EXPLANATORY MEMORANDUM TO

THE HUMAN RIGHTS ACT 1998 (REMEDIAL) ORDER 2019

2019 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Human Rights.

2. Purpose of the instrument

2.1 To address the European Court of Human Rights (ECtHR) judgment in *Hammerton v United Kingdom* (application no. 6287/10) by creating a power under the Human Rights Act 1998 (HRA) for domestic courts to make an award of damages in respect of a judicial act done in good faith in a new set of circumstances.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Human Rights

3.1 A document containing a draft of a proposed Remedial Order and the required information has been laid before Parliament in accordance with paragraph 3(1) of Schedule 2 to the HRA, and representations have been received from the Joint Committee on Human Rights. This Remedial Order is accompanied by a statement containing a summary of the representations and the drafting changes made as a result, laid in accordance with paragraph 3(2) of that Schedule.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 Chris Philp, Parliamentary Under Secretary of State at the Ministry of Justice has made the following statement regarding Human Rights:

"In my view the provisions of the Human Rights Act 1998 (Remedial) Order 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument is being laid in response to the ECtHR judgment in *Hammerton v UK* (application no. 6287/10) which concerned the availability of damages under section 9(3) HRA. Section 9(3) HRA does not allow damages to be awarded in proceedings under the HRA in respect of a judicial act done in good faith, except to the extent

required by Article 5(5) of the European Convention on Human Rights (ECHR) (deprivation of liberty).

6.2 Section 10 HRA provides that if it appears to a Minister that, having regard to a finding of the ECtHR, a provision of legislation is incompatible with an obligation of the UK arising from the ECHR, and the Minister considers there are compelling reasons for doing so, the legislation may be amended by Remedial Order to remove the incompatibility.

7. Policy background

What is being done and why?

7.1 The courts found that the applicant in this case had spent extra time in prison as a result of procedural errors during his committal proceedings, which were such that his rights under Article 6 ECHR as set out in the HRA (right to a fair trial) were breached. However, he was unable to obtain damages in the domestic courts because section 9(3) HRA does not allow damages to be awarded in proceedings under the HRA in respect of a judicial act done in good faith, except to the extent required by Article 5(5) ECHR (deprivation of liberty). The ECtHR found that the applicant's inability to receive damages in the particular circumstances of his case had led to a violation of Article 13 ECHR (the right to an effective remedy).

7.2 Having regard to this judgment, it appears to Ministers that section 9 HRA is incompatible with Article 13. The Remedial Order removes this incompatibility by amending section 9(3) to allow courts to award damages in a new set of circumstances: in respect of a judicial act done in good faith which is incompatible with Article 6 (right to a fair trial) and which results in someone spending longer in detention than they otherwise would have done, or spending time in detention when they otherwise would not have done, were it not for the incompatibility.

7.3 Under section 10(2) HRA, the Government is required to have "compelling reasons" for making an amendment by way of a Remedial Order rather than primary legislation. The current pressure on the legislative timetable means there is little prospect of using primary legislation. We also consider that the nature of the incompatibility contributes to there being compelling reasons for making the necessary legislative change swiftly. Therefore, we consider that a Remedial Order using the non-urgent procedure is the most appropriate legislative vehicle for implementing this judgment promptly while allowing parliamentary scrutiny of the measures proposed.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The Government does not intend to consolidate the legislation.

10. Consultation outcome

10.1 The Government has not conducted a separate consultation exercise as it would not be proportionate to do so for a targeted amendment which is required to implement a court judgment.

11. Guidance

11.1 The Government will not be publishing guidance on this amendment.

12. Impact

12.1 There is no impact on business, charities or voluntary bodies.

12.2 There is no impact on the public sector.

12.3 We have assessed the likely number of future awards for damages under this amendment to be low and the financial impact too small to justify preparing a full Impact Assessment for this instrument.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The effect of this amendment will be monitored on an ongoing basis by the Ministry of Justice. Any declarations of incompatibility made by the domestic courts and judgments of the European Court of Human Rights on related matters will be included in the Government's annual reports to the Joint Committee on Human Rights.

15. Contact

15.1 Michael Johnstone at the Ministry of Justice, telephone: 020 3334 2813 or email: humanrights@justice.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Alice Adamson, Deputy Director for Global Strategy and Rights at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chris Philp, Parliamentary Under Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.