IHRAR's Call for Evidence
Mishcon de Reya response

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INTRODUCTION

Mishcon de Reya ("**Mishcon**"/ the "**Firm**") has a long history of engagement with public causes and human rights issues. The Firm regularly acts for individuals and groups who assert that their human rights have been breached and has challenged the Government in cases where it has been alleged that executive action has been used to curtail people's rights. Based on its experience of cases involving the application of the Human Rights Act 1998 (the "**HRA**"/ the "**Act**") the Firm believes that the HRA is materially fit for purpose.

The Firm's Data Science team has analysed data from the *vLex Justis* database of judgments, along with other data sources; its analysis has been used in support of this submission. The methodology applied is described in the Appendix to this submission.

The Independent Human Rights Act Review (**"IHRAR"**)"Terms of Reference suggest that, "*under the HRA, courts have increasingly been presented with questions of "policy" as well as law.*"[1] It is undoubtedly true that there are occasions when the courts have been confronted with questions of policy, however, an analysis of the case reports demonstrates that the judiciary is acutely aware of the importance not to stray into areas of policy that are, rightly, the exclusive domain of Parliament. Such areas of policy include issues of national security and fiscal policy as evidenced by the cases of *Bellmarsh*[2] and *Carlile*[3] in which the courts were notably reluctant to interfere with the policy decisions in dispute. The HRA was carefully drafted so as to enshrine and protect the balance and separation of power between Government, the legislature and the judiciary. Rightly, in any given situation, power rests with Parliament to amend legislation and with Government to secure it a place on the Parliamentary agenda.

The Government's political response to the euro-scepticism evident in sections of the print media and significant parts of UK society may have informed the focus in the Terms of Reference on the role of the European Court of Human Rights (the "**ECtHR**"). By way of example, the Attorney General stated in Parliament last year when discussing the purpose of the IHRAR: "*What I object to… is any submission to the European Court of Justice, and I am committed to our manifesto commitment to looking at the Human Rights Act and updating it.*" [4] The subtle conflation of the ECtHR with the institutions of the European Union may be politically expedient, but is legally and historically inaccurate. In this context, it is critical to remember the events that drove the UK's commitment to the European Convention of Human Rights (the "**Convention**") and the authority of the ECtHR, and the important part the UK played in its creation. The Council of Europe was established in the wake of World War II, specifically to promote and protect human rights. The European nations recognised the need for a legally enforceable instrument, bolstering 1948's unenforceable United Nations' Universal Declaration of Human Rights, in order to ensure the protection of human rights though a supranational court with the power to sanction nations that breached those rights. The British lawyer David Maxwell-Fyfe, Deputy British Prosecutor at the Nuremburg trials, was the rapporteur of the committee that drafted the Convention.

Despite last year marking the 75th anniversary of the end of World War II, the principles upon which the ECtHR and the rights enshrined in the Convention (the "**Convention Rights**") were founded remain as important as ever. Mishcon's role representing Deborah Lipstadt against the Holocaust denier David Irving is a reminder that we must not seek to downplay, or imagine ourselves now immune to, the atrocities of the past. Indeed, as global political leaders act in an increasingly autocratic fashion, we are seeing formerly fringe political groups gain traction within the mainstream electorate. The "*Rights Brought Home*" White Paper, setting out the case for the HRA, recognised the valuable opportunity the HRA would give the UK courts to act as leaders in safeguarding human rights across Europe: *"rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law."* [5] At a time when global commitment to human rights appears to be in jeopardy we believe that this is a role that Government should be pleased to entrust to our internationally respected judiciary.

The IHRAR does, however, provide a good opportunity to reflect on the way in which the Act operates and how it might be clarified, strengthened or improved. This submission proposes limited reforms to sections 2, 4 and 10 and/or Schedule 2 of the HRA, which we believe would improve the operation of the Act by encouraging more effective engagement with the Strasbourg court, reducing delay, increasing executive accountability to Parliament and strengthening Parliament's legislative role.

EXECUTIVE SUMMARY OF RESPONSES

Theme 1

— The duty to "*take into account*" ECtHR jurisprudence does not equate with a requirement to follow that jurisprudence. In fact, increasingly, the UK court has departed from ECtHR jurisprudence and provided detailed rationale for doing so. That rationale is an essential driver of judicial dialogue between the UK and Strasbourg courts.

— Indeed, we see real value in increased judicial dialogue between the UK and Strasbourg, enabling UK and ECtHR jurisprudence to develop in tandem in response to broader societal developments.

— Any amendment to section 2 of the HRA should therefore be informed by the desire to strengthen our commitment to judicial dialogue. In doing so, Parliament would ensure that the UK courts' reasoning is more likely to be considered and adopted by the ECtHR. This would strengthen the UK's position as a leader in the field of human rights.

Theme 2

— Despite suggestions to the contrary, section 3 does not provide the UK courts with unfettered power to interpret legislation as the judiciary sees fit. Settled case law provides clear parameters for the scope of the courts' interpretative powers under the Act. The power of the courts to seek to interpret UK law in a manner that is compatible with Convention Rights is, however, important. It helps ensure that the rights of vulnerable groups are safeguarded in circumstances where they might otherwise slip through the legislative net.

[1] IHRAR: Terms of Reference, pg.1 at human-rights-review-tor.pdf (publishing.service.gov.uk)

[2] A & Ors v Secretary of State for the Home Department [2004] UKHL 56

[3] R (Carlile) v Secretary of State for the Home Department [2016] UKSC 60

[4] Hansard, Thursday 9 July 2020, Human Rights Act 1998 - Thursday 9 July 2020 - Hansard - UK Parliament

[5] White Paper 'Rights Brought Home: The Human Rights Bill' (October 1997) https://www.gov.uk/government/publications/the-human-rights-bill

— Sections 3 and 4 of the Act invite a degree of judicial activism. The UK judiciary have, however, consistently shown themselves reluctant to intrude on matters of policy. Accordingly, the courts have placed limits on the making of section 4 Declarations of Incompatibility (**"DoI"**). Only 39 declarations have been made since the HRA came into force. Our Firm's data analysis shows that the vast majority of declarations (71.8%) relate to primary legislation enacted before the Act came into force.

— We believe that making DoI part of the initial process of interpretation rather than as a matter of last resort could increase delay. Once granted, individuals would have to wait for the Government to review, amend or repeal legislation, thereby removing the swift route to justice that the HRA sought to create.

— The Convention Rights, enshrined in the HRA, represent the minimum standard of human rights that individuals should expect from a state that is a signatory to the Convention (the "**Convention States**"). We do not believe that the UK should shy away from upholding these rights. As a world leader, the UK should hold itself to the highest possible standards, which, we believe, should apply consistently both at home and abroad.

— Whilst supportive of the Act in its current form, we believe that there may be circumstances in which remedial action could be taken more quickly following the making of a DoI. We have proposed amendments to section 4 and section 10 of the Act whereby the Government would be obliged to report to Parliament the reasons for its delay in laying remedial legislation within six months of the making of a subsidiary "delay" declaration by the court.

THEME 1

How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

The Convention States recognised the difficulty of identifying uniform European standards for human rights and so the Convention is, in reality, the "*lowest common denominator*"[6] of rights they are expected to uphold. The purpose of the HRA was to "*bring rights home*"[7] to the UK, enabling UK courts to make decisions in relation to the Convention Rights that conform to our societal standards, thereby cementing the UK's place as a world-leader in protecting human rights. The HRA sought to provide a framework within which Convention Rights and the jurisprudence of the ECtHR could be considered, tested and developed by the UK courts. Importantly, the HRA provides for domestic courts to disagree with ECtHR jurisprudence: a critical component of the Act, which continues to be exercised, but is often under-reported in mainstream media.[8]

Contrary to popular belief, the HRA's duty to "*take into account*" ECtHR jurisprudence does not bind domestic courts to follow Strasbourg decisions, and certainly does not elevate the ECtHR to a final court of appeal: "*There is a requirement to explain but not to follow and that was Parliament's intention.*"[9]

While Lord Wilson has suggested that it is "*inappropriate save in highly unusual circumstances*"[10] to depart from a decision of the ECtHR, the reasons that domestic courts have given to depart from Strasbourg jurisprudence are multiple and varied, including when the court "*has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process.*"[11,12] In *R (on the application of Nealon & Hallam) v Secretary of State for Justice,* the domestic courts ultimately held that Strasbourg jurisprudence in the area in issue was evolving, and that there was a lack of uniform interpretation from Strasbourg which therefore required further consideration and clarity.[13] This departure from Strasbourg jurisprudence was criticised by JUSTICE for not taking the detailed ruling of the ECtHR fully into account.[14] Such criticism supports the argument that section 2 of the HRA could be clarified so as to ensure a uniform application of the 'requirement to explain' when following or departing from ECtHR jurisprudence.

The duty to "*take into account*" ECtHR jurisprudence also reflects the reality of the relationship between the ECtHR and UK domestic courts, namely that it should not be considered in hierarchical terms. In fact, the growing confidence of the UK courts to depart from Strasbourg law[15] demonstrates that the HRA's system of taking into account Strasbourg jurisprudence is not a conscription to blindly follow, but rather a means to inform and strengthen how our system of checks and balances works.

Dialogue between the ECtHR and domestic courts is vital to ensure that the protection of the rights of individuals evolves in line with societal norms and importantly, the duty to "*take into account*" ECtHR jurisprudence further encourages checks and balances at the domestic level. The UK's application to intervene in the case of *Savran v Denmark*[16] emphasises the continued need for dialogue and that domestic courts can indeed benefit from clarifications provided by the ECtHR around the nature and scope of human rights. Whilst the UK regards itself as a global leader in the field of human rights, we submit that maintaining judicial dialogue with the ECtHR would only strengthen the UK's soft power and global influence in this regard.

[6] Jacobs & White (2006), The European Convention on Human Rights, pg. 53- 54 at https://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/ECHR/Paper2_en.asp

[7] White Paper 'Rights Brought Home: The Human Rights Bill' (October 1997) pg.4 https://www.gov.uk/government/publications/the-human-rights-bill

[8] See also, The Guardian: "British judges not bound by European court of human rights, says Leveson" (24 May 2015) at https://www.theguardian.com/law/2015/may/24/british-courts-echr-leveson

[9] Jack Straw MP, Home Secretary when the HRA was introduced, emphasises that the phraseology of section 2 was crafted with very great care: "Take into account' is there for a reason. There is a requirement to explain but not to follow and that was Parliament's intention". https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf

[10] AM (Zimbabwe) (Appellant) v Secretary of State for the Home Department [2020] UKSC 17 para 34

[11] Horncastle & Ors, R. v [2009] UKSC 14, para 11

[12] This case concerned compensation for individuals convicted of an offence that is subsequently quashed as a result of fresh evidence. The majority of the Supreme Court considered that Strasbourg case law in relation to Article 6(2) was "not settled," "evolving" and "inconsistent" in relation to previous decisions.

[13] R (on the application of Nealon & Hallam) v Secretary of State for Justice [2019] UKSC 2

[14] JUSTICE, 'Supreme Court rejects Strasbourg Court reasoning on the presumption of innocence' (30 January 2019) at justice.org.uk

15 "*Recent years have […] seen a weakening of the domestic courts' presumption in favour of applying relevant Strasbourg case-law, alongside reforms at the supranational level designed to emphasise the primary importance of national decision-making processes to the Convention system. These developments have taken place alongside a gradual improvement in the UK's record before the European Court of Human Rights.*" Roger Masterman, 'Supreme, Submissive or Symbiotic? United Kingdom Courts and the European Court of Human Rights' at https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/166.pdf

16 Savran v Denmark [2019] ECHR 651

Our review of ECtHR case law further indicates that the court routinely assesses whether nations have the necessary procedural safeguards in place to ensure that national legislation protecting the Convention Rights is properly upheld. This system of checks and balances reinforces the relationship between the ECtHR and the UK courts helping to ensure that the interpretation of Convention Rights is influenced by the social values and attitudes of the UK, whilst at the same time protecting the rights of individuals in the UK beyond party politics in Parliament.

When considering whether the HRA has succeeded in its aim to "*bring rights home*", it is helpful to consider "*whether [the HRA] has led to a reduction in the number of judgments at the ECtHR finding a violation.*"[17] Our analysis of Convention Rights violations and non-violations at ECtHR level shows that there was a general surge in cases at the ECtHR from 1999 to 2010, which is also reflected in the data showing increased UK engagement with the ECtHR during these years. This is shown in Chart B below.

While the UK's interactions with the ECtHR remain proportionately very low, Convention violations have fallen considerably over the last 10 years in the UK, as evidenced by Chart A below. Dr Donald argues that "*a decline in adverse judgments would be expected as a result of the fact that UK courts and other public authorities now consider human rights more explicitly and intensively than before—and that the Strasbourg Court is, in turn, more likely to endorse their reasoning and conclusions.*"[18] Further and in contrast to the European trend shown at Chart B below, the UK dataset indicates that the UK's success rate at the ECtHR is greater than many of its Convention State counterparts.

We note that the current review is not the first of its kind and that, in 2012, in response to the UK's concerns regarding the overreach of the ECtHR, the Brighton Declaration was adopted by the Convention states. It was agreed that, "*if convinced that the national decision-making body has performed an appropriate proportionality test and incorporated the relevant Strasbourg case law, the Court will abstain from inspecting the merits. This contribution shall demonstrate that, while this new approach may sometimes lead to unjustified leniency, it constitutes a justifiable manner of endorsing the principle of subsidiarity in an effort to calm the backlash emanating from Contracting States.*"[19] This commitment to leniency from the ECtHR should allay any current concerns regarding the effect of decisions of the ECtHR on sovereignty.

In an era when politics has been shown to shift unpredictably, a check on executive power that does not undermine either national sovereignty or the boundaries of the separation of powers is of paramount importance in the protection of human rights. Particularly in light of the leniency introduced by the Brighton Declaration, we submit that the UK benefits from maintaining judicial dialogue with the ECtHR.

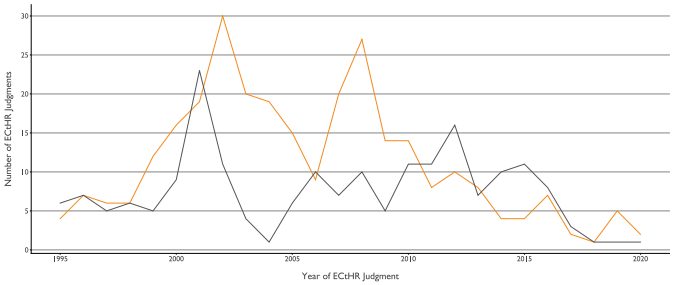
In the context of our uncodified domestic constitutional position,[20] we can see real merit in amending "*section 2 of the HRA*" to clarify the "*requirement to explain*" which underpins "*taking into account*". The reasons for doing so are twofold:

— There are examples within the case law – see *Nealon & Hallam* above – where the courts arguably did not provide sufficient depth of reasoning for departing from ECtHR jurisprudence; and

— It would provide Parliament with an opportunity to consider how it might wish to codify the explanation of Lord Phillips in Horncastle as to what '*take into account*' requires.[21] This could be achieved by the addition of a new s.2(4) to section 2 of the HRA, which provided as follows:

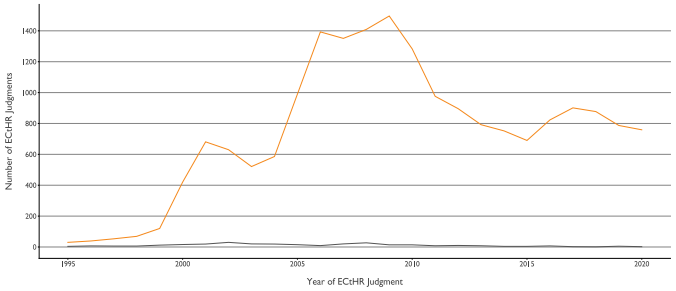
> *"s.2 (4) In this section 'take into account' requires the court or tribunal to provide clear and detailed reasoning as to why it is following or departing from a judgment, decision, declaration, advisory opinion or opinion that falls within s.2(1)."*

CHART A



ECtHR Determinations of UK Violations and Non-Violations ECtHR determinations of UK violations and non-violation of Convention Rights from 1995 to 2020. The quantity of violations is shown by the orange line and the quantity of non-violations is shown by the grey line.

CHART B



ECtHR Determinations of Violations by UK and All Member States from 1995 to 2020 Quantity of judgments where at least one Convention right was violated across all members states (including the UK), shown by the orange line. The quantity of judgments where at least one Convention right was violated by the UK-only is shown by the grey line.

[17] Written evidence from Dr Alice Donald to the Human Rights Committee (14 September 2018) at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/twenty-years-of-the-human-rights-act/written/89787.html

[18] Ibid

[19] Martha Routen, "Examining the 'Backlash' against the European Court of Human Rights in the United Kingdom" 2019) at https://blogs.kcl.ac.uk/kslr/files/2019/04/5-92.pdf

[20] *Attempts to significantly weaken the linkage [through section 2] may well prompt unintended, unpredictable and constitutionally undesirable consequences.*" Roger Masterman, 'Examining the 'Backlash' against the European Court of Human Rights in the United Kingdom' (2015) pg.35 at https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/166.pdf

[21] Horncastle & Ors, R. v [2009] UKSC 14: Lord Phillips stated "*where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process…it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course*"

We believe that in any event, any amendments to section 2 must not dilute or dull the judicial dialogue that section 2 of the HRA enables, but strengthen it by allowing Parliament to clarify what "*take into account*" requires and to encourage due weight being given to the decisions of the ECtHR.

When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

The margin of appreciation permitted to Convention States under ECtHR jurisprudence is essential to the workings of the relationship between the ECtHR and domestic courts. Indeed, the concept has been a key focus of reform to the ECtHR in recent years. Through the margin of appreciation the ECtHR "*devolves to the domestic level a measure of responsibility for ensuring observance of human rights*"[22] and importantly allows for divergence in the approach of Convention States to preserving convention rights.

The ECtHR recognises the value of the margin of appreciation and has emphasised this in *Brannigan and McBride v UK*[23] and *Ireland v. UK*.[24] In *Ireland v UK* the ECtHR held that: "*By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and the scope of derogations necessary to avert it.*"[25] Thus by giving significant weight to the interpretation of the way in which Convention Rights should be protected at domestic level, the knowledge and primacy of domestic courts is preserved.

The Brighton Declaration of 2012 and the Copenhagen Declaration of 2018 have both focussed on the balance between ECtHR principles and their implementation in domestic courts. The Brighton Declaration addressed key criticisms by introducing a further power of the ECtHR to "*deliver advisory opinions upon requests of the interpretation of the Convention in the context of a specific case at domestic level.*" [26] This reflects the principle of the margin of appreciation and encourages the ECtHR to "*give great prominence to and apply consistently these principles in its judgments.*"[27]

Indeed, the Copenhagen Declaration further reinforced the principle of the margin of appreciation, noting that "*there may be a range of different but legitimate solutions which could each be compatible with the Convention depending on the context*" and that *"the Court has generally indicated that it will not substitute its own assessment for that of the domestic courts, unless there are strong reasons for doing so.*"[28] It is evident that this concept is central to maintaining dialogue between Strasbourg and domestic courts and, as a result, the UK continues to be afforded a wide margin of appreciation in issues concerning the Convention Rights.

The HRA was drafted to ensure that domestic courts consider Convention Rights in the first instance. By virtue of the HRA, domestic courts may set out, determine and rule on the reasons for the decision falling within the margin of appreciation afforded to the UK. This means that the ECtHR ordinarily has immediate insight into the unique policies and procedures put in place to protect Convention Rights. For example in *Armani Da Silva v the UK*[29] in 2016, no violation of Article 2 was found in part due to the threshold applied by prosecutors having "*been the subject of frequent reviews, public consultations and political scrutiny. In particular, detailed reviews of the Code were carried out in 2003, 2010 and 2012.*"[30] Further weight was given to the unique "*primacy of the jury in the United Kingdom criminal justice system.*"[31]

While the realities of each Convention State should be accordingly analysed and considered, concern remains that the doctrine of the margin of appreciation is applied leniently by both the ECtHR and domestic courts. In domestic courts, policies regarding the retention of personal data have accounted for several violations of Convention Rights by the UK in recent years.[32] Lord Kerr in his dissenting judgment in *Gaughran v Chief Constable of the Police Service of Northern Ireland*[33] stated that "*an ill-thought out policy which does not address the essential issues of proportionality cannot escape condemnation simply because a broad measure of discretion is available to an individual state*"[34] and that in this case "*the margin of appreciation cannot rescue the PSNI policy from its incompatibility with the appellant's article 8 right.*"[35] The ECtHR ultimately found the UK in violation of Article 8 in this case, in part as "*the degree of consensus existing amongst Contracting States has narrowed the margin of appreciation available to the respondent State.*"[36]

This approach identifies the importance of the checks and balances provided by the ECtHR, in ensuring that Convention States continually assess their own policies and procedures in light of their counterparts. It is therefore vital that due consideration and weight is given to ECtHR jurisprudence at domestic level in light of the practical policies, reviews and political scrutiny given to such issues at a supranational level.

The suggested amendment to section 2 of the HRA set out above would therefore serve only to strengthen the application of the margin of appreciation.

[22] Dean Spielmann, 'UCL - Current Legal Problems (CLP) lecture - Whither the Margin of Appreciation?' (2014) pg.11 at https://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf

[23] Brannigan and McBride v the United Kingdom (Application Nos. 14553/89, 14554/89) (1993) ECHR 21

[24] The Republic of Ireland v the United Kingdon (Application No. 5310/71) (1978) ECHR 1

[25] Ibid, para 207

[26] Brighton Declaration (2012), pg. 7 at https://rm.coe.int/steering-commitee-for-human-rights-cddh-brighton-declaration-adopted-a/1680460d52

[27] Ibid

[28] Copenhagen Declaration (2018), para 28 at https://rm.coe.int/copenhagen-declaration/16807b915c

[29] Armani da Silva v the United Kingdom (Application No 5878/08) (2016) ECHR 30

[30] Ibid, para 268

[31] Ibid, para 219

[32] Gaughran v UK (Application No. 45245/15), Catt v UK (Application No. 43514/15) and Marper v UK (Application Nos. 30562/04 and 30566/04)

[33] Gaughran (Appellant) v Chief Constable of the Police Service of Northern Ireland (Respondent) (Northern Ireland) [2015] UKSC 29

[34] Ibid, para 100

[35] Ibid, para 102

[36] Gaughran v The United Kingdom (Application No. 45245/15), para 84

Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

Currently, both the UK human rights jurisprudence and the ECtHR jurisprudence benefit from judicial conversation, via the auspices of section 2 of the HRA.

This is far-removed from the white noise of the pre-HRA era, encapsulated by *Smith and Grady v UK*.[37] The ECtHR held that the UK court had failed to provide an effective remedy to a breach of the Applicants' human rights, as the UK courts were required to apply a threshold of '*irrationality*' to the policy of banning LGBT members of the armed forces, rather than applying the ECtHR's principles of proportionality. The principles and case law that the UK courts were applying to the facts of *Smith and Grady* were entirely different to those applied by the ECtHR. This meant that the considerations and reasoning of the UK court, and its application of principles and case law to the facts, were irrelevant to the ECtHR's consideration of whether or not ECHR rights had been breached by the policy.

Smith and Grady demonstrates that the greater the divergence between the principles and case law the UK courts and the ECtHR apply to a set of facts, the less impact the UK courts can have on the ECtHR reasoning. In circumstances where there were high levels of divergence, the UK courts would have less opportunity to inform and shape the resulting reasoning of the ECtHR.

The advent of section 2 of the HRA has significantly strengthened judicial dialogue such that UK decisions have since been attributed meaningful weight by Strasbourg.

For example, in *Animal Defenders*[38] the ECtHR Grand Chamber found no violation of the ECHR, with the majority's judgment stating that it "*attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom.*"[39]

Equally, in *Jones,*[40] the ECtHR did not depart from the decision of the House of Lords, explicitly attributing significant weight to that UK judgment:

> *"In the present case, it is deemed clear that the House of Lords fully engaged with all of the relevant arguments concerning the existence, in relation to civil claims of infliction of torture, of a possible exception to the general rule of State immunity…*
>
> *In these circumstances, the Court is satisfied that the grant of immunity to the State officials in this case reflected generally recognised rules of public international law."*[41]

This is reflected by statistics, namely the very low number of ECtHR judgments which found at least one violation of the ECHR by the UK. In 2020, the ECtHR made 762 such judgments against all Member States. Only 2 of these – i.e. 0.26% – were judgments against the UK.[42] This is a stark difference to the pre-HRA era, when in 1999, 6.8% of all ECtHR judgments found at least one violation by the UK.[43]

Any dulling or dilution of section 2 would create static in the judicial dialogue, and see it become less effective. If the UK courts were not able to consider ECtHR case law, or certain aspects of it, we risk an untethering of the jurisprudences. This would likely cause two intertwined jurisdictions, applying the same human rights to the same facts, to come to divergent conclusions having applied lines of jurisprudence which do not communicate with one another.

Effective judicial dialogue minimises the likelihood of conflicting decisions and so reduces the incentive to take a domestic case to Strasbourg. As can be seen, the UK currently enjoys a very low number of applications made against it to the ECtHR. By population, the UK has the fewest applications of all Member States, with only 5 per million.[44]

Section 2 of the HRA ensures judicial dialogue between the two jurisprudences. The UK courts must take into account ECtHR case law, which in turn means how the UK applies such case law. How the UK court applies the Convention Rights is also relevant to ECtHR reasoning – not just for UK cases in Strasbourg, but to the ECtHR's reasoning across its jurisdiction. Indeed, the recently retired President of the Strasbourg Court confirmed that "*certain important principles, entrenched for centuries in British legal culture, have strongly influenced the case-law of the [ECtHR].*"[45]

This broader impact was one of the aims of the HRA: the White Paper 'Rights Brought Home' expected that with the HRA "*British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.*"[46] Commentators accept that this aim is now being achieved:

> *"British courts can now exert strong influence, changing the course of Convention jurisprudence for all Contracting States, and helping to ensure that where the UK wishes to maintain a national position on an important issue, such as its ban on political advertising, this is far more possible than might have otherwise been the case. Applications against the UK now considered by the ECtHR where a UK court has not had the chance to exert its influence are very rare."*[47]

[37] Smith And Grady v United Kingdom (Application Nos. 33985/96; 33986/96) (1999) ECHR 72

[38] Animal Defenders International v UK (Application no. 48876/08) (2013)

[39] Ibid, para 116

[40] Jones and Others v UK (Applications nos. 34356/06 and 40528/06) (2014)

[41] Jones and Others v UK (Applications nos. 34356/06 and 40528/06) (2014) para 214

[42] Violations by Article and by State 2020 at https://echr.coe.int/Documents/Stats_violation_2020_ENG.pdf

[43] Written evidence from the Bingham Centre for the Rule of Law to the Human Rights Committee (24 September 2018) at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/twenty-years-of-the-human-rights-act/written/90241.html

[44] Ministry of Justice, 'Responding to human rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020' (December 2020) pg.44 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf

[45] Dean Spielmann, UCL Graduation Ceremony, Honorary Doctorate of Law, 6 July 2016

[46] White Paper 'Rights Brought Home: The Human Rights Bill' (October 1997) pg.7 https://www.gov.uk/government/publications/the-human-rights-bill

[47] Written evidence from Professor Merris Amos to the Human Rights Committee (14 September 2018) para 1.1 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/twenty-years-of-the-human-rights-act/written/89739.html

As Lord Kerr wrote in his essay contribution to '*The UK and European Human Rights: A Strained Relationship?*', section 2 is "*cast deliberately in terms which do not require strict adherence to Strasbourg jurisprudence.*"[48] This strikes a balance between allowing the judicial dialogue to be free flowing, but also allowing the UK courts to disagree and depart from ECtHR judgments when necessary. As noted above, we believe this balance could be clarified further: the balance in itself is correct, and further clarification would assist the UK courts to apply it consistently.

A clear example of both facets is the dialogue that evolved through the judgments in *Horncastle*[49] and in *Al-Khawaja and Tahery.*[50]

In *Horncastle*, the UK Supreme Court unanimously denied the appeals and elected not to follow the ECtHR 2009 chamber judgment in *Al-Khawaja and Tahery*. Lord Phillips held that:

> *"The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case."*[51]

In response, the ECtHR Grand Chamber in *Al-Khawaja and Tahery (2011)* modified the Lower Chamber's *Al-Khawaja and Tahery (2009)* ruling. Judge Bratza stated that "*The present case affords, to my mind, a good example of the judicial dialogue between national courts and the European Court on the application of the Convention to which Lord Phillips was referring.*"[52]

It is in the UK's national and international interests for our domestic jurisprudence to have an impact and bearing on decisions taken by the ECtHR. Avoiding divergence between UK and ECtHR jurisprudence ensures any UK courts' concerns about ECtHR decisions or direction are significantly more impactful. It also disincentives taking a UK case to Strasbourg, as the prospects of a divergent decision are minimised.

We submit that section 2 should not be dulled or diluted. The balance section 2 seeks to strike ensures the judicial dialogue is strong, but that the UK is not conscripted into following ECtHR case law it disagrees with. However, as noted above, we believe that the drafting of section 2 could be improved by clarifying what the requirement to '*take into account*' requires. The benefits of the section 2 intended balance are clear throughout the case law: clarity will help the courts maintain consistency in applying that balance throughout their judgments. This is unquestionably in the interests of the UK, not just in terms of ECtHR cases relating to the UK, but in terms of impacting and helping shape wider European human rights jurisprudence.

THEME 2

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

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)?

To our knowledge, based on an analysis of case law, instances of the courts interpreting legislation in a manner inconsistent to that which was intended by Parliament, as a result of the section 3 requirement to "*where possible*" read and give effect to Convention Rights, are rare. Indeed, the HRA specifically sought to reduce the need for courts to employ section 3 in the future by requiring, under section 19 of the Act, that the Minister responsible for the passage of a draft Bill make a statement confirming the legislation's compatibility with Convention Rights. Since 2000, section 19 has ensured that Convention Rights are at the forefront of Ministers' minds when drafting legislation.

The current political climate provides useful context for this question. The clear implication is that *European* Convention Rights are impinging upon *British* Parliamentary sovereignty. Our response to the questions in Theme 1 above explains why it is that judicial dialogue between the UK courts and the ECtHR is a wholly positive and necessary process. We have also explained why the notion that the Convention Rights are a European construct is misconceived.

The topic most commonly cited to advance the argument of the ECtHR's undue intrusion into UK policy concerns voting rights for prisoners. A detailed review of the case law on this issue serves to undermine this political myth. Since *Hirst v UK*[53] was first considered by the Fourth Section of the Strasbourg court, and the broad disenfranchisement of individuals serving custodial sentences, as per the provisions of section 3 of the Representation of the People Act 1983 (**s.3 RPA**), was held to be incompatible with Article 3, Government has resolutely declined to amend or repeal the offending provision.

The outcome of *Hirst* is testament to two things: firstly, the deference of the UK courts to Parliament and secondly, the deference of the Strasbourg court to UK sovereignty. In relation to the first, the UK courts have issued only one DoI under section 4 of the HRA in relation to s.3 RPA following Strasbourg's decision in *Hirst*.[54] Over the course of the next twelve years, in each of the subsequent cases concerning s.3 RPA, the Supreme Court declined

[48] The Rt Hon the Lord Kerr of Tonaghmore, 'The Relationship Between the Strasbourg Court and the National Courts – As Seen from the UK Supreme Court' at p 33, in K Ziegler, E Wicks and L Hodson (Eds), 'The UK and European Human Rights: A Strained Relationship?' (Hart Publishing 2015)

[49] R v Horncastle [2009] UKSC 14

[50] Al-Khawaja and Tahery v UK (2009) (Applications nos. 26766/05 and 22228/06) and Al-Khawaja and Tahery v UK (2011) (Applications nos. 26766/05 and 22228/06)

[51] R v Horncastle [2009] UKSC 14, para 11

[52] Al-Khawaja and Tahery v UK (2009) (Applications nos. 26766/05 and 22228/06) and Al-Khawaja and Tahery v UK (2011) (Applications nos. 26766/05 and 22228/06), Opinion of Judge Bratza, para 2

[53] Hirst v the United Kingdom (No.2), 74025/01 [2005] ECHR 681

[54] Smith v Scott [2007] CSIH 9

to issue a further DoI on the basis that it was a matter of policy that was being actively considered by Parliament.[55] As regards the second, the Strasbourg court has repeatedly confirmed its decision in Hirst v UK (in both *Greens and MT v UK*[56] *and Scoppola v Italy*[57]) and yet the ECtHR did not impose sanctions on the UK for failing to address the issue. Indeed, in 2017, the Council of Ministers accepted David Lidington's (the then Lord Chancellor and Secretary of State for Justice) suggested clarification (as opposed to an amendment) of the legislation under the principle of the 'margin of appreciation' permitted to states. It is worth noting that this 'clarification' was not subject to Parliamentary scrutiny. In fact, there are strong indications that Government fettered Parliamentary debate on the issue. In 2013, the *Voting Eligibility (Prisoners) draft bill* was recommended by the Joint Committee tasked with taking evidence and scrutinising the bill. The Government did not formally respond to the Joint Committee's recommendation and the proposals were not taken forward.[58] No mention of the Joint Committee's recommendation was included in the Government's reports to the Council of Ministers on the UK's progress in addressing the issue.[59] If anything, rather than demonstrating the allegedly meddlesome tendencies of the ECtHR, this case highlights the supreme power wielded by *the Government* when it comes to determining the impact that Convention Rights have on UK legislation. Whilst in the first instance the courts have the power to interpret legislation in a manner that reads down Convention Rights, if this issue goes beyond the interpretative powers of the court under section 3 of the Act, it ultimately remains a matter of policy whether Government chooses to amend the legislation in line with the courts' decisions.

Given the emotive nature of the issues covered by the HRA, it is perhaps unsurprising that it provides fertile ground for impassioned reports of perceived judicial overreach. However, as stated above, instances of the courts interpreting legislation in a manner inconsistent with the intentions of Parliament are actually incredibly rare. The one case repeatedly cited in support of this claim is *R v A*[60] which concerned the admissibility of evidence in rape trials. Critics argue that the courts "*flouted the will of Parliament when it enacted the Youth, Justice and Criminal Evidence Act 1999.*"[61] In fact, the court acted to protect the rights of respondents, and did so without compromising the existing safeguards in place for complainants. The court was criticised for adopted a wider approach to section 3 interpretation in *R v A* to include interpretation that "*linguistically may appear strained*", however, subsequent case law has since sought to clarify and constrain this position. It is worth noting that, despite criticism of supposed judicial overreach in *R v A*, the legislation in question has not been amended to correct its allegedly improper extension by the court. In fact, a review by the Attorney General's Office and the Ministry of Justice in 2017 concluded that "*the law is working as Parliament intended.*"[62] The correct approach to judicial interpretation, as set out below, is now relatively settled. *Ghaidan v Godin-Mendoza*[63] explored the parameters of judicial interpretation. That case enabled same sex couples to benefit from protections afforded to heterosexual couples under the *Rent Act 1977*. In *Ghaidan*, Lord Nicholls emphasised the ultimate necessity of adhering to the "*thrust*" of legislative intention: "*The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation.*'" Lord Nicholls noted that to do otherwise "*would be to cross the constitutional boundary section 3 seeks to demarcate and preserve*" and that "*Parliament has retained the right to enact legislation in terms which are not Convention-compliant.*"[64]

As was the case in *Ghaidan*, the courts have often used their interpretative powers under section 3 to protect vulnerable or minority groups whose interests were not necessarily at the forefront of Ministers' minds when drafting legislation. This is particularly true of legislation enacted before the Act came into force. Notable examples include cases concerning the burden of proof placed on respondents to prove their innocence. In *Sheldrake v Director of Public Prosecutions*[65] the court read down an *evidential* burden of proof on the defendant to demonstrate that there was no likelihood of him driving a car under the influence of alcohol rather than a *legal* burden of proof. The legal burden of proof would have required the respondent to prove the relevant facts on the balance of probability, contrary to the presumption of innocence guaranteed by Article 6 of the Convention Rights.

Whilst the role of Parliament is to represent the majority, the courts have a critical role in protecting the fundamental rights of vulnerable and minority groups. For example, in circumstances where it would be electorally unwise for Parliamentarians to defend the perpetrators of sexual assault, the role of the judiciary is essential in ensuring that those individuals continue to benefit from the Convention Rights. Occasionally, an element of judicial activism is essential for the courts to ensure that vulnerable and minority groups do not fall through the legislative cracks.

The tone of the Parliamentary debate around prisoner voting rights starkly highlighted this point, with one Conservative MP asking: "*Does my right hon. Friend think it reasonable for [the ECtHR] to insist on a right for individuals if those individuals have not bothered either to register to vote, or, indeed, to vote when they have not been in custody?*"[66]

The data analysed by our Data Science team shows that the vast majority of DoI by the courts have been in relation to legislation that operates to safeguard vulnerable and minority groups. The four pieces of primary legislation that have been subject to the greatest number of declarations are the Mental Health Act 1983, the Police Act 1997, the Criminal Justice Act 1991 and the British Nationality Act 1981 (see Chart C).

[55] Elizabeth Adams: 'Prisoners' Voting Rights: Case Closed? – UK Constitutional Law Association' (30 January 2019)

[56] Greens and MT v United Kingdom (2011) 53 EHRR 21

[57] Scoppola v Italy (No 3)(Scoppola)(2013) 56 EHRR 19

[58] Prisoners' voting rights: developments since May 2015 - House of Commons Library (parliament.uk)

[59] Voting Eligibility (Prisoners) Draft Bill (November 2012) (justice.gov.uk)

[60] R v A (No. 2) [2001] UKHL 25

[61] Kavanagh, A, The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998, Oxford Journal of Legal Studies (2006) 26 (1):179

[62] Attorney General's Office and Ministry of Justice report: Limiting the use of complainants' sexual history in sex cases (2017), pg. 11

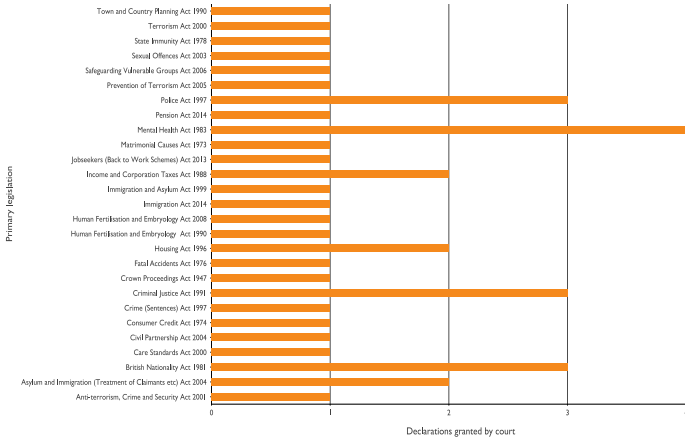
[63] Ghaidan v Godin-Mendoza [2004] UKHL 30

[64] Ibid, para 33

[65] Sheldrake v Director of Public Prosecutions [2003] 2 WLR 1629

[66] Commons Chamber - Thursday 10 February 2011 - Hansard - UK Parliament

CHART C



Declarations of incompatibility concerning primary legislation This chart shows the number of declarations granted in respect of the primary legislation listed on the left axis. The Mental Health Act 1983 has been subject to the most declarations (4).

Recent case law indicates that the parameters set by Lord Nicholl in *Ghaidan* continue to constrain the approach taken by the court to interpretation. The judiciary's deference to the intention of Parliament was recently confirmed in the case of *A local authority v AG & Others*[67] in which Mostyn J confirmed that section 3 "*did not give the court an unfettered power to rewrite legislation to includes words which Parliament had wittingly or unwittingly excluded. The phrase 'so far as it was possible to do so' limits the power to interpretations which are consistent with the natural language of the statute under consideration.*"[68]

It is essential to remember that, *in all circumstances*, Parliament retains the power to amend legislation, or enact new legislation, if it feels that the courts have either misinterpreted or stymied Parliament's intention through interpretation or the use of declaratory powers.

If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

Section 3 plays a central role in the system of checks and balances that is fundamental to the rule of law. In no way can it be argued that it fetters the powers of Parliament when Parliament retains the right to amend or enact legislation to ensure that its intentions are properly interpreted by the courts. An independent judiciary is an integral element of our constitutional system and the courts' decisions should, as Dominic Grieve MP explained to the Human Rights (Joint Committee), challenge Government and Ministers to govern better rather than be viewed as an impediment to effective governance.[69]

Lord Bingham highlighted the constitutional importance of section 3 in the *Belmarsh* case.[70] He noted that "*the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself*".[71] We respectfully agree with Lord Bingham and believe that section 3, carefully drafted by *Parliament,* provides a critical check in the constitutional system that protects not only individuals but also the separate powers and roles vested in Parliament and the Government.

Should DoI (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?

As the HRA currently stands, the primary remedial measure under the HRA is the court's power under section 3 to interpret legislation compatibly with Convention Rights insofar as is possible. Should the court be unable to interpret legislation compatibly with a Convention Right, the court then has discretion to make a DoI under section 4. The "*Rights Brought Home: Human Rights Bill*"[72] makes clear that DoI were created as a means of last resort, only to be employed should it prove to be impossible to interpret legislation as far as possible in accordance with the Convention. In fact, in the progress of the Bill through Parliament, the Lord Chancellor observed that "*in 99% of the cases that will arise, there will be no need for judicial DoI*" and the Home Secretary confirmed the intention that "*in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention*".[73]

Our data analysis confirms that that the Lord Chancellor's predictions have largely been borne out by events (see below).

Following the making of a DoI, Government can then decide whether or not to introduce amending or repealing legislation to remove the incompatibility. The court's power under section 4 is limited to the power to declare legislation to be incompatible but it is expressly stated in the Act that this does not render legislation invalid, nor does it affect the "*continuing operation or enforcement of the provision in respect of which it is given*". Further, such a declaration is not binding on the parties to the proceedings in which it is made (section 4(6) of the HRA). The court cannot strike down or set aside an Act of Parliament.

It is also worth noting that the court has no obligation to make such a declaration and the wording of the Act is simply that it "*may*" make a declaration. As noted by Lord Kerr in *Steinfeld and Keidan*[74] "*The provision clearly contemplates that there will be circumstances in which the court considers that an item of primary legislation is not compatible with a Convention right but that it is not appropriate to have recourse to the section 4(2) power*".[75]

[67] A local authority v AG and others (children) (domestic abuse) [2020] EWFC 18

[68] Ibid para 34

[69] Joint Committee on Human Rights - Oral evidence (Virtual Proceeding): The Government's Independent Human Rights Act Review, HC 1161 (27 January 2021) Dominic Grieve MP at pg.7 at https://committees.parliament.uk/oralevidence/1603/pdf/

[70] A (FC) and others (FC) v Secretary of State for the Home Department [2004] UKHL 56

[71] ibid para 42

[72] White Paper 'Rights Brought Home: The Human Rights Bill' (October 1997) https://www.gov.uk/government/publications/the-human-rights-bill

[73] Hansard, (HL Debates), 5 February 1998, col 840 (3rd reading) and Hansard (HC Debates), 16 February 1998, col 788 (2nd reading).

[74] R (on the application of Steinfeld and Keidan) v Secretary of State for International Development [2018] UKSC 32

[75] Ibid para 56

Our Data Science team has analysed data derived from:

— The Ministry of Justice's review of the DoI made since the HRA came into force set out in the report entitled *Responding to human rights judgments*[76] ("**MOJ Dataset**"); and

— A large collection of judgments derived from vLex Justis' complete collection of full-text judgments from courts in the United Kingdom. This complete collection was filtered on the use of content phrases "Human Rights Act 1998" and "HRA 1998" and judgments that were not given by a court in England and Wales were removed. This produced 5,859 judgments that mention the 1998 Act (the "**Master Dataset**").

The MOJ Dataset and the Master Dataset were analysed to assess the use of DoI over the past twenty years in the courts of England and Wales. Since the HRA came into force, a total of 39 DoI have been made in the Courts of England and Wales. Of this 39, just 14 (35.9%) have caused Parliament to re-legislate using primary or secondary legislation (see Chart G below).

Our findings indicate the rarity of DoI and demonstrate that:

— Approximately 538 of the judgments in the Master Dataset mention DoI and/or section 4 of the HRA.

— To date and as above, just 39 judgments of the MOJ Dataset have granted DoI under section 4 of the HRA.

— Further, of these 39 judgments in which DoI were granted, a further 8 judgments (being 20.5%) were subsequently reversed on appeal, leaving 31 DoI since the HRA came into force (Chart D).

— 24 (62%) of the 39 DoI were granted during the HRA's first decade in force with grants of DoI peaking in 2003 when six DoI (being 15% of the total) were granted (Chart E).

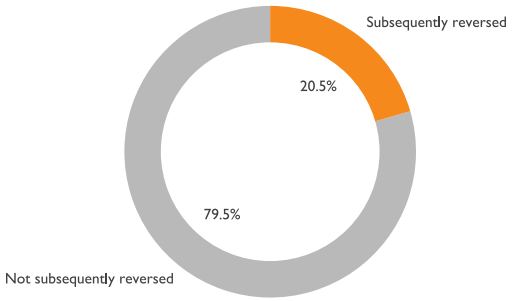
— 28 (71.8%) of the 39 DoI concerned primary legislation that was enacted prior to the HRA's entry into force (Chart F).[77]

— 31 (79%) of the 39 judgments granting declarations involved a Central Government defendant.

— The Mental Health Act 1983 has been subject to more declarations than any other primary enactment.

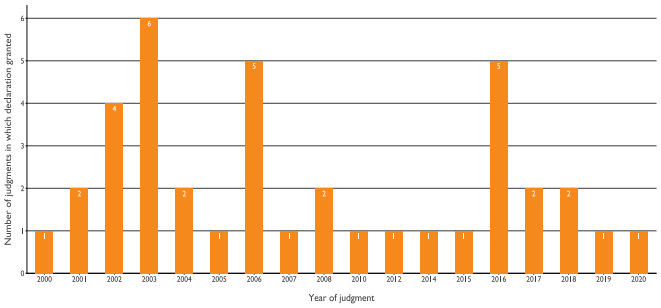
These findings indicate the rarity of the granting of DoI. The 31 DoI granted that were not subsequently reversed on appeal (of which there were 8), equate to just: (i) 0.5% of the Master Dataset (which shows the approximate number of total judgments in which the HRA was mentioned); and (ii) 5% of the 538 judgments mentioning DoI in the Master Dataset. Further, it is notable that the vast majority of the DoI concerned primary legislation enacted prior to the HRA coming into force.

CHART D



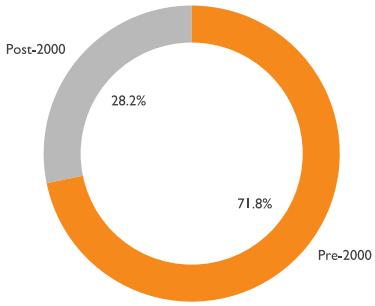
Subsequent reversals of grants of declarations of incompatibility
This chart shows the proportion of declarations that were subsequently reversed on appeal (20.5%).

CHART E



Grants of declarations of incompatibility from 2000 to 2020
The total number of declarations granted per year since 2000 by year of judgment.

CHART F



Grants of declarations in respect of primary legislation enacted before and after 2000 Shows the proportion of primary legislation enacted before and after 2000 in respect of which a declaration has been granted. The majority (71.8%) of incompatible legislation was enacted before 2000.

[76] Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020 [December 2020], pages 31-34

[77] NB. This statistic does not account for instances in which the incompatibility was linked with subordinate legislation (dating from both pre and post 2000).

Section 3 limits the court's policymaking role and was specifically designed to minimise the number of DoI (which, given the findings above, has clearly worked as intended). In the call to "*bring rights home*" one of the reasons most commonly cited was the time and expense of taking cases to the Strasbourg court. As currently drafted, the HRA ensures that individuals have (relatively) quick access to justice. If the legislation was amended so as to make DoI part of the initial process of consideration, rather than enabling the courts to seek to interpret legislation compatibly, individuals would be forced to wait for Parliament and/or the Government to review, amend or repeal legislation before they were afforded any remedy. This would place a significant, and unrealistic, burden on Parliament and would impede the courts ability to fulfil its role whilst the legislation in question progresses through a packed Parliamentary agenda.

In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

Under the auspice of the ECHR the extraterritorial responsibility of the UK, as a Contracting State, is limited. In reality, however, extraterritorial application of the HRA and ECHR applies in two key contexts. The first is its application in British Overseas Territories and the second, during overseas military action. Although a tension arguably exists between human rights law and international humanitarian law concerning extraterritorial jurisdiction, it does not merit the Government's pursuit of a change in the current position.

Overseas military action

The Overseas Operations (Service Personnel and Veterans) Bill

The Government's proposal to impose a duty on the Secretary of State to consider whether to make a derogation under Article 15(1) in relation to overseas operations by amending section 14 of the HRA raises the question as to what policy objective this duty seeks to achieve. The proposal is a response to the rising number of claims in recent years relating to the military operations in Iraq and Afghanistan and the subsequent ECtHR decisions (with cases mostly against the UK and Turkey) confirming extraterritorial jurisdiction in circumstances where the state exercises "*effective control*" over the territory.[78] The apparent extension of Convention State's jurisdiction, by virtue of ECtHR decisions, may warrant a review of the UK's power to derogate from Convention Rights in specific circumstances. However, the power to derogate cannot be absolute: it cannot apply to the right to life (Article 2) or the prohibition of torture (Article 3), and violations of these Articles constitute the "*vast majority' of claims.*"[79] As such, the proposed amendment appears to be artificial as it fails to address the apparent policy objective.

We are of the view that efforts by the UK to derogate from Convention Rights, either within its jurisdiction or abroad, is both optically and operationally unappealing. The UK's recent record in relation to torture is chequered and, as (former Major) Dan Jarvis MP has recently pointed out, "*at a time when we are witnessing an erosion of human rights and leaders turning their backs on international institutions, it is more important than ever before that we uphold our values and standards and not undermine them.*"[80] As we have set out above, efforts by the UK to resile from its commitment to Convention Rights jeopardises its position as a leader in the field of international humanitarian law.

With respect to the proposed statutory presumption against prosecution, the decision to exclude sexual offences but not genocide or torture is illogical. It is, in fact, reminiscent of the illogicality that Leggatt J remarked upon in *Al- Saadoon*, that "*where the lesser use of force involved in apprehending someone has been held to bring that person within the Article 1 jurisdiction of a contracting state, it makes no sense to hold that the greater use of force involved in killing someone does not have that effect.*"[81] Of course, this is not to trivialise the seriousness of sexual offences in war but to note that the intention and effect of the proposal are at cross-purposes: the UK would be a signatory to international humanitarian law on the prohibition of torture and genocide,[82] whilst undermining the same rights, obligations and principles in its national legislation.

International humanitarian law and international law

The question of extraterritoriality is not so much a question of limitations to Contracting States under the Convention. The positive obligation to investigate an infringement of rights, whether the right to life (Article 2, ECHR; Article 16, ICPR) or maltreatment, is found in the ICCR as it is in the ECHR and thus the HRA. Efforts to restrict the extraterritorial application of the HRA would result in a greater number of cases being taken directly to the ECtHR or the ICC. In doing so, the UK would be placing policy decisions in the hands of the ECtHR when, as demonstrated by the House of Lords' decision in Al-Skeini, the UK courts are particularly cognisant of policy implications when reaching their decisions.

Given that the UK has committed to upholding and respecting international human rights through a variety of international treaties and conventions, efforts to limit the applicability of human rights though amendments to the HRA are misplaced. Levelling down would not only lead to an increase in international judgments against the UK, which it sought to reduce by introducing the HRA, but it would diminish the UK's standing as a leader in the field of human rights and would undermine its authority to persuade other states to level up to observe international standards of humanitarian and human rights law.

[78] Al Skeini & Ors v the United Kingdom, 55721/07, [2011] ECHR 1093

[79] Government's Response to the Questions Posed in the Joint Committee on Human Rights' Letter dated 13 October 2016 – Response to question 16, pg.13 of https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/correspondence/2016-17/HH_to_MF_re_derogation.pdf

[80] Overseas Operations (Service Personnel And Veterans) Bill - Wednesday 23 September 2020 - Hansard - UK Parliament

[81] Al-Saadoon & Ors v Secretary of State for Defence [2015] EWHC 715, para 107

[82] Convention on the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Prevention and Punishment of the Crime of Genocide; Rome Statute of the ICC

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

The structure of the HRA seeks to maintain the delicate balance between the principal institutions of power: the executive, the legislature and the judiciary. Indeed, functional independence between these three pillars of state is guaranteed by the operation of the Act.

Before making a section 4 declaration that a statute (or part of a statute) is incompatible with Convention Rights, the court must try, by section 3 of the Act, to interpret or give effect to the legislation "*so far as it is possible to do so in a way which is compatible with the Convention rights*".

Even if it is not possible so to interpret the legislation, the judiciary has shown itself to be acutely sensitive to the maintenance of the separation of powers and the primacy of Parliament. As such there are circumstances where the court will defer to Parliament rather than make a DoI.[83] This may be so even when the court has held that there has been an incompatibility.[84]

Where it does act,[85] the judiciary has no constitutional power beyond the making of a DoI.[86] However, consistent with the delicate balance in the Act, the making of a DoI imposes on the judiciary an extra statutory, *quasi*-advisory, function described by Lord Wilson in *Nicklinson*.[87]

Per Lord Wilson, when it does make a declaration, first: "*it behoves the court precisely to identify in the circumstances of the successful applicant the factors which precipitate the provision's infringement of his human rights. In addressing its task of fashioning a response to the declaration, Parliament deserves no less.*" Secondly, the court will offer the maximum assistance to Parliament "*if it not only identifies the factors which precipitate the infringement but articulates options for its elimination*".[88]

On making a DoI the court becomes ex *functus officio* and the law remains unaltered, a state of affairs that continues until such time (if any) as Parliament acts to remove the incompatibility.

The power to act (or not act) pursuant to the making of the DoI vests wholly in the executive.

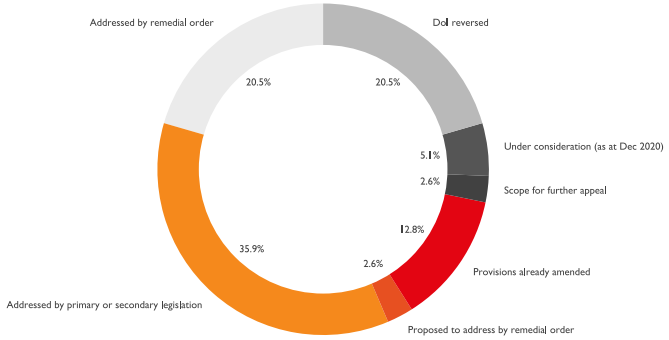
The Government may choose to respond to a DoI in three principal ways. First, it may lawfully choose to do nothing at all. Secondly, the Government can invite Parliament to pass legislation repealing the offending provision. Thirdly, the Government can repeal, amend or replace the offending provision by deploying the remedial order process under s.10 of and Schedule 2 to the Act.

The remedial order process is governed by the HRA, section 10 and Schedule 2 by which a Minister is empowered to amend the act by removal of the incompatibility by way of subordinate legislation. Schedule 2 provides that the remedial order must be laid before both Houses of Parliament for an affirmative resolution either before it comes into force or,[89] in cases of urgency by way of affirmative resolution (of both Houses of Parliament) after it has come into force.[90] In the case of the former, an affirmative resolution must be passed within 60 days beginning with the day on which the draft was laid. In the case of the latter, an affirmative resolution must be passed within 120 days after the original order was made and, in default, the order ceases to have effect.

Thus, whether a DoI is remedied by way of primary legislation or by way of remedial order, the role of the legislature is preserved and respected maintaining the structural balance between the separated powers.

In practice, as can be seen from Chart G below, no action by Government following a DoI is rare (only 2 cases were 'under consideration' in December 2020) and, since the Act was passed, Government has proceeded more often following the making of a DoI by laying primary legislation (on 14 occasions) than by way of the remedial order process (on 8 occasions).

CHART G



Responses to declarations of incompatibility This chart provides a breakdown of the ways in which declarations have been addressed, including where the declaration was subsequently reversed on appeal.

Even where Government has chosen to proceed via the remedial order route, as can be seen from Table A below, it usually follows the paragraph 2 route. Indeed, of the 11 remedial orders made since the Act came into force, in only three instances was an urgent remedial order made under the paragraph 4 process.

[83] See, eg, R (*Nicklinson*) v Ministry of Justice [2015] AC 657

[84] Such as *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27

[85] See, eg, R (*on the application of Steinfeld and Keidan*) *v Secretary of State for International Development* [2018] UKSC 32

[86] In addition to making a DoI, the Court may, subject to the provisions of s.8 of the Act, also grant such relief or remedy, or make such order, as it considers just and appropriate against an act of a public authority which it finds is (or would be) unlawful.

[87] R (*Nicklinson*) *v Ministry of Justice* [2015] AC 657 para 203

[88] Ibid para 204

[89] HRA Schedule 2, paragraph 2(a)

[90] HRA Schedule 2, paragraph 4(4)

TABLE A

No.	Remedial order	Process
1	Mental Health Act 1983 (Remedial) Order 2001/3712	paragraph 4 of Schedule 2 to the Human Rights Act 1998
2	Naval Discipline Act 1957 (Remedial) Order 2004/66	paragraph 4 of Schedule 2 to the Human Rights Act 1998
3	Marriage Act 1949 (Remedial) Order 2007/438	paragraph 2 of Schedule 2 to the Human Rights Act 1998
4	Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011/1158	paragraph 2 of Schedule 2 to the Human Rights Act 1998
5	Terrorism Act 2000 (Remedial) Order 2011/631	paragraph 4 of Schedule 2 to the Human Rights Act 1998
6	Sexual Offences Act 2003 (Remedial) Order 2012/1883	paragraph 2 of Schedule 2 to the Human Rights Act 1998
7	Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018/1413	paragraph 2 of Schedule 2 to the Human Rights Act 1998
8	British Nationality Act 1981 (Remedial) Order 2019/1164	paragraph 2 of Schedule 2 to the Human Rights Act 1998
9	Fatal Accidents Act 1976 (Remedial) Order 2020/1023	paragraph 2 of Schedule 2 to the Human Rights Act 1998
10	Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2020/1085	paragraph 2 of Schedule 2 to the Human Rights Act 1998
11	Human Rights Act 1998 (Remedial) Order 2020/1160	paragraph 2 of Schedule 2 to the Human Rights Act 1998

The functional independence between the executive, the legislature and the judiciary that the structure of the Act guarantees does, however, bring with it a disadvantage. As Jeff King has described one of the most important differences between the operation of the Act compared to the operation of some other foreign systems is "*the fact that the Government is capable of delaying its response to a section 4 declaration by a considerable amount of time. Only political pressure - usually from the [Joint Committee on Human Rights] and civil society - can accelerate the response*"[91] Discounting outliers, the average lag time for the UK to remedy a DoI is approximately 17 months.[92] This time lag is of course the period following the making of a DoI, which itself is likely to have been litigated for some time prior to the DoI being made and any routes of appeal exhausted.

We submit that no amendment to section 10 of and Schedule 2 to the HRA is required to enhance the role of Parliament (that constitutional role having been expressly preserved and maintained by the operation of the Act as enacted). We do, however, submit that sections 4 and 10 of the Act might be amended, whilst maintaining functional independence, to provide a mechanism by which the remedial order process may be accelerated in appropriate instances.

[91] Jeff A King, 'Parliament's Role following DoI under the Human Rights Act' (2015)

[92] Ibid, page 8

We propose the following mechanism:

- On the making of a section 4 declaration, the court shall, in circumstances where it holds that a delay in the Government's response would be harmful to affected individuals (in a specified way), have the discretionary power to make a subsidiary declaration requesting an executive response within six months after all routes of appeal have been extinguished. For the avoidance of doubt, the court would thereafter become ex *functus officio* in relation to both the main and subsidiary declarations.

- In the event no action is taken by the relevant Minister within the six month time period after all routes of appeal against the primary and subsidiary declarations have been made, the Joint Committee on Human Rights (or its successor) shall be expressly empowered by amendment to section 10:

    - To adopt a motion to summon the Minister to appear before it to explain the reasons for the delay; and thereafter

    - To adopt a motion to draw the special attention of both Houses to the delay and the Minister's reasons for it.

The mechanism proposed fully respects the separation of powers between the executive, legislative and judicial branches. It binds neither the executive nor the legislative. It merely ensures that if the court has made a subsidiary declaration the legislative branch is appraised by the executive of the reasons for its delay in invoking the section 10 process.

Conclusion

It is evident that the Act's draftsmen were acutely conscious of the need to protect the balance of power between the twin pillars of Parliamentary Sovereignty and the Rule of Law. Political power is unpredictable, as demonstrated by events in the United States earlier this year, and these two pillars help maintain the essential constitutional system of checks and balances on political power. The amendments we have proposed do not go against "*the grain of the legislation*"[93] but serve to help accomplish the intentions of Parliament when enacting the HRA and provide greater clarity to the nature of our relationship with the ECtHR going forward. In circumstances where the UK has recently withdrawn from the European Union, it is important that its relationship with Europe in the field of human rights, and its position as a world leader in this area, does not suffer.

Our Firm's founder, Lord Mishcon, was an ardent supporter of the Act. At its Second Reading Debate in the House of Lords, he noted its potential brilliance: providing the British people with access to justice "*before an English judge who would interpret – as much as he could - by the principles of English law, the law set down by the Convention.*"[94] The HRA has achieved this vision.

[93] Ghaidan v Godin-Mendoza [2004] UKHL 30, para 33

[94] Human Rights Bill [H.L.] (Hansard, 3 November 1997) (parliament.uk)

Mishcon de Reya LLP
Africa House
70 Kingsway
London WC2B 6AH

T +44 20 3321 7000
F +44 20 7404 5982
E contactus@mishcon.com

mishcon.com

Mishcon de Reya