

Northern Ireland Committee

Oral evidence: Implications of the Bill of Rights for Northern Ireland, HC 678

Wednesday 11 January 2023

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Watch the meeting

Members present: Simon Hoare (Chair); Sir Robert Buckland; Stephen Farry; Mary Kelly Foy; Sir Robert Goodwill; Claire Hanna; Carla Lockhart; Jim Shannon; Mr Robin Walker.

Questions 1-41

Witnesses

[I](#): Alyson Kilpatrick, Chief Commissioner, Northern Ireland Human Rights Commission; Dr David Russell, Chief Executive, NIHRC; and Colin Caughey, Director of Advice to Government, Research and Investigations, NIHRC.

Examination of witnesses

Witnesses: Alyson Kilpatrick, Dr David Russell and Colin Caughey.

- Q1 **Chair:** Good morning, colleagues, and a particularly warm welcome to Mr Shannon, who joins the Committee in the place of Mr Paisley. Jim, it is nice to see you back on the Committee. I wish everybody a happy new year.

May I welcome our witnesses to this session on the implications of the Bill of Rights for Northern Ireland? We are doing a two-panel session today, and we are grateful to our witnesses from the Northern Ireland Human Rights Commission, who join us first. Thank you for finding the time to speak to us this morning. Let me ask you a very general question. What, if anything, about the Bill should a resident of Northern Ireland be concerned about?

Alyson Kilpatrick: As a resident of Northern Ireland as well as the chief commissioner of the Human Rights Commission, my primary concern is that the commitment in the Belfast/Good Friday agreement to complete incorporation of the convention, with direct access and effective remedies, is undermined. Albeit that the convention rights may still be there, what follows in this Bill is a qualification of many of them, and a restriction of the courts' powers to enforce them and give them their full effect. I think there is quite a clear case that they are diminished. Clearly, there is a political part to that, but from analysis of the Bill compared with the position under the Human Rights Act and the commitment in the Good Friday agreement, my primary concern is that my rights will not be as protected as they were.

- Q2 **Chair:** Could you give us an example of somebody who has done something under the current arrangements that they would not be able to do under the proposed arrangements?

Alyson Kilpatrick: Various people, including Lord Mance and Lady Hale, have used cases from Northern Ireland—in fact, the Northern Ireland Human Rights Commission's cases on abortion and on same-sex adoption—as examples of things that would not have happened under this Bill but did happen under the Human Rights Act.

Colin Caughey: In re P, a case from 2008 relating to adoption by unmarried couples, the House of Lords acknowledged that it was within the margin of appreciation, but they felt that the provision was in breach of article 8 and found non-compliance, and that led to legislative change. From our reading of it, that would not be permissible under this Bill.

- Q3 **Chair:** My hunch is that your assessment would be that this Bill is inconsistent with the recommendations of the independent Human Rights Act review panel.



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Alyson Kilpatrick: Yes. I am sure you have heard lots of people's analysis of that independent review, but it quite clearly is going in a very different direction from this Bill.

Q4 **Chair:** If you were to put a percentage on the inconsistency, what percentage would you attach to it?

Alyson Kilpatrick: The percentage of inconsistency?

Chair: Yes.

Alyson Kilpatrick: Just how inconsistent do I think it is?

Chair: Yes.

Alyson Kilpatrick: My primary concern is that it undermines fundamentally one of the most important principles of convention application, which is universality. I think it misunderstands the issues that it is trying to address, and it constrains judges from doing what they do best, which is acting independently.

Q5 **Chair:** Clearly, you take a keen interest in this issue, and you have possibly had a look at other parties' responses to the Government during the consultation. Do you think the Bill reflects those consultation responses?

Alyson Kilpatrick: I don't. I haven't read every single consultation response, but I did try to pick out some of the most favourable and some of the most anti, if I can put it that way. Colin has all the percentages to hand, but I think only 3% of consultation responses considered amending section 3. Is that right?

Colin Caughey: Yes.

Alyson Kilpatrick: That suggests that the Bill doesn't reflect those responses. Do you want to add to that, Colin?

Colin Caughey: In the Government's own report on its consultation, it records that 79% of respondents preferred no amendment to section 3 of the Human Rights Act, yet the Bill abolishes section 3. Only 2% thought that the obligation on a Minister to make a statement of compatibility should be amended, yet, again, the Bill proposes the abolition of that obligation without a replacement.

Q6 **Chair:** On the presumption—it may be an erroneous presumption—that people and organisations that take part in consultations are people of good will and well meaning, why do you think some people support the Bill? Could I encourage you to look at it from the other end of the telescope?

Alyson Kilpatrick: I can give you my personal opinion, which doesn't matter terribly much, but Sir Peter Gross's view was that people needed to understand how the Act actually worked in practice, and not how they had been led to believe it worked. I am not laying blame at anybody's door, but he recommended education and civic engagement. I think that



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explains a lot of negative response to the Human Rights Act. When we go out as the commission and meet members of the public, they are concerned at how limited the convention is, how limited the Human Rights Act is in its application, and how fundamental and basic the rights are. They often think there are greater rights in there, or that they work to other people's advantage and not their own. When you explain to them that the courts do not interpret it that way, they are surprised and pleased.

- Q7 **Chair:** Dr Russell, is that your view? I am always conscious that when somebody is on screen and we have two witnesses in the room, the poor devil on the screen can get overlooked. Let me bring you in on the same question.

Dr Russell: The point that the chief commissioner makes around education is probably key. We see misunderstanding of the Human Rights Act and its application in Northern Ireland. A significant amount of the commission's time over the years, practically, on the ground, has been spent on the application of rights in practice and misunderstandings of them.

- Q8 **Chair:** Let me ask you this—it is not quite the mark-your-own-homework question. I take the point entirely that a lot of people have made the HRA the bogeyman on the statute book and ascribed everything to it—the weirder the decisions, the better, almost. Why haven't organisations and individuals stepped up to that educational challenge to improve understanding of the HRA and its importance, on the presumption that, at some point, somebody must have thought there was going to be some sort of pressure for reform?

Alyson Kilpatrick: The point is a really fair one, and organisations such as mine bear some responsibility for this. Whether it is through our ability, capacity or whatever, I am not sure we have managed to bridge that gap quite as successfully as we should have. We at the Human Rights Commission are very focused on doing that this year, and in coming years. However, for all organisations and public services, money is tight. Sadly, something that should be a top priority often gets squeezed when other things are more immediate and direct. We are very determined to change that—

- Q9 **Chair:** It is a bit late, isn't it?

Alyson Kilpatrick: I think lots of people have tried, but I suspect there has not been enough of a joined-up commitment.

Also—this is not directed at anyone in particular—there is quite an aggressive and successful campaign by the media and others who have access to the press, to social media, etc. That can carry a lot of weight. It takes so much more to educate out of that sort of mindset.

- Q10 **Chair:** To play devil's advocate slightly, do you and like-minded colleagues not also have access to social media and the press? Surely one of the principal purposes of a commission such as yours, and like-



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mindful bodies, is to sell the benefits of the product, not just sit there slightly passively while opponents hammer down.

Alyson Kilpatrick: And we do. As I say, I am putting my hands up with all honesty and saying, "We could do more." As for whether we could do it with our current capacity and resources, I am not so sure. We do use social media, and we have a very good director of communications who uses it very well. I go to all sorts of events as often as I possibly can. Evenings and weekends are often taken up attending events and trying to talk to people and explain to them.

We are a strange organisation, in the sense that we sit between the Government and the public. We are set up to be critical—almost to be that critical friend. Social media can be quite dangerous. Often, particularly in Northern Ireland, you can get dragged into all sorts of arguments you do not really want to get into.

Chair: We are all aware of that.

Alyson Kilpatrick: We have to be careful. We have a very small education team, and we would like to expand it. I am very conscious of the point you are making. It is not that we have not done it, or that we are not aware that we have to do more, but I have to admit that we have not been as successful as I would like.

Q11 **Claire Hanna:** Thank you very much for your evidence, and for being with us. We will hear later this morning from Baroness Hale, who has said that the Bill of Rights Bill represents a reverse of what the Belfast agreement contemplated. Do you agree with that?

Alyson Kilpatrick: Yes. You would be a bold person to disagree with Baroness Hale, but even without that, I do. It is important to remember that the Belfast/Good Friday agreement was not just premised on there being some sort of incorporation of the convention; the convention represented something that was other. It was 47, then, member states that agreed on what the standard should be across Europe, and there is comfort in Northern Ireland in the fact that somebody else was determining the standards, and that they apply to everybody equally—convicted person, accused person, victim. This has changed that fundamentally; I think that is the concern.

There was something very special—magical, almost—about connecting to the convention. It is not just the words; it is how the convention is enforced in an independent, honest-broker, third-party way; that was key. It is dotted throughout the Belfast/Good Friday agreement, and every time I go back to it, I am surprised at how good it is, how many really good references there are to human rights, and why they are there. So, yes, I do agree.

Q12 **Claire Hanna:** You have given a few examples of areas that would be affected. Notwithstanding the legacy Bill, are there particular implications for access to justice in relation to the conflict you see with this Bill?



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Alyson Kilpatrick: Yes. I think you have heard and will hear more about this—without taking up too much of your time—but there are clearly access to justice issues, because it specifically intends to limit access. The reason for that is that it is believed that too many people have used, and have abused, the rights of access that they had. I do not necessarily accept that. I do not say that there could not be a case like that, where somebody tried to abuse the system, but courts are pretty good at getting rid of those cases.

I will not use today to talk about the legacy case, other than to say that this curbs positive obligations, and that clearly is a positive obligation under article 2, which requires the independent investigations. That is maybe for discussion on another day, but it will be directly affected by this.

Q13 **Claire Hanna:** What engagement has the commission had with both the Government and the ad hoc committee on a Bill of Rights in the Assembly, as was? I am not sure how active that was.

Alyson Kilpatrick: I will ask my chief executive to come in on engagement with the Bill of Rights committee in a second, because before my time he did quite a bit of that. We have not really engaged with the Government on this Bill; we have made our views known.

On a previous occasion, I said the engagement was not as we would have liked it. I want to acknowledge that recently, in relation to the legacy Bill, there has been a lot more proactive, constructive engagement, which we really appreciate. The Secretary of State came to see us, we had a good conversation and aired all our points, and I am following up with officials regularly. That has been a real improvement. In relation to this Bill, that has not happened, but we would welcoming it happening again.

In terms of the ad hoc committee, the commission obviously started the ball rolling with its advice on a Bill of Rights. David, could you come in on this? David was very involved in advising the committee, but in the absence of a panel of experts, they reported but were then not able to agree on content.

Dr Russell: The Committee may already know that the commission was quite active in calling for the creation of the ad hoc committee to take the debate on the Bill of Rights forward. We provided our advice under the terms of the agreement back in 2008. We were critical of the fact that it had not really been subject to a significant level of political scrutiny, although everyone had their position on the advice. We worked closely with the committee, both behind the scenes in private sessions, as it worked through each element of its report, and by providing evidence in public. If you like, you can see the report. Obviously, the ad hoc committee references the work that the commission undertook with it.

I feel that the commission was quite instrumental in that work. From our perspective, it was useful engagement with the five Executive parties. We had really constructive engagement with all the parties involved in that



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committee, both at an individual level and collectively. It was unfortunate that they were not able to reach a consensus report in the end, but from our perspective, the level of engagement, the serious interrogation of human rights, and the proposal for a Bill of Rights were evident throughout the work of that committee.

Claire Hanna: Thank you. Do you want to add anything, Colin Caughey?

Colin Caughey: On the commitment in the Belfast/Good Friday agreement for the Northern Ireland Assembly's competence to be linked to the European convention on human rights, there is a concern, which has been raised by Lord Mance and others, that the Bill could open up divergence between jurisprudence at European Court level and in our domestic courts. That will pose a challenge for us an organisation with a statutory responsibility to advise the Assembly; you could have two divergent lines of jurisprudence in relation to human rights protections. The question may arise of whether the Assembly should follow what our domestic courts say, or go with what the European Court of Human Rights has decided.

Q14 **Jim Shannon:** It is really nice to see you, Alyson—and you, Colin, in particular; we go back a long way. I apologise in advance, but I have a meeting with the Immigration Minister at 11 o'clock, so I have to be away. I have asked the permission of the Chair. When I leave, it will not be because I have fallen out with you. Whatever you may say, it will not have offended me.

The Government have been very clear in the Bill's impact assessment that they intend to keep the convention rights enshrined in UK law. First, is this consistent with the Belfast or Good Friday agreement?

Secondly—this second question is probably the one I really want to try to thrust upon—do the proposals diminish rights under the European convention on human rights that have been incorporated into Northern Ireland law? Those are my two questions; they will not be too hard to answer but I hope you give me the right answer.

Alyson Kilpatrick: Yes, in my view it does diminish rights and protections in Northern Ireland, and contrary to the Belfast/Good Friday commitment. I am going to let Colin say a little more on that.

Colin Caughey: If you take in particular the issues of positive obligations, at clause 5 it effectively places a requirement on our courts not to create any new positive obligations. Lord Sumption in particular has been heavily critical of this aspect of the Bill. Positive obligations are central to the enjoyment of human rights. The way that the clause defines a positive obligation is as "an obligation to do any act"—a public authority doing any act. The idea that human rights can be delivered without action by a public authority is quite a strange notion for anybody who has studied human rights in detail. There are serious concerns about the way the Bill is attempting to limit positive obligations. They are central to Strasbourg jurisprudence and have been central to our own jurisprudence in Northern Ireland and throughout the UK.



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As a general point, there are significant concerns in terms of the divergence that will occur between UK court jurisprudence and European court jurisprudence. In our analysis of the Bill, it is difficult to see how that will go, but it is clear that divergence will appear, and will be allowed to appear, under the Bill of Rights. That will lead to conflicts between our courts and, presumably between the UK Government and the Council of Europe, and the question as to whether we have actually incorporated the convention or not will come to the fore.

Q15 Jim Shannon: Have you had any opportunity at this stage to gauge the opinion among the five major political parties in Northern Ireland?

Alyson Kilpatrick: Not any sort of detailed engagement, but we have raised it. It has been slightly complicated by the fact that every time we get ready to do that, there is an indication that the Bill maybe is not proceeding. That has happened a couple of times. Now that we know that it definitely is, we are going to have to go back and really engage again on it. Certainly most of the feedback I have had from the political parties is that there are concerns about this—sometimes different concerns and for different reasons.

Jim Shannon: That would be my perspective as well. I think there are concerns: how far-ranging they are may differ from party to party, but there is a central core of concern.

Q16 Claire Hanna: What discrepancies might these proposals create for protections north and south?

Alyson Kilpatrick: In a more general sense, the south obviously has essentially the same thing. It has a Human Rights Act—the 2003 Act—which incorporates or gives direct effect to the convention in Ireland. So it will continue to keep pace with Strasbourg jurisprudence; in the north it won't. That is going to have quite a quick effect on rights—certainly on rights satisfaction. It is probably going to affect most things you can think of, some sooner rather than later; for others, it may take a long time before we really start to see them. There can be no doubt that there will be an effect. I cannot anticipate whether some of that might be positive—who knows?—but there is certainly going to be an effect and it is certainly going to be different.

Claire Hanna: Thank you.

Q17 Stephen Farry: Good morning, everyone. First, let me just pick up the point about the Good Friday agreement specifically. I suppose, Alyson, this takes you back to your policing board days. Policing reform under the agreement and criminal justice reform were very heavily predicated on the foundation of the European convention and the subsequent Human Rights Act. Do you foresee any potential difficulties specifically in those areas, if some of the understandings and commitments are unpicked?

Alyson Kilpatrick: This is possibly one of the most troubling areas, actually. I did have the privilege of being at the policing board and seeing up close what difference this made to policing—from the police themselves



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and from those who are policed, and I saw it at the policing board as well. It was not always smooth, but it should not be: there should be a tension there in the Human Rights Act.

Every senior police officer that I spoke to said that, once they had got their head around it, the Human Rights Act had created a clear pathway for them to make decisions—the difficult decisions. The way they always used to say it was, “At 2 o’clock in the morning, when my head’s fried, I go back to the Human Rights Act and the balancing exercise and the stages I have to follow.” None of them want to see the Human Rights Act amended, let alone repealed.

Sir Hugh Orde, for example, still speaks very highly of how the Human Rights Act improved policing and made it easier for the police. George Hamilton, the former Chief Constable, said the same thing. In the last couple of weeks, the chief constable of Staffordshire, Chris Noble, who was PSNI, said exactly the same thing in an interview with Joshua Rozenberg: it has helped to ease their path and has made their life so much easier.

As you will recall, the Human Rights Act was central to police reform, which was central to the peace agreement, which was central to everything that followed. My job was to ensure compliance with the Human Rights Act. If there is anything less specific or direct than the Human Rights Act, it would be very difficult to do that job. I had a piece of UK-wide legislation against which I could measure police performance. They have built up everything they do, from their training, their policy, their operational practice, their briefings and their relationship with the community, on the Human Rights Act. They are so comfortable with the language of human rights, and the Human Rights Act in particular. If you take away that framework—that underpinning that they have and are so comfortable with—I don’t know what you replace it is.

Don’t take my word for it; ask any senior police officer, but also ask rank and file officers. They maybe struggled a bit more at the start because they struggled a wee bit sometimes with common sense, but when they get used to it, they like it, they are proud of it, they are professional, and they recognise they are human rights champions. That is what the Human Rights Act says, and they are rightly proud of it.

Q18 Stephen Farry: Thank you very much for that. I am not sure if your colleagues want to come in on that point, but that was fairly comprehensive. Can we turn to the issue of access to the courts and your concern about the potential loss of direct access and uncertainty? Can you comment on the potential loss of jurisprudence to reflect changes, in terms of societal developments?

Alyson Kilpatrick: I will go backwards. On societal developments, people often say that the convention and its jurisprudence are living instruments. All that means is that they can respond to changing times. All the democratic member states can agree what the changing times require. Sometimes we will be ahead and sometimes others will be ahead. It is a forum for democratic agreement about what society requires and how the



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times have changed. We will lose that. This Bill pretty much suggests that we stay where we are or go backwards. That troubles me, because it immediately pitches the Government against public opinion, particularly if society or conventions change.

The other point was access. I will let Colin follow up on this, because I know he is doing a lot of close work on it. In terms of access, it is not just that the actual access into a courtroom and for a judge is diminished, which it is; it is that your ability to argue what you can currently argue is diminished. Courts are told what they can and can't take into account and that some things have to be given greater weight than others. They have to take account of some things and block others.

Although it has a superficial attraction—we all balk at the idea of really violent criminals having rights, if it was one of our family members affected; I understand that as much as anybody—if human rights are not universal, including to those people, they mean nothing. There is a difficulty the minute you single people out and deliberately narrow the groups of people who have access to courts to rely on human rights. In my view, that is a very difficult development. Who decides who is and isn't worthy? It goes beyond simply those convicted, but even they must be protected. They still have human rights. In my view, the beauty of human rights is that they apply to everybody regardless.

Colin Caughey: On access to the courts, one of the objectives of the Human Rights Act was to bring rights home so that people wouldn't have to take their cases to the European Court of Human Rights. The Human Rights Act has been incredibly successful in that. Since 2017, the number of cases brought against the UK per 100,000 inhabitants has been the lowest among all the states. At the minute, we have access to our courts, and our courts are able to take decisions that are in line with the European convention on human rights. This Bill, if enacted, will create a divergence, so to get that redress as issues emerge, people will inevitably have to go to the European Court.

Q19 **Stephen Farry:** Just to tease out that point about the European Court in a bit more detail—you are saying that there may be more cases that end up ultimately in the European Court that would otherwise previously have been dealt with domestically. Talk us through some of the barriers and obstacles that people have, both in terms of the timescale to get access to Strasbourg, and the barriers in getting a case accepted by the Court, which is obviously dealing with cases coming from across the Council of Europe area.

Colin Caughey: It is costs and time—the legal costs that would be involved in exhausting your remedies in the UK and then having to bring a further case to the European Court. The impact of that on the litigant would be significant.

Alyson Kilpatrick: It is also a very different jurisdiction. The courts in the UK determine disputes between parties. That is not really what the European Court of Human Rights does. It is the ultimate review court. It is



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looking at compliance of the state with convention rights. That is very different. If I was about to be dispossessed of my home and I wanted to argue that that was unlawful, firstly, it would take me too long to protect my home, but it wouldn't really do anything for me, even if I got to Strasbourg and they agreed with me, because it is not reconciling the dispute I might have with my landlord or my public authority that is affecting me. Aside from the time and the cost, it is not a remedy in the same way in most cases.

You mentioned policing. What I wanted to say is that a really key thing to remember is that the Human Rights Act—this is how the police see it—protects police officers, and they are using the Human Rights Act more and more to protect themselves on duty and off duty. Much of the work the Policing Board now does is looking at how it helps police officers. This Bill will erode some of that, in my view, because it is not clear to what extent it applies.

- Q20 **Sir Robert Goodwill:** Thank you very much, commissioner. Your very first comment in this evidence session answered my first question, which was regarding the Bill of Rights complying with the commitment to the non-diminution of rights in article 2 of the Northern Ireland protocol. I think you were very clear on that. You also went on to say that you are having good engagement with officials.

Did the Government consult you on the compatibility of the Bill of Rights with article 2, as per your function as part of the dedicated mechanism, and did you very quickly make your views known?

Alyson Kilpatrick: No.

- Q21 **Sir Robert Goodwill:** They didn't consult you.

Alyson Kilpatrick: They didn't consult us, no.

Sir Robert Goodwill: I think I can stop there.

Chair: For a Yorkshireman, that was even pithier than we might have expected, Sir Robert. We are very lucky to have a brace of Sir Roberts on the Committee.

Alyson Kilpatrick: I am about to be corrected.

Colin Caughey: No, no—just to say we responded to the consultation that the Ministry of Justice initiated on it and raised the issues there, but the Ministry of Justice has not come to us to request our advice in relation to—

- Q22 **Sir Robert Goodwill:** Did that surprise you—that you were not on the list of people that they should contact, rather than that you would put in a response to the consultation?

Alyson Kilpatrick: I think it disappointed us, given the reason we have been set up. I do understand that they are busy and that they have different priorities and so on, and they put it out for general consultation. I understand that, and we do our job, but it is disappointing and maybe a



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little surprising on something like this, because all we want to do is be constructive.

We will disagree at times—of course we will, because that is the point of us: to be independent and advise when we disagree—but we do want to be constructive. I think we could have helped, and we certainly were willing to help with some of this.

- Q23 **Chair:** Was it an oversight or was it deliberate? You are part of the dedicated mechanism. Have you been consulted on things before or was this part of a pattern?

Alyson Kilpatrick: In a lot of our submissions and advice and letters, we do keep asking for people to remember that there is such a thing as the dedicated mechanism in article 2 of the protocol and that we are in a position to advise on it and particularly look at compatibility.

I don't know. I don't want to speculate, but it is certainly a recurring pattern. So we haven't been actively consulted on anything to do with the protocol. One does begin to think that maybe that is deliberate.

- Q24 **Chair:** It is more conspiracy than cock-up.

Alyson Kilpatrick: I am not going to speculate on that. What I will say is that recently, certainly in relation to a very difficult area about which we have disagreed—legacy—there has been much more active consideration of our views, but not on the dedicated mechanism side of things, and not on this Bill. But we are still hopeful that we can continue.

- Q25 **Sir Robert Buckland:** To develop that point, the Government did say on publication of the Bill that they would engage in a wider consultation, but as we do not know when the Bill is getting its Second Reading, it might be months before we get there, so there is hopefully still time for them to consult.

Alyson Kilpatrick: We have made our views known, but we could certainly sit down and go through more of the detail.

- Q26 **Sir Robert Buckland:** On that point of detail, obviously the Human Rights Act itself and reform or replacement of it is a matter for the UK Government—there is no doubt about that—but those of us who are close to the issue know fundamentally about the legislative consent motion procedure and the question there. With regard to the future, what impact do you think this Bill would have on the legislative competence of the Assembly if it became an Act, bearing in mind its other roles in the passage of legislation and the assessment test—the compatibility test—that has to be made with regard to the convention?

Alyson Kilpatrick: At the very least, it is going to be messy. It is going to be very difficult to know what advice to give, because it is going to be very difficult to know what standards we are actually applying and which court we are supposed to be following when looking at those standards.



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I think the Assembly will similarly struggle to know what it is that gives them competence or takes away their competence—who do they listen to? At the minute, it works out pretty well. I know there are times when it can seem complicated or whatever, but on balance, it works out really well, I think, and the Assembly is very comfortable now with the convention and how it works in relation to competence. Colin, you have been doing quite a bit on this.

Colin Caughey: The Bill of Rights will amend section 98 of the Northern Ireland Act, so effectively, while we are now having regard to jurisprudence under the Human Rights Act, we will have to have regard under the Bill of Rights. As I said, divergence can emerge, but also the Bill of Rights Bill is introducing quite a bit of uncertainty in terms of some of the language that it uses and how this will be interpreted. I think the instant impact will be a lot of scratching of heads and wondering what the various duties under the Bill will mean in practice, so while we have a very settled position at the minute in terms of the Human Rights Act and very mature jurisprudence there that gives us a solid basis upon which to advise the Assembly, we will be moving into an unknown framework that uses terms that we are not all that familiar with and that are somewhat unprecedented.

Q27 **Sir Robert Buckland:** I suppose, to put the Government's case, they would say that they are in effect cutting and pasting the convention and bringing it into a schedule to the Bill—what's the problem? The second argument is this: if there is a divergence, my worry is that the divergence could actually create a whole set of domestic UK rights that go well beyond Strasbourg. That might be good in some respects—people might welcome that—but the dichotomy could be in that direction. I know people have said that there might be a diminution, but equally there could be a divergence in a different direction, depending on the complexion of Government.

Alyson Kilpatrick: There could, but there could already. If the UK Government wished to give increased rights to people over and above what Strasbourg would require, it can, and in fact it has in some cases. In some of the cases I referred to right at the start, the UK Supreme Court leapfrogged over what Strasbourg was saying at that time, and then they caught up and followed the UK Supreme Court in the end.

But in relation to simply appending the convention, that was the method used in the Human Rights Act. This was clearly intended to change that. To be fair, it is very clear: this was intended to make a huge difference, to repeal the Human Rights Act, so if it does not really make a difference, I struggle to understand why. I do not think I need go much further than that. It detaches the convention, yes, but what it says along with that is, "When you're reading the convention, don't follow the court set up by all the member states to interpret the provisions of the convention; in fact, disregard some of what they say. Don't keep improving or going forward in step pace with the European Court of Human Rights if you disagree." However, they can already do that—the Supreme Court can say, "No, we're not going to", and has done.



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It is a difficult answer to give. On the one hand, I want to ask what this is trying to achieve, because it really makes no difference—what is the import? Just leave it as it is, because Sir Peter Gross says, it is working pretty well.

On the other hand, this clearly means to change things. It says that it is rebalancing, but I suppose the beauty of the convention is that it has already worked through most of the balancing exercises. Public authorities also have to go through the balancing exercises, and are comfortable with them, and the police go through the balancing exercises and, it seems to me, make very mature decisions. So, I am not sure where this is going.

Of course, the Government are entitled to put this forward, but if I take it on its face, I confess that I do not fully understand the sense of it, how it is going to work in practice, other than it will diminish rights protection. By design, it is writing in qualifications on what courts can do with an international obligation.

- Q28 **Sir Robert Buckland:** Here is another argument—what would you say to this one? What the Government are trying to do is, in effect, to say to Strasbourg through domestic legislation, “Look, there is a margin of appreciation. We want to fill it in this way”—for example, that the UK Parliament thinks jury trials are very important. I know that in Northern Ireland that is a much more nuanced issue, bearing in mind the history that we all know about, but the British Government are trying to say, “Look, Strasbourg, certain things are really important to us. If you end up with cases that will cast question marks over”—for example—“jury trials, note the fact that in this Bill of Rights we are saying that they are very important.” What would you say to that, as a seemingly noble attempt to try to fill a margin of appreciation?

Alyson Kilpatrick: I understand that trial by jury is one of those quintessentially UK things—judgment by peers—but there already is trial by jury. The European Court of Human Rights has already said that that can certainly be part of a right to a fair trial. All this says is that a jury hearing is part of a fair trial; it does not say that there is a right to a jury in all circumstances. Northern Ireland is a good example: Northern Ireland has not been found to be incompatible with the convention, but many cases are held without a jury. This will not change that.

Again—I would say this maybe—if they want to add rights and to enhance rights’ protection, I will certainly not argue against that. In terms of them going further, however, I think that is much more of a political decision. In my view, the margin of appreciation is already protected in the way the jurisprudence works. The European Court of Human Rights is very mindful of the margin of appreciation and, if you consider the variety of states that have come together to agree the general principles, they are very diverse. The margin of appreciation has a lot of divergence among member states. The European Court of Human Rights is very conscious of that and allows member states to do what they do best, but there have to be limits—that is the way I have always looked at it.

Sir Robert Buckland: Thank you.

Q29 Mary Kelly Foy: What impact do you think the repeal of the Act and all the reforms in the Bill will have on confidence in public institutions in Northern Ireland?

Alyson Kilpatrick: It does send out a worrying signal. Among the people of Northern Ireland whom we have spoken to—obviously, we cannot speak to them all, but the ones we have spoken to—and the people as reflected in debates with Liberty or any of the organisations that consult the public on this, there is a concern that this is the Government saying that rights are no longer valued in the same way or, certainly, that rights are no longer universal. That could be initially attractive to some people, because it seems to affect only the bad people—"We needn't worry, because we're not the bad people"—but I am not sure that it does limit it in that way. It opens the door to playing favourites—"Who's worthy?", and, "Who isn't worthy?"—and to something other than your humanity making you worthy or unworthy. That is the fear people have. The public in Northern Ireland, I think, are fearful that this means that the Good Friday agreement is somehow being revisited or ripped up as well.

For a lot of people, if you ask them what is concerning them, this will not even be on their agenda. If you speak to them about it, however, and say, "This is what's proposed. What do you think?"—I am being fair; it's not just my spin on it—people do get concerned. They wonder what the logic is. They wonder what the proposal means for them or for others.

I recently met a woman who was a huge opponent of the Human Rights Act until her son was arrested by the police. She came to the Human Rights Commission and said, "I am so sorry. I never believed I would need this, but I do." Liberty have a very good section on their website, which goes through all those cases of members of the public who have been assisted by the Human Rights Act—all those inquiries. Even if the public aren't concerned at the minute, it is for people who know what the proposal means to be concerned on their behalf. Even if the public like this, I feel it is still my duty to say there are concerns about it and this is not the direction human rights are supposed to be going in.

It is not the commitment that the Lord Chancellor says it is. He says it is a commitment to enhance rights. This Bill doesn't do that, so if he is committed to enhancing rights, I think he does need to reconsider what is in this Bill, whether the public are aware of it yet or not. I think they certainly will become aware if this Bill is enacted.

Colin Caughey: One of the concerning elements of the Bill is clause 3 read with clause 12, which removes the obligation on public authorities to read legislation compatibly with human rights. This obligation, contained in section 6 of the Human Rights Act, has played a fundamental role, I think, in embedding respect for human rights in public decision making.



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Alyson Kilpatrick: It was what made the difference to the police. Section 6 was what made the difference to the police, and then the courts—2 and 3.

Colin Caughey: Yes. When we have been advising on the development of new public authorities, we have often taken reassurance from the fact that that commitment is there in section 6. If that is going to be done away with, that reassurance will no longer be there, and the public will be aware of that and no longer have the reassurance that the Human Rights Act provides.

Mary Kelly Foy: Interesting—thank you.

Q30 **Chair:** To come back to Robert Buckland's point about the lack of a clear timetable being set by the Government for the Bill, it doesn't take a great rocket scientist to work out that most people across the country are anxious about how they are paying their bills, the cost of living and so on. Then you have the protocol, the political instability, the lack of Stormont and so on. Is it your hope that given the non-determined timetable, those circumstances might change and so more bandwidth of public attention might be applied to analysing these proposals? This is picking up your point, Ms Kilpatrick, that a lot of people say, "Well, the Human Rights Act only helps criminals avoid sanction, court and so on," whereas in fact it can be very helpful to people—possibly sitting in their front rooms this morning—who don't realise they may need it.

Alyson Kilpatrick: Yes. I am hopeful, but it is going to have to go with that civic engagement and education.

Q31 **Chair:** Going back to the point that we opened the session with, are you, Liberty and other like-minded colleagues now setting a strategy in place to maximise the window of communication, to bring those arguments to a wider audience within—

Alyson Kilpatrick: This is where I have to check myself and keep reminding myself that we aren't Liberty; we aren't a campaigning body.

Q32 **Chair:** I appreciate that, but you can be an educating body.

Alyson Kilpatrick: Yes. Our strategy is to maximise our ability to educate, and to educate in line with our commitments under the Northern Ireland Act—that's on human rights—and to create a human rights culture. Unlike Liberty, we will advise that the Government is entirely correct sometimes.

Q33 **Chair:** Liberty might do that. I don't think they have ever availed themselves of the opportunity hitherto, but they could in theory do it.

Alyson Kilpatrick: You are absolutely right. In fact, Liberty have, in relation to religious expression. I didn't mean it quite that way; I expressed it poorly. We will actually advise Government on how to achieve at an early stage—often something that others may criticise.



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We will do what we can. It's a question of trying to get across the message that the cost of living and all the issues that go with that—waiting lists in hospitals, care homes, policing, children and young people—involve human rights issues. It's about coming back to people to say that with a human rights approach, which is what we advocate—going back to the Human Rights Act—you look at all those things through the eyes of human rights.

Human rights are absolutely affected by somebody living in poverty. They are affected by somebody without a home. They are affected by a person being in an ambulance outside a hospital for 12 hours. Those are all human rights issues. It is connecting the real, day-to-day stuff that we have been desperately trying to do. Certainly, that is my mission. If I do anything at all in this role, it will be to make human rights practical, effective, and felt by the people who deserve them. When I say "deserve", I mean everybody—all of humanity.

Carla Lockhart: Thank you for your presentation thus far. I apologise, Chair; I think Jim has already asked, but I have to go to the same meeting that he is attending.

Chair: Yes, indeed.

Q34 **Carla Lockhart:** In Northern Ireland, sometimes, there can be a bit of a perception that there are greater rights for certain communities, and that they are of greater importance. Do you feel that cognisance needs to be taken of the fact that the Unionist community often feel that their rights maybe aren't as well legislated for? Do you feel that there needs to be reform around that element?

Alyson Kilpatrick: What I accept, absolutely, is that many people from the Unionist community feel that, certainly, human rights do not reflect their daily lives. "There is nothing in it for them," is the way that it is put to me sometimes, and that it seems to be that they are confined to people who fall into a certain category.

There is some truth to the fact that more cases have been taken by those people, because they have used, maybe, the language of rights; they have been more familiar with it. I think the shortfall, actually, is that the Unionist community needs to start using the language of rights more itself.

We are trying to really reach out and engage, and we have done it in numerous different ways. To put it on the record, I would very much like to invite any people who feel that human rights have not applied to them to come to the commission and tell us that, and tell us why.

We are actively engaging with all sorts of people who maybe we did not meet before. I have colleagues at the commission—some of whom are not here today—who have been actively going out into communities and saying, "Please, come and tell us your problems. This is here for you too. Let us prove it."



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I can understand why some people may feel like that, but I think they are wrong to, and we would really appreciate the opportunity to prove why it is wrong, and to be good in our actions as well as our words.

Carla Lockhart: You've thrown the challenge back to me!

Q35 **Mr Walker:** I am a little confused over the position on "own motion" cases, and the issue there. You have recommended that the present Bill should ensure that the NIHRC has the powers to bring "own motion" cases without a victim, and I agree with that. That is the status quo ante, as far as I understand. My recollection is that we discussed with your predecessor—I cannot remember whether it was at the time of either the withdrawal Act or the withdrawal agreement Act—how we would ensure that, as part of the creation of a dedicated mechanism, that was protected, and that that is in legislation.

It is not clear to me why that would necessarily be affected by the human rights Bill as drafted. Is it that you are concerned that it may be, and you think steps need to be taken to avoid that, or that you feel that it definitely would be undermined? It would be useful to understand the detail of that.

Alyson Kilpatrick: It definitely would be undermined. It is purely technical, I believe, and Northern Ireland Office officials actually, very early on, said, "We recognise what has happened here, and we want to fix it." I will let Dr Russell come in on that, because he has more direct contact recently.

It is technical, in that it gets rid of the amended section 7 of the Human Rights Act. All put together, we can take an action without a victim because of amendments that were made. Those amendments are lost if you repeal the Human Rights Act and do not put them into this Bill of Rights Bill. But we do not believe that it was intentional; certainly all the indications from officials have been that it was an oversight. David, is that still your understanding?

Dr Russell: Yes.

Alyson Kilpatrick: We are just working through. We are not that concerned, so long as it is fixed.

Q36 **Mr Walker:** You think that can be remedied.

Alyson Kilpatrick: Yes.

Q37 **Mr Walker:** Have you exchanged text with the NIO as to what you think needs to be done in the Bill to address that?

Alyson Kilpatrick: I think so. I think it is simply lifting what is in the Human Rights Act that was sort of lost, isn't it David?

Dr Russell: Just to be clear, this is not an issue that the commission itself has raised. This inadvertent removal of the commission's "own motion" power under the Human Rights Act was raised with the commission by the Northern Ireland Office and the Ministry of Justice whenever the NIO



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engaged with them. The Government accepts that there has been an inadvertent impact in the current drafting of the Bill, which effectively removes what Robin has suggested was fixed and rightly so. It impacts not just the Northern Ireland commission, but the standing of the Equality and Human Rights Commission in similar terms.

We have not seen a draft amendment yet, and the last time I engaged with the Ministry of Justice on this issue was at the behest of the NIO. It was last summer, from memory—at the start of the summer just past—and there has been no engagement since then, so what we are waiting for is to see the Government's proposed amendment to the Bill. At that point, we will scrutinise it and see whether it effectively replaces the inadvertent removal of the power.

Mr Walker: That is very helpful. It sounds like this is something the Committee might want to give the MOJ a nudge on, to say that it would be good to see.

Alyson Kilpatrick: That would be helpful.

Chair: Shall we put it as an action point to drop them a line?

Q38 **Mr Walker:** I think that would potentially be helpful. You gave some examples, very early on, about the types of cases that you felt might be affected. Just in terms of the "own motion" standing, are there examples that you can give where the NIHRC has acted but could not have acted without that?

Colin Caughey: The re P case was in relation to adoption—that was from the commission. Obviously, we took the case in relation to the termination of pregnancy, and that led to—

Q39 **Mr Walker:** That did have a victim. It was the cruel and inhumane treatment of an individual that was highlighted in that case.

Alyson Kilpatrick: Yes. A sleight of hand is the wrong way of putting this, but we try our very best to only proceed if there is a victim identified. Where there is a victim identified, we would always have them in the case, and not only because it assists the court to hear from them—the courts have told us it really assists to hear from a person affected. That is why I was struggling to think of a case where we know we would not have a victim and we would want to bring an "own motion" case. David, remind me—we talked about this very recently, and I had one example, which I have forgotten. Would you mind?

Dr Russell: Part of the issue at the time with the termination of pregnancy case was because the commission has really not used that power an awful lot. It is very important for national human rights institutions to have it, because there may be instances where a breach or future breach of human rights could be in place on any given issue where a victim may not come forward, so the favoured status of human rights commissions globally is that we will have an "own motion" power. But the truth is, as the chief commissioner said, it is much better to bring a factual



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matrix before the court, so the commission always tries to seek a victim in our interventions.

The best example—it was unfortunate, because it resulted in having to fix the “own motion” power—probably was the termination of pregnancy. The reason why it is such a good example is because the factual matrix, and the impact on different types of victims there, meant that in order to take that case forward, we would have had to have multiple victims. Even in that instance, as you know, we had supporting affidavits and interventions from women and girls who had been affected by the circumstances. It is not a power that is used very often, but it is vital that we have it.

Q40 Mr Walker: And it is important for the standing of the institution that you have it, which I think is an important point.

Dr Russell: Absolutely. Without that “own motion” status, we wouldn’t be—

Alyson Kilpatrick: Increasingly, if significant disadvantage is going to be a criterion for an individual, it will be even more important that we can bring cases where they would not be able to.

Q41 Chair: Perhaps you might furnish us with a note on that, which we can put into our note to Ministers.

Alyson Kilpatrick: Yes.

Chair: Nobody else has indicated that they have further questions. May I thank the three of you for joining us this morning? We are going to switch to panel 2, which is on screen. The two of you are very welcome to stay and listen to that. I would ask you just to move from the front row of the dress circle to the gods.

Alyson Kilpatrick: Thank you for hearing from us. I would very much like to stay.

Sir Robert Buckland: It’s the stalls.

Alyson Kilpatrick: It’s the royal circle, I think. We will stay. Thank you.