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Briefings

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A third sex: returning to an intermediate zone

Jess O'Thompson, legal researcher, and Oscar Davies, barrister, consider the SC's judgment in *For Women Scotland (FWS)*¹. They aim to expose the risks the judgment poses to trans equality under the European Convention on Human Rights (ECHR) and to situate *FWS* in the broader trajectory of trans rights jurisprudence from *Goodwin* to the most recent case of *T.H.*² They argue that the effect of the judgment, whether on a broad or narrow reading, is to place trans people in an 'intermediate zone' of a nature incompatible with the ECHR. The consequence is that they are effectively treated as a third sex, and the rights guaranteed by the Gender Recognition Act 2004 following *Goodwin* have become illusory. They conclude that the *FWS* decision is incompatible with the ECHR and will result in violations of trans people's Article 8 rights. They urge the courts to bear in mind the obligations in the ECHR when interpreting the implications of the judgment in future cases and ensure that all people's rights are respected and protected.

Introduction

In *FWS*, the SC ruled that the term 'sex' within the Equality Act 2010 (EA) means 'biological sex' – that is to say (in most cases³) sex as recorded at birth, unamended by a gender recognition certificate (GRC). In doing so, it claims that such an interpretation would not disadvantage or remove protection from trans people. However, the court fails to consider, with any degree of seriousness, the potentially severe human rights implications of its decision.

'Broad' and 'narrow' interpretations – what does *For Women Scotland* mean?

There is much to say about the SC's decision in *FWS* and the reasoning the court adopted to reach its conclusions. The authors do not doubt that such discussions are likely to proliferate and that important debates remain. This article, however, will focus exclusively on the human rights implications of the judgment.

Of course, to consider its human rights implications, it is first necessary to understand the actual consequences of the judgment. However, this remains a highly contested issue. In the authors' view, current interpretations of the judgment coalesce broadly around two poles.

The first pole we term the 'broad' interpretation. Per this view, the SC's ruling has sweeping consequences for the rights of trans people. This broad reading maintains that the EA now not only permits, but indeed mandates, the exclusion of trans people from spaces and services associated with their lived gender. It would prohibit the provision of toilets intended for women, which permitted trans women to use said facilities, unless men were also able to use them. It would mean a women's gardening club, of which trans women were already members, and all other members desired the presence of, would be forced to disinvite those trans members or else admit men. It might mean that mothers would be unable to bring young male children with them into a women's changing room at their local pool, because this would mean that the changing room would cease to be a single-sex space.

¹ *For Women Scotland Ltd. v The Scottish Ministers* [2025] UKSC 16, April 16, 2025

² *T.H. v the Czech Republic*, Application No. 73802/13; October 12, 2021

³ A procedure exists to 'correct' a birth certificate in the cases of some intersex people. Ultimately, determining 'biological sex' remains a question of fact for the court, *Corbett v Corbett (otherwise Ashley)* [1971] para 83; January 23, 1971.

... the [ECtHR] has recognised that Article 8 imposes positive obligations on states to ensure effective access to legal gender recognition without disproportionate or degrading requirements.

Additionally, this broad interpretation is often read beyond the remit of the EA itself, into various other pieces of legislation that refer to 'sex'. This includes the Workplace (Health, Safety and Welfare) Regulations 1992 and the Police and Criminal Evidence Act 1984. The former would mean that employers would be obliged to provide toilets on a single-sex basis (if they cannot provide individual lockable cubicles) in a manner which would prevent trans people from using the toilet associated with their lived gender. The latter would mean that, for example, a trans woman in custody would have to be strip-searched by a male officer.

This can be contrasted with the second view, which we term the 'narrow' interpretation. This interpretation considers that whilst single-sex spaces and services are entitled to exclude trans people from accessing them on the basis of their lived gender, they are not required to do so, and this would not impede their ability to exclude, for example, cis men from a trans-inclusive women's service. Associations, if they so desire, may also remain trans-inclusive. However, there would still be significant implications for trans people's protections from discrimination on the basis of sex. For example, trans women would be unable to bring equal pay claims against their male colleagues. The 'narrow' interpretation would also limit the effect of the judgment to the EA alone, with the definition of sex within other legislation to be interpreted in its own context (and with proper regard to s9 of the Gender Recognition Act 2004 (GRA)).

Both these poles of interpretation would have significant consequences for the rights of trans people, and indeed others. We do not feel it is necessary in this article to adopt a view on which of these poles of interpretation is correct – although it may be that our analysis is relevant to which approach the courts ultimately take in future cases. Rather, we analyse the human rights implications of both the 'broad' and 'narrow' positions, concluding that each raises serious human rights concerns, nonetheless considering that the consequences of the 'broad' position are far more egregious.

Gender identity and human rights

At the outset, it is worth presenting a brief overview of the case law relating to gender identity under the European Court of Human Rights (ECtHR). In its jurisprudence, the court has recognised that Article 8 imposes positive obligations on states to ensure *effective access* to legal gender recognition without disproportionate or degrading requirements. Generally, the ECtHR has found it unnecessary to additionally consider Article 14 in relation to gender identity where it has found a substantive violation of Article 8 (see, among others, *Goodwin*).

Christine Goodwin v the United Kingdom

By far the most significant case in this area is the decision in *Christine Goodwin v the UK* Application No. 28957/95; July 11, 2002. The applicant, a trans woman (described in the case as a '*post-operative male to female transsexual*'), alleged a violation of her Article 8 right to respect for private life under the ECHR, due to the failure of the UK to legally recognise her changed gender. Her complaint related to her pension rights and her ability to marry, but also to her being considered male by an industrial tribunal, as well as her national insurance number potentially outing her as trans to her employers.

The ECtHR concluded that the UK had failed to comply with its positive obligation to ensure the applicant's right to respect for her private life, in particular through the lack of legal recognition given to her gender reassignment [para 71]. In doing so, the court made several important conclusions. It considered that it was of 'crucial importance' that the ECHR be '*applied in a manner which renders its rights practical*

and effective, not theoretical and illusory⁴, and that this meant it was necessary for its approach to remain dynamic and to evolve [para 74].

In *Goodwin* the court noted that the applicant '*live[d] in society as a female*' [para 76] and recognised that serious interference with private life can arise where domestic law conflicts with an important aspect of personal identity; it emphasised that a '*conflict between social reality and law*' places trans people in '*an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety*' [para 77].

Importantly, the ECtHR stated the following:

Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings [...] In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable ... [para 90] (Emphasis added).

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It concluded that '*having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation...*' [para 93]. As is well known, the decision in *Goodwin* ultimately led to the passing of the GRA.

It is worth noting also the case of *Hämäläinen v Finland* Application No 37359/09; July 16, 2014, concerning a trans woman who had been unable to obtain full legal gender recognition without converting her existing heterosexual marriage into a registered partnership. This was due to Finland's legal incompatibility between same-sex marriage and legal gender recognition at that time. Whilst the Article 8 interference was justified, this case reiterated the impact of a discordance between the social reality and the law, finding the applicant's old male identity number '*no longer corresponded to the reality*' [para 58].

Sterilisation and margin of appreciation

Although at first blush the decision in *Goodwin* applies narrowly to trans people who have undergone gender reassignment surgery, the subsequent case law of the ECtHR makes clear that such a requirement is unacceptable and that the Article 8 protections adhere to trans people more generally.

This issue was addressed in another significant case, *A.P., Garçon and Nicot v France* Applications Nos 79885/12, 52471/13, 52596/13; April 6, 2017. *Garçon* concerned three transgender applicants who were denied legal gender recognition because they had not undergone sterilisation or medical treatment leading to irreversible infertility.

In *Garçon*, the ECtHR ruled that making legal gender recognition conditional on undergoing medical procedures resulting in sterilisation was incompatible with human freedom and dignity [para 128] and amounted to a failure by the state to fulfil its

4 See also on this point *Y.Y. v Turkey* Application No 14793/08; March 10, 2015, para 103. The applicant, a trans man, was refused authorisation to undergo gender reassignment surgery because he had not met the requirement under Turkish law to be permanently infertile. The ECtHR found that this condition interfered with the applicant's right to respect for private life under Article 8 ECHR. It held that the interference was not justified under Article 8(2), as the state had failed to demonstrate that the infertility requirement was necessary in a democratic society [para 121].

positive obligations under Article 8 [paras 132–135]. The interference could not be justified under Article 8(2). Further, the sterilisation requirement undermined their Article 3 rights:

Making the recognition of transgender persons' gender identity conditional on sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – which they do not wish to undergo therefore amounts to making the full exercise of their right to respect for their private life under Article 8 of the Convention conditional on their relinquishing full exercise of their right to respect for their physical integrity as protected by that provision and also by Article 3 of the Convention. [para 131]

In reaching its conclusion, the court emphasised that *'the right to respect for private life under Article 8 ECHR applies fully to gender identity, as a component of personal identity. This holds true for all individuals'*. [para 95]

Importantly, the ECtHR also considered that *'where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted'*. [para 121] In such cases, states will find it harder to justify interference with trans people's Article 8 rights.

Limits of Article 8

However, the ECtHR has also determined that there will be some interferences with trans people's Article 8 rights which can be justified. In the case of *O.H. and G.H. v Germany* Applications Nos 53568/18, 54741/18; April 4, 2023, the first applicant – a trans man – was recorded as the mother on his child's birth certificate. The ECtHR emphasised that Article 8 encompasses the right to self-determination, with the freedom to define one's gender (and legal recognition of such) as one of its most essential components. The court held that this right included protection against involuntary revelation of their trans status [para 81].

The ECtHR reiterated that where a particularly important aspect of an individual's identity is concerned, the state's margin of appreciation is usually narrow. However, where there is no consensus across member states, especially where sensitive moral or ethical issues are raised, or where there is a need to strike a balance between conflicting interests or rights, the margin of appreciation will be wider [para 112].

In *O.H and G.H*, the court considered that the complaint did not relate to the first applicant's own records, but rather his child's [para 113]. Additionally, the court recognised that there was no consensus among member states on how to record trans parenthood on children's birth certificates [para 114]. In view of these circumstances, the court concluded that states should be afforded a wide margin of appreciation in this area. However, it was still necessary for the court to consider whether a fair balance had been struck [para 116–117].

In considering proportionality, the court paid particular regard to the fact that birth certificates which did not show parentage were available, and therefore the first applicant would not have to reveal their gender history, reducing the impact on trans people. Because the applicant's trans history would only be disclosed in a limited number of situations, and given the wide margin of appreciation, the ECtHR held that the German court had struck a fair balance between the applicant's right to privacy and considerations relating to the child's welfare and public interests [para 131].

The ECtHR has therefore made clear that it is willing to afford a wider margin of appreciation to states regarding gender recognition where other rights or interests are

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at stake. However, this margin will not be unlimited, and in the cases where interference has been found to be justified, it has often been of a very limited nature.⁵

T.H. v the Czech Republic

The most recent decision of the ECtHR concerning gender identity was in the case of *T.H. v the Czech Republic*, Application No. 73802/13; October 12, 2021. The applicant was non-binary but sought binary legal gender recognition as female. The court held that the failure to update the applicant's identity documents unless they had undergone gender reassignment surgery was in violation of their Article 8 rights.

In reaching its decision, the court noted it had attached significant importance to the '*clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transgender people but of legal recognition of the new gender identity of post-operative transgender people*'. [para 52]

One of the interveners, the Institute for Legal Culture Ordo Iuris, submitted that the margin of appreciation should be broadened in relation to trans people. In doing so, it specifically highlighted the '*the persisting relevance of the biological and binary concept of sex*', amongst other concerns [para 44].

The ECtHR noted that whilst '*gender reassignment may indeed give rise to different situations involving important private and public interests*', and that in this case there were relevant issues surrounding gender recognition in the 'general interest', the domestic authorities had '*disregarded the fair balance which has to be struck between the general interest and the interests of the individual*'. [paras 56–59]

The court considered that since the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 and the right to gender identity and personal development is a fundamental aspect of the right to respect for private life, states have only a narrow margin of appreciation in that area [para 53].

Not a third sex

It is evident from the above discussion that the ECtHR has developed a strong body of case law establishing gender identity as an important aspect of private life under Article 8 ECHR placing states under a positive obligation to ensure proper legal gender recognition which must be practical and effective rather than theoretical and illusory.

The ECtHR has recognised the importance of the social reality of trans people's lived gender, and noted that a conflict between this reality and the law results in vulnerability, humiliation and anxiety. It has stated that trans people should not be placed in an intermediate zone where they are recognised as not quite one gender or the other. The court has considered that the involuntary 'outing' of trans people also amounts to an interference with their right to private life.

Where a particularly important facet of an individual's existence or identity is at stake, the margin of appreciation will be narrow. In areas where there is no consensus among member states, or where there is a need to strike a balance between conflicting rights or interests, this margin will be wider. However, it will still be necessary for the court to ensure that a fair balance has been struck between the general interest and the interests of the individual. The interferences which the court has considered to be

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⁵ See, e.g., *Y v Poland*, Application No. 74131/14; February 17, 2022, where the ECtHR considered that although the trans male applicant's long form birth certificate still contained reference to him as a female, '*in nearly all everyday situations the applicant [was] able to establish his identity by means of identification documents or the short extract of the birth certificate*' [para 78].

justified have been of a very minor nature, such as on a long-form birth certificate which is rarely seen.

The effect of this case law was summarised by the SC in *R(C)*⁶ by Lady Hale (as she then was):

This puts it beyond doubt that the way in which the law and officialdom treat people who have undergone gender reassignment is no trivial matter. It has a serious impact upon their need, and their right, to live, not as a member of a “third sex”, but as the person they have become, as fully a man or fully a woman as the case may be. [para 29]

The Supreme Court’s analysis in *FWS*

The Human Rights Act 1998 (HRA) is a key component of the UK’s constitutional framework. It incorporates into domestic law the UK’s obligations under the ECHR; s3(1) 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.

In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, the House of Lords considered that s3 imposes a far-reaching obligation on courts to interpret legislation compatibly with the ECHR. The court held that a mere inconsistency of language with an ECHR-compliant meaning does not make such an interpretation impossible. It requires the court to depart even from the ‘unambiguous’ meaning that legislation would otherwise bear. It can require a court to read in words which change the meaning of the legislation and allows the court to modify the meaning and effect of primary and secondary legislation. Courts should not, however, adopt a meaning inconsistent with a fundamental feature of legislation [paras 25–33]. This is a significant and well-known duty upon the court.

Surprisingly, the SC in *FWS* did not engage with the human rights implications of its judgment in any substantive way, and makes no mention of s3 HRA.⁷ We consider that had the SC properly engaged with the ECHR framework, and its obligations under s3 HRA, it would have found that the definition of ‘sex’ it adopts in interpreting the EA is non-compliant with the ECHR. This is true whether a ‘narrow’ or ‘broad’ interpretation of *FWS* is adopted.

The ‘broad’ interpretation

The ‘broad’ interpretation of *FWS* (outlined above), which would mandate the exclusion of trans people from a range of spaces and services associated with their lived gender, and with which they interact on a daily basis, would amount to a clear and egregious violation of trans people’s Article 8 rights. This is best understood through the lens of a case study⁸, which gives insight into the severe impact a broad interpretation has on the day-to-day life of a trans person.

Let us consider what would be the new day-to-day life of Sophie, a trans woman in possession of a gender recognition certificate.

Sophie has lived as a woman for decades. She is not ‘out’ to her colleagues. She has always used the women’s toilets in her office building, which are on the corridor close

⁶ *R (on the application of C) v Secretary of State for Work and Pensions* [2017] UKSC 72

⁷ This is despite written submissions before the SC from Amnesty International UK concerning the human rights implications.

⁸ This is a pastiche of several of the recurring issues that the authors have received from trans people since the SC judgment.

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to her office. Following *FWS*, her employer has informed her that she is no longer permitted to use the women's toilets. Instead, she may choose between using the men's toilets on the same corridor or newly created 'gender neutral' facilities on a different floor of the building. She is informed she can no longer be a part of the women's network, or attend their social events, which she enjoys. Her colleagues notice that since the policy change, she has started to use the toilets on a different floor, and that she has suddenly stopped attending women's network events. This 'outs' her as trans against her will and makes her feel isolated at work.

Sophie is driving a long distance and stops at a petrol station to refill her car, and because she needs to use the toilet. She goes into the petrol station and sees that there are only gendered facilities available. Following *FWS*, these are operated on the basis of biological sex. She therefore leaves without using the facilities. During her drive, she worries she is going to wet herself. She feels uncomfortable and ashamed.

Sophie is also a volunteer at a local women's gardening club, which is an association of more than 25 people. She dedicates a lot of time to the club, and it is where she spends most of her time with friends. After *FWS*, she tells the other members of the club that she is trans, and so she will have to stop being part of the club. The other members refuse to accept her resignation, saying that she is their friend and that she contributes so much, and they would like her to continue being part of the club. They amend their constitution to make clear that they are open to both cis and trans women. An organisation which campaigns for a strict biological definition of sex finds out and asks a male member to apply to join the gardening club. When they refuse, he threatens to sue for sex discrimination. Following legal advice, the club decides that they cannot afford litigation, and so Sophie will no longer be a member.

In *Goodwin*, the ECtHR reminds us that '*the very essence of the Convention is respect for human dignity and freedom*' [para 90]. Whilst the SC does consider the concept of 'dignity' in its judgment and discusses the dignity of women [para 217], it does not meaningfully consider the dignity of women like Sophie, who will experience '*vulnerability, humiliation and anxiety*' [*Goodwin*, para 77] in day-to-day life as a consequence of (the broad interpretation of) its decision.

ECHR case law is clear that the creation of an 'intermediate zone' for trans people is impermissible. It is impossible to see how the position in which Sophie has been placed is anything other than such an 'intermediate zone', and that this will amount to an interference with her right to private life. The intermediate zone in which trans people are placed is also evidenced by the discussion in *FWS* concerning the gender reassignment discrimination exceptions with the EA. It was submitted to the court that on a 'biological' reading of sex, such provisions would be rendered void.

The SC disagreed, stating that instead these provisions were intended to capture where, for example, trans men could be excluded both from single-sex spaces for men (because the court considered trans men to be female), but additionally, where justified, from spaces for women as well, based on their 'masculine appearance' [para 221]. This, alongside the practical reality of trans people being separated into third spaces, shows that a broad interpretation of *FWS* treats trans people as the 'third sex' which ECHR case law, and the SC in *R(C)*, have warned against. As noted, the practical consequence is also that people like Sophie will be involuntarily outed as trans on a potentially regular basis, additionally interfering with her Article 8 rights.

The broad interpretation fails to recognise the 'social reality' [*Goodwin*, para 77] in which people like Sophie have lived, and continue to live, as women. Indeed, 'living' in one's acquired gender for at least two years, and intending to do so until death, is

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a requirement of obtaining a GRC under s2(1) GRA. The broad interpretation of *FWS* recreates a conflict between trans people's social reality and the law in a manner which renders the GRA effectively hollow. By mandating trans people's exclusion from various spaces and services which they access on a day-to-day basis, the practical legal recognition of trans people's gender is largely removed, even if, for other, less obvious purposes, such as pensions, it is recognised. As rights must be practical and effective, rather than theoretical and illusory, it must be considered that, in such circumstances, trans people's Article 8 right to legal gender recognition would all but be removed.

As previously outlined, the ECtHR has held that where a particularly important facet of an individual's existence or identity is at stake, the margin of appreciation afforded to a state will be restricted. Given the sweeping significance of the broad interpretation and its impact on important aspects of the day-to-day lives of trans people, we contend that the margin given to the UK should be a narrow one.

The ECtHR will afford a wider margin of appreciation where there is no consensus across member states. However, if, per the broad view, the EA does indeed now function as an effective trans bathroom ban, then the UK will have made itself a clear outlier among member states, going against a determined consensus towards the greater recognition of trans rights.

The ECtHR will also afford a wider margin of appreciation where other rights or interests are at stake. Some would argue that trans people's rights are in conflict with the rights of women, or with the proper importance of 'biological sex' (although the authors roundly reject such a framing). Therefore, the UK should be afforded a wide margin of appreciation in 'balancing' these rights.

However, the ECtHR has generally only considered the interference with trans people's rights justified in such cases where the interference has been very minor; e.g. concerning infrequently used long-form birth certificates. On the broad interpretation of *FWS*, the interference would be extreme, significantly impacting trans people on a daily basis. It is also difficult to see how various consequences of the broad view relate practically to the rights of others. Taking, for example, Sophie's gardening club: if all the other women want her there, but are unable to include her against their own wishes, how could such an interference be justified by reference to women's rights? Indeed, it seems more likely to infringe additionally upon their rights, such as their Article 11 rights, which protect their freedom of association.

Even if a wider margin were granted, it is still likely that the broad interpretation would be found to be a violation. In *T.H.*, the ECtHR considered submissions on the importance of, among other things, 'biological sex' and nonetheless concluded that the domestic authorities had '*disregarded the fair balance which has to be struck between the general interest and the interests of the individual*'. The position prior to *FWS* already included a mechanism by which to exclude trans people from spaces and services, where this could be justified as a proportionate means of achieving a legitimate aim. This allowed for the appropriate balancing of rights, having regard to the relevant context of each situation. It seems evident that the concerns and the balance to be found cannot be the same regarding a women's gardening club as if it was a women's rape crisis centre. It is difficult to see how the broad interpretation, which in contrast acts as a mandatory exclusionary sledgehammer, could appropriately reach a fair balance for the protection of trans people's human rights.

We therefore consider that the broad view amounts to a significant and unjustifiable violation of trans people's Article 8 rights.

The narrow interpretation

Although far less egregious than the broad view, we contend that even the narrow interpretation of *FWS* would result in a violation of trans people's Article 8 rights.

It seems to have been forgotten, by various campaigners and the courts, who have sometimes sought to limit *Goodwin* to being a case about marriage and pensions, that the applicant also raised in her complaint that she had been considered 'male' by the industrial tribunal when bringing a sex discrimination case. When the ECtHR discussed the harms of an 'intermediate zone', this is part of the zone to which they were referring. Indeed, the ECtHR in *Goodwin* specifically noted the impact that its decision would have on both employment and the justice system [para 91].

The narrow interpretation would still mean, for example, that trans women (unlike other women) would be unable to bring equal pay claims against higher-paid male colleagues. We consider that this would still place trans people in an intermediate zone as regards equality legislation, in a manner which goes against the decision of the ECtHR in *Goodwin*. Moreover, we do not see how in this area the margin of appreciation can be anything but narrow in such cases, as the only interests practically at stake are those of the trans person concerned. We therefore consider that, even on the narrowest possible reading of *FWS*, it may still amount to a violation of trans people's Article 8 rights.

Conclusion

In light of the ECtHR's jurisprudence, we consider that the decision in *FWS* is incompatible with the ECHR and will result in violations of trans people's Article 8 rights. We consider that this is especially likely, and would be particularly egregious, if a 'broad' view of the judgment is adopted.

We therefore urge subsequent courts to interpret the implications of the judgment with the ECHR in mind, giving proper effect to s3 of the HRA, and avoiding the serious violations that would necessarily result from the 'broad' interpretation. If courts find this to be impossible, then they should issue a declaration of incompatibility under s4 of the HRA, encouraging parliament to intervene to protect the human rights of all.