Joint Committee on Human Rights

Oral evidence: Human Rights Act reform, HC 1033

Wednesday 9 February 2022

Watch the meeting

Members present: Joanna Cherry MP (in the Chair); Lord Brabazon of Tara; Lord Dubs; Lord Henley; Baroness Ludford; Baroness Massey of Darwen; Lord Singh of Wimbledon; Dean Russell MP; David Simmonds MP.

Questions 30 - 48

Witnesses

I: Schona Jolly QC, Barrister at Cloisters Chambers; Caoilfhionn Gallagher QC, Barrister at Doughty Street Chambers; Elizabeth Prochaska, Barrister at 11KBW; Professor Conor Gearty, Professor of Human Rights Law at The London School of Economics.

Examination of Witnesses

Schona Jolly, Caoilfhionn Gallagher, Professor Conor Gearty and Elizabeth Prochaska.

Q30 **Chair:** Thank you very much, everyone, for coming this afternoon and welcome to this meeting of the Joint Committee on Human Rights. We are a cross-party committee of Peers and Members of Parliament. Our chair, the right honourable Harriet Harman QC MP, is currently on bereavement leave, after the sad death of her husband, Jack Dromey, the former MP for Birmingham Erdington. I am sure we would all wish to send our continuing condolences and support to Harriet and her family.

My name is Joanna Cherry. I am the MP for Edinburgh South West and deputy chair of the committee. I will be chairing the committee this afternoon in place of Harriet. This is the third session of our committee's inquiry into reform of the Human Rights Act. It will be recalled that, in December, the Government published a consultation paper, *Human Rights Act Reform: A Modern Bill of Rights*. Very shortly prior to that, the independent review panel on the Human Rights Act published its lengthy report.

Last week, we questioned Minister Lord David Wolfson on the Government's proposals. We had hoped to have Sir Peter Gross with us this afternoon. He, of course, was the chair of the independent review. Unfortunately, he has been unable to attend and has sent his apologies to the committee. We send him our best wishes and look forward to rescheduling him for an evidence session at a later date.

This afternoon, we are going to hear from a panel of barristers and legal academics on the Government's proposals. We have with us, joining us virtually, Schona Jolly QC, who is a barrister at Cloisters Chambers, whose principal areas of practice are equality and employment, civil liberties and human rights law, including international law. Thank you for joining us, Schona. You are very welcome. Next, we have Caoilfhionn Gallagher QC, who is a barrister at Doughty Street Chambers, specialising in human rights and civil liberties. I believe that you also have a particular interest in freedom of expression, Caoilfhionn, so thank you for joining us. You are very welcome.

With us in person, we have Professor Conor Gearty, who is professor of human rights law at the London School of Economics. We are very grateful to have Conor with us this afternoon and thank him. Last but most certainly not least, we have Elizabeth Prochaska, who is a practising barrister specialising in public equality and human rights law. Between 2017 and 2019, Elizabeth was a legal director of the Equality and Human Rights Commission. Thank you very much, Elizabeth. We are really grateful to you for joining us this afternoon.

Q31 **Dean Russell:** My question is going to the heart of this. In your experience, is the Human Rights Act working well in practice? What improvements, if any, do you think could be made? I will join that with an

additional note as well, so I do not go round twice. From the Government's perspective, they claim that the way in which the courts have used the Human Rights Act, including taking into account Strasbourg case law under Section 2 and applying the principle of proportionality, has led to uncertainty in the law. Do you agree? Will the Government's proposals reduce this uncertainty? I will come to you first, Caoilfhionn.

Caoilfhionn Gallagher: We had internally taken the view that we may be better going to Conor or Elizabeth first on this question. I hope that that does not cause disruption.

Professor Conor Gearty: Thank you, Caoilfhionn. I do not think this is a pre-arranged fix. I just happen to be now speaking. We were very grateful for having seen these questions the other day, so thank you very much. I was reflecting on this one and trying to approach it as fairly as I can. I am going to answer definitively that it is working well, but that is platitudinous. Why do I think that? There are three reasons, and looking very briefly at them tells us something about the Government's concerns about the Human Rights Act.

First, I like the jurisdiction of the European Court of Human Rights. I like the idea that it is out there. I like the Council of Europe system. I am delighted that the United Kingdom is a member. Secondly, I am a great believer in access to justice. I believe in legal aid. I believe in no barriers to being able to get the case into court—not guaranteed to win but to get the case into court. Thirdly, I really believe that human rights applies to every human within the jurisdiction and even, as we know, beyond the jurisdiction, on the occasion of, for example, military action abroad.

Those are three reasons why I like it. My view is that the United Kingdom Government in these consultation processes are concerned about all three, but not so extensively that they would repeal the Human Rights Act. An understandable position that will be against me is, "We will get rid of the Human Rights Act, we will pull out of the Council of Europe and you would have a coherent set of principles laid before you", which I would strongly oppose, but they would be coherent.

My concern is that the consultation is driven by a sort of resentment about a law that it is not proposed to repeal. For example, you see quite a bit about the European Court of Human Rights, and yet it is going to be very prominent if the some of the proposals go through in this jurisdiction. You see concerns about cases that are described as cases where litigants have been completely unsuccessful but have cost government money in showing that they were unsuccessful. It is not successful cases that are the concern of the Government on many occasions—it is that people have been in court. That is the nature of our system. I have no difficulties with that, but the Government appear, on occasion, to have some, possibly validly, possibly not.

Then, of course, there is a concern about undeserving persons. There is a whiff of people needing to have earned their human rights, whether they

are unlawfully arriving immigrants or persons who have committed criminal offences.

Part of the Government's concerns and difficulties about human rights lie in the ways in which they are more hemmed in than they would like. They are a bit stuck with access to justice, with the universality of the Human Rights Act and with Strasbourg.

Briefly, on improvements, It would be pretty good if Section 19, to be technical for you, which requires that Ministers certify compatibility or not, were thickened a little, so Ministers could perhaps lead a discussion, on paper, as to why they believe one of those two things, compatibility or incompatibility.

I could think of a second improvement. I will address the issue of proportionality very briefly in a moment. I would quite like Section 2, which is the one that says, "Take into account the European court stuff", to be a bit expanded to say, "and do not be afraid of other international agreements". Britain has signed up to various international conventions, most obviously the Convention on the Rights of the Child, and there are various expert bodies that say this or that about it. Do not be afraid of using it. It does not drive the outcome of cases, just the way Strasbourg does not drive the outcome of cases, but it could usefully be remarked upon. That is slightly mischievous of me, because the Supreme Court recently set something of a face against that.

I will deal with the whole question of Strasbourg case law and proportionality very briefly. I do not understand the argument that it leads to uncertainty. I learnt my public law in England on the basis of the Wednesbury principles, which were fairly incomprehensible, and proportionality was a rational controller of an otherwise extremely odd set of unpredictable cases that produced an effect that nobody could be quite sure of in any individual case. Reverting to that would increase uncertainty. We will get to Section 2, but without the clarity of Section 2, the role of the European Court of Human Rights would be like a spectre at the judicial feast here, with nobody quite sure how this or that would play in Strasbourg.

Elizabeth Prochaska: Thank you for having me today. It is a privilege to be here. The way that I would judge whether the Human Rights Act is working well is to focus on the fundamental question, which is whether people are able to enforce their rights, because that is, ultimately, the purpose of the Human Rights Act. That was its stated purpose when it was introduced, and it remains its purpose today. For me, that is the measure of success.

There are two ways of looking at enforcement, and the first is hard enforcement. By that, I mean whether people can achieve legal remedies in the courts. There is mixed success on that measure, because there are real obstacles to Human Rights Act claims. There is a short limitation period of only a year, which is very short when compared to, say, the limitation period for negligence or other similar claims. There are

relatively low awards of damages. Despite what the government proposals might say, the award for damages is very low in Human Rights Act claims. It is much higher if you bring a claim for negligence. Of course, there is the absence of legal aid. There are obviously real problems with hard enforcement of human rights.

By soft enforcement, I mean whether people are able to vindicate their rights without going to court; it is often called a human rights culture. On that measure, there has been really serious failure. The very fact that the Government are able to make these proposals shows the extent of that failure. There has been a complete failure to embed human rights in public understanding.

A good example of that is human rights in the pandemic. There has been really widespread failure to undertake any kind of proper human rights assessment of the impact of the pandemic measures, some of which have led to really egregious breaches of people's rights. I have been working with the charity Birthrights, which I chair, this week. There is a couple in the neonatal ward of University College Hospital, London, who have been prevented from seeing their critically ill baby for five days because a family member is Covid-positive. There has been no proportionality assessment undertaken by the hospital of the impact on that family's rights under Article 8. That is a micro-story that reflects things that have been going on across this country for the last two years.

There has been very little public debate about human rights in the pandemic. You do not have to be a Covid denier or an anti-vaxxer to think that those issues are important and should have been dealt with. There has been failure in hard enforcement, but more serious failure in soft enforcement.

I want to say one thing in particular about soft enforcement. As the Chair said, I was the legal director at the EHRC for a couple of years. One of the things that is noticeably absent in these proposals, and is absent generally in parliamentary discussions about human rights, is the role of the national human rights institution, which is of course the EHRC. It is meant to be the organisation that takes responsibility for enforcement of human rights. That is its statutory responsibility, but, as this committee has found previously in its 2018 report on human rights enforcement, it is unable to do that, for a combination of reasons. It does not have good enough powers. It cannot investigate human rights breaches and it does not have good enough resources.

There is so much more that the NHRI could be doing. It could have a formal role reviewing the law, supplementing or replacing the Section 19 procedure. It could review the actions of public authorities. It could provide advice to Parliament. It could investigate complaints in an ombudsman-like function. It could litigate. It is hobbled by its statutory powers and lack of resources. That is reflected in the failure to embed human rights in public consciousness. That is how I would judge whether the Human Rights Act is working.

Q32 **Chair:** A corollary of what you are saying there may be that, because of the limitations of the Equality and Human Rights Commission, the limitations of its enforcement powers on human rights, the ability and power of individuals to take cases under the Human Rights Act is all the more important.

Elizabeth Prochaska: That is probably right. If the EHRC had a beefed-up role as an enforcer of human rights, through an ombudsman-like mechanism where people could bring complaints to it—perhaps they might even be required to bring complaints to the EHRC before they could bring human rights litigation—yes, it would supplement or even increase people's ability to bring claims. It has never played that role and it cannot do so at the moment, through lack of statutory powers and resources.

Chair: It is no criticism of the EHRC. It just does not have the statutory powers to do it at present.

Elizabeth Prochaska: Speaking frankly, it is the Equality and Human Rights Commission, and equality has always been its primary focus. That perhaps is understandable. When I was there, I certainly advocated for more attention to be paid to human rights issues, but it is very difficult when you have such a big remit over equality law.

Chair: And a reducing budget, as we have heard.

Elizabeth Prochaska: A much-reduced budget, yes.

Caoilfhionn Gallagher: I very much agree with what Conor and Elizabeth have said. On your question, the short answer is that yes, in my experience, the Human Rights Act does, overall, work well in practice. It manages to strike the delicate constitutional balance internally, which is no mean feat. There is no strike-down provision in the way that we see in other jurisdictions, such as Ireland or the US.

Also, at international level, it seems to me that it has achieved the aim of enabling domestic judges within the UK and international judges in the European Court of Human Rights to move towards speaking the same language, to use the words of Lady Brenda Hale in her recent memoir, which were echoed by the President of the European Court of Human Rights in answer, last month, to a question from journalist Joshua Rozenberg.

What problems I encounter in practice with the Human Rights Act are not addressed by this consultation paper or the proposal. I also agree very much with Elizabeth about the importance of looking centrally at enforcement and the whole concept of bringing rights home. Many of us who are in this room, within these four virtual walls today, will have worked with individuals who, prior to the Human Rights Act, had to spend years and sometimes decades taking a case to Strasbourg in order to establish quite a basic principle, which ultimately led to a change in the law. That very long, tortuous process is something that has been not entirely removed but reduced and minimised with the Human Rights Act.

My view overall is that I agree with the view expressed by many and by the two previous witnesses: "If it ain't broke, why fix it?" That is particularly, it seems to me, when the specific proposals that we have on the table to apparently fix it are in fact damaging in a number of respects and, if I may say so, not entirely coherent. I very much share the view of Lord Carnwath, who pointed out that, although supposedly the proposals are to reduce uncertainty, in fact, they are likely to have quite the opposite effect and cause confusion, uncertainty and more delay, so undermining the entire purpose of the Human Rights Act to bring rights home.

I will also add, echoing something Conor said earlier, that the Human Rights Act is often wrongly presented as being a villains' charter, protecting criminal defendants and terrorism suspects. It was for that reason that, a number of years ago, I, along with Fiona Bawdon and Martha Spurrier, who now leads Liberty, rather optimistically started an advertising campaign to tell positive stories about the Human Rights Act, the "Act for the Act" campaign. The reason that we did that is because there is a flawed perception about what the Human Rights Act does. That is why I very much agree with the proposal in the independent Gross report, in the introduction, in chapter 1, that serious consideration should be given by the Government to developing an effective programme of civic and constitutional education in schools, universities and adult education, to myth-bust and remove some of the misperceptions about what the Human Rights Act does.

I will give two very brief examples. I have acted for many years for many of the Hillsborough families in the inquest into the preventable deaths of their loved ones in 1989. Those fresh inquests were only possible thanks to the Human Rights Act.

The second example that I would give is that I very regularly act for bereaved families in a range of circumstances and for specialist non-governmental organisations, where people have lost loved ones in circumstances where public authorities have failed to protect their lives. I would direct the committee, if you have not already looked at it, to the Supreme Court judgment in the case of Joanna Michael from 2015. That was a case in which the common law failed Joanna Michael's family and the Human Rights Act, and, indeed, the positive obligations under the Human Rights Act, was the only method for any form of accountability. That is a landmark case dealing with fatal domestic violence against women and police accountability, where a woman whose life was at risk from a known offender and ex-partner failed to get the protection that she had sought from the police. The Human Rights Act was the only mechanism that she had in order to achieve any form of accountability.

Finally, I agree very much with Conor about the incoherence of the overall proposal. While I and the other witnesses, I suspect, would be extremely concerned if there were a proposal to withdraw from the European Convention on Human Rights, at least you would then have some form of coherent proposal. Here, we have a stated continuing

commitment to the European Convention on Human Rights, which of course is quite right and vital in many ways, including in respect of the Good Friday agreement and the position of Northern Ireland. Simultaneously, you have a proposal to replace the Human Rights Act with this rather unformed proposal for a Bill of Rights.

It looks to me as if what we effectively have is policy sabre-rattling, which is likely to be ineffective. Scrapping the Human Rights Act without withdrawing from the European convention is, essentially, fairly pointless. It is a high-stakes proposal, with many risks to it, and likely to be ineffective. I have some serious concerns about the specific proposals that are made, which I know we are going to come to later in the session.

Schona Jolly: I agree with everything that has been said before, so I will not repeat it. I know we will have the opportunity to come on to some of the details in due course. There are a couple of things I wanted to add. On the human rights culture that Elizabeth spoke very persuasively about, I agree with her. I also think that, when one is assessing the functioning of the Human Rights Act today, it is important to be aware of how much it has infiltrated, if you like, the thinking of public authorities. The focus, as in this consultation paper, is often on the high-profile occasional cases that cause alarm, in the way that any case might do from time to time.

The daily grind of the way the Human Rights Act operates is far less interesting and has far less emotional impact in newspapers and the media. Behind the scenes, there is actually something that public authorities in a variety of settings take into account. I can give examples of my own cases, when I have been dealing with families in the course of the pandemic who are facing terrible situations, separated from loved ones in hospitals, for example. Once you start to engage with the idea of human rights, public authorities and individuals sitting behind those decisions suddenly understand what it is that they are doing and engage with the idea of proportionality.

I am not saying that this has happened across the board. I agree with Elizabeth that there has been an absence of this consideration over the last two years—but it is to give you an example of how, in care homes, hospitals and a number of settings, quite far from the media, the Human Rights Act has had this impact. It has had the effect of bringing rights home. In those settings, people think about and understand this. If you are judging whether the Human Rights Act needs to be changed, you also need to be thinking very much about the quiet examples of how effective the Human Rights Act has been. If you look at, for example, some of the submissions that were given to Sir Peter Gross in the course of that review and report, some of those examples, such as those about care homes, are extremely important and enlightening.

The short answer to your question of whether the Human Rights Act is working is that it is. Can there be improvements? Yes, but to strengthen its use as a floor, not a ceiling, and, secondly, in terms of public understanding. The answer to that question is actually the Gross report,

an incredibly careful review in a 580-page document that I know you will all have read. The enormous difficulty with this consultation is that it passes like a ship in the night. With this consultation, they do not seem to sit together at all. The answer to your question as to whether the Human Rights Act is working in practice is actually set out in the very careful review of the Gross report; it is not reflected, it seems to me, in a number of ways in the consultation.

When we answer specific questions about the proposals, one of the big questions for your committee will be, "If we are changing it, why are we changing it?" I do not think that the framework of this consultation answers that point. If we are changing it because we want a Bill of Rights, presumably the purpose of a Bill of Rights anywhere in the world—the consultation gives the example of the South African constitution—is to strengthen rights protection. The sense you get from this consultation is that what is hoped to be achieved is a weakening of protection, as Conor said, for people who are not deemed worthy, and to disassociate from Strasbourg or whatever it might be.

That is hugely problematic in the context of a Bill of Rights. That is where this gap is. The Human Rights Act is on one side and the Bill of Rights is on the other, and the consultation somehow falls down the middle. One thing it fails to do is to appreciate that the former consultation on the Bill of Rights nearly a decade ago got nowhere, because there was no clarity on what the purpose was.

Dean Russell: Sorry to interrupt. I just know that all those points are going to be covered in quite a lot of detail with future questions, and I am conscious of time.

Q33 **Lord Henley:** I have a very brief supplementary that I want to put to Professor Gearty about a remark he made about Section 19 and certification. I remember certifying Bills in the past, and it was quite a simple statement. Would you like to see an expansion of that—that is, with Ministers giving reasons? Is that something that would be debated in Parliament as the Bill went through as to how they did it?

Professor Conor Gearty: You have experienced it, so you have more experience than me. The purpose of Section 19 is to integrate an understanding of human rights a bit into the political process and get away from this idea that it is all about lawyers. Expanding it would mean that there might be a paragraph in an Explanatory Memorandum that accompanies the proposed Bill that sets out, broadly—it could be very simply put, mostly—why this raises no human rights issue or, if it does, more controversially and unusually, why, nevertheless, the Government are proceeding. That could be integrated into Second Reading discussion on issues of principle. A Minister on the Floor of the House might reply and explain further, and there would be a greater understanding of the reasoning that lay behind the rather succinct statement of compatibility that we presently deliver.

Lord Henley: At the moment, the Minister in either House, depending on

which House it is—my experience is only in the Lords—takes advice from the legal people in the department and then something is put in front of them, as I remember it, though this is some years ago, and he or she signs it to say, "This is compliant with the practice". You are not suggesting that the Bill itself should have that on, but possibly some supplementary memorandum. Again, that is something that would be part of the Second Reading debate.

Professor Conor Gearty: If one was amending Section 19 and I was asked to suggest improvements—I am not deeply wedded to it, and it is not critical—you would say that the Minister would certify both the fact of its being compatible and the reasons therefore.

Q34 **Chair:** Already, at present, a human rights memorandum is published alongside the Bill that people can refer to at Second Reading. Are you envisaging something more than that, Professor Gearty?

Professor Conor Gearty: Just a little bit of a statutory tweak in that direction. I am suggesting that it would be part of the statutory obligation under the Human Rights Act.

Chair: Can I thank everyone for very full answers on the first question? We are going to have to have slightly less full answers as we go forward, as we have a few questions to get through.

Caoilfhionn, I was interested in what you were saying there. Why are the Government doing this? Why are they making some pretty wide-ranging proposals to change the Human Rights Act if they are not actually withdrawing from the European Convention on Human Rights?

I want to play the devil's advocate on that and say that it is quite clear that the Government would find it very hard to withdraw from the European Convention on Human Rights without upsetting the EU withdrawal agreement, because they have been bound into it there. If they withdrew from the ECHR, the EU would have the right to withdraw its co-operation on data protection, crime and security. Do you think that what the Government are doing here is trying to find a way of staying in the ECHR, in order to comply with their agreement with the EU, but making the Human Rights Act a bit toothless and useless?

Caoilfhionn Gallagher: That is a very good question, and it goes to the point that Schona was making about what the purpose of changing it is. I am bound to say, having read the entire document, that I am very unclear. That is why I referred to it as policy sabre-rattling. You have phrases right from the outset, in the executive summary, as early as paragraph 3, claiming, "We will reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society", an assertion that is not then evidenced within the document.

Simultaneously, you have a clear statement in the foreword and throughout the document that the UK remains committed to the UK's tradition of human rights leadership abroad and to the European

Convention on Human Rights. That is part of the reason why I described the proposals as quite incoherent and difficult to follow. Britain was a signatory to the convention long before it introduced the Human Rights Act; the drafting of the convention has British and indeed UK fingerprints all over it. Scrapping it now, without leaving the convention, simply risks reverting us to the position pre-2000, where you have a long road to Strasbourg and long delay before people can enforce their rights, or it would involve a change of title of a document, repeating the convention rights in a different form. In that case, it is a very high-stakes proposal and relatively pointless.

There is an incoherence to the proposal, and it all comes back to what this document was intended to achieve in the consultation paper. There seems to be a fundamental mismatch between the principles set out in the foreword and at the outset of the executive summary and what then follows about UK leadership on human rights issues and UK full commitment to the European convention. That is simply not what then follows in the document or the proposals.

Chair: I am glad you think that it was a good question. I have to say that the phase "toothless and useless" is not my phrase. I took it from a colleague of Professor Gearty's, Professor Francesca Klug, who was previously an adviser to this committee and, like Elizabeth, formerly worked with EHRC and was a commissioner. I was watching a podcast by her and others earlier this week, and she argued that one view is that the present Government have a project to diminish the accountability of the Executive to both Parliament and the courts. You might see that in the nationality Bill and the police Bill.

If one thought that the Government had such an agenda, is it not the case that, for as long as the Human Rights Act remains on the statute book, it is a serious threat to such an agenda? You may well pass a Bill, for example the nationality Bill or the police Bill, parts of which conflict with our obligations under the ECHR. If the HRA is there in its current form, that is a really good vehicle for individuals to challenge aspects of these Bills when they become Acts. If it is not there in its current form and is a bit more toothless and useless, that is going to help the Government to further a project of diminishing executive accountability, if that were indeed to be their project. Do you agree with that? I will maybe start with Conor, as it was your colleague who said it.

Professor Conor Gearty: I should have detected the hand of Francesca Klug in that excellent pithy phrase. There is a later question that is about the potential operation of delegated legislation under the Human Rights Act. Anticipating that, I would say that that is a big one for the committee. If delegated legislation is not capable of being challenged and rendered invalid under human rights law, that is quite a big thing from the point of view of accountability, to your question, Chair.

Quite a lot of delegated legislation goes through and, at the moment, it can be attacked and struck down for breaches of human rights law. If it were merely to be declared in an unenforceable way, that would have a

huge impact on the capacity of the Government to govern without the requirement to adhere to human rights. That would be one way in which I would answer you.

Chair: Equally, the interpretive obligation in Section 2 has been very important, has it not, because, before the Equality Act came in we saw some major gains for gay rights, in terms of the rights of same-sex couples' next of kin and inheritance rights? That was well before the Equality Act, as a result of the interpretive obligation. That would also be very important.

Professor Conor Gearty: Yes, very much so. However the Government fiddle with it, if they fiddle with and do not remove Section 3—or Parliament do not, under their direction—they are going to have to provide some creative capacity on the part of the courts, or it will not be a Bill of Rights, even if they call it just that. The creative capacity of Section 3 will survive on the changes being proposed by Government, because they emphasise purpose. I think that that is going to be there to stay.

Chair: Elizabeth, you were nodding when I asked my question.

Elizabeth Prochaska: It is really important that the committee understands these proposals in that broader context of the Executive attempting to weaken appeal rights and reduce scrutiny of executive action across the board. That has been clear for a long time. That was clear in the Brexit process, but it is clear in legislation currently going through Parliament. You referred to the Nationality and Borders Bill, the policing protest legislation and reform of judicial review, with abolition of Cart judicial reviews as part of that. There is a whole programme that seeks to undermine citizens' access to appeal and to challenge the state, and the Executive particularly. It is really important to situate this in that broader context. In some ways, that may explain some of the contradictions that you were alluding to. Ultimately, the Government are seeking to reduce those appeal rights, but they are hidebound to keep connected to the European court.

The other point of inconsistency to note, to add to what Caoilfhionn and Schona were saying, was that there is a real commitment here to increase rights in some areas. Freedom of expression is the particular one where the Government wish to see more fulsome protection for human rights. Generally, the consultation wants to row back from an ability to enforce those rights. There is an inconsistency there. Do they want greater UK protection of rights? Do they want to see those expanded? If they do, they also need to follow them up with good enforcement mechanisms. The proposals are certainly incoherent in that regard as well.

Chair: It is also a bit odd that the Government did not give the independent review panel the opportunity to explore their recommendations on having a right to trial by jury and expanding freedom of expression. We do not have the benefit of the otherwise huge

amount of work that could have been done by the independent panel on those questions. You are agreeing with me.

Baroness Ludford: I am a Liberal Democrat Peer. Thank you all for coming. We have a very impressive panel today. I want to ask about the proposal for a Bill of Rights. The government consultation proposes two options for a Bill of Rights: one would contain free-standing rights, while the other would see the convention rights effectively incorporated, but would seek to sever the link with how those rights have developed since 1950. Sorry for the laugh—but do you think either of those options are a good idea? How would the proposals affect how courts interpret rights in practice?

If I can just note—and I am relying on Joshua Rozenberg's report, because I have not seen the lecture by Lord Carnwath—he apparently said, "Whatever the answer, I am wholly unpersuaded that the establishment of a new UK Bill of Rights, to be administered by the UK courts but parallel to the still-binding convention administered by the Strasbourg court, is going to assist the process … Either it meant the same thing—in which case what was the point? Or it did not, in which case we could expect a long learning process through the courts to find out what it did mean."

Professor Conor Gearty: The laugh was highly editorialised, pointing us in the direction that I am going to go; I was impressed by it. The first point I make is that it is perfectly possible to have a Bill of Rights and oversight by the European Court of Human Rights. Lots of countries have it. The Irish have their constitution and the Germans have the same. There is no objection in principle whatsoever to that.

Difficulties arise when you try to have a distinctive dimension to your Bill of Rights that is at variance with the thrust of the convention. Mostly, domestic constitutions and bills of rights, Strasbourg versions, move in the same direction. The authorities were very keen to be able to show ways in which a Bill of Rights could be different and better, and that is why they ended up with the somewhat surprising suggestion of a UK-wide jury trial right and the rather embellished freedom of expression that Elizabeth was referring to.

The problems arise when you try to distinguish the Bill of Rights from Strasbourg's convention. As we have heard, Strasbourg's convention is going with the grain of British civil liberties and human rights. Mostly, it is stuff we already have, in fact stuff that we helped produce, way back in 1950. "If it is not Strasbourg, what is it?" is a problem. If it is the same as Strasbourg, how do you distinguish it from Strasbourg? Is it just another Human Right Act?

In my opinion, it is the wrong answer to mimic how things were in 1950 and somehow or other put the brake on the convention's core, in so far as it has any application within the jurisdiction. This is a ruse that emerged from the United States in the 1980s as a way of undermining the abortion case law in the 1980s—so-called original intent. It has

turned American constitutional law into a study of 18th century English law in a most peculiar way.

In the absence of developments since 1950, the European Convention on Human Rights would have very little to say today. The reason there is this living instrument idea is because otherwise the court would not have any cases. The court would be just stuck there, waiting for litigants, because they would be applying a 70-year-old idea of right and wrong. More to the point, and practically anticipated by our colleagues here—and it is another example of this kind of ambiguity about this whole provision—what would happen is litigants would lose in Britain on the truncated version of the convention in the British Bill of Rights. They would obviously be victims; they would obviously take the case to Strasbourg and they would obviously win.

Then you would have a Committee of Ministers in invigilation. You would have political kerfuffles over implementation, like the prisoners' case, and then we are back to where Lord Bingham was in 1993. He was Master of the Rolls and came out in favour of incorporation on practical grounds of cutting delays and cutting costs. Why do you have to take a thing to Strasbourg when you could do it here? In other words, we would be back to the position from which we extricated ourselves with enactment of the Human Rights Act.

Schona Jolly: I will just make one point about the Bill of Rights. I agree with Conor. The point I want to make, which will probably be expanded later, is that you have to have a living instrument to recognise the sorts of harms that our population will now face. A Bill of Rights has to reflect that.

One thing that I wanted to point out, because it is slightly deepened from what Conor was saying, was that, if you skew a Bill of Rights towards a particular direction—so, for example, there is a focus on culture wars and freedom of expression within this consultation—you do it at the expense of other rights that may develop. The courts are naturally engaged in a balancing exercise. I can talk more about that later—and I want to say something about Article 8 and Article 10 later.

The purpose behind the Bill of Rights has to be clear; it has to be to strengthen rights. At the moment, that is not what this looks like. We could end up in a very difficult political situation, both for judges and for Parliament, where there is a back-and-forwards between Strasbourg and UK judges, because no one knows quite what to rely on. What comes from that is uncertainty. Enforcement is already a problem; uncertainty then becomes an enormous problem, because you have satellite litigation about what the difference is meant to mean and what comes first in the priority of orders. All of a sudden, there is an enormous gap. We have spent 20 years trying to work out how that gap best looks. Now, are we about to just cast it aside in favour of something that no one quite knows?

Caoilfhionn Gallagher: The difficulty with getting four lawyers in the room is that we are being more verbose than I expect the committee would like. Very briefly, I agree entirely with Conor and Schona. I wanted to make two short points. The first is that the phrase "Bill of Rights" is now being discussed in the context of this document, when of course the Bill of Rights has been a key issue in respect of Northern Ireland for a long period of time, with a view to a Bill of Rights being ECHR-plus in Northern Ireland. It seems to me that what is proposed here is undoubtedly ECHR-minus, or, in fact, ECHR in reverse, back to a 1950s version of the ECHR, denying the living instrument document that is core to the convention.

The second point I want to make is that I agree very much with Conor's point. When you look at the nuts and bolts of the actual proposal, the proposed changes to Section 2 and so on, when you have a stated continuing commitment to the European convention and international law remaining the same, you will be back to the pre-2000 route of individuals having to spend many years, sometimes decades, enforcing their rights in Strasbourg, the UK having the international embarrassment of losing a case in Strasbourg in those circumstances, and then a long period of delay before there is implementation. That is not certainty or coherence and does not respect the rights of victims and others who are entitled to human rights.

Finally, that entirely undercuts the stated commitment, right at the outset of this document, to the UK being committed to global leadership on human rights. I act in many cases involving victims of human rights in other countries, in countries where people are victims of states that are not rule-of-law-compliant. I am afraid that, over the past year or year and a half, I increasingly find, when I am in meetings with states, people are saying, "You are a lawyer from the UK. How can we take you seriously in circumstances where, in Parliament, reference has been made to breaking international law in a limited and specific way?"

There is a real issue about the message that this process will send to other states that violate human rights with impunity. It entirely undercuts the recommendation, right from the outset here, that the UK must remain committed to its global leadership role in human rights. There is a mismatch between that commitment and what is then proposed in the document.

Q35 **Baroness Massey of Darwen:** I have a couple of Strasbourg questions. The government consultation proposes that the UK courts should not be required to "take into account" Strasbourg case law, as currently required by Section 2. What implications could this have for the relationship between UK courts and the Strasbourg court, including on the margin of appreciation?

Schona Jolly: This is a really muddled proposal and does not make much sense. There are probably three important things to say about it. The first is that it does not sit alongside what the Gross report found at all. There seems to be a complete mismatch between this question and

this aspect of the consultation and the very detailed work of the Gross report.

The second point to say is that it is muddled because it does not know what it wants. This is Caoilfhionn's point—saying that, on the one hand, we remain wedded to the convention and, on the other, we have some slightly spurious sense of domestic law. I am not for a moment suggesting that domestic law is not capable and has not expanded and developed over the years. Of course it has. In one of my specialist areas, equality law, one has seen the UK courts develop the concept of equality in an incredibly impressive way.

The point is that, if you are bringing a Human Rights Act claim, if the courts do not know what to take account of and are expressly coming away from taking account of Strasbourg case law, you end up with this gap that I was talking about, into which litigants will fall. If UK courts must not take it into account where relevant, if that is not going to apply any longer, there is a sort of pick-and-choose effect. It is not clear how this is going to end up. If, in fact, all that ends up happening is that courts carry on doing what they have been doing for the last 20 years, which is taking into account those cases that are relevant and appear relevant, and they carry on as they are going, what is the purpose of the consultation? If they do not do that, and there are bound to be some cases where they might not, you have this question of certainty for litigants. You end up in a situation where people have to go to Strasbourg—and that is the delay, the cost and the enforcement issue. You end up with a win for the litigants and a loss for the UK Government.

I am not sure it makes sense. I do not know whether, in the end, courts will end up following something different. There is no proper evidence that it is not working. That is where not following the Gross report is particularly problematic with this. The Gross report emphasised that there was no real evidence that this was not working. One has to ask why you are asking the question again. This is a really important point.

As a member of civil society and as a member of the Bar in this instance, I would say that huge numbers of civil society groups, barristers, lawyers and all kinds of people spent an awfully long time, as did this committee, preparing detailed reports and evidence for the independent review. Just as that was published, we were asked to do so again. I know, as a matter of fact, that a lot of people simply cannot do it again, right now, within this timeframe—which is effectively two months, because of Christmas, when it was announced. They cannot do it again. It is almost like asking the same question to get a different answer, and that is inherently problematic.

Baroness Massey of Darwen: That is really helpful and very understandable.

Professor Conor Gearty: In the early days of the Human Rights Act, the courts tended to follow Strasbourg. There was a case called Ullah, and people who were concerned about Strasbourg got very hot under the

collar about this. This is a residual concern about that, but that problem, if it was a problem, came to an end in 2009. The UK Supreme Court, in a case called Horncastle—and there have been lots since—said, "We do not have to follow this stuff and we will not, in certain, specific situations". I can understand how this originated, but it is no longer the issue that it might once have been perceived to be.]

Q36 **Chair:** That is really helpful. Last week, Lord Wolfson for the Government said to us that the reason for this is that the jurisprudence has ebbed and flowed, but you are making the point that the other principle got knocked on the head by Horncastle in 2009, and there have been a whole load of cases since the Horncastle case following the Horncastle rather than the Ullah approach. The characterisation of the jurisprudence having ebbed and flowed is probably not correct. It ebbed and then it flowed back and it has been at the same tidal point, if that is the right phrase, since 2009.

Professor Conor Gearty: An ebb and flow would be where it has been Ullah, then it was Horncastle, then Ullah was reasserted and then Horncastle—but it has not been like that. There have been some cases where the courts have reluctantly followed the Strasbourg line, but they are liberated from slavish adherence by Horncastle. There are a whole lot of little mini-dicta about when you do and when you do not. With respect to the government Minister, I do not call that ebb and flow; that is a lightening of Strasbourg's hold on British jurisprudence.

Q37 **David Simmonds:** This question was going to be directed to Conor, but he has just answered it in respect of alignment or the need to interpret ECHR convention rights in a particular way. To generalise the question a little, the government consultation is asking about whether the requirements on the courts and the way they interpret legislation should move away from the "so far as possible" rule. It would be helpful, perhaps, for you to outline what you feel would be the implications of that change, if any, particularly in the light of what we have just been told about the way in which this ebb and flow has taken place.

Professor Conor Gearty: My opinion is that Section 3 has this "so far as possible" thing and the courts have had to wrestle with it. Parliament told them to wrestle with it—it is not an invention—and they came up with an answer. I think that the answer is going to survive the changes. The answer, in Ghaidan v Godin-Mendoza and lots of other cases, is to look at what the purpose of the underlying legislation was then ask whether the change we are being asked to make goes with the grain in one of the judge's explanations and of that pre-existing legislation. If it does not, if it does violence to that legislation, that is not possible. If it is going with the grain of what the underlying purpose was behind that original legislation, then we can use Section 3. The purpose in the original law, not the purpose in the Human Rights Act, is already guiding the judges towards an understanding of whether they can be activist.

They decided in Ghaidan v Godin-Mendoza that the underlying purpose behind this rent stuff was to protect and encourage stable relations. It was not to say, "We like marriage", and it was not to say, "We like

heterosexual relations". It was to say, "We like stable relations", so they felt emboldened by the reading of the purpose to do what they did, which was quite a dramatic reading. I do not think, on one of the Government's proposals on Section 3, or possibly even both, that would change. Removing Section 3 would be a different ballgame.

Q38 **Chair:** Do any of our other witnesses disagree with Professor Gearty there? He is saying that the Government's proposals on Section 3 are perhaps not as alarming as some might think. Perhaps I can put it this way. I think you said, Professor Gearty, that, if you got rid of Section 3 altogether, that would be of concern.

Professor Conor Gearty: Yes.

Chair: I presume that is because, for a Bill of Rights to be a proper Bill of Rights, it has to offer rights universally and has to be some kind of a higher law, so other laws are held to its standard, otherwise it is not going to have the bite. If you take Section 3 out of the Human Rights Act completely, and take the interpretive obligation out completely, you would not have the bite to make the Human Rights Act a higher law.

Professor Conor Gearty: Then you are back to the past. You have these cases in the 1970s and 1980s where people such as Lord Scarman and Lord Denning were saying that you have a duty to, in so far as you can at all, comply with international obligations, of which human rights is one. There was a case in 2000 where Lord Hoffman put it very well. You do not obliterate the need to adhere to your international obligations; you change the nature of the discussion. Removing it completely would mean that the judges had less capacity to focus on the purpose of the underlying Act, with a view to bringing it into line with human rights.

Q39 **David Simmonds:** If I may pursue that a little, your introduction made mention of Wednesbury principles, which I well remember having explained to me in my early days in local government. Perhaps this links on to what was proposed to be the next question around where there may be secondary legislation and things that may be incompatible with convention rights. I am interested in whether there are any limits that you think should be placed upon this interpretation.

I am thinking in particular of processes such as planning decisions, social care assessments and things like that, which may be carried out by state bodies, underneath legislation that is passed by the UK, but where there may be interpretations of that legislation or that process that may bring an interaction with European human rights law—for example, somebody who feels that the way they have been treated for the assessment of their eligibility for social care, or who feels that the way their child has been assessed for special educational needs, is not compatible with what they see as their rights under European law. It was Conor who mentioned Wednesbury principles, so it is probably best to start with him.

Professor Conor Gearty: It is a really interesting one. To be honest with you, there is not just Wednesbury; there is also what we used to call natural justice. The human rights stuff definitely gives people more of a

chance to put their case where something is about to be done to them—they are going to have something taken away from them, or they are going to have their house taken away. In one big case, in 2001 I think, someone was going to have their baby taken away from them in prison.

There is quite a lot of due process, what we used to call natural justice, in the Human Rights Act. It is a kind of right to have a chance to put a case. That has definitely impacted, and you will know from planning as well how that has impacted. There is then the broader question of setting aside the policy, of actually undermining the policy, as opposed to just explaining it and giving somebody a chance. There the courts have been quite hesitant before using the vehicle of the Human Rights Act, with its potentially broad language, to drive into that arena. That is where quite a lot of debate at the moment is taking place.

David Simmonds: That is very helpful.

Q40 **Lord Dubs:** Can I go back to secondary legislation, which Conor referred to in one of the earlier answers? The courts can quash secondary legislation when they find it to be unlawful and, currently, this includes secondary legislation that they find cannot be read compatibly with convention rights. Should they instead be limited, as the government consultation suggests, to making declarations of incompatibility in those circumstances? Who wants to start on that one? We cannot ask Conor all the time.

Professor Conor Gearty: You are exactly right. I am not going to answer. I have already given a hint of what my view is.

Elizabeth Prochaska: I cannot do better than Lord Mance, who gave evidence to this committee recently. He described that proposal as strange, unexpected and inappropriate, and I agree with him. It is bizarre, because there is a longstanding ability for the courts to quash secondary legislation on application for judicial review. The HRA just extended that, creating new ground on which that existing power could be exercised. The power is entirely consistent with the basic rule of law principle that the courts can ensure that secondary legislation made by Ministers is within the powers granted by Parliament in primary legislation—so it seems a very peculiar suggestion, and unconstitutional, frankly, given the way that our constitution currently works.

There is some research that was cited in the independent review that said that, in the seven-year period between 2014 and 2020, only 14 pieces of delegated legislation were subject to successful challenge under the Human Rights Act. Of those 14 successful challenges, only four were quashed. It seems to be a non-problem, in so far as it is a problem at all. Quite what the Government are seeking to address is not clear.

Schona Jolly: I agree with Lord Mance and Elizabeth. There is just one slight side issue, which is not a side issue at all but may be valuable for the committee to consider. This proposal also has to be seen in the context of the recent two House of Lords reports—they were at some time at the end of last year—in which it was described that power was

being subverted back to the Executive, away from Parliament and away from scrutiny. It is important to see this proposal in the context of increasing executive power and there being far less ability for the courts to scrutinise in those circumstances. It also has to be seen in the context of potentially huge numbers of Henry VIII powers and delegated legislation and the ability of both Houses to simply deal with that legislation as well. That is an important context in which to see it. I will not say any more, but that may be important for the committee to consider.

Caoilfhionn Gallagher: I am very happy to support what has been said by my colleagues and not take up more time on this question.

Professor Conor Gearty: I am against this proposal, for sure. It is incoherent.

Q41 **Lord Henley:** Moving on, it has been suggested that the various changes proposed by the Government could lead to an increase in the number of adverse rulings from Strasbourg and an increased number of declarations of incompatibility being issued by UK courts. I am interested to know what the implications of that could be, if that were to be the case.

Professor Conor Gearty: There are some parts of the Government's consultation that say, "We are going to talk to them in Strasbourg about this and we are going to try to change the way things are approached", as they did when Lord Clarke was Lord Chancellor. It is not inevitable that the cases will all be adverse in Strasbourg, if this were to happen; it is possible that subsidiarity, margin of appreciation and so on will kick in and it will not be as severe as some anticipate. But I imagine there will be a greater number of those stories we remember from the 1990s: a Secretary of State is furious about a ruling, the Committee of Ministers is overseeing the ruling and the Lord Chancellor, as I remember Lord Mackay did once, goes out to Strasbourg to say, "Look, you must stop to doing this". There would be a bit more of the relocation of this debate from the domestic to the other arena.

On declarations of incompatibility, whether they are an effective remedy is a very interesting and technical question. Supposing we had a profusion of declarations of incompatibility and somebody went to Strasbourg and said, "Look, that is not an effective remedy. What is the point of a declaration of incompatibility? The law has not changed". I defer to people who have been in practice much more than me, but Strasbourg has not yet said for sure that that is an effective remedy. Strasbourg has said, "We will look at it, and we will see how seriously the Government implement them", but you could have a situation where it says, "We are not even looking at the substance. You have a declaration of incompatibility. The Government have paid no attention. The Government very rarely pay any attention, so you have had a breach of your right to an effective remedy". You would have a subsidiary squall arising out of non-implementation of the declarations—so everything circles back to the Strasbourg oversight.

Lord Henley: So the number of declarations of incompatibility by UK courts is going to increase.

Professor Conor Gearty: It could do. If they were routinely implemented by secondary or primary legislation, and that could be shown, the litigants who had "lost" by getting only the declaration would not be able to argue in Strasbourg that their rights had been affected badly. They have had an effective, albeit unusual, remedy, but if Government were routinely declaring they would pay no attention to them, the argument would be stronger in Strasbourg that there was a breach of what is called Article 13, which is not in the Human Rights Act. You need to go to Strasbourg to exercise it.

Caoilfhionn Gallagher: I agree with what Conor has said but, specifically on the issue of declarations of incompatibility in Strasbourg, this goes back to the point that a number of us have been making about whether this is "toothless and useless", to use Francesca Klug's very powerful phrase, and whether in essence this is going to be a Human Rights Act with a different title and making no real difference—in which case, why embark on such a high-stakes route for so little return?

The alternative is that it will make a real difference, and this is where I have a particular concern in relation to some of the wording of Section 2, which I wanted to highlight at this stage. I have seen much commentary suggesting that options 1 and 2 in the consultation paper for the replacement of Section 2 are essentially not far from the current position, which is right. There is a change of "must" to "may" in relation to the European Court of Human Rights jurisprudence, but of course the current position is that the domestic courts must take it into account. It mandates taking into account, but it does not mandate following. The phrase now, "may have regard", is in some ways a minor difference, but of course what it risks is a situation where a UK court fails to have regard, which under the Human Rights Act would be breaching the Human Rights Act. Under option 1, it would not be breaching domestic legislation but, because the UK is still subject to the ECHR, you have the long road to Strasbourg finding on a UK violation. That is one of my core concerns: that this wording makes it more likely that you are going to have precisely the problem that we had pre-2000, with that series of cases where you had the long road to Strasbourg, and then the UK being embarrassed on the international stage and ultimately having to take remedial action later.

Finally, in light of what Conor mentioned about the move of the forum to having more discussions with the Executive, I am mindful of what was said by the Chair earlier about reducing executive accountability. I can send something more detailed on this in writing if needed; I am mindful of time. There has been a theme in a number of cases over the last number of years, touched on by Elizabeth earlier, in which executive sovereignty, rather than parliamentary sovereignty, is given particular weight. On the international stage, the idea of more negotiations taking place that are the Government negotiating on some of this detail behind

closed doors in Strasbourg, again, is not in keeping with the stated aims of transparency, openness and giving greater power to Parliament. I would also just flag that, and I can give more detail on some concerns I have in that regard in writing, if helpful.

Lord Henley: That would be very useful, and we would be very grateful for that.

Chair: Thank you very much. That would be very helpful.

Q42 **Lord Dubs:** The Independent Human Rights Act Review panel recommended that Parliament and this committee's role in protecting human rights should be enhanced. How do you think this could be achieved? What would be the benefits and risks of giving Parliament such an enhanced role? Do you think the Government's proposals could achieve the correct balance between the Executive, Parliament and the courts?

Elizabeth Prochaska: I can give you an answer that does not directly answer the question. I have already talked about the role of the EHRC, which is the role that, in a way, I would be more interested in seeing beefed up than the role of this committee. You might disagree, as committee members, but the Equality and Human Rights Commission is the national human rights institution under the UN framework. It should be performing a function of independent scrutiny in other jurisdictions; that is a role that the NHRI performs. If you had a properly independent EHRC with independent commissioners—there are currently questions about the independence of the EHRC's commissioners—it could play a really important role in helping Parliament to make better decisions about human rights, or to understand the implications of legislation in a deeper way. In a way, it is over to you as a committee to say how you think your role might be enhanced. From my perspective, that is something that the NHRI should be taking on.

Professor Conor Gearty: Can I warn you about not doing things? I know there is a temptation to embrace extra work, but be careful of a database monitoring Section 3, because that could be quite a big job. Be especially careful of ending up having to scrutinise all statutory instruments for compliance with the convention, because that is a deep hole out of which your staff will never emerge; if you help them, you will not emerge either.

Lord Dubs: We have a committee looking at subordinate legislation anyway, not just on this issue.

Lord Henley: We have two committees.

Lord Dubs: They seem to be working full-time anyway, so this will just increase that work.

Professor Conor Gearty: The temptation is to say you are the human rights experts, so do not be drawn in by flattery. It is another reason why one would be very suspicious of declarations of incompatibility that are

not enforceable against delegated legislation, because what happens is the litigation throws it up, and when it happens it is addressed. Otherwise it will be a huge task.

Lord Dubs: We will not be drawn in by flattery. We have a pretty big workload as well.

Caoilfhionn Gallagher: I agree with Elizabeth and Conor—but just very briefly there is a frustration overall about the process that I just wanted to flag, and this question links to it. I made reference earlier to chapter 1 of Sir Peter Gross's report dealing with human rights education and the importance of that. Similarly, chapter 5 deals in some detail with this issue. There are no other changes to Sections 3 and 4, but an enhanced role for Parliament, including the role of this good committee. You then have a situation where the consultation paper does not grapple with those topics, so that is a particular problem. The consultation paper simply does not match up to the terms of reference and the very careful report that has been produced. We do not have the Government's view on chapter 5 and the role of the JCHR grappling with what chapter 5 dealt with in any detail. Instead, we have the ships passing in the night, where the documents are just performing different functions.

My colleague Adam Wagner summarised the process in a way that is pithy but fair. He said, "Government approach: 1) This is very complicated. We need an independent expert view. 2) Government commission said experts with control over who it appoints. 3) Experts give answer Government do not want. 4) Government ignore experts". There is a feeling of that when you read through the two documents. There is just a mismatch between them. It is frustrating, because you could have the benefit of a 500-page-plus document that grappled with some of these topics fully, including trial by jury or freedom of expression, which I know we are going to come to, and then the consultation paper matching up with that, but they simply do not dovetail. That is a real problem in process, and a particular problem for your committee in this inquiry.

Q43 **Chair:** Our committee still has the independent review. Just because we are dealing with the Government's consultation does not mean that we should ignore what went before it. As you say, not only is it 563 pages long, but there was a methodology that involved all sorts of panel events, virtual roadshow events, et cetera. It would be really extraordinary if we were to ignore that, even if the Government have.

I am going to ask Elizabeth specifically about the idea of having a permission stage. The government consultation proposes that a claimant will be able to bring a human rights claim only if they are found to have suffered a significant disadvantage. That is not defined anywhere. What issues, if any, does this proposal raise for individuals seeking to enforce their rights, and for the UK's compliance with its obligations under the convention as a whole?

Elizabeth Prochaska: There are three points that I will make in response to that question. The first is a point that applies across this consultation but applies particularly here. The evidence base for the creation of this permission stage is extremely weak. There is really very little evidence of these spurious claims that the Government claim are being made. There are no figures in this consultation, nor are there figures available on the number of HRA damages claims that are made.

I know from personal experience—I am sure my colleagues in practice will agree—that it is extremely hard for clients of ours to bring these claims. We often advise them that it is not worth it because there are already multiple obstacles that we have talked about, such as limitation periods, lack of legal aid and so on. Although the consultation paper does cite cases, all of which are in the prison context, many of those were actually cases where prisoners' rights were found to be violated and they were entitled to damages, so it is not clear what a permission stage would have added in those cases except cost and complexity.

My second point is a point of principle. There is really no other area of the law in which a threshold as high as this, with such significant disadvantage, exists. It is not necessary for a claim under the Equality Act, for example, which often raises quite similar issues to human rights claims, so why are human rights being regarded as an inferior sort of claim? If anything, it should be easier to make a claim for breach of rights. Those are really important claims that citizens should be able to make, so why would we be imposing a higher threshold than exists in other areas of the law?

In so far as the Government are modelling these reforms on Article 35 of the convention, which introduced a significant disadvantage hurdle to admissibility under the convention in Strasbourg, there are obviously very different considerations in play here. Strasbourg is an international court, so of course it has a different threshold for admissibility than domestic courts. If you were to impose a threshold at domestic level, you would very likely need divergence from Strasbourg judgments, which is the point that we have all been making this afternoon.

My final point is that there are already mechanisms for weeding out claims. Many Human Rights Act claims are brought through judicial review, and there is already a permission stage for judicial review. You have to have an arguable ground that has a realistic prospect of success. About half of JR applications are not granted admission. The Public Law Project did some great research showing that there has been a year-on-year decline in judicial review applications. They declined last year by 16%. I know from personal experience that judges very often refuse permission on HRA grounds already if they are considered weak.

What does this add to that permission stage in judicial review? What it will lead to is increasing initial costs for both claimants and defendants, because you have to deal with the merits earlier on in the process. It will lead to satellite litigation, where people argue about the meaning of significant disadvantage. Ultimately, it is not going to add anything

except cost, complexity and an additional hurdle to people's enforcement of their rights.

Chair: As Liberty has pointed out, it could add an extra burden on claimants, in so far as they might have to demonstrate the merits of their case before they have had full disclosure from a public authority or a government body. Last week, in his evidence to us, last week Lord Wolfson tried to reassure us, and suggested that this new permission stage would only prevent utterly trivial, spurious or fanciful claims. You are shaking your head. What is your comment on that?

Elizabeth Prochaska: If that is what the Government want to do then they need to phrase the permission stage in those terms. Significant disadvantage is not the same as utterly trivial. That much is obvious to lawyers and non-lawyers alike. There will simply be oodles of satellite litigation to determine the meaning of that phrase, so if the Government want it to mean utterly trivial they should phrase it in that way.

Q44 **Lord Brabazon of Tara:** In the consultation, the Government ask whether damages in human rights claims should be reduced or removed based on the conduct of the claimant. Would this be compatible with the convention and the requirement that rights are practical and effective? What impact do you think the proposals would have on individuals who may want to bring human rights claims?

Elizabeth Prochaska: The notion of creating classes of claimant—the deserving and the less deserving person—is extraordinarily dangerous. The clue to what human rights are is in the name: they are human rights; they are universal and exist because of our humanity, not because of what we have done as people in our lives. There are really no qualifiers to that. The idea that a claimant's conduct entitles or disentitles them to rights is the most dangerous aspect of these proposals.

Of course, from a practical perspective, damages are a discretionary remedy already. Judges take into account claimants' conduct in setting the level or award of damages. I cannot see what this would add, other than to point us down a path of a very dangerous attempt to distinguish between good and bad people, when we all know that these rights are meant to be universal.

Caoilfhionn Gallagher: I agree with the points that Elizabeth has made. I will give a couple of other cautionary tales that reinforce Elizabeth's point. I act in a large part of my practice with people who have been victims of childhood abuse or have been victims of violent crime, and there have been a series of cases in the last number of years concerning access to criminal injuries compensation, for example. I am thinking in particular of cases such as Kim Mitchell v Secretary of State for Justice last year, where the difficulty with saying that your conduct rules you out from obtaining damages was laid bare. It is something that I know has been a particular concern to the Victims' Commissioner in other contexts as well. Again, I am happy to provide more detail, mindful of time, but I agree with Elizabeth's concerns.

We have recent cautionary tales that show precisely why it is problematic and why you cannot have a situation where, for example, someone who may have a criminal conviction that arises from their status as a victim then has to go through a protracted, lengthy court process to prove that their conduct and that conviction or caution from many years previously should not prevent them having access to the court or a remedy. I would add that point as well, and can give more detail to the committee if helpful.

Schona Jolly: I agree with what has been said, but I just wanted to give you the context also of classes of claimants that may then be deprived of damages. I act for a lot of prisoners, for example, and the idea that there is a class or a category of person that is undeserving, so they are not entitled to damages, belittles the fact that, if there is a breach, there is a violation of their rights; it is real. Damages are already, in general, extremely low in Human Rights Act claims. It is not clear what is intended, but what this does is gives credence to this idea that the Bill of Rights is only for those deserving. I will leave it there, but I may add something in writing to that.

Q45 **Lord Singh of Wimbledon:** Some of the points in my question have already been tackled. It is unlawful for a public authority to act in a way that is incompatible with a convention right under Section 6 of the Human Rights Act. The Government plan to change the law so that public authorities will not be acting unlawfully when they are applying primary legislation. What implications will this have for claimants trying to bring cases against public authorities?

Elizabeth Prochaska: I really do not know what problem the Government think they are trying to address with this proposal. Section 6(2) of the Human Rights Act already provides a defence to public authorities: where they are bound to act incompatibly with people's rights by primary legislation, they will not be acting unlawfully. I am really confused. I do not know whether other witnesses can explain the reasoning behind it better than me.

From my perspective, the real issue with Section 6 is in Section 6(3) and the definition of a public authority. There is a pressing need to reform that definition to be clear whether it includes private bodies that contract out with public authorities to carry out some of their functions, given the extent of the outsourcing that exists in the public sector. That exclusion from Section 3 is a real gap in protection for very vulnerable people. That was considered in the consultation, but it was dismissed without giving any reasons why it was being dismissed. To my mind, that is the problem with Section 6, not the existence of the defence under Section 6(2).

Q46 **Baroness Ludford:** The Government claim that the imposition of positive obligations, which in some circumstances require the state to take active steps to protect people's rights, has created uncertainty for public authorities and fettered the way in which they can take operational decisions. Do you think that is a fair assessment? What impact would restricting positive obligations have for those trying to enforce their rights

both in and out of court?

Schona Jolly: I am a little confused by the statement in the consultation about the uncertainty that is being created by positive obligations, and I am very unclear about what is being proposed in terms of some substitute for it. Positive obligations are an important feature of Strasbourg jurisprudence; they are there to ensure that the state protects as well as does not arbitrarily remove—for example, in the right to life, or the Article 3 right against torture and ill treatment. First of all, it is not clear to me what the uncertainty is. That has not been the experience in my practice.

Secondly, if what the Government are proposing is that positive obligations are somehow limited so that they do not apply in certain situations—I am trying to imagine what they might be—then you are going to end up in a situation like Osman v United Kingdom, which was one of the early cases on positive obligations going to Strasbourg, in the context of a police investigation. Effectively, victims of the state, be that at the hands of the police or other public authorities, will simply have to go to Strasbourg, and there will most likely be findings against them in that instance. This is that gap that I was talking about at the beginning.

How is the gap going to be plugged? I cannot see what the confusion is. I suspect this comes from this sense of mission creep, in the language and the introduction to the consultation. This is the sense that somehow the convention has moved from 1950 to where we are now, and that is why you do not have so many Article 2 or Article 3 cases against the United Kingdom, other than in the realm of positive obligations, for example, but it is not clear what is intended. This is that gap. It is just an ambiguous gap, and it is not clear what the Government intend to do. I will not repeat what I said earlier about this.

Elizabeth Prochaska: There are a few important things to say about this. The proposals misunderstand the way that the convention and indeed all human rights instruments, whether it is international ones or domestic ones such as the South Africa constitution, work. Positive and negative obligations are integrated obligations. They are not independent of one another.

Take a case like Malone v United Kingdom in Strasbourg, which was about whether the police could tap phones. There was no law enabling them to do it, nor was there any law telling them they could not, so they just went ahead and did it. When the UK ended up in the European court, the court said, "In order to protect the non-interference right, the negative obligation, the right to privacy, Parliament is going to have to regulate to enable some oversight of police phone-tapping". That is how they are integrated. You cannot do one without the other. The idea that you can carve out a whole area of ECHR jurisprudence and say, "We do not like that bit", just does not work conceptually or legally.

The other point to make is a practical one, which is there is no real evidence or costings in the consultation document about what the

consequence of positive obligations has been. The only example they give is the Osman warnings, although those do not come with costs, and it seems to me an example of taking a single case and falsely extrapolating from that example to justify structural change. Of course, Osman warnings are not just used for gang members and undesirable people, as the Government might have it. They are also used in cases of domestic violence and the kinds of cases that Caoilfhionn was talking about. You have to be careful what you wish for. You can end up trapping some of your more deserving claimants when you are trying to get rid of rights for the ones you deem less deserving.

Chair: Another example of that, which Caoilfhionn mentioned earlier, is the Hillsborough inquests being reopened as a result of the positive obligation. We also have the taxi rapist, John Worboys. The full scale of his crimes would never have become apparent if the positive obligation in the police had not been enforced by some of his victims. I imagine most members of the public would see them as very deserving victims.

Baroness Ludford: The other dimension of that, which I put to Lord Wolfson last week, is that you can see a situation and a context in which public authorities working on the basis of positive obligations could obviate and make unnecessary future inquiries and litigation down the line. You see that in things that go wrong in hospitals. You have had to have big, expensive inquiries when things have gone wrong. Hillsborough is a case in point, where the police could have acted differently. You can surely provide multiple examples of where the failure to operate on a positive obligations level has meant that more mistakes get made, which are very expensive to try to put right.

Professor Conor Gearty: I will say one thing about this, because it is quite revealing. You would have thought they would be really happy with what used to be called Osman warnings, because you would have thought getting the police to concentrate on the possibility of imminent harm to people is quite a big deal. It achieved a level of cultural change, which meant that, often in the domestic environment, women were having concerns about their safety taken seriously. I would have expected it to have been a winner, but actually the way it is dealt with is really interesting. It is about this positive obligation thing, which is generally poorly laid out in the consultation.

On this, it is of a piece with the thing about people's conduct meaning, "They really ought not to be given proper human rights", which we were discussing a moment ago. It is sort of this, anticipated by Elizabeth: "They cost a fortune, police are working night and day in special teams to keep an eye on people, and the people are in gangs anyway". There is that slight feeling in this paper. It is the bit that I like least about it: that the police should not really be too bothered with the positive obligation to warn about imminent harm to people because they think, "Well, you would expect it".

That is what I meant right at the start when I said that their heart is not really in the universality of human rights. They are committed to it, but

their heart is not in it. They are quick to make these points about conduct, in a legal term, stopping people from reliance on human rights. That is really unattractive. It is much better to get rid of the whole thing, honestly.

Caoilfhionn Gallagher: I have some thoughts on this, but I am mindful of the time. I can make some pretty brief points or I can reduce it to writing, depending on the Chair's preference.

Chair: Make some brief points, and then if you wanted to flesh it out in writing, we would be really grateful.

Caoilfhionn Gallagher: I am very happy to do that. It seemed to me that this section of the consultation paper was particularly unclear, paragraphs 132 to 140. You see that when you look at how thin the examples that are given are. You have the examples of Rabone and another v Pennine Care NHS Trust at paragraph 134, Director of Public Prosecutions v Ziegler and others at paragraph 135, and Al-Skeini v Secretary of State in footnote 86, with an out-of-context quote that was all about Article 1 of the European convention, the particularly thorny issue of extraterritoriality and how on that topic the Strasbourg authorities do not speak with one voice. In looking at that and then at what the proposal appears to be, I am very concerned that, as Elizabeth says, there is a misunderstanding about the nature of the positive obligations. I would like to provide the committee with some more detail on, in particular, the positive operational obligation under Article 2 and why the characterisation of the Rabone case here is simply not right.

Lord Dyson's judgment in the Rabone case explains very clearly why this is a young jurisprudence where issues arise in the Strasbourg courts and in the domestic courts, which are factual scenarios that were not anticipated. There is a clear set of principles developed in a series of cases in the European Court of Human Rights, which meant that the Rabone case outcome was indeed entirely predictable. I have acted in many cases since Rabone that committee members may be interested in, which involved, for example, very young children who were known to be suicidal. I am thinking of a case called Liam Hardy—it is publicly reported with his name, before anyone is concerned—a very young boy who was known to be suicidal. His mother had gone to multiple authorities to try to obtain help for him. The risk to his life was known, and he was failed by multiple authorities. That is a case where, ultimately, his family only had a form of accountability through using the positive operational obligation, the Osman-type obligation, under Article 2.

There are many of those cases. This is a critical area for human rights protection. It is the only way in which the right to life set out in Article 2 can be meaningful, because when you have, as you have in Article 2, a protection of the right to life, it is only meaningful if the state has an obligation to take preventive steps where there is a known risk to life from known sources, in the way that is required by the Strasbourg case law. I was very disturbed, with such a thin evidence base, at a half-formed proposal to row back on that critical aspect of Article 2 protection,

particularly when the document protests its support for the right to life in multiple places. That is not borne out by paragraphs 132 to 140.

Q47 **Chair:** That was very helpful. I want to ask about trial by jury. The Government are saying there may be scope to recognise a right to trial by jury in a Bill of Rights. The Minister said to us last week that the substantive nature of the right would remain unchanged. Of course, I have to pause as a Scots lawyer to say that there is no such right in Scots law. It is a bit different—not that I am not a fan of jury trials. I very much am, and I am not a fan of rolling them back. If Lord Wolfson is telling us that the substantive nature of the right would remain unchanged, what would be the impact of including it in a Bill of Rights?

Professor Conor Gearty: It will give distinction and pizzaz. It will allow people proposing this to say, "This is new, fresh, building on the Magna Carta. It has presentation of power". I am not at all surprised that the Government have resiled from the possibility that, for example, if you drop a little bit of litter you should be able to invoke the Bill of Rights to go before a jury of your peers. They are going to just mainly say it is the same. If I may say so, it is a sign of a desperate need to have something different than Strasbourg, when in fact Strasbourg is partly a creature of the English system anyway. It is searching for something.

Caoilfhionn Gallagher: I agree with everything Conor said about this essentially being presentational. It is quite telling that when you get to this section of the paper—paragraph 202 onwards—you have two short paragraphs on trial by jury, you have the paragraphs on freedom of expression, which I know we are going to come to shortly, and they are not set out as proper proposals. They are more questions for consultation, and they are not topics that were explored by the Government's independent experts, because they were not part of the terms of reference. They have appeared, rabbit from hat style, at this very late stage, without clear, coherent proposals, without an evidence base, and without the benefit of these issues having been fully explored in the independent report.

I also have a process concern—and that reinforces my suspicion that Conor is right when he refers to this being a packaging exercise and about presentational issues, about how to make this appear different and interesting.

Chair: You mentioned freedom of expression, which comes in the report after the reference to a right to trial by jury. You said you put it in a similar category: a new thing that was not put to the independent panel for their comments. So far as we can see, the Government are proposing that the Bill of Rights gives greater protection to freedom of expression because they say that Strasbourg has given undue priority to privacy rights at the expense of freedom of expression. Do you agree with the Government's analysis of the Strasbourg jurisprudence? If the Government include a presumption in favour of freedom of expression over and above competing rights or other public interest considerations, what impact will this have?

Caoilfhionn Gallagher: I found this part of the paper very frustrating. I saw the headline about greater protection for freedom of expression, and I am a freedom of expression lawyer. I have clients both domestically and internationally, including many clients who are journalists and media organisations, such as Maria Ressa, who won the Nobel Prize a number of months ago, in December, for her journalism and for the critical role that journalism plays in a democracy.

I was interested to read what was set out here, and I am afraid that when I turned to paragraphs 204 to 217 I was very disappointed. First, there is no specific proposal. As with the one on trial by jury, you simply have what has, if you will excuse the phrase, a back-of-a-fag-packet feel to it when you come to this section of the consultation paper. It was not addressed in the independent review, it is not fully fleshed out, and there is no specific proposal. There are a number of questions put. This is more a topic that has been floated, on the basis of those paragraphs, with some questions for consultation, so I have a process concern about it.

It is very unclear to me what problem they are attempting to address—and I will come to some of the specific points they make and why I do not think there is in fact a problem in the way that they have suggested here. You will see question 6 on page 64, which highlights stronger protection for journalists' sources and what further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources. That is particularly bizarre, because the paragraphs that go before it do not give any explanation about what the apparent problem is in relation to journalists' sources.

In fact, there is very detailed jurisprudence from the European Court of Human Rights under Article 10 regarding the importance of protection of journalists' sources. Many of those cases involve the UK having lost on the international stage, such as Goodwin v United Kingdom in 1996 and *Financial Times* and others v United Kingdom in 2009. There is also a very detailed recent Supreme Court decision relating to the protection for journalist sources under PACE; that is the BSKyB case from a number of years ago. This seemed in part to be a proposed solution, although the details of the solution are not set out here, in search of a problem when it comes to journalist sources. I simply could not see why question 6 is in there, because it does not match up with the material that they set out.

It seems to me that there are two fundamental, misguided assumptions that underpin this section. First of all, it is stated at paragraph 206—and this is echoed in your question, Chair—that the European Court of Human Rights is giving priority to Article 8. It states that the Strasbourg court has shown a willingness to give priority to personal privacy, and it gives one reference. This is the only reference to a case throughout the entirety of this section, the ML v Slovakia case. If you have time—or I can detail this in a note for you—the summary that they give about ML v Slovakia is simply wrong. ML v Slovakia is a very nuanced case, where the finding by the European Court of Human Rights was that the particular reporting here had no contribution to a debate of general

interest and that it was particularly intrusive reporting in respect of a suicide. It is a balanced decision that looks at Article 8 and Article 10. It is simply not a proper basis to have a wide-ranging, very loose-formed proposal in the way that they have here.

In fact, when you look at the Strasbourg case law on the balance between Article 8 and Article 10 over the years, as a freedom of expression lawyer I have some concerns with some of the decisions in some of those individual cases, but I do not think paragraph 206 correctly reflects the Strasbourg jurisprudence.

The second point I would make—again, this is why this section is rather thin and misguided—is that the second fundamental underpinning misconception here is the assumption that Articles 8 and 10 are necessarily in conflict. In fact, the Strasbourg court over the last decade in particular, in a series of cases, has looked at how Articles 8 and 10 overlap. I have particular expertise on safety of journalists, and in many cases involving safety of journalists you find simultaneously a violation of a journalist's right under Article 8 and a violation of a journalist's right under Article 10, for example where you have the state accessing material about the journalist that puts their safety at risk, or leaks from state bodies such as police to others, which put the journalist at risk.

There is a particularly pernicious section here, at paragraph 216, which suggests that the only appropriate form of balance for freedom of expression is likely to be the state's rights. It sidelines the importance of Article 8 rights for individuals and suggests there should be a strong presumption in favour of Article 10, with Article 10 trumping Article 8 in some undefined way, which we can see they suggest is not like Section 12—but they do not explain what it should be. But then when it comes to Article 10 versus the state, they say in paragraph 216 that of course it is very important that the state's interests are given additional weight. I wonder if in fact this is a little Trojan horse for something as yet undefined in paragraph 216, which in fact might run contrary to the Strasbourg jurisprudence, particularly that line of Strasbourg jurisprudence on the overlaps between Article 8 and Article 10.

That is a very quick summary of quite a complex area, but my broad view here is that this appears to be an unformed solution in search of a problem. I am unclear what they are attempting to do in this section. I am unclear why it would differ to Section 12, and I do not agree with their analysis of the Strasbourg jurisprudence, if I can call paragraph 206 analysis.

Chair: That is very clear. I am conscious that we need to finish our evidence session by 5 pm, but I wonder whether anyone wants to add anything on freedom of expression, as it is such a rabbit out of a hat.

Schona Jolly: I will be brief, and if it is helpful to the committee I can also put something in writing about this. I agree with Caoilfhionn, but I also want to add two points about the balance of freedom of expression with other rights. At paragraph 215, the Government say they want to

provide more general guidance on how to balance freedom of expression with competing rights such as right to privacy. There are two big problems to highlight here.

The first is about what kind of guidance it is. What is the issue that has been identified? There is one reference here, at paragraph 206, to a judgment that the Government do not like, but there is no general issue. My concern is that guidance is issued for a problem that has not been properly identified and that may in fact cause many more problems as one proceeds.

Secondly, there is a spurious contrast or conflict created between Article 8 and Article 10 without any justification. One of the things that I find really troubling about this is that, in championing freedom of expression, for reasons that are in paragraph 210, where there is a strange reference to freedom of speech and academic freedom, which perhaps belies another reason why this is being championed, there is no emphasis on important rights that are being developed in the modern era to do with Article 8. For example, one thinks about the right of privacy in the modern era. One has to think about technology, balances, facial recognition, biometrics, workplace monitoring and all of these issues that are really fundamental to people's daily lives, and which will only become more fundamental to people's daily lives. These are not even mentioned.

This strikes me as very troubling because, if you are going to champion freedom of expression and you are going to say that it needs to trump other rights and you are going to provide guidance for it, this needs to be set in proper context. This seems, to use Caoilfhionn's expression, scribbled on the back of a fag packet. It seems as though it has come from some other agenda, unfortunately, and has been tagged on. It speaks very loudly against the Bill of Rights.

One other very short point to make is that, if freedom of expression and journalists in particular are to be protected, there are a number of ways in which this can and should be done. There are any number of organisations, Article 19 and others, who have been campaigning for legislation and protection against so-called SLAPPs and other types of litigation against journalists that effectively clamp down freedom of expression. It seems extremely bizarre to try to stick this into a Bill of Rights instead of focusing on the other numerous aspects that are already out there, which are desperate for consultation and are not being done. It seems to me that this has some other purpose, and it is problematic.

Q48 **Lord Dubs:** The Independent Human Rights Act Review panel's report and the Government's consultation both suggest that the overseas application of the convention has gone too far, particularly in the context of armed conflict. As a result, the Government state that this has created legal and operational uncertainties for our Armed Forces. Do you think any changes need to be made to the extraterritorial application of the convention and, if so, what might they be?

Professor Conor Gearty: I am delighted we got to this issue, because it summarises the whole story. They hate extrajurisdictionality and extraterritoriality. In a perfect world they would end it, but if you look at the paper they are not going to, because they cannot do it unilaterally. They actually admit that, because as long as they keep Strasbourg, the stuff will go to Strasbourg. Then along come their friends in government who say, "Look, if it goes to Strasbourg we might end up having to display our national security stuff in Strasbourg, so let us keep it here in order better to be able to manage the throughflow of controversy to Strasbourg".

The paper unexpectedly permits and proposes the retention of an extraterritoriality that the Government clearly dislike. In other words, they are constrained, so it will more or less remain as it is, and it certainly should. Extraterritoriality was not thought about in 1950 but it has had a massive impact on the reach of the convention, and that is a good thing.

Elizabeth Prochaska: Again, I would just add that context point. Any proposals on extraterritoriality need to be read alongside the Nationality and Borders Bill, and particularly the proposal in that Bill to provide for offshore processing of asylum claims, because obviously that will relate very directly to extraterritoriality of the convention. Again, it is taking account of all the things that are being proposed, not just in this Bill of Rights but in other pieces of legislation.

Schona Jolly: Conor has really summed it up. This is summed up in question 22 at paragraph 281 of the paper, and it really encapsulates this sense of, "We must be seen to be doing something, but we actually are not going to do anything". The question is really bizarre. It just says, "We welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction". This is hugely problematic and demonstrates the fact that ships are passing in the night with the Gross report, because the Gross report actually deals with this in an awful lot of detail.

The Government do not like extraterritoriality. The Gross report said, "Here are these different issues. There is this unsettled jurisprudence in Strasbourg, but ultimately if you, the Government, want to remain part of the convention, you are going to have to deal with it". The Government then have this passage where they recognise that, and nevertheless ask the question. It really is this sense of, "We must be seen to be doing something", but in fact they recognise that they are not going to do anything. This brings us very much full circle. What is the point of changing this for the sheer sake of it? That encapsulates very much the consultation.

Caoilfhionn Gallagher: I was tempted to say, as we often get to say in the Supreme Court as advocates, "I follow", because I very much agree with what has been said by the others. The point Schona just made is absolutely right. Presentationally, we can look at the distinction between the sabre-rattling wording in paragraph 10, which says, "We want to

protect our Armed Forces from human rights claims for actions taking place overseas," and so on, and then the damp squib when you get to paragraphs 277 to 281, where they rightly acknowledge that there is no unilateral domestic legislative solution to this and it would need to be addressed in Strasbourg. Then you have question 22, which acknowledges they cannot do anything.

Chair: I am terribly sorry, Caoilfhionn; I am going to have to stop you there because one of our Members has dropped off the meeting and it means we are not quorate, but in actual fact it is not bad timing.

Caoilfhionn Gallagher: I was just coming to an end as well, which I hope is helpful.

Chair: I am afraid I cannot take it any further than that at this stage. Thank you to all of you very much indeed for your evidence this afternoon. It is really appreciated.