

Justice Committee

Oral evidence: [Human Rights Act Reform](#), HC 1087

Tuesday 8 February 2022

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Members present: Sir Robert Neill (Chair); Ms Diane Abbott; James Daly; Maria Eagle; Dr Kieran Mullan; Paul Maynard.

Questions 78 - 167

Witnesses

[I](#): Lord Carnwath of Notting Hill, Former Justice of the Supreme Court (2012-2020); and Professor Richard Ekins, Head of Policy Exchange's Judicial Power Project, and Professor of Law and Constitutional Government, University of Oxford.

[II](#): Professor Cheryl Thomas QC (Hon), Professor of Judicial Studies, University College London; and Kirsty Brimelow QC, Doughty Street Chambers, and Vice-Chair of the Criminal Bar Association.

Examination of witnesses

Witnesses: Lord Carnwath and Professor Ekins.

Q78 Chair: Welcome to this meeting of the Justice Committee. We are continuing our inquiry into the Government's Human Rights Act reform proposals. Welcome to our first panel of witnesses: the right honourable Lord Carnwath of Notting Hill, and Professor Richard Ekins of the Judicial Power Project and professor of law and constitutional government at the University of Oxford. It is good to see you.

We have to make our declarations. I am a non-practising barrister. Like Lord Carnwath, I am a bencher of Middle Temple from time to time. I know that Ms Eagle, who will return, is a non-practising solicitor. I do not think there are any other relevant declarations.

Gentlemen, thank you for your time. Sir Peter Gross, chair of the independent panel, gave evidence to us last week and we were interested in some of his observations. It seems that one of the major themes of the consultation document published by the Government, which I think Sir Peter was pretty clear was not a response to his review in the strict sense but was a document that touched on some common themes and in other places went beyond, was the clear delineation of responsibility between the courts and Government and Parliament. Would you agree that that is what they seem to be seeking to achieve? Is there a problem with that at the moment? Lord Carnwath, you have been in the courts. What do you think?

Lord Carnwath: I think that is what they say they are seeking to achieve. Perhaps we can come back to how they seek to achieve it. As to whether or not there is a problem, undoubtedly there have been cases over my career where there have been problems in the way the court is required by the convention to assess the merits of public policies. For my part, I would like to think that over the years we have managed to settle those down. In particular, in the last few years and more recently the court has developed many clear policies and does not interfere in matters of high Government policy, or certainly things which should be discussed in Parliament or otherwise, and it is very sensitive. I hope that is the position. I do not know whether Professor Ekins would agree, but I think things have settled down and I am not convinced that what the Government are seeking to achieve is necessarily something that actually requires legislative action at this stage.

Q79 Chair: Before I bring in Professor Ekins so that you can both comment on it, when the Lord Chancellor and Deputy Prime Minister gave evidence to our Committee in November about his priorities, one of the things he talked about was reform of the HRA. He used this formulation: "While there will be some limits, given what the ECHR requires, we have seen a number of areas where the UK courts' licence as a result of the Human Rights Act has gone further than the convention anticipated, and, in some cases, in relation to Strasbourg case law." Lord Carnwath, do you



recognise that characterisation at all?

Lord Carnwath: They are two quite different things. There is no doubt that the European Court has extended the range of some of the rights beyond what one would see naturally in the wording of the convention itself. There are different views about whether that is a good or a bad thing, but it has certainly done that, so to the extent to which it has we have followed suit.

On the question of whether the English courts have gone beyond Strasbourg, there are certainly some instances of that and at least one or two in which I dissented. I think it is dangerous when we do that but, on the whole, there are very few examples of it. Under the president of the Supreme Court, Lord Reed, there has been a fairly clear message that we should not be doing that; we should not be seeking to go further than Strasbourg.

Chair: Professor Ekins?

Professor Ekins: In answer to your initial question, as far as I can discern from the consultation documents, it is the Government's aim to try more clearly to delineate the role of courts from the roles of legislature and Government. There are elements of the consultation well oriented towards that end. There are some others that perhaps are not likely to be as effective. I am sure we will talk about this in the next hour, but the relationship to Strasbourg case law is an area where there is a risk of not delineating different responsibilities as clearly as I think the Government hope and as I think we should.

To my mind, there are some reasons to worry about the delineation between the courts and the elective branches that the Human Rights Act has brought into being. It is undeniable that the Human Rights Act has involved our courts in answering questions that clearly otherwise they would not have had jurisdiction to answer—questions that are often rightly characterised as political questions. It is true that different judges have handled those questions in different ways, often with respect and care not to take over the operation of Government. It varies by judge and by period of the Human Rights Act.

I agree with Lord Carnwath that in a sense, under the current president of the court, we are seeing a shift of tone compared with perhaps two years ago. A number of decisions last year are quite significant in that regard: the C judgment; the AB judgment; and Elan-Cane just before Christmas. That is encouraging, but it bears noting, as I have tried to stress in various contributions, that it is a dynamic picture and, if you want to evaluate the Human Rights Act, don't just pay attention to what was enacted but to how it was developed and the capacity for further development and change.

In answer to the second set of questions you posed to Lord Carnwath, like him I think it is undeniable that the European Court of Human Rights



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has interpreted the convention in ways that cannot be squared with what the parties agreed in 1950. I think that by open admission the living instrument doctrine has that effect; it is a licence to remake the convention over time. As you know, that has been heavily criticised by senior British judges, Lord Sumption and Lord Hoffmann, and a number of others, rightly so because it is not a good technique of judge-craft. There was an effect on the ground in a sense when the Human Rights Act was enacted, and I think that inevitably our courts have had to follow suit in large part because of the structure of the Human Rights Act and the intention of Parliament in enacting it.

We have had a problem with our courts going beyond Strasbourg, beginning in about 2008 with the *Re G* case and a number of others thereafter. There was a very encouraging development, to which I think Lord Carnwath alluded, just before Christmas in the *Elan-Cane* judgment where Lord Reed rightly—not on his own but with colleagues; a unanimous panel of five judges in the Supreme Court—tried to make clear that it would be incompatible with the Human Rights Act for UK courts to go beyond Strasbourg. That was an encouraging development, and I hope that if legislation emerges from this consultation that position will be protected.

Q80 **Chair:** Lord Carnwath, you might want to respond to that and, in doing so, perhaps express a view as to your assessment of the recommendations that the IRHRA panel produced.

Lord Carnwath: I think Professor Ekins said more or less the same thing as I was saying.

Q81 **Chair:** Much the same.

Lord Carnwath: Yes. You asked me about—

Q82 **Chair:** What do you think about the overall set of recommendations that the IRHRA panel produced?

Lord Carnwath: Sir Peter Gross's panel?

Q83 **Chair:** Yes. Do they cover the necessary ground, or are there other areas you would have gone into?

Lord Carnwath: I think they take the position that, on the whole, things are all right as they are. They think there should be a degree of public education simply to make people understand what the Human Rights Act is all about, and that it is part of our law and something that is very important to us all.

A very important part of their discussion is about the importance of judicial dialogue. There is a very interesting chapter where they show how we have been able to have a very successful dialogue with Strasbourg, and enormous respect is shown by the Strasbourg judges for our decisions; indeed, they apply them sometimes. That has been a new development. It has developed very much over the past five years or so.



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What they are saying is that the fact we have the convention as part of our law means that we are talking the same language and that improves the dialogue.

With respect, I do not agree with their proposal to amend section 2. I do not know whether you want to deal with it now or later. They seem to be saying that somehow it would improve our feeling that the thing belongs to us if there was some sort of provision that said, "Start off by looking at British common law and only if that is not adequate go on to the convention." They refer to a case called *Kennedy v. the Charity Commission*. I confess that that was one I dissented in.

The case concerned a journalist who was trying to get information from the Charity Commission about an inquiry into quite a prominent political figure. He went to the courts relying on his rights under the convention. Six years later, when it finally got to us in the Supreme Court, my colleagues decided that he should not have been relying on article 10 but on a common-law right which they found there. I did not quite see the force of that. It seems to me that, if the convention is to give you rights and you bring yourself within those rights, you should be able to rely on them. I do not see why you should be looking round for some other common-law equivalent. That is about the only thing in Sir Peter's report with which I have any problem.

Q84 **Chair:** That is helpful. Professor Ekins?

Professor Ekins: For my part, I thought that the report was a little too status quo-minded. It is true that it recommends minor change, but it is largely content. I am more critical of the Act. The Act has worked a more significant change in the constitutional balance than I think the majority of the panel concluded. They are limited conclusions, including in areas where they recognise there are problems, but have not brought to the fore legislative proposals. I think that was unfortunate.

I agree with Lord Carnwath on the point about priority of common law. I am not persuaded by that. I am not sure that it can really, with respect, make a great deal of sense. If section 3 of the Human Rights Act, or an equivalent, remains on the statute book, one simply has to engage; it is very hard to resist engaging on rights compatibility. I agree that if these are statutory rights one is entitled to insist on them, rather than being told that, first, you have to scrub around and find something else. I think that is a bit odd.

I have already mentioned the Supreme Court's *Elan-Cane* judgment. It is very significant and came a day or two after the report and consultation were published. It answers one point where I think the Gross panel went wrong, which was in thinking that within the margin of appreciation it is equally up to UK courts, Parliament and Government to have their say. If we are in the margin of appreciation, the Human Rights Act should conclude no breach.



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Q85 **Chair:** I suppose that in the end the prisoner voting case was within the margin of appreciation and was sorted out politically. A lot of people thought the Strasbourg Court would not decide on Hirst in the way it did.

Professor Ekins: With respect, I do not think it was within the margin of appreciation from Strasbourg's perspective.

Q86 **Chair:** As they perceived it, but do you reckon that is still the case? The composition of courts changes, as Lord Carnwath said in relation to our own Supreme Court. Do you really believe that Hirst would be decided the same way by the European Court now?

Professor Ekins: That is an excellent question to which I do not know the answer. No one does. It cannot be answered.

Q87 **Chair:** In the end, it was sorted out politically.

Professor Ekins: Yes. In a way, it is very hard to square with the judgments of the court. You are right that it was sorted out politically, and in a sense it is a model for resolution without us changing our law.

Chair: They can get round it. Yes.

Q88 **Dr Mullan:** Thank you very much for your evidence, Lord Carnwath. It seems to me you are not alone in suggesting that the minds of the judges have moved on in terms of how they would approach these cases, and there is greater exercise of judicial restraint in that regard, but can you see why perhaps the Government might argue that that could change in the other direction just as easily as it progressed in the way that we are more satisfied with now, and that putting into legislation some of these safeguards is a surer way of maintaining that constraint?

Lord Carnwath: They talk about ebb and flow. Knowing the personalities as I do and having been part of the process, I think we are in for a fairly stable period for quite a while. I also think that the way the courts work is on the whole very conservative; we build on what has been done. When I was there, we had one or two quite difficult cases where there was a difference of view. In one case, I found myself changing my position in the middle on very difficult questions of social security and proportionality. By the time I left there was a clearer view as to where we were. That then gets enshrined, as Professor Ekins has said, in a unanimous judgment. I think that is pretty solid. I was at the Law Commission and I know how difficult it is to draft legislation that actually achieves what you want to achieve without throwing up all sorts of other problems.

Q89 **Ms Abbott:** Professor Ekins, in 2019 you said: "I argue that rights are best realised not by way of human rights law but by way of ordinary legislation. Respect for human rights does not entail, I contend, enthusiasm for human rights law." Is that still your position?

Professor Ekins: It certainly is, and I have maintained it for many years.



Q90 **Ms Abbott:** You would do away with the HRA.

Professor Ekins: If I had it in my power, which clearly I do not, I think that repealing the Human Rights Act would be a justified decision. Having said that—I have noted this in publications—there are reasons why one might not want to repeal the Human Rights Act in view of devolutionary considerations and the fact that we have had a significant period of constitutional change. There is certainly a prudent and small “c” conservative case for leaving well enough alone and not repealing, but I certainly think there is a case in principle for its repeal.

Q91 **Ms Abbott:** The Government’s consultation states that the Government believe courts should be able to draw on “a wide range of law” when deciding human rights issues. What are the barriers that prevent courts from doing that at the moment?

Lord Carnwath: The answer is nothing. I find that all very confusing, because the truth of the matter is that the Act says we must have regard to Strasbourg jurisprudence, but of course we would anyway. If you are dealing with a European convention which is subject to the European Court, obviously you pay respect to its judgments, but there is nothing to stop anyone referring us to decisions of the Canadian Supreme Court, the South Africa Supreme Court or any other court, and they regularly do. One obviously has to try to have some priority, so we give respect to the Strasbourg Court because it is the ultimate court for the convention.

My worry about section 2 is that I am not sure what it is trying to achieve. The trouble is that, if you have legislation where you are not sure what it is trying to achieve, you have a lot of argument about what it is trying to achieve so it is actually counterproductive.

Q92 **Ms Abbott:** One of the things the Government want to achieve is to introduce a permission stage in human rights claims where only claimants who can demonstrate significant disadvantage will be able to take their claim forward. Effectively, wouldn’t that create a class of acceptable human rights abuses that fall just below the threshold and could not be challenged in court?

Lord Carnwath: I am not quite sure what they have in mind. It sounds to me as if they are thinking of something similar to what we have for judicial review anyway, a leave stage, so the case has to be reasonably arguable. To the extent that most of the human rights cases are brought by judicial review, I do not see that making much of a change. I agree with you that if it was trying to introduce categories of human rights abuse that would be very unfortunate. I did not read it as saying that, but I may be wrong.

Q93 **Chair:** Professor Ekins, what do you make of that?

Professor Ekins: I agree with Lord Carnwath in so far as I think it would bring human rights law more into line with judicial review, which is a discretionary jurisdiction. It is a little odd in so far as these are statutory



rights, so one would otherwise be able to insist on them as a matter of right. It is designed to filter out very minor cases that are not worth the court's time, if the court can adjudge that from a distance. I am sceptical that it would make much difference in practice because I think, with some cause, that courts would be quite reluctant to exclude cases on that ground. There may be some cases that are not worth proceeding with that will be filtered out, but I do not have to hand a list of cases where that would make a difference.

Q94 Ms Abbott: To touch on something relatively topical, would plans to limit the ability of foreign national offenders to appeal deportation orders, which is something we hear a lot of complaints about, mean more appeals being taken to Strasbourg?

Lord Carnwath: That is another area where I find the report somewhat confusing. I find it rather frustrating that in a way this has been the wrong way round. Sir Peter's team, which was very expert, were not asked any of these questions; they were not asked to look at the jurisprudence. Lisa Giovanetti QC, who was on the panel, is probably one of the best recognised immigration lawyers and has done a lot of cases involving the Government. It would have been fascinating to get her views on these sorts of points, but it was the wrong way round.

In 2014, they introduced fairly strict limitations on the powers of the court to stop foreign offenders being deported on human rights grounds. I have criticised those provisions because I do not think they are very clear. A judgment of mine in the Supreme Court says that one of the problems is to try to understand what they mean, but in so far as they give a Government view on how the limits should be applied I do not see a problem with them. There is obviously a risk of Strasbourg saying something different—I think one case went to Strasbourg—but on the whole I think that works well.

I am not quite sure what the Government say is wrong about the way it is being operated by the tribunals. It is not very easy for the tribunals because they have to try to assess the facts and decide whether something is unduly harsh, or there are very compelling reasons and so on, and that is in the legislation. On the whole, I think it is being operated as it is meant to be operated.

Q95 Ms Abbott: How would the Government's proposals on section 2 change the UK courts' approach to the case law of the European Court?

Lord Carnwath: I cannot predict. Happily, I am no longer there. If I was there, I would be very confused. We would go through a period when we had hopeful advocates appearing in front of us citing cases from all over the place. My own feeling is that one would eventually settle down and say, "As these cases may go to Strasbourg, we have to keep in mind what they are saying." I find it very difficult to see how it is meant to operate. It will not increase certainty, which is what the Government seem to be saying.



Q96 **Chair:** Professor Ekins, do you have any observations?

Professor Ekins: If I may go back for a moment to foreign national offenders, it is perfectly proper in principle for Parliament to make more specific legislative provision for how human rights are to be understood in the context of immigration and asylum particularly in relation to foreign offenders. As the consultation says, this is not exclusive to foreign national offenders. Much of the work of the courts on judicial review and otherwise is concerned with migration and asylum. Lord Carnwath says that often the legal materials are quite complex and confusing, so the more specification Parliament can give, the better. It is true that some of the areas where we have seen real creativity—I do not mean that as a compliment—on the part of Strasbourg have been in this domain. My colleagues, Professor John Finnis and Simon Murray, published a major paper for Policy Exchange last year on this topic, with a supportive foreword by Lord Hoffmann pointing out that there are many ways in which the living instrument doctrine has expanded migration and asylum law well beyond the scope of the terms agreed.

If one has legislative provision that proves unpalatable to foreign offenders and others seeking to remain, they may well proceed to Strasbourg. That is true. Quite what Strasbourg does then and what the UK does in response remains to be seen, as with reference to prisoner voting reform. The living instrument doctrine means that their case law is unstable in more than one direction.

Q97 **Chair:** I gather that you do not much like the living instrument doctrine, Professor. Would you call yourself an originalist? Is that the alternative?

Professor Ekins: It is a terrible term and an American one. What is the object of statutory or treaty interpretation? It is the intentions of the authority that enacts it or the states that agree, so to that extent, yes. Can I touch on section 2?

Q98 **Chair:** Hasn't it become rather ludicrous in the States? You get to the stage when the founding fathers wanted an armed militia and all this sort of thing so you cannot tackle pressing social issues. Aren't there dangers in originalism too?

Professor Ekins: I am highly critical of the American constitutional framework as a whole precisely for those reasons. It is a straitjacket for Government and not a good way to govern at all. How one solves that is a difficult question.

Q99 **Chair:** You are not an American originalist either. You wanted to touch on a couple of other points.

Professor Ekins: Section 2 came up in earlier questions. Even without section 2, the whole structure of the Act encourages British courts—the point of the Act, I think—to focus on Strasbourg and Strasbourg case law, so we end up with UK judges following clear lines of Strasbourg case law.



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To anticipate what Strasbourg will do is inevitable given the structure of the Human Rights Act and our membership of the convention.

Part of the point of the consultation is to try to disrupt that and domesticate rights in a more thoroughgoing way so that we have a home-grown British alternative that can be put in tension with Strasbourg case law on some occasions. I think that is the ambition. I am sceptical about the ambition because I think there is a major risk of legal uncertainty and in addition a considerable risk, as I think the consultation is somewhat aware, of domestic judicial creativity running amok. If we do not have precision on what Parliament is doing when it creates the new rights in question, which are a facsimile of the text of the convention, I am not sure where that leaves our judges in terms of deciding what they mean. The new draft clauses for a replacement of section 2 seem to outline a range of considerations designed to stop UK courts following slavishly in Strasbourg's wake. I understand that, but I do not really understand what the positive object would be. That is a problem that has to be sorted out if this is to go anywhere.

Q100 **Chair:** Do you think that following slavishly in Strasbourg's wake is a problem?

Lord Carnwath: I would not have thought so. We have gone through phases of saying we are bound by Strasbourg and then saying, "Well, actually we are not really." We have now settled down to a position where we will generally follow either a Grand Chamber decision or a consistent line of cases, but we reserve the right to disagree if there is some reason for doing so. I think that is a perfectly sensible and logical way of approaching it.

Q101 **Chair:** The suggestion is that this is slightly fighting yesterday's war.

Lord Carnwath: In a way, it probably is. I am not sure when the draft was produced. I have a feeling that it was probably produced a year or two ago because it clearly was not produced in the month or so which followed the submission of Sir Peter Gross's report.

Q102 **Chair:** Professor Ekins makes a point about the potential confusion for domestic UK judges if we go down that road.

Lord Carnwath: If the Government want us to take a particular approach to Strasbourg case law, they have to spell out rather more clearly what that approach is going to be, as to some extent they attempted to do in the Immigration Act. There are different views on how successful that was, but if you are to try to do that you need a much more sophisticated exercise than we have in this paper. The Law Commission might very well be asked to look into it.

Q103 **Chair:** You mean the consultation document.

Lord Carnwath: Yes.

Q104 **Dr Mullan:** Are there other jurisdictions where there is more frequent



disagreement with the Strasbourg court, and how does that tend to play out? It has been such an infrequent occurrence here that it is hard for us to understand what the implications might be if our courts were encouraged perhaps to see things differently.

Lord Carnwath: I don't know. I would be interested to know what Professor Ekins says about that. He may have looked at it more closely. Because we have the actual wording of the convention in our law, it is much easier to compare what we are saying with what Strasbourg is saying. One of the results of that is that on the whole they listen to what we say and there are very few findings of violation by us. How that compares with, say, Germany or France I am not sure; I have not done the research.

Professor Ekins: I have not done the research to the level that I could give a competent answer either. I am aware that some other jurisdictions, such as Italy and to some extent Ireland, have more capacity on the part of their Supreme Court or Constitutional Court to develop their own view, and hold the line, so to speak.

I think this is what motivates this consultation in relevant parts. They think that those jurisdictions have a more home-grown rights jurisprudence, whereas for us in a sense it was transposed. We have the model of the Human Rights Act. I have been critical of judges for departing from the model, because it is what Parliament chose. In part, the model is, "We are incorporating the convention as such and we are requiring you to pay close attention to it and basically follow Strasbourg case law." It is true that, if it is unclear and so on, we take our own view, but that is the basic line.

In making that point I am not criticising our judges for following the line. That was Parliament's choice. I criticise them for not following it. As to whether or not it is the right model, I think the consultation takes the view that it would be better if we had something more like the equivalent of German, Italian or Irish home-grown rights jurisprudence. I am sceptical about that. It risks encouraging a change in domestic judicial behaviour that we should not welcome, but I think that is the main point. It is not just the Government who have that in mind; there have been various calls to repeal section 2 from a bipartisan group and those with no party at all: Lord Judge, Lord Hoffmann and others, I think.

Q105 **Dr Mullan:** I may be incorrectly paraphrasing you, Lord Carnwath, but it seems to me that you suggest that, rather than the UK courts following or trailing what Strasbourg says, and not operating their own minds, there is a natural and substantial alignment in their thinking in both areas and, if anything, Strasbourg anticipates and supports our thinking.

Lord Carnwath: I would not put it as high as that. Certainly, a dialogue has developed over the last decade, and the president of the Strasbourg Court is very keen to encourage that. Indeed, it is interesting that Sir



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Peter Gross discussed it with them. That is a two-way flow which has been very valuable.

Perhaps I should make it clear that I am not an originalist. I am basically a fan of the European convention. It has been around ever since I was in the law, and I was delighted when finally, in 1998, we brought it into our own law. Some of you may know Lord Simon Brown.

Chair: Yes indeed.

Lord Carnwath: He has just written his memoirs, which have a lot of anecdotes, including golfing stories. In the appendix there is what I think is a very useful lecture drawing on his experiences as Treasury counsel for the Government in the period before the Human Rights Act came in. He cites a number of cases that he lost in Strasbourg because our laws were simply not providing protection for rights. Often, the Government were quite keen to lose them because it gave them much greater force.

To my mind, the Human Rights Act was a very important thing. It came too late in my view, but when it came it was very important. I wish we would accept that this is something that we have done. It is working and we should try to improve it rather than trying to change it all the time.

Q106 **Dr Mullan:** Professor Ekins mentioned the German Constitutional Court and the role it plays in reviewing the decisions of the European Court. Do you think that is unnecessary? Why do you think they have that? They must feel that it serves some kind of purpose.

Lord Carnwath: They operate in a different way. When I was at the Supreme Court we had very valuable exchanges with the German Constitutional Court. In our own way, we look critically at the judgments of the European Court and feel free to differ if we think there is a reason to do so. Certainly, if it was a Grand Chamber decision on a point of principle, one would try to follow it if one could. I suspect the German Constitutional Court would do the same, but it probably comes to it in a different way.

Q107 **Dr Mullan:** From a lay person's point of view, if we see justice as a public good, however you might describe a decision, coming up with a correct decision produces a public good. Why does involving judges at transnational level improve the quality of decision making over the British courts?

Lord Carnwath: I'm sorry. Are you referring to the Strasbourg Court? We are part of the European convention and it is subject to the Strasbourg Court and the Government have no intention to change that. While that is the case, we have to pay regard to it.

Q108 **Dr Mullan:** Indeed. My question is about first principles and how you would explain to a lay person, who might read in the papers about the Strasbourg Court taking a different decision from British courts, why it is inherently better at taking decisions than our courts.



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Lord Carnwath: I do not think they are inherently better, but they are certainly not worse. I had the advantage of sitting as an ad hoc judge of the Strasbourg Court in a Grand Chamber case back in 1998. I was terribly impressed. I thought it was extraordinary that 19 of us, from completely different jurisdictions, were represented there. I was sitting between the judge from Estonia and the judge from Norway. We were discussing in English and French, which fortunately was okay for me, and we were talking the same language in terms of the law. I do not think they are inherently better, but they are not inherently worse. It is a great achievement that what started out as a British initiative at the end of the war, when you can imagine what human rights were available across wider Europe at that time, now extends to 47 countries which operate under a single court. I think that is an extraordinary achievement.

Dr Mullan: The other question is about judicial restraint. In your view, we do not need to delineate particular areas.

Q109 **James Daly:** Lord Carnwath, I apologise for attending late; I was elsewhere. I was very interested in what you were saying. I come to this from the point of view of our constituents watching this who need to understand in very basic terms why we need this. For judges to have the authority and power to rule on human rights cases, those human rights must be set down in statute and decided by politicians. Is that the starting point of this?

Lord Carnwath: It is decided by Parliament.

Q110 **James Daly:** By Parliament and politicians. Therefore, it is for Parliament, whenever that may be, to decide the individual rights that should be available and open to judges to interpret.

Lord Carnwath: I am not quite sure how far back you are going. I would have thought that the rights we are talking about in the convention are ones that any Parliament of this country would regard as pretty basic. Obviously, they can change the detail, but I do not think anyone would quarrel with the right not to be deprived of your liberty without good cause.

Q111 **James Daly:** It is all of those things, but what I am trying to clarify is that for the courts to rule on human rights cases, those rights must be set down somewhere, mustn't they?

Lord Carnwath: Yes. I think they should be. We have developed in this country the common law going back to Magna Carta, but that is certainly so in principle.

Q112 **James Daly:** That is the point I want to come to. The common law developed without the need for any of these things to be written down in law, in statute going back over many years. Do you see that that system, the development of the common law and rights was an inferior system to rights being legislated on in what we have seen in the Human Rights Act in recent times?



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Lord Carnwath: I think the rights we had had not caught up with the modern law. I referred to Lord Brown's lecture. Take, for example, gay rights and whether the Army could decide that somebody could be expelled if they were openly gay. That would not have been regarded as something that the common law had coped with, but it is clear from the human rights convention that it is not acceptable. That was what the Strasbourg Court said and we would say. That is just one example.

What was very beneficial about the convention was that back in 1948 when it was being drafted, to a large extent by English lawyers, it was an attempt to encapsulate the things that were regarded as important then. I think they did a very good job of it, but over time that may not catch up. It is an advantage to have them written down in law and then the courts have to try to interpret them.

Q113 **Chair:** I think a principal drafter was Sir David Maxwell Fyfe, wasn't it?

Lord Carnwath: Yes.

Q114 **Chair:** As I recall, he became Home Secretary under Churchill and Eden and was then Macmillan's Lord Chancellor.

Lord Carnwath: Indeed. The judges were not so keen on them then.

Q115 **Chair:** I seem to recall that was right. Are there any observations on Mr Daly's point, Professor Ekins?

Professor Ekins: Certainly. First, I think there is a big difference between the human rights written down in the convention and the case law that develops. Some of that case law is faithful and some is not. It makes an enormous difference. Lord Sumption explained with great eloquence in his Reith lectures that there is a very big difference between agreeing to treaty commitments and abiding by them, and having a supranational court that will hold you to account for your failures and having those commitments understood as dynamic and subject to being remade as they go along.

The question asked whether or not we should be enthusiastic about the common-law tradition. The common-law constitutional tradition is an excellent thing. It consists partly of the common law developed by our judges and partly of statutes enacted to supplement, depart from or correct that common law. That combination has been extremely valuable. For our courts to have proper jurisdiction in relation to human rights, especially in relation to statute, which is partly what the Human Rights Act does and what a Bill of Rights would do if enacted in place of the Human Rights Act, they must have clear legislative authorisation, and Parliament would not be doing its job properly if it did not take responsibility for precisely the role it expects the courts to play, minimising the space for courts to have to make judgments on controversial political questions. It should give the court a role in upholding commitments and choices that Parliament has made, not leaving open the remaking of them in the course of adjudication.



Chair: Thanks very much.

Q116 **Maria Eagle:** I have a couple of questions on sections 3 and 4. The Government consultation acknowledges that Sir Peter's panel did not suggest repealing section 3. Although they say they are minded to agree with that, they set out a number of proposals and wording for replacing the provision that is currently section 3. What do you think of that? Do the changes they are proposing represent an improvement on the current position or make things less clear or worse?

Lord Carnwath: I think it would make it clearer. The present position is that section 3 enables the court to go beyond its normal function in construing legislation. Under general law, we can resolve an ambiguity, but section 3 enables us to go beyond that and try to bring the section into conformity with the convention.

It is one of the areas with which we have had some difficulty, but on the whole the law has settled down. As to the cases cited in the paper, frankly I am not sure what is wrong with them in terms of their outcome, because what they achieved was that we can make a decision that is within the grain of the legislation, as it is put, but avoid having to go off to Strasbourg to get it put right. Obviously, the Government or Parliament can decide that that is too much freedom for us and that we should be confined to our traditional role. The trouble with that is that it would delay people and add to the cost of getting their human rights recognised by Strasbourg.

Q117 **Maria Eagle:** Does it not make it more likely that those who have the backing to do so would go on to Strasbourg?

Lord Carnwath: It may well do, but it just causes extra expense and delay to anyone. One of the cases referred to is Ghaidan, which is about whether inheriting a joint tenancy is limited to people living together as husband and wife. Did that extend to gay couples? The language did not, but the court said we can interpret it as doing so under section 3. I do not see anything wrong with that, but clearly if Parliament decided that was going too far, we would have to take that as it comes.

Q118 **Maria Eagle:** Professor Ekins, do you have any views on that?

Professor Ekins: I have views on section 3. I have argued that it should be repealed or amended. Obviously, not all amendments are made equal. The question would be whether the amendment makes it better or worse.

As Lord Carnwath said, section 3 can involve judges in a different role from their ordinary one. I should add that there are more or less reasonable interpretations of section 3 and there are different applications across time. The Ghaidan case, to which Lord Carnwath referred, is the leading case. Although the application may not be especially controversial, the reasoning that the court sets out is pretty radical. Notwithstanding the text of the statute and Parliament's intentions, we can give it a reading that in our view is convention



compatible, provided we do not depart from the fundamental purpose of the statute. That is quite radical. I do not think it has been applied to the full extent of that radical potential in all the cases that followed. How section 3 will operate is somewhat unpredictable, but I would certainly support an amendment that limited section 3 to maintaining a presumption of compatibility, but keeping the focus on what Parliament is doing when it enacts legislation.

As for the two clauses in the consultation document, I think they are going in the right direction. With respect, there are still some problems with them. I get what they are after with the reference to consistency with ordinary meaning and purpose, but it is not quite faithful to the fundamentals of interpretation. I hope that if they go anywhere they are recast somewhat, but I think the ambition to try to stabilise the statute book is right. It might mean more section 4 declarations, but I think that is okay. You maintain the law as it was enacted and you leave with Parliament the responsibility for deciding whether it should be changed and how far. I am not trying to anticipate what their thinking is in the consultation document, but Governments are often quite happy with section 3 because it makes a problem go away. Section 4 would require some decisions and action. To my mind, that is a reason for not wanting section 3 to be overused.

Lord Carnwath: That is right. I have been told by some of my colleagues that in some of these cases the Government were pressing for the use of section 3 in order to avoid having to go to section 4 and face the problem of bringing in new legislation. It seems to me to work as long as it is used sensibly, and I hope it is.

Q119 **Maria Eagle:** On the Government position on section 4 and secondary legislation, their consultation suggests that they are considering removing the power of the courts to invalidate secondary legislation that is incompatible with convention rights. What would be the advantages and disadvantages of that?

Lord Carnwath: The disadvantage is that a person does not get a remedy and it has to go back to Parliament or whoever to remake it so that it conforms. There is a problem of retrospective invalidation, which was recognised by the judicial review panel under Lord Faulks. I have said publicly that I am quite in favour of giving the court greater flexibility to make prospective orders in order to avoid the sort of upheaval and disruption of invalidating things retrospectively. To the extent that this is suggesting no more than that I have no problem with it, but if it goes further, I think it could cause difficulties.

Maria Eagle: Professor Ekins?

Professor Ekins: There is a problem with a skein of secondary legislation being undone on the basis of conclusions about, say, its proportionality and whether it strikes a fair balance between interests and those sorts of questions. Those are political questions and the Human



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Rights Act gives the court a role in answering them, but the risk is instability in the law. Clarifying that compatibility or not with the rights set out in the Human Rights Act, or the Bill of Rights, does not itself invalidate the secondary legislation would be a useful innovation.

There is a difference. I do not think that the proposal is at all to immunise secondary legislation from invalidation. Clearly, some secondary legislation that is outside the scope of the enacting statute will be invalid and, subject to remedial flexibility, is in trouble, and rightly so, but the problem with the way the Act works now is that it makes the validity of secondary legislation too directly subject to argument about proportionality and otherwise.

In so far as you use section 3 or equivalent to read the scope of the empowering Act, if you read it so that the legislation is not within scope, that is a different matter. Clarifying that point and having section 4 declarations of incompatibility rather than invalidation would be advantageous for legal certainty and stability.

Maria Eagle: Thank you.

Q120 **Dr Mullan:** From a constitutional point of view, could it be argued that you should only ever be able to make section 4 declarations constitutionally to have the courts invalidating legislation? Isn't that the territory of Parliament?

Lord Carnwath: We are talking about invalidating secondary legislation, which we have been doing for a long time and is perfectly acceptable. It is not very frequent. As for primary legislation, obviously it is up to Parliament to say what it wants us to do. Section 3 was enacted by Parliament and we do our best to give effect to it, but if section 3 was amended to say that we had to go down the declaration of incompatibility route, fine.

Q121 **Dr Mullan:** I appreciate that we may have been invalidating secondary legislation for a long time, but you could make an argument that perhaps that was never right and should be a matter for—

Lord Carnwath: Certainly, one could take a very strict constitutional standpoint and say that is simply not what should be happening, but I am looking at it from a more pragmatic point of view and I think it makes sense.

Q122 **Dr Mullan:** Did you want to add something, Professor Ekins?

Professor Ekins: Clearly, there are some legitimate grounds where secondary legislation could be invalid and would have to be quashed if you simply did not have the power to make the legislation that you purported to make—the Minister or whoever else it might be. That is perfectly proper. You have to read the statute that confers the power to make secondary legislation and, if you are outside the scope, your legislation is in trouble as legislation. That is perfectly proper.



The problem is that we have ended up in a situation where, even within what looks like the scope of the power, the legislation you make is subject to challenge on human rights grounds without going to validity, rather than just to a declaration of incompatibility and then political pressure to change it. One can make change there.

Q123 **Dr Mullan:** What are the practical implications? Let's say the Government tolerate and want to accept a greater number of section 4 declarations. Do other countries do that? Can you live with that, or are there consequences if they were to pile up, so to speak?

Lord Carnwath: It is very much connected with parliamentary sovereignty, which is very much a feature of our country; it is not common to other countries, so it does not arise in the same form. We are not dealing with enormous numbers. I do not know how many declarations of incompatibility there have been, but they are relatively few. I would not have thought we would ever be talking about large numbers or numbers that Parliament could not handle. In a way, the problem is the extra time and expense it takes and the fact that the parties do not get their remedy for something that is by definition unlawful.

Q124 **Dr Mullan:** I am sorry if I have not been clear. What I meant was more in the round. If we accept that there is a drive for greater differentiation of the decisions of our courts from Strasbourg and that perhaps there might be increased frequency of those declarations and Parliament chooses not to react to those, what are the actual implications of Parliament just saying, "You have made that declaration and we do not agree," and carrying on?

Lord Carnwath: No doubt there would be a number of cases finding their way to Strasbourg and the Government would have to deal with it through the Committee of Ministers.

Q125 **Dr Mullan:** What does that entail?

Lord Carnwath: We were talking about the Hirst case involving prisoner voting. That was one of the cases where we did not really ever comply with the judgment of the court, but after a number of years it was resolved by administrative measures agreed with the Council of Ministers. It is a kind of political process through the Council of Europe and the Council of Ministers. It is not the most rapid method. The Joint Committee on Human Rights has a rather good survey of the way we have dealt with declarations of incompatibility. I find it very interesting to see what actually happens in practice.

Q126 **Chair:** Professor Ekins, do you want to comment?

Professor Ekins: The context of the domestic political response is that the Government could be embarrassed by their failure to respond to a declaration of incompatibility, or it could be an occasion for wider legislative reform. It rather depends on the declaration, but it would



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certainly make Parliament's response, or decision not to respond, more critical.

As Lord Carnwath indicates, there would probably be more challenges in Strasbourg. Disappointed litigants have the option of proceeding to Strasbourg. What happens then depends on the panel of judges and how the case law of the Strasbourg Court is changing. The UK would have the option of arguing again for compatibility. There is an advantage in having the opportunity to argue again. One concern about the extent to which the Human Rights Act requires UK judges to follow Strasbourg case law is that in a sense we do not get the opportunity to argue before Strasbourg for its change. That is a two-edged sword. Lord Carnwath is right that, if there are judgments against us, the enforcement of them is a matter of the UK liaising with the Committee of Ministers, which works out in different ways in different cases.

Q127 **Dr Mullan:** But there is no formal or set path that Ministers go down.

Professor Ekins: There are a number of different instances and a series of meetings where the Committee of Ministers will ask for action and explanations why there isn't action. It rather depends on the case and the grounds. Like Lord Carnwath, I do not think that we complied with the Hirst judgment. There were some pretty good reasons why we did not. In the end, we had an agreement where everyone declared victory and went home, but many years after Hirst—12 years.

Chair: Having served on the Parliamentary Assembly of the Council of Europe, it is a tortuous business and a lot of toing and froing of British Ministers and British politicians having to justify their position, with litigants not knowing where they stand. That is the scenario when you get declarations of incompatibility. I think we have dealt with question 9.

Q128 **Paul Maynard:** This is the easy question at the end. Is there anything else you would both like to add? I think I understand that question.

Chair: Mr Maynard has the sweeper's question.

Paul Maynard: It may not be.

Chair: It may be quite important. We have gone through quite a number of areas. In the time available we cannot do everything, but if there are any further thoughts, Lord Carnwath and Professor Ekins, please write and feed them into us. Are there any other points that you think we should be seized of, Lord Carnwath?

Lord Carnwath: I don't think so. As we said earlier, it is a pity that this process, no doubt due to a change at the top, changed direction halfway through. The consultation paper raises some genuine concerns which would have been very usefully addressed by Sir Peter Gross's committee, but he was not asked.

Q129 **Chair:** Understood. Professor Ekins?



Professor Ekins: I will simply repeat a point we touched on but that repays further attention. There is an imprecision in the consultation document's proposals for replacing section 2—different considerations pointing in different directions. I think that needs to be cleared up so that if legislation is brought forward the Government and Parliament know what rights they are enacting rather than what lawmaking discretion they are framing.

In terms of points we have not really talked about, there is the temporal scope of the Bill of Rights, or the amended Human Rights Act. How far back in time does it apply? That was a big question for the Human Rights Act and its application to the Northern Ireland troubles. There is also extraterritorial jurisdiction, which the consultation notes is a problem, as does the independent Human Rights Act review, without actually making any legislative proposals. That is a major point that requires attention.

Chair: There is a bit of further work to be done on that. That is very helpful. Gentlemen, thank you very much indeed for your time and your evidence this afternoon. It is good to see you both and we are very grateful to you.

Examination of witnesses

Witnesses: Professor Thomas and Kirsty Brimelow.

Q130 **Chair:** Good afternoon, Professor Thomas and Ms Brimelow. It is good to see both of you. Perhaps you would like to introduce yourselves for us very quickly.

Professor Thomas: I am Professor Cheryl Thomas, professor of judicial studies at University College London and director of the UCL Judicial Institute and Jury Project.

Kirsty Brimelow: My name is Kirsty Brimelow. I am a QC at Doughty Street Chambers and vice-chair of the Criminal Bar Association.

Q131 **Chair:** Many thanks to both of you for coming to assist us today. I know you have done a lot of work on researching juries, Professor Thomas, which I think our Committee has seen in the past. I think much of your work has been about jury advocacy of one kind or another, Ms Brimelow.

Kirsty Brimelow: Yes.

Q132 **Chair:** In the Government's consultation paper, rather than Sir Peter Gross's IHRA review, there is a suggestion that we should put the right to trial by jury, which is long established, on a statutory footing, rather than relying on its common-law history. I thought Joshua Rozenberg put it quite well in his blog: "It is all a bit needless, but there is no harm in it." Would anybody disagree with that? Is there any harm in it? Is there any particular point in it?



Kirsty Brimelow: I think the starting point is: what is the point in it? There isn't a proposal for change to jury trials, so why do you need it in a Bill of Rights? There could be potential harm because, once you start to put something within a statute in that way, you could trigger debates about what sort of jury. Is it still a jury of peers, or will we introduce challenges in that? What about the other nations, particularly Scotland, which has a different system that I know Professor Thomas can probably speak about a bit more than I can? You start to run into potential complications, whereas currently it functions and there is no actual requirement to embed a right to jury within a Bill of Rights.

I looked back at the consultation paper to see the thought process behind saying that potentially this might be under threat. There is a reference in a footnote to one case in Strasbourg, *Taxquet v. Belgium*. That case, which is now over 10 years old, reaffirms that juries are in compliance with article 6 and that juries that do not give reasons are not in breach of article 6. However, the consultation heading suggested that this case might be the basis for a consideration that somehow jury trials are only within a certain framework to the extent the Strasbourg Court allows them, but that is not correct; it is the opposite. I ended up rather confused as to why it is in the consultation paper at all, other than a political reason for it to be there, which is outside my remit, in that generally—Professor Thomas will speak about this—the public like juries, so that was something everyone was going to get very excited about. But we already have juries and there is no threat to them, so why spend time on the debate?

Q133 **Chair:** I suppose if you take a political or philosophical decision to codify the rights of citizens of the United Kingdom, you would pretty much expect that the right to trial by a jury would be in any list of rights.

Kirsty Brimelow: There is already a Juries Act.

Q134 **Chair:** If you codify it, why not put it in another Act? What is your problem with it?

Kirsty Brimelow: Why spend the time bringing in more legislation and debating legislation on something that is not required?

Q135 **Chair:** If you are going to codify anyway, why not include that in the code? Being devil's advocate, that would be the point.

Kirsty Brimelow: I suppose the devil's advocate question, "Why not include it in the code?" is because you are opening up potential complications that are not there currently, in particular complications in terms of Scotland.

Q136 **Chair:** Professor Thomas, what do you think?

Professor Thomas: Having it in a Bill of Rights or codifying it will certainly be a very easy win in terms of the public, because what we know from many years of research about public perceptions of juries is



that the public are very strongly in support of trial by jury in the UK. The last time we had a commission looking at a Bill of Rights some very good research was done by the Rowntree Trust. It explored with the public what they would like there to be if there was a Bill of Rights and which rights should be codified. The top two were trial by jury and the right to treatment on the NHS in a reasonable period of time. Those scored over 90% of support among the public.

It is a very popular thing to put in a Bill of Rights, but I agree that it could be opening up legal questions that we currently do not confront in the UK in relation to trial by jury. If the Bill of Rights is to apply to the whole UK and there is a right to trial by jury, we are opening up issues about the differences in the right to trial by jury in the three jurisdictions.

Q137 **Chair:** It is the basis on which you can or cannot elect trial by jury. Are there any other points, Professor Thomas?

Professor Thomas: And the nature of trial by jury. As you all know, in Scotland there is a fundamentally different jury system. It is not just the fact that there are 15 jurors; they have three different verdicts, they have to have co-operation, and all sorts of things. At the moment, an appeal in Scotland based on a challenge to something about the jury system does not go ultimately on appeal to the UK Supreme Court; final appeal rests in Scotland. I wonder whether thought has been given to what the legal consequences might be of having that in the Act.

Q138 **Chair:** It could have consequences that you might not foresee.

Professor Thomas: Yes.

Q139 **Maria Eagle:** I want to ask a little bit about where you think we are with jury trials in our system. Professor Thomas, how do you assess the current role and status of jury trials in England and Wales? Obviously, this proposal has put it up in lights, but where are we with jury trials in England and Wales? Is it all working? Is it going well?

Professor Thomas: That is a very large question, but from the research that has been done, one thing to say is that the jury system, particularly in England and Wales, is now probably among the best researched in the world. New Zealand also has very good research, but we have been doing research with real juries at court, and looking in great detail at all the data on every single jury verdict in England and Wales over the past 13 years, so we have quite a lot of very good analysis.

In effect, we have been looking for problems or looking to identify whether there are problems. Researching real juries in England and Wales has thrown up the fact that juries appear to be not just fair in their decision making but very effective and efficient. For instance, we looked in great detail, also in contributing to the Lammy review, at the extent to which juries may discriminate against defendants based on their racial background. We can find no evidence of systematic discrimination. The jury conviction rate across a range of offences does not differ according



to the background of the defendant, and in terms of effectiveness and efficiency juries appear to be trying cases based on the evidence and the law put before them, which is clearly what we want. If you give a jury a job to do, they are incredibly efficient. Juries very rarely are unable to reach a verdict. Fewer than 1% of charges put to a jury result in a hung jury. I think the Lammy review put it quite well: it is one part of the criminal justice system that appears to be working very well.

Q140 Maria Eagle: That is reassuring, isn't it? Is there any learning from experience during the pandemic to give any hint that things should change?

Professor Thomas: Kirsty will have something to say about the experience from the practitioner point of view. One thing about the jury system in England and Wales during the pandemic is that, unlike many other common-law jurisdictions that have trial by jury, the jury system was not derailed by Covid. In many jurisdictions, there has been no trial by jury for over a year. Many jurisdictions, for instance in the United States, have gone back to suspension of jury trial because of Omicron. As I think the Lord Chief Justice said to you, there was only a seven-week period in England and Wales when all jury trials stopped. Obviously, it took a bit longer for a large number of jury trials to restart.

I did some research with judges in the Crown court during the pandemic about their experience of jury trials. They routinely noted that the public stepped up in a big way, especially during the early stages of lockdown—the first year of the pandemic—to do their civic duty. It has not been a problem getting people to come forward to do their jury service, and they have kept the jury trial system going throughout a very difficult period.

Kirsty Brimelow: I was a practitioner in the courts with juries during the pandemic, and we were without jury trials for only seven weeks, as Professor Thomas said. The Crown courts themselves did not stop either. Seeing how different parts of the country and how courts have adapted to be able to hold jury trials has been incredibly informative.

It also shows how versatile people have been and how they have really wanted to do their civic duty, perhaps even more so than you would normally see when juries are working very diligently. They were coming to court at a time when there was a direction to stay at home unless it was essential for work. We have seen the Perspex in courts, and papers being quarantined for 24 hours before they can be distributed to the jury in large multi-handed trials. I was in a very large trial in Cambridge earlyish in the pandemic, in the early days of last year. It used two courts. Some of the defendants were in one court and they were linked so that the jury was in another court. When a defendant gave evidence, they went to the court with the jury in it. That is an example of how it worked.

What we have seen from a criminal Bar perspective is that there have been ongoing delays in jury trials because of lack of barristers. Only



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yesterday, I received feedback on two trials where they could not find somebody to prosecute and defend in each of those. The issue has not been juries. There has been some sickness from Covid among juries, with adjournments for a few days and then they resume. That has been quite common in trials, with witnesses and defendants getting Covid and then resuming. Sometimes barristers and court staff get Covid. The current issue is that there are insufficient barristers to prosecute and defend cases.

Q141 Maria Eagle: Professor Thomas, you have done all of this research and found a pretty satisfactory situation, from what you say, but do you have any views about what could be done to improve the operation of juries and their effectiveness in England and Wales?

Professor Thomas: Throughout the whole period of research, over the last 20 years of looking at juries, a number of issues have come up in terms of problems that were identified. The judiciary and the Courts Service have worked very hard to identify those problems. They have commissioned research to explore them and identify solutions.

To highlight just a few things, we probably all know that in the last 10 years social media and use of the internet have presented some challenges in ensuring that jurors do not have access to information outside the evidence presented in trials. There have been some cases where jurors have not followed their legal responsibilities on that, and there was great concern that it might be a threat to trial by jury. Instead of throwing up our hands and saying, "This must be the end of trial by jury," we identified the extent to which jurors were disobeying what they knew to be their legal responsibilities or whether they were simply confused about their legal responsibilities. We did some very detailed research with juries around the country and identified that to a large extent it was the fact that they were unclear about a lot of their legal responsibilities. We then worked with the judiciary to design a way to convey that information to them in the best possible way at the right time, and that has dramatically increased jurors' understanding. That is an example of how the system will always throw up some challenges as technology changes and so on.

We identified that in the past judges did not give juries their legal directions in writing. We have had a massive sea change in England and Wales, not necessarily the same in Scotland or Northern Ireland, in which in virtually every case a jury will be provided with directions in writing. We know from research that juries need them for their comprehension, but they also very much want them. That is just an example.

It is not without its problems. If I can identify something that perhaps jurors would say to you, if they were here, it is that they tend to find it very frustrating when the court process does not work as it should and they are left waiting around. They rearrange their lives in order to do jury service, and I think there is an expectation on their part that the court process should function to be as efficient as possible and use them. It



tends to come back to a court process issue with the jury system, not the actual functioning of juries themselves.

Kirsty Brimelow: I agree with that, having seen the number of times very disgruntled-looking juries are brought in when they have been left waiting around in the process. I suspect that is the feedback you would get.

To add to Professor Thomas's point on written directions, they have been a sea change in process and procedure in the Crown court. Pretty much all cases have written legal directions which the jury can take away with them. They also have the route to verdict, so juries take those documents away with them when they retire. I have noticed over the years that when they have those documents the number of questions that come from the jury—"Could you just remind me of that legal direction from your summing-up?"—has fallen away.

I am afraid I will probably have to keep coming back to the pressure point. Who drafts the legal directions? The judge will do the draft, but the barristers have to agree, which quite often means that they are working antisocial hours with no pay. As all these extra procedures have been added to make the criminal justice system work more efficiently, legal aid has remained cut and lags behind. That is the issue we see at the moment which has come home to roost.

Q142 **Maria Eagle:** Can I ask both of you for your view on the Government's decision to increase the sentencing power of magistrates? Do you believe that will have an impact on the number of outstanding cases and the backlog in the Crown court?

Kirsty Brimelow: Increasing sentencing powers could add to the backlog in the Crown court for the reason that one of the incentives for remaining in the magistrates court is potentially the lower sentence that the defendant will get. As a lawyer, you would be advising on the maximum sentence they could get. Obviously, if it is a guilty plea you get an automatic reduction in the maximum sentence.

As soon as that is doubled, the incentive for remaining in the magistrates court is taken away and we will see more people electing to go to the Crown court, for the reason that generally—this goes back to Professor Thomas's research—people trust jurors and do not necessarily trust the magistrates before whom they are appearing in the same way. In particular, if it is somebody perhaps from a minority background, they are not in front of somebody they see as reflective of them and their background, in the same way as they might not see a judge in a Crown court as representative of them and understanding them, but they will trust the mix of the jury. So we could see more elections, which would add to the backlog.

The Government's own modelling gave figures that suggested it would take about 1,700 cases out of a backlog of 60,000, so even on the



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modelling itself it is minuscule, at around 2% to 3%. Then you have to look at the criminal justice system as a whole. It will potentially put more pressure on the prisons, because one issue we have seen coming from magistrates courts is defendants being sent to prison for short sentences. Potentially, you are increasing the numbers in the prison population. On Ministry of Justice figures, anticipation of the prison population is around 98,500 by 2026, so an increase of almost 25% is already modelled and anticipated, without increasing the powers of magistrates courts.

There is a reason why that particular power has remained gathering dust on the statute book for the last 10 years. Generally, it will not assist the backlog; it could add to it, and it could also place more pressure on the criminal justice system.

Q143 **Chair:** Do you have data for any of the assertions that you make?

Kirsty Brimelow: The data from the Government's modelling.

Q144 **Chair:** What about the CBA's assertion? Is it just your gut feeling as a practitioner?

Kirsty Brimelow: No. The data I have given you is from the Ministry of Justice and the National Audit Office.

Q145 **Chair:** I have got that, but you referred to the number electing jury trial. Do you have any evidence of how that might be offset by the reduction in the number of committals for sentence?

Kirsty Brimelow: The evidence is my evidence on election from a practitioner's point of view.

Q146 **Chair:** It is not a numerically quantified piece of evidence.

Kirsty Brimelow: I do not think there has been any research on elections. I will pass over to Professor Thomas on whether there has been any research on elections, because it has only just been brought in. There will not be any figures.

Q147 **Chair:** I can understand that from your professional experience you might have a gut feeling about it.

Kirsty Brimelow: It is not really a gut feeling; it is based on dealing with people in magistrates courts over the years, and supported by barristers who work in this area across the criminal Bar. It is definitely more than a gut feeling.

Q148 **Chair:** I did it for 30-odd years, as you know. That was my gut feeling.

Kirsty Brimelow: On election, but you would not have been in the position of advising a client on electing when potentially they would get a much higher sentence in a magistrates court.

Q149 **Chair:** Professor Thomas, is there any research on this?



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Professor Thomas: It is an interesting question. Going back to the wider issue of increasing magistrates' sentencing powers, that would be shifting some offences, in effect, to the magistrates courts. What we have is very detailed research about the fairness of jury decision making. Unfortunately, we do not have comparable supporting research about the process of magistrate decision making. What would be ideal would be to replicate the research that we have about juries and use that to do the same research with magistrates to see whether there will be a difference in outcomes. That is the key issue in practice for the defendant. How much faith would they have in the system if they had to elect magistrates or trial by jury?

Chair: That is helpful.

Q150 **James Daly:** That argument only works if you are talking about somebody on a not guilty plea. If you are on a guilty plea, you do not come in contact with a jury anyway, so it is absolutely of no consequence in respect of guilty pleas, which form the vast majority of cases that go through the court.

Kirsty, I say this only because we are both experienced in these matters. I think the evidence would tend to suggest that the community penalties and custodial sentences that are imposed in the Crown court are proportionate and in line with general magistrate sentencing courts. I do not think there is any evidence to suggest that people will deliberately want to go to the Crown court and put off their sentencing case for months and months, unless they have an ulterior motive to do it. In 16 years, I never had somebody say to me, "What I am looking at is the fairness of the jury trials and the socio-demographic make-up of the court and the people who are going to take a decision in respect of my case." I accept that may well be the case and, if so, that is good, but we have to be realistic. I agree with the Chair that it is a long overdue change. It will mean that magistrates can deal with far more cases in a far more efficient manner. I do not think it will lead to any increase at all in the backlog in the Crown court.

Kirsty Brimelow: To deal with the first point about guilty pleas, if somebody gets a sentence which they consider to be too long obviously they can still appeal, so potentially you will see an increase of appeals going up to the Crown court. That will take magistrates out of the magistrates court because you need two of them to sit alongside the judge in the Crown court. That is a potential risk.

Research has been done by the Howard League on the issue of short sentences of imprisonment coming from magistrates courts. If you take that research and apply it to consider that potentially you will have sentences of imprisonment that are appealable, you are still hitting the backlog in the Crown court and it will increase. I do not agree with your proposition that guilty pleas mean everybody then stays in the magistrates court; you are potentially increasing the pleas up to the



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Crown court. On the second point about faith in juries and so on, I would rely on Professor Thomas's research.

- Q151 **James Daly:** I think it is an indictment of the magistracy if we accept your argument, because effectively what you have just said is that magistrates send lots of people to prison and they will almost certainly be appealed to the Crown court, and that just is not the case.

Kirsty Brimelow: I would refer to the Howard League on that.

- Q152 **Chair:** What we have had in recent years, which I did not have when I was in practice, at least to start with, are much better efforts by the Sentencing Council, sentencing guidelines and so on.

Kirsty Brimelow: Absolutely.

- Q153 **Chair:** There was an attempt to professionalise sentencing in both the Crown court and the magistrates court. We have to see what difference that would make.

Kirsty Brimelow: We will have to see. That is obviously a welcome improvement. I heard the Secretary of State indicate that there would be training for magistrates in relation to this new power, so we will have to wait and see what happens.

An added effect when looking at community sentences in the magistrates court and looking holistically at the criminal justice system as a whole is that there have been cuts in the availability of community penalties, community services, probation services and so on. All of it impacts. From a criminal practitioner's perspective, it seems unfortunate that the focus was not on putting resources into community-based penalties, rather than potentially increasing imprisonment.

- Q154 **Ms Abbott:** In passing, you mentioned judicial diversity, which is a very important issue. I hope that the Committee will look at it in more detail at another point.

I want to follow up on what Professor Thomas said about how popular juries are. Do you see any lessening of popularity? I ask that only because of the Colston case a little while ago when the jury found young people not guilty of criminal damage. A lot of politicians went crazy and kept talking about a perverse judgment. I thought that was a little unfair on the jury because they could not know what evidence the jury saw and conferred on. Do you think there is any lessening of support for jury trials?

Professor Thomas: I do not see any evidence anywhere that widespread public support for trial by jury is eroding in any way. The case you mention is an interesting one and reflects the fact that juries have a very long-standing and historical right to acquit, potentially in the face of the evidence, often involving cases of some type of public protest. That was an interesting case that was interestingly reported.



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One thing that often comes up with jurors is that they have sat through the entire case; they have heard all of the evidence, and they may emerge to read or hear media reports about the case they sat on. There is often concern about juries being swayed by media coverage of cases, but what often happens is that juries look at the media reporting and say, "I was on that case and that is an incorrect presentation of what happened in that trial." To answer your overall question, there is no evidence of a lessening of support for juries among the public.

We have some interesting recent research, both here and in the United States, about the wider democratic civic benefits that occur as a result of having a jury system in the form we have. We did some research. I see juries post-verdict—people who have served on a jury and are about to be discharged. We asked a very large number of jurors to say how they felt when they first received their jury summons and whether, if jury service had not been compulsory but voluntary, they would they have opted out of it; 87% said that if jury service had been voluntary when they first received their summons, they would have opted out. They did not want to do it for a variety of reasons: it was inconvenient and so on. When those same jurors were asked, "Now you have done your jury service and sat on the jury, how do you feel about it?", 81% said they would be happy to serve again, and that they had found it interesting and educational.

That very much coincides with some fascinating research in the United States that has shown that people who do jury service and who prior to jury service had never voted before were much more likely to vote at the next election. It also changed their behaviour in how they followed media coverage of legal cases, politics and engagement in their society. There is something about jury service that appears to resonate with members of the public who do it.

Kirsty Brimelow: On the Bristol case, there was almost a moral panic or feeling that there would be anarchy now. What was of interest was where that moral panic was coming from. A lot of it was coming from comments in this area, where we are sitting now. I know some of the barristers who practise and were in Bristol at the time. Obviously, this is only what they communicated to me, but they consider that it was an entirely different atmosphere in Bristol where it was felt that 12 people had made a decision on the evidence they heard in court and returned their verdict. People were not fearful that there would be riots all over Bristol as a result.

The importance of a jury system is also that they are from the local area and they are reflecting their experience. They are always told not to leave their common sense behind. As a jury you are given legal directions, but collectively you are people; this is part of humanity in action in the justice system, which is why probably all of us in this room are very keen to support the jury system as much as possible. That was a good example of the jury system working well.



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Some of the commentary I saw was about lack of understanding of the criminal offences being tried. For example, criminal damage was being reported almost as a strict liability offence when obviously there is a defence within it. There was nothing I saw to show that the jury had disregarded the evidence; quite the opposite. There were legal directions based on the evidence that was there so that counsel left the jury to return a verdict. If there had not been evidence to which the legal directions could anchor, there would have been no defence left for the jury to consider.

Ms Abbott: I think that is right. It is almost as if people like jury trials up until the point they come to a decision they do not like.

Q155 **Paul Maynard:** Ms Brimelow, you hinted that we might come to this, so here we are. Notwithstanding our glorification of trial by jury and our delight in it, do you think that a defendant in the Crown court should have the right to elect trial by judge alone?

Kirsty Brimelow: It is an interesting one to consider. It has been considered back and forth over many years, certainly over my career, usually in relation to big fraud cases. Are they too complex for juries and so on? Each time, it has been considered that the big fraud cases are not too complicated. Basically, you are looking at dishonesty.

Over the last 15 years we have moved on, and cases have become increasingly complicated because of technology. There is now a vast amount of material not only for allegations of fraud offences but for all types of allegations. Juries have to deal with huge amounts of material. There is no proposal that it has to be judge only for a whole range of offences. The first question with that consultation is: for what offences would the proposal be? Why is fraud, for example, said to be so different from a whole variety of other offences tried by juries where there are often vast amounts of technical evidence? Quite often, there is evidence generated through IT, which people are not naturally familiar with, and they might need expert evidence to explain it. The first issue is about who is proposed to do it.

The second issue is that, once you start trying to set a judge-only system, you are moving to a two-tier system. Who is that two-tier system affecting? Is it disproportionately impacting certain communities? On that point, I will pass over to Professor Thomas because I know she has something to say about it.

I have defended in a case before a judge only, which normally would have been before a jury. You might remember that a provision was brought in where the prosecution could apply for a judge-only case if there was a danger of, to summarise it, jury tampering. I defended in the first juryless trial back in 2008 at the Old Bailey, where it first started. It was then heard as a juryless trial in the High Court before a single High Court judge. It involved a case of armed robbery at Heathrow airport.



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I experienced that, and what is interesting is that, at that time, there were two other trials. One started partway through. There was a successful application; the jury was lost because of jury tampering and it finished off with a judge only. I think another one started. That trend of the prosecution applying for judge only in that era did not carry on. I cannot see that it was because of any particular change of behaviour. There was a lot of concern about how it worked in some ways, so it has gone back to the jury system and the court system having sufficient within it to cope with potential threats and intimidation of jurors, and it has gone back to the footing of keeping juries, through that period.

Q156 **Paul Maynard:** Forgive my ignorance of the philosophy of law, but basically your answer is about whether a particular trial or types of trial are suitable or not for jury trials. What about from the other direction? What if a defendant would rather place his or her trust in the judgment of a single judge rather than a jury of their peers? Should they not have that right to choose?

Kirsty Brimelow: It depends on what the case is and how the defendant is making their decision. If they are making their decision on the basis of being told it means that their case will finish much quicker, that might not be sound decision making. There is a huge issue at the moment with the backlog and cases taking years to come to trial, so it is a particularly sensitive time. If we start going down that road, instead of putting the finance into the criminal justice system to uphold the right to jury trial, we could end up being in a position of removing it from them, because the only real advantage for a defendant ultimately is speed.

Q157 **Paul Maynard:** I may have cut off Professor Thomas commenting.

Professor Thomas: I would like to pick up the issue about speed and go back to the base question: why would there be a change to the system? What would it be hoped to achieve in doing that?

I know that during the pandemic this issue has come up in the context of whether it might be a way of dealing with the backlog in the Crown court. That is where concern arises, because it assumes that if you opt to go down the route of a single-judge trial instead of a jury trial you will get a quicker trial. A lot of the proposals I saw early in the pandemic were about focusing this on fraud and white-collar crime cases.

The reality is that you would create a two-tier system for certain types of defendants. We know from the research that in fraud cases defendants are usually white and male. They will get the speedy trial, and all the rest of the defendants who may not have that background will be in the longer process. That would be a fundamentally unfair approach to things. I am looking for the fundamental reason why we need to change that system, and if the issue is about speed, it raises potential problems.

There is a reason why we have 12 people, or multiple people, on a jury. We have majority verdicts in this jurisdiction. What that allows for is that,



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if you have a particular individual who has a biased view or makes a mistake, it can be evened out in the ultimate verdict, but with a single judge a biased decision of a single judge is ultimately a biased decision.

Q158 Paul Maynard: From all you have just said, I might predict your answer, but what do you make of the Scottish proposal to have the single-judge rape trials that Lady Dorrian proposed?

Professor Thomas: Again the question is whether there is a problem that needs to be solved by taking that route. I will not speak in much detail about Scotland because things are very different in Scottish trials involving rape and sexual offences. In England and Wales, there is no evidence that juries are failing to convict in those cases. Despite a lot of media coverage that talks about a conviction rate of 6% to 10% in rape cases, that is not the jury conviction rate. We have been looking at every single jury verdict in a rape case for 13 years in England and Wales. The overall conviction rate is 58%, so juries are more likely to convict than to acquit. The most recent jury conviction rate in rape cases involving female adult complainants is 65%, so there is no evidence in this jurisdiction that juries are failing to convict.

We have a lot of very progressive measures in place in sexual offences cases. I am sure you know about those and have looked into them. For instance, we have a lot of special measures in place. That is different from Scotland. In some respects Scotland is not as advanced in its procedures. Going back to something we both mentioned earlier, we also have written directions. There are very specific written directions that judges give and are able to give at any stage of a trial in a rape and sexual offences case. That is not the practice in Scotland. There may be reasons in Scotland for looking at potentially piloting this. I still would like to see the evidence that Scottish juries are failing to convict, but I would leave that for others.

Q159 Chair: I think your suggestion would be why not try special measures and the other things first.

Professor Thomas: Yes.

Q160 Paul Maynard: Maybe Scotland can learn from us for a change. We are always told to learn from Scotland.

Kirsty Brimelow: In Scotland, they probably look at some of our special measures where the court is still open and say, "Why don't you have a completely closed court?" I had a look at the proposal in Scotland for judge-only rape cases. I could not see the basis or the reason why. That is fundamental.

In England and Wales I think we have real cause to be proud—this is something very positive coming from the Criminal Bar Association—of how we defend and prosecute our cases in the courts. The conviction rate, unfortunately, is often misreported, or perhaps misunderstood. Professor Thomas has just set out the statistics. It is higher than in a lot



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of other crimes. Quite often, there are lots of difficulties with the evidence.

The introduction of special measures has been a sea change, with the training given to barristers who prosecute and defend and the training given to judges. The other aspect I would like to see addressed, rather than looking at the jury and the judge, is the myths that still circle around these trials. If they could be addressed as myths, given the reality of how these cases are dealt with in our courts, that would also assist complainants when making allegations in these cases.

Q161 **Chair:** Professor Thomas, I think you had a look at how much juries were influenced by rape myths.

Professor Thomas: Yes.

Q162 **Chair:** You did not find very much evidence of that at all.

Professor Thomas: We found very small proportions of jurors who believed what we would call the very standard rape myths. We were able to say that there were one or two where it looked like juries might benefit from a little bit of additional guidance, but what is important is that there are big differences between the jurisdictions.

In England and Wales, judges have the "Crown Court Compendium", which gives them sample directions on a whole range of issues, particularly in rape and sexual offences cases, on how to direct juries, so that juries will not bring any false assumptions into the case. They are also now able to direct the jury at any stage in the process. These are things that can be set out right at the start of a trial, and many judges do that.

There was a petition to Parliament in 2018 which called for all jurors in rape cases to be given some training on rape myths and stereotypes. I was asked to look at the extent to which that was necessary. Do large proportions of people who do jury service hold those views? The research found that, no, there are not large proportions of jurors sitting on trials and reaching verdicts who hold those views.

Q163 **James Daly:** We are the Justice Committee. Professor Thomas, it is important to understand what you have just said and where we are. As for the courts, we are in a satisfactory position. I will not go over the top in that respect, but we have to understand that 90% of rape cases are not even referred to the CPS. Of the remaining 10%, in approximately 3% of cases the CPS decides not to continue with them. The number of rape allegations dealt with in the court process is frighteningly small, so we have to put this in context in what we are talking about. We are talking about a very small number of cases. The problem with rape cases is that often we discuss the court process. It should be prioritising what happens before it gets to court. That is where the real problem is.



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Professor Thomas: I think we would all agree on that. That is an issue of public perception, and it is also doing a great disservice to complainants in sexual offences cases who are not given the correct information about what the chances are of the jury convicting if their case goes to a jury. They are not aided by the constant discussion about a 6% to 10% conviction rate. Clearly, that is relevant to bringing their allegation to the police, but if you are someone who has got through the CPS charging process and the case is likely to go to a jury, it would be extremely helpful for people to be aware that juries are more likely to convict than acquit.

Kirsty Brimelow: I completely agree with clear information being given to complainants. That is very important, and throughout my practice I have always tried to communicate with complainants at court in order to explain the system to them, certainly not leaving it to the police officer.

The other issue that we cannot now ignore in the attrition rate is the increase in the time taken between complaint and trial. That is undoubtedly affecting those who would wish to continue their complaint but their life simply cannot wait three years and so on.

Q164 **James Daly:** We are both clear about that. A lot of that is between arrest and charge. It is not the court system; it is not after charge. Clearly, we want things to go quicker in the court system, but, as we both know, over many years there have been delays in the court system. They may be exacerbated at this moment in time, but—

Kirsty Brimelow: It is hugely different.

Q165 **James Daly:** I would challenge you on that, but we do not have time. What has happened is that the decision-making process between arrest and charge or not charge is inordinately longer than it used to be. We have major problems in respect of that, so we have to make it clear that the delays are pre-court process in many circumstances.

Kirsty Brimelow: I absolutely agree with that. These are the stats on that. I have the latest NAO stats. There is a 435% increase in the number of sexual offence trial cases in the Crown court backlog for longer than a year. That is when they are at the Crown court in the backlog. There was a 435% increase between March 2020 and June 2021. Those are the latest NAO figures.

Q166 **Ms Abbott:** I want to follow on from our discussion about rape cases. I am glad you have established this because there is a lot of mythology around it. Once a rape case gets to court, there is as good a rate of conviction as with anything else. Just briefly, what is going wrong before rape cases get to court?

Kirsty Brimelow: There are many factors. It is multi-factored.

Q167 **Chair:** You will have to be quite quick; otherwise, we will lose our quorum. I do not want to do that because this is an important topic.



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Kirsty Brimelow: For example, there is some misinformation about handing over phones. That seems to be changing. Phones will now be given back very quickly, but there was a stage when people misunderstood what would happen with their personal information, and there was reluctance to engage with the police.

There have been cuts within the police that have meant that the SOIT officer, who used to be a constant person with the complainant, which we saw as beneficial in supporting them through the process, has changed or is no longer available, even from the start. The time expanded as well. We have the pandemic on top. Therefore, people are not prepared to wait so long. That is a major factor, but I will hand over to Professor Thomas on that.

Professor Thomas: I do not have too much to add. The pre-trial stage is not really my area of research expertise, but I think everyone can agree that there have been massive cuts in the police and the CPS, and ultimately it will have an impact on the efficiency of what happens in the pre-trial process.

Chair: That is very helpful. Thank you very much for your time and your evidence; it has been very useful to us. It is good to see you both. The session is concluded.