EXPLANATORY MEMORANDUM TO

THE HUMAN RIGHTS ACTS 1998 (REMEDIAL) ORDER 2026

2026 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 His Majesty.

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

2. Declaration

2.1 Jake Richards MP, Parliamentary Under Secretary of State at the Ministry of Justice, confirms that this explanatory memorandum meets the required standard.

2.2 Rob Linham, Deputy Director for Rights and Public Law Policy at the Ministry of Justice, confirms that this explanatory memorandum meets the required standard.

3. Contact

3.1 Farzanar Yasmin at the Ministry of Justice, email: humanrights@justice.gov.uk, can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the instrument

4. Overview of the instrument

What does the legislation do?

4.1 This instrument is being laid in response to the European Court of Human Rights (ECtHR) judgment in *SW v UK* (Application no. 87/18) to allow for damages in respect of a judicial act done in good faith where the judicial act is incompatible with Article 8 of the European Convention on Human Rights (ECHR) on the ground that it was done in such a procedurally defective way as to amount to a breach of the requirements of procedural fairness under that article.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument is the United Kingdom.

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

5. Policy context

What is being done and why?

5.1 The applicant in *SW v UK* was a social worker who had acted as a professional witness in childcare proceedings. The judge in those proceedings, without giving the applicant opportunity to respond, made a number of critical comments about her professional conduct in his judgment and directed that the judgment be sent to the local authority to which she was currently assigned, and advised that his findings be shared with relevant professional bodies. The applicant's assignment with the local authority was subsequently terminated. The Court of Appeal subsequently set aside the relevant findings on the basis that if left standing there would be a breach the applicant's rights under Article 8 (right to respect for private and family life). The applicant was, however, unable to obtain damages in the

domestic courts because section 9(3) of the HRA restricts the circumstances in which damages can be awarded in proceedings under the HRA in respect of a judicial act done in good faith. The ECtHR found that the judgment of the Court of Appeal did not afford the applicant sufficient remedy for her complaint and found a breach of Article 13 (right to an effective remedy), together with Article 8. We are required under Article 46 of the ECHR to implement judgments of the ECtHR against the UK.

To address the Article 13 violation identified by the ECtHR in *SW v UK*, this Remedial Order amends section 9(3) of the HRA.

5.2 The Remedial Order will have the effect that:

- in proceedings in respect of a judicial act done in good faith;

- where the judicial act is incompatible with Article 8 on the ground that it was done in such a procedurally defective way as to amount to a breach of the requirements of procedural fairness under that Article;

a financial remedy may be awarded to the person to compensate for the breach of Article 8.

What was the previous policy, and how is this different?

5.3 Section 9(3) of the HRA provides that damages may not be awarded under the Act in respect of a judicial act done in good faith, otherwise than to compensate a person to the extent required by Article 5(5) or to compensate a person for a judicial act that is incompatible with Article 6 of the Convention in circumstances where the person is detained and, but for the incompatibility, the person would not have been detained or would not have been detained for so long. The Remedial Order will add a further exception to the bar in section 9(3) of the HRA.

6. Legislative and legal context

How has the law changed?

6.1 This instrument is being laid in response to the ECtHR judgment in *SW v UK* (Application no. 87/18) which concerned the availability of damages under section 9(3) of the HRA. The Remedial Order will add a further exception to the bar in section 9(3) of the HRA, such that damages may be awarded to compensate a person where a judicial act, done in good faith, is incompatible with Article 8 of the ECHR on the grounds that it was done in such a procedurally defective way as to amount to a breach of the requirements of procedural fairness under that Article.

Why was this approach taken to change the law?

6.2 The relevant incompatibility identified by the ECtHR concerned section 9(3) of the HRA and we consider that amendment to that provision will be necessary for implementation. Section 10 of the HRA provides that if it appears to a Minister that, having regard to a finding of the ECtHR in proceedings against the United Kingdom, 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.

6.3 Section 10(2) of the HRA requires that a Minister must consider there to be "compelling reasons" for making an amendment by way of a Remedial Order. We consider there is little prospect of finding suitable primary legislation to make an amendment in the near future. We consider that the nature of the incompatibility contributes to there being compelling reasons for making the necessary legislative change swiftly. Therefore, it is considered 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.

7. Consultation

Summary of consultation outcome and methodology

7.1 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 ECtHR judgment and meet our international obligations.

8. Applicable guidance

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

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because 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.

Impact on businesses, charities and voluntary bodies

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

9.3 The legislation does not impact small or micro businesses.

9.4 There is no significant impact on the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 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 ECtHR on related matters will be included in the Government's annual reports to the Joint Committee on Human Rights.

10.2 The instrument does not include a statutory review clause.

Part Three: Statements and matters of particular interest to Parliament

11. Matters of special interest to the Joint Committee on Human Rights

11.1 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 draft Remedial Order is accompanied by a statement containing a summary of the representations made and details of the changes made as a result, laid in accordance with paragraph 3(2) of that Schedule.

12. European Convention on Human Rights

12.1 Jake Richards MP, the Parliamentary Under Secretary of State for Justice has made the following statement regarding human rights:

"In my view the provisions of the Human Rights Act 1998 (Remedial) Order 2026 are compatible with the Convention rights."

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

13.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020, or the Retained EU Law (Revocation and Reform) Act 2023 ("the relevant European Union Acts").