HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Human Rights Act reform, HC 215

Wednesday 11 May 2022

Watch the meeting

Members present: Ms Harriet Harman (Chair); Joanna Cherry MP; Lord Dubs; Florence Eshalomi MP; Lord Henley; Baroness Ludford; Baroness Massey of Darwen; David Simmonds MP; Lord Singh of Wimbledon.

Questions 49 - 61

Witnesses

I: Baroness Falkner of Margravine, Chair, Equality and Human Rights Commission; Alyson Kilpatrick, Chief Commissioner, Northern Ireland Human Rights Commission; Barbara Bolton, Head of Legal and Policy, Scottish Human Rights Commissions.

Examination of witnesses

Baroness Falkner of Margravine, Alyson Kilpatrick and Barbara Bolton.

Q49 **Chair:** Welcome to this afternoon's session of the Joint Committee on Human Rights. We are a committee half made up of Members of the House of Commons and half made up of Members of the House of Lords. We are meeting today with some of us in the room and some of us remotely. As our title suggests, our concern is human rights and we scrutinise the Government and other issues to do with human rights and we report to Parliament.

This afternoon's session is the fourth evidence in our Joint Committee on Human Rights inquiry into the Human Rights Act. You will have heard in the Queen's Speech yesterday the Government announce that they were going to bring forward a Bill of Rights, so this inquiry is very relevant and important.

In December last year, the Government published a consultation paper called *Human Rights Act Reform: A Modern Bill of Rights*, which is what they announced yesterday in the Queen's Speech. In April of this year, this committee published a response to that consultation in which we found that the Government's proposals risked weakening existing human rights protections and would result in more cases being sent to the European Court of Human Rights. Given the importance of the Human Rights Act in the devolved nations, we were concerned that the Government's proposals could have unintended consequences for the constitutional settlement in the UK, something that is very much brought into relief right now.

The purpose of today's session is to consider further the role of the Human Rights Act in the four nations of the UK and the impacts of the Government's proposed reform on the devolution settlement. We will be hearing from the Equality and Human Rights Commissioner, for which we are very grateful. In our first panel, we have the chair of the Equality and Human Rights Commission, Baroness Falkner of Margravine. We will also be hearing from Northern Ireland, Scotland and Wales. The issue is how the Human Rights Act has worked in the past and the implications of what is being mooted for the Bill of Rights that will be brought forward.

Also in this first session we have Alyson Kilpatrick, chief commissioner to the Northern Ireland Human Rights Commission. We very grateful to you, Alyson, for joining us. We also have Barbara Bolton from Scotland. She is head of legal and policy at the Scottish Human Rights Commission.

I will start with a first question to each of you. Could you sum up briefly what impact the Human Rights Act has had on how human rights are enforced in the part of the UK that you have responsibility for?

Baroness Falkner of Margravine: Can I start by saying that it is a great pleasure to be before you and your esteemed committee today? Of course, you are extremely familiar with the work of the Equality and Human Rights Commission, but for the record I might just explain that our human rights remit extends to England and Wales and to reserved

matters in Scotland, with devolved matters being the responsibility of the Scottish Human Rights Commission, represented here by Barbara Bolton. I will therefore defer to colleagues from the SHRC and the NIHRC on human rights and devolution matters relating to Scotland and Northern Ireland. My comments will refer primarily to England and Wales, unless the question goes into reserved matters in Scotland.

The Human Rights Act has played, and continues to play, a vital role in the protection of human rights in the United Kingdom. We have read your recently published report with great interest and we concur with a great number of your findings.

One of the problems we found with the Government's proposals is that, as with most consultation documents, no Government of the day can say very much in their consultations, because otherwise it would appear that they had made up their mind. On the other hand, there is never sufficient detail to understand what the Government intend to achieve. We have analysed the consultation document in that spirit. The principal point that we wish to make is that the Government have given a raft of cases in evidence, but we cannot truly ascertain their intention in detail until we see a draft Bill.

We agree with your committee's conclusions that the draft Bill must be put to pre-legislative scrutiny, but we also have other proposals in that regard.

On the issue of the contribution of the enforcement of human rights in the United Kingdom, we have found that in the nearly 25 years that it has been in existence, the Human Rights Act has made a substantial contribution to improving protections of human rights in the UK. First, and most notably, litigants do not have to go the Strasbourg court; they can enforce their rights in the United Kingdom, which is a huge advance. It truly brings human rights home, as was the caption at the time.

As examples, disabled people and their families have a right to have a say in decisions about their care—that was the London Borough of Hillingdon v Steven Neary case in 2011; gay couples cannot be discriminated against in inheritance matters; and hospital patients at risk of suicide have a right to be protected by the hospital caring for them—that goes to positive rights and public protections.

Overall, prior to the enactment there was access to justice, but the access was distant. Since then, there have been improvements in access. In the intervening period, our courts have developed human rights jurisprudence in the UK, which is incredibly valuable in advancing and understanding how convention rights apply here, and public authorities' human rights practice has improved.

I could go on, but I suspect that you would rather want me to stop so that you can hear from others.

Chair: Those are three very clear and lucid points. Thank you.

Barbara Bolton: I agree with everything that was outlined there about the positive impact of the Human Rights Act—in particular, enforcement through the courts.

Painting a picture of the story in Scotland, I would say that on the whole it has been positive. However, I do not think anyone would suggest that we are there yet on full respect and protection for and fulfilment of human rights in Scotland. We recently submitted to the universal periodic review and highlighted various areas where improvement is needed. That said, there has been significant progress, and the Human Rights Act has been a critical part of that.

The work of the commission as Scotland's human rights institution to promote best practice in relation to human rights and to look at the practices of public bodies has been enhanced greatly by the existence of the Human Rights Act, particularly Section 6, because it brought the European convention rights into national law.

All public authorities are aware that the backdrop to this is, ultimately, enforcement in court. Alongside embedding the Human Rights Act into the Scotland Act, which we will come on to later, that has ensured that the embedding of human rights practice is prioritised from the top down, from the Scottish Government and Scottish Parliament down through all local authorities and public service providers.

There is an understanding and an appreciation of the importance of embedding human rights into the delivery of services. In its lifetime, the commission has done a range of work in that area, working with various institutions across the public sector such as the prisons inspectorate body in Scotland, where we have worked to embed a human rights-based approach into its work. The aim is always to take them a certain distance and then have them run with it themselves. The prisons inspectorate body recently created a new post, an individual who will look specifically at further embedding human rights into its practices, which is exactly what we want to see.

We have also used the Human Rights Act in specific areas of our work. For a number of years we have done work on historic child abuse in care settings in Scotland, where the bringing of the convention rights into national law through the Human Rights Act was key. We have recently published a joint piece of work, and the positive aspects of the duty on the state to protect life were critical to applying a human rights lens to how we look at deaths in custody in prison settings. The fact that these rights are incorporated into national law has played a key role in the respect that our recommendations are given, because there is such an awareness that the backdrop, ultimately, is enforcement. The Human Rights Act is embedded in the Scotland Act, so it is part of the fabric of the work of the Scottish Parliament.

It has also been beneficial in increasing awareness and understanding of human rights. Again, we are not there yet; there is much to be done, and much to be done in the education sphere at all stages of life, but we do

not recognise the very negative portrayal or perception of human rights that is outlined in the consultation paper. Across civil society in Scotland, there is broad support for human rights. In the participation work that we have done, again jointly, we frequently hear that people want to see rights enforced and made real in practice. It is not that people are sceptical about human rights; it is that they want to see them fully fulfilled. In general, it is a very positive story.

Chair: Thank you very much for that perspective from Scotland.

Alyson Kilpatrick: It is a pleasure to contribute to your very important scrutiny of the proposals.

The commission sees the Human Rights Act as having been the vital tool in ensuring human rights compliance across the UK, and that is particularly so in Northern Ireland. The ability to bring an alleged violation of human rights before a domestic court and not to have to go through what some people call the circus of Strasbourg has brought rights home, which was the intention of the Act in the first place. It has been very significant in Northern Ireland, politically and practically.

The Act has facilitated individuals in cases that have benefited the rest of the UK and, I would say, across Europe. It has enabled individuals to hold the state to account in Northern Ireland on issues as fundamental as the right to life and the right to an independent investigation following the alleged unlawful taking of life. That has been reflected also in the UK Supreme Court, which has largely been following European jurisprudence and applying the Human Rights Act directly.

An interesting point, which is often overlooked, is that during a period of suspension of the NI Assembly between 2017 and January 2020, the Human Rights Act continued in force and could be used in relation to abortion services in Northern Ireland. You may recall Lord Mance commenting on how the law on access to abortion in Northern Ireland was in need of radical reconsideration. That led directly to the abortion regulations being introduced, despite the instability in Northern Ireland with the suspension of the Assembly. I do not need to remind you what has been happening in recent days. The instability may continue, so something concrete that people can turn to and enforce in the local courts will become increasingly important.

The political commitment and will to see human rights enforced in Northern Ireland was central to the peace process and certainly to the Belfast/Good Friday agreement, and was translated into the Northern Ireland Act, for example. The Government recognised the centrality of human rights, not just symbolically, although symbolically it is very important, but practically. It has been used to great effect in Northern Ireland.

I would say that the use of it in Northern Ireland has benefited the rest of the UK. We would certainly want to see the Human Rights Act strengthened, not diminished. We do not recognise the basis upon which

these proposals have been put forward, certainly not in Northern Ireland. We think the proposals have paid scant regard to the impact of stronger human rights protection that has been seen in Northern Ireland. We would be very concerned to see any weakening of the Human Rights Act through replacement or amendment in a Bill of Rights. If anything is to change, it needs to be strengthened not weakened.

Chair: Thank you very much for those answers.

Baroness Falkner of Margravine: In Wales, similar to the United Kingdom, the HRA has served to significantly improve rights protections and access to redress. A number of additional initiatives have also been developed in Wales to build on the protections provided by the HRA. There has been, for example, the partial incorporation of the UN Convention on the Rights of the Child into Welsh law, the partial incorporation of UN principles for older people, and the creation of the Older People's Commissioner for Wales. The Welsh Government have also made a commitment to incorporate the Convention on the Elimination of All Forms of Discrimination against Women—CEDAW—and the CRPD, the Convention on the Rights of Persons with Disabilities. They are moving at a different pace and at a different level in incorporating human rights protections more clearly. All I wanted to say is that there is a divergence between England and Wales.

Chair: Thank you very much for those answers. In spite of different cultural contexts, there is a very strong common view about the Human Rights Act enabling you to ensure that there is an embedding of human rights culture, making enforcement more accessible and bringing in our own jurisprudence to add to European jurisprudence. It is very encouraging to hear the same positive view of the Human Rights Act from your different cultural contexts.

Q50 **Lord Dubs:** I am a Labour member of the Lords. What effect will the Government's proposals have on individuals trying to enforce their rights? Are there any proposals that you are particularly enthusiastic about or concerned about? If so, why?

Baroness Falkner of Margravine: One has to recognise that it is a consultation and we have not seen the detail, but trying to take a positive look it, we are extremely relieved that the United Kingdom Government have stated their commitment to remain a party to the European convention and to maintain their commitment to international human rights, although the politics of the Northern Ireland protocol is a bit of a moving feast. We find these commitments incredibly important to the protection of human rights in the United Kingdom.

We are glad to see that the Government have taken up an BIHR recommendation, which we had previously recommended, and a database we developed to keep track of judgments relying on Section 3, which is the requirement for courts to read and give effect to legislation in a way that is compatible with convention rights, so far as that is possible. We think that would enable Parliament and government to

develop a better understanding of how the provision is working in practice. However, we recommend that no changes are made to the provision before this is in place so that we can get a good read across of the evidence they have for that.

We are concerned about the potential implications for devolved contexts. But overall, putting it in plain English, our greatest concern is the confusion, if I might say that, created in our minds throughout this consultation about the Government's attempts to reflect again on the human rights framework and its application through UK courts, which is one side of a particular problem, and their sweeping ambitions to put forward a Bill of Rights.

A Bill of Rights, roughly 330 years since the last one, is a big constitutional innovation in a country that on the whole has a non-codified constitution. We think that combining these two things into a single sentence or two in the Queen's Speech is rather problematic. If the Government wished to look at specific applications of the operation of the Human Rights Act, we think it would have been more relevant for them to do so in a very constrained and defined way, with some of the evidence base that they consult in their consultation paper.

The idea of codifying a Bill of Rights in our country requires deep thought, cross-party consultation, and cross-party support and consensus. As we know from your committee and the work of previous Governments in this area—I have to confess that I was a member of the House of Lords Constitution Committee at the time, so I remember the long tail of these discussions—we as a country have been debating these issues for some 20 years post the implementation of the Human Rights Act, and we accept that the Government are looking at it in the round, but none of those proposals went anywhere. The question that arises for someone like me is that if the proposals did not go anywhere across so many Governments, where will they go today? In plain English, that is the way I would put it at this point.

In the details of our proposals, we are concerned about devolved contexts and the permissions stage. We can see the problems in some of the specific cases that they give, but to us that does not build a convincing case for an overall deep and substantive review of the Act at this point. I would leave it at that for now.

Lord Dubs: May we turn to Scotland?

Barbara Bolton: In summary, the Scottish Human Rights Commission is extremely concerned about the proposals and the severe negative impact that those proposals would have on access to justice and to a remedy for individuals across society, and the potential that this would leave the UK in breach of Article 13 of the European convention.

The first thing you need to have in order to enforce your rights is certainty as to what your rights are, the content of those rights, and how those rights apply in particular circumstances. Over 20-plus years, we

have developed jurisprudence that has brought clarity in relation both to particular rights and to the approach the courts will take to applying those rights in particular circumstances, and that has built confidence in duty bearers and rights holders.

Here we are talking about decoupling the national courts' approaches to the interpretation of rights from the European court, which is currently an anchor. That does not mean that we follow them in every way in every case, but we generally follow them where there is clear and consistent jurisprudence. Overall, that could bring us back to the situation prior to the Human Rights Act, where, as Baroness Falkner said, individuals had to go all the way to the European Court of Human Rights to secure their remedies. The issue there is that very few people will manage to do that.

The barriers to accessing justice—time, money and emotional resource—are quite incredible for individuals as things stand. The most marginalised and those most at risk already find it more difficult to argue and advocate for their rights and to secure remedy for a breach of those rights. Instead of addressing those considerable issues and making it easier for people to enforce their rights, the Government are talking about making it vastly harder by introducing various hurdles that people would have the burden of overcoming before they could even present their case to a tribunal or a court.

One example is having to exhaust all other routes through common law before turning to the Human Rights Act. Our adversarial system means finding and engaging a solicitor to do that exhaustive research for you to find out if there are any other routes to remedy before you turn to your clear human rights. It brings in the possibility of satellite legislation, because none of this is made very clear in the consultation document.

The parameters of these tests—showing that you deserve your rights, that you have clean hands, that your conduct throughout life does not mean that those rights should be curtailed—and just how the courts will apply them have yet to be seen and could take many years to resolve. Demonstrating significant disadvantage raises the prospect of satellite legislation, uncertainty and confusion, and increases the considerable hurdles while undermining the universality of human rights, which is a fundamental principle underlying the human rights system.

We all have those rights. Every individual has those rights when they come forward to advocate for their rights, regardless of what may have happened in their earlier lives. Fundamental to human rights principles is the right to be treated the same as everybody else. The idea that some human rights breaches do not warrant a remedy would undermine a human rights culture by suggesting that there is a certain level of human rights breaches that we can live with. We are extremely concerned about suggestions that we should go down those routes. In the interests of time, I will leave it there.

Lord Dubs: Thank you. May we hear from Northern Ireland?

Alyson Kilpatrick: My answer is rather simple and basic. It goes back to the fundamental point that human rights are themselves basic and that there should be a very basic standard that everyone is entitled to expect.

Human rights should be central to everything for everyone. These proposals mean in practice that far fewer people will be able to complain if their rights are violated, and the circumstances in which those fewer people will be able to complain or get any sort of remedy will also be much more limited. So this has a direct impact on individuals' rights to have their human rights protected.

The importance of being able to go down to one's local court to have that protection, and the importance of the Government saying that it is so fundamental that one should be able to take complaints to your local district judge, cannot be overstated. Our concern is that very basic one. We do not complain about any individual proposal but about the notion of the Human Rights Act needing to be amended at all, or indeed going so far as needing to be scrapped, or that there is anything wrong with how it operates in practice. I have certainly not seen any evidence that makes the case for reform of the already perfectly good Bill of Rights that we have in the Human Rights Act, which serves the purpose that most of us, I think, can see should be served.

Another fear of ours about these proposals generally is their divisive nature and the divisive language used throughout, singling out, it seems to me, certain groups as less worthy of rights protection. That, of course, goes right to the basis of human rights, the universality of rights, that the other speakers have spoken about.

Another point is less about going to court and more about the Human Rights Act requiring public authorities to always act in compliance. In Northern Ireland, that may be the single most important part of the Act. It has changed everything. A very good example of that is policing. The police have transformed beyond recognition, not necessarily because they were able to go to court, or anyone was able to take them to court, over their human rights, but because they were required as a matter of statute to comply with the European convention and the rights therein. That has been transformative in Northern Ireland. When we are looking at courts and people enforcing their rights, it should not be seen simply in the context of enforcing a complaint or getting a remedy through a court but in the context of enforcing their rights in a very practical sense on the street.

Q51 **Baroness Ludford:** I am a Liberal Democrat member of the House of Lords. Thank you, all three of you, for your very clear and interesting evidence so far.

I want to ask about the impact on the devolution settlement. I think what has come out of your evidence on the first two questions is, if you like, the added value in Scotland, Northern Ireland and Wales and a feeling that England has been somewhat left behind. The government consultation suggests that a new Bill of Rights will "reflect the different

interests, histories and legal traditions of all parts of the UK". The consultation notes, for example, that in Scotland there is no right to jury trial. Are there any other divergencies across the four nations that you think the Government should be aware of when developing their reform proposals?

Also, what do you think the advantages and disadvantages of the divergences across the devolved nations may be? Do those divergences affect how individuals enforce their rights? There is a bit of repetition there, sorry.

Barbara Bolton: The use of the language "different legal traditions" perhaps underplays the situation. I think most lawyers would recognise that Scotland has a separate legal system. We have separate laws and a separate administration of justice, and there is a real lack of recognition of that broader situation in the consultation proposals. That means that there is no issue per se in a divergence, because we have always had that, and it goes back to well before devolution; it goes back hundreds of years to the founding of the union.

There is an issue, however, if one part of the UK has changes to the law that mean that the people living in that part of the UK do not have the basic minimum protections of international human rights, and that is what we are looking at here. The Government here are proposing regressive measures that would dilute human rights and put up barriers to access to justice. It is not an issue for the devolved nations to go further. I think everyone accepts that.

The UK Government did not take issue with that principle before the Supreme Court in relation to the children's rights Bill, and, as you have outlined, the three devolved nations are all, to some extent, embarking on projects to advance human rights, so I do not think that is an issue. However, the European convention sits within that broader international human rights system and represents the minimum standards that everyone is entitled to, and the concern is about proposals that may be regressive and leave a certain part of the UK with less rights protection than it ought to have.

Also, with regard to the separate legal system and separate administration of justice, there is a range of proposals here that go to the question of access to justice and court procedure. It is unclear whether UK legislation can address that without working with the various bodies within Scotland, but if it can, I query how that will work in practice and I have concerns about the layers of complexity and uncertainty that this would add.

We have no issue with divergence per se as long as the divergence is to go further with human rights, as Scotland is planning to do with the incorporation of a range of other international human rights treaties and standalone rights, rather than regressing from what is a floor or minimum standard for everyone.

Baroness Ludford: Many thanks.

Alyson Kilpatrick: I am not sure I can improve much on what has just been said. I simply remind the committee that the Human Rights Act and the enforceability of direct access to human rights was a key component of the Belfast/Good Friday agreement, and reference is made to that direct access. It can be seen, therefore, as a key component of the peace process itself and certainly of the outworkings of the peace process that are continuing.

Any statement of practical diminution of rights in Northern Ireland will have a damaging impact. It says a lot to the people of Northern Ireland, I think. It is going back on what was committed to in the Belfast/Good Friday agreement and the Northern Ireland Act. The Act itself has played a very positive role in Northern Ireland in relation to the universality of rights and the standard of rights across Northern Ireland when they have fallen behind the rest of the UK. There may be differences, and we would say that in Northern Ireland they are often of a negative nature, in that we have not risen to the same standard as other parts of the UK. Examples would be abortion services and adoption for same-sex couples. They are only now catching up in Northern Ireland.

I also do not accept that the proposals reflect or respect the different traditions, histories or legal traditions across the UK. If they do, they have paid scant regard to Article 2 of the protocol and the impact on Northern Ireland of leaving the European Union. That does not appear to be reflected anywhere in the proposals, so I fear that they have not been given much close consideration, which is one of the most striking differences, perhaps, among the four jurisdictions across the UK.

All I would add on the advantages and disadvantages of divergence is that divergence should be explained only in terms of some parts of the UK maybe getting better or less good at affording full access to rights. There should never be divergence in the rights of people. All people should have the same rights to the same standard. I worry that these proposals would give rise to a difference between people and separate out certain groups for whom those lower standards are all that they can expect. That can never be right. If the proposals achieve that, they will be wrong, unlawful, and contrary to the true spirit of universality of rights.

Chair: Thank you very much for those answers.

Baroness Falkner of Margravine: Madam Chair, I wanted to bring in the devolution implications for Wales—if not now, at a later point. I will be very brief. We think that the changes to the HRA will have implications for the Wales Act 2006 and the competence of the Wales Government. The competence of the Wales Government is defined by reference to the European convention as given effect in the UK by the HRA.

If the Government intend to replace this reference with a reference to domestic rights in a Bill of Rights, this might affect that competence materially, in two principal ways. One is that the power of the Welsh Government and the Senedd is limited by reference to convention rights,

which is the HRA and reflects the HRA, and observing and implementing obligations under the European convention is devolved, in paragraph 10(3) of Schedule 7A. So the obligation applies to all European convention rights "as they have effect for the time being in relation to the United Kingdom", so we do not quite understand how this would play out.

Moreover, the Wales Government, as I said, want to incorporate certain treaties. In addition, earlier this month on 3 May, the Welsh Counsel General, Mick Antoniw, stated that the Welsh Government intend to incorporate all UN human rights treaties the UK is party to into a Wales human rights Act, so they are wishing to move forward in that regard on their own.

Could I briefly address the advantages and disadvantages? We all accept that there is a universality element to human rights, and although the EHRC would generally absolutely respect the devolved nature and democracy nearer to where people live, differential rights create friction. As we have divergences—we do not know yet, but as we look forward—we may well get forum shopping, as we have in so many different areas, and the development of different laws in Scotland, England, Wales and Northern Ireland. I will leave it at that.

Chair: In relation to the Human Rights Act, if you have any examples of forum shopping, could you write to us afterwards? I would be interested in following that up.

Q52 **Baroness Massey of Darwen:** I am a Labour Peer. I want to talk specifically about the Human Rights Act and Northern Ireland. This question is to Alyson. Thank you for your earlier comments, Alyson. Could you briefly outline the relationship between the European Convention on Human Rights and the Good Friday agreement and the wider peace process in Northern Ireland? How would the Government's proposals impact Northern Ireland's effectiveness in drafting its own Bill of Rights?

Alyson Kilpatrick: As I have probably made clear already, human rights and their incorporation directly into Northern Ireland law have been central to the peace process, and to people's acceptance of the peace process, and to transformation and a willingness to make rights universal. Of course, part of the issue in Northern Ireland was that rights were not universally enjoyed. I will leave it at that.

What the Human Rights Act has done already in Northern Ireland is respect rights in a very reasonable and balanced way. The courts and very responsible judges have, in my view, applied rights in a reasonable and balanced way precisely because of the Human Rights Act. There is no reason to get rid of it, given that there is every reason to retain it. One reason, certainly for Northern Ireland's purposes, is that it is central to the peace process. I do not think I am overstating it. You have other witnesses from Northern Ireland who, I am sure, will have a view on this.

It is not just symbolic; it has also had practical effect. There is a duty on the UK Government in the Belfast/Good Friday agreement to incorporate the convention into NI law, and it is an international treaty. There is further still to go, but the Government agreed to do and have done it. Saying that that will no longer be the case, or that it needs to be changed, sends a very dangerous signal in Northern Ireland.

To be fair to the Government, they recognised in the negotiations on leaving the EU how important this was to Northern Ireland—hence the special arrangement that was agreed—and that has not changed. The reasons for reaching that special arrangement and for having the protocol remain, so the Government should be very cautious about overturning any of those earlier commitments because of what it says domestically and internationally. We have a lot of international actors still interested in Northern Ireland and still giving great support to the ongoing peace process.

The fact that there is an enforceable framework of rights, accepted principles and standards that cannot be legislated against by the Assembly is also terribly important, practically and symbolically, in Northern Ireland. We would say that you meddle with great caution. If there is no case for remedy to the Act—we would say that there is not—but there is every argument for keeping it as it is, the Act should remain. There can be no argument or justification for removing it. Please think about Northern Ireland. There is not much reference to Northern Ireland throughout the proposals, so our great concern during the withdrawal process has been set to one side or has changed, although I have not seen any evidence that it has changed.

Chair: Thank you. Lord Dubs will take that point a bit further.

Q53 **Lord Dubs:** Again to Alyson Kirkpatrick, are the UK Government's proposals consistent with their obligations in the Good Friday agreement to provide direct access to the courts and remedies for breaches of the European Convention on Human Rights, and if not, why not? There is a supplementary to that, which you have partly answered. Are the proposals compatible with Article 2 of the Northern Ireland protocol, which requires that there should be no diminution in the protection of rights in Northern Ireland as a result of the withdrawal from the European Union?

Alyson Kilpatrick: It would easy for me to answer that in the absence of more detail it is hard to say, but I think I probably can. I am certainly prepared to take the risk of saying what I think. It is complies neither with the commitment in the Good Friday agreement, nor with Article 2 of the protocol and the commitment in Article 2. It was a commitment to complete incorporation of the European Convention on Human Rights into Northern Ireland law. That has been reinforced in the withdrawal agreement by saying that there will be no diminution, and that in fact it will be keeping pace in relation to six key equality directives. So, no, is my short answer. These proposals do not sit easily with those commitments. I would go as far as to say—I am speaking only on my

own behalf as chief commissioner; I cannot speak for all the other commissioners—that it would be in conflict with Article 2 of the protocol. Did that cover all parts of the question?

Chair: It did, in a very clear way. Thank you very much. Joanna Cherry has the next question. She has joined us from having spoken in the Chamber earlier. Welcome, Joanna. Please put your question.

Q54 **Joanna Cherry:** My question is for Barbara Bolton, and it is about the Human Rights Act in Scotland. In your response to the Government's consultation, the Scottish Human Rights Commission stated that the Government's proposals could unsettle current devolution arrangements. Can you explain in what ways you think the current devolution arrangements could be unsettled by these proposals?

Barbara Bolton: Yes. The important point is that we are concerned about the potential for unsettling devolution because of the inter-relationship between devolution and the human rights framework in Scotland, because the Human Rights Act is embedded into the Scotland Act, and the remit of the competence of the Scottish Parliament and the Scottish Government is set, including with reference to the content of convention rights.

However, those convention rights are defined with reference to the Human Rights Act. That creates a situation that is not given any recognition in the consultation briefing document, such that if there is a change to the content of those rights, at least in terms of how national courts are interpreting them, there could be a knock-on impact in terms of what that means for the remit of the Scottish Parliament and the Scottish Government. Again, that has been clarified and solidified over 20-plus years. We are now in a place where the Scottish Parliament, the Scottish Government, and public entities are all very comfortable with where those parameters are in general; there will always be hard cases.

What we are talking about now is potentially unsettling that principally by decoupling the national courts' interpretation of rights from the European Court of Human Rights' interpretation and that anchoring. Depending on how the national courts approach that—obviously there is a range of options in the consultation paper, and we do not know which ones will appear in the Bill or quite how national courts will approach it when they are given directions as to which sources they should turn to for interpretation—we could see ourselves in a situation whereby legislation that was issued by the Scottish Parliament right now that was found not to be compliant with the European convention rights could then be found to be compliant. However, that would put it in breach of the convention. So you could see Scottish Parliament legislation that is in breach of the convention but without a remedy in the national system, which is problematic and creates a raft of confusion and uncertainty, which could last for many years. Again, that would undermine human rights respect in culture.

There is another risk, which is that we could end up with parallel lines of jurisprudence. At the moment, people in Scotland who are victims of human rights breaches can take claims under the Human Rights Act and/or the Scotland Act. There is a parallel there, but it works because there is no divergence and there are linkages between the two.

If there were to be divergence—again, this is an area where there is real uncertainty, because the UK Government have not set out their proposals in detail—there would be all these questions regarding precedent under previous decisions interpreting the convention rights through the Human Rights Act. Under the Scotland Act, would they follow that precedent or would they depart from that and apply the new line of jurisprudence under whatever replaces the Human Rights Act? Either way, there are no good outcomes. The outcomes, one way or another, are uncertainty and confusion, which undermines the human rights framework.

Joanna Cherry: If the Human Rights Act is going to be repealed, the definition of convention rights in the Scotland Act will require to be amended.

Barbara Bolton: This is it. There is no recognition of that in the paper, and no suggestion that there will be any change to the Scotland Act. If that is workable, we would support that in the sense that it retains the definition of human rights that applies to the Scotland Act and to the competence, but that is unlikely to be workable in practice.

Joanna Cherry: Equally, if you had convention rights under the Scotland Act for devolved matters but different rights under a British Bill of Rights for reserved matters, you would have the situation that Baroness Falkner alluded to earlier whereby people in Scotland whose human rights are breached could look to the ECHR, provided it was a devolved matter, but people in Scotland and across the UK whose human rights were breached in relation to a reserved matter could only look to the British Bill of Rights. Then you would have what I think you called parallel lines of jurisprudence, which could be quite confusing.

Barbara Bolton: Yes, I think it would add another level of complexity to what is already a complex situation, where people are taking claims that concern devolved or reserved matters—again, with the backdrop that any of those cases could end up at the European Court of Human Rights, because the UK is staying in the convention. We would be talking about divergence on the national level and, again, a greater burden on rights holders to pursue their claims all the way to the European Court of Human Rights, which is precisely what the Human Rights Act was intended to address.

Chair: Looking further at the implications of what you have said in those very interesting answers, we go to Lord Singh for the next question.

Q55 **Lord Singh of Wimbledon:** I am a Cross-Bench Member of the House of Lords. Should the Government seek the consent of the Scottish Parliament, the Welsh Senedd and the Northern Irish Assembly before

they reform the Human Rights Act? If so, why?

Alyson Kilpatrick: Yes, that would be more democratic. It would also recognise that there are different potential impacts across the devolved nations. It would give an opportunity for argument on the specific impact on Northern Ireland. Enforceability of the convention has an impact on other law in Northern Ireland, which merits special consideration by the democratically elected representatives of Northern Ireland, who I think would then be able to engage and consult with the stakeholders in Northern Ireland.

There is one caveat to that, which might sound flippant. I have to say, hand on heart, that I would be fearful of asking for consent to improve rights. I almost want it both ways: I want it to require consent so long as I am fairly confident that the four nations will refuse to consent to reform of the Human Rights Act. That is how strongly we feel about it in Northern Ireland. As a matter of principle, Northern Ireland has to be considered, and the Government have suggested that that is what they trying to do: that they are trying to pay due regard to the different traditions across the UK. If that is right, they must listen to the devolved nations.

Lord Singh of Wimbledon: Consent is one thing. It is something else.

Alyson Kilpatrick: Hence my caveat. I am being a bit feeble.

Lord Singh of Wimbledon: You are being equivocal on consent.

Alyson Kilpatrick: I am being equivocal on consent, because I am certainly old enough to think of a number of occasions when requiring consent to certain things initially looked like a good idea but ended up being to everyone's great disadvantage. But if the principle is that there is a serious impact on a devolved nation that has its own representatives and own stakeholders, they must be consulted and their views must be taken seriously.

Lord Singh of Wimbledon: Opinions can be taken seriously and you have been very fair and open about your view on consent. Thank you.

Chair: Shall we hear from Scotland about that? Do you feel there should be consent?

Barbara Bolton: Yes, I would generally agree. They should not reform the Human Rights Act in relation to Scotland without consent. I do not mean to step into political or constitutional matters there. I am very much focused on the remit of an NHRI for the protection of human rights. One of the key ways in which we protect human rights in Scotland is through the Human Rights Act. There is no appetite in the Scottish Government, the Scottish Parliament or across civil society for these regressive reforms. As I outlined previously, not only would this involve legislating in a devolved area on the implementation of human rights, but it could affect the remit, the competence, of the Scottish Government and Scottish Parliament, giving another reason why consent ought to be

sought and why reforms should not be taken forward in relation to Scotland without that consent.

It goes beyond the Human Rights Act itself, because although the project that Scotland has embarked on, similar to Wales and Northern Ireland, is well under way in incorporating other international human rights standards and does not depend in any way legally on the existence or retention of the Human Rights Act as it is, it is building on that foundation. If we undermine that foundation, we could undermine that project in that way. The success of that project depends not only on getting that Bill on the legislative book but, more importantly, creating the space, time and commitment to embedding those rights into Scottish day-to-day life. If we detract from that by unsettling what we already have, that could have a knock-on impact on that broader progressive project, which is extremely important to the people of Scotland.

Baroness Falkner of Margravine: I have explained the Wales situation, so I will not go specifically to Wales, but I have a general response to Lord Singh's very astute question. Essentially, we have an extremely asymmetrical federation in the United Kingdom. Our federalism is deeply asymmetrical, and a lot of the issues that we are discussing today are related to that asymmetry, but it is important for us to remember too that the Human Rights Act is a reserved matter for the United Kingdom. It is a conundrum that the Government will need to address if they proceed with these proposals.

I do not see much of a balance between consult and consent, because I would be very wary of a Government who, having consulted and encountered stiff opposition, were determined to go ahead. Consultation has to be meaningful, and I imagine that persuasion would involve perhaps loftier ideals, a bringing together of the country. That is why we advocate deep consultation, bi-partisan support across Parliament, pre-legislative scrutiny, all those things, because eventually it will prove to be more persuasive than a binary discussion about consult versus consent.

Lord Singh of Wimbledon: But in the end consent implies ,or almost implies, a right to veto. Do you agree?

Baroness Falkner of Margravine: I would, which is why I would caution deep meaningful consultation, but ultimately I also accept that it is a reserved matter.

Chair: Thank you very much to this first panel this afternoon. You have shed a great light on what might be unintended consequences, depending on what is in the Bill that the Government are bringing forward. I would like to thank you for your evidence here today, which will be very helpful for us in drawing up our report. Thank you also for the work that you do on human rights. It is very important work.