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

II: Professor Aileen McHarg, Professor of Public Law and Human Rights, Durham Law School; Charles Whitmore, Research Associate, School of Law and Politics and the Wales Governance Centre at Cardiff University; Brian Gormally, Director, Committee on the Administration of Justice.

Examination of witnesses

Professor Aileen McHarg, Charles Whitmore and Brian Gormally.

Chair: We will now hear from witnesses who are joining us online. We have Professor Aileen McHarg, professor of public law and human rights at Durham Law School. Thank you very much for joining us. We have Charles Whitmore of the School of Law and Politics and the Wales Governance Centre at Cardiff University. Thank you for joining us from Wales. We have Brian Gormally, director of the Committee on the Administration of Justice. Florence Eshalomi will ask our first question.

Q56 **Florence Eshalomi:** I am one of the House of Commons Members on this committee representing Vauxhall constituency. We have heard a lot in the news about the Northern Ireland peace settlement. To Brian first, what impact, if any, will the Government's proposals have on the peace settlement in Northern Ireland?

Brian Gormally: First, thank you for asking us to appear to give oral evidence to this very important committee. To go straight to the peace settlement question, in lots of ways we could see the agreement as a compromise to allow competing national allegiances to share the same geographical and political space. We had power sharing; equal British and Irish citizenship; and bringing together the concept of the all-Ireland exercise of self-determination, with the consent of a majority in the north as a condition for constitutional change.

At the same time, it was necessary to establish a basis of trust in Northern Ireland institutions, whether they turn out to be temporary or permanent—hence the reform of policing and criminal justice and the array of human rights and equality protections contained in the agreement. The word "right" or "rights" is mentioned 61 times in a relatively short text, and trusted institutions require that they are and are seen to be fair to all sections of the community. That is why adherence to human rights guaranteed by an international convention, not just what the Government of the day say they are, is so essential. Any weakening of human rights protections is bound to undermine trust and thereby weaken the peace process.

Can I reinforce what Alyson Kilpatrick was saying about how the Human Rights Act has become written into the very fabric of Northern Ireland institutions? This is most obvious with regard to the police service. The old Royal Ulster Constabulary was effectively disbanded and replaced by the Police Service of Northern Ireland. That would not have meant anything without fundamental reform. The PSNI is directly monitored by the policing board for compliance with the Human Rights Act through a bespoke monitoring framework devised by the current leader of the Opposition—overseen for many years by Alyson Kilpatrick, actually—but not only that: the whole code of ethics of the police is based on the Human Rights Act.

The PSNI is the only police service in the UK that uses human rights as a guide to operational policing. In 2017, the then chief constable said of an earlier attempt to interfere with the Human Rights Act that it would be hugely detrimental to confidence in policing and the confidence of the police to make difficult decisions, and that human rights have been incorporated into our policy and it has become the norm for human rights to guide the decisions we make and the operations activity we undertake.

If we start tinkering with the incorporation of the convention, which of course was a basic tenet of the peace agreement itself, we are beginning on a road to undermining confidence not just in the institutions but in the rule of law as a whole. We have unfortunately several other examples directly related to Northern Ireland and in the Queen's Speech of undermining the rule of law in Northern Ireland, not least the proposals on dealing with the legacy of the past.

As well as the fact that the independent Attorney-General for Northern Ireland has the power, and uses it, to give human rights advice to all the institutions of the criminal justice system, you can see how trusting Northern Ireland institutions depend on them being human rights compliant and, as somebody said earlier, to meddle in this dispensation is to take risks with what is still a fragile peace process.

Q57 **Joanna Cherry:** Thank you for coming to give evidence this afternoon. My question is for Professor McHarg. I want to ask you about what the Scottish Human Rights Commission has said in its written evidence to us. It has highlighted that "compliance with human rights obligations is part of the fabric of the Scottish Parliament" and that the Human Rights Act plays a key part in the devolution settlement in Scotland. What impact do you think the Government's proposals would have on the Scottish devolution settlement?

Professor Aileen McHarg: I will start by setting out the relationship between the Human Rights Act and the Scotland Act, and then talk about the potential implications.

As has already been said, convention rights apply in Scotland via both the Human Rights Act and the Scotland Act. Broadly speaking, the Human Rights Act governs the actions of public authorities other than the Scottish Government operating in Scotland: UK-level public authorities but also local authorities and other Scottish devolved public bodies. The Human Rights Act also governs the interpretation of UK Parliament legislation, whether that deals with reserved or devolved matters.

When we talk about the actions of the Scottish Ministers, the Scottish Government and Acts of the Scottish Parliament or Scottish secondary legislation, they are subject to both the Human Rights Act and the Scotland Act. These are regimes that are partially but not wholly aligned. The tendency is to act under the Scotland Act when you are dealing with Scottish Government or devolved Scottish legislation, but it is up to the litigant to choose. The Human Rights Act acts as a dictionary for the Scotland Act, as Lord Hope put it in the Somerville case. The convention

rights that are protected under the Scotland Act are those that are incorporated via the Human Rights Act. Challenges to the Scottish Government are partially, but not entirely, aligned with Section 6 challenges to public authorities under the Human Rights Act.

The Human Rights Act is also a protected statute under the Scotland Act, which means that although human rights are not a reserved matter in general, no Scottish Parliament legislation on human rights matters can modify the Human Rights Act. It can supplement it, but it cannot change in any substantive way how convention rights are protected in Scots law.

Against that background, changes to the Human Rights Act could have a number of different impacts. First, as far as the Human Rights Act is used as a dictionary, that will have a direct effect on the operation of devolution, so changing the rules on interpretation of convention rights will change the ways in which those limit the actions of the Scottish Government or the competence of Scottish legislation. Similarly, changes to the remedies for breach of convention rights could have knock-on consequences for actions under the Scotland Act.

Secondly, changes to the Human Rights Act could also expand or narrow the legislative freedom of the Scottish Parliament in the area of human rights, so far as it alters the scope of what is rendered beyond competence by the fact that the Human Rights Act is a protected statute.

Thirdly, there is a serious risk of increasing anomalies between the two regimes. One anomaly at present is that the defence that is available under Section 6(2) of the Human Rights Act for a public authority to say, "Yes, I am in breach of convention rights, but I could not act differently because of the provisions of primary legislation", generally speaking is not available under the Scotland Act for actions against the Scottish Government.

Any weakening of the Section 6(2) defence under the Human Rights Act, or whatever replaces it, increases the anomalous position of the Scottish Ministers. Similarly, if the ability to strike down secondary legislation were removed under reform of the Human Rights Act, that would leave the ability to strike down primary legislation in the Scottish Parliament again looking increasingly anomalous, and newer areas of difficulty could be introduced.

Something that occurred to me is the interpretation of devolved legislation. There are currently two interpretive duties. There is Section 3 of the Human Rights Act and Section 101 of the Scotland Act. These are not quite the same. The Section 101 duty is a rather weaker interpretative duty than Section 3 of the Human Rights Act, but if Section 3 is weakened, Section 101 might become more important in practice because it is a stronger interpretative obligation.

There are problems there and, as we heard earlier, there is of course potential for political conflict on the question of devolved consent.

Q58 **Joanna Cherry:** A quick supplementary to that: the Scottish Human Rights Commission also expressed the view that a number of the Government's proposals—including recognising the right to jury trial, introducing a new significant disadvantage test for human rights claims, and reducing damages for the conduct of the claimant—would impact the administration of justice, which is a devolved matter under the Scotland Act. Do you agree?

Professor Aileen McHarg: That is a tricky question. Virtually everything that is covered by the convention rights has a significant impact on areas of devolved competence, but the Human Rights Act is a protected statute. Therefore, although changes to the Human Rights Act undoubtedly could have consequences for areas of devolved competence, I think we would probably have to see those as consequential effects, because what has been changed is primarily the Human Rights Act, which itself is not a matter that is within devolved competence.

If you are talking about adding things to the Human Rights Act—adding protection from trial by jury, and maybe doing new things in the area of freedom of speech—those could very directly engage devolved competence issues.

More generally, as you know, there are two limbs to the Sewel convention. The Sewel convention is engaged where UK legislation impacts on matters of policy that are currently devolved, but it is also engaged where it affects the scope of devolved competence. There is no doubt that because of the way the Human Rights Act and the devolution statutes interact, any changes to the Human Rights Act will have knock-on consequences for the scope of devolved competence. I would be very confident that that second limb of the Sewel convention is engaged. The first limb is perhaps more arguable, and it would depend on exactly what is proposed in the end.

Chair: Before we go to Wales can we double back to Northern Ireland with a very specific question from Lord Henley?

Q59 **Lord Henley:** I am a Conservative member of the House of Lords. Can we go back to the answer you gave to Florence Eshalomi about whether the proposals have an impact on the peace settlement? More specifically, do you think the proposals are compatible with the Good Friday agreement and the Northern Ireland protocol? If not, what should the Government be doing to ensure that the proposals are compatible?

Brian Gormally: First, the commitment to incorporate the Human Rights Act was a central part of the Good Friday agreement. There is no question about that. The point then is to what extent the Government's proposals interfere with that commitment, changing it in a way that undermines the agreement. It is clear that incorporation of the European convention does not just mean listing the rights and saying that they are now part of domestic law. It means that the convention includes, of course, the European Court of Human Rights and its jurisprudence. Incorporation means incorporation not just of the text of the substantive

rights of the convention but of all the jurisprudence that has been built up by the European court and, indeed, since the passing of the Act by our own courts.

Obviously one of the proposals is to interfere with the extent to which the jurisprudence needs to be taken into account by domestic courts, so in that sense, if in no other, there has been a change in the method of incorporation. The agreement does not go into detail about precisely how the convention would have to be incorporated, but we have had the settled experience of 24 years of the method of incorporation into the Human Rights Act.

It is probably common ground with most, if not all, of the contributors today that these proposals would weaken the impact of the Human Rights Act, which is a direct threat to the Good Friday agreement. The Good Friday agreement is not, of course, a legal document; we are not talking about being able to go to a court and to say that this is a breach of the Good Friday agreement and therefore unlawful, but, in the practical real world, having such obvious contempt for a particularly central part of the agreement will be seen as an egregious breach.

When it comes to the protocol, Article 2, as Alyson Kilpatrick has already suggested, provides for no diminution of rights as a result of Brexit. This would certainly be a breach of Article 2, in the sense that it definitely amounts to a diminution of rights that were protected in the Good Friday agreement. There may be a slippery way of saying that this is not a result of Brexit, but if that were held up, you would have the extraordinary position of the Government saying that the rights that are protected in the Good Friday agreement are so important that they have made special dedicated mechanisms in the Northern Ireland Human Rights Commission and Equality Commission to protect the people against any such diminution due to Brexit, but that, whatever, they will diminish those rights anyway.

That is an extraordinary position for a Government to be in who purport to care about the Good Friday agreement and the protocol. Just today, people are making the argument that the protocol is somehow in breach of the Good Friday agreement. It is utter nonsense and based on an invention that cross-community consent was necessary for any constitutional movement. The Good Friday agreement provides for 50% plus one in a referendum to take Northern Ireland entirely out of the United Kingdom. It would be a bit extraordinary if minor constitutional adjustments had to be subject to cross-community consent. It is just not in the agreement. It is an entire invention that there is any contradiction between the protocol and the Good Friday agreement. That may be slightly off subject. I apologise, but I do think it is relevant in the overall context.

Q60 **Lord Dubs:** My question is for Charles Whitmore. The Welsh Government have described the Human Rights Act and the European Convention on Human Rights as fundamental cornerstones of devolution. Can you briefly explain the importance of the Human Rights Act and the convention in

Wales? As a supplementary, what impact do you think the Government's proposals would have on the Welsh devolution settlement?

Charles Whitmore: Thank you for the invitation to give evidence today. I would like to start by saying that my comments today are based on engagement that we have done on these proposals with civil society organisations in Wales such as the human rights stakeholder group and the equalities and human rights coalition, which is convened by the Wales Council for Voluntary Action and across the UK with human rights consortia in Scotland and Northern Ireland and England-based organisations such as the British Institute of Human Rights. These organisations are very much on the front line of human rights in the UK. We have been working with them to try to develop an understanding of these proposals that is reflective of devolution, and I will refer to that work at various points.

The importance of the convention in Wales is multidimensional. Unlike in England, the convention rights are protected, as we have heard previously, both the devolution of settlement and the Human Rights Act. First, if we think in terms of the devolution settlement itself, as we have heard Sections 108(a) and 81(1) of the Government of Wales Act make legislative and executive Acts out of competence if they are incompatible with convention rights. This essentially places significant constitutional importance on the notion and interpretation of convention rights and taken together with the Human Rights Act effectively means you have two means of challenging Welsh Acts that might be incompatible with the convention, and this contrasts quite strongly with the landscape that we have at the UK level where primary legislation could only be subject to a declaration of incompatibility.

We also have Schedule 7A, which makes the implementation and observation of international commitments, including the convention and other international human rights commitments, a devolved matter. I think materially speaking it is accurate to say that the convention and the Human Rights Act are cornerstones of devolution.

I might even go a bit further and use a different analogy and say that they are the bedrock, because over the course of devolution a bespoke Welsh legal landscape for human rights that builds on the Human Rights Act and the convention have been carved out, and the Commission on Justice in Wales found that this has become a crucial part of the Welsh legal and policy landscape. I will give a few examples. We have the Rights of Children and Young Persons (Wales) Measure, which places a duty on Welsh Ministers to have due regard to the UN Convention on the Rights of the Child. We have the Social Services and Well-being (Wales) Act, which contains a similar due regard provision for the UN principles on older persons. It also makes references to the UNCRC.

Its associated code of practice also contains references to the UN convention on the rights of disabled people. More recently, Wales has sought to follow international trends by entrenching the socioeconomic duty from the Equality Act. In a very clear example of building on the

Human Rights Act in Wales, the strengthening and enhancing of Wales human rights work carried out by Professor Hoffman and Diverse Cymru, upon commissioning by the Welsh Government, has recommended that Wales explores incorporating further international human rights instruments like CEDAW and the UNCRPD, which we heard about earlier. Crucially, this is direct incorporation, which is very similar to the duties under Section 6 of the Human Rights Act.

From our conversations with civil society organisations, this approach to building on the Human Rights Act and the convention is having a variety of positive impacts, particularly around the development of a human rights culture in Wales. We have gradually seen more organisations framing their advocacy around human rights, and public bodies mainstreaming human rights into their policy formulation and in their delivery of services. Organisations working with communities have been telling us that more people are talking in the language of rights. We see examples of people talking about their rights when engaging with schools and care homes, for instance.

It is clearly felt that we need to improve access to justice, and I think the Covid-19 lockdown has only evidenced how far we still have to go, but the development of a human rights culture is viewed almost universally in a positive light in Wales. This is a legacy of the Human Rights Act and convention operating in a devolved context. It contrasts very sharply with the proposals that are before us, which organisations agree will inhibit access to justice and wrongly frame this human rights culture as a negative.

Turning to the impact of the proposals on the devolution settlement, it is difficult to say for certain, because there is no thinking in the proposals about how they will operate in the devolved context, which is a significant problem. The devolution settlement has already come under significant strain with what is seen as a trend for legislation to be increasingly passed despite the Senedd withholding legislative consent. It the proposals are adopted along the lines of what is laid out in the consultation, I think it would further fuel the unsettling effect this is having. The proposals have a significant constitutional implication, and the notion of convention rights is materially significant to the competence of the Senedd. The proposals may lead to a substantive departure from how these rights are interpreted domestically and could eventually even diverge from the European interpretation, potentially placing the UK out of compliance.

It seems to me that legislative consent should be requested. However, bearing in mind, as we heard earlier, that the Senedd very recently passed a Motion expressing very grave concerns about the proposals, I think this consent is unlikely to be forthcoming. Again, we are looking at constitutional reform with significant implications for devolution being adopted without consent, and I think this can only have a negative impact on the devolution settlement.

I echo a couple of points that Aileen McHarg made earlier about how there are potentially several more specific uncertainties, odd interactions, what I would describe as outcomes that represent an anomalous constitutional arrangement that could emerge through these proposals. For instance, the proposals to limit the courts to issuing declarations of incompatibility for secondary UK legislation would create that paradox we heard about whereby secondary legislation could not be quashed on human rights grounds but primary legislation of the Senedd could be struck down for incompatibility.

The point was made by Barbara Bolton earlier that if a significant disadvantage test is part of a claim under the proposed Bill of Rights, not only is it felt in Wales that this would inhibit access to justice, but we could end up with two different ways of challenging incompatible acts by a devolution settlement and the UK Bill of Rights. These would engage human rights in quite different ways. You could end up with different levels of access to claims under the Bill of Rights and under the devolution settlement.

I would also highlight some uncertainty around the proposals on proportionality and qualified rights. There seems to be a push to weigh the test in favour of the Government through the provision of guidance to the courts when balancing interpretative tools like the notion of public interest, the will of Parliament and what is necessary, but there is no information in the proposals on how this would operate in reference to the views of the Senedd or if devolved legislation is involved.

The Commission on Justice in Wales has highlighted that we also have a significant access to justice problem in Wales. We still have a lot of work to do to educate and to build confidence around human rights, and adding a permission stage and the notion of deserving and undeserving claimants will probably exacerbate issues on this front in Wales also.

Chair: It seems like an obvious point, but you have made it incredibly clearly, that the more the Government claim that this is a major constitutional change, the more incumbent it is on them to gain the consent of those who are involved in different constitutional arrangements in Scotland, Wales and Northern Ireland. The points you have made are very important, so thank you. Can we turn for our last question to David Simmonds?

Q61 **David Simmonds:** We have just had quite a comprehensive answer in respect of Wales to this question. It is about whether the Government's proposals infringe on areas that are devolved to Scottish, Welsh and Northern Irish legislatures. Would it be possible to identify any specific proposals and specific devolved areas? We have heard quite a lot about that from Charles Whitmore.

Given that direct input to the Council of Europe would be through its congress, where those devolved legislatures are represented, have there been any collective discussions about what representations might need to be made directly in Strasbourg in respect of any of these proposals in due

course?

Charles Whitmore: I am happy to supplement what I said. The most obvious intersection with areas that are devolved is the interpretation of convention rights and the impact this could have on the competence of the Senedd.

The Section 3 proposals stand out for me, and I believe the independent Human Rights Act review work highlighted that the proposed changes in this area came with certain constitutional risks as well.

The Section 6 proposals on the changes to public authorities come under the purview of the Welsh Government and the Senedd in Wales so there is a clear intersection there. There is also some overlap there with the Section 3 proposals on changing how the convention rights can be interpreted. There is a significant lack of clarity about how these Section 3 and Section 6 proposals would work in a devolved context, which I think would create uncertainty for public authorities.

We have the first option of allowing public authorities to act incompatibly with the convention when giving effect to legislation. This was heavily criticised by the civil society organisations we engaged with, because it would not only reduce enforcement of rights but undo progress made in Wales to entrench the human rights culture that I talked about.

The second option keeps the current exception for authorities to act incompatibly with the convention but embeds the proposed Section 3 changes on how the convention rights are interpreted. Of course, as we heard earlier, the implications of this vary based on which Section 3 option, if any, is ultimately adopted. But one proposal here is to repeal Section 3, which would be problematic for devolution anyway, as highlighted by the independent review of the Human Rights Act.

The other, which limits the court's ability to interpret convention rights, depending on the territorial scope of that change, could place public authorities in Wales in the very difficult position of potentially working to different human rights interpretations when they are acting pursuant to devolved or reserved legislation. Of course, if the change applied to both reserved and devolved legislation, we would have a clear intersection with devolved competencies.

Chair: Thank you very much, and thank you to the extremely thoughtful panel who have given evidence to us this afternoon. We have heard across the two panels this afternoon about the positive impact that the Human Rights Act has had in very different cultural contexts in Scotland, Wales and Northern Ireland, as well as in England, it being something that we hold in common, and thereby having a stabilising impact, and we have had a warning about unintended consequences.

We know that the devolution settlements are always fragile and it is very important to consider them carefully before taking action. Both our panels have helped to shine a light on that and that those dimensions are to be considered very carefully before taking action that might undermine

the Human Rights Act or stability in those devolution settlements. Thank you for your expertise and for sharing it with us this afternoon.