Written evidence from the Faculty of Law, University of Cambridge (HRA0012)

What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?

1. This evidence is provided by the Centre for Public Law, a research group in public law based in the Faculty of Law at the University of Cambridge. The primary contributors to this evidence are Dr Stephanie Palmer and Professor Alison Young, both of the University of Cambridge.

2. The relationship between the courts, Government and Parliament rests on a combination of constitutional principles: parliamentary sovereignty, the rule of law and the separation of powers. It is for Government to initiate legislation and enact subordinate legislation, for Parliament to enact and scrutinise legislation and hold the Government to account and for Courts to interpret legislation, apply and develop the common law and uphold the rule of law.

3. The Human Rights Act (HRA) has readjusted this relationship. However, it was not intended to disrupt the orthodox understanding of parliamentary sovereignty. The HRA is not entrenched: it is not protected substantively or procedurally from express amendment or repeal. The HRA's framework gives "further effect" to Convention rights rather than directly incorporating them into domestic law and giving the Convention rights the "force of law".1

4. The preservation of the doctrine of parliamentary sovereignty means that the HRA does not give courts power to strike down or disapply primary legislation which is incompatible with Convention rights.2 There is power to strike down subordinate legislation unless primary legislation prohibits the removal of the incompatibility.3 The devolved administrations have no competence to act in a Convention incompatible way. The HRA provides that for its purposes any act of a devolved administration is considered subordinate legislation so that there is a power to strike down the legislation of those bodies.

[1] *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, at [97] (Lord Hope).
[2] HRA s.21(1) provides a definition of primary and subordinate legislation.
[3] HRA s.3(2)(b) and (c) provide that s.3 does not affect the validity, continuing operation or enforcement of any incompatible primary legislation or subordinate legislation if primary legislation prevents the removal of the incompatibility.

5. A stated purpose of the HRA was to provide an effective domestic remedy in circumstances where Convention rights are breached. Sections 6 and 7 provide a mechanism for challenging the actions or omissions of public authorities that must act consistently with Convention rights. Section 3 imposes an interpretative obligation and section 4, provides the option of declaration of incompatibility if the legislative provisions are irremediably incompatible.

6. The HRA has significantly altered the approach of the courts to the interpretation of the legislation of the UK Parliament and subordinate and secondary legislation. The obligation under section 3 HRA to read and give effect to all legislation in a way which is compatible with Convention rights "so far as it is possible to do so" applies to all courts and tribunals and in all proceedings. The interpretative duty is the primary mechanism through which Convention rights are "brought home" and incompatibility with the ECHR is avoided. For these reasons, the interpretative obligation is strong and far-reaching. The obligation is deliberately stronger than the model of requiring a reasonable interpretation as provided for in the New Zealand Bill of Rights Act 1998.4

7. In certain circumstances, section 3 enables the meaning of statutory provisions to be altered to achieve compliance with Convention rights. The application of the obligation does not depend upon the presence of ambiguity in legislation. Even if the legislation is clear, section 3 may require the legislation to be given a different meaning.5

8. Section 3 is quite radical, as it goes much further than the ordinary methods of interpretation deployed by the courts. It qualifies the general principle of interpretation of legal instruments, that the text is the primary source of interpretation. It obliges the court to find an interpretation that is Convention-consistent, "if possible", even if this means that the given meaning is linguistically strained. However, it is important to recognise that this stronger form of interpretation is itself an express of the will of Parliament in the HRA. Section 3(1) requires the courts to adopt a Convention-compliant interpretation to legislation, even if this appears to differ from what Parliament appeared to have in mind when enacting it, in order to ensure it complies with a further intention of Parliament that legislation be read, so far as possible, in a manner compatible with Convention rights.

[4] *R v A (No 2)* [2001] UKHL 25 at [44] per Lord Steyn.
[5] *Ghaidan v Godin-Mendoza* [2004] UKHL 43 at [29].

9. This has not resulted in a radical transfer of power from the legislature to the judiciary. When faced with a submission that a statutory provision is incompatible with a Convention right, the courts initially apply the "ordinary" principles of interpretation or use broader constitutional principles which do not depend on statutory ambiguity. In adopting this approach, the courts may conclude that a decision can be reached without resorting to section 3 as the meaning of a provision, as construed by the courts, may reveal no apparent incompatibility with the Convention. Such an approach serves to preserve the primacy of the legislature's intention concerning the legal instrument under examination. If the application of the ordinary principles of statutory interpretation results in an apparent incompatibility between the meaning of the legal instrument and a Convention right, the court is then obliged to turn to section 3.

10. The use of the word "possible" in section 3 clearly indicates that Parliament envisaged that not all legislation would be capable of being interpreted in a Convention compliant manner. In exercising section 3 obligations, the role of the court is "interpretation not legislation".6 The courts are limited to a certain extent by the words used and the overall contextual setting. The courts have used various techniques such as "reading down", "reading broadly", and "reading in" in order to interpret statutory provisions in a Convention compliant manner. The most radical use of section 3 has involved the technique of "reading in" words to achieve compatibility. The results have been controversial as the courts have used section 3 to read in words which change the meaning of the legislation, but it has also proved the most powerful of the tools to achieve compatibility.

11. The breadth of the obligation can be seen from the decisions of the House of Lords in R v A (No 2) and Ghaidan v Godin–Mendoza. The courts are not bound by linguistic constraints but ones of appropriateness in our constitutional structure, including ensuring that an interpretation does not undermine a fundamental feature of the legislation.7 In Sheldrake v DPP, Lord Bingham summarised the explanations provided for the inability to provide a Convention-compliant interpretation. A Convention-compatible 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."8

[6] *R v A (No 2)* [2001] UKHL 25, at [109].
[7] *Ghaidan v Godin-Mendoza* [2004] UKHL 43, at [27]. See also See *R v Holding* [2005] EWCA Crim 3185 and *Gilham v Ministry of Justice* [2019] UKSC 44.
[8] *Sheldrake v DPP* [2004] UKHL 43, at [28].

12. Declarations of incompatibility provide Parliament with the final say over whether, and if so how, to amend legislation which breaches Convention rights. In addition to situations where it is not possible to read legislation so as to comply with Convention rights, courts will also prefer to make a declaration of incompatibility where the legislature is more suited to provide a remedy. For example, courts have made a declaration of incompatibility where there is a range of possible Convention-compatible interpretations and the choice between them may have policy implications, or where Convention-compatibility may require the creation of positive rights or administrative schemes.9

13. The courts also have a discretion as to whether to issue a declaration of incompatibility. There is evidence of courts showing deference to Parliament, failing to issue a declaration of incompatibility when Parliament was already aware of a breach of Convention rights following a decision of the European Court of Human Rights,10 or where Parliament was already in the process of debating a particular issue, or where some judges perceived that the issue was more suited for resolution by Parliament as opposed to the courts.11

14. Whilst the Human Rights Act may have shifted the balance of power towards the courts, it is important to recognise that this was given to the courts by Parliament and that courts have exercised these powers in a manner that is respectful of the relative constitutional roles of Parliament and the courts. In particular, courts are mindful not to make policy choices that are best left to the legislature. This is exemplified not only when courts interpret legislation so as not to undermine fundamental features, or issue declarations of incompatibility to enable Parliament to make policy choices, but also when courts interpret the scope of Convention rights. In particular, courts defer to the choices of democratically elected institutions, giving weight to their assessment of proportionality. They also apply the test of proportionality less stringently when analysing complex social and economic issues, particularly those concerning issues of potential discrimination in welfare rights.

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[9] *Bellinger v Bellinger* [2003] 2 AC 467.
[10] *R (on the application of Chester) (Appellant) v Secretary of State for Justice (Respondent); McGeoch (AP) (Appellant) v The Lord President of the Council and another (Respondents) (Scotland)* [2013] UKSC 63
[11] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.