HOUSE OF COMMONS

Justice Committee

Oral evidence: Human Rights Act Reform, HC 1087

Tuesday 1 February 2022

Ordered by the House of Commons to be published on 1 February 2022.

Watch the meeting

Members present: Sir Robert Neill (Chair); Ms Diane Abbott; Rob Butler; James Daly; Maria Eagle; Laura Farris; Dr Kieran Mullan.

Questions 1 - 77

Witness

I: Sir Peter Gross, Chair of the Independent Human Rights Act Review.

Examination of witness

Witness: Sir Peter Gross.

Q1 **Chair:** Good afternoon and welcome to this session of the Justice Committee, and welcome to our witness, Sir Peter Gross. We are very grateful to you, Sir Peter, for coming to join us this afternoon.

Before we start the evidence, we will deal briefly with Members' declarations of interest, which we have to do as a matter of procedure. I am a non-practising barrister and former consultant to a law firm. Sir Peter, it is right to say that you and I have known each other for many years, both personally and professionally.

Sir Peter Gross: Absolutely.

Laura Farris: I am a non-practising barrister.

Rob Butler: This is probably not directly relevant to today's hearing, but prior to my election I was a magistrate and non-executive director of HMPPS and a member of the Sentencing Council.

James Daly: I am a practising solicitor and partner in a firm of solicitors.

Maria Eagle: I am a non-practising solicitor.

Q2 **Chair:** Sir Peter, thank you very much for coming to give evidence to us. All of us have received and read the report. I have the prop with me if needed. I know that a number of your panel are here today. We thank all of them for the work that has been done.

It may be known to many people, but for the sake of the record it would be helpful if you could outline for us how your panel and the review came about, the methodology with which you approached it and the system of working to produce the substantial document that we have.

Sir Peter Gross: Chair, thank you for the invitation to come today. It is a pleasure to be here and I hope to be of help to your deliberations.

The panel and the review were established by the then Lord Chancellor, Sir Robert Buckland, to review the operation of the Human Rights Act. There were three essential requirements on which Sir Robert and I agreed at the outset. First, it was to be an independent review; secondly, the panel was to be independent; and, thirdly, the terms of reference were to be neutral. If I may say so, Sir Robert held impeccably to that approach, ensuring that the review was conducted independently throughout.

Perhaps I may say at once—you have already touched on it, Chair—that my panel colleagues were outstanding, as was Dr John Sorabji, our principal legal adviser, who is also here. The engagement of each and every panel colleague was remarkable and each made a real contribution. That was how we were set up.

Turning to the work, our remit was to review the operation of the Act. Examination of substantive convention rights was outside our scope, and we stuck rigorously to our terms of reference.

Perhaps I may add two points at this stage. First, it was a fixed premise of the review that the Government were committed to remaining a party to the convention. That fixed premise underlined an interest in what I would call broad consistency between the UK courts and the European Court of Human Rights. For shorthand, today I will call it the Strasbourg court. Secondly, our remit was UK-wide; we were not confined to England and Wales, so we had devolution considerations well in mind from the outset and throughout. Looking ahead, we do not believe that any of the panel's recommendations create any sensible devolution concerns.

How did we approach the work? If you can bear with me, I will take a moment or two over this because the methodology of the panel is quite important. We looked at it in an objective way. We adopted an evidence-based approach. We were tasked under the written ministerial statement to do it independently and thoroughly and we sought to do just that. We had no preconceptions. We did not start with the answers because we did not know what they were, which is probably a healthy place to start. We were not party political. We developed certain principles and criteria as we went along: common law, respect for certainty in the law and considerations of that nature, and keeping an eye on both domestic considerations and the UK's position in Strasburg.

We were obviously not there to talk to ourselves, so we wanted to get views from as wide a spectrum of opinion as we could. We put out a call for evidence. It is set out in our documents, but it is worth emphasising that we had over 150 submissions in writing, most of them substantive. We fully adopted a policy of transparency. We said at the start that we would be open and transparent and we were. Almost every submission went on to our website and is still there. A very few did not, simply because, as you know, you get the occasional submission to something like this which does not really engage with the review at all, to put it neutrally.

We also followed up. We had 150 submissions. Obviously, there were various groups that had specific interests, and we followed up with about 13 or 14 what we called roundtables. Those were small meetings. The minutes of all of those meetings are on the website, so it is all open.

We also did road shows. They were UK-wide and were facilitated very kindly by eight universities, and covered Belfast, Glasgow, Swansea and various places in England. The reason for all that was that this topic cried out for travelling around the UK and talking to people. We could not do that because of Covid, so we covered the ground online. All of our panel meetings for the first few months had to be online. It was with a little bit of a start that you met people after six months and suddenly realised you

had not met before; you had simply seen them on the screen. We have all had that experience over the last year or two.

We did not stop there. We had a session with the president, the UK judge and the Irish judge of the Strasbourg court. We spoke to the Irish Supreme Court and spoke to a judge of the German Constitutional Court.

Q3 **Chair:** Was there a particular reason for doing that?

Sir Peter Gross: We wanted to get the additional available perspectives; we wanted to hear directly from Strasbourg what their views were. The particular reason for Ireland was as a fellow common-law country in the convention, and the particular reason for Germany was the emphasis that we knew Germany placed on the decisions of its own constitutional court and its basic law.

Q4 **Chair:** There have been some recent decisions of the German Constitutional Court which touch on that.

Sir Peter Gross: Precisely so. Those were the reasons. In theory, we would have liked to talk to lots of other courts, but we were working to quite a tight timetable.

I would love to say that we planned the website, but we did not. That website is now one of the best places for finding human rights materials in this country because all the contributions are there, so that is a resource for the future. We are very pleased about that. As I say, we would love to have planned it, but that was the way it worked.

We had a concern. We were going to do a thorough job, come what may, but we also wanted to do it within the timescale, and we did it within a few weeks of the most desired date. To do that, we adopted the quite rigorous self-discipline that, at the end of each panel meeting, we would take a decision on the topic we were addressing, and we did. We then looked at the thing in the round at the end to see how it all fitted together.

On a topic of this nature, and also an important part of the methodology, it would be unlikely, especially with an independent-minded panel, that everyone would have the same views, so we worked on the clear understanding that there was room to accommodate any dissent, and where views differed that can be seen in the executive summary of our report.

Q5 **Chair:** In effect, there is a minute in your executive summary as to who supported what.

Sir Peter Gross: Yes. We decided as a panel that we would identify that wherever somebody did have a different view, as you rightly say, it is there.

Q6 **Chair:** Does that quantify when sometimes you talk in terms of a majority or minority?

Sir Peter Gross: No; we decided against that.

Q7 **Chair:** Is that something about which you are able to help if need be, if ever there is an inquiry as to whether it was a substantial majority or a small majority?

Sir Peter Gross: If it was substantial. I am prepared to go that far.

Q8 **Chair:** That is helpful in giving a flavour of it.

Sir Peter Gross: If it was a very substantial majority.

The striking feature of the whole exercise was the breadth, depth and spectrum of views we obtained, and those informed our views and then our recommendations. That is probably a rather lengthy summary.

Q9 **Chair:** That gives us a very good idea as to how it comes about. I have the nature of the panel. Sir Peter, we know that you are a former Lord Justice of Appeal and that the panel has a number of lawyers, including a former president of the Law Society, Queen's counsel, academic lawyers and other academics, so we have the thrust as to where it comes from.

You indicated that you based your work on the premise that we remain a party to the convention, which is the Government's policy, and the current Lord Chancellor restated that recently. Was your work on the premise as to how the Government would respond to your report?

Sir Peter Gross: The understanding in both the terms of reference and the written ministerial statement was that our report would be published, as would the Government's response, so we anticipated a response.

Q10 **Chair:** The Government have published a consultation document entitled "Human Rights Act Reform: a Modern Bill of Rights". Would you characterise that as a response to your report?

Sir Peter Gross: No.

Q11 **Chair:** Tell me why that is.

Sir Peter Gross: We knew that the current Lord Chancellor intended to go wider than our report. He was very courteous and fair in telling us that. What we did not know was that it was not going to be what I would call a responsive document. The simplest way I can put it is that, if you compare this document with the response to the Faulks IRAL, you could put Faulks down and the response next to it and run the one into the other. You cannot with this. I can explain in more detail, if at some point you would like me to, how we categorise the relationship, but, in short form, you cannot put ours down here, the Government's consultation down there and say that the two work together.

Q12 **Chair:** We may as well deal with it now. How would you categorise the distinction?

Sir Peter Gross: If you can bear with me, there are five different categories. Let me take you through it. The first is that there are parts

where the Government apparently agree with our recommendations. I can come back and give you the details if you like. The first category is areas of apparent agreement; the second is areas of apparent disagreement, without necessarily addressing our reasons for not recommending or rejecting the approaches in question. The third is areas which have not been addressed at all. Those are quite significant.

The fourth area—here we have absolutely no gripe at all, not that we have gripes generally—is matters outside our scope. Let me just deal with that and then put it to one side straightaway. On substantive convention rights, like article 8, freedom of expression, proportionality and various other topics—there are one or two cases, for instance Ziegler—where for all of that we knew that the Lord Chancellor would go wider. That is his prerogative and had nothing to do with us, and we could never have spoken about that, even if we had wanted to, because our terms of reference clearly stopped short of it.

The final category is one or two matters where, with all respect, we are a bit puzzled. We know what is said, but we are not quite sure what those points contribute. Those are the five categories.

Chair: Perhaps we can come back to some of those as we go through. That is a very helpful overview. What I think we can do is start to move through a number of the areas of particular importance and we will pick up some of those differences as we go.

Q13 **Ms Abbott:** Sir Peter, you said that the document that the Government had produced is not a response to your inquiry. Are you expecting an actual response?

Sir Peter Gross: We were, but I do not think we are.

Q14 **Ms Abbott:** You do not think you will get a proper response. When the Human Rights Act was brought into law in 1998 there was some discussion about bringing rights home, but also about creating a rights culture within the UK. It may be broadly true that we have a rights culture, but, on the contrary, there are some elements of public opinion that are almost hostile to the notion of human rights. How do you think that has come about?

Sir Peter Gross: Thank you for that question. We attempted to address that in our report. If I may say so, we think that in general the Act has worked well, but there remain pockets of opinion that are hostile to the Act in a manner that falls short of providing what one might look for, which is settled acceptance of its place in the structure. How has it come about?

In our report, our view is that one reason for it may be a feeling or a perception that it is an alien import rather than organic growth in a country with one of the strongest rights systems in the world. In that sense, looking at it with hindsight, the initial phrase "bringing rights home" may almost have been unfortunate. Everyone at the time knew

what was meant. It meant that you could enforce your rights here without going to Strasbourg. If you look back on it now, you might say it was a little unfortunate, quite unintentionally, because it created the impression that something foreign was being brought in, whereas we had had a very long history of it. We thought about one or two things we could have done on that score—in chapter 2, I think—but decided against cosmetic measures, or measures where we might be accused of acting cosmetically, and preferred to go for a substantive approach to dealing with that.

Q15 **Ms Abbott:** To what extent has the Human Rights Act affected the decision making of public authorities?

Sir Peter Gross: We think quite a bit. The most telling example we had—a very important example, because throughout we are looking to encourage majority support for this—is that we were given quite a graphic account of a case concerning the position of someone in a care home during Covid. It was not high-profile litigation; it was simply the ability to deal with a particular care home using the framework provided by the Act. The person in the care home could have been anyone's relative. We think it has assisted considerably.

Q16 **Ms Abbott:** What would you say are the main weaknesses of the Human Rights Act 1998 that your review identified?

Sir Peter Gross: I think the main weakness is the one I sought to cover in answer to your earlier question: the fact that for some people it has not yet developed settled acceptance and there is still hostility to it. We have tried to address that. I think we said in the review or in the executive summary that we wanted to put something like common law, or in Scotland case law, centre stage, which makes the whole thing more acceptable. It is the right thing to do anyway, but it also ought to entrench support.

Ms Abbott: Thank you very much.

Q17 **James Daly:** Sir Peter, this is absolutely fascinating, but that may be me rather than anybody else. I approach these sessions on the basis that my constituents who are watching this almost certainly will not have legal knowledge. Rather than an eminent lawyer and another lawyer speaking to each other, on the statement you made regarding the Human Rights Act and how the common law dealt with rights before that, could you go into a little more detail on that point?

Sir Peter Gross: Let me be unabashed because we put in the first paragraph of the summary that this country has a record to be proud of in this field. It is not perfect; nobody is perfect, but we have a record to be proud of and we want to assert it with confidence.

Going back hundreds of years, the common law has protected human rights, generally negatively: what people cannot do. You cannot trespass on private property and things like that. The common-law system

provides the background against which subsequent developments took place here, in the US and elsewhere. One must not overstate it, but we can go back to Magna Carta, the Bill of Rights and common-law developments in the 19th and 20th centuries. To me, the obvious starting point in a dispute concerning human rights is our own law. If our own law does not solve it, we go to the convention, the Strasbourg jurisprudence. There is nothing remarkable about that in the Strasbourg context. In Strasbourg terms that is the principle of subsidiarity. If I can be forgiven a cricketing metaphor, Strasbourg sees itself as the longstop with the primary rights protection being in national courts.

Q18 **James Daly:** In that sense, why did we need the Human Rights Act? This is not a political question, but purely in terms of law and the rights outlined in the Human Rights Act would the common law protect those anyway?

Sir Peter Gross: The common law would protect a good deal of it. The common law tends to be negative; a lot of the rights in the convention are positive. It is a different framework for approaching it. I cannot say there is complete identity because there is not, but the more specific answer to your question is that we became a party to the European convention from, say, the 1950s when we signed up and then subsequently when individuals had access to it. We were bound internationally by the convention. The Human Rights Act was brought in primarily to enable British citizens or residents to enforce their rights under the convention in this country rather than having to go to Strasbourg. Those are the mechanics of it.

Q19 **James Daly:** We can talk forever about the history and how the Human Rights Act has affected this country, but there is no point in having rights unless you can enforce them. This goes back to the point you have just talked about relating to Strasbourg and local courts. One of the problems with our legal system is that it is incredibly difficult, certainly for the most vulnerable people in our society, to have access to lawyers, even to the courts, within suitable times to enforce rights.

What is your view in respect of that? The Human Rights Act exists. I spent many happy years in magistrates courts and never once in 16 years did I hear mention of the Human Rights Act, which is probably my fault. If we are to have the Human Rights Act and these rights, what is the best way of people being able to get at them and enforce those rights?

Sir Peter Gross: With respect, I think your question, quite rightly, touches on the links between rights and the ability to enforce them. That brings us to the topic of legal aid, but that is way beyond my scope. I certainly may have personal views on it, but it is outside the scope.

Q20 **James Daly:** I do not expect you to comment in respect of that, but I think it is fair for me at least to elicit an answer in respect of that. We won't take it any further, but if the justice system requires a means by

which people are able to instruct lawyers, that is directly linked to what we are talking about. We cannot simply have people with means being able to enforce their rights through the courts. Your panel will probably agree with that as a concept.

Sir Peter Gross: Had it been within our terms of reference.

James Daly: I will leave it to other colleagues because of the time, but I think this is an excellent and hugely significant document. There is a debate about how legislation and this place can statutorily give and enforce rights compared with how the courts have developed the very well-established rights which, as you say, we have enjoyed in this country for many years. I do not think we should ever underestimate our judicial system and the rights that have been central to our being a free and independent country. Thank you very much indeed, Sir Peter. It is an excellent report.

Sir Peter Gross: Thank you very much indeed.

Q21 **Chair:** To pick up one of Mr Daly's points, the point of what you are saying about bringing rights home is that prior to our signing the convention in 1951 as parties to an international treaty we were bound by the convention. It was, therefore, open to British citizens to rely upon their rights, but they were not able to do so directly through the domestic courts. It was necessary, therefore, to bring proceedings in Strasbourg rather than using those rights in proceedings in UK domestic courts. That was the principal difference that the Human Rights Act was perhaps intended to make.

Sir Peter Gross: Precisely so.

Q22 **Dr Mullan:** Building on the question about public perception and whether the public support it, my impression has always been that it is not so much a concern about the structure or the manner in which decisions are taken, but more about where the balance of rights is weighed differently from how perhaps the majority of the public might balance those rights. Prisoner voting is a high-profile example. Do you think it is fair, from your review, that these are weighing exercises and ultimately the public may take a different view on the weight given to each right?

Sir Peter Gross: You put your finger on it. In many respects, this area is one where there are balances to be struck and views can differ on where and how they should be struck. If the topic is quite controversial—prisoners' rights was one—there will be views on the outcome. Prisoners' rights probably represented the low point that I can remember in our relationship with the Strasbourg court, and ultimately that was resolved politically. If you like, at some point I can come back to a couple of other examples where the dialogue between the courts resolved very satisfactorily the impasse that had developed. I can deal with that.

Coming back for a moment to Mr Daly's question, if I may, both the legislature and the courts have a role in this area. For what it is worth, my own feeling is that they complement each other.

Q23 **Chair:** That is very helpful. Many of us might think that the prisoner voting case might now be decided differently.

Sir Peter Gross: Indeed so.

Q24 **Chair:** Perhaps the other point in terms of the public is that your report specifically recommends that the Government consider a programme of educational questions about human rights. This Committee in the past has also talked more broadly about questions of legal education. Can you expand on why you think that is particularly important in relation to rights, and how much you link that to broader awareness of legal rights?

Sir Peter Gross: We do. We are very interested in the position of civic education, not in any sense condescendingly, to make that absolutely clear. We felt that there was quite a gap in knowledge. We had the feeling that there would be a lot of confusion between Strasbourg and the convention and Brussels and the European Union. We thought that was unfortunate.

More generally, the very point that Dr Mullan raises—the question of the balances to be struck—is one where a civic debate would be extremely helpful so that people can see the different views.

Q25 **James Daly:** We cannot really have that in one sense, can we, because we have to rely on the independence of the judiciary and judicial discretion and interpretation of those rights? To use the example Dr Mullan gave, we may have different views on certain rights that are given out, but I do not think we can ever impose a concrete set view of these rights upon the courts. Do you agree with that?

Sir Peter Gross: Yes. My starting point is that individual judicial decisions and the judicial system are independent. I am not suggesting for a moment any encroachment on that. What I am saying is that in understanding the work of the judiciary and the balance struck in cases—there are balances to be struck—civic education can only assist.

Q26 **Dr Mullan:** To pick up the point about judicial independence, my feeling is that the distinction is more subtle than is often talked about. While it is independent in its operation, the judiciary is there to serve the public in the delivery of justice. While that is somewhat objective, it is also subjective and you can get a gap between the two that does not serve the public well.

Sir Peter Gross: It has to be independent. To my mind, the judiciary is there to act as the independent third branch of the state, so I am very wary of saying whom or what it serves. It is not there as a matter of self-interest plainly, but I see it as an independent third branch of the state. It produces its decisions; it runs its system with independence from the

other two branches. That does not mean it exists in isolation from them; it does not mean it is not cognisant of public debate or what the public mood is.

Ms Abbott: Dr Mullan, when you say that—

Chair: We are not going to have a debate.

Ms Abbott: I do not want a debate. I am just saying that when you say the judiciary is not serving the public—

Dr Mullan: Diane, I am not to be questioned by you in Committee meetings.

Chair: With respect to our witness, Sir Peter, it is not for us to have a conversation between ourselves, fascinating though it will be. It will probably be quite enlightening if we have a debate, but that is not what the evidence sessions are. We have ventilated the issue. I am going to move on to Ms Farris.

Q27 **Laura Farris:** Sir Peter, I want to ask about chapter 2 of your report and the conclusion you reach on section 2 of the Act that there should be an alternative formulation that would mandate a call to consider statute, common law and case law before, in the appropriate context, moving on to consider conventions and decisions of the European Court of Human Rights. The discursive element of that chapter goes through Ullah and the way its interpretation evolved. I notice that you came out with a conclusion that was broadly consistent with what Lord Pannick had suggested, which is essentially what I have just said. You have given a few examples of cases. Did you take the view that there was a misapprehension in the courts of England and Wales as to the degree of priority they had to give to the European Court of Human Rights?

Sir Peter Gross: No, we did not. I would not put it in terms of a misapprehension. What we did see and what our proposed amendment, which is very simple, would do is codify two particular Supreme Court decisions, one called Osborne and one called Kennedy. The reaction from some after the Act came in was, "We've got this new statute, this new framework, so we default to it." We thought that was unhealthy.

We felt that the right starting point was our own law, first because we have a great deal of confidence in it—I must not go on about that—and the way in which our judiciary deals with it; secondly, because it is the right thing to do and you start with your own law and move on from there; and, thirdly, because it will entrench support in this country. Most people would rather lose their case in the context of something familiar than something which has been imposed from elsewhere. Fourthly, on a principled basis it works very well within the Strasbourg framework. That is my longstop example. It is the principle of subsidiarity at work. Strasbourg looks to us to do it; it is there as the longstop.

With respect, it was not so much about a misapprehension, but we felt that putting the common law, or case law in Scotland, centre stage—

Q28 **Laura Farris:** In express terms.

Sir Peter Gross: —in express terms would help. It was very simple. We were very close to Lord Pannick's very helpful suggestion. The only part of it we did not adopt, from recollection, was that Lord Pannick encouraged us also to put in other common-law jurisdictions. The courts of England and Wales are free to look anywhere, but we did not want to put it in, for fear of—

Q29 **Laura Farris:** It would be too onerous.

Sir Peter Gross: Exactly; it was too onerous. How will you prioritise, and might it lead to inadvertent inferences? If we put that in, are we diluting anything else? That was the only area on which we departed from Lord Pannick.

Q30 **Laura Farris:** Perhaps I could ask you about the impact of that conclusion on significant issues as the public would understand them. When I was preparing for this session I was thinking about the two areas in which a member of the public who is not a lawyer might have formed a negative view of the Human Rights Act, or human rights in general. One of them is Hirst, the decision of the European Court of Human Rights on prisoner voting. I suppose you could read through to the Supreme Court decision in Chester on the same subject where Jonathan Sumption gave a very powerful criticism. Do you think that, in the context of what you have recommended in relation to section 2, the risk of having a decision where the UK courts would feel they were bound to do something on prisoner voting that was not what Parliament wanted, and was not what the public thought was right, is reduced?

Sir Peter Gross: Yes, I think I would go that far, although the support we give for this is not even limited to individual decisions. We think that, even if the results in some cases might be the same, the acceptability of the decision would be different. As we know, the common law works incrementally and in a flexible, adaptable fashion. That is one reason why it works so brilliantly in completely different circumstances. It is not hard and fast. You can go forward, rethink, take a step back and go forward again, which is what Sir John Laws called the common-law method.

Q31 **Laura Farris:** I want to ask you about a second area that a member of the public would be aware of but might not understand and might perceive as being construed in a way that was inconsistent with their interests. Those are article 8 rights. Often, a lot of the political discussion about human rights is really about article 8. We use the whole Act when in fact politicians are often talking about article 8 rights.

One thing that I thought was an important corrective in relation to article 8 was the 2012 or 2014 immigration rules about the circumstances in which a foreign national offender being deported could invoke article 8. I

can probably say that, even though this is applied by the immigration tribunals, often it is not until the appellate level that the article 8 argument will be extinguished. Still, the article 8 argument is run, often in conjunction with lots of other things, but it is raised by somebody who is resisting deportation and often not until appellate level. Did you think that by giving priority to domestic law and domestic rules in a way you would be giving an opportunity for that type of thing to be resolved at first instance more easily?

Sir Peter Gross: If you will forgive me, article 8 was very clearly outside our remit.

Q32 **Chair:** Substantive rights.

Sir Peter Gross: Substantive rights.

Q33 **Laura Farris:** I was not really asking about the right but about the method that would be engaged by the new section 2 as you propose it. If it was the case that it was set out expressly in section 2 that the first thing any court must do is consider domestic law statute, I suppose lower-tier courts would feel more confident about knowing where their starting points are.

Sir Peter Gross: With respect, that is exactly right. It helps people as to the starting point. Where they would go from there and how the immigration law system works is an enormous topic.

Q34 **Laura Farris:** It is the area that is probably most often misrepresented to the public and misunderstood by the public.

Sir Peter Gross: As you say, a lot of the political debate focuses on article 8, but we were not asked about it.

Q35 **Laura Farris:** I understand that. Sorry. Thank you.

Sir Peter Gross: We might still have been there.

Q36 **Maria Eagle:** Sir Peter, I found the opening exposition of your report and your lack of having received a response, but having received the consultation document instead, quite interesting, as is that you now do not expect a response, which I must say does not appear to be an enormous amount of payback for the amount of work you have all done. I can see how that might be quite frustrating for you and panel members, but that is just my view.

In respect of section 2 of the Human Rights Act, you made some substantive proposals to make changes. You say it has never been suggested that European Court decisions bind UK courts, although many people seem to think that they do and that one has to follow a precedent coming out of Strasbourg. You have recommended an amendment to clarify the priority of rights protection. Obviously, you have been engaging with Ms Farris in respect of that. To what extent do you believe that that small but hopefully clear change will make section 2 work better?

Sir Peter Gross: For the reasons we set out, we think that. It is a small change, but it is easily implemented. We gave a draft clause. Although obviously parliamentary draftsmen would have to work on it, it is a very simple change. We think it would work better and would have the advantages which Ms Farris canvassed, and it would have advantages in terms of public acceptance.

We gave one example of a very difficult case—the Worboys case, known as DSD. For obvious reasons, the Worboys case arouses very strong feelings. The police were very unhappy about the decision in Worboys and a lot of people were very unhappy with the police. Our own feeling was that whether or not a common-law approach would have produced a different outcome, it would at least have enabled a more graduated response rather than too fixed a duty. For instance, the common law has long had a very narrow duty resting on the police under a case called Hill, which I think goes back to the time of the Yorkshire Ripper saga. We see real advantages in this change.

Can I go back to a point you touched on a little earlier? Nobody has ever suggested that the courts in England and Wales are bound by a Strasbourg decision, least of all Strasbourg. We considered somewhere whether we should say "and are not bound by", but we decided not to do it, rightly or wrongly, because we thought it was a statement of the obvious, and stating the obvious can sometimes produce unintended consequences. If we are not bound by it, what does that mean? Does it mean that we are not bound by all? Does it weaken something else which we did not intend to weaken? But it is a very simple amendment which you could tag on to ours, and we said that, if you wanted to, you could say you should put the common law first and not be bound by any Strasbourg decision.

Q37 **Maria Eagle:** I wonder whether either of the clauses proposed by the Government in their consultation to replace section 2 delivers on your own recommendations in your view.

Sir Peter Gross: We have questions about the clauses under section 2. If I may try to summarise them, the first is that it seemed to us that it risked opening up a more significant gap between the rights you can enforce here and the rights you can enforce in Strasbourg. As the starting point of the whole exercise, as we are a party to the convention, we do not want the gap to get out of hand. Let me be very clear. The Act contemplates that from time to time we might not follow Strasbourg, leaving it to the political branches to sort it out, Hirst being the obvious example. We understand that, but in general avoiding a significant gap is important if you want to stop people having to go to Strasburg, or people going to Strasbourg whether you want them to or not. We thought that was a problem.

The second question or problem with the Government draft was that it removed the words "must take account of". To use Ms Farris's phrase, "must take account of" provides a starting point; it is an anchor. You are

not bound by it, but you must take account of it so that you have your link in. Why shouldn't you have that if you are a party to the convention?

The third concern, although a lesser one in some respects, at least in my personal view, is that it also expressly talks about taking into account other common-law jurisdictions, and that goes back to Lord Pannick's wording, as we saw it. We did not reject it, but we did not recommend it, simply because we thought it could easily give rise to difficult questions of prioritising which jurisdiction would come first. It is not that straightforward if you are starting to apply it. Those are the reasons why we were not attracted to the proposal.

Q38 **Maria Eagle:** I would understand if you decided not to answer this. Do you get the sense that the Government consultation document has been written without reference to your weighty report at all?

Sir Peter Gross: I think you will have to ask someone else about that.

Maria Eagle: Thank you.

Q39 **Dr Mullan:** We have been talking about whether or not we are bound by Strasbourg decisions. I hope you agree that that tends to come up in a debate about whether or not they have undue influence. I can see a scenario where people say, "We don't have to do what it wants," as a way of rebutting the suggestion that they have influence and we would perhaps take different decisions. Looking at the very small number of times when we have rejected what they found, would you say that the rest of the time it is because we would have done it anyway, or is it that we are respecting those decisions because they have come from Strasbourg and we are trying to be a good partner as such?

Sir Peter Gross: It is a mixture. I do not think we have been slavish at all. If I may, let me give two examples which may help on where we have gone back in terms of something I call judicial dialogue. There is a case called Horncastle—it is in our chapter on dialogue—which I certainly remember. Strasbourg came down against the use of hearsay evidence. Our courts went back very firmly and said that flowed from a misunderstanding of our system and we prevailed.

Q40 **Chair:** You were in the Court of Appeal, weren't you?

Sir Peter Gross: I would have liked to be, but I was not.

Q41 **Chair:** I do not remember it very well.

Sir Peter Gross: Horncastle was one case. I was certainly in the Court of Appeal at the time. The other case, which I think was called McLoughlin, was about whole life sentences. There was a constant to and fro on McLoughlin until the UK prevailed. There was what we respectfully call a misunderstanding of how the system worked here.

There is a dynamic relationship. The most interesting thing in dealing with Strasbourg in this exercise was the emphasis by the court there on

the high regard in which, quite rightly, UK courts are held. The view of the panel was that this was a UK asset which may be undervalued domestically.

Q42 **Dr Mullan:** So if a Minister says something informally, or they feel they spend a lot of time in their Department being told by officials that they cannot do something because of X, Y or Z ruling, you would think that was not a fair reflection of the balance.

Sir Peter Gross: I would need to look at the exact example, but occasionally you might want to question that a little further.

Q43 **Chair:** Ministers used to push their officials sometimes.

Sir Peter Gross: Whether you push the Minister or officials I am not sure.

Chair: That is a fair point.

Q44 **Ms Abbott:** We noticed that the majority of your panel rejected the view that the Human Rights Act should be amended to include factors or statutory guidelines that the court should take into account. Why was that?

Sir Peter Gross: We decided not to recommend it after quite a debate on the topic. It is a very interesting question, so thank you. We were trying to address the question of the circumstances in which the courts would depart from Strasbourg decisions. They are not bound, but in what circumstances would we go our own way?

Looking at the cases, we distilled and set out in that passage of the report a set of what we called non-exhaustive circumstances which could provide statutory guidelines. We had three reservations about that, which is why ultimately we did not recommend it. The first is that one would need to take care not to end up fighting the last war. A statute is a blunt instrument. Once you have put it down, that is what you are looking at if you are sitting in court trying to decide it. There is always a danger that the statute will be directed at the last problem, not the one we do not know about yet and is coming round the corner. We thought we might address that if we made it clear that they were non-exhaustive circumstances, so you could get over that problem to a degree.

The second was that, if we put down the guidelines at a high level of generality, we wondered how much practical assistance they would give. Conversely, our third reservation was that the narrower the guidelines and the more specific they were, the more you would encourage, we felt—by a majority—satellite litigation. Before you ever got to debating the substance of the case, you would end up having a great argument about the meaning of the guidelines, and that sort of thing can take up a lot of time in court. You are working your way through a list, whereas you actually want to get to the substantive issue which is perhaps in the field beyond the guidelines. For those three reasons, we decided not to

recommend it, but we set out a list of circumstances upon which one could build if one wanted to go down that road.

Q45 **Ms Abbott:** When your review was launched, the opinion expressed, including by some very distinguished Members of the Upper House, was that the review was not necessary because the Human Rights Act was working perfectly well. How would you respond to that?

Sir Peter Gross: We disagreed with that very clearly, with respect to those expressing those views. We took the view that we would certainly engage in the exercise. Having done so, we feel absolutely clear that it was a worthwhile and meaningful exercise and that, although the Act works in general well, there is room for a meaningful and coherent package of reforms, which we have suggested. We also feel that on a piece of legislation of this nature, after 20 years in operation, it is certainly not untimely to review how it is working. There is otherwise the danger of complacency. There is a wonderful line in the novel "The Leopard" by Lampedusa; if you want things to stay the same, they must change.

Q46 **Chair:** It is a phrase some of us have used more than once in the past. I wonder whether we might look briefly at sections 3 and 4 and your recommendations there. Some of this we have already touched on. I was interested that you considered potential changes to sections 3 and 4 and decided against them. Perhaps you could help us with that and the Government's proposals on section 3 broadly, in their separate document, if I may put it like that. Perhaps you might like to draw a distinction, or a parallel with how much they take on board your work and how much they strike out in a different way.

Sir Peter Gross: I will try to keep it as short as I can. The starting point, which is important, is that sections 3 and 4 provide a balance. You interpret, so far as is possible, in conformity with convention rights. If you cannot, there is room for a declaration of incompatibility. We do not want to disturb that balance, or we will end up with far more declarations of incompatibility, for which I imagine there will be limited enthusiasm. We accept that there are legitimate concerns as to the rule of interpretation in section 3. It goes further than our normal rules. We normally try to interpret legislation in conformity with international obligations where there are ambiguities. This goes beyond ambiguities, so we understand the concerns.

When we looked into it more closely, the view that at least the majority formed was that there was more heat than light in the debate. The two principal cases that attracted opprobrium were in 2001 and 2008. A lot has settled down since then. We all know that in a case law system you can always chase and find a bad decision that you do not like, or a decision that you think is bad because you do not like it, so there is no profit in that, but, in general terms, systemically the two principal cases which were the subject of criticism were the case of A in 2001 and the case of Ghaidan in 2008.

We took the view that, against that background, the case was not made for getting rid of section 3. What we wanted to do was shed light on it, so we had a very similar amendment to section 2, which was designed to bring out when the section 3 rule was actually going to be used, as distinct from when a judge would decide it anyway under the ordinary rules of interpretation. Secondly, we wanted a database. We know quite a lot about section 4 cases—the declarations of incompatibility—but there is no real record of section 3 cases. We also thought, although it is a matter I may be asked about in a week's time or so, that there was scope for the JCHR to do more on section 3 analogous to what it does on section 4. The JCHR does a lot of work on section 4.

The other thing that concerned us was that, if we diluted section 3, we would at once be introducing a period of uncertainty. How is the new section different from the old one? What do the changes mean? That is good for litigation, but not good for much else.

Q47 **Chair:** That was why you came to that conclusion.

Sir Peter Gross: That was why we came to that conclusion. On section 4, we had a small suggestion, which is a discretionary power to make ex gratia payments, for the reason that section 4 provides very important declaratory relief but does not give the individual a remedy. They then go to Strasbourg. It makes more sense to have the facility to deal with it here.

Q48 **Chair:** The declaration and the remedy are wholly wrapped up in the domestic court basically rather than having to go to Strasbourg.

Sir Peter Gross: Exactly so.

There are two final points. One is on sections 3 and 4. Neither in our view encroaches on parliamentary sovereignty; it does not interfere with Parliament legislating as it wishes. The striking feature, despite the heat about section 3, is that in litigation the Government normally opt for it rather than section 4. In the Ghaidan case in 2008, which is exhibit 2 in the charge sheet, the Government expressly argued for section 3 rather than section 4. The second point is that, as all of this is domestic law, if the Government do not like a decision they can go to Parliament and reverse it.

That brings me to the Government consultation paper. I have a couple of short points. There are the same concerns about opening up a significant gap and about uncertainty. There is a further element of uncertainty. We are not quite sure what the Government's position actually is. That may be a failure in our understanding. The Government said they were minded to agree with us not to repeal section 3, but some might think the options for change do just that, so we are not quite sure where the Government have ended up on it, maybe because they are consulting.

Q49 **Chair:** Is that one of the couple of things that puzzles you?

Sir Peter Gross: That is one of our puzzles.

Q50 **Chair:** It says that, if we do not do something, it as near as damn does it. Is that what it comes to?

Sir Peter Gross: I hope that is not being unfair, but we said why we did not want it diluted; they do, I think, but they have not said why they are departing from our view.

Q51 **Chair:** You would like more detail on the reasoning perhaps as to why.

Sir Peter Gross: We would probably welcome that on section 3.

Q52 **Chair:** That is helpful. You talk about the enhanced role for Parliament in relation to those judgments. You have referred to the JCHR, for example, as perhaps being a body that could assist.

Sir Peter Gross: It is not a question of Government telling courts what to decide, but just as Parliament takes an active role in reviewing section 4 decisions, so too if the complaint is that this is putting the courts too much in charge, as has been said—which it is not—there is a role for Parliament in being more active.

Q53 **Chair:** Your argument, as I read it, is that sections 3 and 4 explicitly preserve parliamentary sovereignty in that regard, but there is an issue of perception rather than reality around that.

Sir Peter Gross: The reason for our structured reforms would be that, if you went down that road, one could explore what the real problem was, if any. If there is a problem, it can be addressed by targeted legislation; if there is not, one can go some way toward defusing concerns.

Q54 **Chair:** Understood. The final point is whether or not there should be any change to the power of the UK courts to strike down secondary legislation if it is inconsistent with the convention rights.

Sir Peter Gross: On that, we see secondary legislation in this area as simply a subset of secondary legislation generally. If that is right, and we thought it was—at least a majority of us did—it would be curious, as we put it in the report, that only in the area of human rights could one not strike down offending secondary legislation. That puzzled us, so we did not go for that. On secondary legislation, we thought there might perhaps be more heat than light; hence the database point.

We were cognisant, and we dealt with this in both the report and the summary, that wider concerns were expressed. For instance, we could see roughly where litigation was going. It was put to us that there was a partial picture and a hidden problem concerning policy making, defensive drafting and the like. As we said, we were not unsympathetic to that concern, but we had no evidence of it.

Q55 **Chair:** That is an interesting point. Can you explain a little further that idea of defensive drafting?

Sir Peter Gross: I am putting it crudely; it is not meant to depart from what is in the document. The feeling was that the fear of having your delegated legislation struck down for inadvertently straying over the line would encourage defensive drafting or defensive policy making, simply leaving everything open so that there would be a sort of vicious circle, with more going to the courts without a steer. We said that we understood the expression of that concern, but if anybody looks at it further in the future I think the task will be to try to get some evidence of it; otherwise, one will simply be speculating. If you want a reference for that, it is paragraph 70 of our executive summary and paragraphs 16 to 18 of the relevant chapter in the report.

Q56 **Chair:** That is helpful. You make the point further on in the report in relation to secondary legislation that, regardless of the nature of the secondary legislation, if a Minister or a public authority exceeds the powers given by Parliament, to strike that down is not to question Parliament; it is to question the action of the person who exceeded Parliament's powers and it arguably protects the sovereignty of Parliament rather than the contrary.

Sir Peter Gross: Precisely so. The other thing which evidences our view of it as a subset is the Faulks review and, for that matter, Scotland. Faulks has recommended suspended quashed orders; Scotland has it, very beneficially as we understood it, and we think it obviously applies here too, and in the more specific and occasionally fraught context of designated derogation orders.

Q57 **Chair:** It applies to suspended quashed orders there too.

Sir Peter Gross: It gives the court another option. It can either strike it down instantly or nod it through.

Q58 **Dr Mullan:** I just wondered what your thoughts were on the extent to which the enactment of the Human Rights Act has affected the constitutional balance in the country in relation to the courts, Government and Parliament.

Sir Peter Gross: Dr Mullan, it was one of our two top themes. The first was the relationship with the courts in Strasbourg; the second was the constitutional balance. Ultimately, the view we came to was not nearly as much as has been said. As long as we are parties to the convention, our courts will have to grapple with open-textured convention rights, and that leads the courts into difficult areas. The cure for that is not the Human Rights Act. If we are a convention state, which we are for very good reasons, and anyway it is Government policy, that is a given so we have to address that.

We felt that the HRA itself had a more limited impact than was sometimes suggested. I go back to the answers I gave on section 3 and on delegated legislation. There is another aspect to it, which is a matter of judicial leadership and restraint guarding against the courts trespassing into areas that are better left for others. Judicial restraint is a

very important judicial philosophy. If I may say so, with respect, it seems to be the prevailing philosophy in the Supreme Court at the moment. It is a philosophy I personally have spoken in favour of for many years. It can be encapsulated in focusing on comparative institutional competence. Is this a better case for the courts, for Parliament or the Executive? It does not make the courts pusillanimous. Quite the contrary. It means that you stop and think, "Is this really something for us?"

If it helps, there are three examples. National security tends to be an area where the courts tread very slowly. Issues where there is not yet social consensus are another area where you may want to think very carefully before you produce a judgment. The third area is when you are dealing with the allocation of economic resources. Those are three big areas where, on the whole, courts are wise to tread slowly, and, with respect to those who say otherwise, on the whole they do.

Q59 **Dr Mullan:** Related to that, the review rejected the idea of specifying competencies outside the court's remit. Why was that?

Sir Peter Gross: For very similar reasons to the answer I gave to Ms Abbott's question. You start off with a statute; you are hitting at a known target. It is the next one coming round the corner that you need to deal with. You might find you have very carefully dealt with A to E, but the next case is F. Again, the concerns that we had generally were about either providing over-general guidance or setting up a promising area of litigation on the wording of the guidelines. That was essentially where we went.

Q60 **Dr Mullan:** On the Government consultation, I refer to R *v.* Home Secretary, or the Baiai case, involving marriage certificates. That occurred at a time when the House of Lords was still the final appellate court and they amended legislation. I do not know the answer to this. Can that still be done in relation to these cases? Can the Supreme Court, rather than just declaring something incompatible, choose to amend legislation, or was that just when it was a dual body?

Sir Peter Gross: Today, it would have to be dealt with in context. First, if our recommendations are accepted, is there a common-law point there? If that does not resolve the matter and one goes to the HRA, one looks at section 3 or section 4. The decision itself was of course on substantive rights. I think Baiai was in about 2010, but I may be wrong.

Q61 **Dr Mullan:** It was in 2009—pretty close. In the other direction, to what extent do you feel that our courts and our decisions influence Strasbourg's decisions?

Sir Peter Gross: We were quite impressed with the fact that they did. The point was very much emphasised to us in our discussions with the president of the court. The most striking example is a case which, for shorthand, I will call Denmark where, very unusually, Strasbourg relied on a UK precedent in a case in which the UK was not a party. That is not

an everyday occurrence. In the other cases I have mentioned, Horncastle and McLoughlin, we certainly influenced Strasbourg jurisprudence.

Going back to the questions on section 2, there is a balance to be struck. Clearly, we do not want a Strasbourg straitjacket. We also do not want too much of a gap, but if there is no gap it is quite difficult to provide direction, and certainly one of the aims in introducing the Act was that this country could play its part in developing jurisprudence in this area.

Q62 **Dr Mullan:** To a lay person, if we consider justice as a public good—it is very difficult to define exactly—how would you articulate why a supranational court provides a higher quality of justice than a national court?

Sir Peter Gross: I am sure they will forgive me in Strasbourg if I say that I do not think it does. It provides a different area. There is an international convention; there is the court in Strasbourg to deal with questions at that level. It sees itself, as I sought to emphasise, as subsidiary to national courts. Lord Hoffmann, long retired from the House of Lords, once put it very well when he said words to the effect—I may be mangling the quote—that there is a difference between principles, which are of universal application, and their implementation, which must be influenced or informed by national circumstances.

Dr Mullan: Thank you.

Q63 **James Daly:** I apologise for having to go out, Sir Peter. I do not want this to sound like a very MP-type question. In some of the balances you have been talking about, one of the questions we have is the application of rights. I do not see a debate in respect of that; I think we would agree on that. How is that balanced with political intent, if I can put it that way? One of the difficulties I see is that sometimes—only sometimes—courts have to make very difficult decisions because, if the specific circumstances are not covered in legislation or parliamentary debate, what else can a court do apart from interpreting it in the best possible way from all the evidence? When some of these decisions are being made, I know it is a very laborious process and perhaps that happens. I just wonder what weight is given to *Hansard* or ministerial statements of intent when you look at the legislation that is closest to the issue you are dealing with. I hope that makes sense.

Sir Peter Gross: Certainly it does. It raises some very complex questions. Looking back some decades, the courts would probably not have looked at some of the materials they have looked at since the case of Pepper *v.* Hart, which must have been in the House of Lords. Pepper *v*. Hart broadened the legislative materials to which the courts can have regard, but that itself gives rise to concerns because the statement a Minister may have made may not be reflected in the statute ultimately passed.

Q64 **James Daly:** That is a very interesting point. When you are looking at parliamentary intent, I do not think any draftsman of any Bill in history

could cover every possible intention or meaning behind the Minister, or whoever the politician was, who put it forward. I appreciate the point you are making, but I think the court should pay heed to commentary that Ministers make at the time legislation passes through Parliament, even if it is not specifically the wording of the Bill. Would you disagree with that view?

Sir Peter Gross: Perhaps I can put it this way. I understand why you raise it, but I would be very cautious in that regard because a lot of statements are made in the run-up to a Bill, not all of which are reflected in what comes to pass. Certainly, courts interpret statutes in their context, but the particular subjective view of a Minister may be no more than that. We need to be very careful about that.

As I said, Pepper *v*. Hart has widened the legislative material, some would say it is too wide, but at least it means that more regard is had to the background than might have been had before. In a different context, English law is very restrictive. To give you a non-political context, in interpreting private law contracts English courts are very cautious about looking at pre-contractual negotiations because they may do no more than tell you the subjective hope of one or other of the parties.

Chair: That is a fair point. As a Minister who made statements on the Second Reading of a Bill, I then had to make concessions when the amendments from the Lords came back. I suppose that is the sort of thing it is about.

Q65 **James Daly:** There is still a question about the intent of Parliament, because Parliament is still sovereign.

Sir Peter Gross: Parliament is sovereign.

Q66 **James Daly:** Absolutely. The courts with these rights are interpreting the intent of Parliament. Therefore, the way Bills are drafted is fundamental to how decisions and rights are enforced and interpreted.

Sir Peter Gross: I understand why you raise it, but, with respect, I would be cautious. Courts do not simply look at the text out of all context; it is not something they do. They try to understand the purpose of the legislation. Ascertaining the intent of Parliament can be very difficult on some occasions, just as it can be in a private law contract, but you are right that one needs to look at the context and the purpose. What is the mischief, if you like, of the statute? As to how much subjective statements by individual Ministers count, I think one needs to be cautious.

Q67 **Chair:** There is one other topic I want to touch on. With a bit of luck, I do not think we will be interrupted by Divisions, but occasionally bells go off and interrupt our proceedings. We may be lucky.

You touched on one important point in your report, Sir Peter, which is extra-territorial jurisdiction. I would be grateful to have your thoughts on that. You talk about the worldwide remit and especially active combat

situations which we all know are sensitive politically and in public debate.

Sir Peter Gross: Deeply sensitive, and we saw that as a very important topic for the UK. The view we expressed on this was very clear in, I hope, all its respects. I made it clear to those with whom I spoke in Strasbourg that we feel there is a problem with where the Strasbourg jurisprudence had ended up. The reason is that the convention was designed, essentially, to operate in convention territories; it was not designed to be a worldwide application, but for one reason or another, if the phrase "mission creep" is right, this is probably the area where I accept it could be used. It carries with it a second disadvantage, which is that it then becomes entangled with international humanitarian law, which is the lex specialis, or the particular law that should be applied in situations of armed conflict. It should not be there and it is not cut out for this, to put it in crude terms.

The problem in that sense is quite easy to state. The question then is what you do about it. The thing we were adamant about was that, tempting though unilateral legislation is, narrowing the jurisdiction of the HRA would be—I apologise for using another sporting metaphor—quite a spectacular own goal, for the reason that it would expose our armed forces, agencies and police to Strasbourg proceedings without the benefits of closed material proceedings and other procedures available in the UK courts.

We have urged as strongly as we urged anything that we do not go down a unilateral road there. We were informed in our discussions by those who had an interest in this area and we think we have rightly reflected their concerns. We would suggest that this is a matter to be led at governmental level in consultation with our convention partners. The technical side of it is that it could lead to a protocol to the convention, similar to the Brighton protocol, which dealt with subsidiarity, and that is the way it should go.

Talking of domestic matters, in one of our meetings a national conversation on this very point was urged in the context of changing technology and warfare and the like. We are certainly not averse to that; we adopt that with enthusiasm even, but we think it is a matter for intergovernmental discussions, augmented by judicial dialogue. We do not think it is a matter where courts should lead; we think it is a matter where Her Majesty's Government should lead.

Q68 **Chair:** The loss of the protective special procedure would be what in practical terms?

Sir Peter Gross: It could be disastrous for the agencies or the armed forces, and the result would almost certainly be that a case would not be fought.

Q69 **Chair:** A concession would be made rather than put at risk the subject of the material.

Sir Peter Gross: That is the risk you run if you go unilaterally on that point.

Q70 **Chair:** Do you think that is fully appreciated in the debate?

Sir Peter Gross: The Government consultation paper says they agree, so we hope it is.

Q71 **Chair:** You hope they take it on board.

Sir Peter Gross: We were very keen to make that point so that it was clear beyond peradventure.

Q72 **Chair:** It is one of the points you make very strongly in the summary.

Sir Peter Gross: Yes.

Q73 **Dr Mullan:** Forgive me, I don't quite understand the point you made. Are you saying that, if we say it does not apply overseas in our courts, people could still be subject to it but they would not have the right to come to our courts to have their case heard?

Sir Peter Gross: Dr Mullan, that is exactly the question we had to grapple with. A claim would arise. On the hypothesis that we had narrowed the jurisdiction of the Human Rights Act, no remedy could be obtained here and therefore you go to Strasbourg, but you go there without the benefit of our courts dealing with it first.

Dr Mullan: Thank you.

Q74 **Chair:** That is very clearly put. Sir Peter, you have dealt with a huge amount. I think that we have dealt in large measure with the Government's response to the consultation. You characterised the five topics. Perhaps your secretariat could drop us a note in due course setting out which falls into which of the five. Would that be helpful rather than us seeking to rehearse it here?

Sir Peter Gross: I can certainly see that that is done.

Q75 **Chair:** That would be helpful. Is anything missing from the Government document that you would have wished to see there? There are some areas that go beyond that which you were tasked with.

Sir Peter Gross: That, as I hope I underlined, is the Government's prerogative. We were not dealing with substantive rights. As to what the Government have not addressed, we said something about why we were not recommending a Bill of Rights. The Government said nothing about the margin of appreciation. The Government said nothing about dialogue with Strasbourg. On a lesser note, they said nothing about designated derogation orders.

Q76 **Chair:** The margin of appreciation is one of the most significant matters to be discussed in the practical operation of this report.

Sir Peter Gross: It has been the subject of a recent decision in the Supreme Court, which certainly mirrors our view on judicial restraint. Perhaps it goes further than we do, but they said nothing about that. They have also not explained where they differ from us in their reaction to the width and depth of the views that informed our deliberations. Those are just some of the gaps.

Q77 **Chair:** Having published your report, are you functus officio, or is there more you propose to do with it?

Sir Peter Gross: That was where I was going to say something to you, if I may. I think we are functus. I have always tried to work out what it feels like to be functus, but I think I probably am.

We would like to emphasise to you, if we may, that it is the product of a year's work by an independent panel following very detailed consideration of the law in the area. It has been informed and supported by immense contributions from the widest spectrum of opinion around the UK and beyond. We think the report recommends a coherent package of reforms, putting the common law centre stage. They are practical and easy to implement and they are designed to improve both how the HRA operates domestically and our standing in Strasbourg. At the time we published, we urged the Government to implement the IRAL reforms in full and that remains the panel's view.

Chair: Sir Peter, thank you very much. We are very grateful to you for your time and evidence today. We are also grateful to your panel colleagues. Unless there is anything more from my colleagues, many thanks for your time and evidence. The session is concluded.