Written Evidence from Professor Jacques Hartmann and Dr Samuel White (BOR0015)

[1] We are academic lawyers who research and teach human rights law, human rights compliance, and UK constitutional law. We have previously given written evidence to this Committee's inquiry into the Independent Human Rights Act Review,[1] and to the Independent Human Rights Act Review (IHRAR) itself.[2] We have also given written evidence to the Ministry of Justice (MoJ) in response to the Ministry's consultation, "Human Rights Act Reform: A Modern Bill of Rights".[3]

[2] In our previous submissions we have highlighted the success of the 1998 Human Rights Act (HRA) in protecting individual rights and reducing the number of violations found against the UK at the European Court of Human Rights (ECtHR). We have also argued against the repeal of the HRA, suggesting that this is likely negatively to impact human rights protection in the UK and consequently to increase the number of cases the UK loses before the ECtHR.

[3] This written evidence responds to two of the questions raised in the Call for Evidence:

> **Question 2:** *Clause 3 also provides that the courts may diverge from Strasbourg jurisprudence but may not expand protection conferred by a right unless there is no reasonable doubt that the ECtHR would adopt that interpretation. What are the implications of this approach to the interpretation of Convention rights?*
>
> **Question 6:** *The Bill removes the requirement in section 3 HRA for UK legislation to be interpreted compatibly with Convention rights "so far as possible". What impact would this have on the protection of human rights in the UK?*

Question 2

[4] Question 2 asks "Clause 3 also provides that the courts may diverge from Strasbourg jurisprudence but may not expand protection conferred by a right unless there is no reasonable doubt that the ECtHR would adopt that interpretation. What are the implications of this approach to the interpretation of Convention rights?"

[1] HRA0016. This evidence is available here: <https://committees.parliament.uk/writtenevidence/22953/html/> accessed 1 March 2022. This evidence was cited by the Committee in their report, Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act* (2021-22, HL Paper 31, HC 89).

[2] This evidence is available here: <https://www.gov.uk/guidance/independent-human-rights-act-review> accessed 1 March 2022.

[3] Evidence to this inquiry was not published by the MoJ. A copy can be made available if requested.

[5] Before setting out the implications of the approach envisaged in Clause 3, it is important to note that a general duty not to expand the protection offered by the European Convention on Human Rights (ECHR) was recognised by the UK Supreme Court and does not require the repeal of the HRA. As it stands, the HRA only requires UK courts "take account" of judgments of the ECtHR (s2). They are not required, however, always to follow the judgments of the ECtHR. In *R (AB) v Secretary of State for Justice*, the Supreme Court held that "There should… be a correspondence, in general, between the rights enforced domestically and those available in Strasbourg."[4] The UK's courts are already mindful of the need to be respectful of the role of Parliament in their approach to applying the ECHR.

[6] Nevertheless, we are concerned that strictly limiting the domestic courts' ability to interpret the extent of ECHR rights in perpetuity harms, rather than enhances, the development of a uniquely British approach to the Convention rights.

[7] In the White Paper which preceded the Human Rights Bill and the HRA, the Government of the day noted that "Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts... It will also mean that the 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] Thus the Government clearly envisaged that UK judges would be able to use the latitude afforded to them under the ECHR to develop a nuanced and UK-focused approach to the ECHR.[6]

[8] The margin of appreciation afforded to Council of Europe (CoE) Member States recognises that they enjoy some room for manoeuvre in applying their obligations under the ECHR. As was was described by the ECtHR in *Handyside v UK*, "This margin is given both to the domestic legislator… and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force."[7] Interpretation of Convention rights is the remit of both the domestic courts and the ECtHR, with the ECtHR playing a supervisory role in cases where the domestic courts do not adequately protect individual rights.

[9] As Professor Janneke Gerards has noted, the ECtHR is "entrusted with the task of developing and maintaining minimum standards of fundamental rights protection for the Council of Europe."[8] This brings with it the implication that the jurisprudence of

[4] [2021] UKSC 28, para 55.
[5] Home Department, *Rights Brought Home: The Human Rights Bill* (1997) para 1.14.
[6] In the House of Commons, the then Home Secretary, Jack Straw, reiterated this, saying: "Through incorporation we are giving a profound margin of appreciation to British courts to interpret the convention in accordance with British jurisprudence as well as European jurisprudence." HC Deb 3 June 1998, vol 313, col 424.
[7] (1979-80) 1 EHRR 737, para 4.
[8] Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of

the ECtHR is designed to be a threshold below which no State may fall, but which States are entitled to exceed. As the 2012 Brighton Declaration, adopted under the UK chairmanship of the CoE, outlined "the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions."[9]

[10] The proposed Clause 3 flies in the face of the traditional principle of subsidiarity. It limits the UK courts' ability to develop human rights standards within the framework of the ECHR in a way that accommodated particular aspects of the UK's constitutional position.

[11] Regardless of Clause 3, Parliament is and has always been free legislate if court-developed human rights standards under the current framework run contrary to Parliamentary will. There is therefore little risk of the will of Parliament being usurped by the courts. Instead, Parliament has and will always have the last word; although not complying with a judgment of the ECtHR might result in a violation of international law.

[12] Furthermore, the approach adopted in Clause 3 requires domestic judges to guess how far the ECtHR will go in its interpretation of the ECHR. This could lead to restrictive interpretations on the part of courts in an effort to ensure that an interpretation is not outside the scope of Clause 3. Such interpretations may themselves lead to the number of cases being taken to the ECtHR increasing as claimants may not be certain that the full extent of their rights under the ECHR has been recognised. With an increase in cases being taken to the ECtHR comes a heightened risk of the UK losing more cases.

[13] The risk of losing more cases is exacerbated by the fact that the UK has neither signed nor ratified Protocol 16 to the ECHR. This protocol empowers the "Highest courts and tribunals" of a State to request the ECtHR to give an advisory opinion on a question pending before the domestic courts.[10] Whilst the Government of the day refused to sign or ratify the protocol,[11] if the proposals in Clause 3 proceed, we believe this position should be revisited. Signing and ratifying Protocol 16 would allow UK courts an opportunity to clarify the view of the ECtHR before making decisions where the extent of a right is unclear.

[14] Finally, the 1997 White Paper preceding the HRA asserted that the Act would mean that "British judges will be enabled to make a distinctively British contribution to the

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Human Rights' (2018) 18 Human Rights Law Review 495, 496.

[9] Brighton Declaration, adopted at the High-Level Conference on the future of the European Court of Human Rights, 18–20 April 2012, para 11.

[10] Article 1, Protocol No 16 to the ECHR.

[11] HC Deb 28 October 2014, vol 587, col 17WS.

development of the jurisprudence of human rights in Europe."[12] By limiting the role of UK judges in developing their own jurisprudence on the ECHR, Clause 3 would act to limit the contribution of the UK to the development of the ECtHR's approach to the interpretation of ECHR. This would serve to isolate the UK from the process of ensuring the ECHR reflects the current values and approaches of CoE Member States.

[15] We therefore conclude that Clause 3 ought to be amended to remove this limit to judicial freedom and explicitly permit courts to develop a UK-focused, ECHR-based jurisprudence on human rights.

Question 6

[16] Question 6 notes that "The Bill removes the requirement in section 3 HRA for UK legislation to be interpreted compatibly with Convention rights 'so far as possible'" and it asks "what impact would this have on the protection of human rights in the UK?".

[17] Despite worries, prior to its enactment, that section 3 was "a deeply mysterious provision posing various problems of interpretation"[13] it has proved to be a useful tool for allowing UK courts to manage compliance with the ECHR.[14] At the time of the Human Rights Bill's passage, then Home Secretary Jack Straw indicated that the Government's intention that "the courts to strive to find an interpretation of legislation that is consistent with Convention rights, so far as the plain words of the legislation allow, and only in the last resort to conclude that legislation is incompatible with them."[15] Although he went on to note that "it is not our intention that the courts in applying section 3 should contort the meaning of words to produce implausible or incredible meanings."[16]

[18] Initially, the broad wording of Section 3, including "so far as possible", meant that deciding "Quite where the line is to be drawn between legislating and interpreting is not clear".[17] In the years immediately after the entry into force of the HRA a number of expansive approaches were taken, some of which arguably exceeded the intention of Parliament. However, in a string of cases which ended in *Ghaidan v Godin Mendoza*,[18] the courts honed their approach.

[12] Home Department (n 8) para 1.14.
[13] Geoffrey Marshall, 'Interpreting Interpretation in the Human Rights Bill' [1998] Public Law 167, 167.
[14] This is demonstrated quite clearly by the ever-decreasing number of cases lost by the UK before the ECtHR.
[15] HC Deb 3 June 1998, vol 313, cols 421-422.
[16] ibid.
[17] *Poplar Housing and Regeneration Community Association Limited v Donoghue* [2001] UKHL 37, [2002] 2 AC 545, per Lord Woolf.
[18] [2004] UKHL 30, [2004] 2 AC 557.

[19] In *Ghaidan* the House of Lords explained that section 3 was required where the ordinary meaning of the legislation in question was not compatible with Convention rights. Whilst the ruling recognised that normal powers of interpretation applied, it suggested that section 3 further allows the courts to read words in (as they did in *Ghaidan*), insofar as the words read-in are consistent with the "fundamental feature of the legislative scheme" and must not contradict the "express statutory words".[19] In addition to reading-in, it was held that there was a right to read legalisation down also inherent in section 3 which allows courts to adopt a narrow interpretation of the statute in question, if such a reading will render it compliant with Convention rights.[20]

[20] The report of the IHRAR noted that the *Ghaidan* approach provides "clear and sensible guidance to UK Courts to apply section 3's interpretative duty."[21] It continued, saying of the *Ghaidan* principles that "Since they were set out it is difficult to identify cases where UK Courts have strayed beyond Parliament's intention in enacting section 3."[22]

[21] Thus, the understanding of the words "so far as possible" appears to be settled. An interpretation is not possible if it "would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation."[23]

[22] The motivation behind this change appears to be a concern with the role of judges under the HRA and the expansive approach some allege has been adopted under section 3. Indeed, a number of commentators have expressed concerns about the power which section 3 affords judges.[24] However, as noted above, it is difficult to point to examples of judicial overreach in the nearly two decades since *Ghaidan*. Moreover, as the IHRAR report noted:

> …in so far as those [pre *Ghaidan*] decisions were viewed as going too far, Parliament could have legislated to reverse them; that it did not is more than suggestive of the conclusion that Parliament has not itself over the last twenty years considered that there was a systematic problem with the UK Courts' exercise of the duty imposed on them by section 3.[25]

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[19] ibid paras 32, 33, 66, 67, 75, 121.
[20] ibid para 67.
[21] Ministry of Justice and IHRAR, *Report of the Independent Human Rights Act Review* (CP 586, 2021) 207.
[22] ibid.
[23] *Sheldrake v DPP* [2004] UKHL 43, para 29 (per Lord Bingham).
[24] For example, Sir Philip Sales and Richard Ekins, 'Rights-Consistent Interpretation and the Human Rights Act 1998' (2011) 127 Law Quarterly Review 217 see also the work of the Judicial Power Project.
[25] IHRAR (n 21) 207.

[23] Removing the power afforded to UK courts by way of the words "so far as is possible" may reduce the courts' ability to read legislation into compliance, meaning the chance of cases being taken to the ECtHR and consequently the UK losing these cases is higher. The proposed changes may also be likely to lead to an increased number of declarations of incompatibility.

[24] Commentators such as Professor Aileen Kavanagh have highlighted the political power of such a declaration; this may bring the courts into conflict with Parliament if changes are not made to impugned legislation or if Parliament disagrees about the existence or extent of an incompatibility.[26] Such a situation is undesirable. Moreover, a declaration of incompatibility operates to confirm that the domestic courts consider a violation of the ECHR to have occurred making the likelihood of an adverse decision by the ECtHR higher.[27]

[25] Finally, if the proposed change occurs there requires to be clarity on the effect of this change on existing judgments decided on the basis of the existing wording. As Dr Kyle Murray has pointed out, this is a complex issue and requires careful consideration to ensure clarity and continuity in the law on this point.[28]

[26] We see no issue with the approach the courts have taken in the use of section 3 in its current form. It has worked as part of a toolkit which has been useful in ensuring that the UK courts are able to remedy breaches of the ECHR rights at the domestic level. The IHRAR Report concluded that section 3 ought to be clarified in order to make clear the order of priority of interpretation and that this be coupled with increased transparency in the use of section 3.[29] This approach would seem to be an appropriate means of ensuring that courts use their power in an appropriate manner to protect human rights in the UK whilst continuing to respect the will of Parliament.

[27] We therefore conclude that the removal of the words "so far as is possible" ought not to go ahead. However, if this reform does proceed, care must be taken to clarify the impact it will necessarily have on cases decided under the existing wording.

Conclusion

[28] As we have noted in other evidence to this Committee, to IHRAR and to the Ministry of Justice. We do not believe that a case has been made which justifies the repeal of the HRA. If, however, the Bill of Rights Bill proceeds through Parliament, we

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[26] See Aileen Kavanagh, 'What's so Weak about "Weakform Review"? The Case of the UK Human Rights Act 1998' (2015) 13 International Journal of Constitutional Law 1008.
[27] See ibid.
[28] Kyle Murray, 'The future of rights-enhanced interpretations under the Bill of Rights' (UK Constitutional Law Blog, 12 July 2022) available at <https://ukconstitutionallaw.org/2022/07/12/kyle-murray-the-future-of-rights-enhanced-interpretations-under-the-bill-of-rights/> accessed 10 August 2022.
[29] IHRAR (n 21) 245–252.

believe that the aspects of the legislation which are the subject of questions 2 and 6 ought to be reconsidered.

[29] In respect of both proposals, we believe they risk undermining the UK's strong track record of success before the ECtHR. They may well result in an increase in the number of cases brought before the ECtHR and as a consequence increase in the likelihood that the Strasbourg Court will find the UK in breach of its obligations as a party to the ECHR.

16/08/2022