University of East Anglia

INDEPENDENT HUMAN RIGHTS ACT REVIEW
Call for evidence:

Professor David Mead, School of Law, University of East Anglia

1. I am Professor of UK Human Rights in the Law School at the University of East Anglia (UEA) and have been since 2013. My main area of academic interest over the past twenty years has been the law and practice of protest & public order, and analysis of the domestic protection of human rights through the HRA, including its operational provisions. Full details of my research output can be found here https://www.uea.ac.uk/law/people/profile/d-mead.

SUMMARY

2. The Independent Human Rights Act Review (IHRAR) has called for evidence on one of two themes: the relationship between domestic courts and the Strasbourg Court, and the impact of the HRA on relationships between judiciary, legislature and executive. Each is broken down into a few sub-themes or questions. The focus of this paper is largely on the latter; others are better placed through research and/or experience to offer views on domestic/European relationships and, by implication, on s.2.

3. The narrow scope of the Review is itself a matter of concern.

4. The conclusions this paper reaches are:-

   i. Matters of dispute between the UK and Strasbourg largely seem to boil down to one or two pinch cases, the reach and impact of which is considerably overestimated and/or relative to the numbers of cases each year, is very small indeed.
   ii. The supposed problem of European overreach if ever it existed has been on the wain for the past handful of years, maybe more.
   iii. Similarly, the "problems" of the s.3/s.4 nexus are overplayed; this is not to say that problems do not exist nor that there are not solutions but that these are qualitatively different to those usually envisaged or played out in the media
   iv. On the question of whether or not the current approach 'risks over-judicialising public administration, there could be some scope for reform of s.6 here, to moderate what might be described as the juriscentric approach apparent in cases such as *Begum* [2006] UKHL 15.
   v. If there is public disquiet at the HRA, some blame can fairly be attributed to unbalanced media coverage, as I have sought to show in previous work and evidence to the JCHR.

INITIAL COMMENTS

5. The limited scope of the Review and the implicit assumptions on which it is premised give cause for concern.

6. The opportunity could have been taken for consideration of the substantive protection afforded by the HRA (and/or ECHR), such as consideration of a wider range of rights – socio-economic in orientation, whether or not enforced directly through judicial remedies – and inclusion of rights found elsewhere, in domestic Bills of Rights or internationally.

7. Likewise, the Review could have revisited the 'public/private function' divide at the heart of s.6, certainly in light of *YL v Birmingham* [2007] UKHL 27 (albeit that was rectified as a one-off though legislation), so as to recognise the greater threat posed by private, commercial entities. Here, one consideration might have been to look to the Victorian Charter of Rights and Responsibilities 2006, s.4(1)(c) of which defines a public authority as an entity "whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)".

8. Last, the focus of the Review is on the human rights cases and complaints being litigated, brought to court for resolution. It is something of an irony then that one of its concerns is of an 'over-judicialisation' when there is much good and strong evidence – from e.g. the BIHR – of the critical role of the HRA and human rights values shaping the way institutions and agencies interact with citizens, informally such as to remove the need to go to court or allowing claims to be made, and framed in human rights terms – human rights at the point of delivery, as Lord Irvine didn't quite put it in 1998 (Lord Irvine of Lairg "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights" [1998] P.L. 221, 225–226 and 235–236).

STRASBOURG/UK RELATIONS

9. It has never been clear to me whether the 'problem' at the heart of the UK's relationship with Strasbourg was EUROPEAN judges or European JUDGES. I think it is probably a mixture of both but I think both are either/both misdirected or overplaying the problem. Other criticisms sometimes vented – academic appointments, not judges or the complaint that Strasbourg judges are not elected – betray a singular insularity or failure to understand the Council of Europe appointments process, and I think can safely be left aside.

10. The "take account" formula in s.2 seems amply to allow flexibility. There are in truth very few occasions (if any) where s.2 can properly be said to have been misused – 'forcing' a domestic court to follow Strasbourg jurisprudence where it would not otherwise wish to. There is flexibility built into the well-known exposition of the mirror principle, with caveats, by Lord Bingham in *Ullah* [2004] UKHL 26.

11. The evidence, bar the notorious example of prisoner voting (see below), all indicates a healthy balanced relationship, one where the UK courts are perfectly prepared to strike out alone and indeed, as a result, to forge one based more on dialogue and mutuality. *Horncastle*

is probably the best-known example but two others will make the point. They are both from my own area of research interest and in both I was surprised first at the departure in the UK, and then at that being vouchsafed by the European Court.

12. The first is *Animal Defenders* [2008] UKHL 15, the case involving the ban on political advertising where in the UK the House of Lords went against a long line of closely related ECHR case law to uphold the legality of the UK's ban in the Communications Act 2003; the European Court followed – [2013] ECHR 362.

13. The second is *Hicks* [2017] UKHL 9, the case involving the decision by the Met to arrest various protesters on the day of the Royal Wedding in 2011. The House followed the minority decision/reasoning in *Ostendorf v Germany* (2015) 34 BHRC 738. When the case reached the Strasbourg Court, again the UK line on Art 5(1)(b) and (c) and the decision was upheld: *Eiseman*-Renyard v UK (2019) 68 EHRR SE12, as indeed it had done a year earlier in *S v Denmark* (2019) 68 EHRR 17.

14. In each, and in many other cases, the Strasbourg Court has clearly taken a more deferential line to decisions of both domestic courts and legislatures, what Judge Spano has typified as process-based review, as part of the Court's shift to a procedural embedding stage, and subsidiarity generally.

15. Prisoner votes – *Hirst v UK* (2005) ECHR 681 – has been at the forefront of moves here. Others will be far better placed to assess its place in the lineage but I would offer this: the limited adjustment was needed to comply was to confer the right on those released on temporary licence. The Secretary of State estimated it would enfranchise up to 100 offenders at any one time (out of a total prison population of c.75,000): Hansard, HC Deb 2 November 2017 Vol 630 c1007. Whether the level of opprobrium from politicians – claiming it made them feel sick – or from the media was warranted for that level of change is for others to judge, but it certainly set the mood music for a decade or more.

16. It may be useful here for me to flag for the Review some recent empirical research that I have undertaken on media reporting and media representations of human rights claims and claimants. They can be found here:

    - "'They offer you a feature on stockings and suspenders next to a call for stiffer penalties for sex offenders': do we learn more about the media than about human rights from tabloid coverage of human rights stories?" in M Farrell et al (eds) *Human Rights in the Media: Representation, Rhetoric, Reality* (Routledge, 2019)

    - "'You Couldn't Make It Up': Some Narratives of the Media's Coverage of Human Rights" in Wicks and Ziegler (eds) *The UK and European Human Rights: A Strained Relationship?* (Hart 2015)

17. Two short point might assist. The chapters were seeking to confront the idea of the HRA as a Criminals' Charter. It did so first by showing that cases such as *Michael v CC of South Wales* Police [2015] UKSC 2 or *DSD v Commissioner of Police for the Metropolis* [2018] UKSC 11, in both of which the HRA conferred rights and remedies on victims of crime, were reported with a marginalising or even ignoring of the facilitative role the HRA played in the outcome.

Second, I undertook a study of how the Daily Mail reported claims by Foreign National Offenders (FNOs) seeking to resist deportation on human rights grounds. Official Home Office figures for a three period average out at a 'success' rate for the Home Secretary of about 81% whereas in only 11% of the Daily Mail stories did the Home Secretary win. Readers would have a very different view of the reality if they absorbed the weight and weightings of the stories as truth.

SECTIONS 3 AND 4 OF THE HRA

18. From my own perspective, the issues that relate to those two sections, sections that operate in tandem, are not those that, I imagine, have animated Ministers and led to this Review. My concern has not been with judicial overreach – under the guise of interpretation in effect making the law – but with transparency.

19. It is clear that the two sections are designed to maintain the supremacy of Parliament, as the lawmaker above all others. A s.4 declaration does not alter the law but leaves that task to Parliament. The consistent evidence is of a Parliamentary response – amending or repealing the offending section or Act in line with the court judgment (aside from the prisoner votes issue) – which does tend to suggest acceptance by the legislature of judicial proclamations not as was suggested in the earlier days, drawing on Canadian experience, dialogue between the two, with Parliament ready and willing on occasion to reject a judge's determinations on rights. Whether one would or should expect, on the basis of 40 or so declarations, a least one parliamentary refusal is a normative question not really capable of resolution here. Neither, if indeed it be a problem, is it easy to think how any reforms to the HRA might rectify or rebalance the situation.

20. A sense of perspective is needed. Of the many hundreds of cases heard each year by the High Court or above. (s.4(5)), there have been 43 declarations, not all of which have been upheld on appeal (Ministry of Justice "Responding to Human Rights Judgments: 2019 to 2020" 18 December 2020, https://www.gov.uk/government/publications/responding-to-human-rights-judgments-2019-to-2020

21. There are cases where s.3 has been used creatively, cases where we might well even applaud the outcome. Most obviously here we would think of *Mendoza* [2004] UKHL 30, the case where a majority of the House of Lords interpreted the Rent Act 1977, using s3., to accommodate a gay man seeking to claim entitlement to succeed to his deceased partner's assured tenancy.

22. Two points warrant being made here. Firstly, it remained for Parliament to respond following the judgment to revert to the legal status quo ante. It chose not to. Second, while cases such as *Mendoza* have been subjected to criticism on the grounds that the House of Lords went against the (express) words of the statute, the Rent Act 1977, we need to recall that there are two Acts in play: the Act under consideration and the HRA itself, with its strong adjuration, and implied underpinnings to 'bring rights home'.

23. Ranging *Nicklinson* [2014] UKSC 38 against *Mendoza*, again allows us some perspective; this is not to say for every use of s.3 there is an example of judicial restraint, but in *Nicklinson* – a

right to die case involving a challenge to s.2 of the Suicide Act 1961 – only two of the nine Justices considered s.4 to be an appropriate remedy (Lady Hale and Lord Kerr) keeping in mind it has no bearing on the meaning of the law but simply bats the matter back to Westminster. Three of the majority of nine held that while the Court had the constitutional authority to make a declaration that the general prohibition on assisted suicide in s.2 was incompatible with Article 8 yet declined to do so. Four Justices concluded that the question involved a consideration of issues which Parliament was inherently better qualified than the courts to assess, and that under present circumstances the courts should respect Parliament's assessment.

24. The issue here is not the same as for s.4. While there are far more cases every year on which s.3 could operate, given that there is no restriction on it being the High Court or above, we simply do not know in how many cases s.3 has been used to read and give effect to legislation in a Convention compatible manner. Data here is scarce and sparse, and certainly not authoritative and reliable: Christopher Crawford tells us there were 59 such uses up to January 2013 ("Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998 (2014) 25 King's Law Journal 34).There is no publicly available data at all since then, no duties on government to collate and disseminate and, most worryingly, no real and no effective means by which Parliament collectively and MPs individually can be made aware of which legislation has been subject to s.3 readings, and in what ways. Since a s.3 interpretation binds as an authoritative pronouncement on what any Act or section means or says, irrespective of what Parliament thinks it said or intended to say, it is critical that transparency around the use of s.3 is looked at.

25. Under s.5, whenever a court is considering making a declaration of incompatibility, the Crown is entitled to notice. Amending s.5 to cover cases whenever a court (and of course this could in theory be Crown or County Court) is considering utilising s.3 to interpret legislation would go some way, though a further possibility might be to notify the Speaker, since Parliament's legislation is in question: in *Wilson v First County Trust Ltd* [2003] UKHL 40, the Speaker, through counsel, was given leave to present oral argument before the House, albeit on the rule in Pepper v Hart, not on the legislation per se. Providing a means by which Parliament can be made aware of how certain of its legislation is faring before the courts completes the virtuous circle at the heart of the scheme of the Act, prioritising parliamentary sovereignty as it does.

26. All that said, the vast weight of the evidence is not of s.3 being misused, and it is hard to think of an egregious case (despite what I would argue is Lord Millett's strange analogies in his dissent in *Mendoza* – that dog can sometimes mean cat or dog). In short, the paucity of cases in which it could even be suggested that there might have been (not 'was') judicial overreach speaks in fact to the health of the system and scheme, not a pathological malaise.

SECTION 6 AND OVER-JUDICIALISATION

27. I would like here to make one small point. In an article in 2012, I criticised the approach adopted by the House in the *Denbigh High School* case [2006] UKHL 15 – what I typified as "outcomes are all" whereby an assessment of whether the challenged decision is proportionate is one solely for determination by the reviewing court not the original decision

maker, say a council or governing body of a school. I made several arguments then which I stand by in 2021. The decision is:

> "problematic in two main ways. First, it tends to reinforce a judicial monopoly on protecting rights when dispersing or at least sharing power might be seen as a better vouchsafe. Secondly, it does nothing to stimulate what Tom Poole typifies as an "administrative culture of rights-conscious justification". In short, it will usher in lesser protection of human rights: it will be individualised and judicially determined ex post facto rather than at source by decision-makers and public officials on a more plural basis and (arguably) in a more cost-effective and efficient way."
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> ("Outcomes aren't all: defending process-based review of public authority decisions under the Human Rights Act" [2012] PL 61)

28. I do not subscribe to the view that judges have been (overly) emboldened through the HRA to immerse themselves in political/policy decisions that are more appropriate for elected ministers. Again, critics will be able to point to what they claim are egregious examples – deportations generally and national security matters spring to mind – but in reality whether these are power-grabs (my words not those of critics so far as I know) is contested. Many might conceive of them as judges quite properly policing the contours of a rights-based democracy (as Jeffrey Jowell put it many years ago) against a backdrop of a centralising, executive-focussed tendency in modern British politics, and we need look no further than the prorogation case before the Supreme Court for that. In any event, it is clear that whatever over-judicialising tendency is thought to be evident, there are clear-cut cases that gainsay that – Shamina Begum's case last week in the Supreme Court [2021] UKSC 7 perhaps the most recent and clear example.

29. That said, I would welcome a consideration of whether the *Denbigh High School* position is one that properly reflects either the intentions of the HRA's proponents in 1998 or what we would conceive as the appropriate normative balance between judges and primary decision-makers.

David Mead 3/iii/21