



HOUSES OF PARLIAMENT

## Joint Committee on Human Rights

Corrected oral evidence: [The Government's Independent Human Rights Act Review](#), HC 1161

Wednesday 10 March 2021

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Members present: Ms Harriet Harman (Chair); Lord Brabazon of Tara; Ms Karen Buck; Joanna Cherry; Lord Dubs; Lord Henley; Baroness Ludford; Baroness Massey of Darwen; Lord Singh of Wimbledon.

Questions 30-42

Witnesses

[I](#): Baroness Falkner of Margravine, Chair, Equality and Human Rights Commission; Judith Robertson, Chair, Scottish Human Rights Commission; Les Allamby, Chief Commissioner, Northern Ireland Human Rights Commission.

## Examination of witnesses

Baroness Falkner of Margravine, Judith Robertson and Les Allamby.

Q30 **Chair:** Good afternoon and welcome to this public session of the Joint Committee on Human Rights. This is a parliamentary Select Committee, and half our members are MPs and half are Members of the House of Lords. As our name suggests, we are concerned about human rights.

The evidence session that we are conducting this afternoon is looking very specifically at the Human Rights Act. The Government committed in their manifesto to an independent review of the Human Rights Act, and they have established that review. To assist and shed light on the issue of the workings of the Human Rights Act and whether it needs to be reviewed, we are conducting an evidence session this afternoon.

In order to help us prepare our evidence to contribute to the Government's review, we are very grateful to have the chair of the Equality and Human Rights Commission, Baroness Falkner of Margravine. Thank you very much for joining us, Baroness Falkner. We have the chair of the Scottish Human Rights Commission, Judith Robertson. Thank you very much, Ms Robertson, for joining us. We have the chair of the Northern Ireland Human Rights Commission, Les Allamby. Thank you, all three of you, for joining us.

I would like to start the questioning by asking each of you how you feel the Human Rights Act has had an impact on the enforcement of human rights in the UK, bearing in mind that the fundamental part of the Human Rights Act is the issue of the rights that are in the European Convention on Human Rights, which we were already committed to before the Human Rights Act came into force in 2000.

Perhaps starting with Baroness Falkner, could you tell us how you believe the Human Rights Act has affected the issue of people enforcing their rights under the European Convention on Human Rights?

**Baroness Falkner of Margravine:** The committee has had the submission from the commission, and I will speak essentially to the points that we have made there. The Act has domesticised human rights. United Kingdom citizens no longer have to go to Strasbourg to seek redress through the legal system. It has created a direct route for redress. It has enabled the development of domestic human rights jurisprudence in the sense that over 20 years since the Act was enacted we have seen a very rich example of human rights jurisprudence. United Kingdom courts are well respected, indeed by the European court as well. Very few of our United

Kingdom cases have gone to Strasbourg. With regard to applications, we have the lowest rate per capita of any of the member states of the Council of Europe. I think I am right in saying that, in terms of violations, there were just two out of 284 cases against the UK in 2020, the last year for which we have statistics.

Of course, the Act has enabled constructive judicial dialogue on the margin of appreciation and other aspects. I think it has enabled an embedding in the public mind of a culture of human rights, although of course we have some way to go there, but we will pick that up in other questions.

**Chair:** Thank you very much. Could we hear from Scotland and Judith Robertson next?

**Judith Robertson:** Again, you have our submission and the submission to the review itself, which elucidates a lot of the points that Baroness Falkner has outlined. I just want to add to that picture from the perspective in Scotland. The Act, the convention and the compliance are embedded in the Scotland Act 1998. As a result, convention rights have become a very strong part of the fabric of Scotland's laws or judicial analysis and, crucially, the legislative competence of the Scottish Parliament. It is widely considered in Scotland by civil society, government and the Parliament to be a positive dimension of devolution. The Parliament duty bearers and civil society have sought to build on this in developing a rights-based culture in Scotland.

From our perspective, while there is very much to be done on the points Baroness Falkner made about bringing rights home, enabling people in Scotland to access justice directly through the Scottish courts is very much at the heart of our support for the Human Rights Act. The further thing we have done—we will obviously spend more time on this—is generate an environment where the enforceability and justiciability of rights has moved forward in other ways in Scotland. It has created a context where people understand their rights to some degree and know that there is further they can go in building that rights culture in Scotland.

We have looked at that by initiating the co-operation of other international human rights treaties, and as we go through this discussion in Parliament next week we will be taking the final steps in the process of incorporating the Convention on the Rights of the Child, which from our perspective has taken a long time to come. The fact that it is happening very much builds on the progress that has been made as a result of human rights being brought directly into Scots law.

**Chair:** Thank you very much. Could we go to Northern Ireland and hear from Les Allamby, please?

**Les Allamby:** I will give four very brief examples which no doubt I can expand on in my evidence. First, along with Baroness Falkner, we no longer need to troop off to Strasbourg. The UK used to be regularly in the top three contracting states for violations, and in Northern Ireland there was a steady stream of cases during the Troubles in the 1970s, 1980s and 1990s. That led us to have a reputation on the international stage that, frankly, was not great. That has been turned around, because we deal with these things domestically.

Secondly, it is about embedding a culture of rights. We have done some work with the Northern Ireland Civil Service and the Police Service of Northern Ireland, and we can see how human rights has played a very positive role. That training is about a positive rather than a defensive situation.

The third is some examples of legislative change. In Northern Ireland, because of our particular politics, sometimes things have got stuck. I will give two quick examples. One is unmarried couples—same-sex and heterosexual couples—being unable to adopt. If it had not been for the Human Rights Act, I do not think that we would have been able to resolve that.

More recently, we are in the throes of changing our law on the retention of biometric material, largely to begin to come closer to other parts of the UK. Again, that was an issue that got stuck. We had a Criminal Justice Act to reform the issue because of earlier human rights cases. It could never get through the Executive. It took a further case to finally shift reform. Sometimes, for us, the Human Rights Act has been crucial in getting some reform.

Finally, the Belfast/Good Friday agreement has human rights at its heart. It is not just the incorporation of the convention both in Northern Ireland and, as a result of the Good Friday agreement, in both parts of Ireland. It also emphasises not only the incorporation of the Act but the remedies. That has been central to the Belfast/Good Friday agreement, and again I will be happy to expand on that in due course.

**Chair:** Thank you. We look forward to that. Could we hear the next question, please, from Lord Singh?

Q31 **Lord Singh of Wimbledon:** Good afternoon. I am Indarjit, Lord Singh of Wimbledon, a Cross-Bench Member of the House of Lords.

What has been the impact of Section 6 of the Human Rights Act,

which requires public authorities to act in a way that is compatible with convention rights? To what extent have public authorities across the UK embedded the Section 6 duty in the way they deliver public services? The question is open to all three of you, but perhaps I could suggest, in the way of the preceding question, that Baroness Falkner starts us off.

**Baroness Falkner of Margravine:** As you know, Section 6 provides an enforceable legal duty to comply with ECHR rights and a framework of legal principles to guide decision-making. It helps to ensure more user-focused services of a better quality, such as those to shape training and inspection frameworks. Les Allamby just mentioned Northern Ireland police training and so on, and you could add in health, but I would also say that we need to do more. Covid-19 and our response to it have shown that some public authorities are not doing what they need to be doing in terms of our human rights obligations.

A concrete example is the right of care home residents to private and family life—in other words, Article 8—in the form of visits versus the requirement to take steps to protect the right to life. We have heard discussion even today about how some authorities are continuing to ban visits supposedly due to Covid. These things, even in public authorities, come down to issues to do with the balance of rights. We have our own views on how we intend to deal with them in this particular case, but balancing rights is a challenge if you are a public authority. We see that as an area where we need to do more work.

**Chair:** Before Lord Singh progresses to questions about Scotland and Northern Ireland, could I pick up on part of your answer about care homes, which this committee has looked at? We have taken the view that a blanket ban on residents being visited by their relatives is in breach of the right to family life. Of course, the Government have issued guidance now, but as you said, Baroness Falkner, we have heard it said that, “It’s only guidance, so we’ll decide whether we implement it”. That certainly seems to be the attitude of some in the care home sector.

In view of the importance of protecting the right to family life, what will the Equality and Human Rights Commission do to ensure that people have their right to family life and that it does not continue to be breached in the way that, in our view, it is currently?

**Baroness Falkner of Margravine:** At a strategic level, we are looking at how we can perhaps expand regulation to cover private care homes, because that is where the larger problem lies. We believe that the Human Rights Act should apply to regulated care

homes that might be in private hands. That is at a more strategic level.

**Chair:** Does that mean that you think it should be in regulations, not guidance?

**Baroness Falkner of Margravine:** Yes.

**Chair:** That is a proposal that this committee has made, and we have drafted the regulations, but that is very encouraging that the Equality and Human Rights Commission is backing them. Sorry, I interrupted you. Carry on with your next point.

**Baroness Falkner of Margravine:** No, I was done. At a more practical level, we are looking more closely at where the breaches are happening, in what sets of care homes, who the providers are and so on. That is all.

**Chair:** What will you do once you have looked? Of course we can all look, but the point about the Equality and Human Rights Commission is that you can do stuff.

**Baroness Falkner of Margravine:** Our first step is to engage and have a conversation with the relevant people about how they need to enforce and how to address the balance of rights.

**Chair:** What will your next step be after that first step if you discover, as you surely will, that many of them are not implementing the guidance, are not allowing visits and are continuing with blanket bans?

**Baroness Falkner of Margravine:** I do not want to speak off the cuff here. Perhaps I could write to you once we have determined what our next step is. We may have already done that, but I am not across it at the moment.

**Chair:** Thank you. Back to Lord Singh. Sorry to have interrupted your live questioning.

**Lord Singh of Wimbledon:** Can we hear from Judith Robertson, please?

**Judith Robertson:** Thank you for the question. I started to elucidate a little how I think the Human Rights Act has affected human rights culture in Scotland. I would go as far as saying that it has enabled public authorities to reflect on the development of policy and practice up front and enabled regulators to bring a human rights-based approach into their analysis and thinking. Her Majesty's Inspectorate of Prisons for Scotland, for example, has reframed its inspection standards from a human rights perspective,

which in turn is the basis on which it is undertaking inspections in prisons. It is the test against which what is happening in Scotland's prisons is being measured.

Our health and social care standards have also proactively been completely refreshed and reformed very much to take the perspective of the person living in the care home, the residential setting—as you would expect in a rights-based approach—to ask, from a human rights perspective, and to the degree that it is appropriate and proportionate to do so: “How am I experiencing the care that I am getting? Are my rights being upheld in this process? Is my right to care and all the ways I would like that to happen being upheld?”. It is that kind of activity that is going on, both with regulators and in public authorities.

Another specific example is Public Health Scotland, which is looking from its perspective at the right to health itself—a right that is not in the Human Rights Act—and how it has fostered the culture of human rights in Scotland. It is then looking through that lens at policy and practice around Scotland to ask how that right is being delivered on the ground for people, whether in hospitals or in different health settings. From our perspective, that action of public authorities to look at their work through a human rights lens is one of the things which the Act has engendered.

I want to say a bit more about that, though, because I would say that it has gone much further. In Scotland, the fact of the Act and the fact that it is built into the Scotland Act in such a positive way has enabled Scotland to embrace other UN initiatives, like having a national action plan to develop and promote human rights.

Scotland's national action plan, first launched in 2013, is based on a very extensive piece of research into how rights are being delivered in Scotland. What is the reality on the ground? It showed that, yes, we have a lot of very good laws and a lot of very good policy, but when it comes to implementation we have some considerable distance to travel. The national action plan has run its course for a number of years and we are now in a process of revisiting the plan and generating a situation for the plan for the next three to four years.

The plan itself has also stimulated a huge amount of civil society and public authority engagement in key processes and enabled public authorities to talk directly to rights holders and to engage in a dialogue in a safe space. For example, the police heard directly from children and young people affected by stop and search practices, which were deemed to be in breach. The fact of that

direct interaction transformed the police's understanding of the impact of their activity.

There is still a distance to go in the actions of public authorities in ensuring that practice changes on the ground. We know many examples of where that does not happen, but I would absolutely say that the Act itself and its embodiment in the Scotland Act has gone very far to engender that culture in Scotland. I have more examples, but I am sure you will come back to this question. I do not want to take the whole floor, so I will stop there for the moment.

**Chair:** Could I butt in again and ask, as I did Baroness Falkner, about the specific issue of the right to family life and the right to be able to visit family members in residential care? Are you, like the Equality and Human Rights Commission, looking at this? Will you do anything about it? Do you see the need to do anything about it in Scotland?

**Judith Robertson:** With Covid we raised a whole range of issues, not just at the start of the pandemic but as the whole process of the pandemic unfolded, principally last year. We raised all the care home issues, not just the ones about blanket bans on visiting but decisions being made without consent and people being moved into or out of care homes.

Our key recommendation relates to the nature of the public inquiry that will take place in Scotland on the whole delivery of public services in relation to the pandemic. As far as I am aware, the terms of reference have not been finalised for that public inquiry, but we have had a commitment from the First Minister in Parliament that that inquiry will look at all the Covid issues from a human rights perspective. From our perspective as the commission, that is the core place where some of these decisions need to be interrogated and looked at.

On the specific nature of the blanket ban, as I am sure you are aware, other than raising issues like that in Parliament and through our processes and decision-making about care and the provision of care, and rather than taking a public inquiry ourselves, that is what we have done to prepare briefings and to ensure that people are aware that the right is there and that a blanket ban is not acceptable.

It is also worth saying that civil society organisations in Scotland and the organisations that mobilise around care homes are very vocal on these issues. They are very competent and well versed in the rights framework and its demands and they use it expressly

routinely. To some degree, the issue is well covered, and obviously practice is changing all the time.

**Chair:** If I was a relative wanting to visit a family member in a care home, I would take from what you said that there is a lot of raising of the issue, but are you in a position to do anything about it besides raising it and asking for it to be included in some future public inquiry?

We are thinking about the enforcement of human rights. We have the England and Wales Equality and Human Rights Commission looking at it but not countenancing any action as yet. I know that a lot of relatives are desperate after a year of not visiting. Do we take it that in Scotland there has also been a lot of raising of the issue but you are not in a position, or you have not considered being in a position, to enforce or back the enforcement of these rights to family life for relatives of those in care homes?

**Judith Robertson:** We have not done that specifically. Our briefings on the issue clearly raise the issue, as I have said. Again, there is a plethora of voices on it, but as to whether we have backed enforcement specifically, I have to be honest, Chair, and say that I would have to check. As far as I am aware, we would back it, but we have not expressly been calling for that. I need to check that.

**Chair:** I will return back to Lord Singh at this point.

**Lord Singh of Wimbledon:** Can I ask Les Allamby if he would like to add anything to those comments?

**Les Allamby:** Yes, I have a couple of things to say. First, Section 6 requires public authorities to follow primary legislation, whether there is a breach of human rights or not, but beyond that there is obviously considerable scope to make sure that within Section 6 the public authorities, government departments and so on abide by the convention through the Act.

I have two examples of embedding human rights where I think it has had value. First, we did a piece of work in partnership with the Northern Ireland Civil Service to try to move away from what I might call defensive medicine, a defensive Human Rights Act, and to see the Human Rights Act as a positive tool both for policy development and for decision-making.

Part of that training, which is now a core component of the Centre for Applied Learning online course, was to look at the convention and the idea that some rights are absolute but some are qualified; that there is a margin of appreciation, and what that means in

practice; and that policies must have a legitimate aim—they must correspond to a pressing social need, and they must be necessary and proportionate. It was also to try to say to civil servants that this does not replace their decision-making or their policymaking framework, but it has something positive to offer.

The second area where we did some work, going back some time, was with gold and silver commanders of the Police Service of Northern Ireland. The only two chief constables I have ever heard praise the Human Rights Act, as far as I am aware, were George Hamilton, a former chief constable, and Hugh Orde, who was also a former chief constable and then moved to ACPO.

On public order issues, there was quite robust and interesting training. What we got from senior police officers was that having a framework to deal with public order, recognising that there are competing rights between freedom of association and assembly on the one hand and the right to privacy on the other, did not always give you a kind of sausage machine out of which came a result, but it did give you a basis for saying that you had applied the framework based on judgment, not a whim. That took the sting out of what is sometimes then used in effect to politicise some of the ways in which certain public order demonstrations are dealt with. It does not mean that the police always get it right—take the recent experience with Black Lives Matter, for example—but it provides a framework.

Finally, on the question of care homes, I spent lunchtime on media on this. In a statement today, the Commissioner for Older People said that he considered that there were considerable human rights issues in relation to the lack of access. We have departmental guidance, but we have nothing beyond that.

In terms of what the commission can do, we are limited. We could hold an investigation, but given the time it would take to organise and manage it we would be in difficulties, given how quickly the pandemic is moving. Clearly we could take a legal case if someone came to us, but you would probably be dealing with an individual issue.

We have called on the inspectorate authorities to be more robust in this. We meet both Age NI and the Commissioner for Older People regularly, and one of the difficulties we have found is getting the data and policies of care homes to ascertain what is going on. It is clear that blanket bans are unacceptable. Beyond that, trying to divine what is going on has been very difficult. I hope that is helpful.

**Baroness Falkner of Margravine:** I just wanted to say in response to the Chair's questions about care homes that it is beyond talking. Sometimes you get problems that fall between two stools. The other regulator involved in this is the Care Quality Commission, with which we have signed an MoU. That is where the work we are doing will be done. It will be done jointly. We cannot go there particularly on our own under our current powers, but there is a perfectly good way to work better across regulators to get the decider. It may take the lead in this. We are looking at it actively to see who does what next.

**Lord Singh of Wimbledon:** Thank you very much. Section 6 seems to be generally complied with and people look to it in their provision of goods and services, but the public authorities and other bodies also look in that direction. As a layman, I get the feeling that focusing on the provision of the goods and services or listeners' views and so on tends to compartmentalise the application of human rights. In my experience, organisations such as the BBC seem to feel that if we look to ensure that the rights of the viewers are listened to and complied with, we do not need to bother too much about the human rights of those who work at the BBC, or any other body, as that is just an example. Is there anything in that?

**Baroness Falkner of Margravine:** I am reluctant to comment. Again, I can only say that these things are a matter of the specifics of a case. It is hard, in the abstract, to put your finger on what the response will be.

For employees of the BBC, we have certainly taken action in standing up for their equal rights. You will recall only a few months ago the gender pay gap issue that we dealt with.

**Judith Robertson:** I would say that the picture is patchy. There are instances with regard to the rights of staff and the rights of patients, for example—Covid is a good example—where you will see both very good practice and bad practice happen across the piece. We have done a lot of work in relation to prisons and what has happened to prisoners in the context of Covid. The prison authorities generally endeavour to uphold the rights of staff and the rights of prisoners in their care, although not always perfectly by any means, and far from it in some settings.

I would be able to find you bad examples, for sure. Care homes might be one where the rights of staff within the care homes are less. As the pandemic has gone on, increased detention has enhanced that, but at the very beginning it was poorly understood and the context of care home operations was poorly understood.

The spotlight the pandemic has shone on care homes has in some settings, I am sure, enhanced the rights of staff, but there is still a long way to go here. As you are potentially looking for, that holistic view of rights applying to all of us is definitely a work in progress.

**Lord Singh of Wimbledon:** Exactly, and that is the point I was making. Of course nurses' rights are important, but prisoners' rights should also be considered. Thank you very much.

**The Chair:** Could we have the next question from Lord Dubs, please?

Q32 **Lord Dubs:** My name is Alf Dubs and I am a Labour Member of the Lords.

What barriers to the enforcement of human rights exist today and what might be done to address them? My question is to all of you. I do not think we need to go in the same order. Shall we start with Les?

**Les Allamby:** I will be very brief and succinct. Access to legal aid is one area where there is clearly an issue. It is probably thrown into sharper relief in some ways in England and Wales than in Scotland and Northern Ireland, but the trend is UK-wide. I do not mean access to legal aid in relation to human rights issues, because that largely still remains, but the financial means test for legal aid. There was a high watermark in the late 1970s when nearly 80% of the population qualified for at least a contribution towards legal aid or for full legal aid. The last time I saw figures in Northern Ireland we were down considerably below that. Therefore access to lawyers is an issue when it comes to legal aid, and it is that I would focus on in particular.

**Lord Dubs:** Judith, would you care also to consider the legal aid point that Les has already mentioned?

**Judith Robertson:** As I am sure you are aware, there have been several reviews of legal aid in Scotland over the period. There are various views on this, as I understand it. The scope of legal aid has not been narrowed in Scotland in the same way as it has in England and Wales, but access to lawyers as opposed to legal aid and lawyers who are versed in human rights work is still challenging.

I want to talk about a related but slightly different issue upstream of a court process. You are probably aware that there is a currently national task force in Scotland on human rights leadership and incorporating further rights into Scots law. We have reached out into communities to see how people are able to access justice in those settings and what their views are on that. That has come

back with a very clear message that, while courts are an absolutely essential backstop and an essential part of the process, they are not an accessible process for most people.

Even with legal aid potentially being more accessible in Scotland, people are looking for earlier, quicker and more timely routes to remedy than a court gives provision for. We need better processes in our public authorities, whether they are complaint mechanisms or means by which people can raise human rights issues quickly and achieve some kind of adjudication, and for that to happen in a context that does not necessarily require there to be large amounts of money or legal support.

I think there is scope for a much more accessible process of route to remedy and access to justice within the Scottish, English and Welsh legal frameworks, and potentially in Northern Ireland, than we currently envision.

A lot of focus, time and attention is given to the court system and trying to improve that, which is very important. However, we should also recognise that most people will never access court, although that does not mean that they should somehow not have their rights upheld, and in Scotland we are looking proactively to develop a better way of doing that. That includes the right to information about rights. People really want information about their rights as well as access to independent advocacy. They want support to go through processes, whether that is a public complaints process or a court process. These are key implementation tools that we can put in place more proactively to enable people to access their rights.

**Lord Dubs:** Baroness Falkner, would you like to comment on the first question about the barriers to enforcement of human rights, and say anything about access to justice and legal aid?

**Baroness Falkner of Margravine:** Thank you. Your 2018 report, *Enforcing Human Rights*, covered all the key areas where we needed better enforcement.

I will not repeat what other people have said, but LASPO has had a particular impact in England and Wales. Speaking specifically about Wales, I will give you an example on point. The removal of provision in education cases was a barrier to justice for those seeking redress for breaches of the right to an education under Article 2. The Commission on Justice in Wales has emphasised that this has had a particularly negative impact in Wales in areas where there is no access to legal aid provision at all. Of course, we have published on that matter as well.

Finally, I come to Judith's closing point about people's hunger to know what their rights are. We have touched on education in our submission to the review. I think we will pick that up in the later questions, but that is also a key area. We think that information and education for public bodies and the general public are key.

**Q33 Baroness Massey of Darwen:** I am Doreen Massey. I am a Labour MP in the House of Lords.

This question is for Les Allamby and follows on from Lord Dubs's question. The committee has received written evidence from the Human Rights Centre at the School of Law, Queen's University, Belfast, which argues that the independent review into the Human Rights Act, "presents significant risks to stability and peace in Northern Ireland". Could you comment on that?

**Les Allamby:** It feels like the Belfast/Good Friday agreement is being kicked about like a political football at the moment. On the particular evidence that I have seen and read, I think you interfere at your peril with the core human rights and equality provisions that are central to the Belfast/Good Friday agreement.

Any significant dilution of the machinery of the Act will have to recognise that the independent review is not about the convention rights. It is clear under the 1998 agreement that the understanding was not just about having the convention incorporated into domestic law, which was already happening at the time when the agreement was signed; it was about having access to meaningful remedies.

There was anticipation about a Bill of Rights, which was to be rights supplementary to the convention rights, reflecting international law. We have not moved in the same direction or anything like to the same extent as Scotland has, for example. We have left the European Union. We no longer have the nearest thing that we perhaps had to a convention-plus approach, which was the European Union Charter of Fundamental Rights. That no longer exists in the same way that it did. We can argue about how much of it has been preserved and so on.

I will make one final point. We, the Equality Commission for Northern Ireland—we have a separate equality commission here in Northern Ireland—and the Joint Committee NIHRC and IHREC are now a dedicated mechanism. That dedicated mechanism is about ensuring the UK Government's commitment to the non-diminution of rights under the rights, safeguards and equality of opportunity section of the agreement. That is the agreement where the Human Rights Act and the remedies were incorporated into both parts of Ireland. Therefore, it seems to me that if we were to move away

and significantly dilute the machinery of the Human Rights Act, that would be counterintuitive to the clear aim of the Belfast/Good Friday agreement. Given the current and frankly rather febrile circumstances of Northern Ireland, I would caution against that very much indeed.

**Q34** **Baroness Ludford:** I am Sarah Ludford. I am a Liberal Democrat Member of the House of Lords.

I want to ask about how the independent review is looking at the relationship between domestic courts and the European Court of Human Rights. From the perspective of your respective organisations, how do you think the relationship is currently working, and are any improvements needed?

I think that Baroness Falkner, in her introduction, referred to a constructive judicial dialogue between the Strasbourg court and the national courts. Obviously she was referring to England and Wales. We heard similar from former Supreme Court justices, who said that they think the dialogue worked well. I wondered if I could get your thoughts. I cannot remember who went first last time, so maybe I will invite Judith to go first.

**Judith Robertson:** Thank you. As we covered extensively in our submission, we are very positive about that dialogue process and about the relationship between the courts and the European court. The relationship between the domestic courts and the European court is working well. The overall relationship is premised on subsidiarity, so the national authorities, including national courts, have the primary role in protection of convention rights while the European court provides oversight and authoritative interpretations. That is how it is set out and that is the way it works.

The ability to claim the full extent of our convention rights in national courts without having to pursue claims all the way to Europe is essential in order for this to work effectively. It is vital that our courts obviously take European case law into account. That secures the necessary alignment in the protection of our rights with our international obligations. That is particularly important, because the convention is a living instrument. It is a treaty that must be interpreted in the light of present-day conditions so as to be practical and effective, and it is essential that the national courts apply the evolving jurisprudence.

The commission is very clear that there is no requirement to amend the Human Rights Act on the basis of this or to revise it. This relationship works well. It is an evolving relationship and has been quite positive as far as the UK is concerned. The European

court has engaged constructively in that dialogue. From our perspective, any revision of the Act puts that at risk and puts that in jeopardy, rather than enabling that process to continue to evolve constructively.

**Baroness Falkner of Margravine:** It is an interesting one. I would start from first principles. I do not think that at this point in time, given how narrow and technical the review's remit is—we have met Peter Gross and he has assured us of that—I am not overly concerned about changes to the Human Rights Act that might come out of this review.

Coming specifically to the point on dialogue, I echo Judith's views that on the whole I think the relationship is working. However, I did go back this morning to the Brighton declaration of 2012, which I think was an important change of tone in that relationship. B.11 of the declaration concentrated very much on the relationship of where, at national level, national authorities are in principle better placed than an international court, as it referred to itself, to evaluate local needs and conditions. "The margin goes hand in hand with supervision under the convention system" is what they said.

There are concerns on both sides. One of the concerns that one might have, looking at it from the UK perspective to the European court, is the variable quality of judges and the still incredible backlog of cases, which I would say makes the system slightly patchy in terms of the dialogue. Looking at it from their perspective, looking into the UK, I would have thought that the debate over Brexit, even though it is not directly concerned with this, has highlighted to the court the UK's desire to have more sovereign decision-making.

The next period will be the interesting period for seeing how this dialogue plays out. It is constructive at the moment, and I look forward to seeing how constructive it will continue to be.

- Q35 **Baroness Ludford:** Do you think there have been any misunderstandings and misrepresentations that have brought this issue almost into disrepute? The prisoners' vote case was misrepresented in much of the British press as Strasbourg instructing the UK that it must give all prisoners the vote. What it said was, "Instead of a blanket ban you need to frame a policy that will consider all the factors". It seems to me that that unnecessarily soured the image of the relationship between the national courts and the European court and is probably responsible for this issue being part of this review. Do you think there have been misunderstandings and misrepresentations?

**Baroness Falkner of Margravine:** I recall very clearly speaking on prisoners' votes 10 to 12 years ago. I think the misrepresentation was in the media. It was not that the United Kingdom Government did not understand what was required of them.

Ultimately, the example that you give, Baroness Ludford, is a good example of the dialogue working well, in the sense that ultimately a compromise was agreed. It might not have been as satisfactory to Strasbourg as it may have wanted, in the sense that we allow those rights but in a very restricted fashion now, but I recall how Strasbourg addressed it. First, it said that Parliament had not thought about the matter, because, I think, the relevant Act went back to 1961. Then Parliament did think about it and voted on it. In the second round, it said, exactly as you say, that nevertheless the blanket ban was not appropriate. Ultimately this shows the back and forth that goes on in these dialogues and the importance of the margin of appreciation.

Has that particular case or the whole life terms case made this come to the forefront? I think it is a domestic political concern. Were the United Kingdom courts to arrive at exactly the same judgment—it came from the United Kingdom courts as an original piece of judgment originating here in the UK—I think people would not blink twice about it.

**Les Allamby:** I will pick up that theme. It always strikes me that it is bordering on a form of bipolarity when politicians introduce institutions, including the European convention and the European Court of Human Rights, yet at the same time behind the scenes have worked assiduously, and sometimes pretty effectively, to reform the same kind of institutions and to have an influence. The Brighton declaration is a pretty good example of that.

I am struck by the assumption sometimes in political circles that the judicial dialogue is somehow an impairing of UK sovereignty in courts. I recall the Northern Ireland unmarried couples and same sex couples adoption case in the House of Lords in 2008. The House of Lords did not follow the position of Strasbourg and said that, given what was happening elsewhere in the UK and given where it was, it felt that the inability of unmarried couples to be able to adopt was contrary to the convention and that there was no better convention for doing that. Therefore, sometimes the UK's highest court in the land will go beyond the Strasbourg court.

It is important to remember that Section 2 is about taking into account where relevant. There are lots of examples of a greater symbiosis, and you can see them now. The Supreme Court and

other courts having looked at cases, we are far less likely to find cases overturned in Strasbourg. We can find examples of Strasbourg having taken into account, even in other cases such as Danish cases, and drawn on UK domestic jurisprudence.

Therefore I do see no problem with that kind of approach to judicial dialogue. It is clear that UK courts are not in thrall to Strasbourg judgments, but they do have to take them into account, and by and large they do so without difficulty.

**Baroness Ludford:** Many thanks, all of you.

Q36 **Ms Karen Buck:** I am a Labour Member of Parliament, Westminster North.

The independent review suggests, or at least asks the question, about the extent to which the Human Rights Act is overjudicialising public administration and the extent to which it is pulling the courts into matters of policy rather than of law. Could you say why you feel that question is being asked and to what extent you think that is a reasonable risk? I wonder if we could start with Baroness Falkner.

**Baroness Falkner of Margravine:** I was hoping you would not start with me, because I am not sure I can adequately answer this. Again, it comes to a general sense that public administration is operating more and more narrowly as time goes on. That is why they probably put it in. I did not think to ask them that when I had my initial meeting with them. Coming to whether there is a risk of that—

**Ms Karen Buck:** I am not quite sure that I understood what you meant by the narrowing of public administration. Would you mind expanding on that a tiny bit?

**Baroness Falkner of Margravine:** Yes. Let me go back to an example that I think appeared to feel very constraining to the public out there. That was, if you recall, a few months ago when we were about to go into the vaccination programme. Quite a lot of media attention was given to the fact that we appeared to be slow to train up people to give vaccinations, because they had to take counterterrorism training and human rights training before they could stick a needle in your arm, that kind of thing. That is what I mean. Now we are having that discussion again, which is a very animated discussion, about the balance of rights that come into play when it comes to vaccination passports and things like that.

There tends to be a general concern, because the voices are becoming more strident about the balance of rights, that public

authorities' ability to get on with and do things is being constrained in that regard. That is what I mean.

**Ms Karen Buck:** This may be an unfair question, but do you think, on balance, that is more a question of perception or of genuine risk?

**Baroness Falkner of Margravine:** It is hard to say. At the moment it feels to me like perception. However, we are in the middle of a pandemic, or have been, and we have so much emergency legislation that I cannot tell now whether it is a general risk or whether it is a perception. It feels like it is a perception is what I will say.

**Ms Karen Buck:** Ironically, the experience of the pandemic and the vaccination rollout might be proving to be the exact opposite to where the perception was leading us about the public sector's ability to get on with things without constraints.

**Baroness Falkner of Margravine:** I was thinking specifically of that rather strange judgment in Manchester recently on the hospitality sector and whether you should offer a substantial meal in a pub or not. The scientific advice, if you are familiar with the case, was that it is safer for people to mix and they are more likely to respect social distancing and other rules if they have eaten while they are drinking. However, the ruling went the other way and used discrimination against BAME people as the reason why they found that the judicial review should go ahead. It was a rather strange ruling. That is why I hesitated when talking about perception and reality.

**The Chair:** Before we move on to our next witnesses to answer Karen's question, could I follow up with you, Baroness Falkner? I am not quite sure I understood your answer to the main point of Karen's question. Do you think the way the Human Rights Act works draws the courts into making decisions on things that are better decided by Parliament because they are policy decisions rather than properly matters for the courts, which should be about the interpretation of the law? Do you think that is a problem?

**Baroness Falkner of Margravine:** You have put that very clearly. In response to that very clear question, I would say no, I do not think that is a problem.

**Ms Karen Buck:** Judith Robertson, what is your response to that?

**Judith Robertson:** There is a range of protections there. There is a range of safeguards to stop that happening. The fact that parliamentary sovereignty is sovereign in the context of the Human

Rights Act has been very well written and understood. Even in the context of a declaration of incapability, Parliament still has the scope and the capacity to go back, look again, review and revise its legislation so that it becomes compatible. There is a fundamental, up-front obligation on Parliament to implement laws that are compatible with the convention. That is obviously the democratically agreed process. For me, there is that sense of stepping back from the intensity of that debate and asking, "What are the respective laws and what purpose are they serving in this context?"

The judiciary is playing a role of independent oversight of parliamentary decision-making. That is entirely appropriate, and not just appropriate but a function of the Human Rights Act in and of itself. For the legislation to enable that process to take place, given all the safeguards that are in the legislation itself, feels to me like a very clever piece of legislation. It is held internationally as being so. It is well constructed to respect the rights of Parliament in the process. You could say that in the context of a Parliament where one party has a significant majority, that role is all the more important, because that oversight, that scrutiny, from a human rights perspective is what we have to remember here. That scrutiny is happening from the perspective of people's rights and the rights enshrined in the legislation itself.

As a Parliament we have given that piece of legislation that status. The legislation has enabled the court to do that, and to do that in a proper way. That is not to say that Governments through the 20 years of the Act will like everything that the court says. Clearly that will not be the case, but that is no reason for extracting or weakening that capacity in the legislation. In fact, it is the exact reason for not doing that.

**Les Allamby:** To pick up where Judith left off, at times you have to try to separate out Governments of all political colours and stripes over the years. Long before the Human Rights Act, Governments have occasionally decried judicial decisions. I remember, going back to the 1980s, how unhappy some Ministers were with court decisions and so on. My experience in Northern Ireland, and I do not think it is confined to Northern Ireland, is that the courts are very mindful of not treading into the area of policy-making. You can see quite a number of significant examples of that kind of judicial deference in Northern Ireland.

When you look at issues like the margin of appreciation, it is clear from both convention jurisprudence and domestic jurisprudence that the margin of appreciation is considerably wider for

Governments on issues of economic and social rights—for example, social security, national security, tax and various issues—and much less so on issues of discrimination and so on. I am not sure that the problem here is the Act. There is a debate at the moment under Article 14 on freedom from discrimination. Courts domestically have talked about policies being manifestly without reasonable foundation, which is a pretty high bar to get over. There are questions of proportionality. There is an interesting debate currently about how you would look at discrimination.

I will very quickly take three very controversial pieces of legislation and social security as examples: the bedroom tax, the benefit cap and the two-child policy. Perhaps unsurprisingly, they have all been all the way up to the Supreme Court. The bedroom tax, interestingly, had mixed results. Some parts of it were found to be contrary to human rights, others were not. Interestingly, the Government made some changes to it. Scotland and Northern Ireland decided not to implement the bedroom tax for their own reasons. In the first round, the benefit cap survived, albeit narrowly, a human rights challenge, among other things. It is back and it is probably heading again to the Supreme Court.

The decision is being awaited on the two-child policy. Even if the two-child policy goes against the Government, all the courts will do at most is say that it is not compatible with human rights. That still allows parliamentary sovereignty and the Government to decide what they will do as a result of that ruling. The idea that somehow we are being ruled by courts and court decisions seems a long way off the mark to me.

**Ms Karen Buck:** Those are excellent examples for that answer. Thank you very much.

Q37 **Lord Brabazon of Tara:** I am a Conservative Member of the House of Lords.

The review has been tasked by the Government with considering how the Human Rights Act is operating and whether and how it might be amended to address any issues identified. In all your views, ought any amendments be made? If so, what are the risks of making amendments to the Act?

**Baroness Falkner of Margravine:** In general, I think we would rather wait and see what the review specifically recommends before we comment on it. On the face of it, I really cannot see that we need amendments to the Act at this point in time. Going forward, there might be things that the Government will need to think about as they emerge from the pandemic, but in terms of the Act itself, no, I would not reopen it.

**Lord Brabazon of Tara:** You would not go for any amendments.

**Baroness Falkner of Margravine:** We would like to wait and see what the review says and to look at their specific recommendations.

**Lord Brabazon of Tara:** You would not put any forward yourselves, though.

**Baroness Falkner of Margravine:** We have made a submission, but that has not advocated very many more changes, other than our existing policy positions, one of which is that the equality and human rights position should have greater enforcement powers in human rights. That is not an amendment to the Act itself specifically; it is about our powers.

**Lord Brabazon of Tara:** What about in Scotland?

**Judith Robertson:** My answer will be equally short. We are making no recommendations for amendments to the Act. It is very unusual for us not to make recommendations to amend legislation, I have to say. I was very struck by that in our submission. We recommend that there are no changes to the legislation.

**Lord Brabazon of Tara:** And Northern Ireland?

**Les Allamby:** We are in the leave well alone camp. Like Judith, it is about the only submission in my almost seven years at the commission where we have said that there is no need for change. I would add that it is not simply a question of "We have what we hold". We could not really see what the problems were that would enhance the Act. Then, for all the reasons I mentioned earlier, we think that some dilution of the Act, for all the reasons to do with the Belfast/Good Friday agreement, would be unwise.

**Lord Brabazon of Tara:** Thank you all very much. That is very clear.

Q38 **The Chair:** Can I press you a bit further? You will all have heard the debate about the establishment of the independent review and seen its terms of reference. It is evident that it comes from the point of view of the Human Rights Act as a problem, as bringing the courts into making decisions that are more rightfully the responsibility of Parliament. The suggestion is that somehow it would be better to restrain the roles of the court and water down the scope of the Act. Are there any issues that you are worried about on this? Do you see the independent review's activities as threatening to undermine human rights, or are you quite sanguine about it, you have just given your evidence and you will wait and

see what they come up with?

**Baroness Falkner of Margravine:** I think the key is in the title; it is an independent review. Certainly my impression in my conversations was that they are going to be pretty independently minded. I wait to be proved wrong, but that is my initial impression.

I hear what you are saying about the conversation that led up to the announcement of the review and, to be frank, the review came much later than I expected it to come. I expected the announcement of it to come some time ago, at least six months ago, in the summer of last year. The fact that it is so narrow and technical is, if I can say so, a win for the Human Rights Act. The very narrow focus, rather than going into all the areas that we heard on the rumour mill were going to be covered by the Act, self-points us to the fact that it will be fairly limited. I would not say that I am sanguine, but I would like to wait and see what happens.

**The Chair:** Thank you very much, Baroness Falkner. I remind you that there might be a vote in the Lords, so if you have to disappear at any point we will completely understand. I turn to Les Allamby next and Northern Ireland. Are you worried about what is going to happen with the Human Rights Act review? Do you feel that it is something threatening coming down the track, or do you feel that it is narrow in scope and independent so it will be fine?

**Les Allamby:** The independence of the review is something that we take as read. Our concern comes from seeing it come hot on the heels of the independent review of administrative law. That is obviously one step removed, but not that far removed, from some of the issues to do with the Human Rights Act, particularly again where there are questions of the balance between the citizen's right to challenge public authorities or the state at a local or central level against the right of Government and public authorities to govern. There is clearly a wind that suggests that the Government do not see that the balance or the pendulum is in the right place. However, there is a worry, not about the bone fides of the independent reviews but about where government is.

I think Baroness Falkner is right. Remember that it is not that many years ago when you had manifesto commitments to get out of the Council of Europe and so on. We have moved a long way back from that. I have no sense in which getting out of the Council of Europe or starting to try to hamper the convention rights itself are really at risk, but I would not underestimate the ability to change the machinery—that sounds a rather benign phrase—to make a very significant difference. There is a mantra in the

European Court of Human Rights that rights must be practical and effective and not theoretical and illusory. We need to guard against moving in the direction of the latter.

**The Chair:** Thank you. Could we hear the Scottish perspective on that? Are you worried about what is coming down the track? Do you think that it will be a retrograde step in human rights, or are you confident that it will all be fine?

**Judith Robertson:** Certainly not the latter. I am not confident that it will all be fine. With respect to the independent nature of the review, yes, that is fine, but we have to recognise the context in which that is happening, that context being a parallel review into judicial review and a wider analysis and interrogation of some of those processes.

We are concerned as a commission that making changes to the central mechanism of the Act significantly risks undermining its central purpose, which is to make convention rights directly applicable here in the UK and to enable us to enforce our rights at home. It risks distancing us from our rights, making them harder to realise and enforce and undermining accountability and the development of a rights-based culture.

We would be concerned that, differently from the Belfast agreement but like that, the Human Rights Act is entwined with the Scotland Act and the whole establishment of devolution. The potential weakening, undermining or changing of that framework has potentially complex implications, which I do not think are fully understood. They are certainly not understood at the moment, because we do not know what might or might not be proposed, if indeed anything. Yes, I think we have significant concerns.

I do not want to use the word "continuity", but the integrity of the system through the domestic legislation right up to the European Court, and being able to see a clear line of sight from the convention and the rights enshrined in the convention and how they are then implemented in the domestic courts in Scotland, England, Wales and Northern Ireland, has been a really consistent process up to now. Unpacking or unpicking that risks undermining a system that has been well developed over 20 years. Also, the UK's relationship to that whole system has been very constructive and enabling up to now. We are concerned about it, because the trajectory in Scotland is very different.

Scotland has, to a large but not complete extent, embraced a human rights culture. It is looking to build on that culture and to develop it and further protect people's rights through potentially

incorporating economic, social, and cultural rights, and the right to a healthy environment and the rights of older people to live with dignity and respect. These are important considerations. Weakening the cornerstone on which these other rights are built on is not the direction of travel that Scotland is intending to go in at all, seems to me. From our perspective, any weakening, if that were to happen, would be very destabilising.

**The Chair:** Are you saying that there has to be a particular perspective about any amendments to the Human Rights Act and the implications that they would have for the union in relation to the relationship between Scotland and England and the question of the Scotland Act?

Les Allamby, are you saying that there has to be a recognition of the Northern Ireland agreement and that the implications of any changes made in the Human Rights Act have to be thought through when considering any changes to the Human Rights Act?

**Les Allamby:** In a word, yes. We draw some comfort from the fact that Baroness O’Loan is on the independent review and is clearly familiar with the Belfast/Good Friday agreement. But we are mindful of something not being driven by what is perceived to be an issue in England perhaps and devolved Administrations being forgotten about. Yes, in a word.

**Judith Robertson:** Yes from Scotland as well, obviously.

Q39 **Lord Henley:** I am a Conservative Member of the House of Lords. I think all of you have touched on this a little. We are approaching the anniversary of the beginning of the first lockdown. What do you think has been the impact of the Government’s response to Covid-19 on public attitudes towards human rights across the UK? Baroness Falkner first.

**Baroness Falkner of Margravine:** Thank you, Lord Henley. First, I think it has made people much more aware of their human rights and their civil liberties in general. It has made people reflect a bit more on how decisions are taken. Maybe I am naive, but I think it might have enhanced some understanding of government. Remember in the early days the number of people who were tuning in for 5 o’clock press conferences. It was quite extraordinary. I do not know if that has been maintained, but it was huge numbers. At the same time, it has not necessarily been a great and positive, “Hurrah, our human rights are being defended”, because people are also asking questions about the balance of rights and about the right to liberty versus the right to life and all the questions we have already touched on.

We are just about to do some survey research that examines attitudes to human rights and how they are changing in the post-Covid-19 era and the extent of the influence of the pandemic on people's opinions. We will of course be very happy to share that with the committee when it is completed.

For us, the challenge as a commission has been the balance of different rights and ensuring that equality and human rights considerations and equality considerations and restrictions are proportionate. We have had concern about that. In September, we described it as walking a tightrope. We need to change the balance between saving lives and allowing people's hard-won freedoms and frameworks for those lives.

It is not just the private and family life part, but the right to go out and earn a living, the right to be able to care for your family, and the economic part of the impact of the lockdown, particularly on women. The four groups most severely impacted by this are women, disabled people, young people, and ethnic minorities. It has been very clear that the effect of the pandemic has been unevenly distributed, as we well know. There is also the question of the extent to which we use the period of recovery to address that. I can come on to that later. We want protections to be proportionate and measured. I think the Government have a better defence if they are rooted in science and law. I will leave it at that.

**Lord Brabazon of Tara:** We are breaking in the Lords at the moment, by the way.

**Baroness Falkner of Margravine:** Thank you.

**Les Allamby:** I will be very brief. We do not have any survey data to be able to give an objective analysis. I think it has made people appreciate things that they took for granted, such as liberties to visit family, to work, to travel and so on. People have become more aware that if those are restricted, they have to be restricted in a proportionate manner to deal with a public emergency and so on. It has perhaps sharpened the understanding that you have to be careful and not take rights for granted, and that rights are very important. I am hoping that that is one of the outcomes of this when we eventually leave the pandemic.

**Judith Robertson:** I will describe very briefly what I have seen at different levels in Scotland, particularly at the level of government. There has been a willingness to engage on human rights and to see human rights as a framework and a road map for looking at, thinking about and guiding decisions to some degree. Again, I would say that it is patchy, that it is not perfect, but it is to an

extent a very considerable consideration of human rights in the dynamics, the delivery and the implementation of the changes to policy and seeing that as being very important. I have seen the terms of the debate on human rights strengthen and grow, and I have seen Parliament's role in that in Scotland also strengthen and grow.

The quality of understanding of politicians and again of civil society has really been boosted. I see that as being quite an important dimension. I have also seen people use human rights very proactively as a framework in discussions and conversations and saying, "I have rights here". They have fallen back on the rights framework as a way of being able to have conversations with health professionals and in care homes, prison settings or whatever setting. Schools, students, all these dynamics have opened up these rights conversations. Yes, the balance of rights has been argued about and debated. It has been at the heart of that, but that in and of itself is a very important part of our human rights culture—that you can have that discussion and that dialogue and really understand.

At one level, it would be great for us to do some actual polling and survey so that we could have objective detail on this, but I suppose the biggest thing I see is the population of the UK upholding the rights of other citizens through the actions they have taken in complying with the regulations of lockdown. They have understood wholeheartedly, in fact, that the rights of people, older people and vulnerable people are paramount in this context. They are not just locking down and complying with the regulations for themselves; they are doing that for other people, also. They are doing it for their families and for other people's families, and they are doing that for strangers all across the country. I think we should draw strength from that. We should see that that, in and of itself, is an act of respect for human rights. I am very heartened by that and encouraged by that.

Yes, it is fraught, it is tense and it is contested. All of that is the case, and it should be all those things because that is the only way you can have the appropriate checks and balances and check the proportionality and the appropriate nature of what is interfering with people's rights—we have interfered with people's rights on an unprecedented scale in the past year. I hold great hope for the progression of rights in this context.

The final point to make about that strength and understanding is that this process has not impacted on all of us equally. There are key sectors of our community that have not had the same impact

on them, whether that be people from black and minority ethnic communities, older people, people with health conditions or young people. People have been affected differently in all sorts of ways in our society. Increased awareness of that is also fundamental to a human rights culture. For me, a lot has happened and there is loads to build on. I see that in Scotland as being a very constructive dialogue at the moment.

**Lord Henley:** Thank you very much. I think we would probably all be grateful to have copies of the research that the HRC has commissioned when it comes out. I see Baroness Falkner has her hand up.

**Baroness Falkner of Margravine:** I want to come in very briefly on behalf of Wales. I am not sure whether the committee is aware that just yesterday the Welsh Assembly agreed to amend the Curriculum and Assessment (Wales) Bill, which will now require education providers to promote knowledge and understanding of UN conventions on disabled people's rights and children's rights. This has happened in the last 24 hours and it is a good news story. Covid has made us look at the detail of not just how we are approaching our rights but how the next generation will approach their rights.

Q40 **Joanna Cherry:** Good afternoon. I am the Scottish National Party MP for Edinburgh South West.

Following on from Lord Henley's question, what do you each see as the major human rights challenges facing the United Kingdom and its constituent nations as we come out of the pandemic? Linked to that, as Judith said, we have seen an unprecedented curtailment of human rights during the pandemic, much of it done without much parliamentary scrutiny, and people have largely been very compliant.

In addition to identifying the major challenges, how do you see us re-centring the importance of human rights across the United Kingdom? It is perhaps concerning how compliant people have been, and maybe we need to remind people of the importance of human rights.

**Baroness Falkner of Margravine:** We are approaching our new period of strategic planning as I speak to you. We intend to lay our new strategic plan, a three-year plan, before Parliament next year. We are going to use the lessons of this period to change the way we approach our strategic plan. We have our priority aims, which are health, work and education. Within those we will look at the impacts of Covid on some of those things. This is our longer-term approach.

In addition, in the more immediate term the Government have a pretty heavy legislative agenda of constitutional reform: judicial reviews, the Scottish national task force and human rights leadership. The Welsh Government are looking at several changes that they are hoping to make, depending on the outcome of the elections and their manifested commitments. Yesterday they also agreed almost unanimously to incorporate the public sector equality duty in Wales.

There is a pretty heavy agenda. As I just mentioned, we are looking at serving evidence and further data analysis on equality and human rights. The levelling up agenda is something that I think we can completely understand, given the evidence on how disadvantage affects certain communities with protected characteristics. That is quite high up in our priorities. Essentially we want to avoid regression in women's employment rights in particular, because we see a lot of that coming into play already, with employers using this pandemic to do stuff that in normal circumstances they would never have come near to doing. We are watching that pretty carefully.

We are finalising MoUs with various other organisations. For example, we have just signed one with the Financial Conduct Authority. That is a change for us as well. We want to address systemic barriers to the benefit system for disabled claimants. I think I have already told the committee—if I have not, let me say it now—that we are also doing an inquiry at the moment into workers in the social and care sectors and their employment rights. We have a pretty heavy agenda of work ahead of us at this point in time.

**The Chair:** I will follow up on something that you have just raised. You mention the importance of not allowing employers to use the pandemic to get away with things that they would otherwise not be able to get away with and that are not justifiable, and things that they should not be doing. How do you feel about the fact that you have allowed employers not to file their returns on the gender pay gap? How does that sit with that? Is that not exactly what you said you did not want?

**Baroness Falkner of Margravine:** We have not done that.

**The Chair:** You have not.

**Baroness Falkner of Margravine:** No, we have not allowed employers to get away with not filing the reports. We did not do that last year even at the height of the pandemic, and we have not done it this time. We found that around 60% of employers filed,

even though we suspended it last year, but we encouraged them to do so. Remember that our conversation with employers is very simple and straightforward, and it is this: if you have any women working for you, the strongest signal you can send to them is that you are conscious that this is a big issue and that you are looking at it and acting on it.

This year, we have given employers a final deadline of October 2021. We have asked them to continue to file by April, which is next month. If last year is anything to go by—we managed to get nearly 60% last year—we expect a higher figure this year, because things have now stabilised. I have to say to anyone who says that they cannot do it that I do not accept that there are very good reasons not to do it, because they have no other reporting requirements, and annual reports have been suspended. I do not see why we would want to suspend that, and we have not, for that reason. We have just given them a bit more time. We use the time quite effectively, by the way, when we get a large number of filings to analyse the data.

**Q41 Joanna Cherry:** I am particularly interested to hear from Judith, because I know that the Scottish Government, and the National Taskforce for Human Rights that has been mentioned a few times, are planning a Bill that should be published in draft later this month and, it is hoped, taken forward in the next session of the Scottish Parliament. It will involve the recognition of economic, social, cultural and environmental rights drawn from various UN treaties in addition to the existing civil and political rights we have under the Human Rights Act. That is taking further forward the agenda that is exemplified by enshrining the UN Convention on the Rights of the Child in statute. Could you tell us a bit more about that, Judith?

**Judith Robertson:** Thank you. You have taken the words right out of my mouth. To answer your original question about the key human rights issues coming out of the pandemic, I think they are people's economic and social rights. We can see that the impact of issues like pandemics and a global health crisis on people who are living in poverty in this country are more extreme. They are more affected by the effects of the pandemic. They will also be more affected by all the other processes that have been put in place, whether that be employment practice, coming out of furlough or the economic contraction that will happen—all the practices or developments that we will see following the pandemic. These are considerable human rights issues that are currently not given protection under the Human Rights Act in key ways, but they are issues that could be protected further in Scotland as a result of the work of the task force.

The task force has been looking at and reviewing how Scotland, within the competence of the current devolution settlement, can build that protection so that the protections we have under our economic, social and cultural rights and the right to a healthy environment are strengthened and are as strong as they can be in Scotland, given the constitutional settlement, and that that completes the circle so that the rights protected by the Human Rights Act are one's core set of rights.

Those rights are not complete, however. The right to an adequate standard of living, which incorporates the right to food, adequate housing and adequate income, is a key part of building people's accountability for those rights on behalf of the Government and Parliament in Scotland, and they need to be given proper attention and focus. The key part of a rights-based approach, from our perspective, is that those most affected or most at risk of those rights being breached are the ones who will be given priority focus in that policy development.

We would also say strongly that Governments and public authorities must take steps to realise the economic, social and cultural rights under the ICESCR itself progressively and to the maximum resources they have available. For me, that provides a real guiding star to the next Government of Scotland after the Scottish elections so that, as those rights are incorporated potentially into Scottish law, our priority is to use all the available resources we have to ensure that people's rights are upheld as much as possible over time. That is very important. The ICESCR has a different set of standards and norms than the ICCPR, although obviously they are closely complementary. That is another learning curve in Scotland: to learn and understand what ICESCR gives us, and not just ICESCR but potentially other treaties that may be incorporated.

I am saying all this, because the announcement will be made later this week and I do not want to pre-empt it. There will be plenty for people to review when the report from the task force process is published. There is a lot of work to do, but I am very confident that following the next election, no matter who wins, these issues will to some degree remain on the map for Scotland's work.

**Joanna Cherry:** We will see the report of the task force later this week.

**Judith Robertson:** You will certainly see it in short order.

**Joanna Cherry:** I had understood that it was due before the end of the month. This committee will keep a close eye out for it.

**Judith Robertson:** Yes.

**Joanna Cherry:** Thanks, that is very helpful. Les, I am very conscious of not missing you out, because it is very important for us to hear what you see as the major human rights challenges for Northern Ireland as we emerge from the pandemic.

**Les Allamby:** Yes. I will give you three, and they are interrelated. The first is to do with the fact that BME inequalities, but also income inequalities, have been thrown into sharp relief. They have not happened because of the pandemic. Related to that is how we get out of the pandemic and how we pay for the expenditure incurred during the pandemic.

We did a piece of work on the accumulative impact assessment and tax and social security. It followed a piece of work done by the EHRC in the Scottish commission, and I think we will want to focus on how inequalities are tackled. We have real difficulties for example with BAME communities and getting the kind of data that will show us exactly what is happening. Neither our family resources survey nor the living costs and food survey can tell you what the impact is on BAME communities as a whole, never mind segmenting them into specific communities.

We need to get some stability for Northern Ireland post leaving the EU. That will clearly be important. We have been hit particularly by that, alongside the pandemic. Those are the key issues for us. People in Northern Ireland, like Scotland and elsewhere, have been very compliant, and it is important to make sure that when people get their freedoms back they cherish them once again and recognise that they should be curbed only in the most prescribed and limited circumstances. That is what international human rights standards are all about.

Q42 **Baroness Massey of Darwen:** I had a question about offering opportunities to increase the awareness and understanding of human rights among local authorities and individuals, but I think you have all answered that question fairly comprehensively, unless you have something to add. I wanted to congratulate Scotland on its progress on the UN Convention on the Rights of the Child. I happen to think that knowledge of rights begins with children, and I know that many schools are already incorporating this into their curriculum. I know that Wales incorporated the UNCRC into legislation some years ago, but I am glad to hear from Kishwer Falkner that they are now focusing very much on human rights in the curriculum. That is all good news.

Kishwer also focused on the four categories of people who were

most affected: women, disabled people, young people and minorities. Do you think that those minorities have become more aware of their rights during the Covid pandemic? Judith, do you want to start? Again, congratulations on the UNCRC.

**Judith Robertson:** The Convention on the Rights of the Child will go through its final stage in the parliamentary process in the Scottish Parliament next week. We are fully expecting that legislation to be incorporated into Scots law when it is given Royal Assent and is implemented. We too are delighted to see that. The full incorporation of the treaty is one of the things that marks an important milestone in the development of rights protections in Scotland.

To answer the second bit of the question, yes, I do think that people are missing out. I think that people's rights are being infringed in all sorts of ways across society, and the pandemic has highlighted that. We did a monitoring report into social care in Scotland looking at the decision-making processes for care packages for people who were receiving social care at home, an area that has not received the same attention that the issues in care homes have received.

We identified, along with civil society organisations, which did a lot of work in this sphere, that people's care packages were being removed or reduced without any notice or consultation in far too many contexts in Scotland, and that people were being left effectively with breaches of their rights to private family life, their rights to health, the right to live in dignity. People do not describe it like this, but that is what it is.

My answer to the previous question reinforces this issue: that we need to be much better culturally, societally and as a state at prioritising the focus on people whose rights are most at risk, not just bringing attention to it but prioritising attention to it and shifting resources so that people's rights can be better realised.

The implementation piece that we talk about is the key gap in the system. The protections need to be bolstered, for sure, but so do the practices of implementation. Implementation comes through resource allocation, through wisdom and through looking at that resource allocation from a rights perspective. Whose rights are most at risk here? Who is winning, who is losing, and what are we doing about the people who are losing in the systems?

We have been advocating on behalf of these kind of processes for all of our existence as a commission, and we will continue to do so. It is a key priority in our strategic plan. It has underpinned an

awful lot of work we have done on human rights budgeting, because we recognise that money talks.

Where money goes is where you see the impact. If you want to reduce child poverty, you need to put proper financial resources into these processes. When you look at the budget, if you find out that all the money has gone into other things that do not do that but which potentially reinforce and support people who are quite wealthy—regressive tax policy is a very good example of that—you will miss the mark.

As you can see, this is something of a passion of mine, but that is what we need to be doing next in relation to realising people's rights: prioritising those who are most affected when their rights are breached.

**Baroness Massey of Darwen:** That is very helpful. I think your passion is well read. Kishwer, do you have any comments?

**Baroness Falkner of Margravine:** First, you repeating those four priorities has made me realise that I missed out a critical one, which is older people. I would not restrict it to five groups of people. I would have a broad brush approach to that.

In terms of black, Asian and minority ethnic communities, I think the awakening preceded Covid-19 in the sense that the Windrush scandal already made a certain generation of Afro-Caribbean people much more aware of the lack of respect for their rights as a community. The impact of Covid has had a differential impact across BAME communities, and it has had a greater impact on younger people than on the older generation. Survey evidence is likely to reveal that. I think it has had a differential impact. For South Asians, I think the impact has been more socioeconomic.

Health inequalities have come to the fore across the communities. WEC, the Women and Equalities Committee, just recently published a report on the impact of maternity care. Health inequalities are significant. There is a greater recognition of human rights and liberties, and not just in the communities themselves but among service providers. It is the supply side that I am particularly interested in. We are doing an inquiry into social care and care home staff. To what extent do they appreciate what their responsibilities are in the delivery of the public sector duty? Even though they may not be part of the public sector, they too have duties.

Generally institutionally there has been a much greater awareness of the fact that many of the rights that they may not have thought

of or that might have resided in the compliance department of institutions in the past have moved out of the compliance department and on to boards and into decision-makers' in-trays. That will be significant.

**Les Allamby:** I would take two different strands. First, there is the challenge of how those who are most marginalised will be looked after again once we leave the pandemic. The picture has been missed. People with no recourse to public funds seem largely to miss out. We have had street homelessness but some very clear initiatives for temporary periods and some arrangements for asylum seekers. What happens when we emerge back the pandemic will be important.

There is a second dimension. I have sitting on my desk at the moment letters about delays in dealing with industrial tribunals, as we still call them, including from a number of people whose workplace disputes are still in the workplace. We have to have catch up with regard to courts, tribunals and waiting lists for non-Covid healthcare. The question is how we are going to manage all those things. There is some talk about some industrial tribunals not happening until 2023, so there is a set of issues there.

Our commission is particularly interested in building on the work that we have done on how this will ultimately be paid for in economic and social rights terms. You may remember austerity and the rhetoric in 2010 that we were all in this together. It was pretty clear that those with the broadest backs largely bore the least burden. We have to find a way of ensuring that the people who are already struggling are not the ones who will primarily have to pay in financial terms, so we have to tackle income inequality.

We had a discussion this weekend, started by our Minister of Finance, about possible tax-varying powers in the long term for Northern Ireland. We need to think about how we emerge from the pandemic in a way that is fair both in income equality terms and in wider capability terms.

**Baroness Massey of Darwen:** Thank you all very much.

**The Chair:** Thank you very much indeed. That concludes our evidence session today. I warmly thank Baroness Falkner, the chair of the Equality and Human Rights Commission, Judith Robertson, the chair of the Scottish Human Rights Commission, and Les Allamby, chief commissioner of the Northern Ireland Human Rights Commission. Having a perspective from England, Wales, Scotland and Northern Ireland and from agencies most concerned about human rights has been invaluable and will be very important as we

draw up our report in response to the Government's inquiry into the Human Rights Act. Thank you very much indeed. That concludes this evidence session.