Baker McKenzie response to the call for evidence produced by the Independent Human Rights Act Review Panel

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1. Introduction

1.1 This document contains Baker McKenzie's response to the call for evidence produced by the Independent Human Rights Act Review ("**IHRAR**") panel (the "**Call for Evidence**"). Our response is structured as follows:

(a) First, in section 2 below, we provide an overview of the IHRAR's review (the "**Review**"), including our views on: (i) the constitutional significance of the Human Rights Act 1998 ("**HRA**"); (ii) the impact that the HRA has on administrative decision-making and decision makers; and (iii) the framing of the Review.

(b) Second, in section 3 below, we provide responses to the questions raised under 'Theme One' of the questionnaire contained in pages 5 and 6 of the Call for Evidence (the "**Questionnaire**"), which deals with the relationship between domestic courts and the European Court of Human Rights ("**ECtHR**").

(c) Finally, in section 4 below, we provide responses to the questions raised under 'Theme Two' of the Questionnaire, which considers the impact of the HRA on the relationship between the judiciary, the executive and the legislature.

1.2 Baker McKenzie is the world's largest law firm and has 77 offices in 46 countries around the world. The firm was founded in Chicago in 1949 and London is now its largest office, with more than 400 legal professionals. London is a full service office and its practice areas cover all those that might be expected of a major law firm.

1.3 The Regulatory, Public Law and Media Practice Group is recognised by legal directories as one of the leading public law practices in the UK. Our lawyers advise clients on both contentious and non-contentious public law matters arising under English and EU law, many of which raise human rights issues. We act for governments and regulators, as well as those seeking to challenge decisions made by public authorities, including some of the largest multinational corporations in the world. We also act for non-governmental organisations such as the United Nations High Commissioner for Refugees (UNHCR).

2. Overview

2.1 Before providing our comments on the Questionnaire, we set out in this section our views on: (i) the constitutional significance of the HRA; (ii) the impact that the HRA has on administrative decision-making and on decision makers; and (iii) the framing of the Review.

2.2 UK courts held unequivocal jurisdiction to review the exercise of administrative power prior to the enactment of the HRA. The HRA simply afforded individuals a mechanism by which to directly enforce their existing rights under the constitution and as recognised by the UK's international treaty obligations (including the European Convention on Human Rights ("**ECHR**" or the "**Convention**")). The HRA also addressed the need to secure consistency and certainty in the protection of human rights in the UK by application of standards of review consistent with those international treaty obligations (i.e. encompassing an assessment of proportionality). Legislative recognition of standards of review to be observed through the HRA was particularly important in light of the scope of power afforded to the executive under the auspices of the UK's unwritten constitution and the domestic standards of review otherwise available to the judiciary in the UK.

2.3 Parliament should not take any action that might remove certainty as to the rights and standards to be observed in the UK, undermine consistency in scrutiny of the exercise of executive power, or otherwise dilute an individual's ability to enforce their rights directly before domestic courts. Such action would render rights protections vulnerable to executive overstep, as well as removing a crucial mechanism by which the executive might be held to account for any abuse of power. It might also undermine our ability to offer a level playing field to corporates operating across jurisdictions and who are tasked with meeting a regulatory burden framed by domestic application of international rights obligations. The HRA ensures consistency across the many thousands of acts or decisions of public authorities that are made each year by ensuring that they are compliant with the ECHR. Securing a level playing field in this regard between jurisdictions is a key concern of many of our international corporate clients who are affected by the decisions of public authorities across multiple European jurisdictions, as well as European domestic legislatures.

2.4 We note that the Review's Terms of Reference ("**ToR**") state that the Review will consider the way the HRA balances the roles of the judiciary, the executive and the legislature in protecting human rights in the UK, including asking "*whether the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy*". Framing the Review in this way encourages an (erroneous) assumption that domestic courts are being drawn into, and presuming to determine, matters of policy. It risks eliciting an unbalanced response from to the Call for Evidence that fails to consider the respective roles of the judiciary, executive and the legislature equally. In this respect the ToR neglect to ask what must be a key question; whether the HRA has effectively secured and protected human rights in the UK.

2.5 The HRA does not in any case elevate the role of UK courts or create an imbalance of constitutional power between branches of government. The HRA does not allow UK courts to strike down primary legislation that is inconsistent with human rights. The ultimate security of human rights inherent to all individuals in the UK remains at the hand of executive government and legislature operating lawfully within their constitutional ambit. The role of the courts in interpreting the proper application of fundamental rights under the HRA bolsters that existing constitutional bound upon the exertion of political authority. The operation of the HRA should be carefully considered in this context.

2.6 It should also be emphasised that any proposed reform of the HRA must be considered together with proposed reform of the scope and operation of judicial review more generally in the UK. Judicial review provides only a limited route for scrutiny and recourse in respect of decisions made by public authorities that protect, promote or otherwise affect the rights and interests of individuals. It is an important means by which public authorities and the executive branch are held to account for their exercise of administrative power. The operation of judicial review has already been pared back in the UK by the reduction of time limits to file certain types of challenges as well as decreases in available funding. Further limitation on the ability to pursue judicial review would impede the operation of this fundamental constitutional mechanism and, with it, individuals' rights of recourse in respect of human rights infringements. In this respect, there is potentially significant overlap between the work of the IHRAR panel and the work of the Independent Review of Administrative Law ("**IRAL**") panel. Any proposed changes to the HRA as a result of the Review should therefore be considered in the context of the responses to the IRAL's review and the IRAL's report, which has not yet been published but, we understand, has now been delivered to the government.

2.7 As we noted in our response[1] to the IRAL's call for evidence, public authorities may not always welcome judicial scrutiny, but in our experience the potential for judicial review exerts a positive effect on decision makers, and many decision makers recognise the imperative to good decision-making that it provides. By requiring decisions to be made legally, procedurally fairly and rationally, judicial review ultimately improves decision makers' behaviour and operations and, as a result, the quality of their decision making, as well as ensuring outcomes that fulfil the purpose intended by parliament when it conferred the power on the decision maker. If the Review and the IRAL's review were to weaken the protections afforded by the HRA and judicial review, this would undermine fundamental principles of fairness, accountability and the rule of law. It might also undermine public confidence in the quality of decision-making by authorities.

2.8 Overall, we do not see any basis to revise, replace or remove the HRA in its current form. The HRA is working well and plays a key role in securing individual rights within the UK constitution in a number of areas including, amongst others, immigration and the protection of refugees, national security, movement, rights to work, healthcare, property and expression. It is essential that any reforms arising from the Review do not diminish the protections afforded by the HRA on these, as well as other, fronts, or undermine domestic courts' capacity to discharge their constitutional functions in protecting the fundamental rights of individuals. This is particularly important in the context of the continuing digital transformation of our society, and in light of greater societal and workplace pressures faced by individuals as a result of the current pandemic.

2.9 It is also important to consider the impact of any reforms on business interests, since the HRA plays an important role in attracting investment, particularly in terms of the image it projects of the UK. We note, in this respect, that it would be particularly jarring to be seen to be walking back the UK's commitment to human rights in the year that the UN will celebrate 10 years of its Guiding Principles on Business and Human Rights (the "**UNGPs**") and will publish a report in June 2021 to develop a roadmap for further drive and implementation of the UNGPs.

2.10 We note that neither the ToR nor the Call for Evidence contain any proposals for reform at this stage, and we would expect the IHRAR to consult again should any concrete proposals for amendment or reform be developed in order to allow proper engagement with these issues.

3. The Questionnaire: Theme one

3.1 The ToR note that, under the HRA, domestic courts and tribunals are not bound by case law of the ECtHR, but are required by section 2 HRA to "take into account" that case law (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right.

3.2 In this context, the Questionnaire states as follows:

We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

Specifically, we would welcome views on the detailed questions in our ToR. Those questions are:

[1] Baker McKenzie's response to the IRAL call for evidence is available here: https://administrativejusticeblog.files.wordpress.com/2020/11/londms-12162569-v1-bm_response_to_iral_call_for_evidence_-_20_10_20.pdf

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

b) *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?*

c) *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?*

3.3 In our view, there currently is no need to amend section 2 of the HRA, which provides a clear framework under which the courts have a duty to take ECtHR jurisprudence into account in determining cases dealing with Convention rights. The courts have tended to interpret this provision, at least in the first few years following the enactment of the HRA, according to the 'mirror principle', established by the House of Lords' decision in *Ullah*[2]. According to this principle, judges should follow any clear and constant jurisprudence of the ECtHR and should offer domestic protections for the Convention rights which were neither narrower nor more expansive than those afforded by the ECtHR. In practice, this means that the domestic courts seek to mirror in their interpretation of Convention rights under the HRA the interpretation given by the ECtHR to the equivalent Convention rights set out in the ECHR.

3.4 We recognise that the 'mirror principle' and section 2 of the HRA are viewed by some as permitting the content of domestic human rights laws to be effectively determined by an external source of law, which has given rise to concerns that the ECtHR wields excessive influence over UK laws, and that our courts effectively subordinate themselves to the ECtHR's rulings. However, this position is not borne out by the wording of section 2 of the HRA itself, nor by the way it has been applied in practice by the courts:

(a) The obligation on the UK courts to "take into account" ECtHR jurisprudence does not mean that the courts have to abide by a ECtHR judgment, and the Supreme Court has made this clear[3]. Indeed, if it had been the intention to make ECtHR jurisprudence binding on domestic courts, the choice of words in section 2(1) of the HRA would be illogical.

(b) Moreover, since 2009, there have been numerous cases in which the courts have being willing to depart from ECtHR case law. For example: where ECtHR case law is incompatible with a 'fundamental substantive or procedural' aspect of our law[4]; if the Strasbourg case-law is dated[5] or if a substantially similar result could be achieved through application of the common law[6].

3.5 It is clear, therefore, that courts are not bound to follow every decision of the ECtHR, and in practice are not doing so. This movement away from the 'mirror principle' demonstrates that section 2 of the HRA affords courts sufficient flexibility to utilise ECtHR decisions alongside national laws in the development of rights, whilst maintaining the domestic courts' ability to disagree with the ECtHR where necessary.

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[2] *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323
[3] see Lord Neuberger's comments at para 48, *Manchester City Council v Pinnock* [2010] UKSC 45
[4] *Manchester City Council v Pinnock*, op cit.
[5] *R (on the application of Quila and another) v Secretary of State for the Home Department* [2011] UKSC 45
[6] *Osborn v The Parole Board* [2013] UKSC 61

3.6 By creating a link to ECtHR jurisprudence, section 2 also permits dialogue with the ECtHR which can lead to positive change and improvements for rulings of both domestic courts and the ECtHR. As Lord Neuberger noted in *Manchester City Council v Pinnock*, if the courts were bound to follow every ECtHR decision, this would be impractical and sometimes inappropriate, as it would "*destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law*"[7]. The benefits of the dialogic approach in developing Convention law, and the UK's influence on outcomes in Strasbourg, are clear from the *Horncastle*[8] decision, in which the Supreme Court considered that departure even from clear ECtHR jurisprudence was exceptionally acceptable under section 2 of the HRA in circumstances where the ECtHR's prior decision insufficiently appreciated particular aspects of the domestic process. This link, and the scope it provides for judicial dialogue to take place, also helps to provide certainty and ensure consistency at a European level, which is essential to the interests of many businesses.

3.7 For these reasons, we consider that section 2 of the HRA provides a necessary and important link to ECtHR jurisprudence and that no change is necessary to the section itself, or to the current approach to issues such as the margin of appreciation. If this link were to be weakened, or even broken, this would lead to uncertainty and risks diluting the protections afforded to individuals under the HRA, which would be an unwelcome development for the reasons we set out in paragraphs 2.2 to 2.9 above.

4. The Questionnaire: Theme two

4.1 The ToR note that the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will consider the way the HRA balances those roles, including whether the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy.

4.2 In this context, the Questionnaire states as follows:

We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.

Specifically, we would welcome views on the detailed questions in our ToR:

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

i. 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)?

ii. 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?

[7] Lord Neuberger at paragraph 48, *Manchester City Council v Pinnock*, op cit
[8] *R v Horncastle and others* [2009] UKSC 14

iii. *Should declarations of incompatibility (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?*

b) *What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?*

c) *Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?*

d) *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?*

e) *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?*

Sections 3 and 4 of the HRA

4.3 Overall we consider that the balance currently struck between sections 3 and 4 of the HRA is correct, and would not support changes to be made to the complementary framework they establish, for the reasons we explain below.

4.4 Sections 3 and 4 aim to confer maximum power on the courts to uphold Convention rights, in a manner which is consistent with their constitutional role. Thus, consistent with the separation of powers doctrine, the courts cannot themselves legislate but can interpret legislation under section 3 of the HRA. Similarly, consistent with the doctrine of Parliamentary sovereignty, when it is not possible to give effect to legislation in a manner compatible with Convention rights, the courts cannot quash legislation, or render it unlawful, but instead may issue a declaration of incompatibility under section 4 of the HRA. Legislation declared incompatible with Convention rights continues to apply and have legal effect. However, the declaration sends a political signal to the government and the legislature that an Act of Parliament is incompatible with Convention rights, providing an opportunity, but crucially not an obligation, for Parliament to consider whether the legislation should be changed.

4.5 Together, sections 3 and 4 of the HRA operate as an integrated scheme of which the other is a key component. No provision will attract the exercise of both powers: either it is possible to interpret the legislation compatible with Convention rights under section 3, or it will be impossible to do so, in which case a declaration of incompatibility may be issued under section 4. Whether it is section 3 or 4 that applies in a given case will depend on what is interpretively possible, and it is this question which has led some to form the view that the operation of the HRA has, as the ToR put it, drawn the courts "unduly into matters of policy", particularly in light of the courts' historic tendency to deal with cases under section 3 of the HRA, as opposed to section 4.

4.6 As a result of being more warmly embraced by the courts, it is section 3 of the HRA that has attracted the strongest criticism on the basis that it affords the courts scope to stray beyond the interpretation of legislation and do something verging on amendment, thereby undermining Parliamentary sovereignty. However this criticism fails to acknowledge the limits of section 3, which only allows the courts to interpret legislation compatibly with Convention rights when this is 'possible'.

4.7 When assessing the bounds of what is 'possible', it is important to bear in mind the key remedial role section 3 of the HRA plays by enabling the courts to protect Convention rights which would have

otherwise been breached if the statute governing the case was interpreted according to ordinary principles of statutory interpretation. This is clear from the decision of the House of Lords in *Ghaidan*[9], in which the court extended the right to succeed to a statutory tenancy to same sex couples under the Rent Act 1977. In the majority judgment, Lord Nicholls alluded to a tension between competing aspects of section 3 of the HRA. While noting that it is the statute, and not the Convention rights directly, that had to be 'read and given effect' under section 3 of the HRA, he acknowledged that section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear, and may even require the court to depart from the intention of the Parliament which enacted the legislation[10]. The key point, however, is that while this may frustrate Parliament's intention at the time the legislation was passed, it would fulfil Parliament's intention in enacting section 3 of the HRA.

4.8 Further, the argument that section 3 of the HRA allows the courts to act contrary to the legislative intention of Parliament has much less force in respect of legislation enacted after the HRA came into force as a result of section 19 of the HRA, which requires the responsible minister to make a statement of compatibility with Convention rights. Thus, if Parliament intends to legislate in a way that is inconsistent with Convention rights, it must make this explicitly clear.

4.9 For these reasons, we consider that legislation has been interpreted by the courts in a manner consistent with the intention of Parliament in enacting it, and see no basis for amending section 3 of the HRA.

4.10 As noted above, ECHR consistent interpretation under section 3 of the HRA is not the only tool at the disposal of the courts: where it is not possible to fit cases in the section 3 category, the courts have the option to issue a declaration of incompatibility under section 4 of the HRA. The courts do not have to make a declaration where they find an incompatibility, and there may be circumstances where it is not appropriate to do so, as was found to be the case in *Nicklinson*[11], where Parliament was in the course of debating the law on assisted suicide, so it would have been inappropriate for the court to preempt that debate. More usually, once the court has concluded that consistent interpretation under section 3 of the HRA is not possible, a declaration of incompatibility will follow as a matter of course. In *Steinfeld and Keidan*[12], which concerned the ability of different sex couples to enter into civil partnerships, the Supreme Court was clear that the court should not be reluctant in this case to make a declaration of incompatibility notwithstanding the government's argument that this was a sensitive area of policy that should be for the elected government, not the court to decide on, i.e. it fell outside the court's "institutional competence".

4.11 Nonetheless, declarations of incompatibility are somewhat rare. This may be explained, to some degree, by the fact that declarations under section 4 are generally seen to be more controversial (at least politically). However we consider it unsurprising that the courts (intentionally or otherwise) tend to prefer to resolve cases by means of section 3 of the HRA over section 4 from the perspective of protecting individuals' human rights. This is because of the legal effect (or rather, the lack of) that declarations made under section 4 of the HRA have.

4.12 As noted above, legislation declared incompatible with Convention rights continues to apply and have legal effect. The legal position between the parties to the case is therefore unaffected, which means that the breach of one party's Convention rights will persist unless and until Parliament decides to enact legislation removing the incompatibility, or the executive issues a remedial order under section 10 of

[9] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557
[10] Lord Nicholls at paragraph 30, *Ghaidan*, op cit.
[11] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657
[12] *R (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32

the HRA. There is no requirement on Parliament or the executive to take such action and, even if they did, it would need time to take effect. The courts are therefore unable to provide an immediate remedy to the individual concerned. In this respect, declarations under section 4 arguably do not enable the courts to deal with human rights matters, which was the very purpose of the HRA.

4.13 We note that the ToR ask whether such declarations should 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. Currently, the courts have to take the view that declarations of incompatibility are a measure of last resort, because of the relationship between sections 3 and 4 of the HRA (i.e. because section 3 requires them to first read and give effect to the legislation in a way that is compatible with Convention rights). It is therefore difficult, without having sight of any proposed amendments to the framework established by sections 3 and 4, to comment meaningfully how the role of Parliament might be enhanced in addressing incompatibility, given that it already has the opportunity to do so once the court has made a declaration and plays a role in the remedial order process established by section 10 and Schedule 2 of the HRA.

Subordinate legislation

4.14 Under the HRA scheme, there is a crucial difference between 'primary' and 'subordinate' legislation. In respect of the former, the court must either interpret it compatibly with Convention rights or, if this is not possible, make a declaration of incompatibility. With regard to subordinate legislation, the court can declare this to be unlawful and invalid to the extent of any incompatibility with Convention rights, where it concludes that the 'parent' primary legislation does not authorise ECHR-incompatible subordinate legislation.

4.15 The ToR ask how the courts have dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights. While the courts undoubtedly have the power to effectively quash subordinate legislation in the circumstances described above, in practice, and due to the strength of the section 3 obligation, the courts are usually able to conclude that the subordinate legislation can be interpreted consistently with Convention rights.

4.16 Nevertheless, the courts' ability to declare subordinate legislation to be unlawful is an important mechanism which enables them to protect individual rights in a manner that is consistent with their constitutional role, the purpose of the HRA and the doctrine of Parliamentary sovereignty. If this ability were to be removed, or watered down, it would lead to similar problems that we identified above in respect of declarations of incompatibility under section 4 of the HRA: namely, individuals whose Convention rights have been breached would be left without an immediate remedy (and potentially no remedy at all).

4.17 For these reasons, we do not consider that any change is required in respect of the current approach to subordinate legislation.

Application of the HRA to acts of public authorities outside the UK

4.18 The HRA does not contain any provision which governs the power of the courts to apply Convention rights to public authorities' activities taking place outside the UK. Nevertheless, the courts have in some instances applied them to UK armed forces operating in Iraq and Afghanistan. This is a result of the courts applying ECtHR jurisprudence, which holds that states' obligations under the ECHR extend to action taken extra territorially if their agents exercise effective control over an areas of, or persons in, another state.

4.19 In our view, this is a common sense approach taken by the courts, and enables them to offer at least as much protection as they feel confident that the ECtHR would offer to someone within the jurisdiction of the UK. In our view, this approach is consistent with both the courts' duty under section 2 of the HRA to take ECtHR jurisprudence into account in determining cases dealing with Convention rights, and with the overall purpose of the HRA to allow individuals to protect some rights under the ECHR in domestic courts. On this basis, we see no case for change to this approach.

Remedial orders under section 10 of the HRA

4.20 As noted above, the only legal effect of a declaration of incompatibility under section 4 of the HRA is the triggering of the power of the executive to issue a remedial order under section 10 of the HRA. Once a declaration is issued, section 10 allows (but does not require) the government to enact secondary legislation amending Acts of Parliament that have been found to be incompatible.

4.21 The ToR ask whether the remedial order process, as set out in section 10 and Schedule 2 of the HRA, should be modified, for example by enhancing the role of Parliament. Without having sight of any proposed amendments to the framework established by section 10 and Schedule 2, it is difficult to comment meaningfully on how the role of Parliament might be enhanced, including the advantages and disadvantages of any potential changes. We note, however, that Parliament current plays an important role in the current remedial order process, for example by considering proposals for a draft remedial order once they are formally presented by ministers, providing scrutiny in the form of the Joint Committee on Human Rights and by ultimately approving the order.

5. Conclusion

We hope that our comments above are helpful. If you have any questions or if we can be of further assistance, please contact Francesca Richmond (Francesca.Richmond@bakermckenzie.com), Laura Carlisle (Laura.Carlisle@bakermckenzie.com) or Sarah West (Sarah.West@bakermckenzie.com).