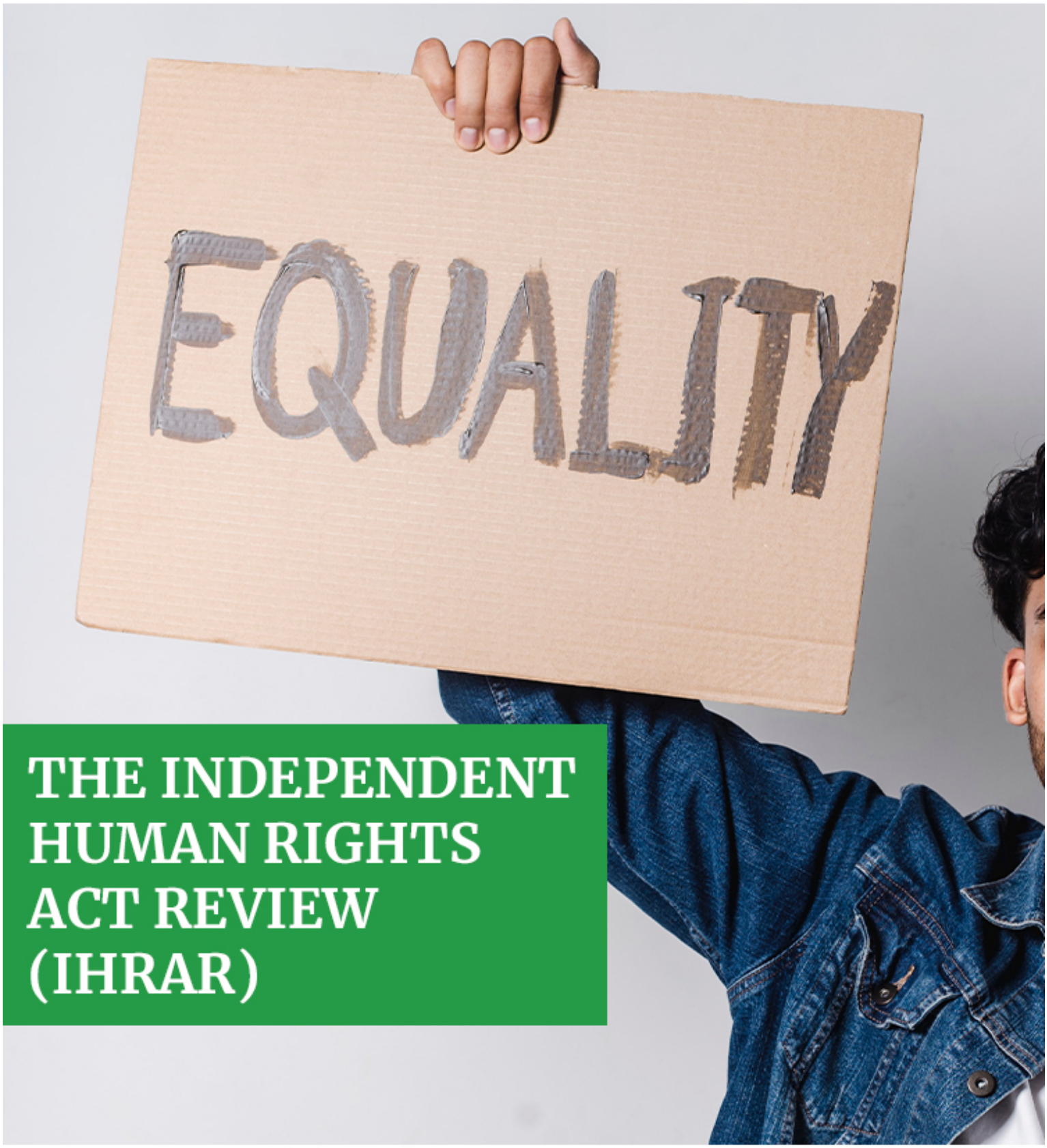

THE INDEPENDENT HUMAN RIGHTS ACT REVIEW (IHRAR)

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A Submission from Muslim Engagement and Development (MEND)

March 2021

MEND's contribution to the review

This submission from Muslim Engagement and Development (MEND) to the Independent Human Rights Act Review (IHRAR) seeks to explore the questions posed by the Independent Human Rights Act Review Panel regarding the current functioning of the Human Rights Act 1998 (HRA), the relationship between domestic courts and the European Court of Human Rights (ECtHR), and the operation of the HRA within the relationship between the judiciary, the executive, and the legislative branches of government.

MEND is a community-funded organisation that seeks to encourage political, civic, and social engagement within British Muslim communities through empowering British Muslims to interact with political and media institutions effectively. Our approach to achieving this involves a combination of community engagement (through education, community events, local campaigns to encourage voting etc.) and advocacy work (involving victim support, submissions to parliamentary inquiries, media analysis, election resources, briefings etc.).

Considering MEND's expertise in the protection of minority rights and those of Muslim communities in particular, we feel that we can provide constructive insights into the HRA and its operational value in society. As such, MEND hopes that this contribution may provide guidance to the IHRAR in approaching the HRA in a manner that recognises the experiences of minority communities that rely upon its protections.

Abbreviations

The European Court of Human Rights **(ECtHR)**

The European Convention on Human Rights **(ECHR)**

The Human Rights Act 1998 **(HRA)**

The Independent Human Rights Act Review **(IHRAR)**

Declaration of incompatibility **(DOI)**

Approaching the review

Democratic and free societies are built upon the ideals of equality, justice, and fairness. It is in line with these principles that we expect our governments and public bodies to act, and it is through these principles that we hold them to account when they do not meet this standard. Within this framework, the HRA is a valuable check on power and an important mechanism for mitigating and correcting intentional or unintentional state actions that jeopardise the values, rights, and freedoms that we hold dear. In other words, even the best-intentioned

legislation and policies can occasionally overlook potential human rights implications and can threaten the equality we expect as citizens; whether that be impacts to our privacy, our access to education, our freedom to hold political or religious beliefs, or our protection from abuse.

The HRA allows citizens to access justice in these situations. Specifically, it allows courts to determine if human rights have been breached. If this is found to be the case, the courts can demand that any legislation that is incompatible with our human rights obligations be changed by the Government. This is a fundamental and objective protection against any government's abuse of power. However, recent times have seen the current Government's increasing hostility to the courts and indications that they wish to remove or restrict judicial scrutiny. If this were to happen, any potential human rights breaches and considerations to legislation would be subject solely to the decisions of Parliament – a body which cannot escape its politicised underpinnings and the subsequent infiltration of political agendas into any such decision.

Consequently, the importance of the courts cannot be overstated. It is only through the courts that all citizens can be assured access to justice and the legal protection of their rights, regardless of the political machinations of those in political power.

Key conclusions

1. It is unnecessary to amend the duty inscribed within Section 2 of the HRA for UK courts to "take into account" any decision of the ECtHR. MEND believes that this section is operating as intended.

2. Parliamentary sovereignty is appropriately protected under Sections 3 and 4 of the HRA. Any amendments to these sections would only serve to damage this balance and undermine the ability to protect and enforce the fundamental rights upon which citizens rely.

3. To amend or repeal Section 3 of the HRA can only cause lengthy delays in victims accessing redress for potential rights violations.

4. Due to the protection to parliamentary sovereignty inherent within Section 4 of the HRA, MEND can see no benefit nor need for Parliament to be involved earlier in the process regarding DOIs.

5. MEND can see no evidence of Section 14(1) operating in a problematic manner to date and considers the remedies available under this section to be measured, appropriate, and a necessary check on power.

6. MEND deems the provisions contained within the HRA to address secondary legislation that contravenes HRA rights to be measured and essential. Indeed, as secondary legislation is subject to reduced levels of parliamentary scrutiny in comparison to primary legislation, MEND believes that the HRA plays an important role creating oversight to guard against human rights implications that may have been overlooked in the legislative process.

7. Remedial orders embodied by Section 10 of the HRA provides an adequate balance between securing timely remedies and allowing for effective parliamentary scrutiny. MEND is not aware of any evidence demonstrating that Parliament is placed at a disadvantage by these provisions, thus consider it unnecessary to expand its role at the expense of victims' swift access to justice.

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

> *"The first theme deals with the relationship between domestic courts and the European Court of Human Rights (ECtHR). As noted in the ToR, under the HRA, domestic courts and tribunals are not bound by case law of the ECtHR, but are required by section 2 HRA to "take into account" that case law (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right. We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change…*
>
> *How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?"*

As observed by the terms of reference for the IHRAR, Section 2 of the HRA requires UK courts to "take into account" any decision of the ECtHR for cases pertaining to rights contained within the ECHR.[1] However, UK courts are not bound by this case law. This is important as the ECtHR hears cases from 47 countries and cases concerning one country have resonance with issues found in the UK context. That is not to say that these cases set a precedent that UK courts are required to follow, rather, they must only consider it when deciding a similar case. Thus, UK courts have discretionary powers when considering the implementation of ECtHR rulings and, as such, decisions of the ECtHR do not automatically mandate the UK to amend domestic legislation.

From the perspective of victims of human rights breaches, this relationship is a fruitful one that creates space for constructive introspection whilst respecting the domestic context. Indeed, the current system not only facilitates constructive dialogue between the UK courts and the ECtHR regarding the application of rights in the UK but does so in a way that allows for an implementation that is compatible with British traditions, cultures, and laws.

Moreover, amendments to this section could result in legal uncertainty. With the Government's assertion that the UK will remain a member of the ECHR, it is the ECtHR that provides clarity in how the rights contained within the convention should be understood and what they mean in practice. Removing the obligation to consider the rulings of the ECtHR would, therefore, create confusion in the scope and application of these rights. At the same time, the ever-changing nature of our society results in the emergence of previously unexplored issues and questions (the fast-paced evolution of technology and its implications for privacy considerations as but one example). Having examples and guidance drawn from 47 nations can only benefit the UK in navigating such uncertainties.

Consequently, MEND argues that it is unnecessary to amend the duty inscribed within Section 2 of the HRA for UK courts to "take into account" any decision of the ECtHR. We believe that this section is operating as intended.

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

> *The ToR note that the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will consider the way the HRA balances*

[1] *Human Rights Act 1998*, vol. 2, 1998.

those roles, including whether the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy. We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change…

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

The HRA protects a delicate balance between the protection and enforcement of human rights by courts on the one hand and the preservation of parliamentary sovereignty on the other. Indeed, the HRA is limited in its power and does not allow for UK courts to overturn any Act of Parliament. As such, Sections 3 and 4 of the HRA fully protect and maintain the separation of powers whilst upholding the sovereignty of Parliament. MEND cannot find any evidence that the HRA poses a risk of domestic courts being unduly drawn into questions of policy. Any amendments to these sections would only serve to damage this balance and undermine the ability to protect and enforce the fundamental rights upon which citizens rely.

Parliamentary sovereignty is appropriately protected under Sections 3 and 4 of the HRA. Any amendments to these sections would only serve to damage this balance and undermine the ability to protect and enforce the fundamental rights upon which citizens rely.

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

Section 3 of the HRA states: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." [2] What this means in practice is that UK courts must interpret legislation set out by Parliament in a way that is compatible with the ECHR. Essentially, Section 3 requires courts to rely on the assumption that the intent to comply with the UK's human rights obligations is inherent within all legislation passed by Parliament, unless Parliament has explicitly stated to the contrary. Indeed, in a democratic society the hope and assumption should always be that Parliament wishes its legislation to comply with our human rights obligations. Consequently, MEND can find no case brought under this section of the HRA for which the outcome could be seen to have resulted in a reading that was incompatible with the intention of Parliament.

In reality, the careful drafting of the Act specifically precludes any possibility of the courts interpreting legislation in opposition to the intent of Parliament. Parliament reserves the right to legislate incompatibly with the ECHR and also reserves the right to legislate to undo a Section 3 ruling. Therefore, there cannot be any question of any threat to parliamentary sovereignty and MEND can see no evidence for any benefit to amending or repealing Section 3 of the HRA.

It is also important to note that if the courts are unable to interpret legislation compatibly with ECHR, they do not possess the power to change or refuse to apply the law as legislated by

[2] *Human Rights Act 1998*, vol. 2, 1998.

Parliament. Instead, they may only make a DOI under Section 4, as will be discussed further below.

At the same time, Section 3 facilitates courts to provide an immediate remedy for individuals and groups subject to human rights breaches. If it were to be amended or repealed the only result would be to delay access to redress as those affected would potentially have no option but to wait possibly for several years for legislation to be redrafted and passed by Parliament.

To amend or repeal Section 3 of the HRA can only cause lengthy delays in victims accessing redress for potential rights violations.

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

Section 4 of the HRA grants the courts the ability to declare a piece of legislation to contravene the ECHR if they are unable to interpret legislation as compatible under Section 3. Section 4(6) also states that "a declaration of incompatibility a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and b) is not binding on the parties to the proceedings in which it is made." [3] This reinforces the fact that the HRA has limited influence on the application or operation of law; it cannot strike down legislation nor are DOIs submitted under Section 4 legally binding – Parliament can decide whether it wishes to ignore the DOI or to change the legislation in question.

Evidence has shown that the declarations of incompatibility are an important collaborative process between the judiciary, the executive and the legislature. While the courts adjudicate and assess cases to provide useful conclusions, it is the Government and Parliament which draws upon these conclusions if they wish to reshape policy. Ultimately, the authority remains with Parliament to decide if and how legislation should be amended. Given that the provisions under Section 4 preserve parliamentary sovereignty, there appears be to no need to enhance Parliament's powers earlier in the process.

Due to the protection to parliamentary sovereignty inherent within Section 4 of the HRA, MEND can see no benefit nor need for Parliament to be involved earlier in the process regarding DOIs.

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

Under Article 15 of the ECHR (derogation in time of emergency), the UK is permitted to derogate some rights under the ECHR in very limited and exceptional instances (such as war or a public emergency that threatens national security). Such derogation must be highly regulated in terms of its justification, its temporary nature, and with specificity regarding which exact rights under the convention are included within the derogation. Derogation orders have been subject to legal challenges over their validity and correct application in both

[3] *Human Rights Act 1998*, vol. 2, 1998.

domestic courts and at the ECtHR, where they have been remedied by quashing orders or declarations.

Section 14 of the HRA grants both judicial and parliamentary scrutiny of derogation orders to mitigate against the possibility of arbitrary and disproportionate use. In particular, this section allows domestic courts to ensure that:

- The relevant conditions of Article 15 of the EHRC are met.
- The measures imposed are proportionate to the threat.
- The measures are otherwise compliant with the protections embodied within the HRA and ECHR.
- The measures are otherwise lawful in accordance with domestic legislation and public law principles.

As a case study, shortly after the 9/11 attacks in 2001, the Anti-Terrorism, Crime and Security Act was brought into effect, providing a power to indefinitely detain international terror suspects without trail at Belmarsh prison. The Government, aware that this measure breached Article 5(1) Right to Liberty and Security, issued a Derogation Order under Article 15. This decision was challenged at court with regards to its incompatibility with the provisions of the ECHR and its unlawful and discriminatory targeting of non-UK citizens. In *A v Sec of State for the Home Department [2004]*[4] the courts and House of Lords rendered the derogation as invalid and issued a declaration of incompatibility with Article 5(1) the HRA and quashed the order.[5]

The case is particularly salient because it underlines the importance of the HRA in providing a mechanism for the judiciary to provide scrutiny and a counterbalance to the disproportionate use of powers by the Executive, particularly regarding matters relating to national security. This check on power is essential in maintaining a functioning democracy.

Moreover, Section 14 remains a remedy of last resort. As such, the use of such remedies remains a rarity. Indeed, there are protections in place to ensure against any inappropriate use of remedies. Hence, considering the limited use of derogation orders and challenges to them, MEND regards the remedies available remain both essential and entirely appropriate.

Consequently, MEND can see no evidence of Section 14(1) operating in a problematic manner to date and considers the remedies available under this section to be measured, appropriate, and a necessary check on power.

Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

As previously discussed, laws that are deemed incompatible with HRA rights can be addressed through Section 3 and 4 of the HRA. However:

- Section 3 cannot be applied to provisions of secondary legislation wherein these provisions are mandated within a primary piece of legislation.

[4] A and others v. Secretary of State for the Home Department, UKHL 56 (EWCA Civ 1502 2004).
[5] Lords Select Committee, *Memorandum By JUSTICE* (Parliament, 2009).

- DOIs have been issued under Section 4, however, this is a rarity and where DOIs have occurred it is overwhelmingly in relation to primary legislation.

There is also an ability to quash or strike down secondary legislation that contravenes the rights protected by the HRA. This is in line with the manner in which any secondary legislation may be quashed if found to be incompatible with a provision of primary legislation as a principle of basic constitutional law. Ultimately, all secondary legislation is subordinate to the provisions of an Act of Parliament – which includes the HRA as it itself is an Act of Parliament. It therefore follows that the quashing of secondary legislation that contravenes the HRA is an integral part of the UK's legislative framework.

Furthermore, Section 10 of the HRA underpins accelerated remedial order procedures in cases of DOIs or when secondary legislation has been quashed, thereby providing an avenue for the Government to quickly rectify any breaches of HRA rights if it is deemed inappropriate to follow the normal processes to address a DOI. Once more, this careful construction serves to support parliamentary sovereignty.

Meanwhile, in the last seven years there appears to have only been 14 successful cases that have challenged secondary legislation on grounds of the HRA.[6] In only four of those cases was the legislation struck down. Considering the fact that thousands of pieces of subordinate legislation are made each year, the comparatively insignificant number of successful cases in challenging secondary legislation highlights both the courts' measured approach when considering secondary legislation and the extreme caution applied when implementing quashing orders, thereby demonstrating the judicial deference to parliamentary sovereignty with courts offering the Executive substantial scope to consider rulings.

Because secondary legislation is subject to reduced levels of parliamentary scrutiny in comparison to primary legislation, MEND believes that the HRA plays an important role in scrutinizing legislation for human rights implications that may have been overlooked in the legislative process. Indeed, where the level of parliamentary involvement is minimal, judicial oversight becomes paramount.

As such, MEND deems the provisions contained within the HRA to address secondary legislation that contravenes HRA rights to be measured and essential mechanisms for ensuring that the UK legislative framework is compatible with our human rights obligations.

Should the remedial order process, as set out in section 10 of Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

The remedial order procedure under Section 10 of the HRA offers a means to revise legislation if a DOI is made by the courts and if a government minister considers it prudent to do so.[7] In such a case, the minister must present a draft order, which is scrutinised by the Joint Committee on Human Rights supported by legal advisors, and which must then be approved by both Houses in order for it to become law. This process takes 120 days, however, urgent orders can also be made provisionally without prior scrutiny but will become void if they are not approved within 120 parliamentary days.

[6] Joe Tomlinson, Lewis Graham and Alexandra Sinclair, "Does Judicial Review Of Delegated Legislation Under The Human Rights Act 1998 Unduly Interfere With Executive Law-Making?", *UK Constitutional Law Association*, 2021, https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/.
[7] Liberty, *A Parliamentarian's Guide To The Human Rights Act* (London: The National Council for Civil Liberties, 2010).

This remedial process is essential for ensuring that human rights breaches can be dealt with swiftly for the sake of victims. Were these provisions not in place, the delay in waiting for new legislation to be passed through Parliament would be significant.

As such, MEND is of the view that remedial orders embodied by Section 10 provides an adequate balance between securing timely remedies and allowing for effective parliamentary scrutiny that acknowledges the legal realities and ramifications. To disrupt this balance would only serve to detrimentally impact those seeking justice. We are not aware of any evidence demonstrating that Parliament is placed at a disadvantage by these provisions, thus consider it unnecessary to expand its role at the expense of victims' swift access to justice.

How MEND can assist parliamentarians, policymakers, and community stakeholders

- Providing briefings, information, analysis, and expertise on issues impacting Muslim communities.
- Arranging opportunities for parliamentarians, policymakers, and community stakeholders to engage with their local Muslim communities.
- Conducting research within Muslim communities.
- Connecting parliamentarians, policymakers, and community stakeholders to other local stakeholders.

If MEND can be of any assistance to your work, please feel free to contact info@mend.org.uk