Cambridge Law Journal, **78(3)**, November 2019, pp. 612–639
doi:10.1017/S0008197319000679

INDICATIONS OF INCONSISTENCY

NICHOLAS PETRIE*

ABSTRACT. *The author makes two claims in this paper. First, there appears to be an increase in indications of inconsistency ("IoIs") across the common law world. Second, this increase is a normatively concerning turn in judicial practice. IoIs are judicial statements which, either explicitly or by implication, indicate that primary legislation is incompatible with certain protected human rights or civil liberties. They are related to, but stop short of, the formal remedies known as declarations of inconsistency ("DoIs").*

KEYWORDS: *constitutional law, human rights, judicial review, incompatibility of legislation, declarations of incompatibility, indications of inconsistency.*

I. INTRODUCTION

I make two claims in this article. First, that there appears to be an increase in what I call indications of inconsistency ("IoIs") across the common law world. Second, that this raises normative concerns. I start by defining IoIs. In short, IoIs are judicial statements which, either explicitly or by implication, indicate that primary legislation is incompatible with certain protected human rights or civil liberties. They are similar to, but stop short of, the formal remedies known as declarations of inconsistency ("DoIs").[1]

After providing my definition of IoIs, I explain why the turn in judicial practice toward IoIs is normatively questionable. I argue that IoIs give rise to a number of concerning outcomes, including that they leave rights-breaching legislation in force and that they normalise a particularly weak solution for rights breaches. Indeed, IoIs provide an even weaker remedial solution than one of the archetypal "weak-form" judicial review remedies:

* PhD Candidate, University of Cambridge. Some embryonic thoughts that led to this article were presented at the 2018 Public Law Conference in Melbourne. Many thanks to the conference attendees for their generous feedback and to Professor Mark Elliott, Dr Stephanie Palmer, Cillian Bracken, Rachael Taylor, Stevie Martin and the anonymous C.L.J. reviewers for their helpful comments on earlier drafts of this article. Address for Correspondence: Gonville & Caius College, Trinity St, Cambridge, CB2 1TA, UK. Email: nmp31@cam.ac.uk.

[1] DoIs are also known by similar names, such as declarations of incompatibility (Human Rights Act 1998, s. 4); and declarations of inconsistent interpretation (Charter of Human Rights and Responsibilities Act 2006 (Vic), s. 36).

DoIs.[2] This weakness is disadvantageous to both litigants and the public more generally, given that IoIs provide a much less clear pathway toward legislative change than DoIs. As such, I argue that an increase in IoIs is likely to be undesirable. In the remainder of the paper, I substantiate these claims through a consideration of recent IoIs in various jurisdictions.

At the outset, it should be noted that the instantiation of IoIs across jurisdictions occurs in very different legal, social, historical and political contexts. As will be clear through the examples considered, I do not claim that there is a uniform phenomenon happening across the jurisdictions considered, nor that there should be a uniform response. Of course, the consequences and desirability of IoIs in different jurisdictions will depend on acutely local issues, not least what the potential counterfactuals to the issuing of an IoI may be. As such, this paper does not seek to assert that IoIs will always be inappropriate or undesirable. It makes the more modest claims that there appears to be a rise in their existence in the common law world and that this raises normative concerns.

II. What Are Indications of Inconsistency?

IoIs arise when, in the course of giving judgment, a judge pronounces or otherwise concludes that a statutory provision breaches a protected human right or civil liberty. The IoI does not affect the validity, operation or enforcement of that legislative provision. The right in question may arise under statute, a constitutional document, the common law or international law. The judicial conclusion that there is a breach of the respective right may be made explicitly or by way of implication in the judgment. The reasoning must include that there is a *breach* of the protected right, rather than a prima facie *interference*. As such, an IoI may include a proportionality analysis, given many rights will only be breached if the infringement is held to be disproportionate. Most importantly, a judicial decision giving rise to an IoI will not take the extra step of either striking down the legislative provision, or issuing a formal declaration that there has been a rights breach. In this sense, an IoI stops short of two commonly utilised remedies within the common law world – legislative invalidation and DoIs.

A central aspect of an IoI is that the judicial pronouncement does not affect the validity of the legislation in question. On one view, this runs counter to the conception of the common law judicial function, which is often expressed as being incompatible with abstract advisory opinions.[3]

[2] On DoIs as "weak-form" judicial review, see M. Tushnet, *Weak Courts, Strong Rights* (Princeton 2008), ch. 2; S. Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge 2013), 30; cf. A. Kavanagh, "What's so Weak about 'Weak-form Review'? The Case of the UK Human Rights Act 1998" (2015) 13 ICON 1008.

[3] See e.g. *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 C.L.R. 569, 608, per Gageler J., citing N.K. Katyal and T. Schmidt, "Active Avoidance: The Modern

https://doi.org/10.1017/S0008197319000679 Published online by Cambridge University Press

Adjudication is often understood to be between two parties, retrospective and presided over by a neutral arbiter[4]; with right and remedy being interdependent.[5] Despite such conceptions of the judicial function, judicial advice-giving is not new in the common law world.[6] Some common law jurisdictions, such as India and Canada, explicitly provide for judicial advice-giving.[7] The Privy Council also has an historic but rarely used jurisdiction to give advisory opinions.[8] However, even in jurisdictions without such specific advisory capacities, one of the first things a student of the common law is taught is that judgments may be split between *ratio decidendi* and *obiter dicta*, with *obiter* being a form of judicial comment or opinion. *Obiter dicta* do not form part of the core substantive reasoning, nor any binding precedent on future courts. Nevertheless, *obiter* remarks may be persuasive for future court decisions, signal possible future legal change, or send a message about a judge's opinion as to the desirability of certain legislation or government policy.[9] However, IoIs should be distinguished from general *obiter* comments on legislation. In particular, we ought to limit our understanding of IoIs to circumstances in which a court notes in its reasoning that a statute actually *breaches* a protected right. An IoI cannot simply be judicial disapproval or a negative comment made in passing, as may be the case with statements in *obiter*. For different reasons, IoIs should also be distinguished from judicial opinions which arise pursuant to a specific advisory jurisdiction, such as in India and Canada. Unlike IoIs, which arise in ordinary common law proceedings between litigants, such advisory opinions are given following a reference or question being put to the court specifically for purpose of an opinion.[10] It follows that judicial advice-giving is not wholly novel in the common law world, however, the rise of IoIs is somewhat of a unique phenomenon and should be analysed as such.[11]

Supreme Court and Legal Change" (2015) 128 Harv.L.R. 2109, at 2112, 2164. Cf. C. Mathen, *Courts without Cases: The Law and Politics of Advisory Opinions* (London 2019).

[4] See e.g. A. Aust, "Advisory Opinions" (2010) 1 JIDS 123.

[5] A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv.L.R. 1281, at 1282; *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 F.C.R. 17, at [458], per Bromberg J.

[6] N.K. Katyal, "Judges as Advicegivers" (1998) 50 Stan.L.Rev. 1709; N. Duxbury, "Judicial Disapproval as a Constitutional Technique" (2017) 15 ICON 649.

[7] Regarding India, see R. Vakil, "Jurisdiction" in S. Choudhry, M. Khosla and P. Mehta (eds.), *The Oxford Handbook of the Indian Constitution* (Oxford 2016). Regarding Canada, see Mathen, *Courts without Cases*. See also, regarding Kenya and South Africa, A.K. Abebe and C.M. Fombad, "The Advisory Opinion of Constitutional Courts in Sub-Sahara Africa" (2003) 46 Geo Wash Intl L Rev 55.

[8] Aust, "Advisory Opinions", p. 124.

[9] See e.g. M. Harding and I. Malkin, "The High Court of Australia's Obiter Dicta and Decision-making in the Lower Courts" (2012) 34 Sydney L.R. 239, at 265.

[10] See e.g. Mathen, *Courts without Cases.*

[11] There are historical examples of courts issuing IoIs, or something similar. An interesting example, albeit one regarding executive statement rather than legislative act, is *Fitzgerald v Muldoon and Others* (1976) 2 N.Z.L.R. 615 (HC), 622–23, per Wild C.J.

One way of understanding IoIs is by way of comparison with DoIs, given the similarity between the two remedies.[12] DoIs arise when a judge reaches a similar conclusion to that within an IoI, but then issues a formal declaration that the statutory provision gives rise to a rights breach. Courts are likely to have many of the same objectives in mind when issuing IoIs as they do with DoIs. These include engaging in "dialogue" with the Parliament and Executive about the need for legislative change, the symbolic vindication of rights and providing positive cost outcomes for litigants. All of this can be contrasted with judicial invalidation, which has the very different result of the court striking down the statutory provision causing the rights breach.[13]

DoIs have been considered novel,[14] because they enable courts to scrutinise valid legislation and declare it to be rights-breaching.[15] As Lord Neuberger has said, such a function would have been "unthinkable" for common law judges 50 years ago, but "[w]e have travelled a very long way".[16] While in some senses revolutionary, the DoI also aligns with common law doctrine, in that it does not alter the legislation in question.[17] As such, any legal changes flowing from the DoI will occur through the supreme law-making body: Parliament.[18] It is for this reason that DoIs are said not to disturb Dicey's conception of parliamentary sovereignty,[19] which has been influential across the common law world. However, DoIs do run counter to Dicey's insistence on the interdependence of right and remedy,[20] given that the court order does not automatically alter or impact the legislation in question. It is this unique operation of the DoI that has led to it being described as "a special pseudo remedy",[21] and being found by

[12] See e.g. the discussion of DoIs in New Zealand in Section IV below.

[13] Even in the UK, where all DoIs have led to legal amendments or are being actively considered by the Government (see note 43 below), DoIs cannot be equated with invalidation, as Parliament always retains the right to do nothing following the DoI.

[14] Gardbaum, *The New Commonwealth Model*, pp. 29–30; Duxbury, "Judicial Disapproval", p. 650.

[15] Gardbaum, *The New Commonwealth Model*, pp. 30–31.

[16] D. Neuberger, "Has the Identity of the English Common Law Been Eroded by EU Laws and the European Convention On Human Rights?", speech at the National University of Singapore, 18 August 2016, available at <https://www.supremecourt.uk/docs/speech-160818-01.pdf>, at [47].

[17] UK Human Rights Act 1998 ("UKHRA"), s. 4(6); Charter of Human Rights and Responsibilities Act 2006 (Vic), s. 36(5); Human Rights Act 2004 (ACT), s. 32(3); European Convention on Human Rights Act 2003 (Ireland), s. 5(2).

[18] Even the fast track procedure that enables the Executive to make amendments to legislation following a DoI under the UKHRA requires some Parliamentary oversight. See UKHRA, s. 10, Sch. 2.

[19] ACT Bill of Rights Consultative Committee, "Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee" (2003) 03/0068, available at <https://acthra.anu.edu.au/documents/publications/BORCC_report.pdf>, at [3.41].

[20] A.V. Dicey, *The Oxford Edition of Dicey: The Law of the Constitution*, vol. 1, J.W.F. Allison (ed.) (Oxford 2013), 116, 119, 159; J.W.F. Allison, "Turning the Rule of Law into an English Constitutional Idea" in C. May and A. Winchester (eds.), *Handbook on the Rule of Law* (Cheltenham 2018), 175, 177.

[21] C. Gearty, "The Human Rights Act Should Not Be Repealed", *UK Constitutional Law Association Blog*, 17 September 2016, available at <https://ukconstitutionallaw.org/2016/09/17/conor-gearty-the-human-rights-act-should-not-be-repealed/>.

the Australian High Court to be outside the "judicial function" as that term applies under the Australian Constitution.[22]

Supporters of DoIs argue that they are facilitative of dialogue between the courts and the other branches of government, which is increasingly important to the "new Commonwealth model of constitutionalism".[23] This is because DoIs enable courts to scrutinise legislation and engage with Parliament about the need for legislative change, but leave the final decision on such amendments to Parliament. Other remedies such as suspended invalidation of legislation also attract positive treatment in much of this literature, for providing the courts with flexible, dialogic remedial options.[24] IoIs may similarly be seen as facilitative of inter-institutional dialogue. However, as will be shown in Sections IV–VII below, the judge-articulated and extra-statutory nature of IoIs means there are often no formally articulated requirements before the court engages in the IoI process, nor specifically laid out expectations flowing from the IoI. As a result, there is arguably more scope for political pushback or inactivity following their pronouncement. And this in turn may undermine the court as an institutional actor.[25] The courts should be mindful of such normative concerns if there is to be an increase in IoI usage.

III. Normative Concern

Remedial creativity has been a hallmark of the common law, with judges applying measured solutions to complex and novel issues.[26] Nevertheless, even subtle shifts in remedial practice and procedure have a significant impact on the adjudication of rights issues.[27] If IoIs are on the rise in the common law world, the judiciary and academy ought be aware of the impact of this. This section raises some concerns about the rise of IoIs, not least that this may normalise a particularly weak remedial outcome for litigants. This risk is not clearly outweighed by any systematic benefit for the legal system as a whole, for example that there will be increased and productive dialogue between the branches of government.

[22] *Momcilovic v The Queen* (2011) 245 C.L.R. 1, 65, at [89], per French C.J., at [184]–[185], at [187], per Gummow J., at [280], per Hayne J, at [457], per Heydon J., at [584], per Crennan and Kiefel JJ., at [661], per Bell J.

[23] A. Young, *Democratic Dialogue and the Constitution* (Oxford 2017), 222–26.

[24] S. Ngcobo, "South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers" (2011) 22 Stellenbosch L.Rev. 37, at 43–45; R. Leckey, "The Harms of Remedial Discretion" (2016) 14 ICON 584, at 585–86.

[25] See e.g. *Attorney General v Taylor and ors* (2019) 1 N.Z.L.R. 213, at [127], [134], per William Young and O'Regan JJ., discussing similar concerns regarding non-statutory DoIs.

[26] See e.g. *C v Minister for Social Protection & anor* [2018] IESC 57, at [20]–[21], per O'Donnell J.; *Simpson v Attorney-General* (1994) 3 N.Z.L.R. 667.

[27] E. Carolan, "A 'Dialogue-oriented Departure' in Constitutional Remedies? The Implications of NHV v Minister for Justice for Inter-Branch Roles and Relationships" (2017) 40 D.U.L.J.(N.S.) 191, at 204; D. Kenny, "Remedial Innovation, Constitutional Culture, and the Supreme Court at a Crossroads" (2017) 40 D.U.L.J.(N.S.) 85, at 5.

In considering the normative arguments for and against IoIs, one natural starting point is the literature on DoIs. This is because, as we have seen above, IoIs and DoIs have similarities in terms of their potential role for litigants and for the legal system more generally. Further, there has been a significant amount written on DoIs across multiple jurisdictions, now that they have been in operation under statute for nearly two decades.[28] Arguments against the use of DoIs include that they may be ignored, leaving rights-breaching legislation in place[29]; that they unduly encourage courts to criticise Parliament[30]; that the judiciary risks becoming involved in political, moral or policy-oriented decision-making[31]; and that diverting attention away from alternative remedial solutions reinforces and normalises a weak solution that may have limited benefit for the individual litigant.[32]

In those jurisdictions with DoIs, the remedy has been met with criticism and controversy.[33] This criticism relates in part to the optics of DoIs, which may not reflect the reality, or intention, of the remedy. Take the UK Human Rights Act 1998 ("UKHRA") for example. While the interpretive power under section 3 of the UKHRA is the "principal remedial measure"[34] and provides a strong mechanism to intrude on the legislative function (by adding, amending or deleting statutory words), it is the DoI power which has been received with significant disdain by the media and politicians.[35] We see this in response to the case of *Thompson*, where a DoI was issued in relation to the inability to remove a person's name from the sex offenders' register.[36] The then Home Secretary Theresa May said she was appalled at the decision and stated: "It is time to assert that parliament makes our laws, not the courts, that the rights of the public come before the rights of criminals and, above all, that we have a legal framework that brings sanity to cases such as these."[37]

[28] The UKHRA came into force on 2 October 2000.

[29] C. Geiringer, "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from Attorney-General v Taylor" (2017) 48 V.U.W.L.R. 547, at 570; F. de Londras, "Declarations of Incompatibility under the ECHR Act 2003: A Workable Transplant?" (2014) 35 Stat.L.R. 50.

[30] *Temese v Police* (1992) 9 C.R.N.Z. 425, which does not directly refer to DoIs, but considers them in light of F.M. Brookfield, "Constitutional Law" [1992] NZRL Rev. 231.

[31] A. Palmer, "The Politicisation of the Judiciary", *The Times*, 20 July 2004, available at <https://www.thetimes.co.uk/article/the-politicisation-of-the-judiciary-tr8btsb9280>.

[32] J. Debeljak, "The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection" (2003) 9 AJHR 183, 226–27; cf. Kavanagh, "What's so Weak?".

[33] See e.g. G. Marshall, "Two Kinds of Compatibility: More About Section 3 of the Human Rights Act"(1999) P.L. 377, at 382.

[34] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557, at [39], per Lord Steyn.

[35] N. Phillips, "The Art of the Possible: Statutory Interpretation and Human Rights", The First Lord Alexander of Weedon Lecture, 22 April 2010, available at <https://www.supremecourt.uk/docs/speech_100419.pdf>, p. 44; Kavanagh, "What's so Weak?", pp. 1022–23; J. Mance, "The Frontiers of Executive and Judicial Power: Differences in Common Law Constitutional Traditions" (2018) 26 A.P.L.R. 109, at 112.

[36] *R (F and Thompson) v Secretary of State for Justice* [2008] EWHC 3170 (Admin); *R (F and Thompson) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 A.C. 331.

[37] A. Travis, "David Cameron Condemns Supreme Court Ruling on Sex Offenders", *The Guardian*, 16 February 2011, available at <https://www.theguardian.com/society/2011/feb/16/david-cameron-condemns-court-sex-offenders>.

David Cameron also criticised the decision, saying he would do the "minimum necessary" to comply with it.[38] These are strange statements, given the DoI remedy was fashioned in the UKHRA to do the very things May and Cameron so desired: give Parliament the final decision on what to do about rights issues.[39] As Lady Hale noted extrajudicially: "[c]uriously, when introduc[ing] the order in Parliament, the Prime Minister was highly critical of our decision, but made no mention of the fact that the Government could have chosen to do nothing about it."[40] Nevertheless, concerns about political pushback and institutional competency may help explain why judges remain cautious about issuing DoIs.[41]

Despite all of the concerns and criticism about DoIs, the remedy is still pursued by litigants and has been acknowledged by various courts to have specific and unique benefits. In addition to the dialogic benefits,[42] DoIs may also vindicate rights, both in the sense that they may hasten the removal of rights-breaching legislation,[43] and as Glazebrook and Ellen France JJ. of the Supreme Court of New Zealand have acknowledged, in "the sense of marking and upholding the value and importance of the right".[44] Finally, on an important practical level, there may be positive costs implications for successful parties.[45]

Normative arguments in favour of IoIs essentially track those of DoIs. They suggest that IoIs help promote positive dialogue between the branches of government,[46] which has flow on benefits such as maximising popular accountability, inspiring better policy choices and encouraging judicial candour.[47] Further, an IoI may help vindicate a rights breach, or be of

[38] Ibid.

[39] C. Draghici, "The Blanket Ban on Assisted Suicide: Between Moral Paternalism and Utilitarian Justice" [2015] E.H.R.L.R. 286, at 295; S. Wilson Stark, "Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998" (2017) 133 L.Q.R. 631, at 654.

[40] B. Hale, "What's the Point of Human Rights?", Warwick Law Lecture, 28 November 2013, available at <https://www.supremecourt.uk/docs/speech-131128.pdf>, p. 17.

[41] Mance, "The Frontiers", p. 118; Wilson Stark, "Facing Facts", p. 654.

[42] *Taylor* (2019) 1 N.Z.L.R. 213, at [55], per Glazebrook and Ellen France JJ.

[43] All DoIs issued under the UKHRA have resulted in the removal of the rights incompatibility, or in the Government promising or actively considering legislative change. See Ministry of Justice, "Written Evidence (HRA0017)" (2018) available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/20-years-of-the-human-rights-act/written/89723.html>, at [7]–[9]. Although note the response to some DoIs has been limited, see A. von Staden, "Minimalist Compliance in the UK Prisoner Voting Rights Cases", *ECHR Blog*, 16 November 2018, available at <http://echrblog.blogspot.com/2018/11/guest-blog-minimalist-compliance-in-uk.html>. Further, this strong response rate occurs in the shadow of Strasbourg litigation: Duxbury, "Judicial Disapproval", p. 651.

[44] *Taylor* (2019) 1 N.Z.L.R. 213, at [56], per Glazebrook and Ellen France JJ.

[45] On cost implications for both DoIs and IoIs, see ibid., at para. [57]; *Attorney-General v Taylor* (2017) 3 N.Z.L.R. 24, at [161].

[46] *Taylor* (2017) 3 N.Z.L.R. 24, at [149]–[152], [164]; *Moonen v Film Literature Board of Review* (2000) 2 N.Z.L.R. 9, 17, per Tipping J.; A. Butler, "Judicial Indications of Inconsistency – a New Weapon in the Bill of Rights Armoury" (2000) 1 N.Z.L.Rev. 43, at 59.

[47] Katyal, "Judges as Advicegivers", pp. 1753, 1824.

assistance should the rights breach be brought before an international forum such as the UN Human Rights Committee.[48]

There are various normative arguments against IoIs. These include that IoIs, like DoIs, potentially cause damage by going against the usual judicial reluctance toward advisory opinions, leading to a blurring of the separation of powers and inappropriately opening courts up to matters which have traditionally been outside their competence.[49] They may also be seen as the judiciary gratuitously criticising Parliament.[50] However, the risks are even worse with IoIs than with DoIs. This is because any risks are counterbalanced by weaker potential benefits than DoIs. IoIs leave the litigant and society in a more precarious position, because there is a less explicit statement that there has been a rights breach, and a less clear process for Parliament and the Executive to reconsider the offending legislation. The dialogue promoted under a scheme of IoIs is therefore likely to be much less robust than through established processes in place for DoIs. Absent clear process to reconsider and amend the law as occurs in statutory mechanisms for DoIs, there is less pressure on Parliament or the Executive to reconsider the law.[51]

While there is much to be said about the normative undesirability of IoIs, there is perhaps even more to be said about the alternative courses of action open to judges who determine that legislative provisions are incompatible with protected rights. Some obvious alternatives are the increased use of the interpretive tools such as the principle of legality[52]; invalidating legislation; and the issuing of DoIs. This paper is not the place to explore all of these, not least because the options and their likely uptake will be very different across jurisdictions. Instead, the following sections will reflect on the potential impact of a rise in IoIs for judicial practice, inter-institutional dialogue and rights protection. In each of the examples considered we see cautious remedial developments made by a judiciary cognisant of problems associated with sudden change or judicial overreach. However,

[48] *Moonen* (2000) 2 N.Z.L.R. 9, 17, per Tipping J.; Butler, "Judicial Indications of Inconsistency", p. 59.

[49] *Quilter v Attorney-General* (1998) 1 N.Z.L.R. 523, 548, per Thomas J.; Butler, "Judicial Indications of Inconsistency", pp. 59–60; P. Rishworth, "Human Rights" [1999] N.Z.L.Rev. 469. Regarding DoIs, see C. Gearty and J. Phillips, "The Human Rights Act and Business: Friend or Foe?" [2012] Lloyd's Maritime and Commercial Law Quarterly 493, 497–99.

[50] *Temese* (1992) 9 CRNZ 425, at [27], per Cooke P.

[51] Under the UKHRA there are fast-track mechanisms to bring about legislative change following a DoI (see s. 10 and Sch. 2). There is also an expectation that the Executive will bring the DoI to the attention of the Parliament Joint Committee of Human Rights Ministry of Justice. See "Responding to Human Rights Judgments (2018) – Report to the Joint Committee on Human Rights Cm 9728", available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756346/responding-human-rights-judgments-2017-18.pdf>, p. 9; cf. the absence of formal procedures and consequences for non-statutory DoIs in New Zealand: S. Winter, "A Constitutional Call to Action", *ADLS*, 16 June 2017, available at <http://www.adls.org.nz/for-the-profession/news-and-opinion/2017/6/16/a-constitutional-call-to-action/>.

[52] See e.g. B. Chen, "The Principle of Legality: Issues on Rationale and Application" (2015) 41 Monash U.L.Rev. 329; F. Cardell-Oliver, "Parliament, the Judiciary and Fundamental Rights: The Strength of the Principle of Legality" (2017) 41 MULR 30.

slow change may nevertheless have major consequences to which we should be alive.[53]

IV. Indications of Inconsistency in New Zealand

The jurisdiction that has most clearly embraced IoIs is New Zealand. This is because, unlike its counterparts in other jurisdictions, the New Zealand Bill of Rights Act 1990 ("NZBORA"), lacks a comprehensive remedial regime. The remedies provisions initially proposed were dropped to ensure the Bill's passage through Parliament.[54] In addition, section 4 expressly disallows the judiciary to strike down or decline to apply any legislation on the ground that it is inconsistent with any provision in the NZBORA. As such, the NZBORA's chief promoter Geoffrey Palmer told Parliament that "the Bill creates no new legal remedies for the court to grant. The judges will continue to have the same legal remedies as they have now".[55] Despite this, the judiciary have approached the NZBORA creatively, incrementally building a remedial arsenal.[56] For example, the courts famously fashioned a form of public law damages for breaches of rights.[57] More recently, the Supreme Court in *Taylor* approved the first DoI issued for a breach of the NZBORA,[58] despite the absence of an explicit provision for such a remedy in the legislation.[59] A number of decisions before *Taylor* had postulated that the courts had such a power.[60] But until that case, the courts had limited themselves to IoIs, or what have become known as "*Hansen* indications", after the case bearing that name.

The key provisions in relation to IoIs and DoIs in the NZBORA are sections 4–6, which provide:

> 4. Other enactments not affected
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

[53] Kenny, "Remedial Innovation", p. 22.

[54] G. Huscroft, "Civil Remedies for Breach of the Bill of Rights" in P. Rishworth et al. (eds.), *The New Zealand Bill of Rights* (Oxford 2003), 811; R. McQuigg, *Bills of Rights: A Comparative Perspective* (Cambridge 2014), 110; A. Butler and P. Butler, "Protecting Rights" in C. Morris, J. Boston and P. Butler (eds.), *Reconstituting the Constitution* (New York, 2011), 169.

[55] G. Palmer, New Zealand Parliamentary Debates (14 August 1990) 510, p. 3450.

[56] A. Geddis and M.B. Rodriguez Ferrere, "Judicial Innovations under the New Zealand Bill of Rights Act – Lessons for Queensland?" (2016) 35 U.Q.L.J. 251, 260–81.

[57] *Simpson* (1994) 3 N.Z.L.R. 667, 718, per McKay J., 691, per Casey J.; Huscroft, "Civil Remedies", pp. 811, 814; Geddis and Rodriguez Ferrere, "Judicial Innovations", pp. 265–69.

[58] *Taylor* (2019) 1 N.Z.L.R. 213.

[59] Note that s. 92J of the Human Rights Act 1993 (N.Z.) confers a limited right to issue DoIs on the Human Rights Review Tribunal.

[60] See e.g. *R. v Poumako* (2000) 2 N.Z.L.R. 695, at [70], [86]–[107], per Thomas J., at [68], per Henry J.; *Moonen* (2000) 2 N.Z.L.R. 9, at [19], per Tipping J. (note, Tipping J. was discussing IoIs, but used the terms "declare" and "indicate" interchangeably).

> (b) decline to apply any provision of the enactment—
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.
>
> 5. Justified limitations
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 6. Interpretation consistent with Bill of Rights to be preferred
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

After the NZBORA came into force, courts and academics considered the correct approach to these sections.[61] In some early cases, the courts avoided considering how sections 4–6 fit together, and particularly the role of section 5, by assuming that the limitation under the statute in question was inconsistent with the NZBORA, before applying the statute pursuant to section 4.[62] Alternatively, the courts proceeded on the basis that the NZBORA had no role to play in the interpretive process because the meaning of the provision was so clear.[63] As a result, these early cases generally did not meet the key elements of IoIs. This is because section 5 is important with regard to IoIs, as most of the rights in the NZBORA are expressed in absolute terms, subject to that universal qualification.[64] Given that an IoI or DoI cannot be made unless there is an unjustified or unreasonable breach of the right, the section 5 analysis becomes crucial.[65]

In contrast to the cautious approach of some early decisions, the courts began to countenance that their role included considering the justifications of limitations to rights under section 5. The Court of Appeal in *Ministry of Transport v Noort* was split on the question of the interpretative role for section 5.[66] The minority approach of Cooke P. and Gault J. was that there was no scope to utilise section 5 in considering whether any limitation on rights was justified.[67] However, the majority of Richardson, McKay and Hardie Boys JJ. held that the courts could reason not only that there was an

[61] *Noort v Ministry of Transport* (1992) 1 N.Z.L.R. 743; *Curran v Police* (1991) 7 C.R.N.Z. 323; *Littlejohn v Ministry of Transport* [1990–92] 1 N.Z.B.O.R.R. 285 (HC); P. Rishworth, "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" [1991] NZRL Rev; D. Paciocco, "Remedies for Violations of the New Zealand Bill of Rights Act 1990" in *Essays on the New Zealand Bill of Rights Act 1990* (Legal Research Foundation, No. 32, 1992) 40, 64–68; Brookfield, "Constitutional Law".

[62] *Curran* (1991) 7 C.R.N.Z. 323; *Littlejohn* [1990–92] 1 N.Z.B.O.R.R. 285 (HC).

[63] *R. v Phillips* (1991) 3 N.Z.L.R. 175; *R. v Bennett* (1993) 2 H.R.N.Z. 358.

[64] Some rights in the NZBORA are expressed in qualified terms, leaving little need for further s. 5 analysis. For example, the right against "unreasonable search and seizure" in s. 21.

[65] Rishworth, "The New Zealand Bill of Rights Act 1900: The First Fifteen Months" in Essays on the New Zealand Bill of Rights Act 1990 (Legal Research Foundation, No. 32, 1992) 19–20.

[66] *Ministry of Transport v Noort; Police v Curran* (1992) 3 N.Z.L.R. 260.

[67] Ibid., at p. 271, per Cooke P.

apparent inconsistency between a statute and a right in the NZBORA, but that this apparent inconsistency was not justified under section 5.[68] This in essence, suggested that courts could make IoIs. And this position has prevailed in the jurisprudence. Even Cooke P. and Gault J. changed their tune later that year in *Temese v Police*, when all of the judges held it was appropriate to consider justification under section 5.[69]

As the courts began to accept the role of section 5, they began to explicitly recognise that what they were doing was issuing IoIs.[70] The Court of Appeal case of *Moonen v Film Literature Board of Review* was groundbreaking in this regard, with Tipping J. stating that the courts must have "the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society".[71]

While the explicit acceptance of the IoI remedy was somewhat controversial at first,[72] it came to be considered routine. The Supreme Court addressed the issue in *Hansen v The Queen*, where it affirmed that courts can make IoIs with regard to rights listed in the NZBORA.[73] While the court in *Hansen* took a slightly different approach than *Moonen* to the order in which sections 4 and 6 were to be considered,[74] *Hansen* was a clear affirmation from the highest court that IoIs should be considered a part of the judicial function in cases considering the NZBORA.

As IoIs became an accepted judicial practice, a question remained as to whether DoIs were available. There had been early flirtations with the idea by judges and academics,[75] and the courts later danced around the question

[68] Ibid., at p. 284, per Richardson J. (McKay J. agreeing), 287, per Hardie Boys J.
[69] *Temese* (1992) 9 CRNZ 425, 4, per Cooke P., 7–8, per Richardson, Casey, Hardie Boys and Gault JJ.
[70] *Quilter* (1998) 1 N.Z.L.R. 523, 554, per Thomas J.
[71] *Moonen* (2000) 2 N.Z.L.R. 9, at [20]. Justice Tipping also used the word "declare" at [19], meaning the case is occasionally and incorrectly cited as approving DoIs. See e.g. *Poumako* (2000) 2 N.Z.L.R. 695, at [87]–[107], per Thomas J.; *Zaoui v Attorney-General* (2004) 2 N.Z.L.R. 339, at [166]; C. Geiringer, "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill Of Rights Act" (2009) 40 V.U.W.L.R. 613, at 618.
[72] J. Allan, "The Effect of a Statutory Bill of Rights Where Parliament Is Sovereign: The Lesson from New Zealand" in T. Campbell, K. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford 2001), 384.
[73] *Hansen v The Queen* (2007) 3 N.Z.L.R. 1.
[74] Ibid., at paras. [57]–[62], per Blanchard J., at paras. [89]–[94], per Tipping J., at paras. [186]–[192], per McGrath J.; cf. Elias C.J., who held the s. 5 analysis could only be done after s. 6 had been considered, at paras. [6], [15]–[24].
[75] Brookfield, "Constitutional Law", p. 239; *Temese* (1992) 9 C.R.N.Z. 425, 427, per Cooke P.; P. Rishworth, "Reflections on the Bill of Rights after Quilter v Attorney-General" [1998] N.Z.L.Rev. 683, at 693; *Poumako* (2000) 2 N.Z.L.R. 695, at [70], [86]–[107], per Thomas J., at [43], per Richardson P., Gault and Keith JJ., at [68], per Henry J.; *Moonen* (2000) 2 N.Z.L.R. 9, at [19]–[20], per Tipping J.; *Hopkinson v Police* (2004) 3 N.Z.L.R. 704, at [83]; *Zaoui* (2004) 2 N.Z.L.R. 339, at [85], [108]; *R. v Te Kahu* (2006) 1 N.Z.L.R. 459, at [44]–[45]; C. Geiringer, "The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament's Power to Legislate?" (2007) 11 OLR 389, at 389.

of whether a formal DoI could be issued.[76] But litigants continued to push for DoIs, adding weight to the argument that they are a desirable remedy. Litigants argued that the formal nature of the DoI remedy may help vindicate rights, in that courts are seen to defend and uphold the respective rights and Parliament is clearly invited to remedy the rights breaches; that DoIs may meet the "effective remedy" requirement under international law; and that DoIs may result in better cost outcomes.[77]

The courts first issued a DoI in the *Taylor* proceedings. In an extensive and groundbreaking decision, the Court of Appeal held that the jurisdiction to issue DoIs was, at least in large part, to be found at common law.[78] The unanimous judgment concluded that the jurisdiction to issue DoIs "finds its source in the common law jurisdiction of the higher courts to answer questions of law" and was "confirmed" by the NZBORA.[79] The majority judges of the Supreme Court were less emphatic on the source of the DoI power. However, they suggested the power to issue DoIs may arise under the common law.[80] All of the judges also firmly concluded that nothing about issuing a DoI was inconsistent with the usual judicial function.[81]

In terms of the rise of IoIs, two things should be noted about *Taylor*. First, neither the Court of Appeal nor Supreme Court ruled out the future use of IoIs now that a DoI had been issued. Instead, the courts clearly emphasised that there was still a place for IoIs in NZBORA cases.[82] Second, the DoI issued in *Taylor* lies somewhere between an IoI and a DoI, in the manner in which DoIs are generally understood outside New Zealand. The *Taylor* DoI resembles DoIs in other jurisdictions in that it is a formal declaration that primary legislation is inconsistent with protected rights. However, it lacks some of the procedural requirements and clear ramifications that DoIs have in other jurisdictions, such as the action to be taken in Parliament and the option for Executive to remedy the rights breach following the issuing of a DoI under the UKHRA.[83] In lieu of these statutory provisions, the Court of Appeal in *Taylor* laid out certain procedural requirements and ramifications for DoIs in New Zealand. Regarding procedural issues, the court specified rules on issues such as

[76] Judges left open the possibility of issuing DoIs. See e.g. *R. v Manawatu* (2006) 23 C.R.N.Z. 83, at [13]; *Belcher v Chief Executive of the Department of Corrections* (2007) 1 N.Z.L.R. 507, at [57]–[59]; *R. v Exley* [2007] NZCA 393, at [21]; *Hansen* (2007) 3 N.Z.L.R. 1., at [253], per McGrath J., at [107], per Tipping J.; *McDonnell v Chief Executive of the Department of Corrections* (2009) 8 H.R.N.Z. 770, at [123]; cf. *Boscawen v Attorney-General* (2009) 2 N.Z.L.R. 229, at [55], per O'Regan J.

[77] *Taylor* (2017) 3 N.Z.L.R. 24, at [154]–[161].

[78] Ibid., at paras. [43]–[77], [109].

[79] Ibid., at para. [109].

[80] *Taylor* (2019) 1 N.Z.L.R. 213, at [38], [47], [50], per Glazebrook and Ellen France JJ., at [100], [104], per Elias C.J.

[81] Ibid., at paras. [53], [63], [65], per Glazebrook and Ellen France JJ., at para. [95], per Elias C.J., at para. [138], per William Young and O'Regan JJ.

[82] Even the dissenting judges anticipated their future use, see ibid., at para. [125], per William Young and O'Regan JJ.

[83] Re. the UKHRA, see note 51 above.

mootness, standing, process and discretion.[84] Regarding ramifications of DoIs, the court noted, among other things, that a DoI would give rise to a constitutional expectation that Parliament or the Government would respond by "reappraising the legislation and making any changes that are thought appropriate".[85] The Supreme Court was less focused on laying out the procedural hurdles which must be met for a DoI to be issued. Further, the lead judgment of the Supreme Court distanced itself from the discussion in the Court of Appeal decision regarding dialogic benefits of DoIs, but it did note that a DoI could be of "assistance" to Parliament.[86]

In terms of the normative arguments, when one compares an IoI like that in *Hansen* to a DoI issued under the UKHRA, the DoI is preferable for both the litigant and for the public more generally. The UK remedy has clear boundaries in terms of when it may be issued and provides a structured process by which the Executive and Parliament must reconsider the rights-infringing legislation. The gulf between IoIs and DoIs is closed somewhat by the issuing of a DoI for breaches of the NZBORA, as in *Taylor*. However, DoIs under the NZBORA still do not provide particularly attractive remedial outcome. As has occurred in response to *Taylor*, it is open to Parliament to completely ignore the DoI issued by the courts and refuse to remove the inconsistency in the legislation.[87]

V. Deferred Declarations of Incompatibility

The deferral of a DoI may constitute an IoI in certain circumstances. The archetypal case producing such a deferred DoI is *Nicklinson*, which related to the compatibility of a blanket ban on assisted suicide with rights under the UKHRA.[88] The UK Supreme Court unanimously held it had jurisdiction to hear the case and a majority (Lady Hale and Lords Neuberger, Mance, Kerr and Wilson) held it was appropriate to consider issuing a DoI under the UKHRA.[89] This majority also held there were substantive reasons to issue a DoI on the facts of the case. Despite this, Lords Neuberger, Mance and Wilson went on to find that a DoI should not have been issued in the specific case before the court. In doing so, these three judges deferred the DoI consideration and in effect issued a form of

[84] *Taylor* (2017) 3 N.Z.L.R. 24, at [163]–[174].
[85] Ibid., at para. [151].
[86] *Taylor* (2019) 1 N.Z.L.R. 213, at [55].
[87] E. Willis, "Prisoner Voting Rights Measure of Democracy", *University of Auckland – News and Opinion*, 18 December 2018, available at <https://www.auckland.ac.nz/en/news/2018/12/18/prisoner-voting-rights-measure-democracy.html>; cf. position in the UK (see note 43 above).
[88] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] 1 A.C. 657.
[89] Lords Sumption, Hughes, Reed and Clarke held they had jurisdiction to hear the matter, but that it would institutionally inappropriate for the court to adjudicate: ibid., at paras. [228]–[232]; cf. *T v Secretary of State for Justice* [2017] EWHC 3181 (Admin), at [30]; E. Wicks, "The Supreme Court Judgment in Nicklinson: One Step Forward on Assisted Dying; Two Steps Back on Human Rights" (2015) 23 Med.L.Rev. 144, at 147; S. Martin, "Declaratory Misgivings: Assisted Suicide in a Post-Nicklinson Context" [2018] P.L. 209.

IoI.[90] The strained reasoning leading to this IoI has had significant and retrogressive consequences for subsequent consideration of assisted suicide laws by all branches of government, despite one purpose of the deferred DoI being to leave it to Parliament to consider any legislative change.[91]

A majority of judges in *Nicklinson* held or indicated the general prohibition on assisted suicide was incompatible with the right to private life under Article 8 of the European Convention of Human Rights ("ECHR"), which is protected domestically under the UKHRA.[92] In coming to this conclusion but refusing to issue a DoI, Lords Neuberger, Mance and Wilson noted that Parliament was about to consider the statutory prohibition on assisted suicide and should be first given that opportunity[93]; that issuing a DoI at that time raised questions of institutional competence or democratic legitimacy[94]; that the court had not identified the way in which the defect should be remedied[95]; and that there had been uncertainties regarding evidence and arguments before the court.[96] These judges did not rule out a future DoI, but rather invited further consideration of the issue, should Parliament not satisfactorily deal with the matter.[97]

This was an unusual and unexpected turn in the development of DoI practice.[98] After all, Parliament had itself assigned the courts a constitutional role in considering the compatibility of legislation against the rights listed in the UKHRA.[99] The more expected course would be that laid out by Lady Hale, who stated:

> I have reached the firm conclusion that our law is not compatible with the Convention rights. Having reached that conclusion, I see little to be gained, and much to be lost, by refraining from making a declaration of incompatibility. Parliament is then free to cure that incompatibility, either by a remedial order under section 10 of the Act or (more probably in a case of this importance and sensitivity) by Act of Parliament, or to do nothing. It may do nothing, either because it does not share our view that the present law is incompatible, or because, as a sovereign Parliament, it considers an incompatible law preferable to any alternative.[100]

[90] Cf. Lady Hale and Lord Kerr, who held it was an appropriate case to issue a DoI.
[91] Martin, "Declaratory Misgivings".
[92] Lady Hale and Lords Neuberger, Mance, Kerr and Wilson.
[93] *R (Nicklinson)* [2014] UKSC 38, [2015] 1 A.C. 657 [113], at [116], per Lord Neuberger, at [190], per Lord Mance.
[94] Ibid., at paras. [115], [116], [148], per Lord Neuberger, at para. [190], per Lord Mance, at para. [197], per Lord Wilson.
[95] Ibid., at para. [127], per Lord Neuberger, at paras. [201], [204], per Lord Wilson.
[96] Ibid., at para. [127], per Lord Neuberger, at para. [201], per Lord Wilson.
[97] Ibid., at para. [190], per Lord Mance, at para. [202], per Lord Wilson. Lord Clarke provided support on this point, at para. [293].
[98] Ibid., at para. [343], per Lord Kerr, at para. [114], per Lord Neuberger, at para. [300], per Lady Hale.
[99] See e.g. ibid., at para. [191], per Lord Mance.
[100] Ibid., at para. [300]. For similar sentiments, see *R (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32, at [58]–[61], per Lord Kerr.

In contrast, Lords Neuberger, Mance and Wilson clearly issued an IoI, by indicating their view that an incompatibility existed between the relevant legislation and Article 8, before refusing to issue a DoI. In justifying this route, Lord Neuberger wrote: "Dialogue or collaboration, whether formal or informal, can be carried on with varying degrees of emphasis or firmness and there are times when an indication, rather than firm words are more appropriate and can reasonably be expected to carry more credibility. For the reasons just given, I would have concluded that this was such a case."[101]

Lord Mance stated that it was not an appropriate time to consider issuing a DoI, before associating himself with Lord Neuberger's main conclusions (including that stated above) and noting that he would "not rule out the possibility" of a further DoI application.[102] Lord Wilson warned that if the case returned to court and Parliament had failed to satisfactorily address the issue, there was a "real prospect" that the fresh claim would succeed.[103]

Interestingly, Lord Neuberger's judgment in *Nicklinson* was one of the first in the UK to endorse the notion of "dialogue".[104] Similarly, Lord Wilson offered extensive suggestions on a possible assisted suicide scheme in an effort to "collaborate" with the legislature.[105] Extrajudicially, Lord Mance has stated that one of the reasons for the deferred DoI was "dialogue with the legislature".[106] However, even if it were accepted that dialogue is a positive metaphor or goal, the extent to which a deferred DoI is a positive dialogic step is questionable. As Stevie Martin has suggested, the "claim that Parliament would *benefit* from the absence of a declaration fundamentally mischaracterises the nature and purpose of s.4 of the HRA",[107] which is to communicate the rights breach in order that Parliament may decide what to do in relation to that breach. Further, Lords Neuberger, Mance and Wilson's judgments also place a significant evidential burden on applicants, by suggesting they must not only prove there is a rights infringement, but that the infringement was disproportionate and that there is a workable scheme which could replace the current rights-infringing scheme. This burden should have fallen on the Executive.[108]

When we add the three judges that I say issued an IoI (Lords Neuberger, Mance and Wilson), to the judges who held they would have issued a DoI (Lady Hale and Lord Kerr), there was a majority of the court providing a clear indication to Parliament that the legislation in question breached

[101] *R (Nicklinson)* [2014] UKSC 38, [2015] 1 A.C. 657, at [117], per Lord Neuberger.
[102] Ibid., at paras. [190]–[191], per Lord Mance.
[103] Ibid., at para. [202], per Lord Wilson.
[104] Ibid., at para. [117], per Lord Neuberger; A. Kavanagh, "The Lure and the Limits of Dialogue" (2016) 66 U.T.L.J. 83, at 86.
[105] *R (Nicklinson)* [2014] UKSC 38, [2015] 1 A.C. 657, at [204]–[205], per Lord Wilson.
[106] Mance, "The Frontiers", p. 114.
[107] Martin, "Declaratory Misgivings", p. 222.
[108] Ibid., at pp. 214–15.

Article 8. Despite this, the response to *Nicklinson* has been stark. The House of Commons and House of Lords have considered but rejected multiple Bills to amend the law.[109] In one sense, this could be seen as dialogue in action: the Supreme Court noted their view on the compliance with rights and the democratic legislature has in turn decided to stick with the status quo. However, *Nicklinson* has been central to the debates in Parliament and subsequent court cases.[110] The unusual reasoning of the court has led to the judgment being confused.[111] For example, *Nicklinson* has been taken as evidence that the current law complies with the ECHR,[112] and therefore supporting the status quo. In contrast, all DoIs issued under the UKHRA since 2000 have resulted in legal changes or are currently under active reconsideration by the Government.[113] The difference between the result following the issuing of DoIs versus the result following the *Nicklinson* deferred DoI lends weight to the normative argument that DoIs are a more effective remedy likely to lead to legislative change, than their weaker IoI counterparts.

Despite the potential problems with the deferred DoI approach in *Nicklinson*, it seems it may become accepted practice within the UK. In *Conway v Secretary of State for Justice* the Court of Appeal considered a further DoI application in relation to UK assisted dying laws.[114] While the court rejected the application, it distinguished the *Nicklinson* deferred DoI approach on the basis of a change in circumstances. These changes included that there had been further Strasbourg jurisprudence, the fact that Parliament had since considered the matter and rejected legislation, and on the basis of better evidence about the alternative scheme that could be implemented if a DoI were to be issued. In doing so, the Court of Appeal in *Conway* made comments which supported the *Nicklinson* deferred DoI approach, which it noted was taken in light of the Supreme Court's reasoning that Parliament was a better forum for determining the issue of legalising assisted suicide than the courts.[115] Furthermore, the Supreme Court refused permission to appeal in *Conway*, therefore providing support for the Court of Appeal decision.[116]

[109] *R (Conway) v Secretary of State for Justice* [2017] EWHC 2447, [2018] W.L.R.(D) 634, at [41]–[58].
[110] Martin, "Declaratory Misgivings", pp. 210, 216; see also S. Martin, "Assisted Suicide and the European Convention on Human Rights: A Critical Analysis of the Case Law'"(2018) 21 TCLR 244.
[111] Martin, "Declaratory Misgivings", pp. 216–17.
[112] See e.g. Fiona Bruce M.P., *Hansard*, HC vol. 599, cols. 656, 11 September 2015, available at <https://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150911/debtext/150911-0001.htm#15091126000003>.
[113] See note 43 above.
[114] *R (Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431, [2018] W.L.R.(D) 402.
[115] Ibid., at paras. [134], [191].
[116] *R (Conway) v Secretary of State for Justice*, UKSC Permission to Appeal Order, 27 November 2018, available at <https://www.supremecourt.uk/docs/r-on-the-application-of-conway-v-secretary-of-state-for-justice-court-order.pdf>.

The *Nicklinson* approach has also been considered *In the Matter of Northern Ireland Human Rights Commission* [2018] UKSC 27 ("*Northern Ireland Human Rights Commission*").[117] The case, which is considered in Section VII below, related to laws criminalising most abortions in Northern Ireland. The court distinguished *Nicklinson*, noting that, unlike *Nicklinson*, there was no clear indication that the legislature was going address the issue at hand in the near future; that the incompatibility in the present case was easily identifiable and easily cured; and that the interests were not of two living adults like in *Nicklinson*.[118] The court's reasoning suggests that, should the facts have been different it would have followed the *Nicklinson* deferred DoI approach. Tellingly, Lady Hale, who vocally opposed the deferred DoI approach in *Nicklinson*, approved of the notion in *Northern Ireland Human Rights Commission*, in distinguishing the two cases on the facts. Given the acceptance of the *Nicklinson* deferred DoI approach it seems reasonable to expect more of these types of IoIs may be given in future UK jurisprudence.

VI. Deferred Invalidation

The idea of constitutional or superior courts suspending invalidation orders is not new.[119] It occurs when a court declares that a law is unconstitutional but suspends the operation of that invalidation order to a determinate time. Deferred invalidation is similar to this. In the case of a deferred invalidation the court indicates the conflict with the constitution, before deferring its decision on remedies, typically to enable the legislature to fix the statutory defect, or to enable the parties make submissions as to the court order.[120] Any invalidation is postponed for an indeterminate and potentially infinite period. While both deferred and suspended invalidation orders may be understood as IoIs, deferred invalidation orders more squarely fall within the definition. This is because suspended invalidation will generally provide for legislative invalidation to be made on a certain future date. Therefore, like ordinary invalidation, the claimant's rights are vindicated and the general public is given the benefit of rights compliant legislation, it is just that this is given delayed effect. On the other hand, in deferring invalidation, the court does not guarantee the legislation will be invalidated or that further action will be taken. Recent Irish cases, in particular the

[117] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27, at [117]–[121].

[118] Ibid., at para. [40], per Lady Hale, at paras. [118]–[119], per Lord Mance, at paras. [296]–[299], per Lord Kerr (Lord Wilson agreeing).

[119] A. Kavanagh, "Situating the Strike-down" (draft paper, 2017), available at <https://www.law.ox.ac.uk/events/topics-comparative-constitutionalism-situating-strike-down-power-0>; A. Niblett, "Delaying Declarations of Constitutional Validity" in F. Fagan and S. Levmore (eds.), *The Timing of Lawmaking* (Cheltenham 2017).

[120] See e.g. *C v Minister for Social Protection* [2018] IESC 57; Carolan, "A 'Dialogue-oriented Departure'", p. 200.

proceedings in *NHV v Minister for Justice and Equality & ors*[121] and subsequent cases, show a burgeoning uptake of deferred invalidation. They neatly show why deferred invalidation orders are an instance of IoIs and help flesh out some of the normative issues. These cases raise other important issues in the Irish context, including with regards to the constitutional permissibility of deferred invalidation,[122] and unenumerated rights.[123] However, my concern is the normative implications of IoIs in the form of deferred invalidation. This is despite the fact that such a consideration is somewhat premature, given this is a recent judicial turn in Ireland.[124]

Aileen Kavanagh has recently written that a range of judicial practices variously described as the judiciary "holding back", "softening its blow" and "leaving legislative leeway" are on the rise, showing increased uptake of suspended and deferred invalidation across different jurisdictions.[125] We see this occurring in countries traditionally understood to be "strong form" judicial review jurisdictions such as Germany, Italy and Colombia[126]; as well as in countries broadly falling in the common law tradition such as the UK (with regard to EU law),[127] India,[128] Hong Kong,[129] Canada,[130] South Africa[131] and Ireland.[132] This is perhaps because the blunt nature of invalidation makes it unappealing to judges.[133] Indeed, suspended invalidation has been received favourably in jurisdictions where it has been utilised,[134] where it is most often justified by judges on the basis of there being exceptional factual circumstances or concerns regarding institutional competence.[135] Kavanagh has argued that the uptake of such practices is leading to an "iterative and interactive dynamic between courts and the legislature".[136] Whether such dialogic aims are being met, or outweigh countervailing normative concerns, is jurisdiction specific. However, the recent case law in Ireland is instructive.

[121] *NHV v Minister for Justice & Equality and ors* [2017] IESC 35, [2018] 1 I.R. 246; *NHV v Minister for Justice & Equality* [2017] IESC 82.
[122] Article 15.4.2. of the Irish Constitution mandates that constitutional laws "shall … be invalid". See Carolan, "A 'Dialogue-oriented Departure'", p. 194; Kenny, "Remedial Innovation", pp. 13–15.
[123] C. O'Mahony, "Unenumerated Rights: Possible Future Directions after NHV?" (2017) 40 D.U.L.J.(N.S.) 171.
[124] *C v Minister for Social Protection* [2018] IESC 57, at [3], per MacMenamin J.; Carolan, "A 'Dialogue-oriented Departure'", p. 192; Kenny, "Remedial Innovation", pp. 1, 9.
[125] Kavanagh, "Situating the Strike-down", p. 2.
[126] Ibid.
[127] *R (Davis and ors) v Secretary of State for the Department* [2015] EWHC 2092 (Admin) [2015] W.L.R. (D) 318; *HM Treasury v Ahmed and ors* [2010] UKSC 5, [2010] 2 A.C. 534.
[128] C. Chandrachud, *Balanced Constitutionalism: Courts and Legislatures in India and the United Kingdom* (Oxford 2017), ch. 4.
[129] P.J. Yap, "New Democracies and Novel Remedies" [2017] P.L. 30.
[130] R. Leckey, "Enforcing Laws That Infringe Rights" [2016] P.L. 206.
[131] See e.g. *Minister of Home Affairs v Fourie* [2005] ZACC 19, (2006) 1 S.A. 524, at [147].
[132] *NHV* [2017] IESC 35, [2018] 1 I.R. 246; *C v Minister for Social Protection* [2018] IESC 57.
[133] Kavanagh, "Situating the Strike-down", p. 2.
[134] Carolan, "A 'Dialogue-oriented Departure'", p. 191.
[135] Ibid., at pp. 193–94.
[136] Kavanagh, "Situating the Strike-down" p. 2.

Judicial supremacy, along with the power to invalidate unconstitutional legislation, is central to the Irish legal order.[137] These concepts often go unquestioned,[138] despite invalidation being the primary remedy for unconstitutionality.[139] In this sense, the *NHV* proceedings and subsequent cases can be seen as part of a constitutional moment in Ireland.[140] However, there is historical and theoretical support for the remedial innovation that is occurring. Despite the judiciary nominally having the "final word" on the Constitution, Fiona de Londras has argued that responsibility for the Constitution has long been shared between branches of government, public authorities and the people.[141] Furthermore, judicial creativity has a long pedigree in Ireland.[142] In addition, prior to *NHV* there was some support for a deferred or suspended approach. For example, some judges had warned, by way of *obiter*, of potential unconstitutionality which needed to be rectified.[143] There was also a line of cases considering the prospective application of constitutional invalidation,[144] which foreshadowed the deferral jurisprudence.[145] However, the clear uptake of deferred invalidation in *NHV* and subsequent cases is a novel turn.[146] This is in part because of the courts in these cases were considering legislation, whereas much of the precedent related to other forms of unconstitutionality.[147]

The Applicant in *NHV* was a Rohingya man seeking refugee status in Ireland. Pending final determination of his asylum application he was given €19 per week, was required to live in State accommodation and was subject to a prohibition on employment.[148] The Minister had refused the Applicant permission to take up an offer of employment on the basis of the prohibition in section 9(4) of the Refugee Act 1996. The Applicant argued this refusal was unconstitutional and sought invalidation of the legislative provision, among other things.[149]

Writing for the court in the 30 May 2017 judgment, O'Donnell J. held that a right to work is a part of the human personality protected by

[137] *Murphy v Attorney General* [1982] I.R. 237, 309, per Henchy J.; see O. Doyle, *The Constitution of Ireland: A Contextual Analysis* (Oxford 2018), 143.
[138] Kenny, "Remedial Innovation", p. 2.
[139] Ibid.
[140] Ibid, at p. 1.
[141] de Londras, "Declarations of Incompatibility"; F. de Londras, "In Defence of Judicial Innovation and Constitutional Evolution" in L. Cahillane, J. Gallen and T. Hickey (eds.), *Judges, Politics and the Irish Constitution* (Manchester 2017).
[142] de Londras, "Declarations of Incompatibility"; de Londras, "In Defence of Judicial Innovation and Constitutional Evolution"; cf. Kenny, "Remedial Innovation", p. 21.
[143] Carolan, "A 'Dialogue-oriented Departure'", pp. 197–99; Kenny, "Remedial Innovation", pp. 9–10; *C v Minister for Social Protection* [2018] IESC 57, at [12]–[19], [27], per MacMenamin J.
[144] See discussion in ibid., at paras. [37]–[64], per MacMenamin J.
[145] Ibid.
[146] See especially *C v Minister for Social Protection* [2018] IESC 57.
[147] Carolan, "A 'Dialogue-oriented Departure'", pp. 197–99; Kenny, "Remedial Innovation", pp. 9–10; *C v Minister for Social Protection* [2018] IESC 57, at [12]–[19], [27], per MacMenamin J.
[148] *NHV* [2017] IESC 35, [2018] 1 I.R. 246, at [2]–[4], per O'Donnell J.
[149] Ibid., 307, at [4], per O'Donnell J.

Article 40.1 of the Irish Constitution.[150] The court then made an "in principle" finding that the Applicant's section 9(4) right had been unjustifiably infringed and the Constitution breached.[151] Despite this finding, the court went on to defer the invalidation, with O'Donnell J. stating:

> since this situation arises because of the intersection of a number of statutory provisions, and could arguably be met by alteration of some one or other of them, and since that is first and foremost a matter for executive and legislative judgement, I would adjourn consideration of the order the Court should make for a period of six months and invite the parties to make submissions on the form of the order in the light of circumstances then obtaining.[152]

The 30 May 2017 decision is an archetypal IoI. The court did not declare the legislation unconstitutional, but noted it was prepared "in principle" to hold so.[153] The court then deferred, not suspended, the invalidation.[154] It was therefore open to the court to refuse to issue the invalidation at a later date, leaving only a warning that the legislation in question was unconstitutional. Adding more credence to the argument that the decision was in substance an IoI, was the fact that the proceedings had become substantially moot, given the Applicant was issued with refugee status in the period between the Supreme Court granting leave to appeal and hearing the case.[155] The court decided to proceed with the hearing given, among other things, there "there is a point of law of general public importance arising here".[156]

On 21 November 2017, the Government announced it would opt in to the EU (recast) Reception Conditions Directive (2013/33/EU), which would have corrected the constitutional breach.[157] When the case did return to the Supreme Court after six months, the State asked for a further deferral, on the basis that invalidation would lead to a flood of applications to work and to enable the Government time to opt in to the Directive.[158] The court issued judgment on 30 November 2017 and afforded the State a further period of time to take whatever measures it considered necessary before an invalidation was made. The court noted it would sit again on 9 February 2018, at which time it would not consider the matter further, but simply

[150] Ibid., 316, at [18], per O'Donnell J.
[151] Ibid., 317, at [22], per O'Donnell J.
[152] Ibid.
[153] Ibid.; Carolan, "A 'Dialogue-oriented Departure'", p. 200.
[154] *NHV* [2017] IESC 35, [2018] 1 I.R. 246, at [22], per O'Donnell J.; Kenny, "Remedial Innovation", p. 9.
[155] *NHV* [2017] IESC 35, [2018] 1 I.R. 246, at [22], per O'Donnell J.; Carolan, "A 'Dialogue-oriented Departure'", p. 195.
[156] *NHV* [2017] IESC 35, [2018] 1 I.R. 246, at [7], per O'Donnell J.
[157] The Department of Justice and Equality, "Government Agrees Framework for Access to Work for International Protection Applicants", 21 November 2017, available at <http://www.justice.ie/en/JELR/Pages/Access_To_Work_for_International_Protection_Applicants>. However, this did not happen until 6 July 2018, when the Government opted in via secondary legislation: Irish Refugee Council, "Country Report: Ireland", 2018 update, p. 50, available at <https://www.asylumineurope.org/sites/default/files/report-download/aida_ie_2018update.pdf>.
[158] *NHV* [2017] IESC 82.

make the declaration of invalidity requested by the Applicant.[159] Chief Justice Clarke noted that the court had "already given judgment in this matter and ha[d] ruled that in certain respects the absolute prohibition … was inconsistent with the Constitution".[160] On 9 February 2018, the Supreme Court sat and made the declaration of invalidity.[161]

The May and November 2017 *NHV* decisions were both technically deferrals rather than suspensions.[162] Neither used the language of suspension, nor specifically declared invalidation before suspending that effect.[163] However, the decision of 30 November 2017 was in essence a suspension.[164] The court specified that on a certain date it would sit and make a declaration invalidating the legislation, without considering the matter further. In justifying its actions, the Supreme Court noted the approach was exceptional and that the usual course would be to render the relevant provision inoperable.[165] However, similar remedies have been issued in numerous proceedings since.[166] Indeed, in the 12 months following the May 2017 decision there were more cases in which the courts issued a deferred invalidity order than a regular invalidity declaration.[167] A notable example is *PC v Minister for Social Protection*.[168]

In *PC*, the claimant challenged section 249(1)(b) of the Social Welfare (Consolidation) Act 2005, which denied certain welfare benefits to detained prisoners, including a State pension for the Applicant. When the matter first came before the Supreme Court, it was determined that section 249(1)(b) was constitutionally flawed because it imposed an automatic punitive sanction on prisoners which could only have been administered by the judiciary.[169] The law was therefore invalid for breaching sections 34 and 38.1 of the Constitution.[170] Despite this finding, the court followed the course in *NHV*, "adjourning" the matter to allow the parties to make submissions on the question of the remedy.[171] This decision was therefore a deferral, although it had a "suspensory effect to the declaration of

[159] Ibid., at para. [8].
[160] Ibid., at para. [1].
[161] *C v Minister for Social Protection* [2018] IESC 57, at [18], per O'Donnell J., at [26], per MacMenamin J.
[162] Ibid., at para. [19], per O'Donnell J.
[163] Kenny, "Remedial Innovation", p. 92.
[164] *C v Minister for Social Protection* [2018] IESC 57, at [26], per MacMenamin J.
[165] *NHV* [2017] IESC 82, at [3].
[166] See e.g. *PC v Minister for Social Protection and ors* [2017] IESC 63, [2017] 2 I.L.R.M. 369, at [69]; *AB v Clinical Director of St Loman's Hospital and ors* [2018] IECA 123, at [54]; *Agha (a minor) & ors v Minister for Social Protection & ors* [2018] IECA 155, at [70].
[167] E. Carolan, "Remedial Creativity in Common Law Courts: Transgressing the Frontiers of Public Law?", Public Law Conference, Melbourne Law School, 12 July 2018 (on file with author), p. 18.
[168] *PC v Minister for Social Protection* [2017] IESC 63, [2017] 2 I.L.R.M. 369; *C v Minister for Social Protection* [2018] IESC 57.
[169] *PC v Minister for Social Protection* [2017] IESC 63, [2017] 2 I.L.R.M. 369, at [65]; *C v Minister for Social Protection* [2018] IESC 57, at [4], [79], per MacMenamin J.
[170] Ibid.
[171] *PC v Minister for Social Protection* [2017] IESC 63, [2017] 2 I.L.R.M. 369, at [68]–[69]; *C v Minister for Social Protection* [2018] IESC 57, at [1], per MacMenamin J.

invalidity".[172] When the matter came before the court again, section 249(1)(b) was declared invalid.[173] The court also held no damages should be issued,[174] but noted the Claimant was entitled to €10,000 in unpaid benefits.[175]

To a greater extent than in *NHV*, the judgments in *PC* considered the correct approach to and issues arising from deferred invalidity. While again noting the normal outcome in such cases would be invalidation,[176] O'Donnell J.'s lead judgment distinguished suspended invalidation (as in Canada), with the deferred invalidation approach of *NHV*.[177] Justice O'Donnell described the Irish approach of deferred invalidation in the following manner: "the practical effect of the order made in this case is to indicate an unconstitutionality, but to leave in place the legislative provision, permitting prima facie the continued operation of a law considered to be inconsistent with the Constitution for the period between the delivery of the judgment and the making of any formal order."[178]

The Irish approach helps focus attention on normative issues arising from deferred invalidation and IoIs more generally. In terms of positive outcomes, deferred invalidation could be a welcome addition to the judicial toolkit,[179] providing judges with a flexible solution to complex cases, while also maintaining the social order underpinning the laws being considered. It has been argued that it is a favourable development tempering judicial supremacy, providing a workable alternative to the blunt tool of invalidation.[180] Relatedly, deferred invalidation may encourage more legislative debate of rights,[181] and enable Parliament to better choose the manner in which rights inconsistencies are ameliorated.[182] And this occurs without changing the status quo of the constitutional order, as the judiciary still has the last word on the Constitution. Finally, Tom Hickey has noted this as a "promising 'dialogue-oriented' departure in Irish constitutional law",[183] albeit within a broader tradition of collaborative governance in Ireland.[184]

[172] *C v Minister for Social Protection* [2018] IESC 57, [14], per MacMenamin J.
[173] Ibid., at para. [23], per O'Donnell J.
[174] Ibid., at para. [26], per O'Donnell J.
[175] Ibid., at para. [48], per O'Donnell J.
[176] Ibid., at para. [17], per O'Donnell J.
[177] Ibid., at para. [2].
[178] Ibid.
[179] Carolan, "A 'Dialogue-oriented Departure'", p. 192.
[180] Kenny, "Remedial Innovation", pp. 3, 5.
[181] On judicial supremacy stifling political debate in Ireland, see E. Daly, "Reappraising Judicial Supremacy in the Irish Constitutional Tradition" in Cahillane et al., *Judges, Politics and the Irish Constitution*.
[182] *C v Minister for Social Protection* [2018] IESC 57, at [17], per O'Donnell J.
[183] T. Hickey, "Direct Provision Ruling Signals New 'Dialogue' between Dail and the Judiciary", *The Irish Times*, 8 January 2017, available at <https://www.irishtimes.com/opinion/direct-provision-ruling-signals-new-dialogue-between-dail-and-the-judicary-1.3110988>.
[184] T. Hickey, "Judges as God's Philosophers: Re-thinking 'Principle' in Constitutional Adjudication" in Cahillane et al., *Judges, politics and the Irish Constitution*.

While there are clearly potential positives in deferring invalidation, these may be outweighed by the potential negatives. These issues align with the concerns raised about IoIs more generally in Section III above. Most obviously, deferred invalidation leaves unconstitutional legislation in place, despite the possibility of future invalidation.[185] Aside from being unsatisfactory for the litigant and other people affected by the relevant legislative provisions,[186] this decoupling of the right and remedy goes against what David Kenny has said "has always been a hallmark of [the Irish] system of litigation".[187] As such, a litigant could be subject to a prolonged wait before her right is vindicated, if this occurs at all. This was the case in *NHV*, where despite being given over eight months to rectify the breach, the Government failed to do so and the court ended up invalidating the legislative provision in the absence of any further solution.[188] Further, this change in remedial landscape may impact litigant behaviour. Notably, potential litigants may be less inclined to bring a case to rectify a breach, as deferred or systemic remedies are likely to be less appealing than immediate and direct ones.[189] Of course, some of these concerns could be tempered by other means. For example, in Canada there is a practice of exempting the litigant from the suspension,[190] and in South Africa the courts may issue "interim orders" which provide a judicial solution to the rights breach during the suspension period.[191] Kenny has argued that unless Irish courts embrace some such practices then deferral will not be workable.[192] But these additional practices seem to create their own concerns. In the case of exemptions, the result is unfair for people affected by the law but not party to the proceedings. On the other hand, interim orders may be seen as the courts providing views to the legislature on alternative legal schemes. This may undermine Parliament's role in the legislative process, which would be contrary to one of the main reasons for deferring invalidation (leaving legislative rectification to Parliament).[193] The question becomes: would it not be better to just use the indelicate invalidation remedy rather than a convoluted and unequal deferral and exemption regime?

Beyond the immediate litigant and proceedings, uptake of deferred invalidation raises concerns going to the core of the legal system.[194]

[185] S. Choudhry and K. Roach, "Putting the Past behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 Sup.Ct.L.Rev. 205, at 230; Carolan, "A 'Dialogue-oriented Departure'", p. 191; Kenny, "Remedial Innovation", p. 15.

[186] *C v Minister for Social Protection* [2018] IESC 57, at [19], per O'Donnell J. More generally, see Leckey, "The Harms of Remedial Discretion", p. 591.

[187] Kenny, "Remedial Innovation", p. 16.

[188] While the Applicant had been given refugee status, others were still subject to the employment ban under s. 9(4) of the Refugee Act 1996.

[189] Kenny, "Remedial Innovation", p. 16; Leckey, "The Harms of Remedial Discretion", pp. 595–96.

[190] Kenny, "Remedial Innovation", p. 17.

[191] Leckey, "The Harms of Remedial Discretion", p. 591; Carolan, "A 'Dialogue-oriented Departure'".

[192] Kenny, "Remedial Innovation", p. 18.

[193] Leckey, "The Harms of Remedial Discretion", p. 591.

[194] *C v Minister for Social Protection* [2018] IESC 57, at [19], per O'Donnell J.; Leckey, "The Harms of Remedial Discretion", p. 593.

Indeed, the Irish courts have previously been reluctant to award remedies other than invalidation on the basis they could impinge on the separation of powers.[195] The idea here is that the judicial role is to enforce constitutional rights and uphold the rule of law, meaning courts invalidate unconstitutional legislation, rather than trying to fix or replace it.[196] In addition, increased use of deferred invalidation could suggest a new role for the courts, with unintended consequences. This includes that the court's analysis is considered one of many valid opinions on the law, rather than a determination of it.[197] Further, judicial choices on the timing and reasoning for deferral may indicate to Parliament various degrees of concern about legislation and therefore impact the subsequent political process.[198] Finally, the courts could veer into a new role of providing opinion on the lawfulness of suggested solutions to rights breaches, which raises concerns about democratic accountability.[199] The Supreme Court has been alive to this final concern,[200] and has been at pains to assert it is not the role of the courts to assess the constitutionality of proposed laws.[201] However, litigants have already taken to requesting judicial consideration of proposed alternatives to legislation subject to deferred invalidation.[202]

How the courts respond to such issues and the frequency with which deferred DoIs are issued, will determine the desirability of these Irish IoIs. Despite the Supreme Court being adamant that deferred invalidation will be exceptional,[203] it could become the preferred or at least a common remedy. The cases following *NHV* suggest this is already happening, as does the experience in Canada, where despite initial pronouncements that suspended invalidation would be used in a limited fashion, it became the default remedy.[204]

VII. No Jurisdiction: No Worries

The final category of cases that fall within the IoI framework does not have a ready-made title. I am calling it "no jurisdiction: no worries". It is essentially where the court finds that it has no jurisdiction to hear a matter and yet

[195] Kenny, "Remedial Innovation", p. 3.
[196] Ibid.; Carolan, "A 'Dialogue-oriented Departure'", p. 192.
[197] Carolan, "A 'Dialogue-oriented Departure'", p. 200; Leckey, "The Harms of Remedial Discretion", p. 603.
[198] Carolan, "A 'Dialogue-oriented Departure'", p. 201. See generally Leckey, "The Harms of Remedial Discretion", p. 597.
[199] Carolan, "A 'Dialogue-oriented Departure'", pp. 201–02.
[200] *C v Minister for Social Protection* [2018] IESC 57, at [26], per MacMenamin J.
[201] *NHV* [2017] IESC 82, at [4]; *C v Minister for Social Protection* [2018] IESC 57, at [17], per O'Donnell J.
[202] *C v Minister for Social Protection* [2018] IESC 57, at [68]–[78], per MacMenamin J.
[203] Ibid., at para. [21].
[204] Leckey, "The Harms of Remedial Discretion", p. 587; Choudhry and Roach, "Putting the Past behind Us?", p. 228; Kenny, "Remedial Innovation", p. 4; *C v Minister for Social Protection* [2018] IESC 57, at [14], per O'Donnell J.

goes on to issue an IoI in any case. The clearest example of this is *Northern Ireland Human Rights Commission*. In that case the Northern Ireland Human Rights Commission ("Commission") brought proceedings regarding both Westminster and Northern Ireland laws which criminalise most abortions in Northern Ireland.[205] The Commission argued that the laws were incompatible with Articles 3, 8 and 14 of the ECHR, insofar as that law prohibits abortion in cases of (1) fatal malformation of the foetus, (2) pregnancy as a result of rape and/or (3) pregnancy as a result of incest. The Commission sought DoIs to that effect under the UKHRA.

A majority of the Supreme Court held it did not have jurisdiction because the Commission did not have standing to bring the proceedings. In the lead judgment on jurisdiction, Lord Mance focused on the abstract nature of the proceedings – holding that the Applicant had no standing because the proceedings were not brought, as the relevant legislation required, in relation to an actual or potential victim of an unlawful act of a public authority.[206] Despite this, Lord Mance, and a differently comprised majority of judges, held that the laws were incompatible with Article 8 of the ECHR, as protected by the UKHRA. The decisions of Lord Mance, Lady Black and Lord Reed (with whom Lord Lloyd-Jones agreed) are of most interest. These judges held that there was no jurisdiction. And yet despite this, they all went on to explain their respective conclusions on the substantive question of whether the legislation complied with the ECHR. Lord Mance noted that despite there being no jurisdiction to give any relief in the case, it would be "unrealistic and unhelpful" for him not to express his conclusions on the compatibility of the legislation with rights protected under the UKHRA.[207] This was because the case had been fully argued and evidence put before the court,[208] and because other judges in the case had held that the Supreme Court did have jurisdiction to hear the case.[209]

That these judges held that they had no jurisdiction but went on to provide a "strong view"[210] on the compatibility of the legislation in place was highly unusual. Lord Reed noted this, when he stated that where an applicant is found to have no standing "it would ordinarily follow that the court should express no view on whether the laws challenged … are or are not compatible with Convention rights".[211] Nevertheless, Lord Mance and Lady Black concluded that the law was incompatible with Article 8.[212]

[205] Sections 58 and 59 of the Offences Against the Person Act 1861 and s. 25(1) of the Criminal Justice Act (NI) 1945. But note, there are exceptions to the prohibition in line with *R. v Bourne* [1939] 1 KB 687.
[206] *Northern Ireland Human Rights Commission* [2018] UKSC 27, at [73], per Lord Mance (Lord Reed, Lady Black and Lloyd-Jones agreeing).
[207] Ibid., at para. [42(c)], per Lord Mance.
[208] Ibid.
[209] Ibid., at para. [91], per Lord Mance.
[210] Mance, "The Frontiers", p. 117.
[211] *Northern Ireland Human Rights Commission* [2018] UKSC 27, at [334], per Lord Reed.
[212] Lord Mance with regard to abortion in cases of rape, incest and fatal foetal abnormality. Lady Black with regard to cases of fatal foetal abnormality.

On the other hand, Lord Reed (with Lord Lloyd-Jones agreeing) went on to conclude that the current legislative scheme did not breach Articles 3 or 8.

Lord Mance noted it had been five years since the Commission raised the issue and that if the court was to refuse to come to any conclusions on the matter, it would still be open for an affected person to return to court and reventilate the same issues. For Lord Mance, this was "not an appropriate course", considering that the law was clearly in need of amendment to remove the incompatibility and that it was inevitable a DoI would be made in such a further round of litigation.[213] As such, Lord Mance summarised his position and the consequences of the legislature failing to amend the law, as follows:

> the present legislative position in Northern Ireland is untenable and intrinsically disproportionate in excluding from any possibility of abortion pregnancies involving fatal foetal abnormality or due to rape or incest. My conclusions about the Commission's lack of competence to bring these proceedings means that there is however no question of making any declaration of incompatibility. But the present law clearly needs radical reconsideration. Those responsible for ensuring the compatibility of Northern Ireland law with the Convention rights will no doubt recognise and take account of these conclusions, at as early a time as possible, by considering whether and how to amend the law, in the light of the ongoing suffering being caused by it as well as the likelihood that a victim of the existing law would have standing to pursue similar proceedings to reach similar conclusions and to obtain a declaration of incompatibility in relation to the 1861 Act.[214]

It is clear that Lord Mance's judgment meets the definition of an IoI. He made a clear finding that there is incompatibility between the relevant abortion laws and Article 8. Further, he urged the legislature to amend the law, as soon as possible. Lady Black held similarly, albeit in less direct and clear language. Further, Lords Reed and Lloyd-Jones would have also issued an IoI had they come to the conclusion that the abortion laws were incompatible with Article 8. The fact their analysis led them to decide in the alternative does not take away from the fact that they followed an approach whereby judges may fully consider the issue of inconsistency of legislation with protected rights, even where the court lacks jurisdiction.

The support of a majority of judges in *Northern Ireland Human Rights Commission* for an approach which denied jurisdiction but still made substantive findings as to the compatibility of legislation against rights protected by the UKHRA suggests that we may see this approach more often in the UK. The recent First Tier Tribunal decision of *Banks v Commissioners for HMRC* is one such case.[215] *Banks* was brought by the pro-Brexit campaigner Arron Banks, after he was issued an inheritance tax bill for

[213] *Northern Ireland Human Rights Commission* [2018] UKSC 27, at [135], per Lord Mance.
[214] *Northern Ireland Human Rights Commission* [2018] UKSC 27, at [135].
[215] *Banks v Commissioners for HMRC* [2018] UKFTT 0617 (TC).

donations that he and companies he controlled gave to the UK Independence Party ("UKIP"). The case related to section 24 of the Inheritance Tax Act 1984 ("ITA"), which provided tax exemptions for political parties that met certain requirements. UKIP did not meet the relevant requirements and Banks argued this breached Article 14 and Article 1 of Protocol 1 of the ECHR, which are protected under the UKHRA.[216] The Tribunal held that the different treatment of Banks under ITA s. 24 (compared with people who made donations to exempt parties) was discrimination on the basis of political opinion within the meaning of Article 14.[217] Judge Greenback held the aim of promoting private funding of political parties was legitimate,[218] but the different treatment of Banks was not proportionate.[219] Regarding remedies, the judge held it was not possible to construe section 24 of the ITA in a rights compatible manner in line with the interpretive approach provided for in section 3 of the UKHRA, because to do so would "go against the grain" of the legislation and because this was a political decision best left to Parliament.[220] Finally, Greenback J noted that the Tribunal could not issue a DoI as it was not a court designated to do so under section 4(5) of the UKHRA.[221]

Banks differs from *Northern Ireland Human Rights Commission*, in that the issue was not standing, but a power to issue a DoI. However, the upshot is much the same. Both judgments complete a full analysis of the compatibility of primary legislation and explicitly find that the respective rights had been breached. Despite those findings, no DoIs were issued, due to a lack of jurisdiction. Like other cases of IoIs, the litigants are left in precarious positions. A judge has authoritatively determined that their rights have been breached by statute, but has done nothing further to remedy that situation. And the pressure on Parliament and the Executive to do anything is minimal at most.

VIII. Conclusion

I have sought to articulate and defend two key points in this paper. First, that IoIs are increasingly being issued across the common law world. Second, that this is normatively concerning. On the first claim, I do not suggest that there is a common, consistent or even conscious trend across jurisdictions. Rather, I have highlighted some cases which I suggest show a creeping rise of IoIs, which are being fashioned through various judicial practices and with differing degrees of intensity. Taken together however,

[216] Ibid., at para. [17]. For alternative arguments, see paras. [130]–[137].
[217] Ibid., at para. [46].
[218] Ibid., at paras. [106] and [110].
[219] Ibid., at paras. [116]–[117].
[220] Ibid., at paras. [127]–[128].
[221] Ibid., at para. [129].

it is at least plausible to conclude that the use of IoIs, as I have defined them, is on the rise.

On the normative question, I have not laid out a comprehensive scheme of why I believe that the risks emerging from the use of IoIs are outweighed by their benefits, of which there are many. I have instead raised a number of concerns which arise across all of the different manifestations of IoIs discussed in the paper. For the litigant, these include a reduced potential for vindication of a rights breach and potentially negative cost outcomes. For the legal system more broadly, if dialogue is to be a remedial aim of IoIs, a robust level of engagement between courts and the other branches of government is preferable, with clear procedures and consequences for the remedy issued. Absent this, what is hoped to engage dialogue becomes more like a passing judicial comment, doing little to vindicate rights for the litigant or cause long-term legislative change.