{113} p 18
\textsuperscript{114} As required by HRA 1998, s 3
\textsuperscript{115} HRA 1998, s 4(2)
\textsuperscript{116} HRA 1998, s 4(6)(a)
\textsuperscript{117} HRA 1998, s 6(1)
\textsuperscript{118} HRA 1998, s 6(2)(a)
\textsuperscript{119} Masterman, ‘Labour’s “Juridification” of the Constitution’ (2009) 62 Parl Aff 476, 478
\textsuperscript{120} Wicks, The Evolution of a Constitution: Eight Key Moments in British Constitutional History (Hart 2006) 133
3. THE PARADOX: AN ATMOSPHERE HOSTILE TO THE HUMAN RIGHTS ACT 1998

It has been argued that the HRA 1998 seeks to promote the protection of legally enforceable human rights standards while respecting and maintaining the principle of parliamentary sovereignty, and therefore accords with the current constitutional arrangements of the United Kingdom. Section 19 was designed to ensure that the Executive and Parliament play central roles within the scheme of the 1998 Act, providing the democratically accountable branches of government with the ability fully to engage with and influence the scope and meaning of human rights in the United Kingdom. Despite this, and perhaps paradoxically, the HRA 1998 has been subject to sustained criticism by both academics and politicians and has not prevented the passage of a stream of legislation which has raised serious human rights issues. This suggests that section 19 may not have had the impact that had been intended.

Academic and political hostility to the Human Rights Act 1998

Much of the hostility to the HRA 1998 within academic and political circles appears to be rooted in a deep suspicion of the role of the judiciary in the protection of human rights in the United Kingdom. Concerns are often expressed that any increase in judicial power has a corresponding effect of undermining the role of the democratically elected Parliament. Such a shift in power is deemed to be unacceptable if it is considered that ‘[h]uman rights are the stuff of politics, not of law. They are inherently contestable, and contested. Debates over the proper extent of their legal protection should therefore take place in Parliament’. The idea that allowing courts to adjudicate on human rights issues both diminishes Parliament’s role and unduly draws the judiciary into political decision-making has even been expressed by a recently appointed Justice of the Supreme Court, Lord Sumption. He argued that by incorporating the Convention through the HRA 1998, ‘we have transferred it out of the political arena altogether, and into the domain of judicial decision-making where public

accountability has no place’. Indeed, according to Sumption the HRA 1998 and the ECHR ‘removes important areas of policy from the domain of democratic accountability, whether at national or supra-national level’. 

This line of academic criticism has been mirrored by political rhetoric, particularly from the Conservative Party. The Conservative Party’s 2010 manifesto, *Invitation to Join the Government of Britain*, pledged to ‘replace the Human Rights Act with a UK Bill of Rights’. This has been Conservative Party policy since at least 2006 when David Cameron first called for a Bill of Rights, arguing that the HRA 1998 had ‘undermined in part’ the fight against crime and terrorism. One of Cameron’s criticisms of the HRA 1998 was that since its passage, ‘judges are increasingly making our laws’, and have ‘too much power over issues that are contested aspects of public policy (...) which should therefore be settled in the realm of domestic politics’. In contrast a Bill of Rights would ‘strengthen our liberties, spell out the extent and limits of rights more clearly, and ensure proper democratic accountability over the creation of any new rights’.

Other leading members of the Conservative Party have written in similar terms. Michael Howard has argued that increasing judicial power is ‘one of the biggest threats to the democratic authority of Parliament and Government’. Asserting that an unelected judiciary should not make the political decisions which are inherent in balancing rights and should not second-guess Parliament’s judgments, Howard hoped that replacing the HRA 1998 with a Bill of Rights would ‘restore responsibility for this balancing act to politicians that the public can elect or boot out as they see fit’.

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124 ibid 21
125 Labour politicians have also openly criticised the HRA 1998: see further p 117-18
129 ibid
131 ibid
Dominic Grieve suggested that a ‘key area of change’ to be included in any British Bill of Rights would be ‘a reconsideration and recalibration of the relationships of our national courts and Parliament and of our national courts and the Strasbourg Court in particular’.\(^{132}\)

The Coalition Government appears to be pursuing this policy, albeit in perhaps more circumspect terms. The *Programme for Government* contained a commitment to:

establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties.\(^{133}\)

The Commission on a Bill of Rights was established on 18 March 2011, and is due to report by the end of 2012.\(^{134}\)

While based on valid concerns, much of the criticism regarding the increased powers and political role of the judiciary at the expense of Parliament does not acknowledge the potential impact of section 19 within the scheme of the HRA 1998. As has been argued, section 19 was specifically designed to facilitate central and continuing roles for the Executive and Parliament in the protection of human rights. Focusing on the judicial role under the 1998 Act overlooks the capacity for the democratically accountable branches of government to play a full part in the development and determination of human rights in the United Kingdom. The fact that a central feature of the HRA 1998 has been overlooked in this way may go some way towards explaining why, since the passage of the HRA 1998, Parliament has enacted legislation which has raised significant human right issues.

**The Human Rights Act 1998 has not prevented the passage of legislation raising serious human rights issues**

In 1996 Klug, Starmer & Weir undertook an assessment of the framework for the protection and exercise of human rights in the United Kingdom against objective


\(^{134}\) <http://www.justice.gov.uk/about/cbr> accessed 27 May 2012
standards drawn from international human rights treaties. They examined areas of English law affecting democratic rights, concentrating on issues surrounding freedom of information, freedom of expression, freedom of assembly, freedom of association and trade unionism, state surveillance, police powers of arrest and detention, and voting and standing for election.\textsuperscript{135} The authors concluded that in many instances either the law itself or the implementation of the law did not comply with international human rights standards.\textsuperscript{136}

In the post-HRA 1998 era, such inconsistencies should be infrequent. Government and Parliament have been equipped with the means to avoid unwittingly enacting legislation which contravenes human rights standards. Since 1998 there have been some examples of legislation which arguably have improved human rights compliance. The Freedom of Information Act 2000 gave a statutory right of access to official information for the first time,\textsuperscript{137} the Regulation of Investigatory Powers Act 2000 provided a unified statutory framework for the use of covert surveillance methods, and the notorious section 28 of the Local Government Act 1988 has been repealed.\textsuperscript{138} There are however many examples of legislation which, in spite of section 19, have either contravened Convention rights or raised serious human rights issues, hinting at a disturbing and sustained anti-libertarian tendency.\textsuperscript{139}

The Serious Organised Crime and Police Act 2005 provides a striking example. Under the scheme established by that Act all demonstrations within a one kilometre radius of Parliament Square had to be authorised by the Metropolitan Police Commissioner, who was able to impose conditions on any such demonstration.\textsuperscript{140} Taking part in an unauthorised demonstration was an offence. Such strict control of political protest in the vicinity of the centre of the political system in the United Kingdom is a serious interference with the rights to freedom of expression and

\textsuperscript{135} Klug, Starmer & Weir, \textit{The Three Pillars of Liberty: Political Rights and Freedoms in the United Kingdom} (Routledge 1996)
\textsuperscript{136} ibid 304-15
\textsuperscript{137} It should be noted that this Act has been criticised, especially on the basis of the extensive exemptions contained in the Act and the availability of a ministerial veto to prevent disclosure of information: Austin, ‘Freedom of Information: A Sheep in Wolf’s Clothing?’, in Jowell & Oliver (eds), \textit{The Changing Constitution} (5th edn, OUP 2004)
\textsuperscript{138} Local Government Act 2003
\textsuperscript{139} For a discussion of a wide range of such legislation, see Ewing (n 102)
\textsuperscript{140} SOCPA 2005, s 132-138
These provisions have been repealed by section 141 of the Police Reform and Social Responsibility Act 2011, and replaced by a system of controls on ‘prohibited activities’ including the use of amplified noise equipment in Parliament Square Gardens and adjoining pavements.\(^{142}\)

The 2005 Act also extended police powers of arrest in the Police and Criminal Evidence Act 1984.\(^{143}\) Police constables may now arrest without a warrant on reasonable suspicion of the commission of any offence as long as one of the general arrest conditions contained in section 24(5) is satisfied. As these conditions include factors such as needing to carry out an arrest to allow the prompt and effective investigation of the offence, it is hard to imagine circumstances in which they could not be met. One commentator has written that this power of arrest ‘would have been viewed as too draconian had it been introduced in 1984’.\(^{144}\)

Most disturbing of all would seem to be the wide range of measures in the form of anti-terrorism legislation. The Terrorism Act 2000 granted broad powers to the Secretary of State to proscribe organisations on the basis of a belief that the organisation is ‘concerned in terrorism’.\(^{145}\) It is an offence to be a member of\(^{146}\) or express support for\(^{147}\) a proscribed organisation. The *Three Pillars* authors had criticised the equivalent regime under the Prevention of Terrorism (Temporary Provisions) Act 1989, on grounds that proscription took place on the order of the Secretary of State, with little parliamentary or judicial oversight.\(^{148}\) In spite of the HRA 1998 and section 19, this system was reproduced under the 2000 Act.\(^{149}\) According to the latest Home Office statistics, there are currently 61 proscribed organisations: 47 of which are deemed to be international terrorist organisations and 14 of which are organisations in Northern Ireland.\(^{150}\)

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\(^{141}\) For a description of the use of these powers in practice see Ewing (n 102) 118-20

\(^{142}\) PRSRA 2011, s 142-149. These provisions entered into force on 19 December 2011 by virtue of the Police Reform and Social Responsibility Act 2011 (Commencement No 2) Order 2011, SI 2011/2834

\(^{143}\) PACE 1984, s 24 as amended by SOCPA 2005, s 110(1)

\(^{144}\) Fenwick (n 24) 1145

\(^{145}\) Terrorism Act 2000, s 3(4)

\(^{146}\) ibid s 11(1)

\(^{147}\) ibid s 12

\(^{148}\) Klug, Starmer & Weir (n 135) 209-10

\(^{149}\) For a discussion of these powers see Ewing (n 102) 182-91

Section 44 of the Terrorism Act 2000 gave the police the power to stop and search anyone within an authorised area for articles which could be used in connection with terrorism \textit{without} requiring a reasonable suspicion that any such article would be found. In practice ‘a rolling programme of renewed authorisations’\footnote{Ewing (n 102) 201} was implemented soon after the entry into force of this provision, permitting the exercise of these powers throughout all of Greater and Central London. This power was widely used: for example, in 2007-08 there were 124,687 such stop and searches in England and Wales, 90\% of which took place in London but of which only 73 resulted in an arrest.\footnote{BBC News, ‘Police “Terror Searches” Treble’ (London, 30 April 2009) <http://news.bbc.co.uk/1/hi/uk_politics/8026745.stm> accessed 27 May 2012} Following a successful legal challenge before the ECtHR,\footnote{Gillan \textit{v} United Kingdom (2010) 50 EHRR 45, finding that the stop and search regime under the Terrorism Act 2000 violated article 8, as the broad powers that it conferred were not sufficiently circumscribed and not subject to adequate legal safeguards against abuse} these powers were repealed and replaced by a temporary regime which provided for a more limited power of authorisation.\footnote{Terrorism Act 2000 (Remedial) Order 2011, SI 2011/631} In turn these powers will be repealed by the Protection of Freedoms Act 2012 which will replace them with a new permanent counter-terrorism stop and search regime requiring reasonable suspicion before the powers can be exercised.\footnote{Protection of Freedoms Act 2012, ss 59-62}

The Terrorism Act 2000 also created new powers of arrest where there is reasonable suspicion that a person is a terrorist,\footnote{Terrorism Act 2000, s 41(1)} a term widely defined to include a person who has committed one of a variety of terrorist offences,\footnote{ibid s 40(1)(a)} or has been concerned in the commission, preparation or instigation acts of terrorism.\footnote{ibid s 40(1)(b)} Once arrested a person may be detained for an initial period of 48 hours\footnote{ibid s 41(3)} (double the initial detention period following arrest under PACE\footnote{PACE 1984, s 41(1)}), which could be extended by a judicial authority up to a maximum period of 28 days.\footnote{Terrorism Act 2006, s 23} This is an extremely long period of pre-charge detention, and even taking account of the judicial oversight built into the scheme, it is hard to accept that this complies with the spirit of article 5 of the ECHR.\footnote{Guaranteeing the right to liberty and security of the person, with certain limited exceptions specified in art 5(1)(a)-(f)} This period of pre-charge detention will be reduced to a maximum of 14 days

\begin{footnotes}
\item[151] Ewing (n 102) 201
\item[153] Gillan \textit{v} United Kingdom (2010) 50 EHRR 45, finding that the stop and search regime under the Terrorism Act 2000 violated article 8, as the broad powers that it conferred were not sufficiently circumscribed and not subject to adequate legal safeguards against abuse
\item[154] Terrorism Act 2000 (Remedial) Order 2011, SI 2011/631
\item[155] Protection of Freedoms Act 2012, ss 59-62
\item[156] Terrorism Act 2000, s 41(1)
\item[157] ibid s 40(1)(a)
\item[158] ibid s 40(1)(b)
\item[159] ibid s 41(3)
\item[160] PACE 1984, s 41(1)
\item[161] Terrorism Act 2006, s 23
\item[162] Guaranteeing the right to liberty and security of the person, with certain limited exceptions specified in art 5(1)(a)-(f)
\end{footnotes}
by the Protection of Freedoms Act 2012.\textsuperscript{163} And of course, to this account of terrorism legislation enacted since the entry into force of section 19 of the HRA 1998 can be added the draconian powers of detention contained in Part IV of the Anti-terrorism, Crime and Security Act 2001.\textsuperscript{164}

Such developments suggest that section 19 and the HRA 1998 more generally, may have had only a limited impact within the Executive and Parliament. The above statutes all received a section 19(1)(a) ministerial statement of compatibility. It is difficult to understand how such a volume of draconian, reactionary legislation could have been so readily enacted if the processes envisaged by section 19 had been implemented effectively.

\textbf{4. CONCLUSIONS: SECTION 19 IS OF CENTRAL IMPORTANCE AND SIGNIFICANT POTENTIAL}

This chapter has argued that section 19 should be seen as central to the scheme of human rights protection created by the HRA 1998. It provides for pivotal roles for the democratically accountable branches of government in the protection of human rights, and as such also fits squarely within the current constitutional arrangements of the United Kingdom, which seeks both to protect human rights and preserve parliamentary sovereignty.

Appropriate recognition of the purpose and importance of section 19 could help counter many of the criticisms of the HRA 1998 made by both academics and politicians which are frequently based on a perceived increased judicial power and corresponding decrease in the power of Parliament. It could also help to reduce the incidence of the passage of legislation that interferes with Convention rights and any litigation contesting such measures. As such, recognising and emphasising section 19 should be central to any understanding of the HRA 1998 and the focus of any discussion of the future of rights protection in the United Kingdom.

This is especially important as not only is section 19 key to the protection of human rights in the United Kingdom, but it also forms part of a wider recent trend

\textsuperscript{163} Protection of Freedoms Act 2012, s 57
\textsuperscript{164} n 15
across a number of Commonwealth jurisdictions. This “family” of legal mechanisms for the protection of human rights, including Canada, New Zealand and a number of Australian jurisdictions as well as the United Kingdom, seeks to provide specific roles for executives and legislatures through formal systems of pre-enactment vetting and scrutiny of proposed legislation. They all require some form of executive reporting to the legislature regarding compatibility issues. It is to a discussion of such measures across these jurisdictions that we now turn.
The requirement for Ministers to make a statement of compatibility under section 19 of the HRA 1998 can be situated within a wider international practice that emphasises the importance of human rights standards in the legislative process. This chapter will examine a number of Commonwealth jurisdictions in which legal mechanisms for the protection of human rights provide for ministerial certification as to a bill’s compatibility with those standards, and encourage legislatures to engage with compatibility issues during a bill’s parliamentary passage.

The Canadian Charter of Rights and Freedoms 1982 and the New Zealand Bill of Rights Act 1990 both require ministerial certification when proposed legislation does not comply with human rights standards. The Australian Capital Territory Human Rights Act 2004 (ACT) and Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) require ministerial certification and scrutiny by parliamentary committees in respect of all bills. Although the Commonwealth of Australia has rejected comprehensive statutory human rights protection, it has recently legislated for mechanisms to ensure greater parliamentary engagement with human rights: the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) requires statements of compatibility to be made in respect of all bills, and has created a joint committee on human rights.

Taken together, these measures can be viewed as a “family” of human rights protections, constituting a new form of constitutional protection for human rights falling somewhere between the US model of judicial supremacy and the traditional Westminster model of legislative supremacy, based on Dicey’s theory of parliamentary sovereignty.¹ Before turning to a more detailed discussion of these measures, it will be useful to examine the features of the “new models” of rights protection.

¹ See p 26
1. THE ‘NEW MODELS’ OF RIGHTS PROTECTION: THEORIES AND FEATURES

The movement to adopt a new form of constitutional protection for human rights has been described by Stephen Gardbaum as a ‘new Commonwealth model of constitutionalism’,\(^2\) and by Janet Hiebert as a ‘new parliamentary model’ of rights protection.\(^3\)

**Gardbaum and the ‘new Commonwealth model of constitutionalism’**

In the post-1945 era and inspired by the US model of constitutionalism, most countries adopting new constitutional arrangements accorded to fundamental rights a higher status than other legislation and entrenched such rights against amendment or repeal by ordinary legislative procedures.\(^4\) These rights were enforced by a powerful judiciary able to invalidate conflicting legislation, whose decisions could not be reviewed by ordinary majority decision of the legislature.\(^5\) However, Gardbaum identified the emergence of an ‘intriguing alternative to this model’,\(^6\) described as a ‘new third model of constitutionalism that stands between the two polar models of constitutional and legislative supremacy’.\(^7\) This ‘Commonwealth model’\(^8\) rejects ultimate judicial supremacy and ‘suggests the novel possibility of a continuum stretching from absolute legislative supremacy to the American model of a fully constitutionalized bill of rights with various intermediate positions in between that achieve something of both’.\(^9\)

All variations of the new Commonwealth model would have three defining features:

(1) a legalized bill or charter of rights; (2) some form of enhanced judicial power to enforce these rights by assessing legislation (as well as other government acts) for consistency with them that goes beyond traditional presumptions and ordinary modes of statutory interpretation; and (3), most distinctively,

\(^4\) Gardbaum, ‘The New Commonwealth Model’ (n 2) 707
\(^5\) ibid 708
\(^6\) ibid
\(^7\) ibid 709
\(^8\) ibid 710
\(^9\) ibid
notwithstanding this judicial role, a formal legislative power to have the final word on what the law of the land is by ordinary majority vote.\footnote{Gardbaum, ‘Reassessing the New Commonwealth Model of Constitutionalism’ (2010) 8 ICON 167, 169}

This new model, Gardbaum argued, would provide a ‘better balance’ between ‘the recognition and effective protection of certain fundamental or human rights [and] a proper distribution of power between courts and the elected branches of government, including appropriate limits on both’.\footnote{ibid 171} It therefore had ‘greater potential to actively involve all three branches of government in rights review’.\footnote{ibid 175}

This involvement would take the form of consideration of human rights at three stages. The executive would undertake ‘preenactment rights review’,\footnote{ibid 176} viewed by Gardbaum as ‘an important, attractive, and distinctive part of the new model and its effective protection of rights’.\footnote{ibid} Courts would perform rights review of legislation and finally would be ‘the possible exercise of the legislative final word’,\footnote{ibid 177} which should involve ‘principled and focused legislative debate’\footnote{ibid} in response to a court ruling at the second stage.

Strong political rights review would require ministerial certification in respect of all bills, preceded by a genuine, through assessment of any human rights issues: ‘the expectation should be of serious ministerial consideration, not merely formulaic or conclusory’.\footnote{ibid 203} Following certification the rights review baton would pass to the legislature, where ‘there must be focused parliamentary consideration of this statement and the material on which it was based, as well as of the bill’s general compatibility with the protected rights’.\footnote{ibid}

This argument for increased focus on rights review by the political branches of government accords with Janet Hiebert’s description of the new systems as a ‘parliamentary model’ of rights protection.\footnote{Hiebert, ‘New Constitutional Ideas’ (n 3)}
Hiebert and the ‘parliamentary model’

Hiebert described this ‘new paradigm for rights protection’ as ‘a parliamentary rights model’, which seeks to include all branches of government in the collective enterprise of rights protection. It ‘introduces incentives and obligations for political judgment about rights, but still benefits from exposure to judicial perspectives on the scope of rights and their application’.

The distribution of responsibility for protecting rights between the branches of government is important because ‘rights are protected not just by after-the-fact external judicial evaluation, but also by establishing opportunities and obligations for rights review by ministers and parliamentarians that are distinct from, and prior to, judicial review’.

In later work Hiebert has argued that despite the attempt to share responsibility for rights protection the judiciary continues to exert a significant influence which affects the content of proposed legislation. If a government understands there to be ‘substantial political and legal consequences for failing to comply with rights’, there will be an incentive to protect legislation from later judicial action. The government will accordingly ‘incorporate case law into the legislative process in order to lower the risk of judicial censure’. The judiciary’s influence may thus be felt throughout the process of developing and evaluating proposed legislation, as ‘reliance on case law alters the norms of policy-making and has the potential to influence a broad range of government’s legislative agenda’.

Hiebert contended that the requirement to report on compatibility had contributed to this, as ministerial certification ‘precipitates bureaucratic evaluations of proposed legislation’ within which ‘consistency with case law is interpreted as the essential condition for claiming compatibility’. Hiebert therefore seems to have concluded that ministerial certification, designed to enhance the role of the democratically accountable branches of government in protecting rights, has

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20 ibid 1963
21 ibid 1964
22 ibid 1979
23 Hiebert, ‘Governing Like Judges?’, in Campbell, Ewing & Tomkins (eds), The Legal Protection of Human Rights: Sceptical Essays (OUP 2011)
24 This argument was also acknowledged by Gardbaum, ‘Reassessing the New Commonwealth Model’ (n 10) 178
25 Hiebert, ‘Governing Like Judges?’ (n 23) 43
26 ibid 44
27 ibid 48
28 ibid 49
in fact reinforced the judicial supremacy which the parliamentary model sought to avoid.

Whether or not this is a correct assessment, these models do – in form at least – offer an alternative to the previously accepted constitutional paradigms of judicial or legislative supremacy by seeking to share responsibility for protecting rights among all three branches of government. A major feature of such systems is ministerial certification of proposed legislation, designed to ensure that governments take account of rights when developing legislative proposals, and that legislatures are apprised of such issues when scrutinising bills. The attempt to enhance the role of the democratically accountable branches of government in rights protection is common to all those systems which fall within the ‘new models’ of rights protection, and it is to an examination of the family of Commonwealth jurisdictions that have adopted such measures that this chapter now turns.


The Canadian Charter of Rights and Freedoms and the New Zealand Bill of Rights Act influenced the form and content of the HRA 1998.29 Both systems contain provision for the ministerial certification of legislation, although the practice in both countries has produced markedly different outcomes.

The Canadian Charter of Rights and Freedoms 1982: too few reports?

The Canadian Bill of Rights Act 1960

The Canadian Bill of Rights Act 1960 was perhaps the first experiment in the “new model” of rights protection, providing statutory protection for human rights and

29 The reporting duty under the NZBORA was referred to in Straw & Boateng, ‘Bringing Rights Home: Labour’s Plans to Incorporate the European Convention on Human Rights into UK Law’ [1997] EHRLR 71, at 79. The Home Office White Paper, Rights Brought Home: The Human Rights Bill (Cm 3782, 1997) also noted that ‘Several other countries with which we have close links and which share the common law tradition, such as Canada and New Zealand, have provided similar protection for human rights in their own legal systems’ at para 1.13
containing the innovative concept of ministerial certification. Described as ‘an administrative “policing” provision’, section 3 of the Act stated:

(...) the Minister of Justice shall (...) examine (...) every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

This created a clear obligation for the Minister of Justice to examine every government bill introduced into the House of Commons, and to report in case of any inconsistency with the protected rights.

This provision exerted ‘a powerful influence on drafts of laws before they became laws’. A Minister sponsoring a bill was expected to submit a memorandum to Cabinet ‘setting forth the nature of the proposed bill and its policy implications’ before drafting instructions could be given to the Department of Justice. Any inconsistent provisions would be removed, as the political risks of introducing inconsistent bills into Parliament were significant.

These internal procedures therefore ‘purified’ draft bills, such that only one section 3 report was ever made. This occurred in 1975 in respect of a Senate amendment to the Feeds Act, inserting a provision presuming guilt. When ‘it returned to the Commons the Minister of Justice reported that the Senate amendment was an infringement of the Bill of Rights and it was deleted’.

The Department of Justice also gained a more prominent and influential role as a result of section 3. Although it ‘would never be publicly acknowledged’, the Department of Justice ‘could restrain an over-zealous Minister of the Crown from framing a Bill (...) which could violate the provisions of the Canadian Bill of Rights’ by the very ‘threat of appending a report’. This early experience under the 1960 Act anticipated what would occur under the Canadian Charter of Rights and Freedoms 1982.

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31 ibid 310
32 ibid
33 ibid 311
34 ibid 312
35 ibid 306
36 Tarnopolsky, The Canadian Bill of Rights (2nd edn, McClelland and Stewart 1975) 128
The Canadian Charter of Rights and Freedoms 1982

The Charter was enacted as Part 1 of the Constitution Act 1982, section 52(1) of which states:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

For these purposes, the Constitution of Canada includes, inter alia, ‘the Canada Act 1982, including this Act’. The Charter therefore forms part of a constitution which is the supreme law of Canada, and as such accords a higher legal status to human rights than did the Bill of Rights Act 1960. As part of the constitution, the Charter binds federal and provincial governments and legislatures, thus requiring all national and provincial laws to comply with its provisions. The Charter does however seek to preserve the ultimate authority of legislative bodies. Section 33 contains a “notwithstanding clause”, enabling legislatures to:

expressly declare in an Act of Parliament (...) that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter [i.e. the protected rights].

Gardbaum has described this provision as ‘the distinctive feature of the Charter (...) and (...) what makes it an instance of the new model of rights protecting instruments.

The Charter included no requirement for ministerial certification of proposed legislation. This omission was rectified by an amendment to the Department of Justice Act 1985, section 4.1 of which requires the Minister of Justice to:

examine (...) every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

37 Constitution Act 1982, s 52(2)(a)
38 Charter of Rights and Freedoms 1982, s 32
39 Charter of Rights and Freedoms 1982, s 33(1)
40 Gardbaum, ‘Reassessing the New Model’ (n 10) 179
Although this reporting requirement was not included in the Charter, executive scrutiny of proposed bills for compliance with Charter rights had nevertheless continued. Section 4.1 therefore ‘confirmed a pre-existing practice’.  

Executive guidance on drafting legislation makes clear the need for legislation to comply with the Charter. The *Guide to Making Federal Acts and Regulations* states that as the Canadian Parliament’s law-making authority is ‘constrained (…) by the Canadian Charter of Rights and Freedoms’, procedures for policy approval and drafting bills must involve consideration of Charter compliance. Once a proposed bill has been included in the Government’s legislative programme, the Minister prepares a ‘Memorandum to Cabinet (MC)’ which is a ‘submission to Cabinet to seek policy approval and authority to draft the bill’. All MCs must ‘include an analysis of the Charter and other constitutional implications of any policy or program proposal’. This process emphasises assessing the risk of successful legal challenge to a policy or proposed Act, as the MC must address:

- whether the proposal is likely to be subject to serious challenge on constitutional (including Charter) grounds and, if so,
- the risk of successful challenge,
- the impact of an adverse decision, and
- the possible costs of litigation, to the extent that they can be estimated.

The *Guide* further states that ‘[a]ssessment of Charter implications for policy proposals neither begins nor ends with the MC process. (…) assessment of constitutional and Charter risks must take place throughout the policy-development process’. Once a proposal has been approved by Cabinet and the bill drafted, the Minister of Justice will examine the bill for Charter compliance and must report to the House of Commons in case of any inconsistency.

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43 ibid 7
44 ibid 67. For a description of the processes surrounding and content of MCs see Murphy, ‘Political Control over Policy Development’ (2003) 24 Stat LR 157
46 ibid
47 ibid 96
48 Department of Justice Act 1985, s 4.1
In the thirty years that the reporting requirement has been in force, no Minister of Justice has ever reported to the House of Commons that a bill was inconsistent with the Charter. This raises a number of issues surrounding the impact of the Charter and the reporting requirement on government processes and on Parliament.

**The impact of the Charter and the reporting requirement**

The Charter’s introduction ‘was not accompanied by any fundamental changes in the way in which governments formulated policy’.\(^{49}\) It was only after the Supreme Court handed down a ‘few landmark cases’ which ‘cost (...) hundreds of millions of dollars’\(^{50}\) that the government ‘began to require that policy proposals were scrutinised with the Charter in mind at much earlier stages of the policy process’.\(^{51}\) In 1991 the Clerk of the Privy Council wrote to all Ministers ‘outlining steps to ensure that Charter issues [were] identified and assessed before new policy proposals [were] submitted to Cabinet’.\(^{52}\)

Since then the Charter and the reporting requirement have had clear effects on government processes, and pre-legislative compatibility testing under the Charter has been said to be of profound significance. Not only did the Charter provoke *changes to processes*, but the ‘new processes and new ways of making policy [made] a *difference to policy outcomes*’.\(^{53}\) It ‘exert[ed] a kind of gravitational pull within the policy system, altering the relative balance between the various options being considered by government’.\(^{54}\) Indeed, Monahan & Finkelstein have argued that ‘the increased role of the judiciary under the Charter is of secondary importance. Far more significant is the way in which the Charter has changed political debate and the policy process itself’.\(^{55}\)

The emergence of these processes has certainly increased the role and significance of the Department of Justice, which is now involved ‘in the policy-

\(^{51}\) Hazell (n 50) 99
\(^{52}\) Monahan & Finkelstein (n 49) 511
\(^{53}\) ibid 506 (emphasis added)
\(^{54}\) ibid
\(^{55}\) ibid 509
development process of its client departments to an extent that would previously have been considered unnecessary and inappropriate’.\textsuperscript{56} This involvement is so extensive that ‘the legal adviser is an important member of the policy-development team’ and legal issues ‘have become as important as fiscal considerations for policy development’.\textsuperscript{57} The Department of Justice’s ‘proactive bureaucratic activism’\textsuperscript{58} in these processes is said to have increased the ability of the executive to maintain its decision-making abilities in the face of increased judicial powers. Systematic review of policy for Charter compliance ‘limits the risk of judicial nullification of the policy objectives of the political executive, and, thus, seeks to ensure that the parliamentary arena (…) remains the centre of the policy process’.\textsuperscript{59} The Department of Justice therefore provides ‘the only institutional structure within the administrative state that can generate political space in a policy environment where the judiciary can be a major actor’\textsuperscript{60} The success of this bureaucratic activism has resulted in only a ‘limited number of Charter challenges involving federal statutes enacted after the Charter was introduced’.\textsuperscript{61} In this context, Kelly has argued that any use of the reporting power would ‘illustrate that the Department of Justice had failed to discipline the administrative state to the policy requirements of the Charter’.\textsuperscript{62}

There is however an alternative interpretation. The fact that no reports have been made under the Charter may instead demonstrate something of a “chilling effect” within government, caused by the judiciary’s use of its Charter powers to invalidate legislation. There seems to have developed among successive governments a political culture ‘that presumes it is inappropriate to proceed with an initiative requiring a report of inconsistency’,\textsuperscript{63} linked to a governmental aversion to tying its hands in subsequent litigation: it would be ‘extremely difficult for a government to defend legislation successfully if the minister of justice had earlier reported to Parliament that it was not a

\textsuperscript{56} Dawson, ‘The Impact of the Charter on the Public Policy Process and the Department of Justice’ (1992) 30 Osgoode Hall LJ 595, 599
\textsuperscript{57} ibid
\textsuperscript{58} Kelly, ‘Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and its Entry into the Centre of Government’ (1999) 42 Can Pub Adm 476, 491
\textsuperscript{59} ibid 503
\textsuperscript{60} ibid
\textsuperscript{61} ibid 504, and see the statistics cited at 506
\textsuperscript{62} ibid 503
\textsuperscript{63} Hiebert, ‘Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?’ (2006) 4 ICON 1, 7
reasonable limit on a protected right'. Such concerns are enhanced by the secrecy surrounding the internal processes used to assess a proposed bill’s compatibility with the Charter: ‘The internal process of Charter analysis in Canada is extremely secretive. Department of Justice lawyers work under confidentiality requirements, and neither the advice given on Charter issues nor the internal reports produced are available to Parliament or the public’.

If the Charter and the reporting requirement have succeeded in successfully embedding Charter rights within government processes, their impact on Parliament has been less extensive. The abovementioned secrecy surrounding the internal processes of Charter-vetting means that ‘Parliament is not alerted by Government to Charter issues raised by proposed legislation’, resulting in ‘the marginalisation of Parliament in terms of scrutinizing the implications of legislation for individual rights’. The success of the executive vetting process can therefore be said to have undermined the Canadian Parliament’s role in rights protection under the Charter.

This is likely to be linked to the fact that the Minister of Justice is only required to report to the House of Commons if a bill is perceived to be inconsistent with Charter rights. As governments have proved loathe to introduce legislation requiring such a report, Parliament will only exceptionally be expressly encouraged to make its own assessment of the Charter issues raised by a bill. In all other circumstances, Parliament will be provided with no information as to the Charter issues considered by the government prior to the bill’s introduction. As such, ‘Parliament may find itself in the untenable position of passing legislation yet not knowing about the seriousness of the risk that the legislation will subsequently be found unconstitutional’.

The problems caused by this lack of information are compounded by the fact that there is no parliamentary committee with responsibility for the systematic scrutiny of bills to determine their implications for human rights. The Senate Standing

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64 ibid 8
65 Cooper, Auditing for Rights: Developing Scrutiny Systems for Human Rights Compliance (JUSTICE 2001) 111
66 ibid 112
67 Hiebert, ‘New Constitutional Ideas’ (n 3) 1971
68 Hiebert, ‘Parliament and the Human Rights Act’ (n 63) 8
Committee on Human Rights was created on 15 March 2001, ‘to which may be referred, as the Senate may decide, bills, messages, petitions, inquiries, papers and other matters relating to human rights generally.’ As these terms of reference suggest, the Committee may only consider a bill if the Senate authorises it to do so. The Committee only scrutinises a small number of bills during each parliamentary session, with the vast majority of its time spent on topical investigations. There is therefore no regular or systematic scrutiny of the human rights implications of bills within the Canadian legislature.

In recognition of this situation, there have been calls for reforms to expand the role of Parliament in the protection of Charter rights. Huscroft has called for full parliamentary debate of the human rights implications of all bills, even in the absence of a report by the Minister of Justice to avoid ‘a sort of learned helplessness, in which parliamentarians become unconcerned about compliance with the Constitution and the importance of fundamental rights in the absence of a report’. Hiebert has argued for the creation of a dedicated parliamentary committee modelled on the Australian scrutiny committee system, to be tasked with ‘identifying possible rights violations’ rather than ‘undertaking qualitative or partisan judgments about the merits of the policy’. Such a committee would not be ‘the locus to solve rights issues’, but it would instead have a role ‘facilitating and giving structure to parliamentary and public debate about the merits and worthiness of a policy’.

The Canadian experience has shown the ability of ministerial certification profoundly to impact policy-development processes within government. In Canada, this has resulted from a combination of the overriding nature of the Charter as part of a

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69 Information about the Committee’s work can be found at: http://www.parl.gc.ca/SenCommitteeBusiness/CommitteeHome.aspx?parl=41&ses=1&Language=E&commit_id=77 accessed 27 May 2012
70 Rules of the Senate, Rule 86(1)(q)
71 In the six most recent parliamentary sessions (from 3 April 2006 – 13 April 2012) the Committee has scrutinised only eight bills: email from Daniel Charbonneau, Committee Clerk, Standing Senate Committee on Human Rights, to author (13 April 2012)
74 ibid 128
75 ibid 131
supreme constitution, a judiciary willing to use its powers to invalidate legislation, and the pervasive influence of the Department of Justice. These factors have effectively placed the task of rights protection in the hands of the executive and the judiciary, and meant in practice that no reports of inconsistency have been made, perhaps at the expense of Parliament’s ability to engage with Charter rights.

This situation can be contrasted with the experience in New Zealand, where the requirement of ministerial certification has produced a markedly different outcome.

The New Zealand Bill of Rights Act 1990: too many reports?

Section 7 of the New Zealand Bill of Rights Act 1990

Unlike the Canadian Charter, the NZBORA is a statutory Bill of Rights which gives no power to the judiciary to invalidate incompatible legislation. This ‘reflects the underlying constitutional relationship in New Zealand between the Parliament and the courts [which is] still founded on the notion of parliamentary sovereignty’. 76 Section 7 of the NZBORA states:

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,

(a) In the case of a Government Bill, on the introduction of that Bill;

Or

(b) In any other case, as soon as practicable after the introduction of the Bill,

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

As under the Canadian model, the Attorney-General must report to the legislature only when a bill appears to be inconsistent with NZBORA.

Section 7 intended ‘to bring protection for the values incorporated in the Bill of Rights Act to bear on the process of Government that is concerned with promotion of

76 Wilson, ‘Mainstreaming Human Rights in Public Policy: the New Zealand Experience’ (2011) 8 JJ 8, 8
new legislation’. It was also ‘designed to alert [Members of Parliament] to legislation which might give rise to an inconsistency and accordingly enable them to debate the proposals on that basis’. Procedures designed to facilitate the first of these aims were introduced soon after the enactment of NZBORA and require consideration of rights issues at a number of stages in the development of legislative proposals.

When submitting bids for bills to be included in the legislative programme the Minister ‘must confirm that [they] comply with certain legal principles or obligations [and] must draw attention to any aspects of a bill that have implications for, or may be affected by’ NZBORA. When Cabinet Legislation Committee is subsequently asked to approve a bill for introduction ‘the Minister is required to confirm in the covering submission that the draft bill complies with the legal principles and obligations identified in paragraph 7.60’. Statements addressing compliance with NZBORA have routinely been included in submissions to Cabinet Committees since May 2003.

The Ministry of Justice also vets all proposed legislation for compatibility with NZBORA and the guidance requires that ‘sufficient time [is] built into the government bill preparation process for adequate consideration of Bill of Rights issues by officials, the Attorney-General, and other Ministers where appropriate. If the Ministry of Justice concludes that the proposed legislation is inconsistent ‘a report will be prepared for the purposes of section 7, and the section 7 report would be ‘tabled in the House by the Attorney-General upon the legislation’s introduction’. The requirement of ministerial certification therefore necessitated changes to policy and legislative development processes to incorporate vetting procedures designed

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78 Legislation Advisory Committee, Guidelines on Process and Content of Legislation (Ministry of Justice 2001, as amended) 113
79 For a description of the early procedures see Iles, ‘New Zealand Experience of Parliamentary Scrutiny of Legislation’ (1991) 12 Stat LR 165
80 Department of the Prime Minister and Cabinet, Cabinet Manual (2008) para 7.60
81 ibid para 7.61
82 Legislation Advisory Committee (n 78) 111
83 In case of bills introduced by the Minister of Justice, this vetting procedure is completed by the Crown Law Office. See for example Legislation Advisory Committee (n 78) 112
84 Cabinet Office, CabGuide: Guide to Cabinet and Cabinet Committee Processes <http://cabguide.cabinetoffice.govt.nz/procedures/legislation/checking-human-rights-issues> accessed 27 May 2012. ‘Sufficient time’ for these purposes is defined as at least two weeks prior to the meeting on the bill
85 Legislation Advisory Committee (n 78) 112
86 ibid 113
to secure compliance with NZBORA. However, a high number of section 7 reports have
been made by successive Attorneys-General, leading some commentators to question
the value of ministerial certification in New Zealand.

The impact of the reporting requirement in section 7 of the NZBORA

Section 7 undoubtedly caused changes to the pre-enactment scrutiny of
legislation, which now involves ‘a more thorough and nuanced consideration of the
human rights implications of policy and legislation within government and parliament
than existed prior to [NZBORA]’. 87 This has contributed to ‘raising the profile of
human rights in public and political life’. 88 Former Attorney-General Butler noted that
even if a section 7 report was not made, the vetting procedures were ‘a useful
mechanism through which respect for the principles of the Bill of Rights can be realised
(…) often Bill of Rights inconsistencies which appear in draft Bills can be readily
solved over the phone, once the problem has been pointed out’. 89 This was confirmed
by Wilson, who stated that the ‘role of the Attorney-General is most effective in
preventing provisions that are inconsistent with the NZBORA being introduced into
legislation either by intervening during the policy stage or with colleagues in Cabinet’. 90

A further positive development is the publication of the legal advice forming the
basis for the section 7 report. Initially legal advice leading to a “positive vet” 91 was not
published, although advice leading to “negative vets” 92 was frequently made available. 93
This ‘substantial lack of transparency’ 94 in the section 7 process was at first alleviated
by the development of a system of ‘selective disclosure’ according to which ‘positive
vets and memoranda [were] released on a case by case basis’. 95 However, since 2003 all
advice to the Attorney-General in this context has been published, with the dual aim of
ensuring that ‘Select Committees and the public (…) understand the Government’s

88 Rishworth, ‘Human Rights – From the Top’ (1997) 68 Pol Q 171, 175
89 Butler, ‘Strengthening the Bill of Rights’ (2000) 31 VUWLR 129, 145
90 Wilson (n 76) 18
91 An assessment that proposed legislation was consistent with NZBORA
92 An assessment that proposed legislation was inconsistent with NZBORA
93 See Taggart, ‘Tugging on Superman’s Cape: Lessons from Experience with the New Zealand Bill of
Rights Act 1990’ [1998] PL 266, 270-271, and Cooper (n 65) 110
94 Butler (n 89) 145
95 ibid
position on any given Bill’ and enabling ‘Select Committees to properly evaluate submissions that raised Bill of Rights issues’. 96 This advice is now published online, 97 a development which is a ‘striking feature of the system’. 98

Critics have nevertheless described the vetting procedure as ‘an unsatisfactory mode of review’, 99 arguing that an assessment of a bill’s consistency with NZBORA carried out by the government itself cannot produce an objective result. In this respect the Attorney-General’s membership of the government ‘may give rise to a conflict of interest’, making it ‘questionable whether a member of the Executive possesses the necessary objectivity to conduct the balancing exercise required by section 5 of the Bill of Rights’. 100

A further issue related to this balancing exercise is the nature of the test applied by the Attorney-General when deciding whether or not a bill is consistent with NZBORA. A section 7 report will only be made where a provision appears to be inconsistent with a right, and the limitation does not fall within the scope of section 5. This has been described as a ‘high threshold’ 101 with adverse implications for parliamentary consideration of the human rights implications of bills, because ‘at best, the scrutiny procedure places a limited amount of information before the House of Representatives, while in most cases no information is placed before the House’. 102 Therefore ‘it is possible that potential human rights issues will either be missed completely by Members of Parliament, or the absence of a section 7 report will be sufficient to remove any misgivings’. 103 Coupled with the fact that questions of justifiable limitations under section 5 would rarely be ‘clearcut’, legislators could be left ‘literally in ignorance of substantive human rights issues in legislation before them’. 104

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96 Archer, ‘Section 7 of the Bill of Rights Act’ [2004] NZLJ 320, 320
100 Cooper (n 65) 111. Section 5 permits limitations to the protected rights that are ‘prescribed by law’ and that can be ‘demonstrably justified in a free and democratic society’
102 ibid 143
103 ibid
104 ibid
However, this problem is likely to have been mitigated by the publication of legal advice relating to consistent bills.105

More generally it has been argued that the actual impact of section 7 on the development of legislation within government is impossible to assess. Although ‘the government [may] decide against bringing some legislative proposals before Parliament after being advised that they are NZBORA inconsistent’,106 ‘it is impossible to quantify with any certainty the number of such measures that disappear from the government’s legislative programme for this reason’.107 Further, there is no way of knowing ‘what would have happened to a given measure if the NZBORA did not exist’.108 It is therefore ‘entirely possible that the entire vetting process of legislation has produced nothing more than what Mark Tushnet calls “noise around zero”: that is, “essentially random changes, sometimes good and sometimes bad, to what the political system [otherwise would have produced]”’.109 Whatever the provision’s true impact within government, a significant number of section 7 reports have been made, which calls into question both the intended deterrent effect of these reports and Parliament’s engagement with human rights issues during the legislative process.

Fifty-eight section 7 reports have been made since 1990, twenty-eight of which related to Government bills.110 It has been argued that a number of these reports have been based on erroneous legal advice,111 while some related to bills which failed to remove existing discrimination against same-sex couples but acknowledged that comprehensive reform of laws adversely affecting such couples was underway.112 Nevertheless, that successive governments have been prepared to introduce into Parliament bills which have required section 7 reports suggests that few serious political consequences follow the making of such reports. Their deterrent effect is therefore

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105 Discussed at p 56-57
107 ibid 473
108 ibid
109 ibid, citing Tushnet, Taking the Constitution Away from the Courts (Princeton University Press 2000) 153
questionable. Rishworth has asked ‘whether we are well served by an evolving practice in which it seems that Government is prepared to “wear” criticism by the Attorney-General that its proposed legislation breaches rights unreasonably’,113 adding ‘there is now a question whether a s7 report is truly criticism; in matters of criminal procedure and the like, it may be coming to be a badge of honour’.114 If correct, this is cause for great concern, as ‘if it becomes acceptable to override the Bill of Rights for some causes and not others, it will always be the unpopular causes (...) that suffer’.115 This problem is compounded by a further issue relating to the high number of section 7 reports: Parliament’s failure consistently to engage with the human rights issues raised by proposed legislation.

The approach of the New Zealand Parliament to human rights scrutiny of bills is affected by a number of factors, the ‘most significant’ of which is said to be ‘the degree to which an identified breach is connected to a bill’s policy objective. The greater the connection, the greater the chance of Parliament’s engagement’.116 It would also seem that the nature of the bill – i.e. whether it is a government bill or not – will be significant: a ‘section 7 report attached to a government bill almost always has negligible impact’, largely because the Government will have a ‘vested interest in pushing it through to enactment’.117 Parliamentary engagement with section 7 reports is often undermined by the behaviour and attitudes of parliamentarians as a result of both the ‘tendency of some parliamentarians to attack the value of the NZBORA itself’,118 and the ‘frequency with which Members speaking in support of a NZBORA breach elevate societal interests other than those affirmed in the NZBORA to the status of “rights”’.119

A worrying, but perhaps inevitable consequence is that:

a large proportion of the apparently NZBORA inconsistent legislation that Parliament has enacted relates to groups possessing only marginal political influence: drug users; gang members; “boy racers”; prisoners on parole; paedophiles; etc. A government can expect to pay a minimal political cost by

113 ibid
114 ibid
115 ibid
117 Geddis (n 106) 477
118 Bromwich (n 116) 190
119 ibid 191
appearing to limit the rights of these groups. Indeed, it may even attract greater voter support for doing so.\textsuperscript{120}

This leads to what Geddis refers to as the ‘uncomfortable conclusion’ that the ‘NZBORA appears to be at its weakest when it comes to protecting those most likely to be overlooked in the legislative process’.\textsuperscript{121}

There have been calls for reform to the section 7 procedure to improve the functioning and impact of such reports in practice. Bromwich has suggested that members responsible for bills which receive a section 7 report should table responses, giving a full explanation as to why any breach is justified.\textsuperscript{122} Further proposals have called for amendments made to a bill during its parliamentary passage to be vetted for NZBORA compliance, and for the Attorney-General to ‘report to the House all bills that [he] considers contain a prima facie breach that is justified under s5’.\textsuperscript{123} Geddis has also suggested changes to improve Parliament’s engagement with human rights issues when legislating, including amending section 7 to require the Attorney-General to report on \textit{all} bills, not just those where there is an incompatibility. A further possibility would be the creation of a standing committee to examine human rights issues, modelled on the JCHR.\textsuperscript{124}

\textbf{Conclusions on the experience of ministerial certification in Canada and New Zealand: executive vetting and parliamentary impassivity}\textsuperscript{125}

Requirements of ministerial certification have resulted in the development of executive guidance and new processes for the internal vetting of proposed legislation in both Canada and New Zealand. In both jurisdictions the Attorney-General or Minister of Justice reports, but only where the bill in question is inconsistent with protected rights. In spite of these similarities, the experience of ministerial certification in Canada and New Zealand has been markedly different. In Canada, there have been no reports of

\begin{itemize}
  \item \textsuperscript{120} Geddis (n 106) 488
  \item \textsuperscript{121} ibid
  \item \textsuperscript{122} Bromwich (n 116) 192
  \item \textsuperscript{123} ibid
  \item \textsuperscript{124} Geddis, ‘Inter-Institutional “Rights Dialogue” under the New Zealand Bill of Rights Act’, in Campbell, Ewing & Tomkins (eds), \textit{The Legal Protection of Human Rights: Sceptical Essays} (OUP 2011) 106. On the JCHR, see ch 5
  \item \textsuperscript{125} For a detailed examination of experiences in Canada and New Zealand see Hiebert, ‘Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes’ (2005) 3 NZJPIL 63
\end{itemize}
a bill’s incompatibility with Charter rights. This could be an example of under-reporting, in which the government adopts a hyper-cautious approach when developing legislative proposals because of the ultimate threat of judicial invalidation. In New Zealand the opposite has proved true. There have been 58 reports of inconsistency since 1990, 28 of which related to government bills. This may be an example of over-reporting, as the government can be safe in the knowledge that once a bill is enacted by the New Zealand Parliament the judiciary has only limited powers.

The role of the respective legislatures can be questioned in light of these conclusions. In Canada, it may be argued that Parliament is being bypassed as an institution capable of protecting Charter rights. The dearth of reports means that Parliament has never had the express opportunity to speak with its own voice on Charter compatibility issues raised by proposed legislation. Instead the executive and the judiciary have assumed responsibility for protecting rights. The New Zealand Parliament may be said to have failed consistently to engage with rights issues. It has had frequent opportunities to make its own judgments about rights compatibility, but has only rarely made changes to government bills aimed at improving compliance with NZBORA.

The human rights legislation enacted in the Australian Capital Territory and in Victoria have perhaps sought to avoid the issues which have arisen in Canada and New Zealand. In both jurisdictions ministerial certification is required in respect of all bills, and there is systematic parliamentary scrutiny of the human rights implications of proposed legislation. In this respect, these measures have clearly been influenced by section 19 of the HRA 1998 and the experience of the JCHR in the United Kingdom Parliament.


The Australian Capital Territory and the State of Victoria enacted human rights legislation in 2004 and 2006 respectively. Influenced by the HRA 1998, and perhaps also the issues which have emerged in Canada and New Zealand, both jurisdictions have provided for systematic ministerial certification and parliamentary scrutiny.
Although relatively recent initiatives, in both jurisdictions there have been calls for reform to the schemes of human rights protection.

**Australian Capital Territory – Human Rights Act 2004**

The HRA 2004 (ACT), described as ‘Australia’s first bill of rights’,\(^{126}\) entered into force on 1 July 2004. Not only was it the first bill of rights to be enacted in any Australian jurisdiction, it was also ‘the first enactment to use the United Kingdom’s Human Rights Act 1998 as a primary model’.\(^ {127}\) The United Kingdom legislation was used because it was seen to provide ‘adequate protection for human rights without moving the locus of ultimate responsibility away from the legislature’.\(^ {128}\) As it would not require ‘a particularly dramatic shift in the balance of constitutional power, it may have been seen as a more attractive option for politicians’.\(^ {129}\)

As a statutory bill of rights based on the United Kingdom Act, the HRA 2004 (ACT) requires pre-enactment scrutiny of legislative proposals, including both ministerial certification and scrutiny of legislation for human rights compliance by a parliamentary committee.

**Pre-enactment scrutiny under the Human Rights Act 2004 (ACT)**

The primary mechanisms for pre-enactment scrutiny under the HRA 2004 (ACT) are found in sections 37 and 38. Section 37 requires the Attorney-General to prepare a written compatibility statement for all bills presented to the Legislative Assembly by a Minister.\(^ {130}\) This must state:

(a) whether in the opinion of the Attorney-General the Bill is consistent with human rights; and

(b) if it is not consistent, how it is not consistent with human rights.\(^ {131}\)

\(^{126}\) Poole, ‘Bills of Rights in Australia’ (2004) 4 OUCLJ 197, 197  
\(^{127}\) ibid  
\(^{128}\) ibid 200  
\(^{129}\) ibid 201  
\(^{130}\) HRA 2004 (ACT), s 37(1) & (2)  
\(^{131}\) HRA 2004 (ACT), s 37(3)
The Attorney-General must therefore give reasons for concluding that a bill appears to be inconsistent with human rights. Section 37 aimed to ‘ensure that the government has considered the human rights implications of all new legislation’ and ‘institutionalise the human rights framework into government policy, increase transparency and hold government publicly to account for its policy decisions’. 132

Procedures have been adopted to ensure that human rights issues are considered throughout the development of legislative proposals, which must be consistent with the ‘ACT Statute Book, particularly “framework” legislation’, which includes the HRA 2004 (ACT). 133 Responsibility for securing compliance rests with Ministers and their departments. 134 To assist in this task, guidance has been produced which sets out the steps to be taken when developing legislative proposals. Ministers and departments must make submissions to Cabinet seeking “first pass approval”, which authorises the drafting of proposed legislation. 135 All such submissions ‘must address compatibility with the Human Rights Act’. 136 Advice on human rights issues is available from the Legislation and Policy Branch in the Department of Justice and Community Safety (JACS) prior to this stage ‘to ensure early identification of potential compatibility issues’. 137

Once drafted, the JACS Bill of Rights Unit assesses the bill’s compatibility with human rights. If it appears to be incompatible but the department nevertheless wishes to proceed with the bill, JACS will prepare a compatibility statement explaining the inconsistencies identified. 138 ‘Bills which are incompatible with the HRA must go to Cabinet with a full cabinet submission for its consideration and must not be included in the bills schedule’. 139 Cabinet then considers whether to grant “second pass approval”, which would approve a bill for presentation to the Legislative Assembly. Cabinet’s

132 Department of Justice and Community Safety, Guide to ACT Departments on Pre-Introduction Scrutiny: the Attorney General’s Compatibility Statement under the Human Rights Act 2004 (October 2004) 1
133 Chief Minister and Cabinet Directorate, ACT Government Legislation Handbook (September 2009) para 4.7.4
134 Ibid para 4.8.2
135 Chief Minister and Cabinet Directorate, Cabinet Paper Drafting Guide (November 2009) para 5.4
136 Ibid para 5.9
137 Ibid
138 Department of Justice and Community Safety, Guide to ACT Departments (n 132) 4
139 Ibid
decision at this stage will be informed by, *inter alia*, an Explanatory Statement\(^\text{140}\) and ‘a memorandum from the JACS setting out whether the Bill is compatible with the Human Rights Act’.\(^\text{141}\)

Once second pass approval has been given, the bill, the Explanatory Statement, and the Attorney-General’s section 37 statement will be presented to the Legislative Assembly. At this stage, section 38 of the Act imposes a duty on the ‘relevant standing committee’ to ‘report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly’.\(^\text{142}\) These functions have been performed by the Standing Committee on Justice and Community Safety (acting as the Scrutiny of Bills Committee) since 9 December 2008.\(^\text{143}\)

*The impact of sections 37 & 38 of the Human Rights Act 2004 (ACT)*

In spite of some early concerns,\(^\text{144}\) academic assessments seem to agree that the major impact of the HRA 2004 (ACT) has been achieved through sections 37 and 38. These provisions have helped create within the executive a ‘marked increase in the awareness of human rights principles due to the kind of scrutiny (…) required of proposed legislation’,\(^\text{145}\) and have had an impact in the legislature, where ‘issues of human rights, and the application of the Human Rights Act, [were] raised in debate in most sitting days’.\(^\text{146}\) Although the HRA 2004 (ACT) has achieved much progress in terms of pre-enactment scrutiny, some issues remain.

The first relates to the scrutiny requirement in section 38. Once the Committee reports to the Legislative Assembly, the Minister responsible for the bill is expected to respond. The Committee attaches this response to a later report, and may add further comments. This could facilitate a growing dialogue between the ACT legislature and

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\(^{140}\) This is prepared by the department and explains the Government’s position on the bill’s compatibility with human rights  
\(^{141}\) Chief Minister and Cabinet Directorate, *Cabinet Paper Drafting Guide* (n 135) para 5.12  
\(^{142}\) HRA 2004 (ACT), s 38(1)  
\(^{146}\) McKinnon, ‘The ACT Human Rights Act – The Second Year’ (Australian Bills of Rights Conference: The ACT and Beyond, Canberra, 21 June 2006) 8
executive on the human rights implications of bills. However, ‘in practice, Assembly debate [on a bill] sometimes concludes before the response is made available, and, in rare cases, before the report is available’. 147 Timing issues such as these, which determine the availability of information for parliamentarians, can undermine parliamentary engagement with the human rights implications of bills.

The impact of pre-enactment dialogue may also be affected by the small jurisdiction in which the 2004 Act operates. ACT’s small size means that there are ‘limits [to] parliamentary resources, and the capacities of and opportunities available to interest groups’. 148 Indeed, in an article assessing Australia’s recent consultative exercise on a Federal Bill of Rights, 149 Allan stated that while ACT ‘was the first Australian jurisdiction to enact [a bill of rights]’ he found it ‘difficult to take overly seriously a jurisdiction that amounts to a glorified city council, one whose laws can be overruled by the Commonwealth government in extremis’. 150

In addition to such academic assessments, sections 43 and 44 of the HRA 2004 (ACT) required the Attorney-General to review the operation of the Act after twelve months and five years respectively. These official reviews confirmed that sections 37 and 38 had produced significant effects within the executive and legislature, and recommended changes to the operation of the 2004 Act.

The *Twelve-Month Review* stated that while ‘the executive has been most affected by the HRA’ 151 as a result of the Act’s impact on the formulation of policy and legislation, the Legislative Assembly had undertaken ‘intense “pre-enactment dialogue” prior to the passing of a Bill’, a ‘key part’ of which was the statement of compatibility. 152 The Review noted that section 37 statements were brief when bills were deemed to be compatible with human rights, as in those circumstances departments or agencies ‘make the case for compatibility at first instance in the

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148 Bayne (n 147) 11
149 Discussed below, p 81-82
151 Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review - Report* (June 2006) 13 (“Twelve-Month Review”) 152 ibid 15. In the first year of the HRA 2004 (ACT) almost 100 bills were assessed for compatibility.
Explanatory Statement’. However, such Statements often lacked detail: ‘only infrequently does the (...) Statement attempt to make a case for compatibility’. The use of Explanatory Statements as a means of explaining a bill’s compatibility was broadly welcomed, but the Review recommended that ‘where a bill raises significant human rights issues, the compatibility statement should provide a “summary of reasons”, tailored to the circumstances’.

Section 37 has therefore been recognised as a key element of the rights protection mechanism introduced by the HRA 2004 (ACT). This was confirmed by the Five Year Review which stated that the impact of the 2004 Act on ‘policy and legislative processes has been more extensive and arguably more important than its impact in the courts’. The HRA 2004 (ACT) had operated so as to:

improve the quality of law-making in the Territory. The development of new laws by the executive has clearly been shaped by the requirement to issue a statement of compatibility for each new bill, and the approach of government has been influenced by a robust dialogue with the legislature, the Scrutiny Committee and the Human Rights Commissioner.

Evidence of this dialogue was provided by Government responses to Scrutiny Committee reports, showing that ‘serious consideration [was] being given to the views of the Committee’ and that the ‘government [had] amended some legislative proposals in light of criticisms in the Committee’s reports’. However, some problems remained:

more often (...) the government has provided additional justification in response to the Committee’s concerns, but has defended its views on compatibility. There may also be a tendency for some government agencies to view the statement of compatibility as a sufficient answer to issues raised by the Scrutiny Committee, which limits the potential for fruitful dialogue.

The Five Year Review therefore recommended that the differing roles of the compatibility statement and the Scrutiny Committee be reiterated to departments, and that ‘Ministers should be encouraged to take the Committee’s concerns back to their

153 ibid 19
154 ibid 21
155 ibid 22
157 ibid 6
158 ibid 27
159 ibid 31
160 ibid
departments for reconsideration, rather than relying on the compatibility statement as proof of compatibility’.  

The *Five Year Review* also recommended that amendments tabled after a bill’s presentation to the Legislative Assembly should be subject to human rights scrutiny. Noting a recent development according to which Government amendments to its own bills had to be referred to the Scrutiny Committee before the bill could be passed, it called for such requirements to be expanded so that ‘all amendments introduced on the floor of the Assembly should be referred to the Scrutiny Committee unless they are urgent, minor or in response to a Scrutiny Committee report’.  

Finally, the *Five Year Review* addressed the ‘ongoing calls for the compatibility statements to contain reasons so as to serve an educative role for the Assembly’. This was an important issue, as the ‘ability of the legislature to participate in a dialogue with the executive on human rights issues depends in part upon the information available to the Assembly’. It therefore recommended that full reasons should accompany all section 37 statements. Statements of reasons:

should continue to be included with each compatibility statement [and] should adopt a clear s28 framework as the requisite standard for assessing compatibility. Where a statement of reasons is not provided, its omission should be explained. Where relevant, all reasons behind compatibility statements should be made publicly available, including advice sought from external sources.  

(Recommendation 15)

The *Five Year Review* was tabled in the Legislative Assembly by the Attorney-General on 18 August 2009. Following a period of public consultation, the ACT Government tabled its response on 29 March 2012. The Government supported

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161 ibid 32
162 ACT Legislative Assembly Standing and Temporary Orders, Temporary Order 182A, 26 February 2009
163 ACT Human Rights Act Research Project, *Five Year Review* (n 156) 33
164 ibid 35
165 ibid 36
166 Detailed statements of reasons had been included with compatibility statements during the 7th Legislative Assembly in accordance with a Parliamentary Agreement between the ACT Greens and the ACT Labor Party dated 31 October 2008: ibid 29, 36
167 HRA 2004 (ACT), s 28(1) states: ‘Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.’
168 ACT Human Rights Act Research Project, *Five Year Review* (n 156) 37
Recommendation 10 in principle, and stated that it believed it ‘complete’, noting that the:

[Human Rights Unit] has been called on to guide agencies in preparing formal replies to Scrutiny Committee Reports which indicates that Ministers are increasingly responsive to Committee concerns in relation to proposed policy approaches and are receptive to making modifications where appropriate or revising explanatory statements to address Scrutiny Committee concerns.\textsuperscript{170}

The Government did not however support Recommendation 12. It argued that the referral of Government amendments to its own bills to the Scrutiny Committee arose from a Temporary Order\textsuperscript{171} adopted as a result of a Parliamentary Agreement.\textsuperscript{172} Making such arrangements permanent would ‘bind successive governments which may take a different view in relation to the role of the Scrutiny Committee and its administrative process and procedure’.\textsuperscript{173} Any such decision would therefore ‘need to be considered by the Legislative Assembly following the 2012 ACT election’.\textsuperscript{174} Finally, in relation to Recommendation 15 the Government supported the continued provision of statements of reasons with compatibility statements ‘apart from the proposition that all reasons behind compatibility statements should be made publicly available, including advice sought from external sources’.\textsuperscript{175} Statements of reasons had been included in the explanatory statements to bills. The fact that these documents were ‘publicly available’ made ‘a detailed compatibility statement unnecessary’.\textsuperscript{176}

These developments show that while the HRA 2004 (ACT) is unlikely to be amended to require the systematic consideration of all amendments to bills by the Scrutiny Committee, or to require compatibility statements to include detailed statements of reasons, such measures could be achieved by political agreements. Human rights protection in ACT is not static. Procedures have developed aiming to facilitate more effective pre-enactment scrutiny, and it seems possible that further changes may take place to make such practices more permanent features of the ACT system.

\textsuperscript{170} ibid 21
\textsuperscript{171} n 162
\textsuperscript{172} n 166
\textsuperscript{173} ACT Government Justice and Community Safety, \textit{Government Response} (n 169) 22
\textsuperscript{174} ibid
\textsuperscript{175} ibid 24
\textsuperscript{176} ibid
A similar story has emerged in Victoria, where changes to the CHRRA 2006 (Vic) have also been advocated. However, unlike in the ACT, those changes would reduce the rights protection currently offered.

**Victoria – Charter of Human Rights and Responsibilities Act 2006**

The CHRRA 2006 (Vic), which entered into force on 1 January 2007, has been described as a ‘landmark in Australia’s constitutional and political history’, being the first bill of rights to be adopted by an Australian State. Like the HRA 2004 (ACT), the Victorian Charter was ‘primarily based’ on the United Kingdom HRA 1998 and is a statutory bill of rights requiring ministerial certification and systematic scrutiny of the human rights implications of proposed legislation by a parliamentary committee.

**Pre-enactment scrutiny under the Victorian Charter**

The Charter emphasises the role of Government and Parliament in the protection of human rights. It aims to ensure that ‘fundamental principles of human rights are taken into account at the earliest stages of the development of law and policy’, in recognition of the fact that ‘the decisive point in achieving protection for human rights is not in court after a breach has occurred, but in government and Parliament in the development of policy and the drafting of law before either come into effect’. To achieve this section 28 requires any member of Parliament proposing to introduce a bill into Parliament to cause a statement of compatibility to be prepared, and to lay that statement before the relevant House before the second reading speech. It must state whether, in the member’s opinion, the Bill is compatible and if so how, or, if it is incompatible, the nature and extent of the incompatibility. This system of ministerial certification is therefore different from and more extensive than that contained in the

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178 ibid
179 ibid 903
180 ibid
181 CHRRA 2006 (Vic), s 28(1)
182 CHRRA 2006 (Vic), s 28(2)
183 CHRRA 2006 (Vic), s 28(3)(a)
184 CHRRA 2006 (Vic), s 28(3)(b)
HRA 2004 (ACT). The Victorian Charter requires the member introducing the bill to make the statement, rather than the Attorney-General and, significantly, requires reasons for the opinion on compatibility in all cases. Section 30 requires the Scrutiny of Acts and Regulations Committee (SARC) to consider any bill introduced into Parliament and report to Parliament as to whether the bill is incompatible with the protected rights.

As in Canada, New Zealand and the ACT, these provisions have caused the development of procedures within government\textsuperscript{185} designed to ensure that human rights considerations are incorporated ‘early in the policy development cycle so that statements of compatibility do not become merely an “add on”’.\textsuperscript{186} The human rights impact of all policy and legislative proposals must be included in submissions to Cabinet,\textsuperscript{187} and the Guidelines explain the process for examining such issues.\textsuperscript{188} Although detailed assessments of all human rights issues may not be possible at the earliest stage of the policy cycle, ‘the impact of the policy issues on human rights should be assessed as thoroughly as possible’.\textsuperscript{189} At the approval-in-principle stage legislative proposals ‘must include a detailed overview of the human rights impacts of the proposal’ which should include ‘which human rights issues the proposed legislation raises; whether the Department has sought advice in relation to the proposal; and whether the proposal can be developed compatibly with the Charter’.\textsuperscript{190} Lastly, submissions for final approval of Bills ‘must state whether or not the Bill is compatible with the Charter. A compatibility statement must be attached’.\textsuperscript{191}

A section 28 statement is prepared once Cabinet has approved a proposed bill for introduction to Parliament. The officer developing the legislative proposal has primary responsibility for assessing its Charter impact,\textsuperscript{192} and may seek advice from departmental legal officers or the Human Rights Unit in the Department of Justice in the event of any uncertainty. The Guidelines provide a statement of compatibility

\textsuperscript{185} Such procedures have also been developed in the UK: ch 4
\textsuperscript{186} Department of Justice, \textit{Charter of Human Rights and Responsibilities – Guidelines for Legislation and Policy Officers in Victoria} (June 2008) 6 (‘the Guidelines’)
\textsuperscript{187} ibid 25
\textsuperscript{188} ibid 26. Appendices A & B contain a human rights assessment table and an example completed assessment table
\textsuperscript{189} ibid 27 (emphasis added)
\textsuperscript{190} ibid (emphasis added)
\textsuperscript{191} ibid (emphasis added)
\textsuperscript{192} ibid 28
template,\(^{193}\) and ‘guidance on the information to be included in the template’,\(^{194}\) including an example statement of compatibility at Appendix E. Running to 17 pages, this highlights the detail and level of information required by the section 28 statement. Such a document would be evidence of thorough consideration of any relevant human rights issues and would enable Parliament to make an informed choice as to whether to accept or reject the statement.

These *Guidelines* are clearly written and are detailed without being overly complex or daunting. As noted above, they also provide templates and examples which can be used by officers involved in developing legislation. As such, the *Guidelines* are impressive as a tool for ensuring that human rights considerations are taken into account throughout the policy development process. This has been enhanced by the ‘development of a whole-of-government portal to maintain up-to-date resources across government’\(^{195}\) on human rights issues. The portal’s ‘statement of compatibility page and register is particularly popular, suggesting that the portal is being used in legislative development and scrutiny’\(^{196}\).

*The impact of sections 28 & 30 of the Victorian Charter*

Academic assessments of the operation of section 28 have been broadly positive, but have identified some issues which could affect the impact of compatibility statements. One such issue relates to the nature of these statements. Gans has described section 28 as ‘the key source of human rights talk in Victoria to date’,\(^{197}\) but noted:

many statements of compatibility extend for several, sometimes dozens, of tightly spaced Hansard pages, incorporating all manner of rights assessments, minor and major, and including both detailed case analysis and some of the most laboured and bewildering rights talk imaginable. It is doubtful that anyone other than a handful of public servants and legal advisers ever reads a word of them.\(^{198}\)

\(^{193}\) ibid Appendix C  
\(^{194}\) ibid 28. This further information is found in Appendix D  
\(^{197}\) Gans, ‘Scrutiny of Bills under Bills of Rights: is Victoria’s Model the Way Forward?’ (Australia-New Zealand Scrutiny of Legislation Conference, Canberra, July 2009) 17  
\(^{198}\) ibid
This highlights the risk that the protection of human rights in Victoria could be undermined by the length and detail of some statements of compatibility, a danger also identified in some statutory reviews of the operation of the Victorian Charter.  

Although scrutiny by SARC under section 30 has been described as ‘probably the least controversial’ provision in the Charter, its effectiveness has been questioned. SARC’s work is said to have produced only a minimal impact in its first two and a half years: ‘At most its reports have prompted amendments to just four bills – all in relatively minor ways – out of over two hundred that were scrutinised’. Further, engagement with those reports by parliamentarians was variable: reports had been ‘cited in Parliament occasionally, but rarely at length or to any apparent effect (...) Government ministers have rarely mentioned, much less responded, to SARC reports on the floor of the house. Key opposition members have used them as political fodder’. Moreover, the extent of SARC’s ‘extra-parliamentary’ influence on the executive was uncertain, depending ultimately on the perceived political costs of an adverse SARC report. This point is perhaps reinforced by the conclusions of Geddis on experience in New Zealand suggesting that few, if any, adverse political consequences have followed the making of a section 7 report, especially where the relevant legislation affects unpopular groups.  

In spite of these concerns, SARC’s ‘most consequential Charter role’ has become the scrutiny of section 28 statements. SARC has proved willing to ‘criticise deficient statements of compatibility’, and although some of these criticisms have received quite prickly responses, the government has responded expressly in some cases either in letters acknowledging SARC’s viewpoint, or in a change in its statement-writing practices made expressly in response to SARC commentary. The government has even issued revised statements when the bill in question reached the upper house.
This is a positive development in the operation of the Victorian Charter, as even though section 30 does not expressly provide for this function SARC’s work in this regard does ensure that ‘statements are read by someone outside of – and indeed independent of – the executive. And it ensures that any flaws in those statements are promptly made apparent to Parliament’.

As in the ACT, the Victorian Charter makes provision for regular statutory reviews of its operation. Section 41 requires the Victorian Equal Opportunities and Human Rights Commission (VEOHRC) to present annual reports to the Attorney-General, examining *inter alia* ‘the operation of the Charter’. These reports have been extremely positive about the impact of sections 28 and 30, although this has not prevented the VEOHRC suggesting improvements to pre-enactment processes.

The VEOHRC reports show that pre-enactment scrutiny processes settled in quickly and effectively. In the Victorian Charter’s first year of operation compatibility statements were ‘often extremely detailed’, providing ‘evidence of genuine engagement with the Charter’s process’ and ‘demonstrat[ing] a consistently high level of human rights analysis across departments’. Within five years of the Victorian Charter’s enactment ‘legislation officers in all departments [had] become proficient in analysing the human rights implications of legislative or policy proposals’, meaning that ‘human rights are increasingly built into policy development from the outset’.

The VEOHRC also reported that SARC had approached its role under section 30 ‘diligently and comprehensively’, developing a specific parliamentary view on human rights issues raised by proposed legislation, and often expressing views diverging from those of the executive. In 2009 ‘a large number of Bills [were the] subject of an active exchange of views between SARC and the member of parliament tabling the Bill’, and many ‘triggered parliamentary debate and comment regarding human rights (...) This indicates that the mechanisms for parliamentary dialogue

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209 ibid
210 CHRRA 2006 (Vic), s 41(a)(i)
213 ibid
214 VEOHRC, *The 2008 Report* (n 195) 71
introduced by the Charter have the capacity to function effectively’. 215 Section 30 therefore provided a ‘sensible, balanced and transparent mechanism for assessing the human rights impacts of proposed laws and informing parliamentary debate’. 216

The VEOHRC also highlighted some issues for further consideration. A ‘key challenge’ concerning the content of compatibility statements and SARC reports was to maintain an appropriate ‘mix of detail and accessibility’. 217 It was ‘essential’ to ensure that members ‘provide substantial statements of compatibility [which] strike the right balance of being informative and digestible by parliamentarians and members of the public’. 218 A further issue was the need to ensure that adequate time was made available during the legislative process for SARC to consider and report on bills in order to ensure the effectiveness of section 30. This was ‘vital’ to ensure that SARC could ‘contribute its analysis to the parliamentary debate’. 219

In addition to these annual reports, section 44 of the Victorian Charter provided for a review of the first four years of its operation. SARC’s report 220 was more circumspect as to the impact of sections 28 and 30 than had been the VEOHRC. It noted that there was ‘evidence of the existence of processes for human rights assessment of new statutory provisions when they are being developed and drafted in Victoria, although (...) the operation of these processes may not be uniform’. 221 Further, ‘the Charter has had some impact on a number of statutory provisions (...) However, it is not possible to identify the actual effect of these processes on any particular statutory provision’. 222 SARC also reported that section 28 had not been without financial cost. $470,339 223 had been spent over five years on legal advice for the preparation of

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215 VEOHRC, The 2009 Report (n 196) 93
217 VEOHRC, The 2008 Report (n 195) 71
218 VEOHRC, The 2010 Report (n 216) 45
219 ibid. See also VEOHRC, The 2008 Report (n 195) 72
221 ibid 81
222 ibid
223 Approximately £304,700
statements of compatibility, while the cost of individual compatibility statements ranged from $257 for low-complexity bills to $2,566 for high-complexity bills.

Sections 28 and 30 had undoubtedly affected legislative processes. From the enactment of the Victorian Charter to July 2011, 403 statements of compatibility had been tabled in Parliament. During that time there had been a ‘steady increase in statements of compatibility that actually identify human rights issues and a roughly correlating increase in the length of statements of compatibility’ – in 2010, human rights issues were identified in respect of 98% of bills, with compatibility statements running to a mean length of almost 3,000 words. Over the same period SARC had issued 195 section 30 reports, and put approximately 150 questions to Ministers on Charter compatibility. However, while sections 28 and 30 had ‘together resulted in a large quantity of information being made available to the Parliament concerning the possible human rights impact of proposed Bills and (...) informed debate on those Bills’, SARC concluded that they ‘had only a modest effect on the content of Victoria’s statutes’.

SARC made certain recommendations aimed at streamlining the section 28 process. The requirement that section 28 statements ‘address any provision that engages a human right, even if the effect is benign, minor or manifestly not a limit on a human right’ meant that statements could be ‘lengthy’. SARC therefore recommended that compatibility statements ‘should only be required for Bills that limit a human right’. (Recommendation 11) This would reduce the number and length of compatibility statements while increasing their ‘readability’, and ‘better signal to parliamentarians the Bills that particularly affect human rights’. This recommendation might be seen as a retrograde step in terms of dialogue and transparency, as it would reduce the frequency with which Parliament was expressly alerted to the potential human rights issues raised.

224 SARC, Review (n 220) 142
225 Approximately £166
226 Approximately £1,663
227 SARC, Review (n 220) 143
228 ibid 84
229 ibid
230 ibid 85
231 ibid 87
232 ibid 88
233 ibid
234 ibid 89
by bills and correspondingly reduce the likelihood that parliamentarians would engage regularly with such issues.

SARC also noted that extensive analyses of reasonable limits to rights ‘unnecessarily introduce technical legal questions into statements of compatibility and also send confusing signals about the human rights significance of the Bill in question’. It therefore recommended ‘changing human rights impact assessment processes or the way that statements of compatibility are drafted or communicated to avoid such unnecessary analyses’. (Recommendation 12) Further consideration should be given to ‘redrafting the (...) rights to avoid occasions when routine, minor provisions are regarded as limiting a right’.

Although seeking to balance the need for effective human rights vetting with accessibility for parliamentarians, this recommendation would lead to a significant risk that the guidelines or even the protected rights themselves could be drafted to the benefit of the Government and the corresponding detriment of the individual. Fortunately, the Victorian Government has not accepted the latter part of Recommendation 12. It did however agree that ‘drafting practices for statements of compatibility should avoid overly long or technical analysis of routine and clearly reasonable limitations on rights’ and undertook to ‘review existing practices with this in mind’.

SARC was also required to examine options for the reform or improvement of the system for protecting rights in Victoria. A majority of its members were in favour of repealing those parts of the Charter which enabled courts to enforce and interpret rights, and which imposed obligations for public authorities to comply with Charter rights. However, SARC recommended retaining the legislative scrutiny provisions, subject to Recommendations 11 & 12. The majority argued that this would result in a more effective ‘regime for promoting human rights through parliamentary scrutiny’ for two reasons. First, ‘developers and drafters of legislation will respond to concerns about the human rights impact of legislation expressly within a statute (...) as they will not be

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235 ibid 90
236 ibid
237 ibid
239 SARC, Review (n 220) 167
able to rely on an external regime\textsuperscript{240} for protecting human rights to ameliorate that impact\textsuperscript{,241} Secondly, ‘drafters of legislation may see less reason to seek external legal advice (...) on the contents of statements of compatibility, avoiding both costs and delays\textsuperscript{.242}’.

The reasons given by the majority in support of such reforms seem somewhat far-fetched. It is contrary to evidence from Canada and New Zealand to imagine that elected politicians would willingly give full effect to human rights when legislating without any external checks and balances. These changes, rather than providing more effective human rights protection, would instead allow governments to avoid the very legal constraints which human rights provide.

**Conclusions on experiences in the Australian Capital Territory and Victoria: early success, uncertain futures**

Despite the recognised success of ministerial certification and parliamentary scrutiny in ACT and Victoria, it would seem that these descendants of the HRA 1998 face an uncertain future. Statutory reviews in both jurisdictions suggest that changes to these statutes are not only possible, but likely. In the ACT, a continuation of the practice of providing reasons to accompany compatibility statements would strengthen the rights protection introduced by the HRA 2004 (ACT), by increasing the transparency of government decision-making and facilitating the parliamentary consideration of human rights issues. In Victoria however, although not universally accepted by the Victorian Government, the proposed changes suggest that there is a substantial and influential body of opinion which would weaken rights protection, by limiting the circumstances in which statements of compatibility were made.

This uncertainty in these jurisdictions may be linked to a deep-rooted aversion to statutory human rights protections at federal level in Australia.\textsuperscript{243} However, in spite of this historic reluctance, concepts of ministerial certification and parliamentary scrutiny

\textsuperscript{240} i.e. court enforcement
\textsuperscript{241} SARC, Review (n 220) 167
\textsuperscript{242} ibid
of the human rights implications of proposed legislation have recently been introduced by Commonwealth legislation.

4. Australia: the Distant Cousin

Recent developments in the Commonwealth of Australia illustrate that concepts of ministerial certification and pre-enactment scrutiny within Government and Parliament have been embraced, even outside comprehensive statutory rights protection.

The background: a written constitution without a Bill of Rights

The Commonwealth of Australia is a federal state with a written constitution found in the Commonwealth of Australia Constitution Act 1900. The Australian constitution contains no comprehensive protection for human rights, but does protect the following limited number of specific rights:

- Trial by jury for trials on indictment in relation to Commonwealth offences: section 80
- Freedom of religion: section 116
- Equal treatment as between residents of States: section 117
- Acquisition of property only on just terms: section 51(xxxi)

These provisions have not offered extensive protection to individuals as a result of the ‘traditionally narrow interpretation of these provisions by the Australian High Court’.244

Despite its restrictive interpretation of these expressly protected rights, the Australian High Court has recognised certain implied rights. The first of these was the right to freedom of political communication, said to arise from the concept of representative government, in Australian Capital Television Pty Ltd v Commonwealth (No 2).245 This was later held to be the basis for the implied right to vote in federal

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244 Charlesworth, ‘The Australian Reluctance about Rights’ (1993) 31 Osgoode Hall LJ 195, 198
elections, recognised in *Roach v Electoral Commissioner*. The Australian High Court has also suggested that a right to freedom from arbitrary executive detention *may* arise from the doctrine of separation of powers, which is enshrined in the constitution. Although controversial, this approach has been welcomed:

The reality is that there is a growing judicial recognition that the legal protection afforded to fundamental rights by the bare text of the Constitution (and by statutory and common law) is inadequate. In the continuing absence of a bill of rights, it is to be hoped that the High Court will continue to engage in providing the best such protection it can.

Some protection for rights is achieved through the work of the Senate Standing Committee for the Scrutiny of Bills which ‘assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety’. This Committee reports to the Senate on whether a bill, *inter alia*, ‘trespasses unduly on personal rights and liberties’, and may draw problems to the attention of the Senate in two ways. First, the Legal Advisor may put ‘the Committee and the Senate on notice by way of an “Alert Digest”’, and will correspond with the relevant Minister. Following this process ‘about three quarters of all queried bills are amended’. If the Government fails to respond to preliminary comments, the Committee may lay ‘a detailed report of its objections’ before the Senate during the debating stages of the bill’s passage through Parliament.

The structure of human rights law in Australia has been described as ‘haphazard and incomplete’, and ‘shaped by both the politics of federalism and a dedication to legalism as the appropriate mode of legal reasoning’. This has resulted in a ‘culture

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246 *Lee, 'Case Comment: The Australian High Court and Implied Fundamental Guarantees' [1993] PL 606*
247 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1*
248 Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1
249 *Jones, 'Fundamental Rights in Australia and Britain: Domestic and International Aspects’, in Gearty & Tomkins (eds), *Understanding Human Rights* (Mansell 1996) 102*
251 Ibid
252 Ibid
253 Ibid
254 Charlesworth (n 244) 196
wary of the discourse of rights’, reinforced by an abiding attachment to Dicey’s concept of absolute parliamentary sovereignty, and concerns about the impact of greater rights protection on federal-state powers and the transfer of power from the democratic legislature to the unelected judiciary. Against this background it is unsurprising that constitutional amendments which would have extended protection for certain rights were rejected in 1944 and 1988, and attempts to introduce statutory human rights protection have also proved unsuccessful.

In the face of this long-standing opposition there have been some proposals seeking to improve rights protection under the Australian constitution through an increased role for pre-enactment scrutiny. Kinley argued for enhanced parliamentary scrutiny of proposed bills for compliance with the ICCPR, and Evans called for greater scrutiny during the policy development process. He argued that by ‘the late stage in the legislative process at which scrutiny committees become involved’ the executive has ‘already decided on its policy objectives, the need for legislation to achieve those objectives, the legislative model and the concrete terms of proposed legislation. (...) the executive has in most cases also publicly committed itself to all of these things’. Evans therefore supported the introduction of Human Rights Impact Statements, prepared by departments and agencies for ‘all policy proposals which have a direct or significant indirect (positive or negative) effect on human rights’. These impact statements would be attached to Cabinet submissions and tabled with proposed legislation on its introduction into Parliament.

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255 ibid
257 Human Rights Consultation Committee, National Human Rights Consultation Report (September 2009) 236-37
259 A description of the attempts to introduce statutory bills of rights in 1973 (the ‘Murphy bill’), 1983 (the ‘Evans bill’) and 1985 (the ‘Bowen bill’) is at Williams, Human Rights under the Australian Constitution (n 258) 252-55
262 ibid 669-70
263 ibid 670
264 ibid 686
Calls for improved protection of human rights at federal level in Australia therefore never completely disappeared, and the issue has continued to form part of political discourse. This persistence has begun to pay off, as recent developments have embraced the concept of pre-enactment scrutiny for the compatibility of bills with human rights standards.

Recent developments: ‘No’ to a bill of rights, ‘Yes’ to pre-enactment scrutiny

The National Human Rights Consultation

A national consultation on the protection and promotion of human rights in Australia began in 2008 and attracted ‘unprecedented community engagement’. The Consultation Committee received 35,014 written submissions, the ‘largest number ever for a national consultation in Australia’. Additionally, ‘about 6,000 people registered to attend the 66 community roundtables, which were held in 52 locations around Australia’.

The Consultation Committee reported in September 2009, recommending significant changes to human rights protection in Australia, including the adoption of an Australian Human Rights Act to provide statutory protection for a broad range of human rights. The Committee also recommended that improved attention should be paid to human rights during the development of policy and the legislative process, whether as part of an Australian Human Rights Act or independently of such a measure. The Committee supported the introduction of statements of compatibility to accompany proposed legislation, which would ‘include an assessment of whether the Bill was compatible with human rights and a justification for any limitations imposed on human rights’. Compatibility statements should be provided for all bills, as well as for

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266 Kirby (n 256) 268
267 Human Rights Consultation Committee (n 257) xiii
268 ibid
269 Perhaps unsurprisingly, Allan took a critical view of these recommendations, arguing that they would ‘enervate parliamentary democracy in Australia’ and ‘shift power over highly debatable social policy line-drawing exercises from elected parliamentarians to unelected judges’ (n 150) 184
270 Human Rights Consultation Committee (n 257) 378
271 ibid 175 (Recommendation 6)
272 ibid 165
‘amendments proposed during parliamentary debate’. 273 Such statements, ‘accompanied by sufficiently detailed reasons would be valuable in ensuring that human rights received the attention they deserve in the formulation of legislation’. 274 The Committee’s preference was for the Attorney-General to prepare statements of compatibility, to ‘encourage a more rigorous and consistent process. Failing that, (…) statements of compatibility prepared by other departments [should be] vetted by the Attorney-General’s Department’. 275 The Committee also recommended the creation of a new joint parliamentary committee on human rights. 276

These recommendations met with significant opposition, 277 and the Government unsurprisingly rejected the adoption of the recommended Australian Human Rights Act. Nevertheless, it did announce measures which would give effect to the calls for ministerial certification and increased parliamentary scrutiny of bills for compatibility with human rights.


Although rejecting a statutory bill of rights, the Government announced a package of measures aimed at improving rights protection in Australia, 278 including the creation of a parliamentary Joint Committee on Human Rights to ‘provide greater scrutiny of legislation for compliance with our international human rights obligations’. 279 The new Committee would be ‘a key mechanism for bringing human rights issues to the fore in Parliamentary consideration of legislation’. 280 Statements of compatibility would also accompany every bill introduced into Parliament to ‘aid parliamentary consideration of new laws against human rights principles’ and act as a ‘valuable assessment to assist the Joint Committee’s work’. 281

273 ibid 166
274 ibid 168
275 ibid
276 ibid 175 (Recommendation 7)
277 Allan (n 150) 186-87
278 Attorney-General’s Department, Australia’s Human Rights Framework (April 2010)
279 ibid 8
280 ibid
281 ibid
These measures are now contained in the HRPSA 2011 (Cth), which entered into force on 4 January 2012.\footnote{HRPSA 2011 (Cth), s 2(1)} Statements of compatibility must now accompany all bills introduced into Parliament,\footnote{HRPSA 2011 (Cth), s 8(1) & (2). This system of statements of compatibility is discussed at Kinley & Ernst ‘Exile on Main Street: Australia’s Legislative Agenda for Human Rights’ [2012] EHRLR 58, 67-68} and must contain an assessment of the human rights implications of the bill.\footnote{HRPSA 2011 (Cth), s 8(3). For these purposes ‘human rights’ means those rights found in the international agreements listed at HRPSA 2011 (Cth), s 3(1)} Reasons for the Government’s conclusions on compatibility must therefore be provided.\footnote{HRPSA 2011 (Cth), s 5. The new JCHR is discussed at Kinley & Ernst (n 283) 62-67} The Act also creates a Joint Committee on Human Rights\footnote{HRPSA 2011 (Cth), s 7} which will examine bills and Acts for compatibility with human rights, and report to Parliament.\footnote{Information on the JCHR is available at: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/FrequentlyAskedQuestionsParliamentaryScrutiny.aspx#role> accessed 27 May 2012} The ‘major activity’ of the Committee will be the ‘scrutiny of Bills and legislative instruments for compatibility with human rights’, although it will also be able to ‘review existing Acts and conduct broader inquiries on matters related to human rights referred to it by the Attorney-General’.\footnote{Statement of Compatibility Templates are available at: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Statements-of-Compatibility-templates.aspx> accessed 27 May 2012}

Conclusions – a new form of the ‘new model’ of rights protection

These recent developments in Australia clearly illustrate the significance of ministerial certification and parliamentary scrutiny for the protection of human rights. Although the federal Government rejected calls for the adoption of a statutory bill of rights, it nevertheless accepted that the recommended procedural measures – i.e. statements of compatibility and a joint committee on human rights – would form a vital part of the protection of human rights in Australia, a country which continues to rely on concepts of parliamentary sovereignty and representative government for the protection of individual rights. The 2011 Act is ‘one of the few pieces of Commonwealth legislation to explicitly and comprehensively integrate human rights considerations into
Australia’s legal framework’, 289 and as such has ‘the potential to strengthen considerably the level of protection accorded to human rights in Australia’. 290

The measures introduced by the 2011 Act closely resemble similar mechanisms found in the different forms of the ‘new model’ of rights protection, especially those in ACT and Victoria. 291 Given that these measures have been adopted outside a comprehensive statutory framework for the protection of human rights, the new Australian system may be seen as a “distant cousin” in the Commonwealth “family”, or a “new variant” of the “new model” of rights protection, which emphasises the value of pre-enactment scrutiny for the protection of human rights.


The rights protecting measures enacted in the jurisdictions discussed in this chapter 293 contain the defining features of the ‘new Commonwealth model’ 294 of rights protection identified by Gardbaum. In Canada, New Zealand, ACT and Victoria there are legalised bills or charters of rights which provide for enhanced judicial power to assess legislation for consistency with the protected rights, but reserve to the legislature the formal power to have the final say on what the law is by ordinary majority vote. 295 More specifically, all of these rights protecting measures recognise the value of ‘preenactment rights review’, 296 requiring ministerial certification and anticipating parliamentary scrutiny of proposed legislation. Although the system adopted in the Commonwealth of Australia does not meet all of Gardbaum’s criteria, its recent introduction of compatibility statements and creation of a joint committee on human rights shows the significance and value of these mechanisms within a growing number of Commonwealth jurisdictions.

289 Kinley & Ernst (n 283) 59
290 ibid 61
291 p 61-77
292 Or constitutional framework, as in Canada: p 48
293 With the exception of the Commonwealth of Australia
294 Gardbaum, ‘The New Commonwealth Model’ (n 2) 707
295 p 43-44
296 Gardbaum, ‘Reassessing the New Commonwealth Model’ (n 10) 176
Section 19 of the HRA 1998 fits squarely within this new model. It requires Ministers to make statements of compatibility in respect of all public bills introduced into Parliament, envisaging appropriate pre-enactment scrutiny of proposed legislation within the Executive and Parliament. In this respect it is more onerous than equivalent requirements in Canada and New Zealand, which require reporting by the Attorney-General only where a bill appears to be inconsistent with relevant human rights standards, but has clearly influenced ministerial certification in ACT, Victoria and now Australia. Section 19 is therefore not only significant within the United Kingdom constitution as a suitable and potentially effective means of promoting and protecting human rights, but also internationally as part of a growing “family” of Commonwealth jurisdictions placing ministerial certification and pre-enactment scrutiny at the heart of their rights protecting measures.

In spite of this, the importance and significance of section 19 for the protection of human rights in the United Kingdom was not recognised at the time of the enactment of the HRA 1998 and until recently has been overlooked.

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297 ch 1
Section 19 of the HRA 1998 should be at the very heart of an effective system of protecting human rights under current constitutional arrangements in the United Kingdom, which insist on the legislative supremacy of Parliament. The 1998 Act recognises this supremacy, as its mechanisms allow Parliament to legislate in contravention of Convention rights should it so wish. In encouraging consideration of those rights during the development and passage of legislation, section 19 has the potential to ensure that human rights standards are embedded within our law and our constitution. In addition section 19 can be situated amongst developments in a number of Commonwealth jurisdictions which have provided for the pre-enactment scrutiny of proposed legislation in rights-protecting measures. However, despite this significance within the domestic and international contexts the importance of section 19 was acknowledged but overshadowed during the parliamentary passage of the HRA 1998, and in contemporary and subsequent academic literature.

1. STATEMENTS OF COMPATIBILITY IN DOCUMENTS PRECEDING THE HUMAN RIGHTS ACT 1998: AN EVOLVING CONCEPT

The concept of a ministerial statement attesting to a bill’s compatibility with Convention rights can be traced throughout the documents published prior to the introduction of the Human Rights Bill into Parliament. Ministerial certification therefore constituted an integral part of the scheme for protecting human rights enacted in the HRA 1998.

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1 Discussed at p 26
2 HRA 1998, ss 3, 4 & 6
3 ch 2
4 Human Rights HL Bill (1997-98) 38
Established in October 1996, the Joint Consultative Committee on Constitutional Reform sought to create a consensus between the Labour and Liberal Democrat parties on ‘a legislative programme for constitutional reform’. In this context, incorporation of the ECHR into domestic law by Act of Parliament was deemed ‘essential to guarantee an open society and a modern democracy’. Any incorporating statute would require Ministers to ‘explain why any provision is, or appears to be, inconsistent with ECHR rights’ when introducing bills into Parliament. The dual purpose of these ministerial statements would be to ‘strengthen Parliamentary scrutiny and aid the courts in interpreting Parliament’s intention in legislating’. The Committee envisaged that parliamentary scrutiny of bills for compatibility with Convention rights would be carried out by a joint select committee of both Houses. Ministerial statements of compatibility and pre-enactment scrutiny by a parliamentary committee therefore formed part of the general proposal for incorporating the Convention. However, at this early stage it was proposed that a statement would only be made when a provision in a bill was, or appeared to be, inconsistent with Convention rights.

Although the Report made no mention of how such requirements would affect the Government, the Committee recognised the importance of Parliament’s role in ensuring the protection of human rights through scrutinising legislation for compatibility with those standards. It also expected the statement to inform the courts in interpreting legislation. Whatever the desirability of an independent judiciary using a ministerial statement to interpret Parliament’s legislation, this Report is evidence that the idea of a ministerial statement to Parliament attesting to a bill’s compatibility with Convention rights was an integral part of the Labour and Liberal Democrat vision for incorporating the ECHR into domestic law.

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5 Labour Party & Liberal Democrats, Report of the Joint Consultative Committee on Constitutional Reform, (Labour Party / Liberal Democrats 1997)
6 ibid para 2
7 ibid para 17
8 ibid para 19
9 ibid
10 ibid para 21
11 This would presumably occur under the principle in Pepper v Hart [1993] AC 593 (HL)

Although not identified as a ‘key issue’, the consultation paper did make clear Labour’s intention to ‘improve the parliamentary scrutiny of legislation’ for compatibility with Convention rights and thereby ‘reduce the risk of breaches’. The Executive and legislature would have distinct responsibilities for ensuring the conformity of legislation with Convention rights. The Executive would ‘ensure that new legislation brought forward does not breach human rights obligations’, and Parliament would ‘scrutinise draft legislation for conformity with those obligations’.

The consultation paper noted that despite measures implemented by Government departments to ensure the conformity of proposed legislation with human rights obligations, primary legislation had been found to breach the ECHR on a number of occasions. It therefore proposed to ‘ensure that departments and ministers are under an obligation to certify that they have, to the best of their ability, considered and concluded that proposed legislation does not breach the Convention’. Following the New Zealand model, ministers would be required to notify any inconsistencies to the Lord Chancellor and the Speaker of the House of Commons, explaining the reasons for such inconsistencies.

Emphasising the independent roles of the Executive and Parliament in protecting human rights, the consultation paper affirmed that the proposed ministerial certification ‘would in no way reduce the obligation of Parliament itself to scrutinise proposed legislation to ensure [conformity] with the Convention’. Parliament was expected to ‘play a leading role in protecting the rights which are at the heart of a parliamentary democracy’. As had the Report of the Joint Consultative Committee, the consultation

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12 Straw & Boateng [1997] EHRLR 71
13 ibid 75. The five ‘key issues’ were: the relationship of the ECHR to existing law, derogation and reservations, applicability, eligibility to challenge, and remedies
14 ibid 77
15 ibid 78
16 The system of ‘Strasbourg proofing’, discussed at p 120-23
17 Straw & Boateng (n 12) 78-79
18 ibid 79
19 p 54-56
20 Straw & Boateng (n 12) 79
21 ibid
22 ibid
The consultation paper therefore built on the Joint Consultative Committee’s conclusions. Ministers would be required to certify that proposed legislation did not breach Convention rights and notify the Lord Chancellor and Speaker of the House of Commons of any inconsistencies. In this respect, the consultation paper recognised that ministerial certification would affect both the Executive and Parliament. These proposals were refined further in the White Paper.


Continuing the theme of dual responsibility for the protection of human rights, the White Paper stated that it was:

highly desirable for the Government to ensure as far as possible that legislation which it places before Parliament in the normal way is compatible with the Convention rights, and for Parliament to ensure that the human rights implications of legislation are subject to proper consideration before the legislation is enacted.

However, its proposals for ministerial statements of compatibility were somewhat different to those in the Report of the Joint Consultative Committee and the Labour Party consultation paper.

The White Paper confirmed that there would be ‘a new procedure to make the human rights implications of proposed Government legislation more transparent’. When introducing legislation the relevant Minister would make a statement setting out his or her view that the bill was compatible with Convention rights. This statement would be included with the explanatory and financial memorandum accompanying the bill. If the Minister did not believe the proposed bill was compatible he or she would make a statement to that effect, confirming that the Government nevertheless wished to

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23 ibid
24 Home Office, Rights Brought Home: The Human Rights Bill (Cm 3782, 1997)
25 ibid para 3.1
26 ibid para 3.2
27 ibid
proceed with the bill. Earlier proposals for notifying inconsistencies to the Lord Chancellor and Speaker of the House of Commons had disappeared – the ministerial statement would be made to Parliament. No proposals were made as to the form or specific content of the ministerial statement, but they were expected to:

have a significant and beneficial impact on the preparation of draft legislation within Government before its introduction into Parliament [and] ensure that all Ministers, their departments and officials are fully seized of the gravity of the Convention’s obligations in respect of human rights.

If a Minister could not attest to a bill’s compatibility with Convention rights ‘Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the Bill. This will ensure that the human rights implications are debated at the earliest opportunity’. This suggests that the ministerial statement was expected to act as a catalyst for debate on human rights issues, but only when a Minister could not confirm a bill’s compatibility with Convention rights. The White Paper did not anticipate Parliament’s role when a Minister provided a statement of compatibility.

As well as expecting Ministers to explain why they could not provide a positive statement of compatibility ‘in the normal course of the proceedings on the Bill’, the White Paper also supported the creation of a ‘new Parliamentary Committee with functions relating to human rights’. Its precise form would be a matter for Parliament, but it was expected to ‘conduct enquiries on a range of human rights issues relating to the Convention, and produce reports so as to assist the Government and Parliament in deciding what action to take’.

The White Paper proposals for a ministerial statement of compatibility to be made in respect of all bills represent a clear development of the earlier proposals on this issue, and formed the basis for clause 19 in the Human Rights Bill.

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28 ibid para. 3.3
29 ibid para 3.4
30 ibid para 3.3
31 ibid
32 ibid para 3.6
33 ibid para 3.7
The Human Rights Bill and accompanying Explanatory and Financial Memorandum

Clause 19 of the Human Rights Bill read as follows:

19. – (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill –

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such a manner as the Minister making it considers appropriate.

The explanatory notes to clause 19 stated only that Ministers must ‘make and publish a written statement’ setting out their views on compatibility.34 It was not expected to generate any ‘significant financial effects’,35 with only clauses 6, 7 and 8 seen as sources of likely extra expenditure for public authorities.36

The proposal for ministerial statements of compatibility therefore formed part of the Government’s plans for incorporation from their earliest stages and was included in the Human Rights Bill. Such statements would have two broad functions: to require the Executive to assess proposed legislation for human rights compatibility, and to encourage Parliament to verify that compatibility during the legislative process. Statements of compatibility thus had the potential to ensure that human rights standards permeated the entire legislative process. Unfortunately, that potential was not recognised during the passage of the Human Rights Bill through Parliament.

34 Human Rights Bill (n 4) iii
35 ibid iv
36 Such expenditure would result from the duty on public authorities to act compatibly with Convention rights, and the availability of legal proceedings and remedies in case of any breach
2. SECTION 19 DURING THE PASSAGE OF THE HUMAN RIGHTS BILL: A MINOR CONCERN

As befits a measure of such constitutional significance, the parliamentary debates on the Human Rights Bill were extensive, lasting a total of 77 hours and 49 minutes, and involving ‘some extremely high quality and informed cross-party discussion of human rights principles and practice’. However, although the importance of clause 19 within the scheme of the bill was acknowledged by a small number of parliamentarians, much of the debate focused on other issues.

The House of Lords: 23 October 1997 – 5 February 1998

The Human Rights Bill received its first reading in the House of Lords on 23 October 1997. Discussion of clause 19 during the 38 hours and 24 minutes of proceedings in the House of Lords took place mainly in the context of debate on other issues, rather than on the basis that clause 19 was a significant clause in its own right.

Second Reading: 3 November 1997

The Lord Chancellor’s opening speech reflected the Government’s belief that clause 19 would affect both the Executive and legislature. According to Lord Irvine, statements of compatibility would require ‘close scrutiny of the human rights implications of all legislation before it goes forward’. He went on: ‘Ministers will obviously want to make a positive statement whenever possible. That requirement should therefore have a significant impact on the scrutiny of draft legislation within government’. Clause 19 should also encourage Parliament carefully to consider proposed legislation: ‘Where such a statement cannot be made, parliamentary scrutiny of the Bill would be intense’.

This recognition of Parliament’s role in the protection of human rights in the United Kingdom is to be welcomed. However, continuing to assert that intense

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38 HL Deb 3 November 1997, vol 582, col 1228
39 ibid col 1233
40 ibid
parliamentary scrutiny would only be expected where a statement of compatibility could not be made[41] appears to restrict Parliament’s role in this regard. As Ministers would not be obliged to give reasons[42] for their conclusions, the ability to make statements of compatibility would be facilitated in most circumstances. Therefore, according to the Government’s view parliamentary scrutiny would not need to be “intense” in most circumstances.

Lord Lester argued that clause 19 would affect all three branches of government. Stating that ‘the Government’s proposals will increase the accountability of the Executive to Parliament’,[43] he recognised that clause 19 would:

enhance parliamentary scrutiny and also enable the courts to ascertain whether legislation enacted after incorporation was intended to comply with or to be inconsistent with the convention. In the absence of a formally expressed intention to enact inconsistent legislation, the courts will be able to act on the basis that the legislation was intended by Parliament to be compatible with convention rights.[44]

While recognising the central place of clause 19 within the scheme of the Human Rights Bill, this statement is problematic as it seems to equate ministerial statements of opinion as to compatibility with the actual intention of Parliament.

Three other peers referred to clause 19 during their speeches, emphasising its role in creating a culture of rights which could help prevent the passage of incompatible legislation and reduce the risk of litigation. Somewhat optimistically Baroness Amos stated that the Bill would help ‘to ensure that [individuals] never need to go to court – by changing the way in which legislation and policies are drafted’. [45] Lord Holme felt that:

what is far more important than what ends in courts is whether legislators in legislating and administrators in administrating build into their thinking this culture of rights so that one ends up with less legal proceedings and more of a culture and society that provide greater respect for rights.[46]

[41] This argument was made in the White Paper: see p 90
[42] The issue of reasons to accompany statements of compatibility is discussed further at p 138-39 & 182-84, and see 246-50
[43] HL Deb 3 November 1997 (n 38) col 1239
[44] ibid col 1240
[45] ibid col 1247
[46] ibid col 1258
Finally, Lord Borrie described a ‘triple deterrent, on any government promoting legislation which may infringe the convention’ in the future, consisting of the statement of compatibility under clause 19, the clause 3 obligation for courts to interpret legislation compatibility with Convention rights where possible, and the ultimate supervisory role of the ECtHR. 47

Despite these references, much of the debate 48 at this stage centred on other issues. In what would set the tone for subsequent examination of the Bill, the House of Lords focused on:

- The much-feared introduction of a law of privacy and the Bill’s effects on press freedom;
- The impact of the Bill on the judiciary and its relationship with Parliament as a result of clauses 4 and 10; 49
- The meaning and impact of clause 6; 50
- The issue of effective remedies and the omission of article 13 of the ECHR from the list of Convention rights in clause 1;
- The Government’s failure to propose the creation of a Human Rights Commission; and
- The question of legal aid for legal proceedings brought under the Bill.

Committee Stage: 18, 24 & 27 November 1997

Clause 19 was mentioned during the first day of committee stage in relation to clause 3 of the Bill. Lord Lester stated that the obligation to provide a statement of compatibility would ‘enable our courts, in looking at future legislation, to give primacy to convention rights in the absence of a clear and unequivocal expression to the contrary, normally in a ministerial statement to both Chambers’. 51 Lord Irvine, in response, did not disagree with this point, stating:

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47 ibid col 1276
48 Which lasted 6 hours and 6 minutes
49 Providing for a fast-track procedure for amending legislation following a declaration of incompatibility
50 Creating a duty for ‘public authorities’ to act compatibility with Convention rights
51 HL Deb 18 November 1997, vol 583, cols 520-21
we proceed on the basis that Parliament, at least post-ratification of the convention, must be deemed to have intended its statutes to be compatible with the convention (...) and that courts should hold that that deemed general intention has not been carried successfully into effect only where it is impossible to construe a statute as having that effect. This seems to me to be a sensible principle and is consistent both with Parliament’s presumed intention post-ratification and with ministerial statements of compatibility, when they come to be made, under Clause 19.\textsuperscript{52}

Both Lords Lester and Irvine thus seemingly believed that a ministerial statement would affect the judiciary’s approach to their interpretative obligation under clause 3 of the Bill. This equates an executive statement of opinion with the intention of the legislature, even though they are not one and the same thing. Further, the appropriateness of the judiciary having regard to a ministerial statement in order to carry out what should be an independent assessment of the compatibility of legislation with Convention rights is uncertain.

On the final day of committee stage two proposed amendments to clause 19 were debated by the House. The first, tabled by Baroness Williams, sought to require Ministers to provide reasons to accompany statements of compatibility. Instead of making ‘statements to the effect of this or that with no great precision, no great clarity and no great helpfulness to the House’,\textsuperscript{53} a Minister would be obliged to ‘think through the statement he makes because he must give reasons and answer to them’.\textsuperscript{54} Opposing this amendment, the Lord Chancellor stated:

\begin{quote}
 this Bill could have gone through without any Clause 19 at all. In its present form, Clause 19 is a demonstration of the Government’s commitment to human rights. (...) Clause 19 is in itself a very large gesture, as well as a point of substance, in favour of the development of a culture of awareness of what the convention requires in relation to domestic legislation.\textsuperscript{55}
\end{quote}

He repeated that clause 19 would affect the development of proposed legislation by the executive, and that if a statement of compatibility could not be made it would be ‘a very early signal to Parliament that the possible human rights implications of the Bill will need and will receive very careful consideration’.\textsuperscript{56} He believed that ‘the reasoning

\begin{footnotesize}
\textsuperscript{52} ibid cols 535-36
\textsuperscript{53} HL Deb 27 November 1997, vol 583, col 1162
\textsuperscript{54} ibid col 1163
\textsuperscript{55} ibid
\textsuperscript{56} ibid
\end{footnotesize}
behind a statement of compatibility or the inability to make such a statement will *inevitably* be discussed by Parliament during the passage of the Bill*. Such discussion in Parliament would be ‘the best forum in which the Government’s thinking can be fully explained’. Satisfied that reasons would be given to Parliament in some form, Baroness Williams withdrew the amendment, describing clause 19 as ‘a very important part of the Bill (…) a very long step forward’.

The second amendment was proposed by Lord Mackay and sought to make clear that the opinion referred to in the statement of compatibility was that of Her Majesty’s Government rather than of the Minister himself. As a lay Minister would be required to defend what might be a complex legal position when making a statement of compatibility, Lord Mackay suggested that ‘the Government may also wish to think about how the existing convention relating to the advice of Law Officers will be applied’. This too was opposed by the Government. Lord Williams was clear that the individual Minister would have the ‘particular responsibility of ensuring that the policy accords with convention rights. His is the duty and his is the responsibility to answer’. The amendment was withdrawn, and clause 19 agreed with no amendments.

One other reference to clause 19 was made during this final day of committee stage. The potential effect of the Bill on the Executive prompted Lord Molyneaux to call for the creation of a Standing Advisory Committee on Human Rights to advise the Secretary of State on Convention matters. Making such expertise ‘available for consultation with departments in the preparation of their legislation’ would ‘avoid situations in which legislation could effectively be challenged immediately a Bill had completed all its stages and received Royal Assent. Departments would benefit enormously’. The Government was unwilling even to entertain that suggestion. Lord Williams stated that the amendment:

> misses the point of the Bill. The purpose of the Bill is to enable people who believe that their convention rights have been violated to enforce those rights in domestic courts. Its purpose is not to create a statutory source of advice for the Government on whether they are acting compatibly with the convention. We do...

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57 ibid (emphasis added)  
58 ibid  
59 ibid col 1164  
60 ibid col 1165  
61 ibid  
62 ibid col 1152
not believe that any such device would have any practical value or merit. It does not go beyond anything that can be done by a parliamentary committee on human rights.\textsuperscript{63}

Whatever the merits of Lord Molyneaux’s proposal, it did recognise the widespread and fundamental implications that the Bill and clause 19 would have for government departments. The outright dismissal of this proposal may suggest that rather than being concerned with the creation of a culture of human rights throughout the institutions of government, as had been anticipated by Lord Irvine, the Government’s real concern was instead the Bill’s effects on the courts and the litigation that would be generated.

\textit{Report Stage: 19 & 29 January 1998}

The issues dominating the eight hours of debate at report stage overwhelmingly related to the application of the Bill to religious bodies, including churches, schools and charities. The only reference to clause 19 was made by Lord Simon during discussion of a proposed amendment to clause 3 which sought expressly to maintain implied repeal for legislation passed prior to the Human Rights Bill. Lord Simon noted that the scheme of the Bill would ‘minimise the chance of future legislation being incompatible by requiring the Minister in charge of the Bill to make a declaration as to its compatibility’.\textsuperscript{64} This again portrays the statement of compatibility as a means of ensuring that post-HRA 1998 legislation would not infringe Convention rights.

\textit{Third Reading and Closing Speeches: 5 February 1998}

Clause 19 was not discussed at this final stage in the House of Lords. By this time the issues had crystallised into certain key topics, notably the position of religious bodies, in particular the Church of England (and related organisations) and Church of Scotland, the fast-track procedure contained in clauses 4 and 10, and the impact of the Bill on press freedom.

\textsuperscript{63} ibid col 1153
\textsuperscript{64} HL Deb 19 January 1998, vol 584, col 1290

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The Human Rights Bill arrived at the House of Commons with clause 19 intact. Before second reading, the House of Commons Library published a number of research papers on the issues raised by the Bill.\textsuperscript{65} The Human Rights Bill [HL] Bill 119 of 1997-98\textsuperscript{66} examined the form and policy of the Bill, discussed its background and principal features, and the issues raised in the House of Lords. Clause 19 was not included in this account. A further paper dealt with the broader constitutional and legislative aspects of the Human Rights Bill.\textsuperscript{67} This paper did refer to clause 19, describing statements of compatibility as part of the ‘Government’s policy for ensuring that future proposed legislation would be scrutinised for conformity with Convention rights’,\textsuperscript{68} and explaining that this was ‘part of a more general policy of ensuring that legislation complies with the Convention’.\textsuperscript{69} The paper described the proposed Lords amendments to clause 19, and noted that ‘Ministerial statements of compatibility may become relevant from the point of view of (…) Pepper v Hart’.\textsuperscript{70}

Some information about clause 19 was therefore available to MPs before the Human Rights Bill came to be scrutinised in the House of Commons. However, debates in the House of Commons did not examine the potential impact of clause 19 in ensuring the effective protection of human rights within the United Kingdom constitutional system. As in the House of Lords, the attention of MPs settled elsewhere.

Second Reading: 16 February 1998

Introducing the Human Rights Bill on second reading, Jack Straw, then Home Secretary, made an oblique reference to clause 19, stating that although courts would not be able to strike down legislation for incompatibility with Convention rights, the Bill would ‘nevertheless have an impact on the way in which legislation is drafted’.\textsuperscript{71} Describing the detail of the Bill, he later stated that clause 19 demonstrated the

\textsuperscript{65} Research papers are published for the information of MPs and their staff, and aim to be politically impartial
\textsuperscript{66} Baber (Research Paper 98/24, House of Commons Library, 13 February 1998)
\textsuperscript{68} ibid 35
\textsuperscript{69} ibid
\textsuperscript{70} ibid 37
\textsuperscript{71} HC Deb 16 February 1998, vol 306, col 770
Government’s ‘determination to improve compliance with convention rights’\(^{72}\) and further clarified:

Ministers will want to make a positive statement whenever possible. The requirement to make a statement will have a significant impact on the scrutiny of draft legislation within Government and by Parliament. In my judgment, it will greatly assist Parliament’s consideration of Bills by highlighting the potential implications for human rights.\(^{73}\)

As with the Lord Chancellor’s introductory speech in the House of Lords, this reflects the Government’s expectation that clause 19 would affect both Government and Parliament. However, unlike the Lord Chancellor, Straw did not seem to suggest that Parliament’s role in scrutinising proposed legislation for compatibility with Convention rights would be limited to cases in which a negative statement was made.

Three other MPs made reference to clause 19 during the second reading debate. Paul Stinchcombe viewed it as one of the means by which the Bill preserved parliamentary sovereignty,\(^{74}\) as the effect of clause 19, together with the remedial order procedure was that ‘the House would remain free to legislate as it chooses, but when it did so it would be more able and better equipped to deal with the human rights concerns of its legislation. That is a huge stride forward’.\(^{75}\)

Fiona MacTaggart called for the creation of a parliamentary committee to examine human rights issues, arguing that:

it should produce a statement on new legislation and its compatibility with the convention. Statements should be a powerful assessment – an audit – of the human rights impact of proposed legislation. We do not want statements to be merely a quick gesture stating that the Minister is confident that there will be no conflict; let us have an assessment of how legislation will advance and develop.\(^{76}\)

This reveals early concerns among parliamentarians that Ministers might not be thorough in assessing proposed legislation for compatibility with Convention rights, and recognises the need for accurate, detailed information on that issue. Finally, Gareth Thomas referred to clause 19 as a means of helping to create a culture of human rights

\(^{72}\) ibid col 779  
\(^{73}\) ibid  
\(^{74}\) ibid col 814  
\(^{75}\) ibid  
\(^{76}\) ibid col 824
in the United Kingdom, describing it as ‘a litmus test of the conviction behind the Bill’.  

However, as in the second reading debate in the House of Lords, the attention of the Commons was focused elsewhere. The debate featured a number of recurring themes, including principally:

- The impact of the Human Rights Bill on the relationships between the Executive, Parliament and the judiciary. Particular concerns centred on the possible increase in powers and perceived politicisation of the judiciary and the fast-track procedure for amending incompatible primary legislation by remedial order;
- The impact of the Bill on the press;
- The impact of the Bill on churches and religious organisations; and,
- The definition of ‘public authority’ under clause 6.

Committee Stage: 20 May; 3, 17 & 24 June; 2 July 1998

Clause 19 was referred to a number of times during the 25 hours and 46 minutes of committee stage proceedings. In the course of an extensive debate on the inclusion of the articles of Protocol 6 to the ECHR in the definition of ‘Convention rights’ in clause 1 of the Bill, concerns were raised on the first day of committee stage that such a step would fetter Parliament’s ability to legislate on the matter in future. In the only reference to clause 19 on that day Gareth Thomas, showing a clear understanding of the structure of the Bill and of clause 19 in particular, recognised that even following ratification of Protocol 6, clause 19(1)(b) would allow Ministers to proceed with incompatible legislation.

During the second day of committee stage proceedings Jack Straw again referred to clause 19 as one of the means by which the Bill respected parliamentary sovereignty:

Nothing could be more compatible with the sovereignty of Parliament than the fact that the Bill incorporating the convention on human rights refers to the possibility (…) that Ministers have to apply it to future legislation. That is not to

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77 ibid col 845
78 On the abolition of the death penalty
79 HC Deb 20 May 1998, vol 312, col 999-1000
say that they have to force future Bills into the apparent straightjacket of the convention; they simply have to make a statement to the House.\footnote{HC Deb 3 June 1998, vol 313, col 420}

He went on: ‘Obviously, it will be incumbent on Ministers (…) to do their best to ensure that Bills are compatible with the convention’.\footnote{Ibid} Straw then set out the Government’s position on the use of judicial powers under clause 3 where Parliament had expressly considered a matter involving human rights. In respect of future legislation, the Government were:

of course inviting the courts to work on the assumption that the House has applied itself to ensuring that legislation is compatible with the convention, except where a Minister comes to the House to say that there are overriding reasons why it is not, to give those reasons and to ask the House to agree the legislation in any case.\footnote{Ibid col 425}

This is a clear statement that the Government expected clause 19 ministerial statements to have an effect on the use of powers conferred by Parliament on an independent judiciary. This was the final reference to clause 19 at committee stage.

\textit{Report Stage & Third Reading: 21 October 1998}

It was not until this late stage in the Bill’s proceedings that clause 19 was discussed in any detail by the House of Commons when amendments were tabled by James Clappison, who called for clause 19(1)(a) statements to be ‘accompanied by a report setting out any issues which the Minister considers to be relevant to the question of the compatibility of the Bill with the Convention’s rights and giving the Minister’s reasons for stating that the Bill is compatible’.\footnote{HC Deb 21 October 1998, vol 317, col 1349} Further, clause 19(1)(b) statements should be:

accompanied by a report setting out:

(i) any issues which the Minister considers to be relevant to the question of the compatibility of the Bill with the Convention rights;

(ii) the reasons why the Minister is unable to make a statement of compatibility; and
(iii) the reasons why the Government nevertheless wishes the House to proceed with the Bill notwithstanding the Minister’s inability to make a statement of compatibility.\(^{84}\)

The final amendment sought to insert the following new subclauses into clause 19:

(2) A statement and report made under subsection 1(a) must be in writing and be published in such manner as the Minister making it considers appropriate.

(3) A statement under subsection 1(b) must be an oral statement given to both Houses of Parliament, and a report under subsection 1(b) must be in writing and be published in such manner as the Minister making it considers appropriate.\(^{85}\)

As with the amendment proposed by Baroness Williams in the House of Lords,\(^{86}\) these measures would have required the Minister making the statement of compatibility to provide clear reasons for his conclusions.

Clappison was concerned that clause 19 put ‘more emphasis on presentation than substance’.\(^{87}\) If Ministers were to be bound by clause 19:

it would surely be more meaningful for them to give their reasons. We wonder just how many Ministers will state that they are unable to make a statement of compatibility before Second Reading. How many will come to the House and say, “This is a bit dodgy, but we want you to go ahead anyway”?\(^{88}\)

There was a risk that ‘Ministers will use the measure as a rubber stamp to present their Bills as complying with the European convention, irrespective of the reasons for doing so and without an informed debate on the subject’.\(^{89}\)

Borrowing heavily from the words of the Lord Chancellor,\(^{90}\) Mike O’Brien, Parliamentary Under-Secretary of State for the Home Department, opposed these amendments in strong terms.\(^{91}\) He argued that they were:

unnecessary, because the House provides for the examination of such issues in its procedures in any event. (...) A statement as provided for by the Bill as it stands will be sufficient to achieve the important aims that both we and, in many ways, Opposition Members want clause 19 to deliver. That would flag up the

\(^{84}\) ibid

\(^{85}\) ibid

\(^{86}\) ibid

\(^{87}\) HC Deb 21 October 1998 (n 83) col 1349

\(^{88}\) ibid

\(^{89}\) ibid

\(^{90}\) p 95-96

\(^{91}\) HC Deb 21 October 1998 (n 83) col 1350
issue to the House, which in the normal course of events would be able to look into the reasoning behind the statement of compatibility. Inevitably, that will be an issue during the passage of a Bill.\textsuperscript{92}

The proposed amendments would add very little to Parliament’s ability to uncover the Government’s reasons during debate. Indeed, O’Brien could not ‘imagine how the mere giving of such a statement could enhance the debate that would normally take place on Second Reading or in Committee, which would usually elicit the required answers’.\textsuperscript{93} Finally, the Government opposed the amendments on grounds that it was ‘not necessary or appropriate’ to require a Minister to make an oral statement as ‘Acts of Parliament do not usually regulate what a Minister will or will not say in the Chamber’.\textsuperscript{94} Unconvinced that clause 19 would be anything more ‘than a rubber stamp and a presentational device’,\textsuperscript{95} Clappison withdrew the amendments.

The Government’s position as revealed in this response places a great deal of faith in the ability and will of Parliament to recognise and accurately debate the human rights implications of bills. It also refers to Parliament being able to examine the reasoning behind a statement of compatibility in ‘the normal course of events’. This begs the question of what might happen when the course of events is not “normal”. In times of emergency, for example in response to a terrorist attack or threat, the need to protect human rights is perhaps at its greatest.\textsuperscript{96} At such times Parliament’s legislative procedures may be rushed as politicians of all parties seek to demonstrate their willingness and ability to respond to events by taking strong measures against those perceived to be the source of the emergency. In such “abnormal” and politically sensitive circumstances, if a Minister confidently asserts that in his opinion a bill is compatible with Convention rights it is perhaps unrealistic to rely on Parliament consistently and thoroughly to examine the human rights implications of the proposed legislation.

A few brief references to clause 19 were made during third reading debate. Jack Straw indicated that clause 19 would come into force before the remainder of the Bill as

\begin{itemize}
  \item \textsuperscript{92} ibid cols 1350-51
  \item \textsuperscript{93} ibid col 1351
  \item \textsuperscript{94} ibid
  \item \textsuperscript{95} ibid col 1352
  \item \textsuperscript{96} See e.g. Bogdanor, \textit{The New British Constitution} (Hart 2009) 56, noting the problems in relying on parliamentary scrutiny of legislation with human rights implications in times of ‘moral panic’. As evidence Bogdanor cites the Anti-terrorism, Crime and Security Act 2001 and Prevention of Terrorism Act 2005, both of which were rushed through Parliament
\end{itemize}
although ‘important for the presentation of Bills before the House’ it did not ‘form part of the main scheme of the Bill’.\footnote{HC Deb 21 October 1998 (n 83) col 1359. This point was repeated at col 1364. Clause 19 entered into force on 24 November 1998, almost two years before the majority of the Act’s provisions} Finally, Fiona MacTaggart repeated her suggestion that a parliamentary committee on human rights ‘could assist Ministers in the business of making clause 19 statements’.\footnote{HC Deb 21 October 1998 (n 83) col 1366}

The Bill was accordingly approved and returned to the House of Lords which considered and approved Commons amendments on 29 October 1998. Clause 19 therefore remained unaltered throughout the passage of the Human Rights Bill through Parliament.

\textbf{Clause 19: Acknowledged but overshadowed in Parliament}

Clause 19 was discussed and explained principally in conjunction with other issues or clauses in both Houses of Parliament. Reference was made to its effects for the development of policy and legislative proposals by Government, as well as its potential to trigger debate on the human rights implications of bills in Parliament. A number of statements also suggested that there would be some relationship between the existence of a clause 19 statement of compatibility and the use of judicial powers under clause 3. More generally, clause 19 was described as one of the major means by which the Bill would respect parliamentary sovereignty and create a culture of human rights in the United Kingdom. Amendments were proposed in both Houses aiming to require Ministers to provide adequate reasons for conclusions as to a bill’s compatibility with Convention rights, but were rejected. Such discussion demonstrates at least an awareness of the justification for and purpose of clause 19 in both Houses. However, it can be argued that there was little recognition of its potential impact and inherent suitability as a vehicle for ensuring that human rights standards permeated throughout the United Kingdom’s constitutional and legislative system.

Although Baroness Williams acknowledged that clause 19 was a ‘very important part of the Bill’ and a ‘very long step forward’,\footnote{HL Deb 27 November 1997 (n 53) col 1164} other clauses were more frequently heralded as the most significant parts of the Bill. Lord Cooke asserted that clause 3(1)
was ‘a key provision in the legislation, possibly even the most important provision’.\(^{100}\) Paul Stinchcombe also recognised the importance of clause 3 which he described along with clause 6(1) as ‘the provisions that truly give the Bill teeth – if rights are to be brought home, it will be precisely because of those provisions’\.\(^{101}\) Lord Simon believed clause 6 to be ‘one of the most important clauses in this important Bill’, \(^{102}\) and in his opening speech at second reading Jack Straw made reference to clauses 3 and 4 and clauses 6–9 as the main ways in which the Bill gave effect to Convention rights.\(^{103}\) Finally, clause 10 was identified by Lord Goodhart\(^{104}\) and Dominic Grieve\(^{105}\) as being of utmost importance within the scheme of the Bill.

Further, although amendments to clause 19 were proposed in both Houses, in neither House was there widespread participation in the short debates on those amendments. The debates involved only those proposing the amendments and the responding Minister, suggesting limited interest, or even awareness of the potential impact of clause 19 among parliamentarians.

The parliamentary debates on the Human Rights Bill were instead dominated by other, more controversial issues, notably the possible effect of the Bill on churches and religious organisations, and on the press. Other frequently debated issues included the definition of ‘public authority’ for the purposes of clause 6, and the fast-track remedial order procedure contained in clauses 4 and 10. In the House of Commons many MPs raised concerns that the Bill would increase the powers of both the judiciary (as a result of clauses 3 and 4) and the Executive (through clause 10) to the detriment of Parliament and parliamentary sovereignty.\(^{106}\) However, although acutely aware of the risks that the Bill posed in this regard, no MPs appeared to recognise that clause 19 could in fact place Parliament at the very heart of the system for human rights protection in the United Kingdom.

\(^{100}\) HL Deb 18 November 1997 (n 51) col 534  
\(^{101}\) HC Deb 3 June 1998 (n 80) col 418  
\(^{102}\) HL Deb 24 November 1997, vol 583, col 754  
\(^{103}\) HC Deb 16 February 1998 (n 71) col 778  
\(^{104}\) HL Deb 27 November 1997 (n 53) col 1111  
\(^{105}\) HC Deb 24 June 1998, vol 314, col 1139  
\(^{106}\) These concerns were raised predominantly by Conservative MPs including Douglas Hogg, David Ruffley and Gerald Howarth at second reading, and Edward Leigh, John Bercow and Oliver Heald at committee stage
It can thus be argued that while parliamentarians were undoubtedly aware of the existence and stated purpose of clause 19, there was little appreciation that it could provide robust mechanisms for ensuring not only that Government should scrutinise its own proposed legislation for compatibility with Convention rights, but that the sovereign Parliament should have a central role in protecting human rights in the United Kingdom. The potential impact of clause 19 had been overlooked.


As was the case in Parliament, contemporary academic work and subsequent articles reviewing the working of the HRA 1998 and constitution more generally acknowledged the importance of section 19, but rarely recognised its potential profound impact on all branches of government.

Section 19 in contemporary academic comment

Of 84 contemporary articles and textbooks examining the HRA 1998, 41 mentioned section 19 directly. A further 14 referred to its likely effects without any direct reference to the provision itself. Most of these discussed the potential effects of the HRA 1998 on the Government, for example when checking its policies for compliance with Convention rights. Three further articles took a wider view, anticipating that section 19 would affect both Government and Parliament. Only one article recognised that a ‘system of ministerial certification’ would be valuable when incorporating the ECHR into domestic law, and could affect all three branches of government.

As illustrated in Table 1, of the 41 articles which made direct reference to section 19, eight were descriptive only, making no analysis of the provision’s potential

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107 For these purposes, “contemporary academic work” has been limited to work published from 1997-99 which examined the HRA 1998 in some broad sense
109 e.g. Wadham, ‘Protecting our Rights’ (1997) 141 SJ 452
111 This thesis will not discuss in detail the actual or potential effect of section 19 on the judiciary
effects. The majority of the remaining articles analysed the effects of section 19 in respect of one or two branches of government. Of those articles assessing its effects on only one institution, four referred to the effect of section 19 on the Government, seven referred to its effects on Parliament, and eight to its effects on the judiciary. A further eight articles discussed the effects of section 19 for the Government and Parliament, and three discussed its effects for Parliament and the judiciary.

**Table 1: Contemporary academic work making direct reference to section 19**

<table>
<thead>
<tr>
<th>Works referring to the impact of section 19 on:</th>
<th>Government</th>
<th>Parliament</th>
<th>Judiciary</th>
<th>Descriptive only</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hudson, ‘Passage of Rights Bill’ (1998) 148 NLJ 1610</td>
<td></td>
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<td>√</td>
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<tr>
<td>Cooper, ‘Human Rights are for People’ (1999) 20 Stat LR 238</td>
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</tbody>
</table>
Only three contemporary articles discussed the potential effect of section 19 on all three branches of government. The first of these was Lester’s ‘First Steps Towards a Constitutional Bill of Rights’,\(^{112}\) in which the author argued that section 19 statements would ‘oblige Ministers to be more open with Parliament’ when a bill had adverse human rights implications, and would ‘enhance the ability of Parliament to fulfil its duties under the Convention when exercising its sovereign law-making powers’.\(^{113}\) As to the role of the courts under the HRA 1998, Lester asserted that section 19 would add ‘much more force to the presumption that legislation was not intended to breach Convention rights’.\(^{114}\)

As might be expected from the principal architect of the HRA 1998, Lord Irvine’s article ‘The Development of Human Rights in Britain under an Incorporated Convention on Human Rights’\(^{115}\) also recognised that the Executive, Parliament and judiciary would be affected by section 19. In his view, ‘Ministers and administrators will be obliged to do all their work keeping clearly and directly in mind its impact on human rights’, and ‘the responsible Minister will have to ensure that (…) legislation does not infringe guaranteed freedoms, or be prepared to justify his decision openly and

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112 [1997] EHRLR 124
113 Ibid 129
114 Ibid
115 [1998] PL 221
in the full glare of parliamentary and public opinion’.¹¹⁶ This would ‘ensure that Parliament knows exactly what it is doing in a human rights context’.¹¹⁷ He went on: ‘this improvement in both the efficiency and the openness of our legislative process [is] one of the main benefits produced by incorporation of the Convention’.¹¹⁸ Like Lester, Irvine also believed that section 19 would affect the exercise of judicial powers under section 3 of the HRA 1998, arguing that ‘Ministerial statements of compatibility will inevitably be a strong spur to the courts to find means of construing statutes compatibly with the Convention’.¹¹⁹ The final article anticipating section 19’s effects on all three branches of government was ‘The Human Rights Bill: Incorporating the European Convention on Human Rights into UK Law’,¹²⁰ in which Tierney argued that section 19 was part of a ‘series of protective mechanisms’¹²¹ requiring Parliament, the judiciary and the Executive to act as watchdogs to ensure protection for human rights within the political constitution of the United Kingdom.

Valuable though such articles undoubtedly are as examples of contemporary academic writing acknowledging the potentially wide effects of section 19, they represent only 3.5% of all 84 contemporary works referring either directly or indirectly to that provision.

Section 19 in reviews of the working and impact of the Human Rights Act 1998

Between 2001 and April 2012, 25 articles, textbooks and chapters have reviewed the operation of the HRA 1998. Twelve of those referred directly to section 19, and a further article referred to its effects but did not directly mention the provision. In ‘Human rights: A Review of the Year’,¹²² Havers & English noted that the Act continued to ‘impact on policy, decision-making and legislation’¹²³ but gave no further explanation. They continued: ‘the importance of the Act in this sphere should not be underestimated. Indeed, it seems to us to be at least as important as the decisions of the

¹¹⁶ ibid 226
¹¹⁷ ibid
¹¹⁸ ibid
¹¹⁹ ibid 228
¹²⁰ (1998) 4 EPL 299
¹²¹ ibid 301
¹²² [2003] EHRLR 587
¹²³ ibid 599
It is unfortunate that this has not been more widely recognised, as many articles purporting to review the operation of the HRA 1998 have focused only on the use of the Act by the judiciary.

As demonstrated by Table 2, all twelve articles referring directly to section 19 analysed its effects in some way. Individual articles examined its effects on the Government alone, Parliament alone, and on the Government and the judiciary. Two articles looked at section 19’s effects on the judiciary, and six analysed its effects for the Government and Parliament.

<table>
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<th>Works referring to the impact of section 19 on:</th>
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</tr>
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<tbody>
<tr>
<td>Woolf, ‘Human Rights: Have the Public Benefitted?’ (British Academy lecture, 2002)</td>
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There was early recognition in 2001 that parliamentarians had failed to engage with section 19, even though it offered them a chance to ‘interrogate ministers every

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124 ibid 599 (emphasis added)

time they introduce a bill with the parrot-like statement that it complies with the HRA’. ¹²⁶ Wadham:

hoped that in future those in Parliament will be able to use [section 19] statements to tease out more details and ensure that these are properly considered by Parliament. If this approach was adopted then section 19 statements (...) could be a powerful tool to ensure that Parliament is able to do its part in the protection of human rights. ¹²⁷

He further noted that the Government’s tendency to make section 19(1)(a) statements in respect of statutes granting broad discretionary powers, assuming that public authorities would exercise the powers compatibly with the Convention, had ‘ousted Parliament’s role’, leaving responsibility for checking for compliance with the courts. ¹²⁸

In 2002 Woodhouse concluded that section 19 would be unlikely to affect the use of judicial powers under the HRA 1998,¹²⁹ and Woolf spoke in general terms about the likely effect of section 19 on policy determination by the Executive and the parliamentary process, especially as a result of scrutiny by the JCHR. ¹³⁰ He also argued that where a section 19(1)(a) statement was made ‘it can be assumed that Parliament intended the legislation to comply with the Convention’, and that the judiciary would therefore be justified in using section 3 powers to achieve compatibility where necessary. ¹³¹ Contradicting Wadham’s earlier conclusions, Irvine wrote that section 19 ‘guarantees an informed consent on the part of Parliament’ which would ‘not legislate incompatibly with the Convention without being absolutely clear that it [was] doing so’. ¹³² Further, if a declaration of incompatibility was issued in respect of legislation which had received a section 19(1)(a) statement ‘the minister must inevitably come under some moral pressure to reconsider the position (...) the declaration will mean that the view he presented to Parliament has been proved wrong in a fully reasoned judgment of a higher court’. ¹³³

¹²⁶ Klug, ‘The Human Rights Act: Can you Spot the Difference?’ (BIHR Lunchtime Lecture, 6 December 2001)
¹²⁸ ibid 624
¹³⁰ Woolf, ‘Human Rights: Have the Public Benefitted?’ (British Academy Lecture, 15 October 2002)
¹³¹ Woolf ‘The Impact of Human Rights’ (Speech at the Oxford Lyceum, 6 March 2003)
¹³³ Irvine, ‘The Impact of the Human Rights Act’ (n 132) 319
Lester subsequently acknowledged that section 19 had ‘attracted little interest during the passage of the Act’, and that ‘neither [he] nor the makers of the HRA appreciated that it would become one of the most potent provisions in the statutory scheme’, linking this potency to the systematic scrutiny work of the JCHR. In ‘Standing Back from the Human Rights Act: How Effective is it 5 Years On?’, Klug & Starmer also highlighted the JCHR’s achievement in persuading the Government to ‘expand slightly’ the information provided in support of section 19 statements. While accepting that there was ‘considerable anecdotal evidence that s19 statements have impacted on the consistency of advice given to ministers (…) on the compliance of new policies and legislation with the HRA’, the authors doubted Lester’s claims of effective systematic scrutiny of legislation, citing the ‘steady stream of legislation certified as “compatible” with ECHR rights by the responsible minister which the JCHR has warned is likely to breach Convention rights and the courts have declared does, in some cases’.

Two authors contributing chapters to The Human Rights Act: A Success Story discussed the effect of section 19 on Government and Parliament. Sedley asserted that section 19 had demonstrated the effectiveness of the policy of the HRA 1998, as:

to have to tell Parliament that a Bill is not compliant is to take a serious political risk; it has become correspondingly important for ministers to be able to state that their legislation will respect Convention rights. This, in turn, makes it necessary for the promoting department of state and the drafter to make reasonably sure that it is so.

In respect of counter-terrorism measures, Gearty argued that the human rights implications of the Terrorism Act 2000 had been discussed as a result of section 19. Further, in the aftermath of the events of 11 September 2001, section 19 ‘and also the probability of legal challenge in the future’ meant that ‘much of the discussion of the [Anti-terrorism, Crime and Security Bill] was conducted in the language of rights.’

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135 [2005] PL 716
136 ibid 718
137 ibid 719
138 Clements & Thomas (eds) (Blackwell 2005)
139 ibid 14
140 ibid 23
These articles and chapters recognised the actual or potential impact of section 19 on certain branches of government and identified a number of problems in its operation. However, only one book examined the potential effects of section 19 on all three branches of government. Leigh and Masterman\textsuperscript{141} noted that section 19 was ‘intended to draw Parliament’s attention to the consequences for human rights of its law-making. If properly applied it should prevent Parliament from enacting legislation that inadvertently overrides human rights’.\textsuperscript{142} They also acknowledged that the provision had ensured that the Executive gave ‘enhanced prominence in the policy-making process to human rights grounds’,\textsuperscript{143} but questioned the success of section 19 as ‘some of the legislative proposals, especially in the counter-terrorism and criminal justice fields, that have presumably been vetted in this way (…) have nevertheless emerged to general criticism on human rights grounds’.\textsuperscript{144} Finally, noting that section 19 statements ‘do not bind the courts’,\textsuperscript{145} Leigh and Masterman argued that if legislation was introduced with a section 19(1)(a) statement ‘the presumption that Parliament thought that the legislation was compatible gives permission for the courts to go beyond conventional interpretation of the statutory language’.\textsuperscript{146}

It is notable that only one book dedicated to reviewing the operation of the HRA 1998 examined section 19 in terms of its effects on all three branches of government. This work is also notable for a further reason. Although some of the issues surrounding section 19 were discussed in academic commentary every year between 2001 and 2005, enthusiasm for such matters appeared to wane. With the exception of Leigh and Masterman’s work, from 2006 onwards no review of the HRA 1998 made reference to section 19.

\textbf{Section 19 in reviews of the constitution}

Of the nine articles reviewing constitutional developments published between 1999 and April 2012, four made direct and two indirect reference to section 19. These articles concentrated only on the provision’s effects for Government and Parliament.

\textsuperscript{141} Making Rights Real: The Human Rights Act in its First Decade (Hart Publishing 2008) 28-36
\textsuperscript{142} ibid 29
\textsuperscript{143} ibid 30
\textsuperscript{144} ibid 31
\textsuperscript{145} ibid 32
\textsuperscript{146} ibid 33
In 1999 Hazell & Sinclair reported that work within Whitehall in preparation for implementation of the HRA 1998\textsuperscript{147} included the systematic human rights proofing of bills so as to enable section 19(1)(a) statements to be made. The subsequent article in this series noted that in practice brief section 19 statements were included on the face of bills.\textsuperscript{148} Statements of compatibility seemed to be having an effect within Parliament: on a number of bills, notably the Immigration and Asylum Bill, ‘the government ha[d] been pressed hard by parliamentarians to provide a fuller statement of its reasoning’\textsuperscript{149}

The extended application of the section 19 procedure to secondary legislation and statutory instruments brought before Parliament was described in 2001 as an ‘important development’.\textsuperscript{150} This article also highlighted the section 19(1)(b) statement made in respect of House of Lords amendments to the Local Government Bill which sought to retain the “Section 28” ban on the promotion of homosexuality in schools.\textsuperscript{151} Finally, in 2005 Kelly, Gay & White observed that the HRA 1998 ‘has had an important impact on the legislative process’\textsuperscript{152} as a result of section 19 and the scrutiny work of the JCHR. Both articles referring only indirectly to the impact of section 19\textsuperscript{153} focused on the JCHR’s role, linking its development to the emergence of a stronger rule of law in the United Kingdom.

**Section 19: Acknowledged but overshadowed in academic comment**

While some of the abovementioned work included some analysis of the effects of section 19, most commentators seemed to acknowledge its effects as regards only one or two branches of government. Only a very small number of articles anticipated that section 19 could have potentially wide-ranging effects throughout all of the United Kingdom’s constitutional institutions, despite the fact that such effects had been foreshadowed during the parliamentary debates on the Human Rights Bill. Of a total of 118 articles, 26 (22\%) directly mentioned section 19 and its effects on one branch of

\textsuperscript{149} ibid 254
\textsuperscript{150} Hazell and others, ‘The Constitution: Rolling out the New Settlement’ (2001) 54 Parl Aff 190, 200
\textsuperscript{151} ibid 200-01
\textsuperscript{152} ‘The Constitution: Into the Sidings’ (2005) 58 Parl Aff 215, 219
government. Nineteen articles (16.1%) directly referred to its effects on two branches of government, but only four articles – that is 3.3% of those studied – referred to the potential impact of section 19 throughout all three branches of government.

It can be concluded therefore that, as during the parliamentary passage of the Human Rights Bill, while commentators were aware of and discussed section 19, its potential impact within the United Kingdom constitution was largely overlooked. The next section of this chapter will attempt to analyse why this occurred.


It is clear from the previous discussion that although acknowledged by Parliament during the passage of the Human Rights Bill and in contemporary and subsequent academic work, section 19 was overshadowed by other issues related to the HRA 1998. It can be argued that this occurred as a result of a number of different factors. The first is that from its earliest days the Government may have lacked commitment to the HRA 1998: ‘In private discussion at the Labour Party conference in 1998, Tony Blair suggested that constitutional reform was Year 1 business: the party had been there, done that, and could now get on with the bread and butter issues of more direct interest to its supporters’.154 This suggests that incorporating the ECHR into domestic law may have been a means of honouring promises made by John Smith, rather than a product of any real commitment to far-reaching reform in this area. This was perhaps complicated by the decision to give responsibility for the HRA 1998 to the Home Office. With a portfolio including the police, immigration and prisons, this was one of the departments of State most likely to face legal challenges under the 1998 Act. With such conflicting roles, the extent to which the Home Office can have been expected fully to promote the HRA 1998 and undertake the required thorough scrutiny of any bills presented to Parliament is questionable.

The second factor is that considerable attention was given to the courts as the primary forum for the implementation of the HRA 1998. Incorporation was principally justified as a means of ensuring that United Kingdom judges could rule on Convention

rights issues, allowing individuals to avoid the time and expense of litigation before the ECtHR.\textsuperscript{155} This assessment as to the likely functioning of the HRA 1998 seems to have been borne out in practice. For example, Bogdanor has argued that although the 1998 Act sought ‘to secure a democratic engagement with rights on the part of the representatives of the people in Parliament, the main burden of protecting human rights has been transferred to the judges’.\textsuperscript{156} Focusing on the role of the judiciary under the HRA 1998 often raises fears of judicial dominance and a corresponding atrophy of Parliament’s role within the constitution. It may also have meant that insufficient attention was given to the potential role of the democratically accountable branches of government, as anticipated by section 19.

As discussed above,\textsuperscript{157} the \textit{Report of the Joint Consultative Committee on Constitutional Reform}, the Labour Party consultation paper and the White Paper called for a Select Committee of both Houses of Parliament to scrutinise bills for conformity with Convention rights. Although undoubtedly valuable as part of the legislative process,\textsuperscript{158} relying heavily on a select committee to perform this scrutiny role might suggest that the Government did not expect debate on compliance issues to permeate the legislative process. The White Paper appeared to call for debate on such issues within the Chamber, but anticipated thorough debates only where a Minister made a section 19(1)(b) statement,\textsuperscript{159} a view re-iterated by the Lord Chancellor during the passage of the Human Rights Bill.\textsuperscript{160} As the Government also believed that in most cases Ministers would strive to make a section 19(1)(a) statement, it seems that extensive and probing debate in Parliament on the compliance of most bills was not an expected outcome.

This attempt to narrow the circumstances in which Parliament would be expected thoroughly to debate the human rights implications of bills can be coupled with the Government’s opposition to the provision of reasons to accompany section 19 statements.\textsuperscript{161} If Parliament is unaware of the Minister’s reasons for making such a statement, its task in scrutinising and testing the accuracy of it is made all the more

\textsuperscript{155} p 17
\textsuperscript{156} ‘Human Rights and the New British Constitution’ (JUSTICE Tom Sargant Memorial Annual Lecture, 14 October 2009)
\textsuperscript{157} p 87, 89 & 90
\textsuperscript{158} The work of the JCHR is discussed in more detail in ch 5
\textsuperscript{159} p 90
\textsuperscript{160} p 92
\textsuperscript{161} p 95-96
difficult. Further, the dismissive terms in which the Government rejected the proposed amendment seeking to create a Standing Advisory Committee\textsuperscript{162} indicates some complacency in its ability to ensure that all proposed legislation would comply with Convention rights.

These factors combined paint a picture of a Government relying on the courts and litigation as the primary means of implementing the HRA 1998. In such circumstances section 19 was perhaps bound to be overlooked, implying as it does onerous obligations for the Executive to ensure its bills comply with Convention rights, and opportunities for Parliament to engage with human rights issues throughout the legislative process. This is borne out by Wadham’s observations regarding the Government tendency to issue section 19(1)(a) statements in respect of legislation containing broad discretionary powers.\textsuperscript{163} Such a practice bypasses Parliament’s scrutiny role, instead relying on the courts to decide whether a public authority has complied with Convention rights when exercising its discretion.

Underlying all this may have been an enduring complacency that English law and practice already complied with Convention rights. Even in 1997 and in spite of the numerous adverse decisions in Strasbourg, some believed that the existing system of ‘Strasbourg proofing’ worked well, and that neither Government nor Parliament would contemplate enacting legislation that did not comply with the Convention.\textsuperscript{164} From this perspective, section 19 and its effects would make little difference to a system which already respected human rights standards.

The above factors were later exacerbated by the events of 11 September 2001 and the subsequent declaration of a “War on Terror”. In those febrile times the HRA 1998 was often portrayed by both Government and the press as a hindrance to effective counter-terrorism measures. It has been noted that ‘even before 11 September, no meaningful steps were being taken towards securing the proposed new human rights culture within government’,\textsuperscript{165} as all Government communication was concerned with meeting legal challenges. Following the events of that day, the backlash in Parliament ‘boded ill for the long-term prospects of the Human Rights Act cementing respect for

\textsuperscript{162} p 96-97
\textsuperscript{163} p 111
\textsuperscript{164} e.g. Lyell ‘Whither Strasbourg? Why Britain Should Think Long and Hard Before Incorporating the ECHR’ [1997] EHRLR 132
\textsuperscript{165} Hazell and others, ‘The Constitution: Coming in from the Cold’ (2002) 55 Parl Aff 219, 230
human rights within government’. Following the terrorist attacks in London on 7 July 2005, Government antipathy to the HRA 1998 was expressed at the highest levels, most notably in a press conference in August 2005 during which Prime Minister Tony Blair famously stated that ‘the rules of the game are changing’ and that should legal obligations arising from the ECHR preventing the deportation of certain persons pose an obstacle to combatting the threat of terrorism, the Government would ‘legislate further including, if necessary, amending the Human Rights Act in respect of the interpretation of the [ECHR]’. It is true that the Government’s subsequent Review of the Implementation of the Human Rights Act concluded that the Act had not significantly impeded the Government’s anti-terrorism measures, but by that time the damage had been done.

The fact that section 19 was acknowledged but overlooked by Parliamentary and by contemporary academic work may have been at least in part the result of Government attitudes towards the features and functioning of the HRA 1998, attitudes which were compounded by the events of 11 September 2001 and the ensuing “War on Terror”. This early focus on the role of the judiciary under the 1998 Act may have delayed appropriate research into and understanding of the features of the Act which seek to both promote human rights and preserve parliamentary sovereignty by providing for a central role for the democratically accountable branches of government. An illustration of this is the fact that of all of the reviews of the operation of the HRA 1998, only Leigh and Masterman in 2008 seemed fully to appreciate the significance of section 19. Indeed, it would seem that even amongst scholars who have been sceptical of legal mechanisms of human rights protection, it is only recently that academic work has begun to appreciate the potential of section 19 as a means of providing a democratic counterbalance to judicial power under the HRA 1998.

Three prominent rights-sceptics have recently noted that the ‘limited capacity of the courts’ to protect rights has led ‘a number of human rights scholars to consider alternative forms of human rights protection, with a focus on the institutional

166 ibid
168 Department for Constitutional Affairs (DCA 38/06, 25 July 2006)
169 Campbell, Ewing & Tomkins, ‘Introduction’ in Campbell, Ewing & Tomkins (eds), The Legal Protection of Human Rights: Sceptical Essays (OUP 2011) 1
mechanisms that may help to restrain human rights violations in the first place’.\textsuperscript{170} The description of this strand of research as a search for ‘alternative forms of human rights protection’ seems both unnecessary and surprising. The HRA 1998, and indeed the rights-protecting measures in all the Commonwealth jurisdictions discussed in chapter 2, already provides a mechanism by which the democratically accountable branches of government can work to prevent human rights violations from occurring: it is section 19. This again illustrates that in focusing on the role of the courts under the HRA 1998, the existing means of facilitating a strong role for the Government and Parliament has been overlooked.

There is no need to search for entirely new means of involving Parliament and the Executive in the task of rights protection in the United Kingdom. What is instead required is an understanding of section 19 and the impact that it has had, and an exploration of ways in which its operation may be enhanced. The remainder of this thesis will accordingly examine how section 19 has affected the Executive\textsuperscript{171} and Parliament,\textsuperscript{172} and will look in detail at the passage of section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, which was declared incompatible with Convention rights and subsequently repealed by Remedial Order.\textsuperscript{173} Finally, suggestions will be made for reforms to the current operation of section 19 aimed at enhancing the role of the Executive and Parliament in the protection of human rights in the United Kingdom.\textsuperscript{174}

\textsuperscript{170} ibid (emphasis added)
\textsuperscript{171} ch 4
\textsuperscript{172} ch 5
\textsuperscript{173} ch 6
\textsuperscript{174} ch 7
CHAPTER 4 - THE INFLUENCE OF SECTION 19 IN THE PREPARATION OF LEGISLATION BY CENTRAL GOVERNMENT

Section 19 of the HRA 1998 was designed to inform and enhance the entire legislative process. Compliance with Convention rights should therefore be an overarching consideration from the development of proposals for legislation by the Executive to the passage of a bill through Parliament. This chapter argues that section 19 has affected the development of legislation within central government, making consideration of Convention compliance a central feature of this process. Indeed, it has been said that the HRA 1998 has ‘decisively changed the culture of Government, as well as the way in which public officials formulate policy, take decisions and determine procedures’.¹ From the perspective of section 19 and ensuring that Government has a role in the protection of human rights in the United Kingdom, this is undoubtedly a positive development.

However, these advances have been marred by a number of problems which have undermined the effectiveness of section 19. These problems are of two kinds. The first relates to the system of compatibility testing as it has been implemented, and includes the early implementation of section 19 and the fact that each department is responsible for vetting its own legislation for compliance with Convention rights. The second relates to the wider features of government in the Westminster system, such as the high turnover of Ministerial roles. All of these factors have meant that the impact of section 19 on the Executive may not have been as profound as it might have been.

1. SECTION 19 – INTENDED EFFECTS AND EARLY IMPLEMENTATION

‘Strasbourg proofing’ – an inadequate system requiring significant change

Procedures for vetting legislative proposals for compliance with the ECHR existed prior to the HRA 1998. In 1987 a Cabinet Officer circular entitled Reducing the Risk of Legal Challenge² stated that in the preparation of legislation and administrative

¹ Straw, ‘New Labour, Constitutional Change and Representative Democracy’ (2010) 63 Parl Aff 356, 362
² Reproduced in Blackburn, Towards a Constitutional Bill of Rights for the United Kingdom (Pinter 1999) 255-58
matters ‘it should be standard practice when preparing a policy initiative for officials in individual departments, in consultation with their legal advisers, to consider the effect of existing (or expected) ECHR jurisprudence’. In case of any doubt, officials were advised to seek guidance from the Foreign and Commonwealth Office. Further, ‘any memoranda submitted to a Cabinet committee, or accompanying a Bill submitted to Legislation Committee, should include an assessment of the impact, if any, of the [ECHR] on the action proposed (much as Departments already do for European Community implications). Even if the ‘origin of this advice to departments was prudent rather than principled’ it is clear that the ECHR should have been considered as a matter of course during the development of policy in Whitehall. This system became known as “Strasbourg proofing”.

Although each government department was responsible for human rights within its own area of responsibility, by 1996 the Constitution Unit in the Home Office had gained overarching responsibility for domestic human rights matters and the Foreign & Commonwealth Office dealt with international human rights issues. Despite only ‘informal co-ordination between departments’ it was clear that a bill’s ‘compliance with the ECHR should have been checked by the policy division in the sponsoring department and Government lawyers, including Parliamentary Counsel and, in particular, FCO lawyers’. The 1997 Ministerial Code also specified that any memoranda submitted to Cabinet or a Ministerial Committee containing policy proposals should include, inter alia, the ‘consequences for (…) European Court of Human Rights and other international obligations’.

In the view of some commentators, this system of Strasbourg proofing worked well, and helped to create more systematic pre-legislative scrutiny of bills. However, although consideration of the ECHR was undoubtedly encouraged, Strasbourg proofing created a ‘minimalist culture’ within Whitehall, according to which officials asked only

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3 ibid 257
4 ibid
6 Constitution Unit, Human Rights Legislation: The Independent Inquiry into the Implementation of Constitutional Reform (Constitution Unit 1996) 65
7 Cabinet Office, Ministerial Code (July 1997) para 10
9 Hazell, ‘Reinventing the Constitution: Can the State Survive?’ [1999] PL 84
‘What’s the least we have to do to keep them off our backs?’ rather than ‘a more affirmative line of enquiry: “How can we best give effect to the Convention?”’.\(^{10}\) This latter view has been illustrated by Harriet Harman, who gave evidence to the JCHR that: ‘when I was first in government in 1997 before the Human Rights Act was passed I do not remember there being much discussion about human rights within my own department at all’.\(^{11}\) Bynoe and Spencer also criticised the pre-HRA 1998 Strasbourg-proofing procedures, describing them as ‘modest and marginal to the business of the executive and legislature’.\(^{12}\) They noted that ‘judicial means of ensuring compliance with the Convention usually only [come] into play after an alleged breach of the Convention has taken place’, and so cold not be ‘a substitute for procedures designed to prevent such breaches’.\(^{13}\) Effective human rights scrutiny within Government would require consideration of legal advice (including on current jurisprudence), the views of those who would be affected by the proposal, and relevant social data. The system of Strasbourg proofing as it operated before the introduction of section 19 did not meet that test.

Bynoe and Spencer described Strasbourg-proofing as an ‘exercise in risk management’,\(^ {14}\) solely concerned with avoiding adverse ECtHR rulings. Focusing as they did on the risk of a small number of cases being taken before the Strasbourg Court over a long period of time, the authors argued that these procedures would not be suitable for a system whereby Convention rights would be enforced by domestic courts on a more regular and immediate basis. Further, Strasbourg proofing was not uniform: ‘knowledge of the ECHR and the priority given to its requirements was far from consistent throughout Whitehall’.\(^ {15}\)

Change was therefore necessary to make the human rights scrutiny of legislation ‘a more proactive process (...) capable of influencing the development of policy, procedures and law earlier in their design and drafting’,\(^ {16}\) and involving a degree of expertise on the issues involved. The authors recommended that Whitehall adopt ‘an approach to human rights impact assessments, and [introduce] procedures, designed to

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\(^{10}\) Sedley, ‘A Bill of Rights for Britain’ [1997] EHRLR 458, 463

\(^{11}\) JCHR, Human Rights Policy, Oral Evidence (2005-06, HL 143, HC 830-i) Q35

\(^{12}\) Bynoe & Spencer, Mainstreaming Human Rights in Whitehall and Westminster (IPPR 1999) 36

\(^{13}\) ibid 22

\(^{14}\) ibid 43

\(^{15}\) ibid

\(^{16}\) ibid 58
ensure consistency across government',\textsuperscript{17} and proposed a strategy for ensuring that human rights would be ‘at the heart of government decision-making’\textsuperscript{18} consisting of four main features:

1. *Cabinet Office Guidance for Human Rights Impact Assessments:* to set out the aims of ensuring compliance and good practice, and the broad principles involved in assessing compliance with Convention rights;

2. *Leadership at Ministerial Level:* a named Minister would be responsible for overseeing the successful implementation of the HRA 1998 across Government, with a Minister within each department responsible for human rights issues;

3. *Annual Human Rights Report:* to be submitted to Parliament as a source of information on the Government’s thinking regarding impact assessments and section 19 statements;

4. *Human Rights Manual:* to ‘explain what the international human rights standards are, how they are enforced at national and international level and how they can help to develop better practice and policy in government’.\textsuperscript{19}

Although not implementing the measures recommended by Bynoe and Spencer, section 19 of the HRA 1998 was intended to improve compatibility testing within Government departments.

**Section 19: designed to influence the executive in the development of legislation**

It is clear from the history of the HRA 1998 that section 19 was intended to influence the preparation of legislation by the Executive.\textsuperscript{20} The Labour Party consultation paper proposed that Ministers should have an ‘obligation to certify that they have, to the best of their ability, considered and concluded that proposed legislation does not breach the Convention’.\textsuperscript{21} The Executive would therefore have a particular responsibility to ‘ensure that new legislation brought forwards does not breach human rights obligations’.\textsuperscript{22} This certification would not be made lightly, and would require a

\textsuperscript{17} ibid 60  
\textsuperscript{18} ibid 64  
\textsuperscript{19} ibid 71  
\textsuperscript{20} See brief discussion at p 20-21  
\textsuperscript{22} ibid 78
thorough legal analysis of proposed measures: ‘Departmental lawyers, parliamentary counsel and the Government’s Law Officers are all expected to ensure that legislation presented to Parliament does not breach international treaty obligations such as the ECHR’.  

The White Paper refined this proposal, stating that in respect of every bill placed before Parliament ‘the responsible Minister will be required to provide a statement that in his or her view the proposed Bill is compatible with the Convention’. If such a statement could not be made ‘the Minister will indicate that he or she cannot provide a positive statement, but that the Government nevertheless wishes Parliament to proceed to consider the Bill’. This evidently formed the basis for what is now section 19. The ministerial statement was designed to ensure that ‘Convention rights are taken more fully into account in the development of new policies and of legislation’, and was expected to have:

- a significant and beneficial impact on the preparation of draft legislation within Government before its introduction into Parliament. It will ensure that all Ministers, their departments and officials are fully seized of the gravity of the Convention’s obligations in respect of human rights.

To give effect to these aims the Government pledged to ‘strengthen collective (...) procedures so as to ensure that a proper assessment is made of the human rights implications when collective approval is sought for a new policy, as well as when any draft Bill is considered by Ministers’.

During the passage of the Human Rights Bill through Parliament a number of Ministers suggested that the requirement to make a section 19 statement would enhance the scrutiny of bills within Government. In the House of Lords, Lord Irvine anticipated ‘close scrutiny of the human right implications of all legislation before it goes forward’ in accordance with the Government’s ‘commitment to undertaking further

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23 ibid
24 Home Office, Rights Brought Home: the Human Rights Bill (Cm 3782, 1997) para 3.2
25 ibid para 3.3
26 ibid 3
27 ibid para 3.4
28 ibid
29 HL Deb 3 November 1997, vol 582, col 1228
pre-legislative scrutiny of all new policy measures’. Similar statements were made in the House of Commons by Jack Straw and Mike O’Brien. The Government seemed keen to ensure that the assessment of bills as required by section 19 should take place entirely within Government departments. Rejecting a proposal that would have created a Standing Advisory Committee on Human Rights, Lord Williams stated that the purpose of the Human Rights Bill was ‘not to create a statutory source of advice for the Government on whether they are acting compatibly with the Convention’. This would suggest that all legal advice on compatibility issues was expected to come from within Government, which was confident of its ability to provide such a service.

The entry into force of section 19: the consequences begin

Section 19 entered into force on 24 November 1998 by virtue of the Human Rights Act 1998 (Commencement) Order 1998, almost two years before most of the remaining provisions of the Act. This could be evidence of a Government committed to ensuring that human rights considerations played an integral part in the development of legislation. From this early date Ministers would be obliged to comply with the requirements of section 19 by making a statement before the second reading of a bill, either to the effect that in the Minister’s view its provisions were compatible with Convention rights, or that the Minister was unable to make such a statement, but that the Government nevertheless wished to proceed with the bill. In accordance with the stated purpose of section 19, from this time Government departments would be expected to scrutinise all bills for compatibility with Convention rights.

A press release marking this occasion announced that section 19 would require Ministers to make a statement ‘which makes clear whether the provisions of any

30 HL Deb 27 November 1997, vol 583, col 1163
31 HC Deb 16 February 1998, vol 306, col 779
33 HL Deb 27 November 1997 (n 30) col 1153
34 SI 1998/2882
35 HRA 1998, ss 18, 20 & 21(5) took effect on 9 November 1998, the date of Royal Assent. All other provisions took effect on 2 October 2000 by virtue of the Human Rights Act 1998 (Commencement No. 2) Order 2000, SI 2000/1851
36 HRA 1998, s 19(1)(a)
37 HRA 1998, s 19(1)(b)
Government Bill (...) are compatible with the European Convention on Human Rights’. Unfortunately this is an inaccurate description of the requirements of section 19. The statement required by section 19 contains only a Minister’s view as to compatibility, not a definitive or binding statement as to whether a bill is in fact compatible. Lord Burlison later provided a more detailed description of the Government’s approach to section 19 statements. A section 19(1)(a) statement:

must be made where, in the view of the Minister, the provisions of the Bill are compatible with the convention rights. In other cases a statement under Section 19(1)(b) of the Act must be made: such a statement is not one that the provisions of the Bill are incompatible with the convention rights but to the effect that the Minister is unable to make a statement of compatibility. A Section 19(1)(a) statement is a positive statement of compatibility.  

Practical matters: how, when and why section 19 statements would be made

The ‘how’ and ‘when’ of making statements of compatibility were made clear immediately after section 19 entered into force. Such statements would ‘appear as a note on the face of each Government Bill and in the explanatory notes for most Bills’. Such notes would take the following form:

*European Convention on Human Rights*

Mr. Secretary … has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the … Bill are compatible with the Convention rights.

Or

Mr. Secretary … has made the following statement under section 19(1)(b) of the Human Rights Act 1998:

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39 HL Deb 5 May 1999, vol 600, col WA92
40 HC Deb 25 November 1998, vol 321, col 2W (Jack Straw)
I am unable to make a statement that in my view the provisions of the … Bill are compatible with the Convention rights but the Government nevertheless wishes the House to proceed with the … Bill.41

These are straightforward matters. A clear statement, reflecting the wording of section 19 would be included on the front page of a bill at the time of its publication. The ‘why’ – the grounds on which a section 19 statement would be made – is a little more complex.

The Government had announced that a section 19(1)(a) statement would only be made when a Minister was ‘clear that, at a minimum, the balance of arguments supports the view that the provisions are compatible’.42 Legal advice would determine whether ‘on balance’ a bill’s provisions were compatible with Convention rights, adopting a test of ‘whether it is more likely than not that the provisions of the Bill will stand up to challenge on convention grounds before the domestic courts and the European Court of Human Rights in Strasbourg’.43 In making this assessment ‘the fact that there are valid arguments to be advanced against any anticipated challenge is not a sufficient basis on which to advise a Minister that he may make a statement of compatibility where it is thought that these arguments would not ultimately succeed before the courts’.44

As the meaning and scope of both the Convention rights and any exceptions to them are not always certain, a test requiring an assessment of whether on a balance of probabilities the provisions of a bill would survive legal challenge seems sensible. In the absence of clear precedent, it may be impossible to predict with certainty how either the domestic courts or the ECtHR would interpret a particular right or exception.45 In spite of this eminently common sense approach, the Government was adamant that it would not provide reasons for its conclusions on compatibility. It believed that ‘the best forum in which to raise issues concerning the compatibility of a Bill with the convention rights is the parliamentary proceedings on the Bill’.46 This was because:

41 ibid
42 HL Deb 5 May 1999 (n 39)
43 ibid
44 ibid
45 See for example the differing conclusions on the issue of whether the stop and search regime contained within Terrorism Act 2000, ss 44 & 45 was ‘in accordance with the law’ within the meaning of article 8 of the ECHR in the House of Lords in R (Gillian) v Commissioner of Police of the Metropolis [2006] UKHL 12, [2006] 2 AC 307 and in the ECtHR in Gillan v United Kingdom (2010) 50 EHRR 45
46 HL Deb 10 December 1998, vol 595, col WA116 (Lord Williams)
a debate in Parliament provides the best forum in which the person responsible can explain his or her thinking on the compatibility of the provisions of a Bill with the Convention rights. Reasons can then be given in the context of particular concerns about particular provisions.\(^{47}\)

As Convention issues were often ‘complex’ it ‘would be difficult to do justice to them in a written statement accompanying a Bill and it would not be practicable to provide a written statement of reasons in advance of the parliamentary proceedings on the Bill’.\(^{48}\)

If Parliament wanted to discover the reasons behind the bare statement of compatibility, Parliament would have to ask.\(^{49}\) Should this occur, ‘a Minister in charge of a Bill should be ready to address Convention-related issues during proceedings’,\(^{50}\) but would ‘retain the discretion to decide how to do so in the context of the debate’.\(^{51}\)

The basis for the Government’s view at this time that it was not practicable to provide a written statement containing the reasons for its views on compatibility in advance of parliamentary proceedings on a bill is unclear. No-one would deny that Convention issues are often complex. However, once section 19 had entered into force a thorough assessment of such issues should have been a routine part of the development of legislation within government departments. That this was one of the intended effects of the provision is evident from documents published in advance of and statements made during the Act’s passage through Parliament.\(^{52}\)

Lord Falconer has argued that procedures for ensuring compatibility with Convention rights were already in place within Government at the time of section 19’s early implementation, which occurred because ‘what the drafting of legislation requires, as it had required prior to the passage of the Act, was compliance with the [ECHR], which is an international law obligation. We had people who had been advising Government on that since prior to 1997 (…) so there couldn’t be any justification for delaying that’.\(^{53}\) Implementation of section 19 did however change the nature of the legal advice sought. The issue became ‘more immediate’ because ‘to be a risk that you were in breach of a treaty obligation is a totally different scale of problem to “you’ve

\(47\) HL Deb 19 May 1999, vol 601, col WA35 (Lord Williams)
\(^{48}\) Ibid
\(^{49}\) See HL Deb 17 December 1998, vol 595, col WA186 (Lord Williams)
\(^{50}\) HL Deb 30 June 1999, vol 603, col WA41 (Lord Williams)
\(^{51}\) Ibid
\(^{52}\) p 123-25
\(^{53}\) Interview with Lord Falconer, former Lord Chancellor and Secretary of State for Constitutional Affairs (London, 27 April 2011)
got to comply with the law before you do this, and what’s more, you’ve got to certify that it complies with the Convention in the Act”.

This change in the nature of the advice sought might explain the Government’s reluctance to publish its reasons for its conclusions on compatibility. At the time of the entry into force of section 19 the Government may not have developed adequate or systematic methods for scrutinising legislative proposals when faced with the more immediate need to ensure compatibility with Convention rights. If this is correct, then it can be argued that section 19 should not have entered into force at the time that it did. The value of both the Minister’s statement to Parliament and section 19 will have been undermined if appropriate and thorough procedures for the scrutiny of bills for Convention compatibility were not in place and in use.

In addition to these concerns the Government’s justification for not providing an advance statement detailing its views on compatibility, and instead waiting for a plucky parliamentarian to raise the issue in debate rests on shaky foundations. If it is not practicable to provide a written statement in advance because of the “complex” nature of the Convention issues at stake, it seems somewhat optimistic to expect those issues and their ramifications within the context of a bill to be thoroughly and soberly discussed during the cut and thrust of parliamentary debates, which are often dominated by party politics and limited time. This is especially true of the House of Commons, in respect of which Lord Falconer stated:

the Commons is an elected Chamber. The human rights issues are not of interest to the public save to the extent that human rights tends to be unpopular. The politics of human rights in the country is reflected in the Commons, which is as it should be in one sense – the Commons should be good at reflecting the views of the country.

It seems therefore that the Government may have sought to avoid close scrutiny of the basis for its section 19 statements. Whether this was because adequate measures were not in place within departments to enable a thorough compatibility assessment to be made, or because some Ministers may not have felt confident discussing the complexities of human rights law in Parliament is unclear.

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54 ibid
55 ibid
The timing of the implementation of section 19 may indeed demonstrate that the Government was sincere in its desire for the effects of the HRA 1998 to be felt throughout Government and Parliament at the earliest opportunity. However, having been elected in May 1997, introduced the Human Rights Bill into Parliament on 3 November 1997, secured its Royal Assent on 9 November 1998, and driven the development and passage of other constitutionally significant legislation,\(^{56}\) it would have been remarkable if the Government had also been able to develop and fully implement throughout Whitehall the scrutiny procedures required by section 19 to ensure that human rights considerations formed an integral part of the process for the development of legislative proposals.

The early commencement of section 19 may therefore have undermined its effectiveness. However, procedures have been implemented to facilitate the assessment of Convention compatibility during the development of legislative proposals. Although such procedures are to be welcomed, they are not without problems.

2. SECTION 19 – PROCEDURES AND PROBLEMS

Pre-implementation: a Government committed to effective scrutiny

Preparations for the implementation of the HRA 1998 appear to have been determined and dynamic. A Human Rights Unit was established within the Home Office,\(^{57}\) which assisted with overseeing departmental preparations for implementation. This involved six-monthly reporting on a variety of issues such as assessing existing legislation for compliance with Convention rights and staff training. Section 19 featured in the earliest stages of the implementation process, with some guidance issued to departments in spite of its early entry into force. In a letter dated 27 November 1998 David Omand, then Home Office Permanent Secretary, confirmed that ‘Guidance on the new procedure has been sent out on the Parliamentary Clerk net’.\(^{58}\)

\(^{56}\) For example the Data Protection Act and the devolution legislation were also enacted in 1998, and preparations for the House of Lords Bill, introduced on 19 January 1999 must have been well underway during that year.

\(^{57}\) <www.nationalarchives.gov.uk/ERORecords/HO/421/2/hract/unit.htm> accessed 27 May 2012

Annex A to the letter explained that section 19 would ‘place the onus on the Minister and Departments to make their legislation compatible as far as they are able to do so, or else to have very good reasons which the Minister can give to Parliament to justify proceeding with it despite its possible incompatibility’.\(^{59}\) Annex C referred to the practical implications for the preparation of legislation, stating that ‘procedures will be strengthened so as to require an assessment of compliance with the Convention rights at an earlier stage, when a Minister seeks collective approval for the policy to which the Act is to give effect’.\(^{60}\) Further, ‘it will also be necessary to take the Convention rights explicitly into account when preparing any proposals for primary legislation’.\(^{61}\)

This demonstrates that the Government was modifying the system of Strasbourg proofing in light of the entry into force of section 19. However, the extent of such changes and the extent to which they were applied uniformly throughout Whitehall at this time is questionable. In addition to the short time frame for the development of new, more thorough human rights scrutiny procedures, individual departments, deemed ‘best placed to judge how the Act will affect their laws, policies and procedures, and what needs to be done’,\(^{62}\) were responsible for preparing for the implementation of the HRA 1998. Some inter-departmental work was carried out where this was necessary to ‘address points of common concern’,\(^{63}\) for example the Cabinet Office Committee CRP(EC)O ‘looked at cross-cutting issues such as guidance on Section 19 statements’.\(^{64}\) However, there was no central Ministerial leadership during implementation of the HRA 1998, as had been recommended by Bynoe and Spencer,\(^{65}\) leading to a fragmented approach to human rights scrutiny between Government departments.

\(^{59}\) ibid
\(^{60}\) ibid
\(^{61}\) ibid
\(^{64}\) ibid para 6
\(^{65}\) p 123
Preparation by individual Government departments: a fragmented and uneven approach

In evidence to the JCHR Lords Irvine and Williams portrayed the making of a section 19 statement as a serious matter. Lord Williams stated that ‘it is a solemn occasion when you are putting your fingerprint down on history and people do take it very seriously’, and Lord Irvine agreed, describing it as ‘a very large step’. However, emphasising the central role of individual departments in preparing for implementation of the HRA 1998 with minimal central co-ordination caused a fragmented and uneven approach, revealed in evidence provided to the JCHR for its report on the *Implementation of the Human Rights Act*.

Sixteen departments provided evidence to the JCHR on issues including departmental approaches to section 19 statements. The evidence varied significantly in the level of detail provided. At one extreme, HM Customs and Excise gave no information as to its approach to section 19, stating that it had ‘not been in the lead on any Government Bills since the requirement came into effect’. Be that as it may, at the time of publication of the JCHR’s report, section 19 had been in force for over two years. Even if the department had not yet been required to make a statement of compatibility in Parliament, it should have developed procedures enabling legislative proposals to be assessed for compliance with Convention rights, and it would have been helpful for such information to have been provided to the Committee.

Various other departments which had introduced bills into Parliament since the entry into force of section 19 confirmed that statements of compatibility had been made, but gave no information about their procedures for ensuring that their bills complied with Convention rights. These departments included the Cabinet Office, the Department for Education and Employment, which provided a descriptive account of

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67 ibid Q58
68 e.g. Lord Williams stated ‘Each department is responsible for developing its own programme of training and preparation, tailored to its particular needs’: HL Deb 17 May 1999, vol 601, col WA5
70 ibid Appendix 13
71 ibid Appendix 1
section 19 but no detail as to its own procedures in this respect,\textsuperscript{72} the Treasury,\textsuperscript{73} and the Ministry of Defence.\textsuperscript{74}

Other departments elaborated further, asserting either that before making a section 19 statement the Minister had received ‘advice’ (the Foreign & Commonwealth Office, the Department for International Development, the Department of Social Security, and the Department of Environment, Transport and Regions),\textsuperscript{75} or that the department had followed the Guidance issued by the Home Office\textsuperscript{76} (the Department of Health and the Northern Ireland Office).\textsuperscript{77} Only three departments provided any degree of detail as to the procedures adopted to enable a Minister to make a section 19 statement.

The Inland Revenue had developed a ‘Human Rights Act Action Plan’ in preparation for implementation of the 1998 Act. As a result ‘new policies (…) are not put forward for approval by Ministers and/or senior managers until any human rights issues have been resolved’. Further, in order to give effect to section 19 ‘all new legislation is vetted by Inland Revenue lawyers throughout the policy process who ensure appropriate advice is given to Treasury Ministers’.\textsuperscript{78} The Department for Trade and Industry was more forthcoming still. There, departmental lawyers helped ensure that ‘the human rights implications of all the Department’s legislative proposals are assessed as an integral part of policy development’. Further checks as to the human rights status of proposals for primary legislation would take place before bids were made for legislative slots and again ‘in accordance with central procedures before clearance is given for the introduction of Bills’. The section 19 statement itself would be drafted when a bill was ready for introduction into Parliament, when ‘Ministers [would] be ready to explain to Parliament the thinking on the compatibility of provisions in individual Bills’.\textsuperscript{79}

Both those departments appeared effectively to have “mainstreamed” human rights assessments in their processes for the development of legislative proposals. The

\textsuperscript{72} ibid Appendix 7 \\
\textsuperscript{73} ibid Appendix 11 \\
\textsuperscript{74} ibid Appendix 12 \\
\textsuperscript{75} ibid Appendices 2, 3, 10 & 15 respectively \\
\textsuperscript{76} Discussed below, p 134-39 \\
\textsuperscript{77} JCHR, \textit{Implementation of the Human Rights Act 1998} (n 69) Appendices 8 & 9 respectively \\
\textsuperscript{78} ibid Appendix 14 \\
\textsuperscript{79} ibid Appendix 6
Home Office memorandum confirmed that section 19 had ensured that ‘Convention rights issues are more clearly identified and addressed during the preparation of a Bill and during internal policy consideration’. In doing so, the Home Office took account of its own guidance and applied a basic test of ‘whether, on the balance of probabilities, the provisions of the Bill would be found compatible with the Convention rights if challenged in court or tribunal’.

The repercussions of this fragmented approach to implementing the HRA 1998 were still being felt in 2005, when the JCHR felt compelled to report that there was:

a wider problem within the Government (...) resulting from the apparent inability of the DCA and other central mechanisms within the Government to ensure that all Departments follow best practice in implementation of the HRA, and fully embrace the principles of human rights in their delivery of services to the public.

This statement reveals a lack of central co-ordination regarding implementation of the HRA 1998 resulting in a continuing uneven approach to human rights issues between departments.

Although each department was responsible for preparing for implementation of the HRA 1998, guidance was developed by the Home Office and Cabinet Office. This should have provided at least minimum standards for introducing human rights considerations into the processes for developing legislation, and could have been a vital tool for departments. However, the content of the guidance and timing of its publication further undermined the potential effects of section 19.

**The early Guidance: centrally produced, questionably helpful**

The first guidance on the HRA 1998 was produced by the Home Office and Cabinet Office with the assistance of the Human Rights Task Force, a body whose members included Government Ministers, Officials and representatives from NGOs such as Justice and Liberty. It was created to ‘help departments and other public

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80 ibid Memorandum dated 14 March 2001, para 17
81 ibid para 14
82 ibid para 15
authorities prepare for implementation’\textsuperscript{84} of the 1998 Act. The Task Force ‘made a strong contribution (…) receiving regular reports from departments, and suggesting ways to cover gaps’\textsuperscript{85}

Minutes of Task Force meetings reveal that finalised guidance aimed specifically at Whitehall departments was not made available until some time between 8 June and 27 July 1999. Minutes to the meeting of 9 March 1999 record that guidance produced by the Cabinet Office was still in draft form and would be revised to take account of Task Force comments. It was noted that this guidance was ‘suitable for and urgently needed by the specifically Whitehall audience’\textsuperscript{86}. Minutes to the meeting of 8 June confirm that the guidance had been finalised and was about to be issued,\textsuperscript{87} and those to the meeting of 27 July that it had been made available.\textsuperscript{88}

This means that for between six and eight months after section 19 entered into force, with the attendant expectation of thorough assessments of the compatibility of all bills with Convention rights, Whitehall departments had no access to centrally produced, finalised guidance as to how to set about this task. During this period it is likely that either the old inadequate Strasbourg proofing procedures continued to apply, or each department developed its own unique system for assessing the human rights compatibility of legislative proposals, with no benchmark or standards for ensuring that such measures were adequate or appropriate. Aside from resulting in an uneven approach across Whitehall, there is a further risk that once the finalised guidance was issued, departmental procedures may have become established and difficult to change, making it almost impossible to secure a coherent approach throughout Government.

The lack of core guidance as to the procedures required to give effect to section 19 may therefore have produced a variable standard among departments in terms of attitudes towards and effectiveness in assessing legislative proposals for compatibility with Convention rights. The failure to provide such guidance for a significant period

\textsuperscript{86} para 3.4 <http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/hract/taskmin2.htm> accessed 27 May 2012
\textsuperscript{88} para 1.2 <http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/hract/taskmin5.htm> accessed 27 May 2012
after the implementation of section 19 is likely to have undermined both the good intentions which undoubtedly underpinned the Government’s haste in bringing section 19 into force, and the effectiveness of the HRA 1998 itself as a catalyst for ensuring better protection for human rights in the development of legislative proposals. Adding to any confusion and uncertainty caused by this delay, once finalised the guidance itself was not without problems.  

The guidance stated that before making a section 19 statement, the Minister should have received advice at different stages in the process of developing legislation, based on a ‘careful examination of the policy and proposed provisions’ in light of Convention rights. At the policy approval stage, the senior administrator in charge of a bill should prepare a ‘general assessment’ for the Minister ‘in close consultation with legal advisors’. The form of this assessment could vary according to the circumstances, such that it ‘may be sufficient for the material to be incorporated in more general appraisals’ of the implications of proposed legislation. Consideration of human rights issues at this policy approval stage is laudable. However, when faced with an assessment of Convention issues expressed in very general language, the extent to which a Minister could feel confident that he or she was approving a policy which did not violate Convention rights is questionable, unless that Minister was legally trained or otherwise interested in the intricacies of human rights law. As has already been mentioned, arguments as to the scope of Convention rights and their exceptions are often complex and assessments of the compatibility of a particular policy with those rights usually require a careful balancing of all competing interests. General references to Convention issues are unlikely to enable a Minister to make a fully informed decision as to the compatibility of a given policy.

Once drafted, a ‘document analysing the ECHR points’ raised by a bill should be prepared, usually by departmental lawyers and in consultation with the Foreign & Commonwealth Office and any other departments as necessary. This document would be cleared with Ministers and circulated along with the bill for Legislation Committee

89 This is based on Home Office, Human Rights Act 1998 Guidance for Departments (2nd edn, February 2000). Relevant sections of the 1st edition of the Guidance were unavailable.
90 Home Office, Guidance, (n 89) para 33
91 ibid para 34
92 ibid
93 ibid para 35
Taking account of any necessary changes following consideration by LEG, it could then be used ‘as the basis for [the] section 19 statement’. 

The guidance also explained the degree of certainty required before the Minister would be able to make a section 19(1)(a) statement, directly reproducing the statements made by Ministers in Parliament on 5 May 1999. Therefore no further explanation was provided as to the level of certainty required for a section 19(1)(a) statement. This is important as the test itself is somewhat ambiguous. Here in particular the spectre of the “51% rule” makes its presence felt. In requiring that the ‘balance of arguments supports the view that the provisions are compatible’, the test does not specify whether this means that each of a bill’s provisions must be deemed on balance to be compatible with Convention rights, or whether it is instead an assessment of a bill’s compatibility overall. If it is the latter, it could be argued that as long as 51% of a bill’s provisions could be said to be compatible on balance, then a section 19(1)(a) statement could properly be made. The dangers of such an approach are evident. It would allow a Minister to make a statement of compatibility on the basis of innocuous provisions constituting 51% of a bill, regardless of the content of the remaining 49%.

Feldman has argued that criticisms that the “51% rule” is ‘insufficiently rigorous’ are ‘unconvincing’, as:

No minister could conscientiously claim to be certain that a Bill would prove to be Convention compatible. In the light of the speed at which the case-law of the European Court of Human Rights is developing, it would be very hard, in many cases, to be satisfied even that there is no reasonable doubt that a Bill would be compatible. (…) It seems reasonable for a Minister to apply a balance of probability test.

It is true that any assessment of a bill’s compatibility with Convention rights can only take place on the basis of the law as it exists at the time, and that the jurisprudence of the ECtHR, which sees the Convention as a ‘living instrument’ to be interpreted in light

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95 Home Office, Guidance (n 89) para 35
96 ibid para 36
97 p 126-27
98 p 127
100 ibid
of present day conditions,\textsuperscript{101} may develop and change over time. On that basis it is indeed reasonable for Ministers to apply a balance of probabilities test when carrying out the compatibility assessment required by section 19. The fact that a balance of probabilities test may be suitable for such an exercise does not however address the point made above that the guidance is unclear as to what exactly the balance of probabilities is based on. Acknowledging the suitability of this test does not answer the question of whether a section 19(1)(a) statement requires 51% of a bill’s provisions to be compatible, or whether all provisions in a bill must be compatible on a balance of probabilities.

In addition, the effectiveness of this test in ensuring a fair consideration of the human rights implications of bills will depend on a fair analysis and assessment of such issues being presented to the Minister. As noted above, these issues are not always clear-cut. It is at least a possibility that in-house legal advisors supplying this information to Ministers may not always provide absolutely impartial advice, whether intentionally or not, and whether because of their own career ambitions, or because they are working for Ministers with a clear agenda for implementing a particular policy. Such an eventuality must be more likely for those legal advisors working on issues such as terrorism, crime reduction or immigration, all areas where the human rights of unpopular minorities are often deeply affected, and all areas where governments frequently seek to make political capital.

The guidance also reiterated the Government’s views regarding the disclosure to Parliament of the reasoning behind the section 19(1)(a) statement.\textsuperscript{102} Noting the Government undertaking that ‘a Minister in charge of a Bill should be ready in debate to explain his or her thinking on the compatibility of particular provisions of the Bill’, the guidance states that the Minister should be ‘ready to give a general outline of the arguments’ which led to the making of the statement ‘in relation to the particular provision’.\textsuperscript{103} In doing so a Minister would not normally disclose legal advice, but should be able ‘at least to identify the Convention points considered and the broad lines of the argument’.\textsuperscript{104}

\textsuperscript{101} e.g. \textit{Marckx v Belgium} (1979-80) 2 EHRR 330
\textsuperscript{102} Home Office, \textit{Guidance} (n 89) para 39
\textsuperscript{103} ibid
\textsuperscript{104} ibid
These references to “at least” identifying Convention points and “broad lines of the argument” seem inconsistent with the requirement that the Minister be able to discuss the compatibility of “particular provisions of the Bill”, which implies a fairly detailed knowledge and understanding of relevant Convention issues. It is to be hoped that a Minister would indeed have such a degree of knowledge when making a statement to Parliament which contains his considered view on a bill’s compatibility with Convention rights. Aside from the general requirement to make accurate and honest statements to Parliament contained in the Ministerial Code, in making the section 19 statement the Minister’s opinion could (and perhaps should) trigger a discussion of Convention points during the bill’s passage. If the Minister was only able to respond to questions on such issues in “general” or “broad” terms, this again undermines the value of the section 19 statement. It is surely common sense that if a Minister expresses what is purportedly his own view as to compatibility, then he should properly have understood the implications of the statement being made, and be willing to explain in some detail and defend the statement before Parliament.

Although the availability of guidance must have assisted departments, Pleming doubted its effectiveness in the early stages of implementation of the HRA 1998, arguing:

> a question mark remains whether the guidance provided has been sufficient to ensure that the scrutiny of legislation, policies and practices has been sufficiently thorough and comprehensive. The main burden has been placed on individual departments and more detailed guidance and practical assistance from the centre may have helped.  

As might be expected, over time more detailed guidelines have indeed been published. The current guidance can be found in the Guide to Making Legislation.

The current Guide to Making Legislation: more detail, fewer problems?

The Guide to Making Legislation is published by the Cabinet Office, and refers to four main stages during the legislative process at which Convention rights should be

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105 Cabinet Office, *Ministerial Code* (May 2010) para 1.2(c)
considered: preparing policy initiatives; preparing the ECHR Memorandum for LEG; the section 19 statement; and the drafting of explanatory notes. There are also some further opportunities for consideration of Convention issues.

Preparing policy initiatives

The Guide asserts that it should be standard practice for officials to consider the impact of Convention rights when preparing policy initiatives. This should not be left to legal advisors, nor to a last minute ‘compliance exercise’.\textsuperscript{108} This is a positive aspect of the Guide, demonstrating that human rights considerations should be at the centre of policy development from the very start of the process, and implying that all officials involved should have a good working knowledge of the Convention and its requirements.

Preparing the Bill for Introduction - the ECHR Memorandum

Before a bill may be approved for introduction or publication in draft, an ECHR Memorandum must be submitted to LEG. This document must ‘cover the human rights issues raised [by the bill], with a frank assessment by the department of the vulnerability to challenge in legal and policy terms’.\textsuperscript{109} It is ‘not disclosable, and should address the weaknesses as well as the strengths in the department’s position’,\textsuperscript{110} and should make reference to any relevant significant cases, aiming to provide a ‘clear and succinct statement of the human rights considerations and the justification in ECHR terms for any interference’.\textsuperscript{111}

The legal checks surrounding this Memorandum are numerous. It is prepared by departmental legal advisors, who receive input from policy officials and may access guidance from the ‘Law Officer Action Zone on LION (the intranet for Government legal advisors) or from the Attorney General’s Office’.\textsuperscript{112} The Memorandum must be cleared with the Law Officers before submission to LEG, and should accordingly be

\textsuperscript{108} ibid para 12.6
\textsuperscript{109} ibid para 12.9
\textsuperscript{110} ibid para 12.10
\textsuperscript{111} ibid
\textsuperscript{112} ibid para 12.11
sent to the Attorney General’s Office at least two weeks before the bill is considered by LEG, a period that may be extended for larger bills or ‘Bills that touch closely on human rights issues’.\textsuperscript{113} At this stage, if any concerns regarding Convention compatibility ‘cannot be resolved before introduction of the Bill, the provision in question must be dropped until the Law Officers have had a chance to look at the matter in detail’.\textsuperscript{114} If departmental legal advisors need assistance in drafting the Memorandum, ‘Officials in the Attorney General’s Office and the Legal Secretariat to the Advocate General are also happy to look at a draft of the Memorandum at an earlier stage if this is helpful’\textsuperscript{115}

These requirements are again positive developments, suggesting that the question of a bill’s compatibility with Convention rights is taken seriously during the preparation and development of legislation. Indeed, the recently published \textit{Cabinet Manual} refers to the requirement for Ministers to provide to the relevant Cabinet committee an ECHR Memorandum cleared by the Law Officers,\textsuperscript{116} demonstrating that this may now be viewed as an essential element in the development of legislative proposals.

The \textit{Guide} seems to require an honest, balanced approach to the question of compatibility, involving a thorough and detailed assessment of a bill’s compatibility with Convention rights within the department. Further, if provided with full information LEG should be aware of any risks posed by the legislation in ECHR terms, enabling it to make an informed judgement on whether to approve a bill for introduction or publication in draft. Together with the role of the Law Officers, this goes some way towards allaying concerns arising from the previous guidance that advice provided to Ministers by in-house legal advisors may not always be balanced or complete. However, it would seem that legal advice to Ministers on compatibility issues may be framed to take account of the political environment in which it is provided. Although maintaining that they were not influenced by political pressures, legal officials interviewed by Hiebert did accept that ‘the force of this advice is occasionally tempered, by framing it in a manner that allows for different interpretations on the essential

\textsuperscript{113} ibid para 12.8  
\textsuperscript{114} Goldsmith, ‘Government and the Rule of Law in the Modern Age’ (LSE Law Department and Clifford Chance Lecture, 22 February 2006) 15  
\textsuperscript{115} Cabinet Office, \textit{Guide to Making Legislation} (n 107) para 12.8  
\textsuperscript{116} Cabinet Office, \textit{Cabinet Manual} (1\textsuperscript{st} edn, October 2011) para 6.31
compatibility question’. Advice given to Ministers ‘is not structured as an unequivocal yes or no, but sets out “a thought process about the arguments on either side or where (...) the balance lies”’. This approach ‘permits a minister to claim that a bill is compatible, even when this is contrary to the preferred interpretation of legal advisors’.

The section 19 statement

Departmental legal advisors ‘take the lead in providing the formal advice required to justify’ section 19 statements, and in doing so may seek ‘assistance from legal advisors in the Ministry of Justice Human Rights Division and ultimately the Law Officers as necessary’. The statement should be sent to Parliamentary Counsel ‘before the Bill is published and ideally before it is considered for introduction by [LEG]’. There should therefore be little scope for erroneous advice or justification for the section 19 statement.

Should a Minister make a section 19(1)(b) statement, it is ‘permissible’ to indicate which provision is responsible for the compatibility problem in the statement itself. Specifying the source of a bill’s incompatibility is positive as it would facilitate parliamentary scrutiny, enabling informed decisions to be made during the bill’s passage. However, the fact that something is “permissible” is no guarantee that it will happen in practice. If the offending provisions are not specified, Parliament would be left to hunt for the incompatibility in what could be a very large bill, in what might be a very short time frame. Such an eventuality would be no victory for openness or effective scrutiny.

The Guide explains that:

the most common (...) situation in which a s19(1)(b) statement will be necessary is on entry to the second House, where a first House amendment has been made.

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118 ibid 36
119 ibid
120 Cabinet Office, Guide to Making Legislation (n 107) para 12.15
121 ibid
122 ibid para 12.21
123 ibid para 12.19
which the Government does not support and which it considers to be incompatible with the Convention rights. In this case, the reason for the certification as non-compatible can be explained at Second Reading, and the Minister can indicate whether or not the House is to be invited to remove the amendment in question.124

This has occurred on one occasion: a section 19(1)(b) statement was made by the Government on 13 March 2000 in respect of the Local Government Bill125 on its introduction into the House of Commons.126 The Bill had been amended by the House of Lords to retain the controversial “Section 28” prohibition on the promotion of homosexuality in schools.

The Guide also requires Ministers to be aware of the implications of any amendments made during a bill’s progress through Parliament for compatibility with Convention rights. Although there is:

no legal obligation on the Minister to give a view on compatibility other than as required by section 19, nor is there a specific requirement for the Minister to reconsider compatibility issues at a later stage (...) were a Minister to reach the conclusion that the provisions of a Bill, whether as originally introduced or as amended, no longer met the standards required for a section 19 statement to be given, it would be a breach of the Ministerial Code to proceed towards Royal Assent without either amending the provisions or informing Parliament of the issue.127

This seems to be a reference to the general obligation for Ministers to ‘behave in a way that upholds the highest standards of propriety’,128 including an ‘overarching duty on Ministers to comply with the law including international law and treaty obligations (...) and to protect the integrity of public life’.129 Ministers must also observe the ‘principles of Ministerial conduct’130 which as far as relevant include:

- The ‘duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies’;131

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124 ibid para 12.20
125 Local Government HL Bill (1999-2000) 9
127 Cabinet Office, Guide to Making Legislation (n 107) para 12.23
128 Cabinet Office, Ministerial Code (n 105) para 1.1
129 ibid para 1.2
130 ibid
131 ibid at (b)
- The ‘paramount’ requirement for Ministers to ‘give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity’, and
- The need to be ‘as open as possible with Parliament and the public’, only refusing to provide information in the public interest.

This demonstrates that the section 19 statement engages a Minister’s individual responsibility to Parliament. Making a misleading or inaccurate section 19 statement, although without legal implications, could cause serious political repercussions for a Minister’s career.

The Guide makes clear that if:

it appears likely that there are any provisions in the Bill which the Minister will not be able to declare compatible, Legislation Secretariat should be informed immediately and advice on the ECHR Memorandum and Explanatory Notes should be sought from the Ministry of Justice Human Rights Division in the first instance.

If complied with, this should reduce the likelihood of the Government using the 51% rule when deciding whether a section 19(1)(a) statement could properly be made in respect of a bill. This of course does not mean that a bill containing potentially incompatible provisions will never be approved or introduced into Parliament, but this approach represents a vast improvement on the ambiguity of the earlier guidance.

Explanatory Notes

Explanatory Notes accompany all Government bills, and must be drafted by the time the bill is sent to LEG for approval for introduction. LEG will not approve the bill’s introduction if the department has not prepared Explanatory Notes, which now contain a section on compatibility with the ECHR. This section should state that a section 19 statement has been made and what that statement was, and must ‘give

\[\text{References}\]

132 ibid at (c)
133 ibid at (d)
134 Cabinet Office, Guide to Making Legislation (n 107) para 12.25
135 See discussion at p 137-38
136 Cabinet Office, Guide to Making Legislation (n 107) para 11.3
137 ibid para 11.29
138 ibid para 11.63
further details of the most significant human rights issues thought to arise from the Bill139 which will already have been identified in the ECHR Memorandum.140 However, advice from Law Officers on compatibility issues must not be disclosed. The Guide specifies that ‘this assessment of the impact of the Bill’s provisions on the Convention rights should be as detailed as possible setting out any relevant case law and presenting the Government’s reasons for concluding that the provisions in the Bill are Convention compatible’.141 When the bill moves to the second House, the Minister there will make a new section 19 statement142 and the Explanatory Notes may be amended to reflect any changes made in the first House.143 The section on ECHR compatibility and any references to section 19 are removed when the final version of the Explanatory Notes is published following Royal Assent.144

These requirements are welcome and signal a move away from the Government’s initial reluctance to provide reasons for section 19 statements. In their current form, Explanatory Notes should aid Parliament in scrutinising bills for compatibility with Convention rights and make such work more effective and efficient. They should enable parliamentarians to focus their scrutiny where it is most needed, whether that is on apparently flimsy compatibility arguments or on entirely different matters if justifications for any prima facie interferences with Convention rights seem sound. However, the length and quality of Explanatory Notes will inevitably vary, and seem to depend on a number of factors, including the bill’s subject matter and perhaps the relevant Minister’s interest in and attitude towards compatibility issues.145

The most detailed Explanatory Notes contain extensive discussions of Convention issues including any relevant United Kingdom and Strasbourg case law, and explain the reasons for the Government’s belief that a bill is compatible with Convention rights. Examples include the Explanatory Notes to the Counter-Terrorism

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139 A section on the main Convention issues has been included in Explanatory Notes for all bills introduced after 1 January 2002: HC Deb 18 December 2001, vol 377, col 256W (Michael Wills).
140 Cabinet Office, Guide to Making Legislation (n 107) para 11.63
141 Ibid para 12.16: ‘The [section 19] statement must be made before Second Reading in each House. This means that when the Bill passes from one House to the other, a second statement will have to be made, taking into account any amendments (…) made in the first House’
142 Ibid para 11.75
143 Ibid para 11.82
144 Such variations are said to be ‘from Bill to Bill, rather than Department to Department’: Feldman (n 99) 107
Bill 2007-08\textsuperscript{146} and the more recent Parliamentary Voting System and Constituencies Bill 2010-12.\textsuperscript{147} Others may be less detailed because of the bill’s content, as was the case for the Parliamentary Standards Bill 2008-09\textsuperscript{148} which discussed possible issues arising under the Convention, albeit arguing that the bill did not in fact directly engage any individual Convention right.

At the opposite end of the spectrum discussion of Convention issues may be scant indeed. The Explanatory Notes to the Academies Bill 2010-12 focused on the possible effects of any transfer of land for use by an Academy on the property rights of certain private landowners.\textsuperscript{149} No mention was made of the Bill’s possible effects on the right to education,\textsuperscript{150} despite its potential to transform the provision of education services in England. This approach seems to have been based on the Minster’s identification of ‘only one area where (…) some further explanation might be useful’.\textsuperscript{151} This demonstrates that whatever the Guide may advise, the quality of the Explanatory Notes to a bill will depend on the attitude of the responsible Minister. This level of discretion means that there remains a significant risk that Explanatory Notes may fail to discuss major human rights issues raised by bills.

An example of a complete failure to discuss Convention issues can be found in the Explanatory Notes to the Identity Documents Bill 2010-12,\textsuperscript{152} which make only the bare assertion that ‘Having considered the possible implications, the Secretary of State for the Home Department has made a statement saying that in her view, the provisions of the [Bill] are compatible with the Convention Rights’.\textsuperscript{153} Aside from the fact that this does not comply with the guidelines for drafting Explanatory Notes, this statement is remarkable for another reason. The Bill received Royal Assent on 21 December 2010, and re-enacted certain provisions of the Identity Cards Act 2006 which permitted biographical checks for the purposes of passport applications and created criminal offences regarding the possession or making of false identity documents. These are both areas where Convention rights are likely to be engaged and so deserved to be brought to

\begin{thebibliography}{9}
\bibitem{146} Explanatory Notes to the Counter-Terrorism HC Bill (2007-08) [63] paras 252-308
\bibitem{147} Explanatory Notes to the Parliamentary Voting System and Constituencies HC Bill (2010-12) [63] paras 137-76
\bibitem{148} Explanatory Notes to the Parliamentary Standards HC Bill (2008-09) [121] paras 127-31
\bibitem{149} Explanatory Notes to the Academies HL Bill (2010-12) 1 paras 51-56
\bibitem{150} Article 2, Protocol 1 to the ECHR
\bibitem{151} Explanatory Notes to the Academies Bill (n 149) para 59
\bibitem{152} Explanatory Notes to the Identity Documents HC Bill (2010-12) [1]
\bibitem{153} ibid para 35
\end{thebibliography}
the attention of the House of Commons, currently home to 232 new MPs elected at the 2010 election who would not have had the opportunity to debate the measures when introduced by the 2006 Act.

This variation in the quality and content of Explanatory Notes has often been noted and commented on by the JCHR. In 2005, the Committee noted that in respect of the provision of human rights information in Explanatory Notes ‘performance remains very uneven. We have found ourselves commenting frequently on the inadequacy of the Explanatory Notes’.154 Failure to provide adequate information affected the Committee’s scrutiny of legislation: ‘Time after time our scrutiny would have been expedited if Explanatory Notes had contained a fuller explanation of the Government’s reasons for considering that a bill’s provisions were compatible with human rights’.155 The Committee accordingly called for the Government to provide a ‘free-standing Human Rights Memorandum devoted solely to an assessment of the human rights compatibility of a bill, without divulging legal advice’.156

Although continuing calls for the production of Human Rights Memorandums, the JCHR has since noted a general improvement in the overall standard of the information provided in Explanatory Notes.157 Nevertheless, problems remain. On two recent occasions the Committee noted that a ‘particularly common problem is for explanatory notes to assert that a provision complies with the ECHR without giving any justification for that point of view’.158

Even when the quality of Explanatory Notes is good, other issues can arise. The Explanatory Notes to the Policing and Crime Bill 2008-09 contain an extensive section discussing compatibility issues.159 This Bill consisted of a large number of provisions dealing with a wide range of subjects, including modification to the system for authorising RIPA surveillance, creating new criminal offences in relation to prostitution, amending police powers regarding alcohol misuse in young people,

154 JCHR, The Work of the Committee in the 2001-2005 Parliament (n 83) para 75
155 ibid para 76
156 ibid para 78
158 JCHR, Work of the Committee in 2008-09 (n 157) para 38. The Committee made this point in almost identical language in The Work of the Committee in 2007-08 (n 157) para 44
extradition issues and aviation security. While the depth of the discussion in the Explanatory Notes demonstrates that the Government had taken its job of assessing the Bill for compatibility seriously, it also raises other issues in terms of facilitating Parliamentary scrutiny. The very extent and detail of a discussion of Convention points could either discourage parliamentarians from engaging with those issues at all, or persuade them that as the Government had done such a thorough job, they should concentrate on other matters.

It must be remembered that however detailed and thorough such Explanatory Notes may appear to be, they are a statement of Executive opinion as to the major Convention issues raised by a bill. As long as the Executive is able to decide which Convention issues are “major” and merit inclusion, and in addition has a profound political motivation for seeing its legislation enacted, these Explanatory Notes should not be considered as a definitive, impartial, or authoritative statement of the law, and should instead be approached with some circumspection.

*Other considerations of Convention rights*

Convention issues may be considered at three further stages in the development of legislation. These are: the Impact Assessment; at publication in draft; and by Parliamentary Counsel.

1. Impact Assessment

An Impact Assessment analyses the ‘likely impact of a range of possible options for implementing a policy change’ and sets out ‘the risk or problem to be addressed and the options available’.¹⁶⁰ It must be made when a legislative proposal has a ‘significant impact on business, the third sector or the environment, or (...) imposes costs of more than £5m on the public sector’,¹⁶¹ and should include a number of specific assessments, including regarding human rights.¹⁶² The *Guide* refers users to an *Impact Assessment*

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¹⁶¹ ibid para 14.4
¹⁶² ibid para 14.2
Toolkit\textsuperscript{163} as a source of detailed guidance on the completion of such tasks. However, in relation to the specific human rights assessment, the Toolkit simply asks ‘What are the impacts on human rights (right to life, liberty and security, a fair trial and prohibition of torture, slavery forced labour)\textsuperscript{164} and refers to the Ministry of Justice website containing guidance for public authorities. This can hardly be described as “detailed guidance”.

2. Publication in Draft

LEG approval must be obtained before a bill may be published in draft.\textsuperscript{165} In order to obtain this, the Minister must write to LEG providing, \textit{inter alia}, Explanatory Notes and a note on compatibility with the ECHR, but not a section 19 statement.\textsuperscript{166} Explanatory Notes and any Impact Assessment, both of which should contain information on human rights issues, should be published with the Draft Bill.\textsuperscript{167} The \textit{Guide} notes that parliamentary committees carrying out pre-legislative scrutiny are likely to require a note on ECHR compatibility.\textsuperscript{168} These requirements should not impose any significant additional burdens on the Government, as the development of the draft bill should have included detailed analysis of any Convention issues, as described above.

3. The role of Parliamentary Counsel

When sending drafting instructions to Parliamentary Counsel a department should identify any basic legal concepts to be incorporated into the bill, set out the existing law, and refer to any relevant cases or statutory provisions.\textsuperscript{169} Presumably this should include any relevant case law on human rights issues likely to affect the bill.

\textsuperscript{164} ibid
\textsuperscript{165} Cabinet Office, \textit{Guide to Making Legislation} (n 107) para 22.6
\textsuperscript{166} ibid para 22.9
\textsuperscript{167} ibid para 22.13
\textsuperscript{168} ibid para 22.29
\textsuperscript{169} ibid para 9.18
Parliamentary Counsel have been described as ‘internal guardians of values customarily regarded as integral to the legal order such as (...) respect for the liberties of the subject’.

In case of any conflict between drafting instructions and their duty to the law, Parliamentary Counsel may refer their instructions to the Law Officers, who may discuss the matter with the relevant Minister. In the absence of an entrenched constitution this ‘concept of legal policy as interpreted by Parliamentary Counsel is as close as our system has traditionally come to a check on the “constitutionality” of legislation’. This role still exists and seems now to have been formalised and incorporated within the procedures for drafting the ECHR Memorandum for LEG.

The Cabinet Office acknowledges that Parliamentary Counsel have certain responsibilities which ‘may appear at times to create a tension between their own objectives and the immediate objectives of the department’. One such responsibility is for Counsel in charge of a bill to ‘brief the Law Officers (...) on matters of legal policy to which a Bill may give rise, including matters involving the rule of law, retrospection and matters involving fundamental rights and freedoms including those arising under the [ECHR]’. Such matters are ‘now generally covered in the ECHR Memorandum’ which must be prepared for LEG and ‘agree[d] with the Law Officers two weeks before the meeting’. If ‘the matter is settled between the department and the Law Officers, [Parliamentary Counsel] will not seek to revisit it before [LEG]’.

This would suggest that if for some reason the matter has not been settled between the Law Officers and the department, or if Parliamentary Counsel identifies a new and significant ECHR point relating to the bill, they would have a duty to refer the issue to the Law Officers as part of their responsibility to legal policy. Parliamentary Counsel may therefore be seen as an additional extra safeguard for Convention rights during the development of legislation, at arm’s length from the politically motivated Government departments responsible for bills.

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170 Daintith & Page, The Executive in the Constitution: Structure, Autonomy and Internal Control (OUP 1999) 254
171 ibid
173 ibid
174 ibid FN11
175 ibid
Section 19 and the development of legislation – a mixed picture

The procedures that have been adopted to integrate Convention compatibility issues within the development of legislative proposals by the Executive demonstrate that section 19 of the HRA 1998 has to some extent achieved its stated aims. As a result of the Guide to Making Legislation ‘Convention rights are taken more fully into account in the development of (...) legislation’ than had been the case under the previous system of Strasbourg proofing. A number of Ministers have attested to the impact of section 19 in this regard.

According to former Attorney General Lord Goldsmith section 19 has enhanced the internal mechanisms for ensuring that legislative proposals comply with human rights standards. Indeed, in his opinion ‘it is actually this (...) which has had the greatest impact on bringing respect for fundamental rights sweeping through Whitehall’s corridors – rather than the power of the court to rule on non-compliance’. This understanding of the impact of section 19 is shared by Lord Falconer who recalled ‘a genuinely gigantic number’ of occasions on which Convention compatibility issues affected the content of proposed bills ‘in the planning field, in relation to the government ownership field, very many examples in relation to the security field, [including] anti-terror legislation, criminal legislation generally, huge numbers of areas in relation to confiscation of assets in the context of the criminal law’. He considered that section 19 had been ‘very effective in practice’. When Lord Chancellor and Secretary of State for Justice, Kenneth Clarke put forward a similar view in evidence to the JCHR, stating ‘In government nowadays references to our obligations under the Convention on Human Rights are made frequently. It is amazing how often it occurs in submissions to Ministers and so on’. In his opinion the ECHR was ‘pretty firmly institutionalised now in the process of government’.

However, it has been argued that the actual and potential impact of section 19 on the development of legislation within Government may have been undermined by a
number of factors. The early implementation of section 19 may have reduced the opportunity for departments to develop methods for integrating Convention compatibility testing into their processes for developing bills. In addition the decision to place responsibility for implementing the HRA 1998 with individual departments may have led to a fragmented, uneven approach to section 19. Further issues have arisen from the content of guidance made available to departments, such as an ambiguous description of how to test a bill for compatibility with the Convention, and more recently the degree of ministerial discretion that may affect the information provided to Parliament in Explanatory Notes to bills. However, these are not the only obstacles facing section 19. Further issues arise from the features of government in the Westminster system.

3. Section 19 – Obstacles From Government in the Westminster System

Section 19 of the HRA 1998 was took effect within the well-established system of government at Westminster. It can be argued that certain features of this system may have impeded the ability of section 19 to ensure that Convention compatibility issues are central to the process of developing legislation and fully understood by the Ministers whose responsibility it is to make the statement of compatibility before Parliament.

Ministerial turnover and its implications

It has become a feature of the modern system of government at Westminster that ministerial careers are often short and reshuffles frequent. A recent report noted that ‘Most ministers return to the back-benches after no more than three years, during which many have had more than one ministerial post’. Further, since the 1960s ‘Changes in the machinery of government and rapid movements of both Ministers and staff have become increasingly frequent’. A stark example of such changes was given by Chris Mullin, discussing the varied ministerial career of Joyce Quin:

185 ibid 19
Every year a new department. In opposition she was our Europe spokesman, a job for which she was eminently qualified, whereupon as soon as we were elected she was made Minister of Prisons and the Europe job was given to Doug Henderson, who was equally unqualified. After a year it became clear that this wasn’t working out so Joyce was moved to the Foreign Office to do the job for which she was the obvious candidate all along. A year later, she was brushed aside to make room for Geoff Hoon. He stayed only three months to be replaced by Keith Vaz, who has no obvious qualifications. Now Joyce is at agriculture.186

Such unsettling changes have a number of implications for a Minister’s ability to engage with Convention rights issues, and therefore for the potential for section 19 to take full effect.

First, they may affect a Minister’s relationship with his officials. Lord Falconer stated that ‘Rapid turnover makes it harder to be able properly to scrutinise what your officials are saying. When you start as a Minister, it’s very difficult to evaluate what’s good and what’s bad, and if you’re not a lawyer, it’s difficult to evaluate the quality of the legal advice you’re getting’.187 This seems to be borne out by the evidence of former Home Secretary Charles Clarke to the House of Lords Constitution Committee regarding his experience of receiving legal advice in the context of section 19 statements:

What I disliked strongly when I was Home Secretary (…) is the sense of flailing around in a cloud of different legal opinions from different people all purporting to be very senior lawyers, in fact being very senior lawyers but with very different opinions, and the difficulty of getting to a firmness of accuracy in that situation.188

Such evidence suggests that in spite of the procedures adopted to give effect to section 19, Ministers may not always be clear about the human rights implications of bills, and may not understand the advice that they are given. In such circumstances it is questionable whether a Minister could make a fully informed judgment as the basis for a statement of compatibility.

A further implication of frequent ministerial changes is that Ministers may not have the time or the opportunity fully to understand either their own portfolio or the

186 Mullin, A View from the Foothills: The Diaries of Chris Mullin (Profile 2009) 66
187 Interview with Lord Falconer (n 53)
188 Constitution Committee, Relations between the Executive, the Judiciary and Parliament, Oral Evidence (HL 2006-07, 151) Q131
operation of Convention rights in relation to it. Following appointment to a ministerial role it would take ‘time to adapt and learn about the basic issues, people and interest groups within one’s portfolio: constant reshuffles prevented the growth of institutional memory and practices’.\(^{189}\) The less time that a Minister has to familiarise themselves with the work of their new department, the less chance there will be of fully engaging with the human rights implications of their work. Such a situation cannot bode well for a Minister’s ability to understand and defend the reasoning behind a statement of compatibility.

**Politics and personalities**

Lack of knowledge or understanding of human rights issues, together with a possible reluctance to challenge legal advice given by officials occurs within a system in which Ministers often are not involved in the assessment of compatibility issues. Rather than being concerned with the legal ramifications of a bill, Ministers instead focus on a bill’s political implications, such as whether it would be supported by backbench members.\(^{190}\) In such circumstances, responsibility for Convention compatibility issues appears to be delegated to officials, suggesting that although Ministers must make statements of compatibility to Parliament, they will in fact have little personal knowledge of whether such statements are accurate. Indeed Lord Falconer confirmed that Ministers are likely only to ask for explanations of compatibility issues from their officials ‘if the matter is ever raised in Parliament’.\(^{191}\) If the Minister was told that a bill ‘might not be compatible (…) he would then get into the detail. But if he’s told that it is compatible, then he won’t get involved in it, and then he’ll hope that it doesn’t get raised [in Parliament]’.\(^{192}\) If correct, this contradicts the aim of section 19 to ensure that Ministers are fully aware of the human rights implications of all bills for which they are responsible.

It should not be forgotten that legislating is a political act that takes place within the highly politicised atmosphere of Westminster. The legislative process has been

\(^{189}\) Yong & Hazell, *Putting Goats amongst the Wolves: Appointing Ministers from Outside Parliament* (Constitution Unit 2011) 45

\(^{190}\) Regan, ‘Enacting Legislation – A Civil Servant’s Perspective’ (Lecture at IALS, 31 January 2011)

\(^{191}\) Interview with Lord Falconer (n 53)

\(^{192}\) ibid
described as a ‘war of attrition’\textsuperscript{193} in which governments aim for their bills to proceed through Parliament largely unscathed. In this context the Minister in charge may be vital in securing the bill’s smooth passage through Parliament, particularly if he or she has a good understanding of ‘parliamentary tactics’.\textsuperscript{194} It is this political ability that seems to be the most important factor in the appointment of Ministers, who ‘are by and large selected for their political strength rather than their expertise’.\textsuperscript{195} In these circumstances, in which the Government’s overriding goal is to see its legislation enacted for party political purposes, it is perhaps inevitable that complex issues surrounding Convention compatibility may be secondary. Although understandable, this does undermine section 19 and the HRA 1998 and the aims of ensuring that Convention rights are considered and understood by all branches of government throughout the legislative process, and in particular by Ministers who engage their ministerial responsibility when making statements of compatibility to Parliament.

\section*{4. CONCLUSIONS: SECTION 19 AND THE EXECUTIVE – IMPROVEMENTS AND IMPEDIMENTS}

The Government has made significant progress in its approach to assessing proposed legislation for compatibility with Convention rights since the entry into force of section 19. The \textit{Guide to Making Legislation} is detailed, and requires thorough and balanced consideration of Convention issues throughout the development of legislation within Government, from policy development and approval to the introduction of the bill and the section 19 statement. This is a success for the policy behind section 19 and a clear improvement on the previous system of Strasbourg proofing.

However, there remains an impression that a number of factors have acted as impediments to the achievement of the aims of section 19. The first of these is that section 19 may be been brought into force too early, leaving little time for adequate preparation within the Government departments that it was designed to affect. Even the current \textit{Guide} is affected by continuing problems, such as the risk that advice provided to Ministers may not always be based on impartial interpretations of human rights law.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{193} Regan (n 190)
\item \textsuperscript{194} ibid
\item \textsuperscript{195} Interview with Lord Falconer (n 53)
\end{enumerate}
\end{footnotesize}
Further, and perhaps more troublingly, Ministers appear to retain significant discretion in respect of the way in which assessments of compatibility are made public, for example in deciding whether to mention the specific reasons for making a section 19(1)(b) statement, and in relation to Explanatory Notes which vary considerably in their discussion of Convention issues.

Politically-motivated Ministers should not have such broad discretion over these issues. The processes that have been developed to give effect to section 19 are intended to ensure that the Executive performs a thorough assessment of Convention issues when developing legislation. This information is then made available to Parliament via the section 19 statement and the Explanatory Notes to a bill, which should be used to provoke and facilitate scrutiny of the bill. The fact that the quality and accuracy of such information could depend on a Minister’s own commitment to upholding human rights standards undermines the value of section 19 and the HRA 1998 itself.

Further impediments have arisen from some of the features of government at Westminster, such as high rates of ministerial turnover and focusing on the political implications of proposed legislation. Such factors are likely to reduce the extent to which Ministers are aware of and understand human rights issues, which in turn affects the importance accorded to human rights considerations during the development of legislative proposals. These impediments may therefore have affected the potential impact of section 19 within Government departments, reducing the ability of the Executive fully to engage with and determine the meaning of human rights standards in the United Kingdom under the HRA 1998.

As will be examined in the next chapter, a similar picture of good practices being hampered by significant obstacles has emerged in relation to the impact of section 19 on Parliament’s role in the protection of human rights.

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196 p 145-47
CHAPTER 5 - THE INFLUENCE OF SECTION 19 ON PARLIAMENT AND THE PARLIAMENTARY SCRUTINY OF LEGISLATION

The statement of compatibility required by section 19 of the HRA 1998 sought to accord to the democratically-accountable arm of the state a crucial role in influencing both the meaning and protection of human rights. It was designed to provoke debate and scrutiny of human rights issues during a bill’s passage through Parliament, to help prevent the enactment of rights-violating legislation and reduce the need for costly, time-consuming litigation. Section 19 aimed to ensure that the sovereign Parliament had a central role in the protection of human rights in the United Kingdom both symbolically and in practical effect.

This chapter will discuss the impact of section 19 on Parliament and the parliamentary scrutiny of legislation. It will examine the creation of the JCHR\(^1\) and argue that although the work of the Committee is highly regarded, the delay in its creation and nature of its early working practices may have prevented section 19 and the 1998 Act from having an early and lasting effect on parliamentary scrutiny. It will further argue that any impact that the JCHR and the HRA 1998 may have had in encouraging the parliamentary scrutiny of legislation for compatibility with Convention rights has occurred in spite of a number of institutional obstacles inherent in the system of parliamentary government as it currently exists in the United Kingdom. These obstacles are so significant that the laudable aim of encouraging Parliament to engage with and protect human rights has thus far had a more limited impact on the current Westminster system than was originally intended.

1. SECTION 19 AND ITS INTENDED EFFECT ON PARLIAMENT

The purpose of section 19 was to encourage Parliament to play an active role in protecting human rights, and compelling reasons exist for the adoption of such an approach.

\(^1\) Information about the JCHR and its work is available at: <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/> accessed 27 May 2012
Section 19: designed to produce effects in Parliament

Prior to enactment of the HRA 1998 there existed within Westminster no formal procedures enabling the systematic human rights scrutiny of legislation. It was for individual parliamentarians to highlight any human rights issues raised by bills, although such action had been made difficult by the fact that ‘Parliamentary procedure [did] not encourage the receipt of specialist advice to members’. As a result, unless a parliamentarian had a specific interest in such matters, issues of compatibility had been raised only rarely. This allowed ‘politicians [to] readily assert in cases of doubt that a particular piece of law making [was] compatible with human rights even though the contrary view [was] persuasive’. Blake concluded that when legislating, Parliament ‘may frequently know little of and care less what the Strasbourg view is on a question engaging the Convention’.

Against this background, section 19 of the HRA 1998 was intended to act as a catalyst which would encourage Parliament to scrutinise legislation for compatibility with Convention rights. This aim is evident from the Labour Party consultation paper and the White Paper published before the introduction into Parliament of the 1998 Act.

The Labour Party consultation paper asserted that ‘Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy’. The White Paper was equally clear that Parliament should have an important role in ensuring that ‘the human rights implications of legislation are subject to proper consideration before the legislation is enacted’. If a Minister felt compelled to make a section 19(1)(b) statement ‘Parliament would expect the Minister to explain his or her reasons during the normal course of the proceedings on the Bill. This will ensure that the human rights implications are debated at the earliest opportunity’. To reinforce and support Parliament’s role the White Paper called for the creation of a parliamentary committee on human rights which ‘might conduct enquiries on a range of human rights

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2. ibid
3. ibid
4. ibid
5. See brief discussion at p 20-21
8. ibid para 3.3
issues relating to the Convention, and produce reports so as to assist the Government and Parliament in deciding what action to take’.  

Section 19 was therefore designed to be one of the principle conduits through which human rights standards would influence Parliament’s legislative work, reinforced by the work of a parliamentary committee. This objective was both laudable and valuable.

The value of human rights scrutiny by Parliament: prevention, not cure

That Parliament should have a primary role in the protection of human rights in the United Kingdom is valuable for a number of reasons, from the principled to the more practical.

Reasons from democracy and the rule of law

Parliament is the national democratically accountable institution within the United Kingdom constitution. As it is subject to regular elections, and its members are directly accountable to their constituents, it is appropriate for Parliament to be actively involved in the determination of the scope and application of Convention rights as they affect individuals within the United Kingdom. It can be argued that Parliament has a long history of legislating on human rights issues, and that the British public ‘expect such issues to be decided by Parliament’. This long-established role should continue and be augmented under the HRA 1998, facilitated by section 19.

The nature of democracy itself also suggests that Parliament should be central to any system for the protection of human rights. In modern times the democratic ideal requires that ‘basic values of liberty and justice for all and respect for human rights and

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9 ibid para 3.7. The Labour Party consultation paper had also called for the creation of such a committee, which would have a legislative scrutiny function: Straw & Boateng (n 6) 79
10 Currently only the House of Commons is directly accountable to the electorate. Members of the House of Lords are not elected, although the Coalition Government is committed to the creation of a predominantly elected Upper Chamber: see the House of Lords Reform Draft Bill (May 2011) at <http://www.official-documents.gov.uk/document/cm80/8077/8077.pdf> accessed 27 May 2012
fundamental freedoms must be guaranteed’, making it ‘morally right that states and their agencies should respect fundamental rights of individuals’. Such respect is ‘instrumentally valuable [as it] tends to promote conditions in which democratic systems can flourish for the benefit of people generally’. Not only does respect for human rights support democracy, it is also increasingly viewed as central to ‘supporting respect for the Rule of Law’. To promote a society in which these values are respected it is right that Parliament should engage with human rights issues when legislating.

**Reasons from the structure of the Human Rights Act 1998**

The HRA 1998 was designed expressly to preserve parliamentary sovereignty. Thus sections 3 & 4 of the 1998 Act are said not to ‘affect the validity, continuing operation or enforcement’ of incompatible primary legislation. If a declaration of incompatibility is issued, it is for Parliament to decide how to respond – if at all – to remedy the problem. This ‘imposes special responsibilities on Parliament to ensure that each House understands the human rights implications of the course which it contemplates and makes a properly informed decision’. This must also be the case for Parliament’s ability to legislate more generally. As Parliament may still in principle pass any law on any matter in accordance with Dicey’s theory, it is vital that parliamentarians are aware of human rights standards and how they will be affected by proposed legislation.

This is reinforced by the fact that Parliament is not classed as a ‘public authority’ for the purposes of the 1998 Act, and therefore is not subject to the duty

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13 ibid
14 ibid
16 Respectively requiring courts to interpret legislation so that it is consistent with Convention rights as far as it is possible to do so, and enabling courts to issue declarations of incompatibility where a consistent reading cannot be reached
17 HRA 1998, ss 3(2)(b) & 4(6)(a)
18 Williams, ‘The Role of the House of Lords in terms of Parliamentary Scrutiny of Legislation’ (JUSTICE annual lecture, 9 October 2002) 5
19 A discussion of Dicey’s theory and the centrality of parliamentary sovereignty in the current constitutional arrangements of the UK is at p 26 & 32-33
20 HRA 1998, s 6(3)
requiring such authorities to act compatibly with Convention rights.\textsuperscript{21} Feldman has argued that this:

exemption given to the two Houses of Parliament imposes special responsibilities on them: as courts will be unable to provide an effective enforcement mechanism for Parliament’s compliance with Convention rights, Parliament is solely responsible for ensuring that each House complies with them, or, if it is considering acting incompatibly, at least understands and considers the human rights implications of its decision.\textsuperscript{22}

As Parliament retains ultimate legislative authority within the constitution, it is vitally important that it is aware of and considers human rights standards throughout the legislative process. Should it fail to do so there is little that the courts can do to require Parliament to reconsider and act compatibly with Convention rights.\textsuperscript{23}

\textit{Reasons from the structure of section 19}

Section 19 does not specify what a statement of compatibility should contain.\textsuperscript{24} In practice a rather bland statement of the Minister’s opinion on compatibility with Convention rights is included on the face of a bill. The general nature of the statement raises the risk that Parliament’s attention could be deflected from the human rights issues raised by the bill. In other words, parliamentarians may accept the Minister’s assessment of the bill’s compatibility and focus on other issues during the bill’s passage.\textsuperscript{25}

Ministers and Governments have political reasons for ensuring that their legislation is passed by Parliament without incident. Although Explanatory Notes may provide some detail which can assist parliamentary scrutiny, these documents are not always detailed and are still ultimately based on the Government’s interpretation of the

\begin{footnotesize}
\begin{enumerate}
\item HRA 1998, s 6(1) states: ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’
\item Even if courts interpret legislation to make it compatible with Convention rights using HRA 1998, s 3 there is nothing to prevent Parliament from legislating anew to impose its will
\item See discussion at p 19
\item For example, the Government is said to have used s 19 as a ‘shield’ to avoid discussing the human rights issues raised by the Special Standing Committee established to scrutinise the Immigration and Asylum Bill: Cooper, \textit{Auditing for Rights: Developing Scrutiny Systems for Human Rights Compliance} (JUSTICE, 2001) 52
\end{enumerate}
\end{footnotesize}
human rights issues involved. The fact that Ministers may hope that a section 19 statement might dissuade Parliament from assessing for itself the human rights implications of bills suggests that Parliament should be assertive and rigorous in carrying out this task. If Parliament routinely examined the human rights implications of proposed legislation there would be a significant incentive for the Executive fully to integrate those standards into its own procedures for the development of legislation. The assumption by Parliament of a central role in the promotion and protection of human rights may therefore lead to an improvement in the implementation of those standards within the Executive.

**Reasons from the risk of subsequent litigation**

The availability of legal challenges to legislation whose Convention compatibility is questioned means the risk of litigation looms large in the Government’s development of legislative proposals. Thoroughly testing the accuracy of the Government’s assessment of compatibility during the legislative process would be beneficial to both Government and Parliament for a number of reasons.

If litigation challenging an Act’s compatibility with Convention rights does take place, evidence of a proper assessment by Parliament of the human rights implications of the legislation could affect the outcome of the case. Klug & Wildbore noted:

> there is evidence that the more thorough the job that Parliament does in conscientiously reaching its own views about compatibility after carefully considering the issues and evaluating the evidence and arguments, the more likely it is that the courts will take note of the legislature’s intentions when they are subsequently called upon to determine the same compatibility questions in litigation.

26 See discussion at p 144-48  
28 Discussed in ch 4  
29 See the threshold tests adopted by the Government for assessing the compatibility of proposed legislation with Convention rights: p 127  
This certainly seems to be true of the approach of the ECtHR, which ‘frequently considers the quality of the reasoning relied on in support of a legislative measure when deciding compatibility questions, and whether there was a democratic debate about those justifications prior to the measure’s enactment’.\textsuperscript{31} In \textit{Hirst} the fact of an ‘absence of parliamentary debate about the blanket ban on prisoner voting’\textsuperscript{32} contributed to the ECtHR’s ruling that the ban was a disproportionate interference with article 3, Protocol 1 to the ECHR. However, in \textit{Friend} the Court ‘expressly referred to the fact that various proposals were considered in the course of extensive parliamentary debates preceding the adoption\textsuperscript{33} of the hunting ban\textsuperscript{34} when concluding that the ban had not violated the Convention.

There is also some evidence of a similar approach in domestic courts. In rejecting an application for a declaration of incompatibility in respect of the ban on political advertising contained in section 321 of the Communications Act 2003,\textsuperscript{35} Lord Bingham ‘seems to have been influenced (…) by the consideration which was given to the compatibility issue during the course of the Bill’s passage through Parliament’.\textsuperscript{36} Such judicial attitudes could result in beneficial outcomes for the Government, which would thus be advised not only to encourage parliamentary scrutiny of the human rights implications of its bills, but also fully to integrate those standards into its own internal processes to ensure that its bills survive more detailed scrutiny.

This could even help avoid litigation from occurring at all. It is at least arguable that a robust parliamentary examination of the human rights implications of a bill could dissuade potential litigants from taking legal action, especially in light of the preceding point. Writing before the enactment of the HRA 1998, Ryle optimistically argued that ‘adverse judgments by the [ECtHR] in respect of statutory infringement would be totally eliminated if steps were taken to ensure that the legislation was not flawed in the

\textsuperscript{31} Hunt, Hooper & Yowell, ‘Parliaments and Human Rights: Redressing the Democratic Deficit’ (AHRC Public Policy Series No 5, AHRC, April 2012) 54, giving the examples of \textit{Hirst} and \textit{Friend v United Kingdom} (2010) 50 EHRR SE6
\textsuperscript{32} ibid 55
\textsuperscript{33} ibid 56
\textsuperscript{34} In the Hunting Act 2004
\textsuperscript{35} \textit{R (Animal Defenders International) v Secretary of State for Culture, Media and Sport} [2008] UKHL 15, [2008] 1 AC 1312
\textsuperscript{36} Hunt, Hooper & Yowell (n 31) 57
first place’.\textsuperscript{37} Even if such infringements were not totally eliminated, appropriate and serious parliamentary scrutiny of the human rights implications of bills would at least minimise the risk of litigation, saving money and resources. Evidence provided to the JCHR showed that litigation concerning the control order regime established by the Prevention of Terrorism Act 2005 was both costly and resource-intensive: ‘over £8 million was spent by the Home Office on legal costs between April 2006 and October 2009, not including legal aid costs and the costs incurred by HM Courts Service’.\textsuperscript{38} This is a considerable sum, and represents only one (albeit significant) strand of litigation on human rights issues.\textsuperscript{39} Any Government would be wise to attempt to avoid incurring such costs on a regular basis, and improving the parliamentary scrutiny of the human rights implications of bills could assist in such an aim.

However valuable litigation may be in protecting human rights it remains the case that relying on ‘redress of wrongs by the courts means that human rights are being established and protected after their infringement, not before’.\textsuperscript{40} Further, litigation is only possible if there is a litigant willing to make the claim, and often to pursue the claim to the Supreme Court or ECtHR. The cost and time involved in such litigation may discourage or even prohibit many claims from being made.\textsuperscript{41} Even if claims are made, ‘more wrongs may be done while cases are awaiting consideration by the courts’.\textsuperscript{42} This remains true even when a successful litigant obtains a declaration of incompatibility: until Parliament decides to change the law, the incompatible legislation remains in force and applicable to the litigant and anyone else affected by it.\textsuperscript{43} This is compounded by the fact that most legislation will not be subject to litigation on human rights grounds, meaning that Parliament’s legislation will often represent ‘a final and authoritative decision about how to reconcile social conflicts where rights claims

\textsuperscript{37} Ryle, ‘Pre-Legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights’ [1994] PL 192, 194
\textsuperscript{38} JCHR, \textit{Work of the Committee in 2008-09} (2009-2010, HL 20, HC 185) para 16. This figure was provided to the Committee in a letter from Rt Hon David Hanson MP, Minister of State, Home Office, dated 27 November 2009, published at 141-143
\textsuperscript{39} The JCHR referred to the cases of \textit{A v United Kingdom} (2009) 49 EHRR 29 and \textit{Secretary of State for the Home Department v AF} [2009] UKHL 28, [2010] 2 AC 269
\textsuperscript{40} Ryle (n 37) 192
\textsuperscript{41} The desire to enable UK citizens to enforce Convention rights in domestic courts, rather than incurring the cost and delay of litigating before the ECtHR was a reason given by the Government for incorporating the Convention into domestic law: p 17
\textsuperscript{42} Ryle (n 37) 192
\textsuperscript{43} HRA 1998, s 4(6)
arise’. In short, litigation alone cannot ensure that human rights are protected fully under the system created by the HRA 1998.

It would seem therefore that those who wish to protect human rights should seek to ensure that the aim of section 19 to secure better parliamentary scrutiny of the human rights implications of bills is fulfilled. This chapter will now turn to an examination of what has been achieved to promote such scrutiny by Parliament, and why section 19 and the HRA 1998 may not have had the impact within Parliament that may have been hoped for.

2. THE JOINT COMMITTEE ON HUMAN RIGHTS: A QUALIFIED SUCCESS

The creation of the JCHR: beset by delay

Both the Labour Party consultation paper and the White Paper preceding the HRA 1998 called for the creation of a parliamentary committee with responsibility for human rights. The former argued that incorporation of Convention rights would provide an ‘opportunity to strengthen parliamentary machinery on human rights’, and supported the creation of a joint committee to scrutinise legislation identified as raising human rights issues. The White Paper, too, called for a committee which ‘might conduct enquiries on a range of human rights issues relating to the Convention, and produce reports so as to assist the Government and Parliament in deciding what action to take’. There was also widespread academic support for the establishment of such a committee. However, although the idea of creating a joint committee on human rights was widely supported, its establishment was beset by delay.

The HRA 1998 received Royal Assent on 9 November 1998, with section 19 entering into force on 24 November 1998. Reidy argued that as the proposed human

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45 Straw & Boateng (n 6) 79
46 Home Office, Rights Brought Home (n 7) para 3.7
rights committee would have ‘the leading role in ensuring that this new constitutional arrangement is effectively implemented and that the standards and values which the Human Rights Act imports are an integral part of Parliament’s business’,\textsuperscript{49} it should have been established ‘as soon as possible’ with a ‘target date’ of the ‘autumn session of 1999’.\textsuperscript{50} However, the motion to create the JCHR and determine its terms of reference was not laid in the House of Lords until 12 July 2000,\textsuperscript{51} and not debated by the House of Commons until 15 January 2001.\textsuperscript{52} The JCHR did not therefore meet for the first time until January 2001. This was ‘more than two years after the Leader of the House of Commons had announced that it would be set up, and over three months after the Human Rights Act 1998 had come fully into force’.\textsuperscript{53}

What does not seem to have been acknowledged is that although the JCHR first met over three months after the HRA 1998 had entered fully into force, section 19 had by that time been in force for over two years. As has been demonstrated, section 19 was intended to ensure that both Government and Parliament played their parts in ensuring that human rights standards were taken into account throughout the legislative process.\textsuperscript{54} The delay in establishing the JCHR meant that for over two years Parliament was unequipped to perform effective human rights scrutiny of legislation. It is possible that this delay further undermined the impact and effectiveness of section 19 as a mechanism for ensuring that human rights standards were embedded in the legislative process. Any goodwill that may have existed within Parliament soon after the passage of the HRA 1998 is likely to have waned by the time the JCHR came into being in January 2001.

The JCHR is innovative in form: ‘It was the first permanent Joint Committee of both Houses. In effect it was a new species; a standing joint committee with a broad, and largely undefined remit’.\textsuperscript{55} This remit is found in the JCHR’s terms of reference, which require it to consider:

(a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);

\begin{enumerate}
\item Reidy (n 47) 6
\item ibid
\item HL Deb 12 July 2000, vol 615, cols 233-34
\item HC Deb 15 January 2001, vol 361, col 146 et seq
\item Feldman, ‘Whitehall, Westminster & Human Rights’ (n 22) 22
\item p 123-25 & 158-59
\item Klug & Wildbore (n 30) 234
\end{enumerate}
(b) proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and

(c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order No. 151 (Statutory Instruments (Joint Committee)).

These terms of reference are indeed broadly drafted. It was acknowledged during the Commons debate on the terms of reference that the Committee would ‘play a traditional parliamentary role, which is not to take the place of the courts but to scrutinise the preparation of legislation by the Government of the day, and seek as far as possible to ensure that it is compatible with the law as it stands’. However, it is unlikely that those taking part in the debate foresaw the extent to which such legislative scrutiny work would become central to the Committee’s work.

The JCHR’s working practices: legislative scrutiny takes centre stage

The JCHR has considered legislative scrutiny to be central to its role, and its working practices have developed over time to facilitate more efficient and more effective scrutiny.

The initial approach: comprehensive scrutiny

The Committee’s broad terms of reference meant that the ‘onus [was placed] on the Committee itself to define the parameters of its working methods’. From its earliest days, the Committee attached great importance to legislative scrutiny, stating in its first report: ‘We regard the scrutiny of bills in relation to human rights issues as one of the most important parts of our terms of reference’. Indeed, so important was this aspect of its work that four years later the Committee described it as its ‘main priority, in theory and in practice’. The ‘two key principles’ informing this work were ‘comprehensive scrutiny of all Government bills’ and ‘seeking detailed evidence from

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56 House of Commons Standing Order 152B
57 HC Deb 15 January 2001 (n 52) col 152 (Paul Tyler)
59 JCHR, Criminal Justice and Police Bill (2000-01, HL 42, HC 296) para 1
60 JCHR, The Work of the Committee in the 2001-2005 Parliament (n 58) para 2
the Government, when necessary, on the human rights compatibility of bills before arriving at final views on them’. 61

The JCHR aimed to ‘alert both Houses of Parliament on occasions when (…) they may be at risk of proceeding to legislate in a manner which will later be held by a court to be incompatible with the ECHR’. 62 The Committee therefore emphasised legal compatibility, acknowledging that while Parliament remained free to legislate as it pleased, the courts were the final arbiters of Convention compatibility issues under the scheme of the HRA 1998. 63 In assessing compatibility the JCHR was willing to ‘look behind the ministerial statement of compatibility’ 64 and examine a bill’s provisions for itself.

A sifting process was developed according to which every Government bill would be scrutinised as early as possible to identify any significant human rights issues. 65 Legislative provisions were assessed according to a ‘gradation of concern’ which determined whether a provision raised a “significant risk”, a “risk”, or “no appreciable risk” of incompatibility but “some human rights concerns”. 66 The level of “significance” was assessed by ‘applying various criteria, including how important is the right affected, how serious is the interference with it and, in the case of qualified rights, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are’. 67 If a significant human rights issue was identified, the Committee’s Legal Advisor would prepare a Note containing his opinion on compatibility, which would ‘form the basis for a draft report containing [the Committee’s] initial or provisional views on a bill’. 68 The Committee would also seek ministerial responses to specific questions on the human rights issues identified, and could seek written comments from NGOs where appropriate. Its final views on compatibility would be published in a second report on the bill, which would also contain the Government’s response. 69

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61 ibid para 27
62 ibid para 44 (emphasis added)
63 ibid para 45
64 ibid para 43
65 ibid para 46
66 ibid para 44
67 ibid para 47
68 ibid para 48
69 ibid
The JCHR sought to ‘provide (...) advice on the human rights compatibility of proposed legislation in a timely manner for Parliament to be able to take it into account as it debates that legislation’.\textsuperscript{70} This meant aiming to report ‘before second reading in the second House’.\textsuperscript{71} Reporting early in the legislative process is an admirable and sensible goal: the more time that Parliament has to consider the JCHR’s views, the more chance there will be that those views may help improve the bill’s compatibility. Unfortunately, the Committee was not always able to meet its reporting targets.

Statistics\textsuperscript{72} show that while in most cases the Committee did report before second reading in the second House, in respect of a significant number of Government bills the Committee reported after this stage.

\textit{Table 3: JCHR Reports published before and after second reading in the second House, 2001-05}

<table>
<thead>
<tr>
<th>Session</th>
<th>No. of Government bills</th>
<th>JCHR reports published before second reading in second House</th>
<th>JCHR reports published after second reading in second House</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001-02*</td>
<td>35</td>
<td>62.8%</td>
<td>31.4%</td>
</tr>
<tr>
<td>2002-03</td>
<td>36</td>
<td>83.3%</td>
<td>16.6%</td>
</tr>
<tr>
<td>2003-04</td>
<td>35</td>
<td>77.1%</td>
<td>22.8%</td>
</tr>
<tr>
<td>2004-05***</td>
<td>22</td>
<td>59%**</td>
<td>13.6%</td>
</tr>
</tbody>
</table>

* Two bills during this session were not reported on by the JCHR

** A report was published on the same day as second reading in the second House in respect of one other bill

*** Five bills during this session did not receive a second reading in the Second House

This is cause for some concern. Second reading in the second House is already relatively late in the legislative process. By that time, the bill has been approved in the first House and depending on the conclusions of the second House, might not return there for substantive debate or scrutiny. In such a case, the second House would be the only part of the legislature with access to the Committee’s opinions on a bill’s compatibility with Convention rights, and the later that it has access to those opinions, the more limited will be the opportunities for those opinions to have any bearing on the bill’s content. A further issue is that even where the JCHR did report before second reading in the second House, there was sometimes very little time between publication of the report and the second reading debate.\textsuperscript{73}

\textsuperscript{70} ibid para 41  
\textsuperscript{71} ibid para 51  
\textsuperscript{72} ibid Annex 2  
\textsuperscript{73} ibid
Table 4: Periods between JCHR report publication and second reading in the second House

<table>
<thead>
<tr>
<th>Session</th>
<th>Minimum period between publication and second reading</th>
<th>Maximum period between publication and second reading</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001-02</td>
<td>1 day</td>
<td>6 months</td>
</tr>
<tr>
<td>2002-03</td>
<td>2 days</td>
<td>1 year</td>
</tr>
<tr>
<td>2003-04</td>
<td>2 weeks</td>
<td>6 months</td>
</tr>
<tr>
<td>2004-05</td>
<td>1 day</td>
<td>2 months</td>
</tr>
</tbody>
</table>

Again, the less time that is available for parliamentarians to read and digest the Committee’s report on compatibility, the less likely it is that those parliamentarians will be able effectively to use the report during debates.

The considerable problems encountered during its legislative scrutiny work, often arising from a lack of parliamentary time coupled with the complexity and length of the legislation in question, were acknowledged by the Committee. For example, in respect of the Prevention of Terrorism Bill 2004-05,\(^{74}\) the Committee noted:

> the circumstances in which we found ourselves made our task of providing considered human rights compatibility advice to both Houses extremely difficult. We found ourselves having to consider draft reports on complex legislation with little or no notice in the context of a bill passing through its parliamentary stages very swiftly and in a highly politicised environment.\(^ {75}\)

Other issues also affected the Committee’s ability to report at an early stage in the legislative process,\(^ {76}\) including the fact that it had no advance access to bills and so could only start its scrutiny after a bill’s introduction into Parliament, and that it had no advance access to amendments with human rights implications. The Committee’s work was also delayed by late ministerial responses to questions on bills raising significant human rights issues.

These factors must have been compounded by the Committee’s early undertaking to scrutinise all public bills for compatibility with Convention rights. The sheer volume of work and the difficulties encountered by the JCHR led to changes in its working practices which aimed to achieve a more streamlined legislative scrutiny process.

\(^{74}\) Prevention of Terrorism HC Bill (2004-05) [61]
\(^{75}\) JCHR, *The Work of the Committee in the 2001-2005 Parliament* (n 58) para 72
\(^{76}\) ibid para 74
Changes to working practices: more focused scrutiny

The Committee’s re-examination of its working practices recognised that ‘Our predecessor’s early decision to undertake such comprehensive scrutiny was one which had profound effects on their work throughout the course of the Parliament’. Although the JCHR had quickly been recognised as a source of ‘authoritative and impartial’ advice, its early approach had been:

of less relevance to the more political environment of the House of Commons (…) because most major Government Bills start in the House, with the consequence that in a lot of cases the Committee’s Reports on those bills [had] not been published in time to influence debate there.

The Committee had therefore ‘missed or reduced the opportunity to influence Government policy at a stage when – given the realities of the parliamentary system – a shift in policy is more likely to occur’. In light of these conclusions the JCHR proposed new, more focused working practices which sought to ‘ensure that our resources are used in order to enhance our ability to alert both Houses in a timely way to the most significant human rights issues raised by bills, rather than trying to provide an exhaustive analysis of every bill which engages human rights’. The new system was implemented at the beginning of the 2006-07 session of Parliament.

The JCHR would continue to examine all Government bills, but would only report on those raising ‘significant human rights issues’. In order to determine which bills merited further investigation the Committee’s Legal Advisor would sift all bills ‘as soon as possible after their publication, and if possible within a week’. The Legal Advisor would then provide the Chairman with a list of bills which did not cross the significance threshold and a preliminary analysis of any bills which did, identifying the human rights issues and indicating the next steps for the Committee. For bills crossing the significance threshold, the Committee could use its webpages to notify

78 ibid
79 ibid para 6
80 ibid
81 ibid para 16
82 ibid para 19
83 ibid para 25
84 ibid para 35
85 ibid para 36
parliamentarians of the issues raised by a bill, and facilitate more submissions from NGOs which could aid the Committee’s investigation.\textsuperscript{86}

The JCHR would aim to ‘report to Parliament as early as possible in a bill’s passage’.\textsuperscript{87} If writing to the Minister in connection with the issues raised, the Committee would ask for a response within two weeks. If deadlines were met, ‘it should be possible (…) to publish a full Report on a bill raising significant human rights issues while the bill is still in the first House, and sufficiently early to be of value to that House. Ideally (…) a timetable of reporting within approximately 8 to 10 weeks of a bill’s publication’\textsuperscript{88} would be followed. If oral evidence was to be taken the JCHR would ‘aim to publish a Report within about three weeks of the date of taking evidence’.\textsuperscript{89} These earlier targets would have obvious benefits: making reports available to the first House during the legislative process would provide more opportunity for Parliament to consider the human rights implications of Government bills.

The emphasis of the Committee’s reports would also change. They would be ‘shorter and more focused (…) less expository of the relevant law and more focused on the particular question or issue which the relevant law throws up’.\textsuperscript{90} Further, reports would ‘focus on the most significant issues raised by the bill, rather than exhaustively on all the issues raised by a bill’.\textsuperscript{91} The Committee would use ‘freestanding reports more frequently to report our substantive views on major Government bills, whenever feasible’.\textsuperscript{92}

In the 2007-08 session the JCHR began to publish annual reports of its work. They are extremely useful as they track the implementation of the new working practices. The first of these reports suggests that the changes had led to real improvements in the Committee’s reporting. During 2006-07, the Committee ‘succeeded in consistently reporting at a much earlier stage in a bill’s passage’.\textsuperscript{93} Indeed:

\begin{itemize}
  \item \textsuperscript{86} ibid para 39
  \item \textsuperscript{87} ibid para 43
  \item \textsuperscript{88} ibid para 45
  \item \textsuperscript{89} ibid para 46
  \item \textsuperscript{90} ibid para 47
  \item \textsuperscript{91} ibid
  \item \textsuperscript{92} ibid para 50
  \item \textsuperscript{93} JCHR, \textit{The Work of the Committee in 2007 and the State of Human Rights in the UK} (2007-08, HL 38, HC 270) para 33
\end{itemize}
In all but 2 of the 13 Government bills reported on we reported within 8 to 10 sitting weeks of the Bill’s publication, and in all but 3 of the bills we reported before the bill left the first House. This means that in the vast majority of Bills on which we reported, our report was available before report stage in the first House.\footnote{iibid}

Although a significant improvement on the previous system, the JCHR recognised that its work continued to be hampered by a number of factors including the speed of a bill’s progress through Parliament, the complexity of the issues under scrutiny, and ‘delays in the Government’s response to (...) questions’.\footnote{ibid para 34} As an example of the latter issue, the Committee noted that ‘it took the Home Office nearly six weeks to respond to our letter about the Criminal Justice and Immigration Bill, making it impossible to report on that Bill before report stage in the first House’.\footnote{ibid FN 21} The Home Office was not the only guilty party: a wider problem was that of departments claiming ‘not to have received (...) letters, or to have mislaid them, where they have actually already acknowledged receipt’.\footnote{ibid para 34}

In spite of these issues the Committee hoped in future to extend its scrutiny to include ‘significant Government amendments, at least in relation to bills which we have decided to scrutinise further’.\footnote{ibid para 38} During 2007 the JCHR also began to suggest amendments to bills ‘designed to give effect to specific recommendations, dealing with human rights compatibility problems or omissions from bills [as this was seen as] a useful way of pressing for a Government response to a recommendation about human rights compatibility in a scrutiny report’.\footnote{ibid para 42. This practice is discussed in more detail below at p 176-77}

Despite this early progress, subsequent reports suggest that timetables for reporting changed somewhat. In its report on the 2007-08 session,\footnote{JCHR, The Work of the Committee in 2007-08 (2008-09, HL 10, HC 92)} the Committee stated that it aimed ‘to report on bills before Report stage in the first House, if possible, or before Second Reading in the Second House’.\footnote{ibid para 38} Of the 12 Government bills examined in 2007-08, the Committee reported on:

6 bills before report stage in the first House

\footnote{ibid para 38}
4 bills before second reading in the second House
2 bills before committee stage in the second House.\textsuperscript{102}

In the most recent annual report to date,\textsuperscript{103} the Committee reported that in the 2008-09 session it had maintained the targets set in the previous report, and that of the 10 Government bills examined it reported on:

9 bills before report stage in the first House
1 bill before second reading in the second House.\textsuperscript{104}

These figures represent a vast improvement in early reporting on bills raising significant human rights issues and suggest that the new working practices have been successful. This can only benefit Parliament in fulfilling its central role under the scheme of the HRA 1998.

The work of the JCHR: widely acclaimed…

The work of the JCHR has been widely acclaimed, and its legislative scrutiny work ‘recognised by the Council of Europe to be one of the examples of best practice on this particular aspect of national implementation throughout the Council of Europe’.\textsuperscript{105}

The impact on Parliament as the guardian of human rights values

The JCHR has been described as one of the ‘new pillars of the constitution’,\textsuperscript{106} along with the House of Lords Constitution Committee and the Delegated Powers and Regulatory Reform Committee. Hazell argues that the work of these committees has enhanced Parliament’s role as the guardian of legal values within the constitution, a view which is widely held. According to Hunt the work of the JCHR has sought to implement the ‘culture of justification’ required by the HRA 1998 by ‘enhancing the

\textsuperscript{102} ibid
\textsuperscript{103} JCHR, \textit{Work of the Committee in 2008-09} (n 38)
\textsuperscript{104} ibid para 34
\textsuperscript{105} JCHR, \textit{Enhancing Parliament’s Role in Relation to Human Rights Judgments} (2009-10, HL 85, HC 455) para 18
\textsuperscript{106} Hazell, ‘Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?’ [2004] PL 495, 495
role of Parliament in protecting and promoting human rights’,\textsuperscript{107} and Harlow & Rawlings have also argued that the Committee ‘has emerged as central to the effectiveness of Parliament in maintaining human rights standards’.\textsuperscript{108}

These assessments provide grounds for optimism for the emergence of an enhanced role for Parliament in the protection of human rights. Recognition of such a role would seem to encourage an increased awareness among parliamentarians of the implications for rights of proposed legislation, and suggests that the JCHR has gone some way towards achieving the role for Parliament that was envisaged by the framers of the HRA 1998.

\textit{The impact on the Executive in its preparation of the section 19 statement}

The thorough scrutiny work of the JCHR has also affected the preparation of section 19 statements within the Executive. Careful examination of statements of compatibility and their respective bills ‘has given section 19 its potency’,\textsuperscript{109} and ‘provided an incentive for the executive to take pre-legislative review of compatibility seriously’.\textsuperscript{110} Hiebert elaborated: ‘The regularity of the [JCHR’s] reports and questions to ministers signal to departments the importance of conducting, in a significantly robust manner, their own audits for section 19 purposes in order not to be the subject of a subsequent JCHR inquiry’.\textsuperscript{111} This has been affirmed by Klug, whose interviews with a lawyer and policy officials at the Department for Constitutional Affairs:

confirmed that departmental legal advisers were likely, when considering human rights compatibility, to include the question “How would this run by the JCHR?”.

\begin{footnotes}
\item[108] Harlow & Rawlings, \textit{Law and Administration} (3\textsuperscript{rd} edn, CUP 2009) 154
\item[110] Leigh & Masterman, \textit{Making Rights Real: The Human Rights Act in its First Decade} (Hart Publishing 2008) 42
\end{footnotes}
obviously the more significant factor when giving advice on compatibility, but that can be a “long way off” whilst JCHR scrutiny “is more immediate”.

Again, these conclusions seem to show that the HRA 1998 has worked as intended, making the protection of human rights a collaborative exercise in which a dialogue between the branches of government would emerge.

The impact on debate and scrutiny in Parliament

The impact of the Committee’s work on debate and legislative scrutiny within Parliament is perhaps less certain. It would certainly seem that the JCHR has helped raise the profile of Convention rights within the legislative process. A former legal advisor to the Committee argued that the ‘very existence of the Committee and its activities appears to have had an effect on the normative weight of Convention rights in the legislative process’. This has sometimes manifested itself in the form of amendments to bills. For example, the Committee noted in 2005 that ‘In many cases we have been successful in causing the Government to bring forward specific amendments to legislation, or to accept amendments moved by others, to take account of human rights considerations’.

Such success may be enhanced in future through further use of a practice developed by the Committee since 2007, according to which it:

suggest[s] amendments to bills designed to give effect to specific recommendations, dealing with human rights compatibility problems or omissions from bills [which was seen as] a useful way of pressing for a Government response to a recommendation about human rights compatibility in a scrutiny report.

During 2007 ‘Members tabled and spoke to amendments in both Houses which aimed to give effect to the Committee’s recommendations, in particular on the Mental Health, UK Borders and Corporate Manslaughter and Corporate Homicide Bills’.

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112 Klug, ‘Report on the working practices of the JCHR’, Appendix 1 to JCHR, The Committee’s Future Working Practices (n 77) para 8,4
114 JCHR, The Work of the Committee in the 2001-2005 Parliament (n 58) para 132
115 JCHR, The Work of the Committee in 2007 & The State of Human Rights in the UK (n 93) para 42
116 ibid para 96
the Government response to this development was not encouraging, subsequent annual reports were positive about the impact of such amendments. The Committee believed that this practice had ‘raised [its] profile in both Houses, raised the profile of human rights issues (…) and been effective in contributing to changes to legislation’.118

During the 2007-08 session the Committee proposed amendments in respect of six Government bills, covering 27 separate issues. These proposals had some impact in respect of 14 of those issues, for example through Government agreements to consider the issues further, or through Government amendments meeting the Committee’s concerns.119 This work continued in the 2008-09 session, when the Committee proposed amendments to nine Government bills covering 29 different issues. Again, some positive outcome was achieved in respect of 14 of those issues.120 Although no annual reports are available covering the 2009-10 and 2010-12 sessions, the current legal advisor to the Committee has stated that during that period:

amendments recommended by the Committee were debated on the floor of one or other House in relation to a number of Bills, e.g. the Child Poverty Bill, Digital Economy Bill, the Equality Bill, the Crime and Security Bill, the Children, Schools and Families Bill and the Constitutional Reform and Governance Bill.121

If this work continues, Hunt may be proved right in his suggestion that this practice has been the most important development in the Committee’s work.122 The ability of the Committee to achieve real changes to legislation which improve human rights compatibility will significantly enhance Parliament’s role in protecting human rights.

Beyond this development, the Committee’s impact on Parliament’s legislative work is less certain. An early article identified a number of ways in which the JCHR might affect Parliament’s work.123 First, Committee reports could form the basis for proposed amendments to bills. Even if such amendments were not accepted, a Minister might consent to creating administrative guidance to address the Committee’s

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118 JCHR, The Work of the Committee in 2007-08 (n 100) para 52
119 ibid Annex 3
120 JCHR, Work of the Committee in 2008-09 (n 38) Annex 3
121 Hunt, ‘The Impact of the Human Rights Act on the Legislature’ (n 107) FN 14
122 Hunt, ‘Scrutinising Legislation for Human Rights Compatibility’ (Lecture at IALS, 8 June 2009)
123 Lester (n 109) 438-44
concerns. Secondly, the Opposition might use Committee reports in support of their opposition to a measure, or to inform debate. Thirdly, concerns raised by the Chair to a Minister could form the basis for Government amendments during the bill’s passage, even where time pressures meant that the Committee was unable to produce a report prior to debates on a bill. Finally, questions put to Ministers during oral evidence sessions could produce concessions from Ministers which would later be incorporated into the bill.

Recent research has identified the instances in which parliamentarians have made ‘substantive references to JCHR reports’ during parliamentary proceedings. “Substantive references” for the purposes of the research were defined as those meeting one or more of the following criteria:

1. specific reference to the content of a JCHR report
2. reference to specific views or positions of the JCHR on particular issues, including members of the committee speaking explicitly or implicitly on behalf of the JCHR
3. commendation of a JCHR report
4. discussion of particular influence of JCHR on an issue
5. discussion of oral evidence given to the JCHR or written evidence gathered by the JCHR
6. reference to the JCHR’s conclusion that a particular bill is or is not compatible with human rights, as well as references to the JCHR’s silence on a bill to support an inference that the JCHR considers the bill to be compatible with human rights
7. discussion of amendments moved by or directly influenced by the JCHR or JCHR members, substantive Government responses to JCHR proposals including discussion of action taken or that will be taken and promises to scrutinise a bill in the light of JCHR analysis.

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124 Lester gave the example of the Criminal Justice and Police HC Bill (2000-01) [31]; ibid 438-39
125 This was said to have occurred in relation to the Police Reform HL Bill (2001-02) 48; ibid 442
126 The example given is the Employment HC Bill (2001-02) [44]; ibid 442
127 This occurred in respect of the Anti-terrorism, Crime and Security HC Bill (2001-02) [49], where David Blunkett accepted that there should be a requirement of reasonable grounds for a belief that an individual was suspected of international terrorism for the purposes of Part 4 of the bill: ibid 444
128 Hunt, Hooper & Yowell (n 31) 19
129 ibid 20-21
The research found that there had been 1029 substantive references to JCHR reports in the parliamentary sessions 2000-01 to 2009-10 inclusive. The vast majority of those references were made during the 2005-10 Parliament: of the 1029 references, 1006 were made during that period. The authors highlighted a number of possible reasons for this significant increase, including the higher number of reports produced by the JCHR during the 2005-10 Parliament, the change in the Committee’s working practices, and the regularity of debate about counter-terrorism measures within Parliament.

The authors concluded that the greatest proportion of JCHR references were made in relation to the legislative scrutiny work of Parliament: ‘About 60% of substantive references (...) involve legislative scrutiny of various kinds, including proposing (i) amendments to bills or existing law, (ii) the rejection of provisions in bills (in the absence of revision), and, occasionally, (iii) the repeal of existing law’. However, although most JCHR references were used in this way, the nature of those references was variable and the authors concluded that ‘The extent to which JCHR Reports are referred to in (...) debates ranges widely from brief, general references to extensive, detailed discussion of proposed amendments and the reasons for those amendments’.

Nevertheless, the research suggests that arguments made in Parliament on the basis of JCHR reports are taken very seriously by the Government. Government responses to issues raised by the JCHR accounted for 15% of all references identified in the research. The authors identified 16 JCHR references in respect of which ‘the Government offered amendments to a bill or agreed to do so, (...) based on recommendations in JCHR reports’. There were also ‘at least 7 instances in which the references show that the Government issued guidance on the basis of recommendation [sic] in JCHR reports (or agreed to do so) to administrative and law enforcement officials’. Such outcomes are extremely positive. They suggest that the Government regularly feels compelled to meet arguments based on JCHR reports with serious

130 ibid 19
131 ibid
132 ibid 22
133 ibid 30
134 ibid 34
135 ibid 42
136 ibid 43
137 ibid 44
responses that may result in changes to legislation or to administrative practices, and that Parliament is beginning to hold the Government to account on these issues. These developments suggest that the scheme envisaged by the HRA 1998, in which all branches of government have roles to play in protecting human rights in the United Kingdom, is in some respects functioning well.

This positive view is supported by a number of commentators. Feldman for example stated that the Committee’s reports are ‘widely read within Parliament, and have helped to inform debate on legislation and a range of other matters’, and Kavanagh noted that it was ‘widely accepted that the scrutiny work of the Joint Committee (...) improves parliamentary scrutiny to secure better compliance with Convention rights’. However, others have painted a less positive picture. Leigh and Masterman have argued that the ‘House of Commons has shown relatively little interest in rising above party tribal affiliations to use the independent assessments provided to it by the Joint Committee’.

Diverging assessments of the Committee’s impact can be seen in relation to its scrutiny of counter-terrorism legislation. A number of authors argue that the Committee ‘has had an important influence (...) on controversial and human rights sensitive pieces of legislation such as the Anti-terrorism, Crime & Security Act 2001 and the Terrorism Act 2006’. Tomkins has argued that in respect of all major counter-terrorism legislation since the events of 11 September 2001 ‘the government has not found it straightforward to proceed always as it would have wished. [Although all were enacted] all have been subject to serious and often probing scrutiny in Parliament, and all have been passed only subject to amendments’, largely as a result of the work of the JCHR. Hiebert has also argued that the passage of the 2001 Act was used by the Committee to ‘assert a role as “parliamentary guardians” of the HRA’.

138 Feldman, ‘Can and Should Parliament Protect Human Rights?’ (n 113) 643
139 Kavanagh, Constitutional Review under the UK Human Rights Act (CUP 2009) 13
140 Leigh & Masterman (n 110) 48
144 Hiebert, ‘Parliamentary Review of Terrorism Measures’ (2005) 68 MLR 676, 677
If it is true that the JCHR carried out extensive and close scrutiny of these Acts resulting in some amendments,\textsuperscript{145} it is far from clear that this work prevented the Government from achieving its objectives. Indeed, in spite of significant and widespread criticism regarding the notorious Part 4 of the 2001 Act,\textsuperscript{146} ‘what finally compelled the government to reassess its legislation was the Law Lords’ ruling in December 2004’.\textsuperscript{147} This suggests that however trenchant may be the criticisms made by Parliament and the JCHR, governments will only make significant changes to policy once the courts have issued a final ruling that legislation is incompatible with Convention rights under section 4 of the HRA 1998: ‘Parliament is unlikely to divert the government from its destination, though it may succeed in placing obstacles in the way that make the journey longer and more difficult’.\textsuperscript{148} If this is the case, it would seem that whatever good work may be done by the JCHR, Parliament must become more robust if it is to play a full role in the protection of human rights under the scheme of the HRA 1998 and prevent the enactment of legislation which violates Convention rights.

In light of this, it may be that the more circumspect conclusions regarding the Committee’s impact on legislation are correct, for now at least. The JCHR has certainly had some impact, although the extent of this is not certain. Ewing has argued that the JCHR’s work has meant that ‘human rights scrutiny is now relatively integral, relatively informal and relatively inconclusive’.\textsuperscript{149} It can be argued that this uncertainty may in part be caused by some ongoing problems which continue to affect the Committee’s work.

\textsuperscript{145} n 127
\textsuperscript{146} Allowing for the indefinite detention without charge of foreign national terrorist suspects who could not be deported as a result of the UK’s obligations under article 3 ECHR
\textsuperscript{147} Hiebert, ‘Parliamentary Review of Terrorism Measures’ (n 144) 677, referring to \textit{A v Secretary of State for the Home Department} [2004] UKHL 56, [2005] 2 AC 68
…But some problems remain

At a general level one factor which may affect the impact of the Committee’s work is that it is only one of a number of ‘non-departmental select committees, all of which are formally charged with scrutinising legislation of one form or another’. These committees include the Lords European Union Select Committee, the Joint Committee on Statutory Instruments and the Lords Constitution Committee, all of which are highly regarded. Scrutiny by these committees is in addition to that carried out by public bill committees on individual bills. The JCHR is therefore only one voice among the many which contribute to Parliament’s legislative scrutiny, and as such may not always succeed in having its voice heard.

More specifically, the timing and nature of the JCHR’s reports may also inhibit its impact. This issue has been discussed in more detail above, but it is possible more generally to argue that regardless of the specific point in the legislative process at which the JCHR reports, the government is unlikely to be willing to change its settled policy contained in proposed legislation: ‘once a Bill has reached the stage of a section 19 statement the government is unlikely to be persuaded by human rights arguments to amend it unless there is a combination of factors producing overwhelming parliamentary opposition’. Quite simply, the Committee’s ‘opinion on compatibility appears too late in the process to be effective’. It may be that even when the JCHR reports early in the legislative process the detailed, legal nature of its reports can undermine their effectiveness. Hiebert has argued that these reports ‘draw upon legalistic analysis better suited to an audience of constitutional legal scholars or judges than to members of Parliament. [This] risks seriously overloading elected members who have extremely hectic schedules and already overworked staff’.

One of the main issues affecting the Committee’s work is the willingness of government to provide information to it. The Committee has long recognised the need for the government to provide reasons for its conclusions on a bill’s compatibility if it is to conduct its own assessment thoroughly. Often these reasons are elicited through

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150 Klug, ‘Report on the Working Practices of the JCHR’ (n 112) para 5.6
151 A list of these committees is at Appendix 4 to the Klug Report: ibid 102-08
152 p 168-70
153 Leigh & Masterman (n 110) 39
155 ibid 41
correspondence with Ministers.\textsuperscript{156} However, the JCHR has frequently and persistently called for more information to be made available to it on a more regular and consistent basis. It has had some success in ensuring that Government includes a section on human rights compatibility in the Explanatory Notes to bills. Although the ‘quality of the analysis of human rights compatibility issues in the explanatory notes to bills has improved’,\textsuperscript{157} there are continuing problems, ‘particularly common’ among which is for ‘explanatory notes to assert that a provision complies with the ECHR without giving any justification for that point of view’.\textsuperscript{158}

To counteract this situation the Committee has consistently called for a Human Rights Memorandum to accompany every bill, ‘devoted solely to an assessment of the human rights compatibility of a bill, without divulging legal advice’.\textsuperscript{159} At ‘the very minimum’ these Human Rights Memorandums should discuss: the Convention rights engaged, and by which provisions; the reasons why it is thought that no incompatibility arose; an assessment of why any interference with a qualified right could be justified; and any evidence taken into account by the department.\textsuperscript{160} The then Government opposed any such development, arguing that no ‘further purpose could be served by creating a separate human rights memorandum. The information that would be included would be substantially the same as that included in the Explanatory Notes at present but under a different title’.\textsuperscript{161} It further argued: ‘Given that human rights compatibility is not merely a “tick box” exercise undertaken by the provision of one document, but is integral to the whole policy-making process, it is practically impossible to provide one continuous account covering every issue that the Committee might raise’.\textsuperscript{162} Interviews carried out by Hiebert revealed that the Government’s reluctance was based on three main factors: ‘workload demands’, ‘the failure of some departments to consider human rights considerations early enough in the policy process’, and ‘concerns that providing more detailed explanations about compatibility could be used to support litigation against the Crown’.\textsuperscript{163}

\textsuperscript{156} e.g. JCHR, \textit{Third Special Report – Scrutiny of Bills} (2000-01, HL 73, HC 448)
\textsuperscript{157} JCHR, \textit{Work of the Committee in 2008-09} (n 38) para 38
\textsuperscript{158} ibid. And see ch 4 for a more detailed discussion of the varying quality of Explanatory Notes
\textsuperscript{159} JCHR, \textit{The Work of the Committee in the 2001-2005 Parliament} (n 58) para 77
\textsuperscript{160} ibid
\textsuperscript{161} JCHR, \textit{Government’s Response} (n 117) 8
\textsuperscript{162} ibid
\textsuperscript{163} Hiebert, ‘Governing under the Human Rights Act’ (n 154) FN 65
Despite this opposition, the Government began to provide more information to the JCHR. The Committee welcomed a ‘new development’ of Ministers writing to it after a bill’s introduction to ‘set out in more detail than in explanatory notes their view of the human rights issues it raises’. 164 This practice continued during the 2008-09 session but was ‘not universal’. 165 The Committee was also ‘surprised and pleased’ 166 to have received during that session human rights memorandums on the Marine and Coastal Access Bill 167 and the Equality Bill. 168 This is an extremely positive development, and has been carried on by the Coalition Government such that the JCHR has stated that the provision of a human rights memorandum is now ‘becoming a widespread practice’. 169 In evidence to the JCHR, Kenneth Clarke revealed that, although unwilling to commit to the production of a human rights memorandum for all bills, the Government’s position was that ‘when significant human rights issues are raised, departments should consider them and I would expect them to produce a suitable memorandum’. 170 If this practice continues it should facilitate more efficient, targeted scrutiny by the JCHR which can only enhance Parliament’s ability to assess proposed legislation for compatibility with Convention rights.

Whatever advances may be made, the ultimate factor limiting the ability of the JCHR to ensure that legislation is compatible with Convention rights is that ‘it cannot stop Parliament violating rights. It can only warn and seek to influence each House and its views will not always dictate the pattern of voting’. 171 Parliament remains sovereign under the HRA 1998. 172 As such, it cannot be compelled to legislate in a certain way. In such a system, the JCHR may only seek to maximise its effectiveness and impact, and hope that its advice is heeded.

164 JCHR, The Work of the Committee in 2007-08 (n 100) para 45
165 JCHR, Work of the Committee in 2008-09 (n 38) para 38
166 ibid para 41
167 Marine and Coastal Access HL Bill (2008-09) 1
168 Equality HC Bill (2008-09) [85]
171 Feldman, ‘Can and Should Parliament Protect Human Rights?’ (n 113) 674
172 Discussed at p 160-61
Perhaps understandably most discussion of Parliament’s role in scrutinising legislation for human rights compatibility has concentrated on the work of the JCHR, as through developing and maintaining an emphasis on legislative scrutiny the Committee ‘discharges some of the wider duties of Parliament in relation to human rights scrutiny’. However, the intention behind section 19 and the HRA 1998 was to encourage Parliament as a whole to play a significant role in protecting and determining human rights in the United Kingdom. The next section of this chapter will argue that this was an unrealistic goal, given the considerable obstacles imposed by the current system of parliamentary government at Westminster.

3. Parliament – A Qualified Failure

Although a statement of compatibility must be made before the second reading of a bill, section 19 itself does not require and has not resulted in any formal, regular or systematic scrutiny or debate on the human rights implications of bills within the chambers of either House of Parliament. Section 19 has had some effect on Parliament, but its impact has been limited.

The good: the advent of a human rights culture

There is no doubt that some instances of good practice have emerged following the enactment of the HRA 1998. Many authors have described a growing human rights culture within Parliament, which can be assisted by the provision of information by NGOs.

Human rights debate in Parliament

Although section 19 does not require debate on the human rights issues raised by bills there is evidence that since the enactment of the HRA 1998 there has been more routine human rights scrutiny within Parliament. Section 19 has contributed to this: it has ‘concentrated the minds of both ministers and parliamentarians on Convention

173 Ewing, ‘The Parliamentary Protection of Human Rights’ (n 149) 258
This has been facilitated by the work of the JCHR, which has ‘undoubtedly enhanced awareness of the HRA within Parliament’. These conclusions seem to be supported by evidence showing that some parliamentarians engage with the concept of proportionality in the course of scrutiny and debates, a concept that is central to a proper understanding of human rights standards. Hunt, Hooper & Yowell recorded ‘numerous explicit mentions of proportionality, as well as to “necessity” and “balancing” as components of the proportionality enquiry’. There are in addition:

many implicit uses of proportionality-style reasoning, for example when Members probe Government ministers about alternatives to proposed measures that would have a lesser burden on the right in question, or when members engage in evaluative argument that involves weighing the value of legislative proposals against their effects on rights-protected interests.

The combined effect of section 19 and the work of the JCHR can be said to have fulfilled the role that was envisaged for Parliament under the HRA 1998 to some extent, as it has ‘stimulate[d] pre-enactment scrutiny of legislation within Parliament, rather than relying purely on the post-enactment scrutiny provided by the courts’. Kavanagh cites section 55 of the Nationality, Immigration and Asylum Act 2002 as an example of ‘provisions that have been included in Bills specifically to make them comply with the Convention’. Convention rights have also featured in debates on counter-terrorism legislation, and on the Civil Contingencies Act 2004.

These conclusions have been broadly confirmed by Hunt, whose ‘impressionistic and thoroughly unscientific’ view is that:

Parliament’s role in relation to human rights has increased not decreased since the passage of the Human Rights Act. The number of substantive debates on human rights issues has increased. Most significant human rights issues of the

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175 Klug & Starmer, ‘Standing Back from the HRA: How Effective is it Five Years On?’ [2005] PL 716, 718
176 Hunt, Hooper & Yowell (n 31) 40
177 ibid
178 Kavanagh (n 139) 359
179 ibid. This allowed the Secretary of State to withhold support from asylum seekers who did not make their claims for asylum as soon as reasonably practicable after entry into the UK, as long as the withholding of support did not breach their Convention rights
180 Tomkins, ‘Parliament, Human Rights and Counter-Terrorism’ (n 143)
181 Lester, Pannick & Herberg, Human Rights Law and Practice (3rd edn, Butterworths 2009) para 1.51
182 Hunt, ‘The Impact of the Human Rights Act on the Legislature’ (n 107) 607
day are now likely to be recognised as such and debated in some form or other in Parliament.\textsuperscript{183}

This increased role for Parliament has been facilitated by the provision of information by NGOs.

\textit{The role of NGOs: source of additional information}

NGOs play an important role in providing information to parliamentarians which may assist their legislative scrutiny work. This information might include ‘expert legal assessment of the incompatibility of the provision with the Human Rights Act’,\textsuperscript{184} or might be based on ‘expert and factual knowledge of the way that the provisions would actually take effect, or the underlying public interest questions involved, which will be crucial to an assessment of the necessity and proportionality of a particular proposal’.\textsuperscript{185} Such information is invaluable, particularly as most members of Parliament are not lawyers and so may not have the skills required to understand the legal implications of proposed legislation.\textsuperscript{186} The influence of NGOs is therefore ‘significant’\textsuperscript{187} and ‘the more complex the subject (…) the more valuable this input is’.\textsuperscript{188}

Liberty for example produces policy papers,\textsuperscript{189} described as ‘expert briefings for different stages of parliamentary debate on Bills that contain proposals which will impact human rights and civil liberties’,\textsuperscript{190} more detailed reports on specific human rights issues, and maintains a “Bill tracker” tool, which follows a bill’s progress through Parliament and includes relevant briefings, analysis and press releases.\textsuperscript{191} Liberty sends

\textsuperscript{183} ibid
\textsuperscript{184} Cooper (n 25) 39
\textsuperscript{185} ibid 41
\textsuperscript{186} Chakrabarti, ‘How a Lobbying Group can Affect Legislation’ (Lecture to IALS, 11 May 2009)
\textsuperscript{187} Brazier and others, \textit{Law in the Making: Influence and Change in the Legislative Process} (Hansard Society 2008) 190
\textsuperscript{188} ibid 191
\textsuperscript{190} ibid
\textsuperscript{191} In 2011 this was used to track the Public Bodies Bill, the Terrorism Prevention and Investigation Measures Bill, the Legal Aid, Sentencing and Punishment of Offenders Bill, the Protection of Freedoms Bill and the Police Reform and Social Responsibility Bill: <http://www.liberty-human-rights.org.uk/policy/bill-tracker/past-bills/index.php> accessed 27 May 2012
its briefings to all parliamentarians as bills progress,\textsuperscript{192} and undertakes more targeted lobbying with individuals who are known to be sympathetic to Liberty’s arguments. As such, its work is often facilitated by close working relationships with some parliamentarians and its ‘policy team regularly meets with frontbench and backbench MPs and Peers to brief them on individual human rights issues, and to ensure that they keep basic rights and freedoms in mind when considering laws and policies’.\textsuperscript{193} Liberty seeks to provide options for practical changes to legislation, suggesting various amendments which would either completely reform a bill to fully meet Liberty’s concerns or reach a compromise which would remove some of the more serious human rights concerns from a bill.\textsuperscript{194} Similar work is carried out by JUSTICE,\textsuperscript{195} whose Strategic Plan for 2010-2015 aims to ensure ‘that Parliament has adequate resources to assist in a human rights approach to legislation and, in particular, that the Parliamentary Joint Committee on Human Rights works as well as it can’.\textsuperscript{196}

In spite of the benefits that this type of information can bring a number of factors which may inhibit the participation of many organisations. Major problems are the speed at which legislation passes through Parliament and the complexity of the issues often contained in bills.\textsuperscript{197} Insufficient time for thorough analysis of complex issues will diminish the opportunities for NGOs to ensure that their points are understood and advocated by parliamentarians. These problems are a small part of the wider obstacles faced by those who would see Parliament play a more prominent role in the protection of human rights in the United Kingdom.

\textbf{The bad: considerable institutional obstacles}

Any benefits that the HRA 1998 may have brought in terms of encouraging Parliament to engage with human rights issues when legislating are fighting against a considerable tide of institutional obstacles imposed by the Westminster system. These obstacles suggest that it may be extremely difficult for Parliament to play a full part in

\textsuperscript{192} Interview with Rachel Robinson, Policy Officer, Liberty (London, 4 July 2011)
\textsuperscript{194} Interview with Rachel Robinson (n 192)
\textsuperscript{195} See also the work of the Equality and Human Rights Commission: <http://www.equalityhumanrights.com/> accessed 27 May 2012
\textsuperscript{197} Cooper (n 25) 74
protecting human rights in the United Kingdom, as envisaged by section 19 of the HRA 1998.

**Government uses of section 19: a mechanism for maintaining opacity**

The fact that section 19 does not require Ministers routinely to provide detailed reasons for conclusions on compatibility has led some commentators to believe that rather than acting as a mechanism for achieving transparency in Government policy making, section 19 can instead be used to maintain opacity.

The first way in which this occurs is in relation to legislation which creates new broad powers for public authorities. Section 6 of the HRA 1998 requires public authorities to act in a way which is compatible with Convention rights. Governments seemingly rely on this duty in order to state that a bill is compatible with Convention rights, assuming that ‘all those public authorities that have to implement the provision will act in compliance with the Convention if they have the power to do so’. This is problematic as it ‘ousts Parliament’s role in ensuring that legislation complies with the Act. Instead of Parliament having a duty to ensure that legislation complies with the Convention, in reality the duty is left with those who have to implement the legislation and to the courts if they get it wrong’. Parliament is therefore bypassed on the basis that responsibility for ensuring compatibility lies outside its legislative processes, and with the relevant public authority. Wadham argues that ‘for Parliament to accept such bland uninformative statements diminishes its authority’.

The second issue arises from the practice of enacting legislation drafted in broad terms, leaving the detail to be specified in subsequent secondary legislation. In this case, Parliament is asked to enact legislation without any certain knowledge of the shape of the final legislative scheme once all relevant secondary legislation has been enacted. In such circumstances it would seem impossible for Parliament to assess a bill’s compatibility with Convention rights. This problem was highlighted by Liberty in relation to the Children Act 2004, which provided for the creation of extensive

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198 The 1998 Act does not provide an exhaustive definition of the term ‘public authority’. The literature on this subject is vast. See e.g. Leigh & Masterman (n 110) 138-49
200 ibid
201 ibid
databases holding information on all children and young people: ‘It is likely to be presumptuous for the Secretary of State to make a declaration [sic] under section 19(1)(a) (...) because, by leaving the detail to secondary regulations, it is not yet apparent the extent to which the rights will be engaged’. 202

The making of a statement of compatibility in both cases undermines the value of section 19 and the ability of Parliament properly to scrutinise legislation against human rights standards. In making statements in such cases, the Government effectively removes from Parliament responsibility for ensuring the human rights compatibility of the final legislative scheme. This responsibility is transferred either to the public body asked to implement the legislation or to the Executive drafting the relevant secondary legislation. Both of these events take place outside the normal legislative processes of Parliament, and therefore diminish Parliament’s capacity to oversee Convention compatibility. This is further hindered by the next issue facing Parliament: a lack of understanding of human rights issues amongst its members.

Lack of expertise: encouraging deference to Government assessments of compatibility

A major issue affecting Parliament’s ability to scrutinise legislation against human right standards is the level of expertise regarding and understanding of those issues amongst parliamentarians. Parliament cannot perform this scrutiny if its own members do not understand what these standards mean, or how they are assessed. Early in the life of the HRA 1998, Bynoe and Spencer noted that MPs in particular often have little expertise regarding international human rights, and ‘no means of obtaining clear legal advice, apart from that supplied to them by lobbyists and pressure groups’. 203 This point was reiterated by Feldman, who argued that ‘there are systemic limits to the continuity and comprehensiveness of the advice which Parliament receives, and thus to its capacity to use human rights consistently’ 204 as standards for scrutinising government policy.

This problem is especially relevant in relation to Convention rights. These are legal standards carrying with them autonomous meanings that have been elaborated by a

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203 Bynoe & Spencer (n 47) 49
204 Feldman, ‘Can and Should Parliament Protect Human Rights?’ (n 113) 648
now extensive jurisprudence. Further, the application of these rights may be uncertain – concepts such as proportionality often do not provide for immediately apparent solutions, but require careful balancing of competing factors. These rights are enforced internationally by the ECtHR and domestically by United Kingdom courts with significant powers in respect of incompatible primary legislation. Parliament’s legislative decisions may therefore be questioned in a public and publicity-attracting forum. In these circumstances it may be understandable that many parliamentarians, especially those with no legal training, would experience difficulty in understanding and applying Convention rights. However, if this is the case, Parliament’s ability to act as a guardian and primary protector of those rights is undermined.

Further, although the research carried out by Hunt, Hooper & Yowell demonstrated a marked increase in references to JCHR reports during the 2005-2010 Parliament, the majority of those references were made by a minority of tenacious parliamentarians: ‘241 members of Parliament made at least one substantive reference, although two thirds of substantive references were made by 43 members who made at least 5 such references’. Of these 43 members, 7 were classed as ‘high-frequency users’ of JCHR reports, making 30 or more references, and 36 classed as ‘medium-frequency users’, making between 5 and 29 references to JCHR reports. Taken together, ‘high-frequency and medium-frequency users accounted for 669 of the 1006 total references to JCHR reports, or 67%’. This can be seen in a positive light, as it does provide evidence of persistent, more regular references to human rights in Parliament. However, it also shows that references to JCHR reports are regularly made by only a small number of parliamentarians: 43 members is a fraction of total membership of both Houses of Parliament.

If there is limited understanding of the HRA 1998 and its requirements within Parliament, there is likely to be an increased risk that parliamentarians will accept the Government’s assessment of the compatibility of a bill with Convention rights. If this does occur, Parliament is unlikely thoroughly to test that compatibility, thus granting

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206 HRA 1998, ss 3 & 4
207 p 178-79
208 Hunt, Hooper & Yowell (n 31) 24
209 ibid
210 ibid
disproportionate influence to the Executive in determining the meaning and scope of human rights in the United Kingdom, and reducing its own role under the HRA 1998.

Party politics: undermining objective scrutiny

This lack of understanding may bolster the next factor affecting Parliament’s ability to scrutinise legislation against human rights standards: the impact of party politics. Oliver has written:

Members of the House of Commons will find it difficult, when undertaking the scrutiny of legislation for compatibility with Convention rights under the Human Rights Act, to set aside their party political allegiances and reach objective scrutiny as to whether proposals breach Convention rights and, if they do, whether the breach is necessary in a democratic society, etc.  

This is significant. Human rights issues are frequently matters of great political controversy, and almost always involve political decisions. In the Westminster system, most issues are seen as part of a wider political stand according to which politicians will be expected to vote. A vivid example of this was given by AC Grayling at the Convention on Modern Liberty. He said:

Back in 2006, when the Identity Card Bill [sic.] was being discussed in the House of Commons, I wrote a pamphlet on behalf of Liberty, which was sent to all MPs, and I received scores of replies from Labour MPs, all saying that they agreed with the argument against having an ID card scheme and a National Identity Register, but saying that they were going to be whipped into voting for it and that they couldn’t do otherwise.

This dominance of party politics in the House of Commons is particularly troubling when viewed against a background of widespread political hostility to human rights in general and the HRA 1998 in particular. This was acknowledged by Lord Falconer who stated:

the Commons is an elected Chamber. The human rights issues are not of interest to the public save to the extent that human rights tends to be unpopular. The

212 Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ (n 174) 327
213 For details of this event, see <http://www.modernliberty.net/> accessed 27 May 2012
215 See discussions at p 34-36, 117-18 & 239-41
politics of human rights in the country is reflected in the Commons, which is as it should be in one sense – the Commons should be good at reflecting the views of the country. And they are as a group, the Commons, unsympathetic, not understanding, and keen to reduce the role of human rights generally.\footnote{Interview with Lord Falconer (London, 27 April 2011)}

If a politician is already unsure about the meaning and significance of any relevant Convention rights, against such a background he or she may be more likely to simply accept the party line, and far less likely to act with any degree of objectivity. Such an approach necessarily undermines the ability of Parliament, as distinct from the parties whose members populate it, to scrutinise legislation effectively. It also undermines the ability of Parliament fully to engage with the human rights standards that its own legislation encouraged it to protect.

Features of the legislative process: institutional obstacles to effective human rights scrutiny

A number of features of the legislative process at Westminster constitute significant obstacles to the scrutiny of legislation against human rights standards. The first of these is that legislative scrutiny is a ‘part-time activity for parliamentarians’.\footnote{Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ (n 174) 324} This is especially true of MPs, who:

face so many demands on their time that the time-consuming, and often unrewarding, task of scrutiny can sometimes become of secondary importance. Even the minority of MPs who spend a majority of their time on parliamentary work can neither take part in most legislative debates nor grasp the detail of most of the bills that pass through the Commons during a parliamentary debate.\footnote{Brazier and others (n 187) 193}

These competing demands led a ‘number of parliamentarians’ to confess to the authors of \textit{Law in the Making} that ‘the content of anywhere from a quarter to a half of all the legislation they voted on was effectively a mystery to them’.\footnote{i bid 194} This is extremely worrying. If it is the case that MPs often are unaware of the content of the legislation on which they are voting then they cannot be expected to understand the human rights implications of it, themselves often involving complex legal and political issues.
The lack of time available for MPs adequately to scrutinise legislation is heightened by the increasing length and volume of legislation introduced into Parliament. Long and complex legislation ‘curtails debate’ and ‘simply defeats Parliament’s resources for scrutiny’. Further ‘there has just been so much legislation, particularly relating to crime and criminal justice, that it risks overwhelming both Parliamentarians and practitioners’. To illustrate this both Liberty and JUSTICE highlighted the Criminal Justice Act 2003, which contained 339 sections and 38 schedules. When faced with such legislation, it is difficult to see how time-pressed parliamentarians with no legal background can begin to carry out adequate scrutiny of a bill’s contents, let alone its compatibility with Convention rights.

The increasing length, volume and complexity of legislation introduced into Parliament is exacerbated by ‘the predominant culture within government [which] inspires the creation of more and more legislation’. Feldman attributes this to the need felt by politicians to be seen to be taking action in response to a problem: ‘In this atmosphere, human rights appear not as principled guides to action but as blocks on action, and, moreover, non-democratic blocks’. Such attitudes are unlikely to be conducive to objective, thorough scrutiny of legislation in light of Convention rights.

This issue is compounded by Government control of programming within the House of Commons. The highly controlled timetabling of bills and use of measures to contain debate such as the so-called “guillotine motion”, mean that Parliament ‘is often, in practice, a weak mechanism for detailed scrutiny of proposals put to it by the Executive’. In 2007 Hazell wrote: ‘Timetabling has become more ruthless, and almost every bill now has its programme motion, routinely pushed through by the Government’s majority’. This does not lend itself to detailed scrutiny of the human rights implications of bills which may be time consuming and potentially awkward for Governments. The JCHR acknowledged these problems in relation to the passage of the Prevention of Terrorism Bill during the 2004-05 session, in which it had to ‘consider

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220 Smith, The Future of the Rule of Law (JUSTICE 2007) 9
221 ibid 10
222 Liberty, ‘Human Rights Audit’ (n 202) and JUSTICE, ‘Annual Report 2005’
223 Brazier and others (n 187) 195
224 Feldman, ‘Can and Should Parliament Protect Human Rights?’ (n 113) 647
226 Cooper (n 25) 33-34
draft reports on complex legislation with little or no notice in the context of a bill passing through its parliamentary stages very swiftly and in a highly politicised environment’. 228

Government control over the legislative process can also be seen in the regular practice of introducing substantial and substantive amendments to bills at late stages in the legislative process. Feldman has argued that this practice affects ‘the extent to which Government can be persuaded to take account of human rights concerns about legislation’, 229 as many such amendments contain ‘essentially new policies’. 230 Feldman cited the Nationality, Immigration and Asylum HC Bill (2001-02) [119] as the ‘most egregious recent example’ of this practice, noting that human rights arguments were raised in Parliament despite the rushed timetable for the bill, but that the short time available ‘was a factor limiting the Government’s willingness to give careful thought to the criticisms of the new clauses’. 231 A further example was given by Chris Mullin, describing the passage of the lengthy Criminal Justice Act 2003:

Another afternoon on the Criminal Justice Bill. Today we nodded through Blunkett’s plans for ratcheting up life sentences and doubling (from 7 to 14 days) the length of time that terrorist suspects can be held without trial. Both of these measures have only appeared in the last ten days, so there has been no previous opportunity for discussion (apart from a little informal session that I and half a dozen members of the committee had with him last week). 232

The introduction of clauses containing substantial new policies at the late stages of a bill’s progress through Parliament undermines rather than facilitates scrutiny of the human rights implications of those clauses. 233

Taken together, these features of the legislative process at Westminster constitute considerable obstacles to the effective scrutiny of the human rights implications of bills. The fact that they are long-standing and that they work to facilitate the passage of Government bills suggest that it was inevitable that section 19 would fail to achieve its goal of encouraging the examination and proper consideration of human

228 JCHR, The Work of the Committee in the 2001-2005 Parliament (n 58) para 72
229 Feldman, ‘The Impact of Human Rights on the United Kingdom Legislative Process’ (n 15) 105
230 ibid 108
231 ibid 109
232 Mullin, A View from the Foothills: The Diaries of Chris Mullin (Profile 2009) 409
233 See ch 7 for a case study of such an occurrence in relation to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004
rights issues during the legislative process. These institutional obstacles are further enhanced by Government dominance in the House of Commons.

**Government dominance in the House of Commons: human rights scrutiny becomes optional**

The dominance of the Executive within the House of Commons is a long-recognised feature of the United Kingdom constitution.²³⁴ Such is the impact of this phenomenon that Oliver has argued that ‘Parliament’s centrality is declining (…) The House of Commons is dominated by the Executive, in whose hands real power and initiative lie.’²³⁵ This has a clear impact on Parliament’s ability to scrutinise legislation: ‘only rarely does a government lack direct control over the majority of the House of Commons and lesser, but still considerable, control over the majority of the House of Lords. As a consequence, Parliament can be very weak in applying appropriate scrutiny to government legislation’.²³⁶ In such circumstances, human rights scrutiny is therefore dependant on the Executive’s willingness to countenance and facilitate such scrutiny: ‘the ability of Parliament to protect human rights is only as good as the ability of Parliament to hold the executive to account generally’.²³⁷

The considerable control by the Executive over the procedures of the House of Commons and the voting patterns of its members mean that even if opposition parties are minded to raise human rights issues in relation to legislation their points are unlikely to result in change to the legislation in question. This is a significant issue in terms of Parliament’s ability to protect and promote human rights. The scrutiny of a bill’s impact on human rights standards deserves and requires objective assessment rather than acquiescent voting along party lines in accordance with the wishes of a Government with political reasons for seeing its legislation enacted unchanged. Put differently, the dominance of the Executive within Parliament means that rather than being a routine, objective exercise, the effect of human rights scrutiny of legislation is optional and

²³⁴ e.g. Hailsham, *The Dilemma of Democracy: Diagnosis and Prescriptions* (Collins 1978)
²³⁶ Smith, *The Future of the Rule of Law* (n 220) 8
²³⁷ Ewing, ‘The Parliamentary Protection of Human Rights’ (n 149) 266
dependant on the will of the Executive. This is not what was intended by the enactment of section 19 of the HRA 1998.

4. CONCLUSION - CONSIDERABLE INSTITUTIONAL OBSTACLES TO EFFECTIVE HUMAN RIGHTS SCRUTINY OF LEGISLATION IN PARLIAMENT

In the face of such considerable institutional obstacles, section 19 could not have succeeded in encouraging regular and thorough scrutiny of the human rights implications of legislation. Weir put this succinctly:

The root cause of the [Human Rights] Act’s failure is that it and other constitutional measures were simply added to existing structures of political power that left the dominance of the executive essentially unchanged. Further, the law may have changed, but our political and judicial culture did not. 238

This conclusion is reflected in the fact that for all their good intentions, section 19 and the HRA 1998 have not succeeded in preventing the passage of illiberal, and sometimes rights-violating legislation – a fact that has led Ewing to argue that ‘we live in a period of unparalleled restraint on our liberty’. 239 In support of this conclusion, Ewing referred to a number of restrictive measures enacted by Parliament since 2000, including the Terrorism Act 2000, which introduced ‘de facto powers of random stop and search’ and prohibited more organisations ‘than at any time in our history’, 240 and the Anti-terrorism, Crime & Security Act 2001, which meant that ‘since 2000, we (…) have more people detained than we had before, we have more violations of privacy by the state, (…) and we have more confiscation of the private property of individuals’. 241

It is significant that the legislation referred to by Ewing was enacted after the passage of the HRA 1998, and after section 19 had entered into force. Section 19 should have encouraged Parliament thoroughly to assess the human rights implications of these bills. Such scrutiny may have mitigated their deleterious effects. Unfortunately, these

241 Ewing, ‘The Futility of the Human Rights Act’ (n 239) 838. This article was written prior to the House of Lords judgment in A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68
Acts are not the only measures with harmful effects on human rights to have been enacted by Parliament since the passage of the HRA 1998. Liberty identified legislation enacted every year between 1999 and 2008 which significantly interfered with and may have violated Convention rights.\textsuperscript{242} The legislation so identified is as follows:

\textit{Table 5: Legislation enacted between 1999-2008 identified by Liberty as interfering with Convention rights}

<table>
<thead>
<tr>
<th>Year</th>
<th>Act of Parliament</th>
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<tbody>
<tr>
<td>1999</td>
<td>Immigration and Asylum Act 1999</td>
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<td>Care Standards Act 2000</td>
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<td>Criminal Justice and Court Services Act 2000</td>
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<td>Freedom of Information Act 2000</td>
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<td>Terrorism Act 2000</td>
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<td>Criminal Justice and Police Act 2001</td>
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<td>Social Security Fraud Act 2001</td>
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<td>2002</td>
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<td>Proceeds of Crime Act 2002</td>
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<td>2003</td>
<td>Sexual Offences Act 2003</td>
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<td>Anti-social Behaviour Act 2003</td>
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<td>Criminal Justice Act 2003</td>
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<td>2004</td>
<td>Asylum and Immigration (Treatment of Claimants etc) Act 2004</td>
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<td>Domestic Violence, Crime and Victims Act 2004</td>
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<td>Civil Contingencies Act 2004</td>
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<td>Prevention of Terrorism Act 2005</td>
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<td>Serious Organised Crime and Police Act 2005</td>
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<td>2006</td>
<td>Identity Cards Act 2006</td>
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<td>Terrorism Act 2006</td>
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<td></td>
<td>Immigration, Asylum and Nationality Act 2006</td>
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<td>Racial and Religious Hatred Act 2006</td>
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<td>2007</td>
<td>Corporate Manslaughter and Corporate Homicide Act 2007</td>
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<td>Serious Crime Act 2007</td>
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<td>UK Borders Act 2007</td>
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<td>2008</td>
<td>Counter-Terrorism Act 2008</td>
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<td></td>
<td>Criminal Justice and Immigration Act 2008</td>
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</table>

In its summaries of these 31 Acts, Liberty identified only a very small minority in which Parliament obtained amendments to ensure improved protection for Convention rights. The report cites the Terrorism Act 2006, during the passage of which the House

\textsuperscript{242} Liberty, ‘Human Rights Audit’ (n 202)
of Commons defeated the Government’s proposal for 90 days pre-charge detention, and the Racial and Religious Hatred Act 2006, in respect of which House of Commons amendments ensured that offences involving ‘stirring up hatred on religious grounds’ in section 1 were restricted to intentional acts and inserted a provision protecting freedom of expression.

This is a damaging record, suggesting that section 19 and the HRA 1998 have not had the impact that was hoped for at the time of the Act’s passage. Some progress has been made in improving parliamentary engagement with human rights standards, notably through the work of the JCHR. However, any such progress has been tempered by factors such as the delay in the creation of the JCHR, the timing of its reports, and its ability to obtain information on human rights reasoning from the Government. This progress must also be viewed against a background of serious institutional obstacles arising from the nature of the Westminster system. In the face of such difficulties it is disappointing, although perhaps unsurprising that Parliament has passed a series of laws which have adversely affected human rights in the United Kingdom. The next chapter will explore some of these issues in more detail, focusing on the enactment of and subsequent litigation arising from section 19 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004.

243 As enacted, the 2006 Act provided for a pre-charge detention period of 28 days: s 23. The Protection of Freedoms Act 2012, ss 57 & 58 will reduce this period to a maximum of 14 days

244 JUSTICE’s Annual Reports also highlight legislation with implications for human rights
CHAPTER 6 - SHAM MARRIAGES AND SHAMBOLIC LEGISLATING: THE ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC) ACT 2004, A CASE STUDY

As discussed in previous chapters, section 19 of the HRA 1998 was designed to affect and influence the development of legislative proposals by the Executive¹ and the scrutiny of legislation by Parliament.² It aims to make both Government and Parliament more aware of the human rights implications of legislation, thus encouraging the enactment of Convention compatible legislation. This approach has significant potential benefits: in helping to prevent the enactment of rights-violating legislation, litigation on such matters may be reduced. Section 19 therefore facilitates central roles for the democratically accountable arms of the state in the protection of human rights.³

Section 19 has undoubtedly enjoyed some success, including the fact that Convention rights must now be taken into account during the development of legislation⁴ and the work of the JCHR.⁵ Nevertheless, Parliament has enacted legislation which has been questionable in human rights terms⁶ and in a significant number of cases the domestic courts and the ECtHR have established the incompatibility of legislation passed after 1998.⁷ Such occurrences are evidence of the weaknesses of the system of statements of compatibility under the HRA 1998. After examining this evidence this chapter will discuss in detail the recent case of Baiai,⁸ in which a declaration of incompatibility was made in respect of section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. This illustrated many of the obstacles inhibiting the potential impact and purpose of section 19 and undermining Parliament’s role in the protection of human rights in the United Kingdom under the HRA 1998.

¹ ch 4
² ch 5
³ For a more detailed discussion see p 123-25 & 157-59
⁴ p 139-50
⁵ p 165-85
⁶ p 197-99
⁷ HRA 1998, s 19 entered into force on 24 November 1998. All legislation introduced and enacted since that date should therefore have been subject to compatibility testing and scrutiny
⁸ R (Baiai) v Secretary of State for the Home Department [2008] UKHL 53, [2009] 1 AC 287

If section 19 of the HRA 1998 operated as intended, the enactment of incompatible legislative provisions should be unusual. However, evidence from cases heard before domestic courts and the ECtHR suggests that section 19 has not always worked effectively, reflecting weaknesses in the system of statements of compatibility introduced by the HRA 1998.

Evidence from domestic court outcomes: declarations of incompatibility

Declarations of incompatibility may be issued where a court is satisfied that a provision of primary legislation is incompatible with Convention rights. As such, they provide a clear message to both Government and Parliament that the legislation in question does not meet the human rights standards protected by the HRA 1998.

The use of such declarations to measure the effectiveness of statements of compatibility in ensuring that human rights standards are considered throughout the legislative process is problematic for a number of reasons. First, the declaration of incompatibility is a discretionary remedy. This means that there may be circumstances in which, although recognising an incompatibility, the court is unwilling to make a formal declaration of that incompatibility. Such cases would fall outside statistics based on section 4 declarations.

Secondly, many legislative provisions raising compatibility issues may be remedied through use of section 3 of the HRA 1998. Logically prior to the declaration of incompatibility, this provision requires courts to interpret and give effect to legislation ‘in a way which is compatible with the Convention rights’, as far as this is possible. Judicial reliance on this interpretative power would necessarily reduce the numbers of declarations of incompatibility. In other

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9 HRA 1998, s 4(2)
10 e.g. R (Chester) v Secretary of State for Justice [2010] EWCA Civ 1439, [2011] 1 WLR 1436 in which the Court of Appeal refused to issue a declaration of incompatibility in respect of the Representation of the People Act 1983, s 3(1) where such a declaration had already been made in respect of that provision by a court in Scotland, and the UK Government had not yet taken measures to remedy the violation caused by that provision, as established in Hirst v United Kingdom (2006) 42 EHRR 41
11 For a detailed discussion of recent obiter dicta indicating a restrictive approach to the issuing of declarations of incompatibility see Buxton, ‘The Future of Declarations of Incompatibility’ [2010] PL 213
12 HRA 1998, s 3(1)
words, many incompatible legislative provisions will be remedied without recourse to section 4 of the HRA 1998.

In spite of these issues, cases in which courts have issued declarations of incompatibility have been used as identifiers of the weaknesses of pre-enactment compatibility vetting in the United Kingdom. They are less numerous than cases in which courts have relied on section 3, and so provide a more manageable evidential base.\textsuperscript{13} Further, where a court does issue a declaration of incompatibility it is likely to have concluded that a compatible reading of the legislation using section 3 was not possible,\textsuperscript{14} suggesting that there are serious issues which should be remedied by Parliament. Although less numerous than section 3 cases, a number of declarations of incompatibility have been made in respect of post-1998 legislation.

Since the entry into force of section 4 of the HRA 1998 on 2 October 2000, 27 declarations of incompatibility have been issued.\textsuperscript{15} Of these, eight were made in respect of legislation enacted \textit{after} section 19 of the HRA 1998 entered into force on 24 November 1998. Two of these eight were overturned on appeal, and six have become final, resulting in changes to the law. All of these cases are significant. Even where a declaration of incompatibility was overturned on appeal, the fact remains that at least one level of senior court believed there to be an incompatibility that could not be remedied by statutory interpretation.

\textit{Table 6: Declarations of incompatibility in respect of post-1998 legislation}

<table>
<thead>
<tr>
<th>Case</th>
<th>Incompatible provision</th>
<th>Final?</th>
<th>Outcome</th>
</tr>
</thead>
</table>

\textsuperscript{13} A Westlaw search for cases citing HRA 1998, s 3(1) returned 394 results, and a search for cases citing HRA 1998, s 3 returned 987 results (figures correct on 27 May 2012)

\textsuperscript{14} Guidance as to the criteria according to which courts will determine whether it is possible to reach a compatible reading under section 3 can be found in the leading speech of Lord Nicholls in \textit{Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557} \textit{[1} – [36]

\textsuperscript{15} As of 27 May 2012. A full list of these cases including details of the incompatible legislative provision, the Government response, and the outcome is available at HC Deb 26 April 2011, vol 527, col 144W (Kenneth Clarke)
<table>
<thead>
<tr>
<th>Case</th>
<th>Act</th>
<th>Incompatibility removed</th>
</tr>
</thead>
<tbody>
<tr>
<td>EWHC 823 (Admin), [2007] 1 WLR 693</td>
<td></td>
<td>Incompatibility removed by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2001, SI 2011/1158 (see further below)</td>
</tr>
<tr>
<td><em>R (June Wright) v Secretary of State for Health</em> [2006] EWHC 2886 (Admin), [2007] 1 All ER 825</td>
<td>Care Standards Act 2000, s 82(4)(b)</td>
<td>Yes</td>
</tr>
<tr>
<td><em>R (Nasseri) v Secretary of State for the Home Department</em> [2007]</td>
<td>Asylum and Immigration (Treatment of Claimants, etc) Act 2004, sch 3, para 3</td>
<td>No – overturned by Court of Appeal, a decision upheld by the House of Lords at [2009] UKHL 23, [2010] 1 AC 1</td>
</tr>
<tr>
<td>EWHC 1548 (Admin), [2008] 2 WLR 523</td>
<td></td>
<td>Incompatibility to be remedied by Remedial Order. Draft Sexual Offences Act 2003 (Remedial) Order 2012 was laid before Parliament on 5 March 201216</td>
</tr>
</tbody>
</table>

These statistics show that courts have not infrequently issued declarations of incompatibility in respect of post-1998 legislation. The requirement to make a statement of compatibility may not therefore have had the deterrent effect within Government and Parliament that may have been hoped for. Evidence from the ECtHR tells a similar story.

**Evidence from ECtHR outcomes: violations of the ECHR**

The availability of legal action before domestic courts on the basis of the HRA 1998 does not preclude litigation before the ECtHR. Having exhausted all domestic

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remedies, United Kingdom citizens may still choose to challenge legislation in Strasbourg on grounds that the legislation violates one or more articles of the Convention. Such litigation requires persistence, patience, and significant resources on the part of the applicant. Despite the many disincentives, the ECtHR still receives regular and numerous applications from United Kingdom citizens, many of which result in substantive judgments, as the following table illustrates.

Table 7: ECtHR judgments in respect of the UK: 2001-2011

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of judgments</td>
<td>33</td>
<td>40</td>
<td>25</td>
<td>23</td>
<td>18</td>
<td>23</td>
<td>50</td>
<td>36</td>
<td>18</td>
<td>21</td>
<td>19</td>
</tr>
<tr>
<td>Finding at least 1 violation</td>
<td>19</td>
<td>30</td>
<td>20</td>
<td>19</td>
<td>15</td>
<td>10</td>
<td>19</td>
<td>27</td>
<td>14</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>Finding no violation</td>
<td>11</td>
<td>4</td>
<td>2</td>
<td>--</td>
<td>--</td>
<td>8</td>
<td>7</td>
<td>6</td>
<td>3</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>Friendly settlement / striking out</td>
<td>2</td>
<td>6</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>5</td>
<td>24</td>
<td>3</td>
<td>1</td>
<td>--</td>
<td>2</td>
</tr>
<tr>
<td>Other (i.e. just satisfaction)</td>
<td>1</td>
<td>--</td>
<td>--</td>
<td>--</td>
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</tbody>
</table>

Within these figures are included a number of challenges to the Convention compatibility of post-1998 primary legislation. In five such cases, the ECtHR found a violation of at least one article of the Convention. These cases are:

   Blanket ban on prisoner voting in the Representation of the People Act 1983 had not been amended by the Representation of the People Act 2000, and constituted a violation of article 3, Protocol 1 to the Convention

   Blanket retention of DNA samples of persons arrested or charged but not convicted of an offence, introduced into the Police and Criminal Evidence Act 1984 by section 82 of the Criminal Justice and Police Act 2001 constituted a violation of article 8

17 Article 35(1) of the ECHR sets out admissibility criteria for applications to the ECtHR, one of which is that all domestic remedies must be exhausted before the application is made
19 The continued failure of the UK to implement this judgment led to a further finding of a violation of article 3, Protocol 1 in *Greens v United Kingdom* (2011) 53 EHRR 21

Indefinite detention without charge of foreign nationals suspected of international terrorism offences who could not be deported, as provided for by the Anti-terrorism, Crime and Security Act 2001 constituted a violation of articles 5(1), (4) & (5)


Stop and search powers in section 44 of the Terrorism Act 2000 constituted a violation of article 8

5. *O’Donoghue v United Kingdom* (2011) 53 EHRR 1

Exemption for marriages celebrated in the Church of England in section 19(1) Asylum and Immigration (Treatment of Claimants, etc) Act 2004 constituted a violation of articles 9 & 12 in conjunction with article 14

Also significant are challenges to post-1998 legislation resulting in ECtHR rulings that there had been no violation of the Convention. Such cases must have involved highly arguable issues as to the legislation’s compatibility with the Convention. This has occurred in three cases to date:


Restriction of powers of Magistrates Courts to grant bail for “scheduled offences” in Northern Ireland by section 67(2) of the Terrorism Act 2000 did not violate article 5(3)

2. *Kennedy v United Kingdom* (2011) 52 EHRR 4

Regulation of surveillance and interceptions by the Regulation of Investigatory Powers Act 2000 did not violate articles 8, 6(1), or 13


System for setting whole-life tariffs in the Criminal Justice Act 2003 did not violate article 3

While the number of cases in which either a domestic court issued a declaration of incompatibility or the ECtHR ruled on the compatibility of post-1998 primary legislation may not be especially high, it is significant. Parliament enacted the eleven above-mentioned Acts, in respect of which the Government had made statements of
compatibility under section 19(1)(a) of the HRA 1998. These cases show that in some circumstances at least, section 19 has not had the effect on primary legislation that might have been hoped for. Any impact that it may have had during the legislative process did not prevent the enactment of the incompatibilities later identified in court.

This chapter will now turn to a more detailed examination of a statute found to be incompatible with Convention rights by both the domestic courts and the ECtHR: the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

2. SHAM MARRIAGES: SECTION 19 OF THE ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC) ACT 2004 AND BAIAI

A legislative response to the problem of ‘sham marriages’: section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004

Five years after section 19 of the HRA 1998 took effect the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 was introduced into Parliament on 27 November 2003. It received Royal Assent on 22 July 2004, and was the ‘third major piece of legislation in this area in five years’ following the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002. The central aim of the Act as introduced was to ‘create a unified appellate structure for asylum and immigration appeals’ which would ‘target delay and reduce abuse in the system’. Despite this ambitious aim, the Act ‘had no preceding White Paper, no consultation and no pre-legislative scrutiny’. More troublingly, ‘a number of new policy proposals intended to ‘tackle sham marriages’ were put forward during the Act’s passage through the House of Lords. Such marriages were defined as those involving ‘no intention of entering into a subsisting relationship, but where the purpose is solely to circumvent our immigration

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20 This could be only the tip of the iceberg – as noted above, these cases do not include instances in which domestic courts have remedied incompatible legislative provisions using HRA 1998, s 3
21 Doughty Street Chambers, Blackstone’s Guide to the Asylum and Immigration Act 2004 (OUP 2004) 1
22 Juss, A Guide to the Asylum & Immigration (Treatment of Claimants, etc) Act 2004 (Cavendish 2005) vii
23 ibid
24 Explanatory Notes to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, 1
25 ibid 2
The Government argued that as the number of sham marriages was increasing, legislative changes were needed to strengthen our capability to deal with this abuse where it occurs and to protect the integrity of our marriage ceremonies. As the new proposals did not form part of the Bill as introduced they would not have been covered by the statement of compatibility made at the beginning of the Act’s passage through Parliament.

Section 19 of the 2004 Act would apply to a marriage ‘solemnised on the authority of certificates issued by a superintendent registrar under Part III of the Marriage Act 1949’ and ‘a party to which [was] subject to immigration control’. The first of these criteria meant that marriages taking place according to the rites of the Church of England would not be subject to the new provisions. Parties subject to immigration control were defined as persons who were not EEA nationals and who required leave to enter or remain in the United Kingdom under the Immigration Act 1971. Marriages falling within the scope of this provision could not take place unless the person subject to immigration control:

(a) had an entry clearance granted expressly for the purpose of enabling him to marry in the United Kingdom,

(b) had the written permission of the Secretary of State to marry in the United Kingdom, or,

(c) fell within a class specified for the purpose of this paragraph by regulations made by the Secretary of State.

Applications seeking the permission of the Secretary of State under section 19(3)(b) had to be made in writing, and were subject to the payment of a fee initially set at £135 and later increased to £295. The policy adopted by the Secretary of State governing

26 HL Deb 15 June 2004, vol 662, col 681 (Lord Rooker)
27 ibid
29 AITCA 2004, s 19(1)(a)
30 AITCA 2004, s 19(1)(b)
31 AITCA 2004, s 19(4)(a)
32 AITCA 2004, s 19(3)
33 The Immigration (Procedure for Marriage) Regulations 2005, SI 2005/15, regs 7 & 8
34 ibid reg 8(1)
35 The Immigration and Nationality (Cost Recovery Fees) Regulations 2007, SI 2007/936, reg 15
the allocation of certificates of approval (‘COA’), which would permit a person subject to immigration control to marry in the United Kingdom, required that the applicant:

- had at least six months leave to remain in the UK, with more than three months remaining at the time of the application, or
- had an initial application for immigration status or an appeal outstanding for 18 months, or
- could show compelling compassionate circumstances.  

Berry has noted that although designed to tackle sham marriages, these criteria:

were wholly concerned with immigration status. There were no criteria based around the nature of the relationship between the persons to be married. Even the compassionate circumstances (...) were not based on the nature of the relationship (...) The process of application for a COA provided no opportunity for an assessment of the relationship of the persons to be married or of whether any immigration advantage was actually obtained. 

The Government’s late additions to the 2004 Act would therefore apply only to non-EEA nationals who did not have leave to enter or remain in the United Kingdom, and only to those marriage ceremonies which took place outside of the Church of England. The proposals therefore appeared to make distinctions based on nationality and religion. In light of this, it was perhaps no surprise that these provisions were soon challenged in court.

The legal challenge: R (Baiai) v Secretary of State for the Home Department

The facts

Mr Baiai was an Algerian national and a Muslim who had entered the United Kingdom illegally in February 2002 and had not attempted to regularise his immigration status. Ms Trzcińska was a Polish national and a Roman Catholic who had been working in the United Kingdom as an EEA national since July 2004. They met in August 2004 and began a relationship. Wanting to marry before starting a family, Mr

36 The policy was contained in the Immigration Directorate Instructions of 15 February 2005, Chapter 1, Section 15 and Annex NN
Baiai applied for a COA by letter dated 31 January 2005. In application of the policy described above, his application was refused by letter dated 15 February 2005. The claimants sought judicial review of the refusal, arguing that the section 19 regime and the Secretary of State’s policy were incompatible with article 12 and constituted discrimination contrary to article 14 of the ECHR.

The judgments

In the High Court Silber J concluded that the section 19 scheme was incompatible with article 12 and constituted discrimination contrary to article 14. The right to marry as protected in article 12 could be restricted in the interests of effective immigration control, ‘provided that each of those conditions or restrictions satisfies the (...) requirements of proportionality’. In the present case, these requirements had not been satisfied. First, the scheme constituted an inflexible, blanket policy according to which ‘all marriages of a party who requires a COA are to be regarded automatically as actual or potential marriages of convenience’. Secondly, the Secretary of State had provided no evidence to support the assumption that Church of England marriages were not sham, whereas all other marriages might be sham. Silber J formed the ‘clear impression that very surprisingly and for no apparent reasons, the Secretary of State and his officials had not even considered, let alone investigated, whether sham marriages took place in non-Anglican religious ceremonies but had merely assumed that sham marriages took place in them’. This was particularly concerning because ‘it [was] very likely that many of those non-EU nationals or their partners are likely to be members of religions other than the Church of England’. Finally, the section 19 scheme ‘arbitrarily [failed] to take into account many factors which might be relevant to considering

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38 p 208
39 Article 12 states: ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right’
40 Article 14 states: ‘The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’
41 [2006] EWHC 823 (Admin), [2007] 1 WLR 693
42 ibid [57]
43 ibid [76]
44 ibid [83]
45 ibid [84]
whether a proposed marriage is a sham’, 46 instead regarding as ‘the only and crucial relevant factors in determining whether a non-EU national can marry in this country as his or her immigration status or the length of an outstanding application or appeal’. 47

The section 19 scheme also constituted discrimination on grounds of nationality and religion contrary to article 14, as it ‘only [applied] to persons who are subject to immigration control wanting to marry in the United Kingdom’. 48 Further, the scheme amounted to ‘direct discrimination as the group being targeted (…) are those who, because of their religious convictions or lack of them, are unable or unwilling to marry pursuant to the rites of the Church of England while those who wish to marry pursuant to those rights [sic] are exempted from the scheme’. 49 The Secretary of State had not provided ‘adequate reasons, let alone very weighty reasons justifying the difference between those marrying pursuant to Anglican rites and those who marry in any other religious ceremonies’. 50 Therefore there was ‘no reasonable and objective justification for the distinction in treatment (…) with the consequence that the article 14 claim must succeed’. 51 Regarding the discrimination on grounds of nationality, Silber J held that ‘the section 19 regime is not rationally connected to the objective of reducing or eliminating sham marriages and the means used by the Secretary of State are more than is necessary to accomplish that objective’. 52

Based on these conclusions Silber J issued a declaration of incompatibility in respect of section 19 of the 2004 Act. Accepting the part of the ruling on discrimination on grounds of religion, 53 the Secretary of State unsuccessfully appealed against the remainder of the judgment. Giving the lead judgment of the Court of Appeal, 54 Buxton LJ noted that Silber J had been ‘right to hold that the scheme fails the test of proportionality, and for the reasons that he gave’. 55 The Secretary of State could ‘only interfere with the exercise of article 12 rights in cases that involve, or very likely involve, sham marriages entered into with the object of improving the immigration

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46 ibid [85]
47 ibid [86]
48 ibid [135]
49 ibid [136]
50 ibid [140]
51 ibid [141]
52 ibid [146]
53 This is surprising, as during the parliamentary proceedings on the Act the Government had insisted that the exemption for Church of England marriage services did not amount to discrimination: p 218
54 [2007] EWCA Civ 478, [2008] QB 143
55 ibid [48]
status of one of the parties’. Proportionality required that such a scheme ‘either properly investigate individual cases, or at least show that it has come close to isolating cases that very likely fall into the target category. It must also show that the marriages targeted do indeed make substantial inroads into the enforcement of immigration control’. The section 19 scheme for preventing sham marriages as it had been operated ‘[did] not pass that test’. The declaration of incompatibility in respect of article 12 was accordingly upheld.

The Secretary of State made a final appeal to the House of Lords. In his lead judgment Lord Bingham characterised the issue as being ‘whether the scheme established by and under section 19 involves a disproportionate interference with (and therefore a breach of) the article 12 right to marry’. Any scheme restricting the right to marry could ‘be justified only to the extent that it operates to prevent marriages of convenience which, because they are not genuine marriages, do not earn the protection of the right’. From this perspective, the section 19 scheme was not proportionate for the reasons given by Silber J and the Court of Appeal. However, Lord Bingham concluded that the ‘vice of the scheme’ came neither from section 19 nor from the Regulations, but instead from the policy contained in the Immigration Directorate Instructions. This policy effectively imposed a ‘blanket prohibition on the exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages are marriages of convenience or whether they are not’, constituting a ‘disproportionate interference with the exercise of the right to marry’.

Lord Bingham accordingly ruled that the declaration of incompatibility should be ‘set aside (…) save as to discrimination’. The incompatibility would instead be remedied using section 3 of the HRA 1998 to read section 19(3)(b) of the 2004 Act, the legal basis for the COA scheme, as having the following meaning:

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56 ibid [58]
57 ibid
58 ibid
60 ibid [1]
61 ibid [24]
62 ibid [28]
63 ibid [31]
64 ibid
65 ibid [32]
has the written permission of the Secretary of State to marry in the United Kingdom, such permission not to be withheld in the case of a qualified applicant seeking to enter into a marriage which is not one of convenience and the application for, and grant of, such permission not to be subject to conditions which unreasonably inhibit exercise of the applicant’s right under article 12 of the European Convention. 66

Therefore, during the course of the Baiai litigation a declaration of incompatibility was issued and became final in respect of section 19(1) of the 2004 Act, which was found to be contrary to article 14 of the ECHR. The declaration of incompatibility in respect of section 19(3)(b) of the 2004 Act was set aside, and the provision instead read so as to render it compatible with article 12 of the ECHR using section 3 of the HRA 1998. This case has been described as the Labour Government’s ‘most direct defeat’ of all the immigration cases decided during its thirteen years in office: it was a ‘severe blow to Labour’s blunderbuss approach to eliminating those weddings celebrated for their immigration consequences’. 67

The aftermath: a long-delayed Remedial Order

As the making of a declaration of incompatibility does not affect the validity or continuing application of the relevant legislation, 68 it was for Parliament to remedy the incompatibility contained in section 19(1) of the 2004 Act. It was the JCHR’s position that following a section 4 declaration, incompatibilities should be remedied ‘sufficiently swiftly’. 69 This was especially important in light of the ECtHR ruling in Burden v United Kingdom 70 that a declaration of incompatibility may not constitute an effective remedy for the purposes of article 13 of the Convention:

if the Government can demonstrate to Parliament’s satisfaction that it consistently responds promptly and adequately to such declarations, the ECtHR may in time come to regard a declaration of incompatibility as an effective

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66 ibid
67 Kelly, ‘Law Lords v New Labour: Did the Highest Court Frustrate the Government’s Attempts to Control Immigration’ (2011) 25 JIANL 146, 166
68 HRA 1998, s 4(6)
70 (2008) 47 EHRR 38
remedy which must first be exhausted before an individual can apply to Strasbourg.\textsuperscript{71}

Final decisions as to how to remedy incompatibilities should accordingly be made ‘no later than 6 months after the relevant legal proceedings’.\textsuperscript{72}

According to this timetable the Government should have taken a final decision on how to remedy the incompatibility identified in \textit{Baiai} by October 2006, as Silber J gave judgment at first instance on 10 April 2006 and the Government did not appeal that part of his judgment relating to the statutory exemption for Church of England marriage ceremonies. Even if the Government could justify delaying such action until all appeals had concluded, its decision should have been taken by February 2009, the House of Lords having handed down its judgment on 30 July 2008. The Government however proved extremely reluctant to remedy the incompatibility identified at first instance. As Kelly has argued, the Government was able to counter its defeat in court, using ‘inertia [as] the weapon of choice’.\textsuperscript{73}

The Government’s initial planned response to the High Court ruling, to ‘extend the scheme to marriages within the Church of England, in order to remove the incompatibility with Article 14 ECHR’,\textsuperscript{74} was later delayed pending the outcome of the litigation before the House of Lords.\textsuperscript{75} By March 2010 with the incompatibility still to be remedied,\textsuperscript{76} the Government had ‘decided to remove the entire Certificate of Approval scheme rather than reform it to extend to Church of England marriages’,\textsuperscript{77} using the Remedial Order procedure under section 10 and schedule 2 to the HRA 1998.\textsuperscript{78} The Government’s actions were heavily criticised. In evidence to the JCHR, the Immigration Law Practitioners’ Association argued that ‘the Government’s approach (…) has been to do as little as possible, as late as possible, to implement the judgment’, and that the Government had failed ‘to appreciate the gravity of the past and ongoing

\textsuperscript{71} JCHR, \textit{Monitoring the Government’s Response} (n 69) para 111
\textsuperscript{72} ibid para 112
\textsuperscript{73} Kelly (n 67) 148
\textsuperscript{74} JCHR, \textit{Monitoring the Government’s Response} (n 69) para 136, citing a Home Office letter dated 19 September 2006
\textsuperscript{76} JCHR, \textit{Enhancing Parliament’s Role in Relation to Human Rights Judgments} (2009-10, HL 85, HC 455) para 144
\textsuperscript{77} ibid para 149
\textsuperscript{78} ibid
breach of human rights in this case’. Although welcoming the decision to bring forward a Remedial Order, the JCHR noted that the ‘relevant declaration is over three years old and yet we still have no clear proposals to scrutinise or any timetable for action’. In the meantime, the scheme ‘continue[d] to operate in a discriminatory way, in breach of the right to marry without discrimination’.

The change of Government in May 2010 also signalled a change in approach to the outstanding *Baiai* declaration of incompatibility. Assurances were given that a non-urgent Remedial Order would be ‘laid in Parliament before the Summer Recess’ and would enter into force by the end of 2010 or early 2011. It was intended to:

abolish the Certificate of Approval scheme so that those subject to immigration control who wish to marry in the UK (…) will have the freedom to give notice of marriage without first having to seek permission of the Secretary of State. This will ensure that the incompatibility with the Convention will be removed.

Even though section 19(1) of the 2004 Act related only to marriages, the Remedial Order also proposed to ‘repeal the Certificate of Approval scheme in relation to civil partnerships [to] ensure consistency between the treatment of civil partnerships and marriages’.

A proposal for a draft Remedial Order was laid before both Houses of Parliament on 26 July 2010 under the non-urgent procedure set out in section 10 and schedule 2 to the HRA 1998. The JCHR supported both the use of this procedure and the terms of the proposed draft Remedial Order, especially in light of the time that had elapsed since the declaration of incompatibility was first made. The Committee noted that ‘since that time, the Government has received 47,926 individual applications under the discriminatory Certificate of Approval scheme’, demonstrating the profound scale of the human rights violation caused by the scheme. The Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010 was accordingly laid

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79 ibid Ev 34  
80 ibid para 151  
81 ibid para 152  
83 ibid 30  
84 ibid  
85 JCHR, *Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010* (2010-12, HL 54, HC 599)  
86 ibid para 47
before both Houses on 21 December 2010, and approved by the JCHR.\textsuperscript{87} The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011\textsuperscript{88} was finally laid before Parliament on 25 April 2011 and entered into force on 9 May 2011.\textsuperscript{89} The incompatible law had been remedied, very nearly five years after the first instance decision in \textit{Baiai}, and nearly three years after the final decision of the House of Lords.

This long, drawn-out episode raises the question of how these controversial provisions, assessed by the High Court, Court of Appeal and House of Lords to be incompatible with Convention rights, could have reached the statute book. They were enacted five years after section 19 of the HRA 1998 entered into force, during which time the making of statements of compatibility had become a routine part of legislative procedure. The passage of these provisions reveals the extent to which the Government is able to manipulate the legislative process for its own ends, illustrating the weaknesses of section 19 of the HRA 1998 as a means of ensuring that human rights standards are taken seriously by Government and Parliament.

\section*{3. SHAMBOLIC LEGISLATING: THE WEAKNESSES OF SECTION OF THE 19 HUMAN RIGHTS ACT 1998 ILLUSTRATED}

The marriage provisions: late introduction

As noted above,\textsuperscript{90} the marriage provisions ‘were introduced at a very late stage’\textsuperscript{91} in the parliamentary passage of the Bill. While the Bill was introduced into the House of Commons on 27 November 2003, it was not until 25 May 2004 that the Government notified Parliament of its intention to introduce new clauses. By that time the Bill had reached report stage in the House of Lords, and because of the significance and extent of the new clauses the Bill was re-committed.

A number of peers expressed concern about the late introduction of the marriage provisions. Baroness Anelay of St Johns\textsuperscript{92} remarked that the Government’s notification

\textsuperscript{87} JCHR, \textit{Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010 – Second Report} (2010-12, HL 111, HC 859) para 8
\textsuperscript{88} SI 2011/1158
\textsuperscript{89} ibid reg 1(1)
\textsuperscript{90} p 206-07
\textsuperscript{91} Doughty Street Chambers (n 21) 2
\textsuperscript{92} Then Opposition Home Affairs spokesperson
of 25 May had mentioned ‘a small number of new policy amendments’, some of which would refer to marriage, but did not presage the ‘torrent of 13 new clauses plus other new amendments that amount[ed] to seven substantial policy issues to be considered’. She was concerned that ‘the Government’s haste in drawing up these amendments at the eleventh hour means that they may be defective or cause unintended consequences’, points echoed in strong terms by the Countess of Mar who, as a member of the Immigration Appeals Tribunal, was ‘absolutely astonished that these amendments have been tabled at this late stage. It is not as though these problems are new. We have known about bogus marriages for 10 or 15 years. (…) To introduce the measure at this late stage in the Bill is, frankly, an abuse of Parliament’. In equally critical terms, Lord Avebury stated: ‘we object to the Government’s pernicious habit of introducing major amendments at the eleventh hour to deal with problems that could well have been foreseen at an earlier stage, allowing for proper consultation with the agencies concerned’.

The late introduction of the marriage provisions is a clear example of the Government’s ability to introduce substantial and substantive amendments to bills at late stages in the legislative process, discussed in the previous chapter. In this case, late introduction meant that the marriage provisions fell outside the scope of the statements of compatibility made on the Bill’s introduction and transfer to the Second House, and substantially reduced the opportunities for scrutiny in both the House of Lords and the House of Commons. This necessarily limited Parliament’s ability to be proactive and effective in protecting Convention rights. The Government’s ability to introduce these substantial policies at such a late stage of the legislative process therefore undermined Parliament’s ability to play a full and valuable role under the HRA 1998.

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93 HL Deb 15 June 2004, vol 662, col 636
94 ibid
95 HL Deb 15 June 2004 (n 93) col 637
96 ibid col 643
97 ibid col 688
98 p 195
Scrutiny of the new clauses by parliamentarians: concerns & complacency

Concerns in the House of Lords

A number of peers did highlight the potential human rights issues raised by the new clauses, in spite of their late introduction and the reduced opportunities for scrutiny.

During committee on re-commitment, two peers focused on the implications of granting a power to the Secretary of State to grant or withhold permission to marry to non-EEA nationals. Lord Avebury argued that ‘to force a couple to remain separate or to live together in contravention of their community’s social and religious rules, to deprive a child of his father, and to discourage someone from practising her religion in the interests of immigration control cannot be in the public interest’ and so would contravene articles 12 and 14 of the ECHR. Had the Government provided information to justify the policy contained in the new clauses ‘a better solution could have been developed, avoiding the possibility of ECHR breaches, and of interference with legitimate marriages’. Lord Ahmed also warned of a potential breach of article 12, stating ‘is [the Minister] not venturing one step too far in prescribing exactly who can get married? The right to marry and found a family is enshrined in the [ECHR] (…) such broad discretion in the hands of the state will, I strongly suspect, breach that right.’ At report on re-commitment Lord Dholakia voiced further concerns that the marriage provisions were not compatible with Convention rights. He asserted that ‘the power to prevent a marriage going ahead will amount to a breach of article 12’, and argued that clause 19 ‘discriminates against anyone who is not a member of the Church of England’, warning that ‘the proposals will certainly lead to discrimination against couples where one or both partners is from a black or ethnic minority group. The proposals represent an attack on members of minority faiths who may not be able to celebrate the civil and religious ceremonies together’.

Such concerns led Lord Avebury to move an amendment which would have removed clause 19 from the Bill on the grounds, inter alia, that Liberal Democrat peers

99 HL Deb 15 June 2004 (n 92) col 688
100 ibid
101 ibid col 694
102 HL Deb 28 June 2004, vol 663, col 61
103 ibid. This point was also made by Lord Ahmed at col 53
104 HL Deb 28 June 2004 (n 102) col 62
were ‘not satisfied that what is (…) proposed is effective, proportionate and compatible with the ECHR’.\textsuperscript{105} In a scathing attack on the new clauses he said:

this is the first time that the person’s natural right to get married in the UK had been questioned. That is going to impede the matrimonial plans of many people from the black and Asian communities who still have close family ties to their countries of origin, and perfectly naturally look for partners in those countries.\textsuperscript{106} He went on:

such a fundamental change also needs to be enacted – if at all – after thorough consultation with the agencies representing all the ethnic minorities concerned, as well as with independent experts who could advise us on the human rights implications. \textit{Such has been the haste of the Government that even the JCHR has not been able to look at these new clauses}.\textsuperscript{107}

The Government met these criticisms with adamant insistence that the marriage provisions did not discriminate on grounds of religion. Lord Rooker\textsuperscript{108} stated ‘religious ceremonies are not affected. If the people are eligible for the ceremony of the relevant religion, they will not be affected by the amendments (…) There is also, by the way, no evidence of sham marriages in the Church of England’.\textsuperscript{109} While it may well have been the case that religious ceremonies were not affected by the new clauses, the Minister’s argument seemingly fails to appreciate that marriages celebrated according to the rights of religions other than the Church of England would not be legally binding without the corresponding civil marriage that could only take place with the permission of the Secretary of State. The fact that religious ceremonies were not affected did not therefore remove the discrimination which had been highlighted in debate. Further, the Minister’s confidence that sham marriages did not take place in the Church of England would later be proved misplaced by the prosecution in 2010 and 2012 of Anglican vicars who had carried out a number of such marriage services.\textsuperscript{110}

\textsuperscript{105} ibid col 59  
\textsuperscript{106} ibid  
\textsuperscript{107} ibid (emphasis added)  
\textsuperscript{108} Then Minister for Housing & Planning at the Office of the Deputy Prime Minister and responsible for the bill in the House of Lords  
\textsuperscript{109} HL Deb 15 June 2004 (n 92) col 696  
Lord Rooker also argued that the marriage provisions would not violate articles 12 and 14 of the ECHR as ‘[t]he right to marry under article 12 can be subject to the requirements of immigration control, just as the ability to treat people differently will not breach article 14 if it is objectively justified by the circumstances’. He reassured the House that the ‘Secretary of State will ensure that any decision taken under the proposed amendments will not on the individual facts breach either article 12 or article 14 of the ECHR’. This focus on the exercise of the powers in individual cases by the Secretary of State does not address the issue of whether the proposed clauses themselves unlawfully interfered with Convention rights. It also provides an example of the tendency of Governments to introduce legislation drafted in broad terms, relying on the duty on public authorities in section 6(1) of the HRA 1998 to ensure that the statute operated compatibility with Convention rights. As previously discussed, this approach bypasses Parliament as a forum for human rights scrutiny and protection, further reducing its ability to fulfil its role under the HRA 1998. Such an approach may be seen as particularly troubling in the field of immigration law, a politically sensitive issue in respect of which governments are increasingly keen to be seen to be taking robust action, and where those people adversely affected by the exercise of legal powers may form part of an unpopular minority on the margins of society.

At report on re-commitment the Minister offered a slightly more detailed justification for the Government’s view that the marriage provisions were Convention compatible, stating:

So far as article 12 is concerned (...) the right to marry is subject to national laws governing the exercise of the right. The Commission has not been inclined to regard the right to marry a chosen partner in a contracting state as one that overrides national immigration laws. This is because the parties may marry elsewhere.

If the parties could not marry elsewhere, the Secretary of State could give permission for them to marry in the United Kingdom. Again, although this may indeed be the case, this does not address the point that to achieve compatibility with the Convention, national laws seeking to regulate the right to marry in the interests of immigration

111 HL Deb 15 June 2004 (n 92) col 699
112 ibid
113 p 189-90
114 HL Deb 28 June 2004 (n 102) col 66
control must not impair the essence of the right and must be reasonable in order to
determine whether a marriage was genuine and if not, to take steps to prevent such a
marriage taking place.\textsuperscript{115}

As for article 14 and the risk of discrimination on grounds of religion, Lord
Rooker stated that the Government was:

not seeking to discriminate against people who are members of a religion other
than the Church of England. The Marriage Act 1949 provides for marriage in the
Church of England (…) to take place after either ecclesiastical preliminaries or
civil preliminaries (…) All other marriages (…) must be preceded by civil
preliminaries. The difference in preliminaries is fundamental marriage law,\textsuperscript{116}
and certainly outside the scope of this Bill.\textsuperscript{117}

Whether a matter of ‘fundamental marriage law’ or not, this argument failed to address
the fact that the marriage clauses contained a difference in treatment between groups
which adversely affected those unwilling or unable to marry in the Church of England.
If the Government was aware of that difference in treatment and had vetted the marriage
provisions for compatibility with Convention rights, it is open to question why it did not
take the opportunity either to remove that difference in treatment from the provisions, or
ensure that there was no discrimination on grounds of religion in the operation of this
scheme, for example by stipulating that relevant marriages could not take advantage of
the Anglican ecclesiastical preliminaries. There is nothing in either the constitution or
the HRA 1998 to prevent a sovereign Parliament from amending an earlier statute,\textsuperscript{118}
whether or not it contained so-called ‘fundamental’ marriage law.

It should be noted that the debates at committee on re-commitment and report on
re-commitment took place without the benefit of a JCHR report. The JCHR was only
able to report on the new clauses on 5 July 2004,\textsuperscript{119} just one day before third reading in
the House of Lords. Despite this short time frame the JCHR’s conclusions were brought
to the attention of the House at third reading by Lord Avebury,\textsuperscript{120} although by that time
it was too late for the House to use the report to scrutinise the Bill in any meaningful

\textsuperscript{115} Baiai (n 59) [14], [16] & [22] (Lord Bingham)
\textsuperscript{116} For a discussion of the special position of the Church of England under UK marriage law see Juss,
‘Church of England Marriages: Historical Particularity or Anomaly?’ (2009) 20 KLJ 155
\textsuperscript{117} HL Deb 28 June 2004 (n 102) col 71
\textsuperscript{118} Discussed at p 160-61
\textsuperscript{119} JCHR, Asylum & Immigration (Treatment of Claimants, etc) Bill: New Clauses (2003-04, HL 130, HC
828)
\textsuperscript{120} HL Deb 6 July 2004, vol 663, col 718 et seq
way. Although in a more advantageous position in this respect, the House of Commons failed fully to take advantage of the JCHR report during its debate on the Bill as amended.

Complacency in the House of Commons

The House of Commons considered the Lords’ amendments on 12 July 2004, one week after the JCHR reported. Although the House had access to the report, there was no detailed discussion of the human rights issues raised by the marriage provisions. The Opposition referred in only the briefest terms to the JCHR’s concerns, stating: ‘the Joint Committee had something to say on the [marriage] clause, and I hope that [the Minister] deals with the matter in a way that satisfies the House’.121 The fact that all marriages other than those taking place in the Church of England were affected was described somewhat complacently as ‘a little difference that perhaps we need to look into’.122

In response to these lacklustre observations the Minister repeated many of the justifications for the marriage provisions that had been advanced in the House of Lords, and argued that the JCHR’s conclusions123 that the provisions risked causing discrimination on grounds of nationality and religion lacked ‘adequate and objective justification’.124 The Minister assured the House that the Government was ‘not seeking to discriminate against people who are members of a religion other than the Church of England’125 and, acknowledging that the law provided for special procedures in respect of Church of England marriages, noted that ‘the discrimination is therefore not new’.126 A remarkable admission that existing marriage law was discriminatory, this argument did not change or justify the fact that whatever its intention, the Government’s provisions – which should have complied with Convention rights following the enactment and implementation of section 19 of the HRA 1998 six years earlier – continued and enhanced that discriminatory treatment.

121 HC Deb 12 July 2004, vol 423, col 1215 (Humfrey Mallins)
122 ibid
123 Discussed at p 223-25
124 HC Deb 12 July 2004 (n 121) col 1225 (Desmond Browne, Minister for Citizenship and Immigration)
125 ibid
126 ibid
The failure of the House of Commons to discuss in detail such significant risks of Convention rights violations, even after the publication of a highly critical JCHR report, seems to suggest that section 19 of the HRA 1998 has not necessarily achieved its objectives of ensuring adequate human rights scrutiny of bills in both Houses of Parliament. Although it is true that the JCHR had little opportunity to inform debate and scrutiny of the Bill because of the time-constraints involved, some parliamentarians did raise and discuss the relevant human rights issues raised by the bill. Unfortunately, any such positive effect seems to have been largely confined to the House of Lords. Even though the JCHR report was available prior to the House of Commons consideration of Lords amendments, little use was made there of its clear, reasoned conclusions and recommendations.

**Scrubtiny by the JCHR: time constraints, stark warnings & limited impact**

*The work of the JCHR: adversely affected by pressing time constraints*

The introduction of the marriage provisions shortly before report stage in the House of Lords made it impossible for the JCHR to meet its target of reporting on a bill ‘before second reading in the second House’. The ability of the JCHR to inform parliamentarians of the human rights implications of the Bill was also significantly affected. Lord Avebury described it as ‘profoundly unsatisfactory that we should be considering the advice of the JCHR on this important matter at the eleventh hour and without the benefit of a reasoned answer from the Government to the detailed objections’ raised by the Committee. He regretted that:

> decisions are not going to be made on the basis of reasoned argument and that Ministers can easily cast aside the opinions of a committee established by your Lordships for the purpose of ensuring that we avoid making human rights errors that will land the Government in the courts. In the past the Government has ignored the JCHR’s advice and have good reasons to regret it.

This illustrates the precarious nature of achieving adequate human rights scrutiny of legislation within Parliament. Such scrutiny is dependent on the Government’s decision

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128 HL Deb 6 July 2004 (n 120) col 720
129 Ibid
as to the stage of parliamentary proceedings at which to introduce new clauses and its willingness to both respect the need for human rights scrutiny and engage with any human rights issues identified. The Government seems to have been unwilling to do either of those things in respect of the marriage provisions to the detriment of parliamentary scrutiny and the protection of human rights.

Lord Lester, a member of the JCHR, was damning in his criticism of the time constraints imposed by the late introduction of the marriage clauses, which meant that there was likely to be no adequate Government response to the report. As the Committee had reported only the day before third reading in the House of Lords:

it would be impossible for us to expect the Minister now (...) to respond properly in this debate and before the end of Third Reading to the points [raised in the JCHR report]. The net result will be that, in a thinly attended House late in the afternoon, the luckless Minister will have the task of responding to a report as best he can and we shall then move on.\(^{130}\)

Sounding a prescient warning as to the consequences of the Government’s actions, Lord Lester said: ‘There will be no adequate parliamentary scrutiny of these human rights issues and (...) the matter will end up in court. (...) I regard it as a misfortune whenever legislation is passed in a form so defective that judges and lawyers have to come to the rescue. (...) It is dispiriting and it is entirely the fault of the Home Office.\(^{131}\)

*The JCHR report: trenchant criticisms and stark warnings…*

In spite of the time pressures the JCHR did report on the marriage provisions on 5 July 2004.\(^{132}\) The Committee, too, was critical of the way in which the clauses had been introduced, stating:

some of these amendments have obvious and serious implications for human rights. We were given no advance notice of the substance of these amendments, and neither we nor the House of Lords were given any written explanation of the Government’s reasoning in relation to the compatibility of the proposed measures with human rights.\(^{133}\)

\(^{130}\) ibid col 722
\(^{131}\) ibid
\(^{132}\) JCHR, *Asylum and Immigration (Treatment of Claimants, etc) Bill: New Clauses* (n 119)
\(^{133}\) ibid para 2
This raises clear and serious questions about the usefulness of section 19 of the HRA 1998 and its ability to encourage consideration of human rights issues during the legislative process. If by introducing significant amendments late in that process the Government is able to avoid the scrutiny envisaged by the statement of compatibility process, it is open to the Government to subvert Parliament’s role in protecting human rights in the United Kingdom. Reducing the time available for the JCHR to seek and receive evidence from Government departments on the content and implications of late amendments also enables the Government to avoid the scrutiny which has become a feature of the Committee’s work.\(^\text{134}\) This was explicitly recognised by the JCHR which described it as:

unacceptable that amendments having significant implications for human rights should be introduced at a late stage in a Bill’s passage through Parliament, without a clear explanation of the Government’s view of the human rights implications. (…) such a practice undermines parliamentary scrutiny of legislation for compatibility with human rights. Such scrutiny is crucial to the democratic legitimacy of the Human Rights Act 1998.\(^\text{135}\)

Having thus rebuked the Government the JCHR went on to discuss the compatibility of the marriage clauses with Convention rights. Here again the late introduction of these provisions had implications for the Committee’s scrutiny: as the Government had not provided detailed reasons for its belief that the provisions were compatible with articles 12 and 14 of the ECHR, the JCHR could not fully assess whether the Government’s reasoning was correct, or whether any interference with those rights would be proportionate.\(^\text{136}\) In spite of the paucity of information available to it, the Committee nevertheless concluded that there was a significant risk that the new clauses would not be compatible with Convention rights. It argued that ‘the requirement to obtain permission to marry’\(^\text{137}\) would breach article 12 as the restrictions on the right appeared to be disproportionate, there being no ‘clear rational connection between the purpose of the measures, namely to prevent sham marriages, and the criteria to be applied by the Secretary of State when deciding whether to grant permission under the

\(^{134}\) Discussed at p 175-76

\(^{135}\) JCHR, Asylum and Immigration (Treatment of Claimants, etc) Bill: New Clauses (n 119) para 3. The Committee made clear that this was not an isolated incident: it had made similar complaints in relation to the Planning and Compulsory Purchase Bill in Scrutiny of Bills: Third Progress Report (2003-04, HL 49, HC 427) at para 5.7

\(^{136}\) JCHR, Asylum and Immigration (Treatment of Claimants, etc) Bill: New Clauses (n 119) paras 55 & 58

\(^{137}\) ibid para 68
clause’. Not only were the measures drawn too widely and ‘potentially affect[ed] more people than is necessary to achieve their purpose of preventing sham marriages’, but the new procedures were likely to ‘prove excessively burdensome to individuals who are within the scope of the new requirements but who wish to enter into a genuine marriage’. There was a further significant risk that ‘the imposition of what is in effect a prior permission requirement on non-EEA nationals who wish to marry in the UK may impair the very essence of the right to marry’.

The Committee was equally clear that there was a significant risk that the marriage provisions would breach article 14. The fact that the provisions would not apply to marriages celebrated in the Church of England but would apply to all other religious and non-religious marriages meant that they were ‘discriminatory on their face’. The Government’s claims that no sham marriages took place in the Church of England was not a ‘sufficiently weighty justification for such a clear difference of treatment on grounds of religion or belief in relation to a matter which affects almost everybody in one of the most fundamental aspects of their private lives’. As there was no ‘objective and reasonable justification’ for the difference in treatment, the provisions were likely to breach article 14 in conjunction with articles 12 and 9 of the ECHR. The Committee also warned of a breach of article 14 in conjunction with article 12 on the basis of discrimination on grounds of nationality, as the provisions amounted to ‘less favourable treatment of people wishing to marry who, but for their nationality, are in an analogous position to nationals wishing to marry’.

... But only limited impact

The JCHR had therefore clearly identified the very issues that would form the basis for the litigation in *Baiai*. Had these warnings been heeded, it is possible that the litigation could have been avoided. However, not only did the time limits work against this possibility, with the JCHR only able to report one day before third reading in the

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138 ibid para 61
139 ibid para 64
140 ibid para 65
141 ibid para 66
142 ibid para 71
143 ibid para 72
144 ibid
145 ibid para 74
House of Lords, but the Minister responsible for the Bill in that House was unaware that the JCHR had reported, and therefore could not meaningfully engage with its findings. Lord Rooker stated that until Lord Avebury’s speech, he had ‘not even know[n] that the report was being published yesterday. (…) I am angry that I did not know that it had been published. This lack of knowledge completely undermines the ability of parliament to scrutinise the human rights implications of bills and the Government’s reasons for concluding that its bills are compatible with Convention rights. It seems remarkable that a Minister responsible for a Bill would not be aware that the JCHR had published a highly critical report in respect of it. Lord Rooker acknowledged this, noting that the ‘Government’s treatment of the committee could be bordering on contempt in not allowing sufficient time for scrutiny because I cannot respond’. The Government’s failure to engage with the JCHR report meant that the House of Lords was given no further information as to the Government’s reasons for concluding that the marriage provisions were compatible with Convention rights, and no sense of its response or reaction to the Committee’s conclusions.

The third reading debate in the House of Lords also revealed a further weakness of the statement of compatibility procedure. The Bill was introduced into the House of Commons where the section 19 statement was made. Lord Rooker asserted that ‘no Minister would sign the front of the Bill unless he received written advice to the effect that it was compatible’. However in respect of this Bill, the Bill for which he was responsible to the House of Lords, he admitted, ‘I just do not know what the procedure was’. The Minister explained that as the new clauses were introduced during the Bill’s passage through the House of Lords:

it was not another Bill. I am not sure whether a signature was required because the Bill was that which was presented to Parliament, both to the first House and then to this House. I have never been required to sign to the effect that a particular amendment to a Bill is compatible. On the other hand the advice that one receives would cover these points.
This suggests that the Minister may have been unaware of the advice forming the basis for the Government’s conclusion that the new provisions were Convention compatible. In such circumstances he would not be able to provide information on this matter to Parliament, which in turn undermines Parliament’s ability effectively to scrutinise and test the Government’s conclusions.

This further demonstrates that no statement of compatibility had been made in respect of these substantial new provisions. Such statements are made before the second reading of a bill in each House. The timing of the introduction of the marriage provisions, such that they were debated only after second reading in both Houses, suggests that the Government was able to avoid the statement of compatibility process and reduce the opportunity for any possible human rights scrutiny of those provisions. If the Government was aware of the potential breach of Convention rights caused by the new clauses, their late introduction would have avoided both the risk that a Minister might mislead Parliament by making a statement of compatibility in respect of them, and the political controversy and attention likely to have been generated by a section 19(1)(b) statement. Such manipulation of the legislative process and the procedures contained in the HRA 1998 designed to encourage all branches of government to participate in the protection of human rights in the United Kingdom, in order to bypass parliamentary scrutiny for political ends is neither helpful for democracy nor for the compatibility of legislation with Convention rights.

The JCHR did receive one letter from the Government in response to its report on the new clauses, but this largely mirrored the statement made to the House of Commons by the Minister during the debate on 12 July 2004, and seemed to rely on bare assertions of fact to refute the Committee’s conclusions on compatibility. For example, in response to the criticism that the provisions would be excessively burdensome to those people wishing to enter into a genuine marriage the Government stated: ‘Weddings are already expensive occasions (…) we do not believe that the requirement to give notice at a designated centre is a great inconvenience to the couple’. It is difficult to identify in the letter any attempt seriously to engage with the human rights issues identified by the JCHR, or to justify the policy in human rights

152 HRA 1998, s 19(1)
154 JCHR, Scrutiny of Bills: Seventh Progress Report (n 153) 52
terms using relevant jurisprudence and legal tests, such as proportionality. Even where such terminology is used, the Government fails to meet the criticisms advanced by the JCHR. For example, in relation to the Committee’s findings that the provisions carried with them a significant risk of discrimination on grounds of nationality, the Government stated:

Whilst we accept that we are treating persons subject to immigration control and their partners differently in comparison to other persons wishing to get married, it would be unlawful and disproportionate to impose such obligations on those not subject to immigration control as there is no rational connection between the measures and those not subject to immigration control.\textsuperscript{156}

While this may be the case, this does not provide any objective and reasonable justifications for the measure. Again, the impression given is of a Government seeking to avoid engaging with human rights scrutiny of its legislative proposals and a Parliament which, even if willing to engage in such scrutiny, was prevented from doing so.

Even had the letter responded in more detail to the JCHR’s conclusions, it was dated 9 July 2004, three days after third reading in the House of Lords, which therefore had no access to the Government’s response to the report to aid it in its scrutiny of the Bill. Further, 9 July 2004 was a Friday. The House of Commons considered the Lords amendments on 12 July 2004, a Monday. It would therefore have been almost impossible to make the Government’s response available to MPs in time for that debate. In fact the letter was not published until 4 August 2004, two weeks after the Bill had received Royal Assent. The Government’s response to the JCHR’s stark warnings that the marriage provisions carried a significant risk of incompatibility with articles 12 and 14 of the ECHR were not therefore available to the parliamentarians whose responsibility it was to scrutinise them.


The ‘sham marriages’ affair illustrates the Executive’s ability to manipulate the parliamentary process to circumvent the vetting and scrutiny procedures envisaged by

\textsuperscript{156} ibid 53
section 19 of the HRA 1998. This is a fundamental weakness of the current position: for all its good intentions, the effectiveness of the system of statements of compatibility seems to be at the mercy of the Government.

In the case of the marriage provisions inserted into the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, clear warnings were given during the parliamentary passage of the Bill that these clauses carried a significant risk of violating articles 12 and 14 of the ECHR. The Executive could not therefore have been unaware of the risks involved in enacting the legislation. Certainly the Executive should not have been unaware of the human rights implications of these provisions. If the pre-legislative vetting procedures had been properly carried out it seems highly unlikely that these risks would not have been identified. It can be argued then that if these provisions were vetted for Convention compatibility, a calculated choice must have been made not to include the marriage clauses in the Bill as introduced into Parliament because of the potential for difficulties in light of their human rights implications.

Such a choice may be evident in the timing of the introduction of these provisions, which meant that they were at no stage included in a section 19 statement of compatibility. This approach is perhaps also reflected in the fact that the Government did not challenge the part of the High Court’s declaration of incompatibility that found that the provisions constituted discrimination on grounds of religion. If the Government’s legal advice had been that its provisions did not so discriminate, the decision not to challenge that part of the court order seems anomalous, especially when an appeal was made against the remainder of the declaration. The Government’s decision also seems inconsistent with its repeated assertions during the parliamentary proceedings on the Bill that the exemption made for Church of England marriages did not amount to discrimination.

This case may also have been illustrative of a wider problem in the Home Office. At report on re-commitment, Baroness Anelay noted:

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157 Such warnings were not only given by the JCHR (n 119) but also in a briefing prepared by the Immigration Law Practitioners’ Association for third reading in the House of Lords. This is available at <http://www.ilpa.org.uk/pages/briefings-on-the-asylum-and-immigration-treatment-of-claimants-etc.-bill-2003.html> accessed 27 May 2012

158 p 210

159 e.g. p 218
The Home Secretary certainly has a track record of charging ahead with flawed proposals that are then challenged successfully in the courts. That is bad for everybody concerned: bad for the reputation of Parliament; bad for the taxpayer for having to foot the bill, and bad for the Government overall, because it means people lose trust in what they are trying to implement.\textsuperscript{160}

This point was reiterated by ILPA in evidence to the JCHR during its scrutiny of the proposed Remedial Order in 2010.\textsuperscript{161} ILPA stated that the events leading to \textit{Baiai} and the declaration of incompatibility were ‘indicative of the tendency of the Secretary of State for the Home Department to make immigration law without adequate regard to compatibility with the Convention’.\textsuperscript{162} Such statements provide further evidence that the system introduced by section 19 of the HRA 1998 has not in practice resulted in the Executive consistently paying greater heed to the need to achieve compatibility with Convention rights, or Parliament being able or willing consistently to prevent the enactment of rights-violating legislation.

The late introduction of the marriage provisions enabled the Government successfully to minimise effective human rights scrutiny in Parliament and ignore the warnings that were given regarding the compatibility of those provisions with Convention rights. This demonstrates that the strength of the Executive and its control over legislative processes enables it effectively to disregard the safeguards against the enactment of human rights violating legislation envisaged by section 19 of the HRA 1998. This undermines Parliament’s role under the 1998 Act, a role that was designed to ensure that the democratically accountable branch of government was able to inform, shape and protect human rights in the United Kingdom. In the case of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, the Government’s failure to heed the warnings led directly to a lengthy, costly and ultimately successful legal challenge to the legislation, which eventually resulted in the abolition of the Certificate of Approval scheme. Had the Government acted differently, and had Parliament more effectively been able to make its voice heard, the sorry tale of \textit{Baiai} might well have been avoided.

\textsuperscript{160} HL Deb 28 June 2004 (n 102) col 16
\textsuperscript{161} p 212-15
\textsuperscript{162} JCHR, \textit{Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010} (2010-12, HL 54-II, HC 599-II) 5
CHAPTER 7 – CONCLUSIONS AND RECOMMENDATIONS FOR REFORM OF SECTION 19 OF THE HUMAN RIGHTS ACT 1998

This thesis has argued that section 19 should be recognised as being of central importance within the scheme of the HRA 1998. In encouraging and facilitating the consideration of the compatibility of proposed legislation with Convention rights by both the Executive and Parliament, section 19 seeks to ensure that the democratically accountable branches of government have significant roles in determining the meaning and scope of human rights protection in the United Kingdom. Section 19 accordingly fits squarely within the current constitutional arrangements of the United Kingdom which have a long tradition of promoting the protection of human rights\(^1\) and continue to insist on the centrality of parliamentary sovereignty as a fundamental guiding principle.\(^2\)

Section 19 can also be situated within a wider international context in which a number of Commonwealth jurisdictions have emphasised the importance of human rights standards in the legislative process.\(^3\) The United Kingdom thus forms part of a “Commonwealth family”, all members of which require some form of ministerial reporting to the legislature, intended to encourage consideration of and respect for relevant human rights standards within those branches of government. In Canada\(^4\) and New Zealand\(^5\) ministerial certification is required only where proposed legislation is considered not to comply with human rights standards. In those jurisdictions there is no requirement for systematic scrutiny of bills by a parliamentary committee, although since 2001 the Canadian Senate Standing Committee on Human rights has performed some limited human rights scrutiny.\(^6\) In contrast, the more recent legislation in the Australian Capital Territory,\(^7\) Victoria\(^8\) and the Commonwealth of Australia\(^9\) requires

\(^1\) p 22-29  
\(^2\) p 32-33  
\(^3\) ch 2  
\(^4\) Canadian Charter of Rights and Freedoms 1982 and Department of Justice Act 1985, s 4.1, discussed at p 48-54  
\(^5\) New Zealand Bill of Rights Act 1990, s 7, discussed at p 54-60  
\(^6\) The committee’s work is discussed at p 52-53  
\(^7\) Human Rights Act 2004 (ACT), ss 37 & 38, discussed at p 62-68  
\(^8\) Charter of Human Rights and Responsibilities Act 2006 (Vic), ss 28 & 30, discussed at p 67-77  
\(^9\) Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), ss 2 & 7, discussed at p 83
ministerial certification in respect of all bills and the scrutiny of bills by parliamentary committee.

However, although section 19 of the HRA 1998 sought to make the protection of human rights a collaborative exercise involving all branches of government and was thus consistent with both the features of the United Kingdom constitution and international developments in other Commonwealth jurisdictions, its significance was overlooked during the parliamentary passage of the Human Rights Bill\(^\text{10}\) and in contemporary and subsequent academic literature.\(^\text{11}\)

This chapter will argue that while section 19 has enjoyed some success in ensuring that Convention rights are considered by the Executive and Parliament during the legislative process, this success has been limited and has emerged against and may have contributed to an environment of widespread political hostility to the HRA 1998. Had section 19 been more immediately effective, some of this hostility might have been avoided. In encouraging assessments of Convention-compatibility within the democratically accountable branches of government, statements of compatibility are valuable as part of a legislative scheme for the protection of human rights, and should be retained. However, certain reforms to the system of statements of compatibility and parliamentary scrutiny are necessary in order to improve the effectiveness and impact of section 19, and ensure that the Executive and Parliament can play engaged, informed and central roles in the protection of human rights in the United Kingdom.

1. THE PARTIAL SUCCESS OF SECTION 19 OF THE HUMAN RIGHTS ACT 1998

Section 19 and the Executive\(^\text{12}\)

Section 19 of the HRA 1998 has ensured that ‘Convention rights are taken more fully into account in the development of new policies and of legislation’\(^\text{13}\) than they had been under the previous system of ‘Strasbourg proofing’.\(^\text{14}\) The current Guide to

\(^{10}\) Human Rights HL Bill (1997-98) 38, discussed at p 92-106

\(^{11}\) ch 5

\(^{12}\) The impact of HRA 1998, s 19 on the preparation of legislation by the Executive is discussed in detail in ch 4

\(^{13}\) Home Office, Rights Brought Home: The Human Rights Bill (Cm 3782, 1997) 3

\(^{14}\) Discussed at p 120-23
Making Legislation\textsuperscript{15} contains detailed guidance as to the stages of the legislative process at which consideration of Convention compatibility should occur,\textsuperscript{16} demonstrating that such issues have become embedded within the development of legislative proposals within Government departments.

Many of the Guide’s requirements are positive examples of the impact of section 19 and demonstrate that the Government is in principle committed to considering and complying with Convention rights. For example, the ECHR Memorandum that must be prepared before a bill may be approved for introduction or publication in draft must ‘cover the human rights issues raised [by the bill], with a frank assessment by the department of the vulnerability to challenge in legal and policy terms’.\textsuperscript{17} This seems to require an honest, balanced approach to compatibility issues, involving a thorough examination of the bill’s provisions.\textsuperscript{18} The now routine inclusion of a section on ECHR compatibility in the Explanatory Notes to all Government bills\textsuperscript{19} is also welcome. This information should be ‘as detailed as possible setting out any relevant case law and presenting the Government’s reasons for concluding that the provisions in the Bill are Convention compatible’,\textsuperscript{20} and therefore is potentially an important aid to parliamentary scrutiny.

However, alongside these advantages a number of issues have undermined the actual and potential impact of section 19 on the preparation of legislation by the Executive. The early implementation of section 19\textsuperscript{21} may have left Government departments with only a very limited time to develop the procedures required to enable Convention compatibility testing to become an integral part of the development of legislative proposals. Further, section 19 had been in force for between six and eight months before the first finalised guidance on the HRA 1998 was published.\textsuperscript{22} This delay may have been compounded by the decision to place responsibility for implementing the HRA 1998 with individual government departments, reflecting the fact that the

\textsuperscript{16}Discussed in detail at p 139-50
\textsuperscript{17}Cabinet Office, Guide to Making Legislation (n 15) para 12.9
\textsuperscript{18}Although this approach may be driven more by a desire to avoid subsequent legal challenges than by a belief in the inherent value of human rights as standards to guide the development of legislation: p 127
\textsuperscript{19}Cabinet Office, Guide to Making Legislation (n 15) para 11.3
\textsuperscript{20}ibid para 11.63
\textsuperscript{22}p 135-36
Minister responsible for a bill is required to make the statement of compatibility to Parliament.\textsuperscript{23} This decision appears to have caused a fragmented, uneven approach to compatibility assessments,\textsuperscript{24} which seems contrary to the intention of section 19 to ensure that all departments treated human rights as crucial in the development of legislation.

Further problems arose from the content of the guidance issued to departments to assist in their assessment of legislative proposals for compatibility with Convention rights. The early guidance was somewhat ambiguous as to the degree of certainty that would be required before a Minister would be able to make a statement of compatibility under section 19(1)(a). Such a statement could only be made where it was ‘clear that, at a minimum, the balance of arguments supports the view that the provisions [of a bill] are compatible’.\textsuperscript{25} This test does not specify whether each of a bill’s provisions or the bill as a whole must be deemed on balance to be compatible with Convention rights. In the latter case, if 51% of the bill’s provisions could be said to be compatible on balance, then a statement of compatibility could be made.\textsuperscript{26} In addition, the guidance did not seem to impose particularly onerous obligations on Ministers to understand and fully articulate to Parliament the Government’s reasons for concluding that a provision was Convention compatible, stating only that a Minister should be able ‘at least to identify the Convention points considered and the broad lines of the argument’.\textsuperscript{27}

These ambiguities may have resulted in a practice according to which although legally required to make statements of compatibility to Parliament, Ministers are only rarely involved in establishing the accuracy of such statements. If a Minister is told that a bill ‘might not be compatible (...) he would then get into the detail. But if he’s told that it is compatible, then he won’t get involved in it, and then he’ll hope that it doesn’t get raised [in Parliament]’.\textsuperscript{28} Ministers are likely to seek explanations of compatibility issues from their officials only ‘if the matter is ever raised in Parliament’.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{23} HRA 1998, s 19(1)
\item \textsuperscript{24} p 132-34
\item \textsuperscript{25} HL Deb 5 May 1999, vol 600, col WA92 (Lord Burlison)
\item \textsuperscript{26} See the more detailed discussion at p 137-38
\item \textsuperscript{27} Home Office, \textit{Human Rights Act 1998 Guidance for Departments} (2\textsuperscript{nd} edn, February 2000) para 39
\item \textsuperscript{28} Interview with Lord Falconer, former Lord Chancellor and Secretary of State for Constitutional Affairs (London, 27 April 2011)
\item \textsuperscript{29} ibid
\end{itemize}
Somewhat paradoxically, this “hands off” approach is accompanied by significant ministerial discretion as to the information provided in Explanatory Notes.\textsuperscript{30} The extent to which Explanatory Notes discuss ECHR compatibility varies considerably from bill to bill, and seems to depend on a number of factors including the bill’s subject matter and the Minister’s interest in and attitude towards compatibility issues. This variation, commented on by the JCHR,\textsuperscript{31} is problematic. The purpose of section 19 of the HRA 1998 was to encourage the protection of human rights through a collaborative exercise involving all branches of government. If the level and quality of information provided to Parliament about the Government’s conclusions on compatibility are at the mercy of a Minister and his or her own views of the importance of human rights, this purpose can be said to be undermined.

The impact of section 19 has also been impeded by the nature of Government at Westminster. The rapid rate of ministerial turnover\textsuperscript{32} that has become a feature of modern government reduces the opportunity for Ministers to gain a thorough understanding of their portfolios and the operation of Convention rights in relation to them. The less chance Ministers have to familiarise themselves with the work of their departments, the less chance that they will be able fully to engage with the human rights implications of their work. Added to this is the fact that human rights will be only one of a number of political considerations affecting a bill’s contents. Legislating is a political act driven by party-dominated governments in the highly politicised atmosphere of Westminster. In such circumstances, it is perhaps inevitable that complex issues surrounding Convention compatibility have not always been treated with priority.

A similar picture of the valuable aims of section 19 of the HRA 1998 resulting in some good practices but being hampered by significant obstacles has also emerged in relation to Parliament’s role in the protection of human rights.

\textsuperscript{30} See further p 145-47
\textsuperscript{31} p 147
\textsuperscript{32} Discussed at p 152-54
Section 19 and Parliament

Section 19 sought to encourage human rights scrutiny of legislation within Parliament, thus involving the democratically elected body in the work of protecting Convention rights in the United Kingdom. Although section 19 does not guarantee rigorous and regular scrutiny of the human rights implications of bills within the chambers of the House of Commons or House of Lords, the creation of the JCHR has been a major step towards raising the profile of Convention rights during the legislative process.

Legislative scrutiny is a central part of the work of the JCHR and its contribution in this respect is highly regarded. As part of this work, the Committee’s careful examination of section 19 statements has ‘proved an incentive for the executive to take pre-legislative review of compatibility seriously’. The JCHR has also affected debate and scrutiny of bills within Parliament, although the extent of its impact in this respect is not always clear. However, the Committee’s emerging practice of proposing amendments to bills to give effect to its recommendations has had an effect on the content of some bills. Recent research has begun to map the use made by parliamentarians of the JCHR’s reports.

However, the impact of the JCHR and by extension section 19 has been hampered by a number of factors, not least among which is the fact that the Committee did not meet for the first time until January 2001, over two years after section 19 of the HRA 1998 had entered into force. This delay meant that for over two years Parliament was not equipped fully to perform the effective human rights scrutiny of legislation intended by section 19. Once established, the Committee attached great importance to legislative scrutiny and undertook to carry out ‘comprehensive scrutiny of all

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33 The impact of HRA 1998, s 19 on Parliament and the parliamentary scrutiny of legislation is discussed in detail in ch 5
34 Discussed at p 158-59
35 A discussion of the Committee’s work is at p 165-85
36 The changing nature of the Committee’s working practices is discussed at p 167-74
37 Leigh & Masterman, Making Rights Real: The Human Rights Act in its First Decade (Hart Publishing 2008) 42, and see the discussion at p 175-76
38 Discussed at p 176-81
39 p 173-74
40 Hunt, Hooper & Yowell, ‘Parliaments and Human Rights: Redressing the Democratic Deficit’ (AHRC Public Policy Series No. 5, AHRC, April 2012), and see the discussion of these findings at p 178-80
41 See discussion at p 165-66
Government bills’. The JCHR aimed to report ‘before second reading in the second House’ in order to inform and if necessary influence debate on the bill.

Although laudable, this early approach was not without problems. Second reading in the second House is already a late stage in the legislative process, by which time the Government’s policies and priorities for the bill will have been long settled. Further, the JCHR was not always able to meet its reporting targets. The later that Parliament has access to the Committee’s opinion on a bill’s compatibility with Convention rights, the more limited will be the opportunities for those opinions to affect its contents. The changes to the Committee’s working practices implemented at the start of the 2006-07 session seem to have alleviated a number of these difficulties. Nevertheless, the JCHR continues to call for better information to be made available to it by the Government, preferably in the form of a Human Rights Memorandum to accompany all bills.

More generally, Parliament’s ability to engage with the human rights issues raised by Government bills has been affected by the tendency of governments to make statements of compatibility in respect of legislation which either relies on public authorities to exercise powers in accordance with Convention rights, or accords broad powers to the Secretary of State to bring forward secondary legislation to establish the detailed workings of the legislative scheme. In both cases Parliament’s ability to examine the human rights implications of bills is undermined as it is asked to trust that other institutions will fulfil their own obligations under the HRA 1998 outwith the normal legislative processes of Parliament. The Government’s ability to issue section 19(1)(a) statements in such circumstances may be enhanced by the fact that many parliamentarians lack the expertise and knowledge required to perform thorough human rights scrutiny of legislation. Such parliamentarians may pay greater deference to

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43 ibid para 51
44 p 169-70
45 JCHR, *The Committee’s Future Working Practices* (2005-06, HL 239, HC 1575), and see discussion at p 171-72
46 The JCHR’s calls for the provision of Human Rights Memorandums is discussed at p 183-84
47 As required by HRA 1998, s 6(1)
48 Discussed at p 189-90
Government assessments of compatibility, and focus instead on the political implications of the legislation before them. ⁴⁹

Here, again, it seems that the potential impact of section 19 of the HRA 1998 has been diminished by the considerable institutional obstacles imposed by certain features of the legislative process at Westminster. ⁵⁰ Competing demands on MPs’ time and the increasing length, volume and complexity of legislation introduced into Parliament suggest that MPs and many Peers will be unable to devote as much time as might be necessary for the scrutiny of legislation for compatibility with the Convention. Further, the Government’s dominance over both the legislative procedures of the House of Commons ⁵¹ and the voting patterns of an overall majority of its members also reduces the potential for Parliament to act as a forum for objective, careful discussion of the human rights implications of bills.

The outcome: enactment of legislation adversely affecting Convention rights

It is a disappointing, although perhaps inevitable consequence of the aforementioned obstacles affecting the impact of section 19 that Parliament has enacted legislation that has adversely affected, and sometimes violated, Convention rights. ⁵² An example of such legislation is section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. ⁵³ The enactment of this provision clearly illustrated a number of the issues impeding the ability of statements of compatibility to ensure that human rights considerations are fully examined and assessed during the legislative process by both the Executive and Parliament. Later found to have violated Convention rights, ⁵⁴ this provision was introduced as a Government amendment at a very late stage in the bill’s passage through Parliament. The timing of its introduction meant that the provision was never included in any statement of compatibility and the opportunities for scrutiny by Parliament and the JCHR were significantly reduced. This demonstrates the ability of the Government to manipulate the legislative process to avoid scrutiny of the

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⁴⁹ Discussed at p 190-92, and see p 256-59 below  
⁵⁰ Detailed discussion at p 188-97  
⁵¹ e.g. through the programming of legislation: p 194-95  
⁵² See Table 5 (p 198) and the discussion of adverse rulings by domestic courts and the ECtHR at p 201-06  
⁵³ Discussed in detail in ch 6  
⁵⁴ R (Baiai) v Secretary of State for the Home Department [2008] UKHL 53, [2009] 1 AC 287
human rights implications of its bills. Such actions clearly undermine the purpose of section 19 and Parliament’s role under the HRA 1998, both of which were intended to ensure that the democratically accountable branches of government were able to contribute to the protection of human rights in the United Kingdom.

The only partial success of section 19 of the HRA 1998 must be understood against, and indeed may have contributed to, the widespread political hostility that has served as the background to the operation of the 1998 Act in recent years.


Widespread political hostility to the Human Rights Act 1998

Since its implementation, section 19 of the HRA 1998 has operated against a background of widespread political hostility. The Labour Party leadership’s support for incorporation of the ECHR into domestic law before the 1997 general election was tested following the tragic events of 11 September 2001. The “War on Terror” and subsequent bombings on the London Transport network on 7 July 2005 saw the Labour Government taking significant and far-reaching legislative steps to combat the threat of terrorism, many of which adversely affected Convention rights. In those circumstances a number of very senior Government Ministers spoke out openly against the HRA 1998, suggesting that the requirements of the Convention rights were impeding the Government’s efforts to prevent further terrorist attacks. Although later disproven, such statements did little to foster understanding of and support for the HRA 1998 among either politicians or wider society. Conservative Party criticisms of the HRA 1998 seem to have been based on a concern that the Act substantially increased the power of the judiciary to the detriment of the democratically elected Parliament. Such arguments have underpinned Conservative policies to replace the

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55 Discussed at p 17
56 p 117-18
57 p 118
59 See further p 35-36
HRA 1998 with a Bill of Rights for the United Kingdom since at least 2006, and featured in the party's 2010 general election manifesto.

Hostility to the HRA 1998 remains a feature of political discourse in the United Kingdom, with senior Conservative Ministers making trenchant criticisms of judicial decisions and their use of human rights arguments. In relation to the continuing wrangling over the response to the ECtHR judgment in *Hirst* to the effect that prisoners should not automatically or in every case be disqualified from voting in any election, the Prime Minister declared that ‘even having to contemplate having to give the vote to anyone who is in prison’ made him ‘physically ill’. Home Secretary Theresa May subsequently stated that the Government was ‘disappointed and appalled’ at the ruling in *R(F) v Secretary of State for the Home Department* which declared that section 82 of the Sexual Offences Act 2003, imposing a lifelong obligation to notify the police of their place of residence and plans to travel abroad on persons sentenced to over thirty months’ imprisonment for a sexual offence, was incompatible with article 8 of the ECHR. Such was the Government’s disapproval of this decision that the Home Secretary insisted: ‘It is time to assert that it is Parliament that makes our laws, not the courts; that the rights of the public come before the rights of criminals; and, above all, that we have a legal framework that brings sanity to these cases’. Theresa May continued her attack on the HRA 1998 at the Conservative Party Conference in October 2011, stating:

We all know the stories about the Human Rights Act. The violent drug dealer who cannot be sent home because his daughter – for whom he pays no

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63 *Hirst v United Kingdom* (2006) 42 EHRR 41
64 HC Deb 3 November 2010, vol 517, col 921
65 HC Deb 16 February 2011, vol 523, col 959
66 [2008] EWHC 3170 (Admin), [2009] 2 Cr App R (S) 47
67 Article 8(1) states: ‘Everyone has the right to respect for his private and family life, his home and his correspondence’
68 HC Deb 16 February 2011 (n 65) col 960
maintenance – lives here. The robber who cannot be removed because he has a girlfriend. The illegal immigrant who cannot be deported – and I am not making this up – because he had a pet cat. This is why I remain of the view that the Human Rights Act needs to go. 69

It is amid such controversy that the Coalition Government’s Commission on a Bill of Rights has been tasked with examining the options for the future of human rights protection in the United Kingdom.

The Commission on a Bill of Rights: troubled by the respective roles of Parliament and the judiciary in the protection of human rights

The Coalition Government’s Programme for Government included a commitment to:

Establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. 70

Established on 18 March 2011, the Commission has held a number of meetings, undertaken a consultation exercise, and held a short series of seminars as part of its inquiry. 71 The minutes of the Commission’s meetings 72 reveal that the issue of the relative powers of the branches of government in any future system of human rights protection has been a feature of the Commission’s work. 73 Framed as an examination of the balance struck by the HRA 1998 between parliamentary sovereignty and the role of the judiciary, this issue was discussed in detail in the Commission’s meeting of 15 November 2011 74 and again at a Seminar held on 23 February 2012. 75 At the latter event, a view was expressed that ‘there might be scope for greater involvement of

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71 <http://www.justice.gov.uk/about/cbr> accessed 27 May 2012
72 Available at: <http://www.justice.gov.uk/about/cbr/meetings> accessed 27 May 2012
73 ibid: minutes to the meetings held on 6 May 2011 and 9 September 2011
74 ibid: Annex B to the minutes to the meeting held on 15 November 2011
75 This Seminar was co-hosted by the Arts & Humanities Research Council, and was held under Chatham House Rules. A summary of the discussion is available at: <http://www.justice.gov.uk/downloads/about/cbr/ahrc-seminar.pdf> accessed 27 May 2012
Parliament under a UK Bill of Rights than that currently envisaged by section 19 of the HRA. 76

The issue of the appropriate roles for Parliament and the judiciary under a future scheme of rights protection has proved controversial and seems to have contributed to the resignation of one Commissioner, Dr Michael Pinto-Duschinsky. 77 Following his resignation, Dr Pinto-Duschinsky described ‘core disagreements within the commission’ relating to ‘different conceptions of Britain’s constitutional architecture’. 78 The Commissioner had ‘hoped that there would be a set of serious and prolonged discussions with advice from world experts on the appropriate roles of judges and legislators and the interactions between them’. 79 However the ‘opportunities for [such discussions] were limited by the commission’s lack of funding and staffing and also the busy professional lives of most members’. 80

This focus on the appropriate roles of Parliament and the judiciary reflects long-standing trends in academic and political discussion of the HRA 1998, but arguably fails to appreciate the potential of the existing system of statements of compatibility to ensure the centrality of the Executive and Parliament under current arrangements.

Section 19: its contribution to and possible role in reducing such hostility

It has been argued that the principal purpose of section 19 of the HRA 1998 was to ensure that the democratically accountable branches of government were of central importance in the collaborative exercise of protecting human rights in the United Kingdom. Yet this feature of the HRA 1998 seems to have been overlooked by those critics who argue that the 1998 Act has increased the power of the judiciary to the detriment of Parliament. It would seem therefore that the only partial success of section 19 may have contributed to the flourishing of such criticisms.

76 ibid 8
79 ibid
80 ibid
Had the impact of section 19 been more immediate following its implementation in November 1998 there may have been greater understanding within Whitehall and Westminster of the governmental and parliamentary roles envisaged by the HRA 1998. If guidance for departments had been available at the time of its entry into force and if the delay in the creation of the JCHR had not occurred, it is at least possible that the new mechanisms introduced by section 19 could have had a positive effect on the human rights compliance of new legislation and engagement with and acceptance of Convention rights among politicians. Although unlikely to have persuaded committed Euro-sceptics of the desirability of a legislative scheme based on rights transposed from the ECHR, more effective and immediate implementation of section 19 could have helped avoid some of the hostility that has blighted perceptions of the HRA 1998.

From this perspective, the mechanism of statements of compatibility as provided for in section 19 of the HRA 1998 should be retained in any future system of human rights protection in the United Kingdom, whether that takes the form of the current legislation, a Bill of Rights, or even a written constitution providing entrenched protection for human rights. A system of ministerial certification as to the compatibility of legislation with human rights has clear benefits. It promotes a collaborative approach to the protection of human rights involving all branches of government and is thus consistent with current constitutional arrangements and developments within a number of Commonwealth jurisdictions.

81 Opposition to “interference” in UK law by European bodies was evident during the debate on Voting by Prisoners, held in the House of Commons on 10 February 2011. For example, Ian Davidson stated “There is a Brussels mindset, irrespective of where it is physically located, that basically says that European is best and that there is a political elite in Europe that knows better than we do in this country how our country should be run” (HC Deb 10 February 2011, vol 523, cols 563-63), and Philip Hollobone stated “We want our Government to show leadership on this issue, to tell the European Court that it has lost its way, and to defend the settled will of the British people that we will not cave in to this kangaroo court” (ibid, col 538)


83 ch 1
84 ch 2
A renewed understanding of the HRA 1998 focusing on the central importance of section 19 is therefore needed. Such an approach would help to allay fears of judicial dominance\textsuperscript{85} and might facilitate more confident use of the roles already available to the Executive and Parliament through the system of statements of compatibility. However, in order to maximise the effectiveness of section 19 and achieve greater understanding of the central roles accorded to the democratically accountable branches of government by the HRA 1998, certain reforms to the system of ministerial certification and parliamentary scrutiny of legislation for compatibility with Convention rights\textsuperscript{86} are necessary.

3. REFORMS TO THE SYSTEM OF STATEMENTS OF COMPATIBILITY UNDER SECTION 19 OF THE HUMAN RIGHTS ACT 1998

It has been argued in previous chapters that many of the obstacles to the realisation of the full potential impact of section 19 of the HRA 1998 arise from the nature of government at Westminster.\textsuperscript{87} In the present political circumstances there seems to be little prospect of the significant or fundamental change to the system of government in the United Kingdom which might help alleviate some of those obstacles. For example, Ewing has argued that a more representative House of Commons composed using the additional member system would remove the current Government dominance of the House, enabling Parliament to play a more independent role in the protection of human rights and civil liberties.\textsuperscript{88} However, electoral reform is unlikely to be achieved in the near future following the rejection of the alternative vote as the electoral system for parliamentary elections in the referendum held on 5 May 2011.\textsuperscript{89} Although there were some indications that the Labour Party under Gordon Brown’s leadership was beginning to consider a possible future move to a codified, written constitution for the United Kingdom,\textsuperscript{90} such a policy is not openly supported by the

\begin{itemize}
  \item \textsuperscript{85} Discussed at p 34-36
  \item \textsuperscript{86} Or indeed any human rights standards applicable under a future system for rights protection
  \item \textsuperscript{87} p 152-55 and p 188-97
  \item \textsuperscript{88} Ewing, \textit{Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law} (OUP 2010) 275-76
  \item \textsuperscript{90} Ministry of Justice, \textit{The Governance of Britain} (Cm 7170, 2007) paras 212-13
\end{itemize}
current leadership of the Conservative Party\textsuperscript{91} and it is extremely unlikely that such a policy would be a priority for any government at the present time.\textsuperscript{92} However, reforms to the system of statements of compatibility could mitigate a number of the problems caused by the nature of government at Westminster.

Certain features of the current system of statements of compatibility should be retained. The requirement to make a statement of compatibility in respect of all Government bills is preferable to a system of ministerial reporting only where a bill appears to be inconsistent with human rights standards.\textsuperscript{93} Requiring ministerial statements for all bills contributes to human rights scrutiny becoming a regular and routine feature of the legislative process, enhancing the opportunities for Parliament to test the Government’s reasons for concluding that a bill is Convention compatible. This is especially important as most compatibility assessments are likely to be based on the proportionality of an interference with Convention rights, involving difficult and often subjective assessments of relevant factors. These are issues on which reasonable people may disagree, and it is therefore appropriate that Parliament’s scrutiny of such assessments should be facilitated. Further, recent legislation in a number of Commonwealth jurisdictions has followed the example of section 19 of the HRA 1998, requiring certification in respect of all bills.\textsuperscript{94} Retaining the current requirement for statements of compatibility to be made for all bills would therefore accord with modern developments in comparative jurisdictions.

Additionally, the current statutory approach of not specifying the scrutiny to be performed by the JCHR is the correct one. Recent legislation in other jurisdictions has prescribed such scrutiny in varying terms.\textsuperscript{95} However, in the United Kingdom the

\textsuperscript{91} The Conservative Party’s 2010 manifesto (n 61) made no reference to reform of the nature of the constitution
\textsuperscript{93} As in Canada and New Zealand: p 48 & 54
\textsuperscript{94} HRA 2004 (ACT), s 37; CHHRA 2006 (Vic), s 28; HRPSA 2011 (Cth), s 8
\textsuperscript{95} HRA 2004 (ACT), s 38 requires the relevant Standing Committee to ‘report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly’. CHHRA 2006 (Vic), s 30 requires the Scrutiny of Acts and Regulations Committee to ‘consider any Bill introduced into Parliament’ and report ‘as to whether the Bill is incompatible with human rights’. HRPSA 2011 (Cth), s 7 requires the newly-created JCHR to examine bills introduced into Parliament ‘for compatibility with human rights, and to report to both Houses of the Parliament on that issue.’
freedom accorded to the JCHR to determine its own working practices\textsuperscript{96} has enabled it to develop efficient and effective methods of scrutinising proposed legislation tailored to current political circumstances. The ability of the Committee to focus on bills raising the most significant human rights issues allows it to perform more targeted scrutiny, which may contribute to enhancing the impact of its work among parliamentarians.\textsuperscript{97}

Reforms to section 19 of the HRA 1998 should instead focus on changes affecting the Executive in the making of statements of compatibility and Parliament in its scrutiny of the compatibility of bills with Convention rights. Reforms might also be made in relation to the wider governmental approach to human rights policy.

**Reforms affecting the Executive: reasoned statements of compatibility and centralised responsibility**

*The need for reasoned statements of compatibility*

Section 19 of the HRA 1998 does not require the Minister making the statement of compatibility to give reasons for his or her conclusions regarding a bill’s compliance with Convention rights. Ministers would instead be expected to provide such reasons during the course of the debate on the bill.\textsuperscript{98} The decision not to include a requirement to provide reasons when making a section 19 statement provoked criticism even during the parliamentary passage of the Human Rights Bill. Amendments were proposed in both the House of Lords\textsuperscript{99} and the House of Commons\textsuperscript{100} which would have required Ministers to provide reasons for their conclusions on compatibility. Since the enactment of the HRA 1998, the JCHR has been persistent in its calls for the provision of more information from the Government to explain the basis for its statements of compatibility.\textsuperscript{101}

As the HRA 1998 has become embedded in legislative processes within the Executive and Parliament, successive governments have become gradually more

\textsuperscript{96} See discussion of the Committee’s changing working practices at p 167-74
\textsuperscript{97} A number of authors have highlighted the risks of providing too much detailed legalistic information to busy parliamentarians: see e.g. p 182
\textsuperscript{98} Discussed at p 128
\textsuperscript{99} By Baroness Williams: discussed at p 95-96
\textsuperscript{100} By James Clappison: discussed at p 101-03
\textsuperscript{101} Discussed at p 182-84
transparent as to their reasons for concluding that bills are compatible with the Convention. This does not seem to have been a direct result of thorough parliamentary scrutiny of bills against human rights standards.\(^{102}\) Instead, the Executive has required that all Explanatory Notes include a section on compatibility with the ECHR which must ‘give further details of the most significant human rights issues thought to arise from the Bill’.\(^{103}\) Further, and largely as a result of the tenacity of the JCHR,\(^{104}\) Government departments are increasingly producing Human Rights Memorandums to accompany bills which set out in detail the Government’s opinion on compatibility without revealing legal advice.\(^{105}\)

It remains the case that although increasingly common, such practices are not without problems. The degree of discretion accorded to ministers and departments as to the content of Explanatory Notes has resulted in significant variations in the length and quality of the Convention compatibility information provided,\(^{106}\) and Human Rights Memorandums are not yet produced as a matter of routine. Although some contend that the provision of such information would merely duplicate information already made available in Explanatory Notes or through debates in Parliament,\(^{107}\) in the interests of increasing the effectiveness of section 19 and enhancing the role of the Executive and Parliament under the HRA 1998, section 19 should be amended to require the provision of a dedicated Human Rights Memorandum to accompany all Government bills.

Human Rights Memorandums have long been called for by the JCHR as part of its attempts to ensure that better reasoning for section 19 statements of compatibility is made available to Parliament,\(^{108}\) and are supported by the EHRC which argued that such a requirement ‘would increase transparency and improve the quality of “dialogue” between the executive, Parliament and the courts’.\(^{109}\) The routine provision of more detailed reasons for conclusions on compatibility would also accord with recent

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102 A clear example of the House of Commons’ failure to test the human rights implications of a bill can be seen in relation to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 19, discussed in ch 6
103 Cabinet Office, Guide to Making Legislation (n 15) para 11.63
104 JCHR calls for the provision of Human Rights Memorandums are discussed at p 183-84
105 p 184
106 Detailed discussion at p 145-47
107 p 183
109 EHRC (n 82) 89
developments in a number of Commonwealth jurisdictions. Legislation in the Australian Capital Territory requires statements of compatibility to state:

(a) whether, in the Attorney-General’s opinion, the bill is consistent with human rights; and

(b) if it is not consistent, how it is not consistent.\footnote{HRA 2004 (ACT), s 37(3)}

Similarly, in Victoria the member of Parliament making a statement of compatibility must indicate:

(a) whether, in the member’s opinion, the Bill is compatible with human rights and, if so, how it is compatible; and

(b) if, in the member’s opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.\footnote{CHRRA 2006 (Vic), s 28(3)}

Finally, in the Commonwealth of Australia a statement of compatibility made by a member of Parliament introducing a bill ‘must include an assessment of whether the Bill is compatible with human rights’.\footnote{HRPSA 2011 (Cth), s 8(3)} In New Zealand, where there is no statutory requirement for the Attorney General to provide reasons for reporting that a bill or part thereof is not compatible with human rights,\footnote{NZBORA 1990, s 7 requires only that the Attorney General ‘bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights’} calls for increased transparency on such issues have resulted in publication of the legal advice forming the basis for section 7 reports.\footnote{Discussed at p 56}

Reforming section 19 to require the routine provision of Human Rights Memorandums need not imply a particularly onerous duty on the part of the Executive, and may indeed provide some benefits. If Government departments act in accordance with the \textit{Guide to Making Legislation}\footnote{n 15} their legislative proposals should already be subject to scrutiny for human rights compliance. Providing reasons for concluding that such proposals are compatible with Convention rights to Parliament in the form of a Human Rights Memorandum, either in addition to or instead of the relevant section in the Explanatory Notes, would avoid the restriction that ‘Explanatory Notes cannot
contain argumentative material'. \(^{116}\) In the opinion of the JCHR that restriction is likely to ‘inhibit the inclusion of the Government’s full reasons for its view that any interference with a Convention right was justified in the sense of being necessary to meet a pressing social need and proportionate’. \(^{117}\) The provision of a Human Rights Memorandum would therefore enable the Government more fully to express its views and arguments forming the basis for a statement of compatibility made under section 19 of the HRA 1998.

The regular provision to Parliament of such information would foster parliamentary engagement with that reasoning, facilitating the human rights scrutiny of legislation that section 19 was designed to provoke. Parliament cannot engage with and test the Government’s reasons for its conclusions on compatibility if it is not provided with relevant information. Routine access to this information may encourage parliamentarians to view human rights scrutiny as an integral and habitual part of the legislative process, thus enhancing Parliament’s role in the protection of human rights in the United Kingdom. Ensuring that Parliament fulfils the role envisaged for it under the HRA 1998 is especially important: as the Act ‘denies to the judiciary the final say when determining constitutional validity, political scrutiny of impending legislation is vital’. \(^{118}\) Although denied the final say over the constitutional validity of legislation, the judiciary nevertheless enjoys significantly enhanced powers over legislation as a result of the HRA 1998. \(^{119}\) A further reason for supporting the regular provision of a Human Rights Memorandum is that ‘fuller scrutiny of compatibility issues in Parliament make it more likely that legislation will withstand human rights scrutiny in our own courts’. \(^{120}\) This would therefore increase the perception of human rights protection as a collaborative exercise, and help counter criticisms that the HRA 1998 has resulted in *de facto* judicial dominance. \(^{121}\)

\(^{116}\) JCHR, *The Human Rights Act: The DCA and Home Office Reviews* (n 108) para 66

\(^{117}\) Ibid

\(^{118}\) HL Deb 22 March 2007, vol 690, col 1403 (Lord Thomas)

\(^{119}\) HRA 1998, ss 3 & 4

\(^{120}\) JCHR, *The Human Rights Act: The DCA and Home Office Reviews* (n 108) para 61

\(^{121}\) e.g. Morgan, ‘Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties’, in Campbell, Ewing & Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011), arguing at 442 that the practical application and impact of HRA 1998, ss 3 & 4 has resulted in UK courts gaining powers akin to those granted to Canadian courts under the Canadian Charter, and calling for the replacement of section 19 with a ‘wider and more useful obligation to provide a “reasoned statement of the Bill’s implications for civil liberties and human rights”’.\(^{7}\)
The production and provision of Human Rights Memorandums would be facilitated by the next proposed reform to the system adopted for the implementation of section 19: centralising responsibility for statements of compatibility.

The need to centralise responsibility for statements of compatibility

Section 19 of the HRA 1998 requires the Minister responsible for each bill to make the statement of compatibility,122 and as a result responsibility for vetting proposed legislation for compatibility with Convention rights and preparing the statement of compatibility rests with each Government department.123 Such a system undoubtedly has advantages. It seeks to ensure that there is widespread awareness and understanding of human rights standards throughout Whitehall, such that ‘compliance with the Human Rights Act is a central function of each department’.124 Further, requiring each Minister to make the statement of compatibility ‘requires them to take ministerial responsibility’.125 Ministers should therefore take care to ensure that their statements to Parliament are accurate and honest, in accordance with the requirements of the Ministerial Code.126

However, the system introduced by section 19 of the HRA 1998 has not been without problems in practice. The implementation of section 19 and development of mechanisms for vetting proposed legislation for compatibility with Convention rights was fractured and uneven, with some departments seemingly more willing to engage with the requirements of section 19 than others.127 Further, devolving responsibility in this way has left much scope for ministerial discretion. The extent to which the Executive is willing or able to provide information to Parliament on the reasoning supporting a statement of compatibility, whether in the course of debates128 or in Explanatory Notes129 to a bill, may vary considerably and depend on an individual Minister’s understanding of and commitment to the protection of human rights. Such

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122 HRA 1998, s 19(1)
123 Discussed at p 131-32
124 Interview with Lord Falconer (n 28)
125 ibid
126 See further p 143-44
127 Detailed discussion at p 132-34
128 p 129
129 p 144-48
variation does not facilitate the scrutiny of the human rights implications of bills by Parliament, and undermines the impact of section 19 and the HRA 1998.

Centralising the vetting of proposed legislation for compatibility with Convention rights, and amending section 19 of the HRA 1998 to require statements of compatibility to be made by the Attorney General\textsuperscript{130} would help minimise these issues. Such a reform would accord with reporting mechanisms in a number of Commonwealth jurisdictions. In Canada and New Zealand the Minister of Justice and the Attorney-General respectively are required to report where it appears that the provisions of a bill are not compatible with human rights,\textsuperscript{131} and in the Australian Capital Territory the Attorney General must make a compatibility statement in respect of all bills introduced into the Legislative Assembly by Ministers.\textsuperscript{132}

A number of specific benefits of centralised vetting have been highlighted in relation to the Canadian system. The Department of Justice has assumed a more prominent role, with its lawyers involved throughout the development of legislative proposals.\textsuperscript{133} This ensures that human rights considerations are taken into account at a time where they may influence the content of a bill, and are based on coherent, high-quality legal advice. A more consistent approach to rights-vetting in the United Kingdom followed by a statement made by the Attorney General would bring significant advantages, by minimising the risks presented by the current degree of ministerial discretion, and presenting a more objective basis for the statement of compatibility, founded on sound legal advice.

Further, centralising responsibility for statements of compatibility may also help prevent judicial powers under from becoming dominant within the settlement created by the HRA 1998. Kelly has argued that in Canada the Department of Justice’s ‘proactive bureaucratic activism’\textsuperscript{134} has increased the influence of the democratically accountable branches of government, reducing the likelihood of judicial nullification of legislation

\textsuperscript{130}The Attorney General, rather than the Secretary of State for Justice should have the duty to make statements of compatibility in the United Kingdom. The Secretary of State for Justice has a broad range of policy responsibilities (<http://www.justice.gov.uk/about/moj/what-we-do/our-responsibilities> accessed 27 May 2012), many of which are often controversial and raise human rights issues. See e.g. the current controversial proposals in the Justice and Security Green Paper (Cm 8194, 2011)
\textsuperscript{131}Department of Justice Act 1985, s 4.1 and NZBORA 1990, s 7
\textsuperscript{132}HRA 2004 (ACT), s 37
\textsuperscript{133}Discussed in detail at p 50-51
\textsuperscript{134}Kelly, ‘Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and its Entry into the Centre of Government’ (1999) 42 Can Pub Adm 476, 491
and therefore contributing to the successful implementation of the Executive’s policies. This would be especially valuable in the United Kingdom, where the current widespread hostility to the HRA 1998 often focuses on the perceived use of judicial powers to the detriment of the sovereign Parliament. More consistent and more accurate compatibility testing within Government departments, minimising the risk of successful legal challenges to legislation on Convention grounds while ensuring adequate protection for human rights, could contribute to calming current criticisms and re-focused perceptions of the HRA 1998 to acknowledge the significance of Parliament and the Executive within the scheme of the Act.

Transferring responsibility for statements of compatibility to the Attorney General would also reflect the balance of power and influence regarding Convention compatibility issues that exists within Government under the current system. The advice of the Law Officers on human rights issues is definitive and adhered to by Government departments and Ministers. In evidence to the JCHR in 2006, Harriet Harman stated, ‘the Attorney’s last word is very important because if the Attorney says “This is ECHR compliant” the Government is going to go ahead with it and not start looking over its shoulder’. This account of the Attorney General’s influence was confirmed by Lord Falconer, who explained:

The body that is definitive within Government is the Law Officers. So the Attorney General’s view on whether [a bill] is compatible is ultimately final. (...) If he says it’s ok, i.e. it does comply, then there won’t be any debate, because who’s going to question that, if that’s what the department wants? (...) Ultimately, within Government, it’s the definitive view of a lawyer that determines whether or not it goes ahead.

This view, taken together with evidence that Ministers are only rarely involved in discussing or assessing the human rights implications of proposed bills, suggests that the centralisation of responsibility for statements of compatibility would more accurately reflect current arrangements for decision-making on Convention compatibility.

135 See further p 34-36
136 JCHR, Human Rights Policy, Oral Evidence (2005-06, HL 143, HC 830-i) Q47
137 Interview with Lord Falconer (n 28)
138 p 154
Finally, such centralisation may have benefits from the perspective of the information made available to Parliament to aid its legislative scrutiny. Ensuring that a single government body is responsible for vetting legislation and making compatibility statements would facilitate the production of Human Rights Memorandums. Having carried out a legal assessment of the compatibility of the provisions of a bill with Convention rights, the Attorney General would be best placed to prepare a document containing the Government’s reasoning behind the section 19 statement, without inappropriately revealing legal advice. As argued above, this would assist the human rights scrutiny of legislation by Parliament, thus ensuring that the protection of human rights in the United Kingdom is guaranteed through the collaborative model envisaged by the HRA 1998.

Reforms affecting Parliament: the JCHR and increased information and training for parliamentarians

Changes to the powers of the JCHR

The work of the JCHR in scrutinising legislation for human rights compatibility and pressing the Executive to provide reasons for its section 19 statements has been widely praised.\(^{139}\) The Committee has developed its working practices to suit legislative processes at Westminster, and now focuses its scrutiny efforts on bills that raise significant risks of violating one or more of the Convention rights.\(^{140}\) There is evidence that the work of the JCHR is being increasingly recognised within Parliament,\(^ {141}\) and that its recent decision to propose amendments to give effect to its recommendations is affecting the content of some bills.\(^ {142}\) The JCHR has undoubtedly acted as a valuable, non-partisan voice in scrutinising legislation for compatibility with Convention rights, and its work has had some impact within Parliament. However, certain reforms could make the Committee’s work more effective still.

A first option would be to transform JCHR consideration of bills into a formalised stage in the legislative process. Morgan has argued that this could take place

\(^{139}\) Discussed at p 174-81
\(^{140}\) See further p 171
\(^{141}\) n 40
\(^{142}\) p 176-77
in one of two ways. The first alternative would be to amend the Standing Orders of both Houses of Parliament to require ‘consideration of the JCHR’s report before proceeding to the Committee Stage on any Bill’. This would be advantageous as it would facilitate parliamentary scrutiny at an early stage in the legislative process, thus maximising the opportunity for human rights debate and reducing the likelihood that Parliament may unwittingly enact rights-violating legislation. However, the Committee has not always been able to report on bills before the committee stage and it may be that a formal requirement with a strict time limit as suggested by Morgan would be unworkable in all cases. Therefore, a more general requirement that ‘JCHR reports should be formally considered at some stage of the legislative process in both Houses’ seems a more realistic reform. This would have the advantage of ensuring that both Houses were ‘required directly to confront human rights issues as part of the enactment of legislation’ through the consideration of JCHR reports, but would avoid the risk that the JCHR may not always meet deadlines set out in a more prescriptive change to the Standing Orders.

A second, more radical alternative would be to make the JCHR’s scrutiny ‘another “stage” of [a] bill’s passage through Parliament, with the JCHR able to amend the text of the bill’ exercising similar powers to public bill committees. According to Morgan, the ‘heightened political interest’ likely to be generated by such a reform would accord with the view that ‘human rights are properly subjects for political debate’. However, in light of the growing success of the JCHR’s recent practice of proposing amendments to give effect to its recommendations, such a reform is currently unnecessary. Instead, the effectiveness and impact of the Committee’s amendments should be monitored for the short- to medium-term, rather than prematurely adding to the already complex legislative process.

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143 Morgan (n 121) 443-44
144 ibid 444
145 See further p 173-74
146 Ewing, Bonfire of the Liberties (n 88) 277
147 ibid
148 It will be recalled that owing to a number of factors the JCHR report in respect of the Asylum and Immigration (Treatment of Claimants, etc) Bill received only limited parliamentary consideration even though it contained stark warnings of significant risks of rights violations: p 223-28
149 Morgan (n 121) 444
150 A description of the powers and functions of Public Bill Committees is available at: <http://www.parliament.uk/about/how/committees/general/> accessed 27 May 2012
151 Morgan (n 121) 444
A further option for reform would be to increase the powers of the JCHR, without necessarily formalising its role in the legislative process. Ewing suggests enabling the Committee to ‘delay a bill for a year and perhaps indefinitely’ where it has been found to violate rights, based on the constitutional model used in Sweden. Although Ewing is surely correct to suggest that such a measure ‘would indeed be a salutary restraint on government’ and would promote Parliament’s role in the protection of rights, it is uncertain at what stage of the legislative process a bill would need to be identified as violating rights before it would be delayed on this basis. If such identification did not take place at a very early stage, significant parliamentary time could be lost in scrutinising a bill that was later subject to extensive delays on human rights grounds. In addition, such a reform would necessitate exceptions for bills which the Government sought to have enacted within a short time frame in response to pressing circumstances. Furthering Parliament’s ability to scrutinise bills for human rights compatibility is unlikely to be won at Westminster at the expense of a government’s ability to implement its policy objectives.

As such, a more achievable reform would be in respect of Government amendments to Government bills. The JCHR has recommended that any future Bill of Rights for the United Kingdom could contain a requirement that reasoned statements of compatibility should not only apply to bills on introduction, but also to Government amendments to bills. Such a measure could be implemented by means of a reform to section 19 of the HRA 1998, and should be accompanied by a power for the JCHR formally to notify both Houses of Parliament when late Government amendments containing new policies raise a significant risk of violating Convention rights. These reforms would not only strengthen Parliament in its ability to hold the Executive to account and scrutinise the human rights implications of legislation. They could also discourage the Executive from taking tactical decisions as to the timing of amendments in the knowledge that in so doing, close scrutiny of its policies may be avoided, as seems to have happened to unfortunate effect in respect of section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

152 Ewing, Bonfire of the Liberties (n 88) 278
153 ibid 277-78
154 ibid 278
155 JCHR, A Bill of Rights for the UK? (n 82) para 226
156 Discussed in ch 6
Increased information and training for parliamentarians

The ability of the Executive and Parliament to assess legislative proposals for compatibility with Convention rights depends on the members of those institutions having sufficient knowledge to engage with such issues. Ministers will be unable adequately to explain the Government’s conclusions on compatibility and parliamentarians unable thoroughly to scrutinise bills if they do not understand relevant human rights standards. They need to be ‘familiar with Convention issues and be able to raise concerns or questions relating to human rights compatibility with confidence and authority’. 157

A wide programme of judicial training was undertaken prior to implementation of the HRA 1998, in anticipation of the new powers granted to the judiciary by the Act. 158 This programme of training, carried out by the Judicial Studies Board ‘cost £4.5 million [and involved] some 3,500 judges and 30,000 magistrates’ 159 and included a ‘series of 58 seminars on specific sections of the Act and Articles of the Convention’. 160 This training contributed to the successful implementation of the HRA 1998 ‘from a legal perspective’, 161 as ‘the arguments are taken seriously and the courts have been able to grapple with the sort of arguments that human rights principles require’. 162 Although successful implementation by the courts is vital to the effective working of the HRA 1998, the Act envisaged that all branches of government would be responsible for ensuring the protection of human rights in the United Kingdom. Unfortunately, efforts to ensure that the judiciary would be prepared fully to engage with Convention rights were not mirrored in respect either of the Executive or Parliament. Although some measures were taken within Government to facilitate implementation of the HRA 1998, 163 ‘Whitehall departments did not see an increase in their budgets to deal with incorporation’ 164 and it seems that no effort was made to provide training or information to parliamentarians. It is therefore argued that increased and regular training should be made available to members of the Executive and Parliament to facilitate human rights

157 Cooper, Auditing for Rights: Developing Scrutiny Systems for Human Rights Compliance (JUSTICE 2001) 35
158 Especially under HRA 1998, ss 3, 4, 6, 7 & 8
159 Leigh & Masterman (n 37) 22
160 ibid
162 ibid
163 Discussed at p 130
164 Leigh & Masterman (n 37) 22
scrutiny of proposed legislation, and to fulfil the aim of the HRA 1998 that the democratically accountable branches of government should have central roles in protecting human rights in the United Kingdom.

As argued above,165 certain features of government at Westminster may contribute to a lack of knowledge or understanding among Ministers of human rights issues and a possible reluctance to question legal advice given by officials. Recent research by the Constitution Unit166 has revealed that almost all “outsider ministers”167 confirmed that ‘there was very little in the way of induction or introduction following their appointment: “I was dropped right in it. A few weeks after appointment I was taking a Bill through the Lords.” “It was sink or swim”’.168 Although focusing on “outsider ministers” who may have little or no direct political experience, the rapid rate of ministerial turnover that is a feature of modern government is likely to mean that such experiences are shared by many new Ministers. The authors noted that ‘this situation has apparently improved: the Government’s Chief Whip may explain the nature of a minister’s duties at appointment, and there are induction courses for new ministers available at the National School for Government [sic]’.169

The National School of Government provided an Induction Programme for new Ministers from July 2007. This included workshops for new Ministers after general elections or major Cabinet reshuffles followed by individual discussions to identify the training needs of Ministers. These courses were not compulsory and statistics available in July 2010170 showed that from June 2010 only nine ministers attended individual briefings on Parliament which included information on internal legislative processes.171 This is only a very small proportion of the total number of Government Ministers: in July 2010 there were 119 Ministers, Government Whips and Government

165 p 152-54
166 Yong & Hazell, Putting Goats amongst the Wolves: Appointing Ministers from Outside Parliament (Constitution Unit 2011)
167 i.e. persons made members of the House of Lords to permit their appointment to ministerial roles
168 Yong & Hazell (n 166) 37
169 ibid
170 These statistics were obtained from: <http://www.nationalschool.gov.uk/policy/MinisterialProgramme/table.asp> accessed July 2010. Since the closure of the National School of Government on 31 March 2012, this information no longer appears online
171 These briefings should have included some discussion on Convention compatibility, as by that time compatibility-vetting had become a formalised part of the development of legislative proposals
Spokespersons in the House of Lords.\textsuperscript{172} It is no longer certain whether such training is available to Ministers following the closure of the National School of Government on 31 March 2012.

It therefore seems clear that new Ministers would benefit from increased training and information at the start of their ministerial careers. Yong & Hazell recommended that ‘There should be a better induction process for all incoming ministers. Induction might involve, at a minimum, a briefing on the parliamentary role of the chief whip, and on the departmental role from the permanent secretary’.\textsuperscript{173} Further, they recommended that the:

civil service could provide newly appointed ministers with an “induction pack” [which] would deal with the basics of ministerial life, such as the role of the Private Office, the Permanent Secretary, press office; key responsibilities and duties of ministers (tailored to the relevant House), aspects of House procedure; practical matters such as ministerial pay, travel and the like.\textsuperscript{174}

Such information would be invaluable to new Ministers and could be supplemented with guidance regarding the Government’s, and therefore the Minister’s, legal responsibilities, including the need to ensure the Convention compatibility of legislative proposals as required by section 19 of the HRA 1998. Indeed, regular refresher courses could be made available to all Ministers as a means of ensuring that they have access to up-to-date, relevant information on human rights developments and begin to develop a working knowledge of human rights issues. This would only improve the ability of the Executive to work within the scheme of the HRA 1998: ‘The more Ministers know about the detail of the Human Rights Act and how it is deployed in the course of legislation, the better.’\textsuperscript{175}

Similar training and regular information should be made available to parliamentarians. Although there are encouraging signs as to the use made of JCHR reports within Parliament,\textsuperscript{176} much could be done to improve the standard of human rights scrutiny within the chambers of the Houses of Parliament. It remains the case that most references to JCHR reports are made by a minority of tenacious

\textsuperscript{172} <http://www.cabinetoffice.gov.uk/resource-library/government-ministers-and-responsibilities> as accessed July 2010
\textsuperscript{173} Yong & Hazell (n 166) 86
\textsuperscript{174} ibid
\textsuperscript{175} Interview with Lord Falconer (n 28)
\textsuperscript{176} n 40
parliamentarians. This seems to reflect research into the attitudes of Australian parliamentarians to human rights, which identified that a significant issue affecting the ability of legislatures to carry out human rights scrutiny of legislation was the extent to which parliamentarians were able to ‘identify human rights problems in legislation’. Although information on human rights issues was available from sources such as parliamentary libraries and NGOs, ‘fully half [of parliamentarians] did not use any source of information other than their own knowledge and insights or the advice of the parliamentary committee and its experts’.

This demonstrates that there is significant scope for improving the human rights knowledge and understanding of parliamentarians, especially as the JCHR is not always able to report early enough in the legislative process to inform debate and legislative scrutiny. The provision of regular, accurate and up-to-date information to parliamentarians would facilitate the human rights scrutiny of legislation by Parliament. Not only would this enable Parliament to fulfil its central role in the protection of human rights under the scheme of the HRA 1998, it may also affect the use of judicial powers in the context of challenges to primary legislation on human rights grounds. The likelihood of courts using their powers in a way that respects Parliament’s decisions will be diminished if human rights issues do not form part of the debate on the legislation. It is therefore in Parliament’s own interest to ensure that its members are able to engage with and apply human rights standards during its scrutiny of legislation.

Wider reform: A Human Rights Action Plan

A significant factor underlying the problems experienced in the implementation of the HRA 1998 is the continuing misunderstandings surrounding the Act, its meaning and implications. In spite of a Government attempt in 2006 to dispel a number of these myths and misperceptions, considerable problems remain. In its November 2011

177 See further p 191
179 Ibid 339
180 See the discussion of the late introduction of the marriage clauses into the Asylum and Immigration (Treatment of Claimants, etc) Bill: p 215-28
181 Detailed discussion at p 162-63
182 Department for Constitutional Affairs, Review of the Implementation of the Human Rights Act (n 58)
response to the Commission on a Bill of Rights consultation document the EHRC argued ‘Substantial work is still required to improve understanding and reduce misconceptions of human rights by people working in public authorities, the general public, politicians and the media’. Liberty also stated that:

It is undeniable that there is a lack of public understanding and “ownership” of the HRA. An almost complete absence of public education about the Act by the Government that introduced it has meant that for many years the human rights narrative has been one of real and imagined litigation as reported by a mainly hostile media. It is disappointing that more was not done before, during or after the Act’s enactment to explain its effect to the British public.

This situation has meant that the validity and constitutional suitability of the HRA 1998 continues to be a treated as a live party political issue. According to Lord Falconer, ‘The difficulty in relation to human rights [in the United Kingdom] is the failure of the body politic to get human rights in the context of the European Convention accepted as a fundament of our constitution. And as long as it is in play politically, compliance will not be total.’ This was echoed by Rachel Robinson of Liberty who acknowledged:

there’s obviously, and always, and unavoidably, the wider political issue that the narrative around human rights legislation that we can’t escape – the media presentation of human rights – means that to some extent and in some quarters it’s a dirty word (…) there’s a fear of embracing the language of rights too much, because of the wider narrative.

One possible method of alleviating these problems might be the adoption of a Human Rights Action Plan for the United Kingdom. As part of its Human Rights Framework the Australian Government has developed a National Human Rights Action Plan as a means of assessing human rights priorities and identifying measures to be implemented.

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183 EHRC (n 82) 5
185 Interview with Lord Falconer (n 28)
186 Interview with Rachel Robinson, Policy Officer, Liberty (London, 4 July 2011)
in order to achieve further protection for human rights in Australia. A similar measure, assessing and monitoring the United Kingdom’s human rights obligations not only internationally but also domestically could bring considerable benefits.

Kissane argues that ‘it was precisely a shortfall in planning following the passage of the HRA in 1998 that has led to persistent public and media discontent with human rights in the United Kingdom’. 189 This somewhat ad hoc attitude to implementation of human rights standards has continued: ‘After 60 years of formal commitment to human rights, and 13 years after the passage of the HRA, there is still no single account of the United Kingdom’s current domestic policy on human rights’. 190 Adoption of a Human Rights Action Plan could provide an opportunity to create an objective assessment of the state of human rights in the United Kingdom, serve as an educative tool for politicians and the public, and if created with cross-party support could help alleviate some of the political controversy that has blighted the HRA 1998. Both the Executive and Parliament may then feel less inhibited in their discussion and examination of the human rights implications of legislation, and accordingly play to the full the roles envisaged for them as the democratically accountable branches of government under section 19 of the HRA 1998.

189 Kissane, ‘Does the United Kingdom need a National Human Rights Action Plan?’ [2012] EHRLR 1, 3
190 ibid
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