HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Human Rights Act Reform, HC 1033

Wednesday 26 January 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; Angela Richardson MP; Dean Russell MP; David Simmonds MP; Lord Singh.

Questions 1 - 11

Witnesses

I: Lord Mance, Former Justice, The Supreme Court of the United Kingdom; Professor Alison Young, Sir David Williams Professor of Public Law, University of Cambridge; Professor Adam Tomkins, John Millar Chair of Public Law, Glasgow University; Dr Hélène Tyrrell, Lecturer, Newcastle University.

Examination of witnesses

Lord Mance, Alison Young, Adam Tomkins and Hélène Tyrrell

Q1 **Chair:** 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, Harriet Harman MP, is currently on bereavement leave after the sad death of her husband, Jack Dromey, the former MP for Birmingham Erdington. I am Joanna Cherry, and I will chair the committee in her place this afternoon. I would like to extend my sincerest sympathy to Harriet and her family.

In 2021, this committee published our report to respond to the independent Human Rights Act review, chaired by Sir Peter Gross. At that time, we said that the evidence we had heard had led us to conclude that there was no case for changing the Human Rights Act. Following the publication of the independent Human Rights Act review report in December, the Government published a consultation paper in December 2021 called *Human Rights Act Reform: A Modern Bill of Rights*, and the consultation is running for three months until 8 March 2022.

The Joint Committee on Human Rights intends to respond to the Government's consultation and will take evidence to enable us to do so. This is our first public evidence session to help to inform that response, and our focus will be on the proposed changes that will affect the relationship between the United Kingdom's domestic courts and the European Court of Human Rights in Strasbourg, and relationship between the United Kingdom's domestic courts and Parliament and the Executive—sometimes referred to as the separation of powers.

We are very grateful and fortunate to have a number of distinguished witnesses giving evidence to us this afternoon. We will hear from three academics who specialise in constitutional law and the Human Rights Act in particular, and a former justice of the Supreme Court, who will be able to tell us about how the Human Rights Act is applied in practice.

The first witness is Lord Mance, the former Deputy President of the Supreme Court. He was appointed to the House of Lords in 2005, where he spent four years as a Law Lord before becoming a justice of the Supreme Court on its formation in 2009. He was Deputy President there from 2017 to 2018. Welcome, Lord Mance. We are very grateful to have you here this afternoon.

Next, we have Professor Alison Young, who is the Sir David Williams professor of public law at the University of Cambridge and a fellow of Robinson College. Welcome Professor Young. We are very happy to have you here this afternoon.

Then we have Dr Hélène Tyrrell, who is a lecturer in law at Newcastle University. Hélène's research focuses on courts and judges, human rights and administrative law. We thank her for being here this afternoon.

Last but not least we have Professor Adam Tomkins, who joined Glasgow Law School as the John Millar professor of public law in 2003. Adam specialises in constitutional law and was previously a Member of the

Scottish Parliament for the Glasgow region in 2016, where he sat until 2021 before returning full time to his academic career. Thank you, Adam. We are delighted to have you with us this afternoon.

We have quite a few questions to be going on with. Before handing over to one of my colleagues, I will ask the first question, which I will direct to you, first, Professor Tomkins. It is just a general overview question. The Government say that they plan to reform the Human Rights Act to provide what they have called a "clearer demarcation of the separation of powers between the courts and Parliament".

Is that necessary? Do you think there is presently something wrong with the separation of powers between courts and Parliament? The Government seem to think that there is. Do you agree? What impact do you think the changes the Government are consulting on could have on the separation of powers and our constitution?

Professor Adam Tomkins: Thank you very much, Chair, for inviting me to give evidence this afternoon. I think the question goes directly to the heart of the matter. My answer is that it might not be strictly necessary, but it is certainly desirable. The separation of powers is a long-standing principle of constitutional practice in a number of countries around the world, and it is becoming more important in the United Kingdom.

The so-called Miller/Cherry case that ended up in the Supreme Court was decided by the Supreme Court—I think correctly, by the way—not least on the basis of the separation of powers. That case has nothing to do with the Human Rights Act, of course, but it is a very powerful illustration of the growing importance of the separation of powers in the United Kingdom's constitutional orders. I would therefore be inclined to support any steps taken by any Government in these islands to help to clarify what that principle might mean and how far it might go.

In your introductory remarks, Chair, you said that you wanted the focus of today's evidence session to be on two critical relationships. The first is the relationship between the UK domestic courts and Strasbourg. The second is the relationship between the UK courts and the institutions of parliamentary government. That is precisely the relationship that is, might be or should be governed by ideas and practices of the separation of powers.

There is no doubt that the Human Rights Act has, as Lord Sumption put it in the Carlile case in 2014 for example, affected or redistributed powers between the courts on the one hand and parliamentary government on the other. The courts have grown in power and stature under the Human Rights Act at the expense of parliamentary government. There is no doubt about that. At the same time, there is also no doubt that the institutional competence of the courts has not changed. There are still things that courts know that they are not best placed to resolve. Again, the Carlile case in which Lord Sumption uttered those remarks is a very good illustration of that, as is the Nicklinson case on assisted dying, as is the Animal Defenders International case on free speech and political

communication. We can talk about these cases in more detail this afternoon, if that would be helpful to members of the committee.

They are all illustrations of the same basic point, which is that the separation of powers has changed because of the Human Rights Act but the extent of those changes is not always clear, and it would be helpful to bring some clarity to that. If that is something that reform of our human rights law can deliver in the Government's proposals when developed, I would welcome it for those reasons.

Chair: Thank you very much indeed. Professor Young.

Professor Alison Young: Thank you very much Chair, and thank you for inviting me to give evidence today.

To the extent that I think it is desirable to ensure that we have a good separation of powers, then of course I am in agreement with Professor Tomkins that this is a good thing and that it is good to ensure that we have a good balance between different institutions of the constitution.

If you are asking me specifically whether there is a need to provide a clearer demarcation, because in some way, shape or form this demarcation is either too unclear or is in some way tipped too far in favour of the cause, I would not agree with that conclusion. As Professor Tomkins has pointed out in his evidence, the courts are aware of their proper constitutional functions and take care to ensure that they do not intrude too greatly on political choices when they are thinking about their powers under Section 3—when they are interpreting legislation—and when they are thinking about balancing rights when performing proportionality exercises. We see this in particular when we think about the balance of social and economic rights. There is much greater need for Government and Parliament to be able to take policy choices in those areas.

If I had particular concerns here, it is that I am not sure that these reforms as proposed—I am not 100% sure where they are going from the document—will necessarily give us that particular clarity. That is because some suggestions in the reform proposals in the document setting out the questionnaire seem to be based on reducing the powers of the courts, thinking carefully about when we use Section 3, and perhaps reining in on the interpretive obligation. Then, with regard to Section 2 changes, there are suggestions that we should look at common law rights and domestic law before looking at the European Court of Human Rights.

Whenever you are bringing in such changes, there will be a lack of clarity. As we have new law, it has to settle. Then there will be case law that determines what that barrier is, which might create further uncertainty. In particular, if you are suggesting on the one hand that courts are meant to be developing the common law, we do not know what the common law rights are in the same way that we know a clear list of convention rights. That could in some way give more power to the court, in contrast with when we are looking at the balance of Section 3 and Section 4, which

gives less power to the court. That might send a further confusing message rather than clarifying this distinction, which I agree is a very important one to maintain.

Chair: Thank you, that is a very interesting point. Dr Tyrrell, can I come to you next?

Dr Hélène Tyrrell: Yes, thank you, and thank you very much for inviting me to give evidence in this session. I will keep my answer fairly brief, because I know there is a lot to go through.

In principle, it is impossible to disagree that it is desirable to have a clear separation of powers. I do not think that the changes to be made to the Human Rights Act will improve overly on the separation of powers situation. The Act was carefully and very cleverly designed for the peculiarities of the UK constitution, including the separation of powers, and the provisions of the Act work together to provide as much.

The government proposals include some quite sweeping changes—I am sure we will discuss them—which I think would start to unravel the overall structure of that framework, which protects rights according to our constitutional traditions. One thing that I think will need to be considered very carefully is the consequence of reducing powers in the courts, for example. If we reduce the powers of the courts, especially where they are holding the Government to account, we have to think about where that power then shifts. Does it increase the power of a different institutional body? Those things need to be thought very carefully about.

Chair: Thank you. Lord Mance, may I turn to you now on this question?

Lord Mance: Thank you for inviting me. I think the starting point should be that the Human Rights Act is itself the product of parliamentary sovereignty. Parliament decided the line that was taken in the Human Rights Act. Of course, it is open to Parliament to change it, insofar as we have, perhaps unusually in the world, a concept of parliamentary sovereignty as overriding all other potentially controversial rights, whether they be regarded as quasi constitutional or not. That is catered for in the Act by the circumstances in which a declaration of incompatibility has to be made.

Short of that nuclear option, Parliament willed a situation in which courts would, under Section 2, broadly align themselves with Strasbourg. Under Section 3 it willed, as was pointed out back in re A and Ghaidan v Godin-Mendoza, the situation where an unusual rule of interpretive construction was introduced is open to Parliament to remove, as I think one of the proposals indicates. How far that rule has been utilised is, of course, not easy to assess, but, in my belief, it is relatively rarely. In other words, normally conventional rules of interpretation fortified by the principle in re Simms have sufficed.

From my experience, I would also agree with what Professor Tomkins said about institutional caution. I believe it is right—I speak as a former judge here, but obviously I am not representative—that we have been institutionally cautious. To the cases he cited one might add the case of Rotherham, about the allocation of EU regional funds, which was challenged on grounds of inequality between different regions. The challenge failed. I think that institutionally the present system works.

Do we need more definition, therefore? I would think that the present situation was reasonably satisfactory. If it was felt that the interpretive obligation, which was a deliberate choice if you look at the White Paper that is referred to in re A, was a deliberate choice to avoid situations in which legislation was found incompatible by declaration and claimants had to go off for a remedy to Strasbourg, unless they could get one retrospectively through Parliament, it would be open to the Government to reverse, as I said. No doubt the courts would live with the revised situation, but of course the consequence would be the loss of one of the aims of the original Act, which was to avoid people having to go off to Strasbourg. That seems to me to be a sort of tension or triangulation here.

Chair: We will definitely return to that issue this afternoon.

Q2 **Lord Singh:** The Government, in their consultation, repeatedly assert that there is a lack of public confidence in the interpretation and operation of the Human Rights Act. Do you agree, and, if so, why do you think that has arisen? How do you think public confidence in the Human Rights Act could be improved?

Lord Mance: I am not a MORI poll, so I cannot speak for the population at large. Public confidence should not always be the test of what is the right legislation. There are some situations—in particular, when you are talking about rights that are in many ways more important for people one dislikes, for minorities—where public confidence may not be the litmus test.

That said, obviously there are comments publicly by politicians and by others objecting to various decisions. I am not persuaded that there is a general lack of confidence in the human rights reflected in the Act. I would certainly encourage more educational outreach, which you have touched on in your question. In this country we are perhaps a little cavalier in calculating our understanding of our constitutional position and the value, the enormous benefits, this country has by having the rule of law rather than just a rule by law.

Lord Singh: Thank you. Professor Young.

Professor Alison Young: Thank you. I am not sure there is necessarily a lack of public confidence. I think there is, more generally, a lack of public awareness of what convention rights are. This can be part of the difficulty and part of the problem. If there is no awareness of what the rights are and how those rights are available for everybody, you might

not have a full awareness of what the Human Rights Act is there for because you will only hear piecemeal accounts of cases that make interesting news stories or have very important consequences.

I would add only that what was particularly useful for the independent Human Rights Act review was that it carried out a series of road shows, and in some of those road shows members of the public raised specific human rights issues. I do not think that necessarily showed that there was a lack of confidence in their ability to use the Act, but that this Act was known in a piecemeal fashion in some sense. That is the real difficulty.

Lord Singh: Thank you. Professor Adam Tomkins.

***Professor Adam Tomkins*:** I slightly disagree with Lord Mance and Alison Young on this one. I do think there is a public confidence problem with regard to the Human Rights Act in particular and the role of the Supreme Court in general. I think that is caused by many things, one of which is confusion about what we were talking about in the first question, on the separation of powers.

I do not think the public at large are confident about knowing what we want judges to decide in questions of politics and government, and what we want to be left to elected politicians, accountable as they are to the parliaments in which they serve and sit. I do not think this is necessarily a general problem that manifests itself with equal force across the range of public policy, but it does crystallise. It comes to a head in certain rather well-known instances, perhaps the most famous of which is the ongoing, still unresolved, controversy that persists about the extent to which Ministers and their officials should be able to deport foreign criminals when those criminals are arguing that their deportation is a disproportionate interference in their family life under Article 8 of the convention.

The extent to which that is a question of public policy for Ministers accountable to government, and the extent to which that is a question of law for judges to determine, or for judges to determine in tribunals and on appeal in the courtroom, is a matter over which there is a lack of public confidence, and that has been caused by the Human Rights Act. It has been caused by the Human Rights Act because, as I said in my answer to Joanna Cherry's question at the beginning of the session, the Human Rights Act has changed the distribution of powers in the British constitution between the courts on the one hand and parliamentary government on the other. I do not think that is a journey in respect of which the public have necessarily been brought along. That has generated a problem of public confidence in the way in which the Human rights Act has come to be used.

Proportionality, which is the key doctrine in our modern human rights law, is a sharper weapon in the hands of the judiciary than old doctrines of Wednesbury unreasonable, which will be familiar to anyone who has studied administrative law in the last 70 years. There is no doubt about

that. I am not saying that the relative empowerment of the judiciary under the Human Rights Act is a bad thing. I am not taking sides in this answer on that dispute. I am just pointing out that, yes, things have changed under the Human Rights Act, and it would be idle to pretend that they have not.

Some of the things that have changed under the Human Rights Act have generated problems of public confidence, and one of the ambitions that the Ministry of Justice clearly has in its proposals—an ambition which I think it is right to have and which I would share—is to try to bring some clarity to this so that we can have fewer disputes in the future between parliamentary government on the one hand and the courts of law on the other about who exactly is responsible for what. I am in favour of taking steps to try to reach that parity so that we have fewer instances of certain well-known tabloid newspapers getting it very badly wrong on their front pages.

Lord Singh: Thank you so much. Dr Hélène Tyrrell, would you like to add something?

Dr Hélène Tyrrell: Yes, just briefly, because I want to pick up on something that Professor Tomkins just said. I do not disagree that there is confusion about the way the constitution works, the separation of powers, but I do disagree that the root of that confusion is the Human Rights Act itself.

There is a distinction to be made. One of the problems is the way that the Human Rights Act has been represented rather than the way it has in fact worked in practice. Professor Tompkins touched on that in his reply. Some people have done great empirical work on media reporting of the Human Rights Act and the human rights claims and claimants, which broadly shows that the media vastly underplay the Government's success rate in human rights cases, for example. That kind of misreporting understandably leads the audiences to those outlets to have a very distorted image of human rights. That is twinned with a general scepticism about the foreignness of the convention and the sense that the Human Rights Act is then a vessel for importing foreign norms. Much of the damage has been done through our relationship with foreign instruments.

By contrast, there is very little reporting about good-news stories under the Human Rights Act, and some people, like the British Institute of Human Rights, gave compelling evidence in their submissions to the independent Human Rights Act review panel, explaining the impacts that the Human Rights Act could be observed to have had—for example, the arrangements made for visiting relatives in care homes during the pandemic. These are important stories, but the fact is that very little is heard about the way the Human Rights Act secures people's rights every day. As Professor Young said, we are more interested in the juicy stories about unpopular claims.

Q3 **Lord Singh:** Thank you, that is very helpful. Can I ask you about a linked

topic? Do you agree with the recommendation made by the independent Human Rights Act review panel that the Government should implement a programme of public and civic education about human rights and the constitution in schools, higher education and adult learning? Also, is that the area where the education is needed, or should there be education for employers, civil servants and others where human rights are brought into question when it comes to procedures and timescales for speedy and efficient review?

Dr Hélène Tyrrell: I can be fairly brief on the first question, because I agree that this should be resolved, in some respects anyway, by a better educational push. There have been some brilliant initiatives by non-governmental actors to address public awareness of the Human Rights Act, but a lot more could be done, for example through the curriculum.

By way of anecdote, it always surprises me that even students who have chosen to study law at degree level arrive with a very limited understanding of what the Human Rights Act is or does. There are exceptions, of course, but on the whole there is a lot of confusion about the Human Rights Act, the relationship between the Human Rights Act and the European Court of Human Rights, and the way that affects the constitutional balance of powers. That runs very deep.

If one of the aims of giving effect to the convention rights in UK law is the development of a rights culture in the UK, that is usually premised on the fact that individuals are unable to argue about their rights in domestic courts. If that is to be effective, it relies on individuals having an understanding of their rights in the first place. If building a culture of human rights in this country remains a serious aim, whatever that might be based on, a significant effort is required to promote an understanding of the way the law protects people's rights.

On the second point, I think that, by and large, education about the Human Rights Act was better in the implementation of the Human Rights Act for public bodies and public authorities than it was for the general public, but others may like to elaborate.

Lord Singh: Thank you so much. Professor Mance, would you like to comment?

Lord Mance: Dr Tyrrell picked up a point that I would thoroughly endorse. I think Professor Tompkins suggested that the public needed to be more confident about knowing what we want judges to decide. I think the Government—and one would hope that the press would follow—should be upfront about their aim. Is it the original one, which was to bring rights home so that one had fewer cases going to Strasbourg? That, on the face of it, was a remarkably successful aim. That is what has happened: virtually no cases succeed in Strasbourg now. In that case, what judges are doing when they implement human rights—particularly in the area he mentioned, deportation—is giving effect to international jurisprudence in the way the Government have intended. If, on the other

hand, the Government wish to diverge, they are open to do so. One would find then that more people would have to go to Strasbourg.

The position that has arisen is one of deliberate choice on the part of government. It is one where I do not think the judges themselves have gone wrong. You can no doubt criticise the application in individual cases, but I do not think that in principle they have gone wrong. On the contrary, we have introduced a system by a deliberate choice that is a constitutional, or quasi-constitutional, system, bringing us closer, as I said earlier, to the rest of the world.

Lord Singh: Thank you so much. Professor Alison Young, would you like to comment?

Professor Alison Young: Only very briefly. I agree that there needs to be broader general education and perhaps the need to ensure that we keep educating. There was a very strong programme at the beginning of the implementation of the Human Rights Act to make sure that the judiciary and public authorities were trained, and that needs to continue.

The only other thing I would add is that if we really are to build public confidence in the Act and have the public thinking about what human rights are, particularly if we are thinking about reforming the Human Rights Act and changing how it works, it is very important that any reform we make involves full general public consultation. That way, the public can be both educated on what rights we have at the moment and involved in thinking about what further rights they may want to have and what changes they may want to see.

Lord Singh: Do you believe that it is possible for a member of the public to assert their human rights without engaging a very expensive barrister?

Professor Alison Young: This is part of the difficulty. What tends to happen—this has led to some criticisms of the Act—is that it is often very difficult to get to court because it might not be possible to obtain legal aid. That can often mean that public interest groups will then be sought to try to find people. Crowdfunding is also used now to help to try to get cases to court. This can be a difficult issue, so, yes, we also need to think very carefully about making sure that rights are accessible and that individuals are able to protect their rights when needed.

Lord Singh: Thank you very much. Professor Adam Tomkins, could you also address that question and the question about access to human rights?

Professor Adam Tomkins: The short answer to the question is yes. Other than that, it might put us law professors out of a job, because we will have less to teach our ignorant incoming first-years, who apparently know nothing about human rights or constitutional law, although I have to say that that is not my experience in Glasgow; Scottish law students seem to be remarkably well informed about the nature of Scottish politics and indeed law. But yes, who could possibly rationally and sensibly argue

against civic education in human rights and civilities? That is a rather preposterous proposition, is it not?

The more important point is this: in a healthy constitutional democracy, there should be permanent, open, public debate, including between the courts and parliamentary government, about the allocation and distribution of power and responsibility in our constitutional affairs. It is no bad thing that we sometimes disagree about this. It is a good thing. It is not a bad thing that there are sometimes cases that politicians or Ministers want to react to, sometimes adversely.

That is not unhealthy. The way they do it has unfortunately sometimes been unhealthy; none of us would advocate newspaper front pages with pictures of judges being described as enemies of the people and so on. But it is not unhealthy to have a vibrant public debate in our democracy about the appropriate allocation and distribution of powers and responsibilities between the courts on the one hand and parliamentary government on the other. Some of these issues do not lend themselves to easy resolution.

Chair: Professor Tomkins, I am terribly sorry. I have to interrupt you in the middle of your very interesting answer, because I will have to suspend this committee meeting for votes in the Commons.

The committee suspended for a Division in the House of Commons.

Lord Singh: Professor Tomkins, you were just concluding. Would you like to continue?

Professor Adam Tomkins: No, thank you, Lord Singh. I have made the points I wanted to make. I am happy for the committee to move on, if that is what the Chair wants to do.

Lord Singh: Thank you all very much.

Q4 **Lord Brabazon of Tara:** My question is about Section 2 of the Human Rights Act and the interpretation of convention rights. Lord Mance, do you think that, as the Government say, there has been an overreliance on Strasbourg case law by domestic courts? Have domestic courts felt able to depart from Strasbourg jurisprudence where appropriate?

Lord Mance: I do not think there has been an overreliance, certainly compared with what the Government and Parliament intended when they put forward the Human Rights Act. The Act contains a deliberate choice by requiring us to take account of Strasbourg case law and by the reinforced interpretive provision in Section 3. The Act, as I said before, set out to bring rights home. "Take account of" gives a certain amount of flexibility, and I believe that the United Kingdom courts have been, and are increasingly, successful in influencing Strasbourg jurisprudence. Of course, the United Kingdom Government themselves played a part. The Brighton declaration and its follow-up in Denmark have been very successful measures in helping to persuade—

Lord Brabazon of Tara: You have gone mute.

Lord Mance: I said that not only the United Kingdom courts but the Government at the international level and other Governments of Europe have, through the Brighton and Copenhagen process, been very successful over the last 10 or 12 years in persuading the European Court of Human Rights. I do not say that it was unwilling to be persuaded of the virtues of subsidiarity and the margin of appreciation. There has been marked dialogue, in a true sense, with the European court at both the public and the private level. There are very fruitful meetings of judges at which there is very frank discussion as well as at the public level in judgments.

Some of the instances are very well known, such as in R v Horncastle in the United Kingdom courts, when we said that the Strasbourg jurisprudence relating to hearsay evidence really did not make sense, and it was modified by the Strasbourg court in al-Khawaja. Then, in a series of cases about the lawfulness of detention in cases where there had been a lack of prison courses or prison treatment to help prisoners in their detention, the Strasbourg court in James appeared to suggest that a lack of courses made the detention unlawful. We disagreed in Haney and Kaiyam, and the Strasbourg court picked it up in a later Kaiyam case, Kaiyam v the United Kingdom, and made it clear that that was not the case; that the lawfulness of detention was not affected, and that it was possibly a matter of compensation if there was a lack of courses.

There are other examples. There is the basis on which people are detained if they are suspected of being about to commit an offence. The Strasbourg court, in a case called Ostendorf, had advanced one theory as to how that fitted with the convention. We disagreed in Hicks, and the Strasbourg court expressly adopted what we had said in S, V and A v Denmark. It quoted it verbatim, endorsed it and changed its mind.

More recently, the Strasbourg court has taken a view in Allen about the right to compensation if you are acquitted, and we fundamentally disagreed in Hallam. There is a very fruitful interchange, which is one that is allowed by the wording. There has, of course, been some recent jurisprudence on how far the wording allows you to go further in Strasbourg, but judges have never done that very often. There is an argument about how far the margin of appreciation committed domestic courts to making up their own minds about the meaning of a convention article where the Strasbourg court had not been prepared to find an infringement, and that appears to have been settled in a recent case, Elan-Cane, on the 15th of last month, in favour of the proposition that it is not for domestic courts in that situation to make up their own mind.

I note with interest that that is not something which the independent Human Rights Act review thought should happen. Actually, it endorsed the opposite view in Chapter 3. Chapter 3 now does not seem to apply, and the Government's own paper here, talking about a more autonomous approach to human rights, at one point might be thought to have

suggested an opposite solution. But there you have a cautious view taken by the United Kingdom Supreme Court, which settles the law.

Lord Brabazon of Tara: Thank you very much Lord Mance. Would any of our other witnesses like to make any comments?

***Dr Hélène Tyrrell*:** I am happy just to suggest that although the duty takes the Strasbourg's jurisprudence into account, it is well established by now that it is not a duty to follow it. I think Lord Mance's point is that the courts have settled that point now through quite a long line of cases. There are a number of examples, some of which were mentioned, of the UK court deciding a question about convention rights in a way that is contrary to the way the Strasbourg court would seem to have done or would be seen to be likely to do.

The very recent Elan-Cane case is very interesting, because, as Lord Mance said, to some extent it settles the question of how far the courts can go in the interpretation of the convention than the Strasbourg court has indicated might be necessary, because there exists what is called a margin of appreciation. If the courts are doing that by careful reference to the Strasbourg case law and being careful not to go beyond it, the duty in Section 2 can also act as a brake in some respects on an expansive interpretation of rights, which seems to be at the heart of the concerns that the government proposals put into writing.

Lord Brabazon of Tara: Thank you.

Q5 **Baroness Ludford:** The independent panel on the HRA concluded that Section 2, which, as we have just discussed, requires domestic courts to take account of Strasbourg case law, should be amended to make clear that courts should consider rights protected under domestic statute and case law before proceeding to consider convention rights. I think this is part of increasing public ownership sort of thinking. Do you support that recommendation, and what impact do you think it would have in practice?

Professor Alison Young: I think "cautious support" is probably the best way of putting it. In order to think about what the consequences will be, we have to think carefully about the different kinds of relationship there might be between domestic legislation, common law rights and existing convention rights.

In most of the case law that was cited in the Government's response and the independent Human Rights Act review looking at this issue, you had a situation where both common law and domestic law was very much in line with convention rights. Using common law provisions first and then seeing that that was in line with convention rights was a good way of showing that this is a domestic protection but that it is also in line with the convention.

You can also have examples where the common law perhaps goes further than convention rights. Again, that could be a good way of showing that we are in line with the convention, but we have existing common law and domestic law provisions that go further. For example, domestic legislation

recognising same-sex marriage rights is a good way of showing that legislation can build on convention rights as well as thinking about other areas.

My concern is what happens if the common law and domestic law does not go as far as convention rights. That will depend on a very careful understanding of what we mean by using domestic law first. Does that mean that we use domestic law but it does not go as far as convention rights, and now we can look at the convention and make sure that we are still bringing rights home and still in line with convention rights? How far will there perhaps be concerns of potential criticisms of the court if they then go to convention rights because they do not think that common law goes as far or that legislation goes as far as the convention rights in certain circumstances?

We would have to think very carefully about what this relationship is between. Is it just a question of looking first, and if it goes further and protects rights, great, but, if not, let us see whether we need to rely on the convention? Or will there be other elements of different weight being given to the common law and legislation before we look at convention rights? That would be why I would perhaps be partially concerned, because I think we need to flesh out what the inter relationship should be, as well as the potential order of looking at domestic and convention rights.

Baroness Ludford: Many thanks.

Professor Adam Tomkins: It is a very interesting question. The Human Rights Act has been enforced for more than 20 years, since October 2000. I am in favour of the proposition that, by now, in our development of a sort of self-consciousness—if I can put it like that—about the articulation and enforcement of fundamental rights and our constitutional law, we can do it very well ourselves without having to rely on Strasbourg jurisprudence. The points that Lord Mance made in response to the previous questions are points that I would very much endorse.

There has been a manifest increase, a ratcheting-up, of British judicial and ministerial influence in Strasbourg that has materially improved the quality of judgments that we get out of Strasbourg. But, frequently, when you read judgments of the European Court of Human Rights and compare them with judgments of our own appeal courts in England or Scotland, you can see a clear difference in the quality of the reasoning.

I think we should be very self-confident as a country now in—dare I say it—taking back control of our own human rights. I do not mean that in any kind of jingoistic way or in any way associated with any kind of withdrawal from the convention or from Strasbourg or anything like that. What I do mean is that we should have, and I think we do have, the self-confidence in our Parliament and in our courts to articulate for ourselves as a country the rights that we want to regard as fundamental and to legislate for them in a way that we already do, and to adjudicate on

disputes arising with regard to those rights without having to worry too much about what is happening in Strasbourg.

Earlier in this evidence session, before the Members of Parliament had to vote, Lord Mance reminded us all that one of the key aims of the original Human Rights Bill introduced by Lord Irvine and Jack Straw all those years ago was to reduce the number of cases going to Strasbourg, and in particular to reduce the number of UK government defeats in Strasbourg. I do not think it follows that if, 20 years on, we do something more now to decouple our own human rights jurisprudence and our own architecture of human rights law from Strasbourg that we will necessarily see more cases going to Strasbourg or more government defeats.

I do not think the two necessarily follow from one another, because, irrespective of what any replacement to Section 2 of the HRA says in statute, our appeal court judges will still be very deeply conscious of what is happening in Strasbourg. Unless they are clearly told by Parliament not to, I think they will want to take that into account as they develop the common law and statutory understandings of human rights law here in the United Kingdom. That is a long answer to a short question, but the short answer is yes.

Baroness Ludford: Excellent. Lord Mance.

Lord Mance: I just want to make this point. As the author of a leading judgment in Kennedy v the Charity Commission, I would be the first to encourage lawyers and judges to look at the common law position and not to focus exclusively on the human rights position. That is effectively what we said in the context there. It was about how far the Charities Commission was obliged to act transparently, and we thought that remedies could be found at common law as much as elsewhere.

But one has to face up to the fact that there have been situations when the convention and the Human Rights Act have helped domestic law to advance. The removal of the Home Secretary's right to set the tariff for lifers is a good example, as is the removal of sentencing discretion from the Executive, the ending of detention without trial of aliens suspected of terrorist involvement, the lifting of the ban on homosexuals in the Armed Forces or, in a civil law context, the development of a law of privacy. These are all matters where the convention was a necessary inspiration.

I would qualify Professor Tomkins' statement to this extent: that we have not always been able to find a remedy at common law. As to the particular proposal, I actually have reservations, because it strikes me as a rather odd and clunky interference with court procedure, with actual judicial activity: "You shall consider first this before considering that". That is not the way courts operate, and it could be very questionable sometimes.

For example, if a point of common law is very uncertain, do you have to compel the lawyers to argue it out over two days when there is an obvious convention point? That would be hugely expensive. I think the

review has gone too far in saying, "You must do this first before you must then do that". I am entirely happy with something that says that you should take account of the potential relevance of UK statutory and common law rights in the relevant area, as well as take account of Strasbourg case law. Something like that would be fine, but it would leave it to the court to carry on its business in the usual way, rather than fettering it procedurally and formulaically.

Baroness Ludford: Very interesting answers from all three of you. I am glad to say that Dr Tyrrell also wants to complete the quartet.

***Dr Hélène Tyrrell*:** I just wanted to flag one possible complication, which is that even though priority might be given to sources of law that are not based in the convention, there is the fact that claimants may need to press the domestic courts to look at convention rights where they might be relevant. That is because the Strasbourg court has recently suggested that it is a requirement. The domestic courts have been asked to consider the convention rights if claimants want later to be able to take their case to Strasbourg. That was the reason given a couple of weeks ago in the Lee v the United Kingdom case, when the claimants in the so-called gay cake case were told that their application to Strasbourg was inadmissible.

It might be remembered that that was the claim that was brought for breach of Northern Ireland's anti-discrimination laws against a bakery that had refused to sell a cake iced with the message supporting legalising same-sex marriage. The claim before the domestic courts had not asked the Supreme Court to balance the convention rights of that claimant against those of the bakery and its owners. It had relied solely on domestic law, and on that basis the Strasbourg court said that that meant that they had not exhausted all their domestic remedies prior to their application under the convention, so the case was inadmissible. I suspect the lawyers will have that in mind even if the courts are told to prioritise other things.

Chair: Thanks. Yes, that was a very interesting case. Lord Dubs will ask a little more about the obligation under Section 2.

Q6 **Lord Dubs:** Thank you, Chair. This question follows very clearly from the last question. The government consultation suggests that weakening the obligation in Section 2 would provide that UK courts no longer have to take into account the relevant ECHR case law, although they may have regard to it. What do you think will be the advantages and disadvantages of that approach? How could amending Section 2 affect the relationship between the UK court and Strasbourg? Let me add this. Do you think the approach would undermine the original aim of the Human Rights Act to bring rights home? Would it lead to more individuals pursuing their claims in Strasbourg?

Professor Alison Young: I agree that, if we are not careful, weakening the connection between UK cases and Strasbourg cases could lead to undermining the idea of bringing rights home and could lead to more cases going to Strasbourg. That is very hard to predict, because

obviously it will depend on what the newly worded Section 2 will be. It will also depend on how far the UK courts still have regard to cases before Strasbourg when taking their own particular decisions.

As Lord Mance indicated in his answer to previous questions, the UK courts have been thinking that they take account, but they take account respectfully, and if you look at instances where UK courts tend to disagree with Strasbourg, it is always done for specific reasons—for example, because there has been a misunderstanding of UK law or how it applies, or because there are problems with the reasoning in the judgment and they believe that there are better reasons in a minority judgment before the European Court of Human Rights rather than the majority.

I do not think that element of respect and reasoning will necessarily disappear. You may find that even if you weaken it and still allow UK courts the ability not to necessarily follow Strasbourg courts, UK courts will not necessarily think, "Well, that means that we can do whatever we want and disagree with the Strasbourg case just because we feel like it". I think courts will continue to give that institutional respect to judgments of other courts in the same way they do if they are looking at judgments from the Canadian Supreme Court if they are using that to influence their development.

The potential problem will be whether there will then be criticisms of the courts because they are not using this freedom not to follow Strasbourg in certain cases. That could undermine our trust in the judiciary and protecting those particular rights.

Lord Dubs: Thank you.

***Dr Hélène Tyrrell*:** An advantage to weakening the Section 2 obligation, although I do not think this is particularly persuasive, is that it would to some extent appease those who are worried about tying the UK courts too closely to the Strasbourg pronouncements. It might make it clearer that Strasbourg case law is merely one of a number of persuasive sources that might be considered in human rights cases.

However, those points have broadly been made before, and the court is free to take into account a range of sources, including the Strasbourg jurisprudence in these cases. As Professor Young intimated earlier, there might be a case for saying that if the courts are freed from the Strasbourg jurisprudence, they might be better able to support going beyond it, where it can be supported by reference to other relevant sources of authority, although I am not sure the Government would consider that an advantage as such.

Requiring domestic courts to take the Strasbourg jurisprudence into account means that even in cases where the court does not consider that they should follow it, they are more likely to come up with explanations for diverging from what the Strasbourg court has previously indicated that it would say on the matter. These elements were alluded to in one of

Lord Mance's answers earlier in the session when he mentioned dialogue. It is these elements in the judgments of domestic courts that contribute to the dialogue between the UK and Strasbourg, and in turn that is how the UK can contribute to the development of the convention jurisprudence.

I believe that the committee has received evidence in the past on this: that careful consideration of convention principles in domestic courts also makes it less likely that the Strasbourg court will make adverse findings against the UK in subsequent cases on that point. The answer to the second part of your question is bound up in that. Breaking the formal link between the UK courts and Strasbourg could also make it more likely that there will be diversions in the understanding of convention rights. It also means that people would be more likely to need to pursue their claims before Strasbourg; and, of course, if they have not had the advantages of reading carefully reasoned judgments that take account of their jurisprudence, they might be more likely to find against the UK when they have to decide the case.

Lord Dubs: All right. Thank you very much.

Professor Tomkins: Thank you, Lord Dubs. I do not have much to add to what has already been covered on this point. I would be in favour of deleting the word "must" in Section 2 of the Human Rights Act and replacing it with the word "may", for much the same reason that Lord Mance has already objected to the word "must" appearing in some of the Government's proposed alternatives.

If courts want to take into account the jurisprudence of Strasbourg, they should be able to take it into account. If courts want to take into account the jurisprudence of the Supreme Court of Canada, the High Court of Australia, the Israeli Supreme Court or some other common law court that is grappling with very similar issues, the UK Supreme Court should be free to take that into account as well. We should not be compelled in any of these cases to follow it.

There was a problem with the meaning of Section 2, 10 or 15 years ago after the Ullah case, where the Supreme Court/the House of Lords seems to tie itself more closely to Strasbourg jurisprudence than the Human Rights Act had intended. But those overly tight ties have been loosened of late and the current jurisprudence is not unsatisfactory. It is clear that the UK Supreme Court, and indeed other appeals courts in the United Kingdom, now have the self-confidence that I was talking about a few minutes ago with regard to rights jurisprudence to depart from Strasbourg jurisprudence when it is appropriate to do so in the circumstances that we find ourselves in in the United Kingdom.

Whatever ends up replacing or revising Section 2 of the HRA should reflect that reality. There is a degree of discretion here that our appeal courts enjoy and should enjoy and which, by and large in recent years, if not in the earlier days of the Human Rights Act, has been exercised appropriately and responsibly. I would like our human rights law to be

loosely tied, but not too tightly tied, to the jurisprudence of the Strasbourg court. I think that is what we have. I think that is what the Human Rights Act, as originally enacted, intended. That is broadly where we have got to over the last 20 years, and we should probably stay there.

Lord Dubs: Thank you. Lord Mance.

Lord Mance: I think the Government should be careful what they wish for. If you have a policy of avoiding challenges in Strasbourg, must or requiring in this context is sensible. The Act is intended to avoid that. There is also the underlying presumption that will ineluctably direct courts to look at Strasbourg jurisprudence, and that is the presumption that the Act should be interpreted in a way that complies with this country's international obligations.

Now, I am not sure which way the Government's paper is going on this. Half the time it is saying that it would like freedom for courts to depart more often in its favour—in other words, to go less far than Strasbourg. But then, at other points, it says that the aim, by encouraging for example citation of the South African Constitutional Court or the Canadian Supreme Court jurisprudence, would be to promote a more autonomous approach—I assume an individual, English, approach.

As Dr Tyrrell pointed out, if you do that, you may get caught saying, "Well, why shouldn't we go a bit further than Strasbourg would, because we're deciding for ourselves?" The reality is that recent jurisprudence in the Supreme Court has gone in a way that I would have thought makes quite a lot of this discussion rather academic, because in AB last July the Supreme Court underlined the Ullah principle. In other words, you do not go further. It further underlined that in Elan-Cane, which we referred to, by saying that all domestic rights—although according to a current case, McQuillan, you may still regard them as separate rights—mean rights corresponding with but going no further than the convention would be treated as going in Strasbourg. They also mean rights going less far.

It is a one-way system, which is what I would have thought is consistent with and probably perhaps even goes further than the Government thought the law would when they wrote this consultation paper, because they did not know about the most recent decision. Certainly the Gross review did not, because it advocated an opposite result to Elan-Cane.

In my book I do not really think there is anything wrong with the present formulation. Equally, though, if you changed "must" to "may", it would not make much difference.

Chair: Thank you. That is very interesting.

Q7 **Baroness Massey of Darwen:** Good afternoon, everybody. This is indeed a very interesting, useful discussion. I hope that my question will build on that and stir up some new thoughts.

The Government's consultation effectively seems to propose two different

approaches to a new Bill of Rights, one of which will be more akin to a stand-alone constitutional British Bill of Rights, where the rights happen to look like the ECHR rights. The other would incorporate the ECHR, but would seek an originalist approach to interpreting ECHR rights.

What are the advantages and disadvantages of each approach? I know that is a bit complex, but let us have a go at it.

Professor Alison Young: Thank you very much, Baroness Massey. I will try to be as brief as I can. I will focus first on adopting an originalist approach. The purported advantage of that approach is that there will be far less judicial creativity, which means that judges will stick very closely to a particular text that in some way shape or form is seen to express the wishes of those who originally signed up to that particular text.

The problem, the disadvantage, is that that does not actually work, because it is very difficult to know what the original intentions actually were. The assumption is that the original intentions are expressed in the wording. The problem with that is that a lot of these rights are expressed in a broad way, and in some senses the original intention is sometimes to have what we call constructive ambiguity: you have reached a broad agreement over what you think the right is, but you recognise that as time progresses that might evolve, that might change. Do we see it as, "This is an ambiguous provision, and somehow we have to think about what everybody's original intentions were when they enacted it", or not?

I find it very difficult to know precisely what we mean by an originalist approach. Do we mean the aim? Do we mean the wording? Do we mean the purposes? I am not necessarily sure that adopting that particular viewpoint would make it any clearer. There is also the danger, in adopting that viewpoint, that if it is interpreted quite stringently, it is essentially saying that we should go back to the rights we thought we should have had in the 1950s, and I am not necessarily sure that is where people actually want to go.

In that sense, I am much more in favour of the advantages of adopting a living tree approach. When we think about how this works in practice, we have to think carefully about whether this is being done by the European Court of Human Rights, or whether it is being done by domestic courts. In some senses, the European Court of Human Rights is actually quite cautious. It recognises that it is an international court. It is thinking about an international level of rights protection, and it tends to focus on when it sees some kind of element of consensus across the different signatory states to that particular convention. As we discussed earlier, sometimes that can be influenced by domestic judgments, domestic assessments that will help to find a consensus on how far rights should go and be interpreted in certain circumstances.

I accept that some will think that this is problematic, that it might go beyond people's original intentions, but I would respond that the intention now is perhaps expressed in the Government's document: that the UK will potentially remain a member of the European Convention of

Human Rights as currently understood. It is difficult to know precisely what the original intention was.

Baroness Massey of Darwen: Thank you. Professor Tomkins?

Professor Adam Tomkins: I think there is a risk of massively overreading what is at stake here. I can understand why that risk has emerged; it is because the Government, and indeed the Conservative Party, have come from a position of long-standing scepticism about whether the Human Rights Act was a sensible or valuable measure.

However, the proposals in front of us are modest. They will not do anything very much. They will tweak Section 2, and we have talked about that. They will tweak the relationship between Section 3 and Section 4. That is really important, and we have not talked about that yet, but I hope that we have time to come on to that later this afternoon. They will say something about the right to trial by jury, which may or may not be interesting and may or may not be valuable, and they will say something about the right to free speech, which, as Joanna Cherry and I both know, is incredibly important in the modern United Kingdom, and although Joanna Cherry and I have different political perspectives on a lot of things, I think we share a commitment to and a deep belief in the importance of free speech. That is more or less it.

This will not be an ab initio, complete reconstruction of our human rights law or our human rights jurisprudence. There is no pulling back from Strasbourg. There is no withdrawal from the Council of Europe. The substance of the rights will continue to be as it is now, although there will be a slight decoupling of them from their European origins. With great respect to every member of the committee, I would caution against reading too much into the really rather modest set of proposals that are on the table from the Government here.

Having said that, I remember giving evidence to the European Scrutiny Committee in the House of Commons when it was chaired by Bill Cash and it was considering the European Union Bill, which became the European Union Act of 2011, and I remember saying to that committee that those who wield the power of the sovereignty of Parliament should always be extremely careful how they wield it and extremely careful what they wish for.

Using legislation to tell judges how to decide cases is a bad idea. It is not necessarily contrary to the separation of powers, but it is a bad idea because judges are unlikely to pay a great deal of attention to the legislature's instructions about how to do their job. Any temptation that anybody might have to use the awesome power of the sovereignty of Parliament to lay down in legislation how human rights cases must be resolved in the future is likely to find that the sovereignty of Parliament does not really work like that.

To anybody who thinks that some kind of original intention can be enshrined in legislation and that judges can be required by law to adhere

to that originality, I have to say that that is just not how representative democracy works in a common law system. The common law is a living, breathing, moving instrument that changes with the times and changes, hopefully, in accordance with prudence and caution. It is a small-C conservative animal, it seems to me, and large-C Conservatives should welcome that. That is all I really want to say in response to your question, Baroness Massey.

Baroness Massey of Darwen: Thank you so much. Hélène Tyrrell, please.

***Dr Hélène Tyrrell*:** I have very little to say on this, you will be pleased to hear, only that the concept is itself tricky. If we are to remain a signatory to the convention but require some sort of originalist approach to interpret those rights, that is very tricky to rationalise. It would be strange, given the title of the consultation, which purports to propose a modern Bill of Rights in any event. There is something very odd about proposing a modern Bill of Rights that would be constrained with respect to giving effect to the rights as recognised some half a century or so ago. Actually, I think the common ground between Professor Young and Professor Tomkins there is that that is what the Government properly intend. I will leave it at that.

Baroness Massey of Darwen: Thank you. Finally Lord Mance, please.

Lord Mance: I would endorse what Professor Tomkins said about the relationship between Parliament and the judges. Obviously, we loyally seek to apply Parliament's intention objectively ascertained, but telling us in detail its application in particular cases is not the function of Parliament and infringes the separation of powers. It is for judges to apply, in particular cases, the general principles laid down.

As to an originalist approach, one can certainly criticise some of the past jurisprudence of the Strasbourg court for perhaps an overenergetic and overexpansive approach. That is, as I have indicated, historical, but we still have to live with it. Take the expansion of the territorial jurisdiction. Whether you think it is a good thing in principle or not, it is probably not what anyone thought the convention originally meant. There are examples of where Strasbourg has gone, perhaps unfortunately, further than was intended. Prisoner voting is an example. There was an express discussion as to whether there should be such a right, and the travaux préparatoires, the preparatory papers, indicate not. But in a case called DSD I made some comments about the way in which the Strasbourg court had expanded the investigative duties under Articles 2 and 3: that is, the duty to investigate death, for example, beyond the sphere of cases where a state actor, a state agent, was potentially involved.

That said, that is not a matter that is addressed by the proposal in the consultation paper. It is a matter that has happened in Strasbourg. If this paper is intended to encourage courts to go further in refusing to follow Strasbourg, I have to say that there was a considerable amount of consideration whether to follow Strasbourg on, for example,

extraterritoriality and the application of the convention in Iraq and Afghanistan. What would have been the reality if we had refused to do that? Originally, the courts did refuse, and then they changed their mind. What would have been the reality if they had stood by the refusal? We would have had lots of cases going off to Strasbourg, and that is the dilemma or the tension that has to be born in mind when there is encouragement to deviate from what Strasbourg has decided in that sort of case.

Baroness Massey of Darwen: Thank you, everybody.

Q8 **David Simmons:** The government consultation proposes either scrapping Section 3 altogether or changing it to require courts to interpret legislation compatibly with the Bill of Rights only where the ordinary meaning of the words and purpose the legislation permits that interpretation.

Is scrapping or amending Section 3 in this way necessary? Perhaps you could give us some examples of what you think the consequences might be, or how it would be different if judges were left to apply common law principles rather than being tied, as they currently are, or less closely tied, to the convention.

Professor Adam Tomkins: This is really important stuff. Getting the balance right between Section 3 and Section 4 is probably the most critical of all the areas of reform. Notwithstanding what I just said about the importance of freedom of speech, this is the most critical issue that faces the Human Rights Act at the moment and faces those who wish to defend it and not change it or those who wish to tweak it in ways such as the Government had proposed.

I am very much of the view that the courts have not always got this right. I think the courts have tended to use Section 3, which is the power to reinterpret legislation, too liberally, and sometimes too aggressively, in cases where it would have been constitutionally more appropriate for a Section 4 declaration of incompatibility to be issued instead.

There are a number of examples that one could give, but the example I will give is the recent Ziegler case, which the Supreme Court decided in June or possibly July last year, about obstruction of the highway. It was a complete rereading of the obstruction of the highway offence in the Highways Act to make it say something that it simply does not say. By a narrow 3:2 majority in the Supreme Court, a split decision, the Supreme Court narrowly decides that the relevant provision of the Highways Act needs to be reinterpreted to bring it into line with the right to freedom of peaceful assembly and association in Article 11 of the convention.

What you end up with there is the court unilaterally rewriting the legislation in a manner that, according to evidence given by the police since that case was decided, has made it more or less impossible for that section effectively to be policed, as we saw in the autumn with Extinction Rebellion and other groups effectively shutting down large parts of the M25 and the police being apparently unable to do very much about it.

That is largely, not exclusively, because of the way in which the Supreme Court, I think completely wrongly, reinterpreted the Highways Act in the Ziegler case.

I am perfectly happy to write to the committee in more detail about that if members would think it helpful. I do not want to get too much into the weeds of a particular case that people might have different views on, but it is an example of the sort of case where Section 3 is being used and should not be used, and where Section 4 should be used instead. I think the Government are absolutely right to keep a close eye on this and to think that that balance needs to be addressed. This is one of the most important parts of the Government's proposals, and I do think that this is a real set of issues that demands a response.

David Simmons: Thank you.

Professor Alison Young: You asked specifically what would happen if we scrapped Section 3, so I would like to focus on that. I agree with Professor Tomkins that there is a very important balance, and I do not think any of us would say that the courts or Parliament or the Government have a 100% record on getting this right. It is very important that we look at this carefully. If we scrap Section 3, we revert back to the position we were in prior to the human rights site of having a requirement to read and to give effect to committing to legislation in line with convention rights so far as it is possible to do so. Instead, you will be saying, "When legislation is ambiguous, please try to interpret it in line with convention rights". This could be problematic.

You also have to consider what the courts would do in that situation, specifically if the common law had developed further in those particular aspects. Then we get to aspects of considering whether the courts would think about using things like the principle of legality. The principle of legality triggers in different circumstances. When we are thinking about Brind, it is the idea of ambiguity. When we are thinking about the principle of legality, it is that when legislation is general, we will read it in a way so as not to undermine the fundamental common law rights.

One of the difficulties people often state with regard to this principle—it was mentioned in the Government's response to the independent review of administrative law—is that there is not necessarily a very clear list of what these fundamental common law rights are. So in scrapping Section 3 there could be a problem either of a retrograde protection in human rights, with potentially more cases going to Strasbourg and rights not necessarily coming home, or of a greater lack of clarity as to what rights we have, when they can be protected and how far they will be protected. If you were giving me a choice between scrapping and amending, I would go along the lines of potentially amending rather than scrapping Section 3.

With regard to the advantages and disadvantages of amending Section 3, there is a case for thinking very carefully about what the wording would be, how it would change and the requirement for ambiguity before you

can even go away and interpret legislation. If we were thinking about aspects of ensuring things were compatible with the wording or overall purpose of legislation, I am not sure that is too far removed from what the UK courts are already doing. The case law developed since Ghaidan v Godin-Mendoza is not perfect, and there could be some areas where we might think they have gone too far. But they do try to think about the wording, and they also try to think about purpose.

We also have to think very carefully when the Government suggest a particular wording for Section 3 rather than wanting to go for a Section 4 declaration of incompatibility. Sometimes you find that government barristers will say, "Here's the wording. Could we agree the wording with another party of how we want Section 3 to be read?" Sometimes it can be advantageous even to the Government to have that ability to use Section 3 in certain circumstances. In the example given by Professor Tomkins, you could suggest that Parliament is free to legislate and is in the process of doing so with regard to protest rights when it thinks that perhaps interpretations have gone too far.

David Simmons: Thank you. Hélène, perhaps you would like to just round this up?

Dr Hélène Tyrrell: Yes. I just wanted to underscore that it is important not to overlook the fact that the impact of Section 3 extends beyond the courtroom. The duty to interpret legislation compatibly with the convention is not just laid on the courts; it is something that public authorities need to keep in mind when they are making decisions. A public authority must act compatibly with the convention under Section 6, and the only defence to that is if they are following primary legislation and, by implication, they cannot read it compatibly or they cannot decide to act compatibly under it. There are many laws that are capable of being operated both compatibly and incompatibly with the convention, and, depending on the facts of a particular case, Sections 3 and 6 together tell public authorities to be guided by convention rights in making decisions in those cases.

A short point to make is that there is an undertone running through Section 3 discussions which assumes that when the courts apply Section 3 and stretch legislative language to make it compatible with the convention, they are doing so contrary to the will of government. In reality, the Government are very involved in these conversations, and government lawyers frequently ask the courts to make the legislation work through the application of Section 3 in preference to the possibility of proceeding to a declaration of incompatibility under Section 4. I believe that is correct, but Lord Mance will be able to correct me, I am sure, if I am wrong.

Lord Mance: I entirely endorse what the last two speakers have said. In my experience, it is in no way uncommon that, in this situation, where a question of incompatibility arises, the government lawyers on instruction invite the court to use Section 3 rather than make a declaration of incompatibility. It avoids Ministers getting a degree of egg on their face

through having stood up in Parliament and certified compatibility. It means that the legislation is compatible, and courts, not surprisingly, give some attention to that sort of request. But the Act is a deliberate choice to introduce this unconventional interpretive principle, for the reason that I have reiterated already: that people do not have to go off to Strasbourg or persuade Parliament to pass retrospective legislation in order to get proper redress in the individual case.

Abolishing Section 3 would mean more declarations of incompatibility and more Strasbourg challenges. If the Government want that, it is entirely open to them to do it. I would certainly not restrict the operation of any interpretive principle to cases of ambiguity, because it would be difficult to know what that meant. There is a general presumption that legislation will give effect to the country's international obligations and protecting human rights in any event. You will not be able to abolish that if you introduce some reference here to ambiguity. I am not sure how the interplay would work out with those general principles.

As to the cases, this is probably an area where I would regard Professor Tompkins as having overemphasised its importance. I am not sure it is the most critical issue. Obviously, in some cases it is important, but as the consultation paper itself says, re A, which one can disagree with—Lord Hope did not go along with the majority—is probably the high water mark. It is superseded in its approach, as Professor Young explained, by Ghaidan v Godin-Mendoza, which introduces a very considerable restriction: that before the Section 3 interpretive tool can be used, you have to be satisfied that its use would go with the grain and be consistent with the thrust of the legislation. The only modern case cited in the consultation paper is Gilham, in which a district judge was held entitled to whistle-blower protection. I would have thought this hardly a controversial result, even though it did not strictly fall within the statutory wording. I am not sure why that is regarded as so objectionable, but it is a one recent decision.

As to the decision regarding Ziegler, which Professor Tomkins mentioned, I am in a slightly embarrassing position because my wife was party to this decision. I hasten to say that I was never involved in it myself and I have not studied it, but I have just turned it up on my iPad, and I am not sure that Professor Tomkins, with respect, is right in saying that this is a controversial Supreme Court decision. What the Supreme Court was doing in this case was deciding whether, as a matter of proportionality, the district judge's decision was maintainable. In other words, was it so blatantly wrong that it had to be set aside? The court split, but there does not appear to have been in the Supreme Court any controversy about the application of the interpretive provision at all. I read from the minority judgment of Lord Sales that, "The Divisional Court construed section 137 in light of the interpretive obligation in section 3(1) of the HRA and having regard to the duties of public authorities under section 6 … No one has criticised their construction of section 137 and I would endorse it".

Thus, before the Supreme Court there was no argument about the interpretive principle; it was common ground. The issue was, as I said, whether the district judge had made a Colston-type decision and gone wildly wrong in his assessment of what was proportional. Appellate courts rarely intervene in this sort of situation. The majority evidently thought that the decision was okay and could stand, the minority did not. But I emphasise that everything must be taken with a pinch of salt in the night. There was my wife's involvement, but I have nothing to do with the case.

Professor Adam Tomkins: Very briefly on Ziegler, I am afraid that what Lord Mance said there is not quite right. Lord Sales' judgment is supportive of the Divisional Court judgment, which was given by Lord Justice Singh as I recall, which the majority, including Lady Arden in the Supreme Court, overturned. The dissent was endorsing the judgment of the Divisional Court, which the majority in the Supreme Court overturned. I am afraid that the point about the application of Section 3 of the Human Rights Act to Section 137 of the Highways Act was precisely the issue that divided the Supreme Court. It has been a matter of intense controversy, not least in the House of Lords debates over subsequent public protest legislation. But, as I said earlier, if the committee wants to go into further detail about that, we can perhaps do it in writing.

Lord Mance: I stand corrected as to which way around it was. Equally, I have not read the whole judgment. But I would have thought that that statement is a general statement that applies to the whole court. In other words, there was no argument about the application of the interpretive obligation. But since we are arguing about a point of law, perhaps Professor Tomkins and I can think about it a bit further.

David Simmons: Back to you Chair, I think.

Chair: Thanks, David. It is an interesting debate and I think Professor Tomkins has offered to write to us. If you do not mind, Professor Tomkins, we will take you up on that offer, and perhaps, Lord Mance, we could copy you into the correspondence and give you a right of reply? How would that be?

Lord Mance: Yes, obviously.

Chair: Thank you very much. Lord Brabazon has the next question.

Q9 **Lord Brabazon of Tara:** Thank you, Chair. Do you think that the combined effect of the changes proposed in the government consultation would lead to an increase in the number of adverse rulings from Strasbourg and the number of declarations of incompatibility issued by UK courts? How could this potential increase be managed, particularly given the existing constraints on parliamentary time?

Professor Adam Tomkins: I do not think there is necessarily a connection between tweaks to the Human Rights Act and the number of cases that go to Strasbourg. Lord Mance is absolutely right in pointing out

that one of the policy intentions of Lord Irvine in the House of Lords and Jack Straw in the House of Commons when they introduced the Human Rights Bill in 1997-98 was to end up with a situation where there were fewer cases from the UK courts getting to Strasbourg; that is correct.

It is also correct to say that that policy objective has been achieved in that the number has gone down, as has the number of UK Government defeats in Strasbourg. But it does not follow that tweaking the aspects of our human rights laws that we are talking about in these proposals—namely, addressing some of the concerns about Section 2, addressing some of the concerns about the balance or the relationship between Sections 3 and 4, improving the way in which our law protects freedom of speech, and perhaps inserting an additional right to trial by jury—will ineluctably or inevitably lead to an increased number of cases going to Strasbourg or an increased number of UK Government defeats in Strasbourg.

If we address the current imbalance between Section 3 and Section 4, one could expect, maybe even want, there to be an increase in the number of declarations in the compatibility that are given. Lord Mance and the other witnesses have talked really interestingly about the number of cases in which government lawyers are arguing for Section 3 to be used rather than Section 4. Lord Mance suggested that that might in some cases be because government lawyers are, on instruction, trying to secure outcomes that result in less egg on ministerial faces, a declaration of incompatibility being some sort of badge of dishonour or some such.

I do not think it should be read like that at all. A declaration of incompatibility is exactly how the Human Rights Act was supposed to work in cases where courts, as in the Ziegler case, were confronted with legislation that they could not read compatibly with convention rights. There is no badge of dishonour attached to having a declaration of incompatibility issued. There certainly should be no badge of dishonour, because it is precisely the scheme of the Human Rights Act that the judges have neither the last nor the only word on the meaning and application of our human rights laws. They have a really important role to play. But the consequence of a declaration of incompatibility is that Parliament is then invited to re-examine its statute book. Whether it continues to wish to have the impugned provision on its statute book or whether it wishes to amend the legislation to make it rights compatible, that decision is Parliament's. It is not a decision for the court, and that is one of the things about the Human Rights Act that I like.

I fully acknowledge that if we, in a sense, have less reliance on Section 3, it follows that there will be more reliance on Section 4. If there is more reliance on Section 4, it follows that there are likely to be more declarations of incompatibility in the future. I do not think that is a bad thing at all, because it goes right back to the very beginning of our conversation earlier this afternoon when we were talking about the constitutional distribution of responsibilities. It is, in the end, Parliament's responsibility to decide whether it wishes to continue to have in force

provisions of legislation which the courts have said are incompatible with human rights. That is, in the end, a decision for Parliament that is recognised in the Human Rights Act in cases where Section 4 is used. The argument is that there are some cases, including, I would argue, as a recent example the Ziegler case, where Section 3 is being used as a shortcut through that in a manner that is constitutionally undesirable and inappropriate. But it does not follow from any of that that we will see more cases going to Strasbourg. That would be my answer.

Dr Hélène Tyrrell: On the declaration of incompatibilities question, that is really interesting and important now. I would agree in principle with Professor Tomkins on one thing, which is that declarations of incompatibility should not be a controversial direction for a court to end up in in a case. It is within a scheme of the Act that it punts the issue back to the democratically elected body.

That said, I recently looked very closely, with my colleague Conall Mallory, at the way the courts treat declarations of incompatibility or their discretion under Section 4 to make declarations of incompatibility. One of the surprising things that people may not be very aware of is how often the courts are entitled to make a declaration of incompatibility—as in, they find themselves in the space where they can legitimately exercise the discretion to make a declaration of incompatibility, but where they choose not to do so. Typically, that might include because they consider that even though a declaration of incompatibility is merely declaratory, there is still some implicit force to a declaration of incompatibility and they would prefer, generally speaking, to leave it to the legislative body to think about, or because they think the legislative body is already thinking about it, or for any number of other reasons.

Part of that exercise of restraint in that discretionary power has, some people argue, made the declarations of incompatibility more powerful, because if you do not always make them, when you do make them you should probably take notice of them. The flip side to that is that if declarations of incompatibility become much more frequent, their potency might become diluted, which would change the dynamic of what happens when a declaration of incompatibility is issued. I make that point, because it is one of the ways in which the government proposals consider dealing with incompatible secondary legislation. If that is the case, it would vastly increase the number of declarations of incompatibility that are made.

Professor Alison Young: I would like to focus on the aspect of your question that thinks about what we can do in Parliament if we do end up with more declarations of incompatibility, particularly given the pressures on time. That is a very interesting and important question, and I hope that this committee and the Government, in response to the committee, when they write that review, will take it very seriously, because there is a genuine need to ensure that Parliament engages more effectively with these kinds of human rights issues.

However, the main problem is how we do that in the time. There are a number of things that could be thought about. We have an annual report from the Ministry of Justice that looks at declarations of incompatibility and adverse judgments from the Strasbourg court. We could ensure that there was always a debate in response to that report. When these decisions are made, we could ensure that a committee like the Joint Committee on Human Rights, for example, had the ability to look at these and perform a kind of scrutiny exercise in the same way we saw when we were looking at modifications through delegated legislation concerning Brexit and considering whether we needed the negative procedure or whether it should be moved to the affirmative. You could have something similar and think about whether this could be resolved quite quickly and so perhaps go through a quicker process, or whether we needed legislation, or further debate, or whether this could be done through the current Section 12 process.

There is an odd irony in some senses in that it can be quicker to enact legislation in response to an adverse judgment or a declaration of incompatibility than it can be to use Section 10, because Section 10 has the draft affirmative element and you have to lay it before Parliament for 60 days. There is work to be done here to examine whether there should be a range of different responses, because sometimes you have an obvious answer to a particular declaration of incompatibility.

In the Steinfeld case, for example, it was clear where the direction of travel was going to go within Parliament and that it could be resolved perhaps quite quickly without necessarily full debate. But you also have more complex issues where there needs to be further debate or where there might be a choice of ways of making sure that legislation is compatible with convention rights, and that might trigger more detailed legislation.

Without wishing to add to your jobs, could you perhaps think carefully about those different procedures and suggest the best way, and put it on to the political agenda to help these changes to come through more quickly?

Lord Mance: Chair, might I just make one very brief comment on the last question?

Chair: Yes, please do.

Lord Mance: I simply wanted to emphasise that I do not think courts shirk the duty to decide between Sections 3 and 4, although I was very interested to hear what Dr Tyrrell said about the discretionary decision and whether actually to grant a declaration. There are quite a lot of cases, including Anderson, which I mentioned earlier, but also Bellinger and others where declarations were made, although it was argued that they need not be. Despite the pleas of government lawyers, I think courts do their job.

Chair: Thank you.

Q10 **Angela Richardson:** I have appreciated all the very full answers from the witnesses, but it will be interesting to see how concise an answer we can have to my question. When deciding whether a measure is necessary in a democratic society, do you think the UK courts give sufficient weight to the views of Parliament? Should the courts start from the basis that if Parliament has legislated on an issue, that establishes that Parliament considers a measure to be necessary in a democratic society?

Dr Hélène Tyrrell: We have to remember that separation of powers in the UK is imperfect as a starting point. The Westminster model does not clearly separate the legislature from the Executive. It draws government from the Members of Parliament, so the Government of the day necessarily exercise influence over the legislature. Now, if we accept that to be true, it is quite difficult to be persuaded that the mere fact of legislation should be taken to foreclose conclusions about what is necessary in a democratic society. In reality, it may simply reflect what the Government of the day decided was a good idea to put into law and had influence over Parliament to be able to do so. I will start the discussion there but let it move on.

Angela Richardson: Thank you very much. Professor Young.

Professor Alison Young: Thank you. I would say that the courts definitely do try to take this into account. You can see evidence of decisions of the courts where in particular, when they can see that there has been democratic discussion of a particular issue, they will give more weight to that discussion. Also, when you are dealing with more controversial areas like social and economic rights, they will again be very cautious about going too far and will give weight to Parliament.

But I would exercise the same aspect of concern that there is no necessary correlation between a policy choice of a particular Government that is then voted in by Parliament. It does not necessarily mean that this must be a proportionate restriction on a particular right. I would emphasise that the more deliberation and debate in Parliament there is about this issue, the more ability there is for the courts to look at that. It recognises that Parliament does not reason in the same way as courts, and it tries to give respect to those views.

Angela Richardson: Thank you. Lord Mance.

Lord Mance: If Parliament's intention is clear and the courts are concerned not so much with parliamentary views but with parliamentary intention objectively expressed in the legislation that it passes, that is a starting point and there is an onus on anyone criticising it as unnecessary in a democratic society to make that proposition good. But we certainly do not scrutinise what Professor Young described as democratic discussion because of the difficulty with the Bill of Rights as a block. We would not wish to get involved, nor would you wish us to get involved, in examining individual debates to try to value them as debates and weight them accordingly.

There is a strong presumption that you start with what Parliament has enacted, and if somebody says that it is contrary to the convention rights they have to make that good. That said, we weigh what is necessary according to the circumstances. As Professor Young rightly said, if it is a matter of social or economic rights, there is a far greater inhibition against interfering than there is if it is in relation to an area where the courts are familiar, such as personal liberty. I hope that Nicklinson, to which I was of course a party, shows a considerable understanding of institutional competence and the appropriateness of some areas being dealt with through Parliament rather than the courts.

Angela Richardson: Thank you very much, Lord Mance. Professor Tomkins.

Professor Adam Tomkins: Thank you very much, Angela. This is a really important aspect of what the Government are proposing, because it reflects on the fact that the Human Rights Act does not say that courts should have either the last or the only word in balancing where competing interests lie in complex cases like Nicklinson about assisted dying or Animal Defenders International about the appropriateness of our general prohibition on political advertising in the UK broadcast media or indeed countless other examples. It is a critically important part of the process that Parliament gets to decide where the balance of competing public interests lines. That is reflected in the architecture of the Human Rights Act. By and large, the courts tend to recognise that, but there are exceptions, and we do need to think about this.

Lord Mance mentioned the Nicklinson case. The Nicklinson case was decided by a panel of nine Supreme Court justices who fell into three different camps. Some of the judges thought that it was not appropriate at the moment for the courts to insist on a change of law with regard to assisted suicide. Some of the judges thought that it would never really be appropriate for the courts to insist on a change in the law with regard to assisted suicide, because it was rightly a matter for Parliament. But some of the judges decided that the law should be changed and would have granted a declaration of incompatibility but that the provisions of English statute were incompatible with the ECHR. Those judgments illustrate that there are judges, even at the highest level, who do not, in my view, defer appropriately—or adequately give appropriate weight, if you do not like the language of deference—to the judgment of government and Parliament.

I know you want us to be quick, Chair, but I have just one final response, if I may, to something that Hélène Tyrrell said. If it is inappropriate for Parliament to legislate for the way in which courts should decide cases, it is also inappropriate for courts to inquire into whether a parliamentary intention is really only a reflection of the Government of the day or whether it really is what it says it is constitutionally, which is a parliamentary intention. Lord Mance is absolutely right to remind us that there are constitutional imperatives as to why courts should not do that.

My answer to the question is that, by and large, because of the prudent judgment that most of our judges bring to this most of the time, our courts in the United Kingdom have given sufficient weight to the intention of Parliament in its legislation. That there have been notable exceptions to that, including at the very highest level, should give us all reason to pause and think about it.

Angela Richardson: That is very helpful. Now back to you, Chair.

Q11 **Chair:** Thank you, Angela. The final question of our session this afternoon is about the impact of the proposed reforms on the devolved settlements. We have had written evidence from the Northern Ireland Human Rights Commission, the Scotland Human Rights Commission and other various stakeholders, which have all expressed the view that the UK Government's proposed reforms represent a regressive approach contrary to progressive steps taken to realise human rights in the devolved nations. I wonder whether each of you agree with that and what impact you think such divergence would have on the devolved settlements.

Professor Alison Young: It is important that we think carefully about these concerns and think very carefully about maintaining the balance between the devolved legislatures and the Government at Westminster. I would be very concerned about modifying the ability to strike down delegated legislation that has come from some of the proposals, because it would be very difficult to say, on the one hand, that delegated legislation made by a UK Minister cannot be struck down if it is incompatible with convention rights but that, on the other hand, the devolved legislatures may not legislate contrary to convention rights and their legislation can be struck down. That would send a very inappropriate message, and I would be very cautious. There are other ways of dealing with potential problems of strike-down issues in delegated legislation.

Secondly, I would draw attention to the recent UNCRC reference case with regard to Scottish legislation to implement the United Nations Convention on the Rights of the Child and the very broad way in which the Supreme Court interpreted when devolved legislatures might act in a way that would limit the ability of Westminster to legislate in a devolved area for a devolved country.

In particular, there were concerns that Section 3 and Section 4 of the Human Rights Act, or equivalents to them, would make it difficult or impossible and so were not the kind of clauses that we could have. This would then impede the ability of the devolved legislatures if they thought, "Well, the UK is perhaps bringing in legislation that we do not like. We'd like to preserve our ability to use something equivalent to Section 3 and Section 4 with regard to how human rights are protected in our devolved area". If it was then perceived that they were unable to do that when there was a desire to do so, that could also bring problems as well. So, yes, we need to think very carefully about that interrelationship and ensure, particularly with regard to Northern Ireland, that we do not

undermine the progress that has been made on protecting human rights there.

Lord Mance: May I simply endorse all that Professor Young has just said? I particularly agree with her comment about delegated legislation. It would be a strange, unexpected and inappropriate situation in which you could strike down the legislation of the devolved Administrations but could not in relation to secondary legislation, which does not receive the attention that would merit it being given the status in this context of primary legislation. In my view, that would be a real backward step. I endorse entirely her comments about concern for the position, particularly in relation to Northern Ireland, if we start arriving at a situation where the rights are diminished, or indeed perhaps even worse in some respects, where they are different in different jurisdictions.

Chair: Thank you. Dr Tyrrell.

Dr Hélène Tyrrell: I am happy to subscribe to the very articulate explanation given by Professor Young and Lord Mance, especially on the point about delegated legislation, which I just repeat because it is so important.

Chair: Thank you very much. Professor Tomkins.

Professor Adam Tomkins: Thank you, Chair. As you very well know, I spend a lot of time with both my legal and my political hat on thinking about the implications of legislation and government proposals for the future of the United Kingdom. I was very struck by the way this point is addressed in the consultation paper. Perhaps I can just quote from it briefly. In paragraph 262, the Government say this: "We recognise that while we are a union with shared values, we are also a union of diverse interests, history and legal traditions. Our existing human rights framework reflects this balance by setting out the same substantive rights guaranteed across the United Kingdom while allowing through the devolution settlements for devolved legislation relating to human rights issues within devolved policy areas and different procedural application in devolved areas".

That struck me as a really important, and if I may say so insightful, way of approaching it. It is as if the United Kingdom sets the floor for our human rights protections across all the nations of the United Kingdom. Where there is the devolved power to raise the ceiling, that devolved power may be exercised so long as it is exercised within devolved competence and compatible with the devolution settlement, as it was for example in the UNCRC Bill passed by the Scottish Parliament, of which I was still a Member last year. Certain provisions of that Bill were quashed by the Supreme Court in the reference that has already been referred to, but most of the Bill remains intact and it is a good example of the Scottish Parliament legislating within its competence for increased rights protection, perhaps, but certainly increased rights recognition in Scotland in comparison with the position on children's rights generally in the UNCRC, particularly in England, Wales and in Northern Ireland.

We have to understand that the Human Rights Act is one of the building blocks of the United Kingdom constitution, and it is properly reserved to the United Kingdom Parliament to reflect on, and where it deems it appropriate to amend, that aspect of the United Kingdom's constitutional settlement. The proposals in the Government's consultation paper pose a problem for the devolution settlement. They are based on exactly that recognition that we see in paragraph 262 of the consultation document, which is to say that at a fundamental level our human rights laws are and should be the same across the whole of the United Kingdom. Within devolved competence, however, the Welsh Parliament, the Northern Ireland Assembly and the Scottish Parliament can legislate on the basis of those foundations to raise the ceiling of human rights protections that we have in the law in the UK.

Chair: Can I ask everyone's forbearance and come back to Professor Tomkins with a question about his answer there? I hear what you are saying about the Westminster Parliament providing a floor above which the devolveds can go, provided they do not go out with their competence, if I understood you correctly. But there is a potential problem with that in relation to the proposals about the right to a jury trial. You will probably agree with me that there is a right to a jury trial in English law, but there is no right as such in Scots law. We have always approached it rather differently, and, as you will be aware at the moment, the Lord Advocate and Lord Justice Clerk have put forward proposals that we may have a pilot project to do away with jury trials in rape and serious sexual offences cases in Scotland.

We all have different views about whether or not that would be a good thing, and that is not so much what I am interested in. I am interested in whether, if we have a British Bill of Rights that enshrines the right to jury trial based on the English common law tradition, that would not cause problems in the Scottish jurisdiction where there has been no right to jury trial. Some of us might think there should be, but that is a different matter. Do you see what I am getting at?

Professor Adam Tomkins: Absolutely. It is a really well made point.

Chair: What do you think about that? I can see Professor Young nodding, and maybe I can bring Professor Young in as well.

Professor Adam Tomkins: It is a really well made point and really important, if I may say so, Chair. I would hope that there could be intergovernmental communication about this, law officer to law officer. As you know, the UK Government have their own bespoke law officer for Scots law, the Advocate-General. I would very much hope that relations between the Lord Advocate and the Advocate-General are such that if the Scottish Parliament were of the view that it was appropriate to consider legislation to amend what I, as an English trained lawyer, would call the right to trial by jury in a certain category of offences, because it has been demonstrated to be in the public interest at least to pilot trials in a particular area of criminal prosecution without juries, that could be

considered, notwithstanding the general principle that there is an understood right to trial by jury across all of these islands.

Again, I would just go back to what paragraph 262 says, which should be welcomed by unionist and nationalist alike. We are a union with shared values, but we are also a union of diverse interests, history and legal traditions, and our legal traditions as between English law and Scots law with regard to the right to trial by jury or the existence of trial by jury are different. I am a bit nervous, however, about going too far here. I would want to distinguish the current proposals that are being considered by the Lord Advocate and the Lord Justice Clerk from the altogether broader proposals that were brought to the Scottish Parliament by the Scottish Government last year, when I was still a Member of it, to abolish trial by jury generally in the name of the public health emergency that at the time we were dealing with. I led the opposition to that from the Opposition Benches, and I was right to do that, if I may say so. Of course, the Government withdrew those proposals. So I would be nervous in carving out too big an exception for Scotland with regard to trial by jury.

Chair: But it is another area where, despite our political differences, we agreed on that last year. Perhaps we should not go there in any more detail. Ultimately, I take your point about what is written in paragraph 262, but it would be fair to say—I will come back to Professor Young in a minute—that the proof will be in the pudding, will it not? It is deeds, not words, that matter. Those are perhaps fine words in the first part of paragraph 262, but some people might say that during the Brexit process, for example, we heard fine words about involving the devolved Governments in the decision-making, but that did not go as well as perhaps the headlines had suggested it would. I do not think I am being too controversial if I say, "Yes, good statement, but we need to see if it is adhered to".

Professor Adam Tomkins: I could not agree with you more. We do not agree on Scotland's constitutional future, but we do agree on quite a lot today, it would turn out. I would just say that Brexit was peculiarly difficult when it came to managing that with the devolution settlement. However, UK Ministers have announced that the power to freeze regulatory powers at Westminster and not allow them to be devolved, which the UK Parliament legislated for, without Holyrood's consent, in Section 12 of the EU withdrawal Act, will be repealed, because it never needed to be used, because common frameworks have been successfully negotiated and agreed across all the areas where UK Ministers wanted to see them.

If we can have successful political negotiations between the Governments of these islands on matters pertaining to trade in goods and services, surely we can have successful negotiations between the Governments of these islands on matters pertaining to the right to trial by jury. I am more confident and more optimistic than you might be, Chair, about

being able to get to those solutions without necessarily having to have huge legislative carve-outs for them.

Chair: Professor Young, can I bring you in on the question I asked about jury trials?

Professor Alison Young: Thank you. I will be very brief. It does raise the point that we need to think very carefully about what British rights are and perhaps what peculiarly English rights are, recognising that Scotland in particular has a distinct legal system and we need to tread very carefully in thinking about what that common baseline would be. In line with that, it is very important to ensure that, when we are discussing this review and taking it forward, if there is future legislation there is a full engagement and discussion, not just between the Westminster Government and the devolved Governments but between the Westminster Parliament and the devolved legislatures.

I am aware that the intergovernmental structures review has reported and has suggested a whole system of new committees to try to facilitate those interactions, and if we were to modify how human rights are protected it would be extremely important to focus on how far it is a British Bill of Rights and that there is full engagement with devolved Governments and legislatures moving forward.

Chair: Thank you very much, and thank you to all our witnesses this afternoon. It has been quite a long session, but it has been extremely useful. We are very grateful to you for your forbearance with our stopping and starting earlier.