Northern Ireland Assembly

Ad Hoc Committee on a Bill of Rights

OFFICIAL REPORT (Hansard)

Briefing by Human Rights Consortium

5 November 2020

NORTHERN IRELAND ASSEMBLY

Ad Hoc Committee on a Bill of Rights

Briefing by Human Rights Consortium

5 November 2020

Members present for all or part of the proceedings:
Ms Emma Sheerin (Chairperson)
Mr Mike Nesbitt (Deputy Chairperson)
Ms Paula Bradshaw
Mr Mark Durkan
Miss Michelle McIlveen
Mr Christopher Stalford
Mr John O'Dowd

Witnesses:

Mr Kevin Hanratty	Human Rights Consortium
Professor Christopher McCrudden	Queen's University Belfast

The Chairperson (Ms Sheerin): Today we have a briefing on a report titled 'Economic and Social Rights in Northern Ireland: Models of Enforceability' by Professor Christopher McCrudden on behalf of the Human Rights Consortium. We will hear from Kevin Hanratty, the director of the Human Rights Consortium, and Chris McCrudden, professor of human rights and equality law at Queen's University.

Christopher and Kevin, thank you very much for joining us. I appreciate your patience. I ask you to begin your briefing.

Mr Kevin Hanratty (Human Rights Consortium): Hello.

Professor Christopher McCrudden (Queen's University Belfast): Hello.

The Chairperson (Ms Sheerin): Hello. How are you, Kevin and Chris? You can begin your briefing when it suits you.

Mr Hanratty: Thank you, Chair. Good afternoon to the Committee, and thank you for the invitation to me and Chris to give evidence.

Our plan is that I will give background context to the research report that we have just launched and want to talk about today. Chris will then give an overview of the models that have been developed in that report, if that is OK.

I represent the Human Rights Consortium, which is a coalition of over 160 member groups across Northern Ireland from various communities and sectors. Historically, the unifying factor in the consortium as a coalition has been the idea of the creation of a human rights-based society.

Fundamental to that has been the idea of an instrument such as the bill of rights envisaged under the Good Friday Agreement to deliver that type of society.

We have been to the fore in arguing and advocating for the creation of that bill of rights for Northern Ireland ever since the Good Friday Agreement was signed. That is why we have, over the past 10 years, been quite frustrated by the lack of progress on delivering on that bill of rights, but it is also why we are quite glad to see the Committee in operation. We wish you well in your work, and we hope that we can assist you in your deliberations. At the end of the process, we would like to see recommendations that will move us closer to the achievement of what we would call a strong and inclusive bill of rights for Northern Ireland.

Your discussions are not really starting from scratch. We know that there have been numerous consultations and engagement opportunities historically, and we have the Human Rights Commission's advice. We would like to play a role by trying to add value to some of the debates and conversations that have happened to date. One of the ways in which we have seen the process and dialogue break down historically, at least at a political level, is in the conversation about the inclusion of economic and social rights in the bill of rights and the manner in which they could be enforced. It is worth outlining that we would *[Inaudible]* having various strands of enforcement, including a judicial element as a method of last resort and a backstop in case the legislative and executive functions fail to protect fundamental economic and social rights. That is replicated in some of the debates, and in the commission's advice in 2008 as well.

At a political level, we are stuck with two *[Inaudible]* models of what enforcement and economic and social rights would look like in a model of a bill of rights. At one end of the spectrum, we have the idea of declaratory principles, where the rights would be declared without there being any real enforcement mechanism. At the other end, we have full legal enforceability through the courts as a mechanism. That is again akin to some of the recommendations from the Human Rights Commission. There was not really much exploration of the options in between or of how different pieces from different jurisdictions could be utilised to build on the Human Rights Commission's advice or to remove some of the anxieties that people had about the idea of enforceable social and economic rights.

That is where the report comes into play. We did not commission it recently. We commissioned it a couple of years ago, but it plays very well into the process that you are going through now. Fundamentally, what it does is that it looks at that middle ground — the middle of the spectrum — between declaratory principles and fully enforceable rights. It looks at what enforcement options are available in the middle of the spectrum. For us, it provides food for thought and a toolkit of ideas that you on the Committee or we in civil society and beyond can really take on board and try to digest in order to create greater dialogue and be creative with the idea of how we enforce social and economic rights that could add value to what the commission has already put into the public domain. We are very thankful for the role that Chris and his team at Queen's and beyond played in developing and commissioning the report. It is our hope that it will add value to the debate that we have had to date and that it will create more options for us as we discuss the bill of rights and move towards creating it.

I will leave it at that and ask Chris to go into more detail on the models.

Professor McCrudden: Thanks, Kevin. With your permission, Chair, I will share my screen and go through some bullet points via PowerPoint. Is that OK with you?

The Chairperson (Ms Sheerin): Absolutely.

Professor McCrudden: Thank you very much.

Kevin's starting point was the motivations behind the report. That is really important. I will first sketch out what we are talking about when we talk about economic and social rights. The definition that we have taken from the Office of the High Commissioner for Human Rights is a good starting point:

> *"Economic, social and cultural rights" —*

I will come back to "cultural rights" in a minute —

> *"include the rights to adequate food, to adequate housing, to education, to health, to social security ... to water and sanitation, and to work."*

That is a fairly comprehensive set of what we might call bread-and-butter issues. We were not asked by the Human Rights Consortium to consider cultural rights, not least because they raise somewhat different questions. We are really focusing in the report on the economic and social rights element.

The starting point here is that we already have a lot of those rights in the United Kingdom. The United Kingdom has signed up to and ratified the International Covenant on Economic, Social and Cultural Rights — you are well aware of that — and the Council of Europe's European Social Charter. There is therefore a set of international obligations that the United Kingdom has taken on regarding those economic and social rights, some of which are specifically protected by elements of national UK law, whether it be common law or statute. We have only to think of the extensive legislation dealing with questions on housing, education or social security. We are not starting from a blank sheet of paper. Rather, the debate is on how to make the rights that are set out in texts such as the international covenant more effective in practice and to prevent regression.

In the context of the debate about the bill of rights, which is the Committee's primary focus, as Kevin said, two main contrasting approaches are often identified. Declaratory principles are sometimes thought to be adequate, whereas full enforceability seems to be the name of the game in other cases. What we were asked to do, as Kevin said, is to identify methods of enforcing and providing for economic and social rights in Northern Ireland that span the middle of that spectrum, as it were, between the declaratory principles and full enforceability.

The purpose of doing that, as Kevin also said, is to stimulate debate about how those economic and social rights can be better delivered, even if the approach of full justiciability is not adopted. We were asked to be innovative and creative. I have listed the authors, who are a team from Queen's. Our position is that the models that I am about to set out are for debate. We do not take a position on whether full justiciability should be adopted nor do we rule out any other constitutional-type reforms. Equally, we neither endorse nor reject those proposals in the advice of the Northern Ireland Human Rights Commission that you are well aware of. Nothing that we are suggesting gets in the way of enacting those principles, if that should be the Committee's decision. We are essentially attempting to bring in alternatives, for the purposes of making the debate clearer, on what a bill of rights might encompass. There are therefore lots of contexts, which are set out in the report, but I will not delay further.

I will discuss the five models, which are listed on your screens. As I say, we envisage them being in between simple declarations of support for economic and social rights on the one hand and full justiciability or enforcement on the other. I will talk about each model in a little more detail. The first model is what we call "pre-legislative scrutiny". The second is what we call a "piecemeal approach" which would include socio-economic requirements in specific legislation. The third is what we call "fundamental non-justiciable but constitutional duties". The fourth is what we call "progressive implementation", through, for example, a planning obligation, with light-touch judicial review. The fifth is what we call "trade conditionality".

To repeat, we are not ranking the models in order of their political feasibility or effectiveness. We are simply identifying them as leading candidates for that middle-of-the-spectrum approach. We have adopted a comparative approach that draws on pretty extensive experience from Canada, the Republic of Ireland, India and South Africa, among others, as you will see in the report.

I will now consider the models in a bit more detail. The first model that we suggested was "pre-legislative scrutiny". That would involve placing responsibility for dealing with economic and social rights on local politicians. The primary emphasis is on political obligation: local politicians would be reminded every so often of the international legal obligations to implement those rights. One way in which to do that would be to establish, probably through a change to the Assembly's Standing Orders, an additional Committee charged with regular pre-legislative scrutiny of Bills going through the Assembly for their compliance with economic and social rights: a bit like the obligation on the Westminster Parliament to certify that any legislation being introduced by a Minister is in compliance with the European Convention on Human Rights (ECHR). We are anticipating that that type of scrutiny could stimulate Ministers or civil servants to take those kinds of rights more seriously when considering policy options. It might also involve an amendment to the current ministerial code for Northern Ireland Ministers and perhaps particular targeting of the budgetary process. That is model one.

Model two is about including socio-economic requirements in specific legislation. The idea here is quite simple: you would insert references to economic and social rights into specific Assembly legislation or, indeed, Westminster legislation that applies to Northern Ireland. One example put to us

was that of amending section 75 of the Northern Ireland to include something like socio-economic status as one of the grounds subject to the mainstreaming requirements of schedule 10 to the Act, thereby applying a due regard duty in that context. That would mirror what has been going on, particularly in Scotland and Wales, where the equality duty has been expanded to include socio-economic status or an equivalent.

This is a brief footnote, but the point of the models is not to suggest that any of them is costless or does not have difficulties associated with it. In fact, in each of the models that we are looking at, we specifically identify potential advantages and potential disadvantages.

Model three is about what we are calling constitutionalising economic and social rights principles. What we envisage here is the potential for a Northern Ireland constitution to incorporate non-directly justiciable duties on the state — so-called directive principles — to apply socio-economic principles when making laws. There is an example of that both in India and in the Republic of Ireland, with minimal elements of judicial recognition in the Republic in particular. In the report, we identify an alternative to that in Finland, and we can go through some of the details of that in a moment, if that would be useful.

Model four is, again, somewhat different. It envisages the idea that the Assembly and the Executive would be under a duty to take reasonable legislative and other measures to achieve the progressive realisation of economic and social rights. Again, the emphasis is on the Assembly and the Executive being given primary responsibility to decide how best to achieve that agreed aim, with a planning idea envisaged: a five-year plan or whatever. Judicial involvement here would essentially be restricted to judicial review of the reasonableness of the plan brought forward by the Assembly and the Executive.

Model five is based on the idea of incorporating economic and social rights through future trade agreements. What is obviously on everyone's mind is whether the United Kingdom agrees, as part of the future relations agreement that is currently being negotiated, to implement a basic set of economic and social rights as a condition of that agreement being concluded. We envisage that the issue of how far, if at all, to incorporate economic and social rights in future trade agreements — so-called trade conditionality — will run and run after the transition period, irrespective, in a sense, of the EU-UK future relations agreement. The Assembly will be aware that, in the White Paper from February 2019, the UK Government announced that the devolved Administrations would be involved in making recommendations on future international trade policy, although I have to say that that has been thrown into some question by the effects of the Internal Market Bill, which we might want to return to in further discussion. Those are therefore the five models.

The last point that I want to make is that those models address several common objections to incorporating economic and social rights, and there are three objections that are often made. One is about the vagueness of the rights. The second, which is critical, is that incorporating economic and social rights is regarded as undermining political responsibility, particularly for budgetary and distributional issues. The third is that it is unsuitable for judges. We are suggesting that the models, separately and together, address each of those objections in somewhat different ways. Vagueness is addressed in model two by the need for specification of particular legislation. On the issue of incorporating economic and social rights undermining political responsibility, we saw that each element in the models stresses political responsibility rather than undermines it. On the issue of it being unsuitable for judicial decision-making, we have seen, in each of the models, that the judicial role is minimised, and removed entirely in some of them.

We do not think of the models as being alternatives to one another. Rather, we think of them as identifying what might be called building blocks, which can provide the material for a new approach. That is what we are envisaging here, with declaratory principles as a potential at one end of the spectrum, full enforceability at the other end and these different models fitting in between the two ends of the spectrum.

I will end at that point, if I may. I am very happy to have a further discussion and take questions.

The Chairperson (Ms Sheerin): Thank you very much to both of you for your time this afternoon, and thanks for the presentation. It was quite different from a lot of the presentations that we have had thus far, given how practical it was and how you weighed up pros and cons and outlined how different things would take shape.

I want to ask some questions that follow on from one of your last points, which was about the Internal Market Bill and trade arrangements. That is a topical issue. You mentioned that the first model would

place a responsibility on the Assembly and require Ministers to act by inserting economic and social rights into legislation. You suggested a scrutiny role for a Committee. As you commented, the UK Government said that devolved Administrations would have a role in shaping the Internal Market Bill, and we are perhaps seeing that that has not quite come to pass. What impact do you think that will have on how something like model one would work practically, particularly when you consider that the Stormont Administration have fallen and risen again many times? What are the practical implications?

Professor McCrudden: Kevin has suggested that I lead on some of the questions and that he will chip in as necessary. You asked about the effect of the Internal Market Bill. We have yet to see its final shape, so I am speaking about it in the context of its non-final form. As it is constructed at the moment, it presents three potential difficulties for some of the issues that we are talking about today.

The first is, of course, the most controversial element, which is the willingness and ability to override international and domestic law in certain circumstances, and that is what has attracted most of the adverse publicity, not least from the European Commission. To the extent that we are talking about economic and social rights as arising, in part, from international legal obligations on the United Kingdom, the Internal Market Bill does not send out a very good message about the willingness of the United Kingdom, in certain circumstances, to abide by those international obligations. That is one problem.

The second problem that arises is that, in making the suggestions about potential models, we have assumed that the Executive and the Assembly will have available to them the full range of devolved powers that they have at the moment. That is a reason for a lot of the complaints arising from Scotland in particular, but parts of the Internal Market Bill would appear to undermine the ability of the Assembly and the Executive to have the full range of discretionary powers available to them that they have at the moment. There seem to be powers being taken by central government at Whitehall to intervene in devolved areas, particularly through funding mechanisms, and that may have the effect of taking over or interfering with the ability of the devolved Administrations to exercise their current powers.

To be complete, there is a third problem with the Internal Market Bill. It also relates to the question about rights. You will be aware that article 2 of the Ireland/Northern Ireland protocol specifies that there should be no diminution of rights arising from the United Kingdom's exit from the European Union. That non-diminution requirement for both human rights and equality rights is specified with greater particularity in annex 1 to the protocol, which lists a series of European Union directives in the equality area. In article 2, the British Government give the commitment that, if there are changes to that list of equality directives subsequently from the European Union — if, for example, one of them is replaced by the European Union with another directive — it will be that new directive that applies in Northern Ireland. That will have to be legislated for, however, in order to keep up the standards. The problem that the Internal Market Bill gives rise to, at least on one reading, is that those pieces of legislation that update equality legislation, in order for it conform to the article 2 requirement of the protocol, are potentially challengeable, because they give rise to differences between Northern Ireland and the rest of the United Kingdom. Another part of the Bill, which deals in particular with the non-discrimination principle operating among the different parts of the United Kingdom, seems to envisage that those differences could be challengeable as being directly or indirectly discriminatory, because they would give rise to differences in trading arrangements between Northern Ireland and the rest of the United Kingdom.

I am sorry that I have gone on at such length, Chair, but those are the difficulties that the Internal Market Bill appears to give rise to. There is quite a lot of debate yet to happen in the House of Lords. We will have to wait and see how far those difficulties will be resolved. Each of those elements, however, does cause some difficulties for what the Assembly might be able to do. I will stop at this point and wait for Kevin to chip in, if he would like to.

Mr Hanratty: I largely agree with Chris's interpretation or reading of the Internal Market Bill and some of the difficulties that it would create for human rights protections and the role of the Assembly in some of the models, particularly the conditionality one. The devolved autonomy question is really the big one for not just the Assembly but the Scottish Parliament and the Welsh Parliament. The Internal Market Bill really drives a coach and horses through the idea of devolved autonomy in that sense. As Chris has already outlined, some *[Inaudible]* powers would be undermined, and that is in the context of already having a substantive conversation about establishing common frameworks. The new legislative framework that puts in place the idea of mutual recognition and non-discrimination for goods coming into Northern Ireland is, as Chris says, difficult from a human rights point of view, because of the non-diminution provisions in article 2 of the protocol and in annex 1 to the protocol. For instance — again, this is the interpretation — if the directives are updated, will they fall within the

definition of being substantially updated and therefore fall under the purview of the non-discrimination provisions, and therefore be excluded from being updated in Northern Ireland? That is a fundamental condition of the protocol in how it applies. There are huge concerns about that, and that is setting aside the section 47 concerns about undermining the European Convention on Human Rights and how it applies in terms of the protocol, which the Human Rights Commission and the Equality Commission have raised concerns about.

An added complexity is what other rights we are losing in our move out of the EU. There is potential for a bill of rights to fill some of those vacuums. That is an added complexity that maybe needs to be considered within the context of your bill of rights deliberations. You have had other experts give evidence on that. It is certainly another element of the exit-from-the-EU process and the end of the transition period that would be useful to consider in your deliberations.

The Chairperson (Ms Sheerin): Thanks, Kevin. A couple of weeks ago, we had a presentation from Daniel Holder, and he spoke at length about the fact that it was his view that a bill of rights here could, potentially, have prevented some of the breakdowns that we have had in Stormont, and also some of the issues that have arisen out of Brexit and COVID-19. Obviously, the remit of the Committee is to consider the creation of a bill of rights as per the 1998 agreement, the particular circumstances of the North, and Brexit and the impact that that is going to have.

What you have said there leads me into my next question. The Internal Market Bill is one element of that, and the way the British Government have handled it thus far has caused concerns for the devolved Administrations. In the wider context of Brexit and what that means in terms of us losing the charter, and how EU directives will, potentially, be lost or not updated, I think I am safe in assuming that you feel there is a role there for a bill of rights for the North in plugging some of those gaps.

Professor McCrudden: I am sure that Kevin will want to come in on this one as well. There are lots of uncertainties about all this. One of the uncertainties is how far the negotiations that are currently taking place between the UK and EU, literally as we are sitting here —. These negotiations in part involve what are called the level-playing-field requirements. Several of those requirements, in terms of labour and environmental rights, are critical to several of the economic and social rights issues that we have been talking about. Were the United Kingdom to agree to the current proposals from the European Commission, that agreement would underpin those rights in Northern Ireland — and throughout the United Kingdom, of course. In the absence of an agreement, several of the underpinnings of those rights by European Union law will go, particularly labour rights but also environmental rights. To the extent that environmental rights are critical to economic and social rights, they are obviously of considerable concern here. One uncertainty is whether the future relations agreement will fill the gaps that are going to be left by the UK leaving the European Union. That is one element.

You mentioned, Chair, the role of the Charter of Fundamental Rights. The charter goes, as a matter of it being part of UK law, and that is specifically in the withdrawal Act that Parliament passed. However — I am sorry if this is complicated again — the Charter of Fundamental Rights remains in Northern Ireland with regard to how the other parts of the protocol are to be interpreted and applied. In other words, there are parts of the Ireland/Northern Ireland protocol which specify that EU law will apply in Northern Ireland. Those elements of EU law that apply in Northern Ireland have to be interpreted according to the way in which the European Court of Justice would interpret those rights. Therefore, that includes the need to interpret those rights as incorporating the Charter of Fundamental Rights. In that sense, Northern Ireland is going to have a continuing role for the Charter of Fundamental Rights that the rest of the UK will not have, because aspects of European law will apply directly in Northern Ireland. The reason that I have spelled this out is that the role for a Northern Ireland bill of rights in filling the gaps left by the UK leaving the EU is going to be determined by what those gaps are. It is not going to be entirely clear until the end of the negotiations, which are in play at the moment, how far there are going to be these gaps which are going to have to be filled, by either legislation or a bill of rights. Again, my apologies for going on at length, but you will appreciate that these are pretty complicated questions, and I am happy to take further questions on that.

Mr Hanratty: The only thing that I will add to that, Chair, is that historically — the Committee will be aware of this — the role of the EU with regard to human rights and equality standards in Northern Ireland and through the Assembly has been substantive. The inability to reach political consensus, historically, in the Assembly on rights and equality issues has been problematic in that sense, in that perhaps some of the more substantive developments with regard to rights moving upwards have not come through the vehicle of local Assembly legislation or directly via Westminster, but through the

remit of our membership of the EU. We have seen that in circumstances where new or amended EU directives have come into play *[Inaudible]* Northern Ireland's legislation and Westminster's legislation that is applicable in Northern Ireland has to be read in compliance with those new directives or regulations. I think that that is an important point to remember when we are considering what rights need to be included.

I absolutely agree with everything that Chris said, and we almost need to see where the cards fall with regard to the gaps that are created in how the Charter of Fundamental Rights *[Inaudible]* or does not apply to some of the protocol's provisions, and what else is left that does not have a link to the Charter of Fundamental Rights. Therefore, I think that there could and should be a role to replicate and fill those gaps, or even to potentially replicate some of the protections that are already in the protocol. There is no reason why those could not potentially be replicated as well. You have already heard, probably from the Equality Coalition, about other areas where the gaps could be filled, including those issues around identity and the rights to identify, with regard to citizenship. They were largely ignored for many years because of the freedom-of-movement provisions under EU law, but they have now come into stark contrast because of the gaps that are created under our exit from the EU. So there is also an opportunity to really fill those gaps as well. I think that exploring the potential within the bill of rights *[Inaudible]* is actually part of the remit of this Committee, so that is an important aspect.

The Chairperson (Ms Sheerin): Thank you. From my reading of the report that you provided, there was a suggestion of passing laws to cover elements from the charter that we will potentially be losing, and I understood that that would have to happen before the end of the transition period. However, I am not sure if that is correct, or if you are saying that there is wriggle room for us after that.

Professor McCrudden: If the preference is not to have any gap of coverage in the application of the Charter of Fundamental Rights, then that gap will have to be filled between now and the end of the transition period, because, after the end of that period, there will be changes in the application of the charter. What I have been suggesting is that the application of the charter will not cease entirely in Northern Ireland after the transition period, as it will in the rest of the United Kingdom. Therefore, the extent of the gap that needs to be filled is unclear until we know for sure what areas of European Union law, or its equivalents, are going to be required as a result of the — we hope — forthcoming agreement on future relations. However, there is nothing to stop the Assembly taking action on the filling of gaps after the transition period. There is nothing that affects the Assembly's powers there one way or the other. If the preference is not necessarily to fill the gaps immediately, the Assembly can of course take its time and decide where the gaps are and how best to fill them, whether or not that is before or after the transition period.

The Chairperson (Ms Sheerin): Thank you. In the context of what you have set out in your paper, you talked about party political differences and, specifically, the lack of political consensus around economic and social rights. Obviously, this is now a political process being addressed by this Ad Hoc Committee. Do you have any ideas around how we can address those things?

Professor McCrudden: I am not a politician, Chair. *[Laughter.]*

Mr Stalford: With an answer like that, you could be a diplomat.

Professor McCrudden: I am going to be relatively cautious here with a couple of ideas. If the opposition to economic and social rights in a bill of rights, or more broadly, is because there is opposition to the rights themselves — if, for example, the argument is that we should pull out of the covenant on economic, social and cultural rights — then there is nothing in our report that is going to be persuasive to those who oppose economic and social rights. We have not sought to make an argument as to why social and economic rights are a good idea or a bad idea. We have assumed that the Assembly and the United Kingdom will want to comply with their international obligations on economic and social rights. In other words, if the political opposition is to the rights themselves, then I am not sure that we have very much to say to that.

If, on the other hand, the opposition to economic and social rights is for some secondary set of reasons: that judges should not be involved; that politicians should not be replaced in the process; concerns that the politicians are going to be undermined — which is quite a lot of what I hear when people oppose economic and social rights being incorporated; or the idea they are so vague that they are worthless. If those kinds of arguments are the concerns, then we are suggesting that the report that we have produced could be helpful in unblocking some of the concerns, or in addressing some of those concerns, by saying that it is not a binary process. It is not that you either have economic and

social rights that are purely declaratory or that you have economic, social and cultural rights that have all the bells and whistles attaching to them in terms of the full justiciability that the human rights committee recommended. We are saying that it is not a binary choice here. There is a set of alternative ways of dealing with these kinds of rights that actually reinforce political engagement and the role of politicians, make them really quite specific and do not render them vague, and do not involve the potential difficulties of judicial involvement. It is to try to loosen up the process, to say — I have used the analogy before in another context — that we should think of this as a kind of set of Lego bricks that you can build various structures with. Some of those structures will look quite different from the kind of orthodoxy that others will want to put forward. That is point one: loosen up the process; there are alternatives; it is not a binary choice.

The second suggestion is that I wonder whether COVID has changed the atmosphere, in the sense that the kinds of economic and social rights that we are talking about here — rights to education, rights to health, rights to work — are the kind of rights that are deeply engaged in the concerns about the effects of COVID on us. Those are the kind of rights that seem, pretty clearly, to cover everyone in Northern Ireland. To the extent that rights talk in Northern Ireland has, unfortunately, become highly toxic because it seems to be identified with one community rather than another, it has become, to a degree, sectarianised and toxic. Ironically, paradoxically and unfortunately, in a sense, the COVID pandemic and its effects have re-emphasised in lots of quarters the idea that maybe some of these rights are rights that apply to all of us. In that sense, it may serve to detoxify these rights. For example, we talk about all the time now about the right to education — that children have the right to be educated and that we should not be depriving them of that. Hence the reason why the schools are being kept open all the time, and that is absolutely right. That goes across the communities in a way that perhaps the other, more traditional civil and political rights have been seen, I think incorrectly, as being associated with particular communities' claims.

Mr Hanratty: *[Inaudible],* Chair, I agree with everything that Chris has said. My one addition, similar to what Chris was saying about Lego bricks, would be the idea of creativity. That is really what we hope this report can bring to the table. Where there are problems, anxieties, concerns and, I suppose, mental road blocks to economic and social rights and to their enforcement, my appeal would be to think creatively, in the way that Chris is talking about. Chris and his team have put only five models on the table, but any number of models and solutions could be developed. It is really just a case of doing the leg work in terms of the scrutiny around those models and the problems and how solutions can be found.

An analysis of the Human Rights Commission's original advice would be very helpful as well, because of the details of some of the concepts that it is putting forward. It is a not a simple binary choice around legalising economic and social rights. There are limitations and manners in which economic and social rights apply. There are things like progressive realisation, minimum core obligations and the legal duties that are placed on public authorities. It is about a process of analysing what those recommendations are and, if there are anxieties or concerns, exploring alternative models to see where consensus can be reached. That is how you will reach a model for a bill of rights that can create political consensus.

I agree in one sense with Chris's concept of the toxicity around some of the debates. However, at a public and community level, we sense, and have always sensed, that the community are with you in trying to reach consensus on this issue, because, as Chris says, economic and social rights, even before COVID, were the rights that had the greatest consensus and support at community level across Northern Ireland. People want to see their politicians reaching agreement on those types of rights, because they are exactly the type of rights that people are most conscious about in their day-to-day lives. Finding a workable solution would continue to find the public's support in that regard.

The Chairperson (Ms Sheerin): Brilliant. Thank you both. I will pass now to the Deputy Chair. Mike, tear away.

Mr Nesbitt: Thank you, Chair. Chris and Kevin, thank you very much for your engagement. Before I discuss the five models that you have given us, I should like, perhaps, to deal with the context. I am not arguing about whether it is a good thing or bad thing, because I accept that the environment has changed a lot since 1998, not least because of Brexit, but, in discussing economic and social rights, are we not immediately going beyond the intent of the Belfast/Good Friday Agreement, which, as I understand it, was to say that we have the European Convention on Human Rights, and then what we want to do is decide whether there are any further rights which would reflect the particular

circumstances of Northern Ireland. If there are particular circumstances, they are actually more likely to be cultural than economic or social.

Professor McCrudden: Thank you, Mr Nesbitt. Immediately, we are into the debate about the particular circumstances of Northern Ireland. I hope that, when you read the report, you will have seen that there is a kind of touching of our cap towards that issue, in the sense that, at one point, we say that access to some of those rights has been a recurring issue — let us put it that way — in the Northern Ireland context. It is obviously up to the Committee to decide whether these types of rights address issues that arise out of the particular circumstances of Northern Ireland. I would suggest that there are, but I know that there are people who, in good faith and quite reasonably, suggest that there are not. It is up to you to deal with that.

As regards whether those who negotiated the Belfast Agreement had in mind economic, social and cultural rights as being potential areas to explore with regard to the particular circumstances in the bill of rights, I was not there at the negotiations, so I do not know. My guess — and it is a guess — is that all the research that is now being done on the Good Friday Agreement negotiations indicates that, at the last minute, various things were put into the agreement without, perhaps, their implications being fully thought through. There was a sense of exhaustion and of, "Let us get this done in a way that enables us to move on and get an agreement", without necessarily having a full, complete understanding of what exactly was being agreed. I suspect that those who were negotiating it did not really think very hard about whether economic, social and cultural rights would be included in the bill of rights context. I suspect that some did and some did not. What one derives from that, I am not sure. We are where we are, which is that there is a discussion about the bill of rights. Certainly, in the context of an international understanding about rights, it would be strange not to include economic and social rights, not least because the distinction between civil and political rights and economic, social and, indeed, cultural rights is wafer-thin, if it is there at all. I think that it would be putting too much weight on this conceptual distinction for it to be regarded as hermetically sealed from civil and political rights. We can talk about this in more detail, but I resist the idea that there is this sharp distinction. Kevin may have an additional view on this.

Mr Hanratty: No, I agree. I think, Mike, that there is an opportunity, but also a danger, of being too restricted by the letter of the law and our interpretations around what that paragraph in the Good Friday Agreement says. Processes like the Bill of Rights Forum — I know that Christopher Stalford was part of that conversation — wasted months talking about the interpretation and the various arguments around what we define as "particular circumstances". We make arguments that there are clear overlaps with social and economic rights with regard to our particular circumstances in Northern Ireland. There *[Inaudible]* and background research that can show evidence of that, but, again, if people want to interpret particular circumstances in a certain way, they will do so. The danger is that we get drawn into debates about what particular words and phrases mean, and that we overlook the opportunity that is presented by a bill of rights. We have largely, for the last 10 years, overlooked or not taken that opportunity. If you are starting from the point of view, as Chris says, that you are not interested in economic and social rights, then this is a moot point. However, if you are starting from the point of view of how we can best protect rights in Northern Ireland and how we can, in fact, make Northern Ireland a world leader with regard to the protection of rights, then you have to consider those economic and social rights protections, because they are supplementary to the European Convention on Human Rights, which is largely a civil and political rights document. And the international standards that we could draw upon —. Obviously, we have many economic and social rights documents and covenants at a UN level that are an assumed part of the wider international standards around human rights that the UK has signed up to. In many cases, we are actually in violation, according to the UN) of those rights by not implementing those economic and social rights in legislation, and there have even been calls at the UN review committees to implement the bill of rights as a mechanism to do that. I just have a note of caution about getting too caught up in wording because it can, unfortunately, be interpreted whatever way you want in order to limit or to expand this process. As a human rights organisation, we really want to see the widest suite of protections that can be available to individuals, and, for us, that includes economic and social rights. We are very conscious that this debate has been stalled precisely because of some of these questions and conversations. This report is really an attempt to try and remove some of those anxieties and to move and push the debate on, if it works. That is our position on that question.

Professor McCrudden: If I may just add a footnote to that, Mr Nesbitt, the one additional point that is perhaps worth bearing in mind is that the terms of reference for your Committee also refer to the impact of Brexit. In that context, it seems to envisage that some of the economic and social rights that we have been talking about — workplace rights, for example — which are going to be affected, are

clearly within the remit of this Committee. Whether or not it is within the remit of the particular circumstances of Northern Ireland envisaged in 1998, Brexit has, as you rightly said in the introduction to your question, changed all of this. Whether or not it was central to concerns in 1998, when we were in the European Union, it is certainly a matter of current concern given that we are exiting.

Mr Nesbitt: Chris, you mentioned, for example, the "right to education", and you defined it as "the right to be educated". You twice made reference to the "right to health". You could spin that. Does it mean the right to access a national health service, or does it mean a right for an individual to be healthy? If it is the latter, does that not have implications, for example, for people who smoke, are overweight or consume too much alcohol?

Professor McCrudden: I would love to have a discussion about the interpretation of the right to health, not least because it is now quite extensively developed in terms of the types of questions that you are raising. For example, there was a debate in Canada over the right to health, and whether it required the ability to have private health insurance, and so on. In other words, the right to health can be taken in different directions. If the thrust of your question is that there is an interpretation that has to be given to the notion of the right to health, that is absolutely clear and right.

The question that flows from that underlying concern is, "What do we do about the fact that it has to be interpreted?". We suggest in the report that there are various ways in which we can give greater content to it. One of them is the judicial. So we put all of this into the judicial context. We present them with a right to health and we say, "Make of it what you will. Borrow from the international experience, and so on, but it is up to the judges."

We are suggesting that there is an alternative, that the kind of question that you have raised might be considered in the context of a political process. There are obviously different ways of interpreting it. One of them is that there should be a national health service. Obviously, if you are in the United States, the notion of a national health service is not the common interpretation of a right to health. It is closer to your second interpretation. Therefore, we have to understand the context in which those questions are going to be considered. The right to health does not necessarily mean the same thing in all jurisdictions so it has to be, in some degree, tailored to each particular jurisdiction and circumstances, to use that phrase, of Northern Ireland, given that we have a national health service.

You are trying to draw me into making a binary choice; is it one or the other? I am suggesting to you that, first of all, we need a process for trying to determine how to answer the question, before we begin to answer it.

Mr Nesbitt: I am suggesting that it is very complex.

Professor McCrudden: Absolutely.

Mr Nesbitt: For example, you could have a consultant who says, "You need a procedure, but I am not going to give it to you until you stop smoking", or you say, "I am going to the courts because smoking is legal and you are trying to stop me."

Professor McCrudden: If the question is, "Is this really complex?", the answer is yes.

Mr Nesbitt: OK. In the five options, you have given us the range from, at one end, declaratory, and at the other, fully enforceable. Is it possible to have both, in that a preamble to a bill of rights could be declaratory or aspirational, but the main body would have judicable, specific rights?

Professor McCrudden: Yes, of course.

Mr Nesbitt: Great. OK. One final question —.

Professor McCrudden: But that does not resolve the dilemma here, of those who are objecting to full justiciability. We are suggesting that, even if you were to go for a preamble and reject full justiciability, you would still have other options that you might want to think about. In other words, objecting to justiciability, to all the bells and whistles, does not get you off the hook of trying to determine whether there are other ways of skinning the cat, if you want to put it crudely.

Mr Nesbitt: On first reading, is option 5 a version of the MacBride principles?

Professor McCrudden: I had not thought about that. No, it is not, for the following reasons: the MacBride principles, as I remember them, were a set of principles agreed by, if you like, civil society in the United States — a combination of religious groups and Irish American groups. They were adopted by various states, particularly in terms of their investment decisions and putting pressure on some of the large pension funds. Those were, essentially, private operational codes of practice. What is being envisaged in the fifth option is, rather, that it would be agreed as part of an internationally binding trade agreement or, indeed, an investment agreement. MacBride never really got to that kind of position. Rather, it was the opposite. The British Government argued that the MacBride principles, in various ways, breached international trade agreements — or potentially breached them.

Mr Nesbitt: OK. I think I am going to disagree. The similarity is that both are saying, "We will not do business with you unless ... ".

Professor McCrudden: Oh, sorry. If that is the question, my apologies. If that is the thrust of the question, then the similarity is that it is linking economic decision-making with human rights.

Mr Nesbitt: Yes.

Professor McCrudden: To that extent, yes, I understand the thrust of your question.

Mr Nesbitt: Perfect. Chris and Kevin, thank you very much.

The Chairperson (Ms Sheerin): Michelle and Christopher, do you have a question?

Miss McIlveen: My question was in relation to consensus, and the particular circumstances have been well covered, so thank you.

Mr Stalford: I am fine.

The Chairperson (Ms Sheerin): One hundred per cent. I can see that Paula has indicated.

Ms Bradshaw: Yes. Thank you, gents, for coming along this afternoon. In some ways, my questions follow on from Mike's.

I am late to the meeting because our Health Committee meeting went on a bit late. One piece of correspondence that we received was from the Health Minister regarding transgender rights. I understand what the Minister was saying in that there were vacancies and there were problems trying to fill them and procedural issues about not taking anybody new onto the waiting list.

This is my long-winded way of saying that, in many ways, rights may not be realised because of other factors. I think that was what Mike was alluding to about vacancies and not being able to find the specialists.

I think you spoke about taking reasonable measures to address progressive realisation of rights. Is there not the potential that there will always be some way in which a Minister can come back, and say, "We haven't addressed these rights" — for want of a better phrase — "because of x, y and z", and nothing could end up in the courts?

Professor McCrudden: The answer is yes. If the question is, "If each of these are potential middle-range models, does each have potential problems?", the answer is yes. That is the nature of political debate. You do not need me to tell you that. What the suggested models that we have been talking about do, however, is to begin to reorientate the debate to some degree.

It is different, I suspect, in the way that politics is debated, to say, "You are actually breaching a right here" than to say "You are breaching a policy position". That is why we often use rights talk, because it emphasises the importance of them. It emphasises the notion that you are dealing with individuals rather than an amorphous budgetary process that does not seem to have a direct connection with a person on the ground.

What I am suggesting is this: is it going to present a way for those who want to criticise a Minister because of the difficult decisions that the Minister has to face? Will it present a way of dealing with ministerial objections in a knock-down manner? No, but it may reorient the debate and make Ministers

more sensitive to the fact that they will have to consider those questions when they devise policies in the first place. It gives a set of tools to those who seek to interrogate Ministers' views.

Ms Bradshaw, if I could give you one example. Going back to Mr Nesbitt's point about health, or, indeed, transgender rights, once there are thought to be rights and you borrow from the notion of those rights being internationally protected, you have a whole set of interpretative principles, precedents and jurisprudence that can be used to pin or interrogate the decision maker and ask them, "Have you considered this?", "Have you considered that?" or "Have you considered the implications here?". You are provided with a whole toolbox to enable you to better implement those basic rights. There does not always have to be a level of vagueness or of reinventing the wheel. The whole point of them being internationally protected is that they have also been internationally debated between countries, and you have that toolbox at hand if you want to use it.

Ms Bradshaw: I suppose that my concern is that we will build up expectations among some about what they see as their rights, and they will always be able to look at international instruments and say, "My right fits under that".

I want to move on to my second question. As you stated, Christopher, you served on the Bill of Rights Forum all those years ago. I served on that too. I do not mean this question to be contentions, but could you give us an understanding of whose rights or in what way rights in Northern Ireland have been undermined because of the gap that we have had for the last 22 years or since 2008? What rights have been undermined or not realised in those 12 years because we did not have a bill of rights in place?

Professor McCrudden: That is a good question. Let me link it to your last point about expectations. The answer to the question, "Will this give rise to expectations?" is absolutely yes. It should give rise to expectations. Remember, these rights have been agreed already internationally. The United Kingdom has already signed up to them as binding international commitments, so the expectations should already be there in the population. People should know about those rights, they should know that they are internationally protected and that their Government has signed up to implement them.

One brief way of answering your second question is to look at the reports of the United Nations Committee on Economic, Social and Cultural Rights, which has examined the United Kingdom and, in that context, Northern Ireland; the reports of the special rapporteurs on, for example, extreme poverty, which has recently reported; or the reports of the European Committee of Social Rights. There you have a whole set of reports over the last 20 or so years, which, as Kevin will know as well as I do, set out, in various ways, how various rights have been let slip in how they are being implemented, whether they are rights that are being applied to asylum seekers, rights that deal with the right to housing for rough sleepers or rights that deal with deficiencies in the health service and health protection — all the issues that are coming home to bite us in the context of the COVID pandemic. COVID has exposed several of the areas that have been the consistent concern of those who have been seeking better implementation of economic and social rights.

We can go into those in considerable detail, but I would refer you to those reports as a neat way of summarising several of the kinds of concerns that we have been suggesting. Kevin may have a view on that as well.

Mr Hanratty: Yes, it is a really good question. From our perspective, the lack of a rights framework or a way of talking about rights or taking the progress of rights forward in Northern Ireland has barred us from even keeping pace with the rest of the UK and what is happening in other neighbouring jurisdictions. I mentioned previously that the EU really raised us up by the bootstraps, over the last 10 or 20 years, in progressing or keeping pace with EU protections. However, at a UK level, we have really fallen behind the pace of development in that regard. Back in 1998, we were leading the debate with the establishment of section 75, and, obviously, when it comes to realising progress on rights, that has failed from many people's perspectives.

Because of the lack of political consensus, Northern Ireland has not been able to match the speed and pace of some of the other developments that have taken place across the UK. I am thinking in particular of the Equality Act 2010, which pulled together a lot of the existing equality provisions and regulations across other parts of the UK, put them together in a single, accessible document and enhanced some of the equality protections that were already available to individuals. We simply were not able to do that in Northern Ireland. There were campaigns and conversations about a single

equality Act to pull together those protections in a similar document, and that simply was not achievable because of a lack of political consensus.

Similarly, in recent years, we have seen developments at a devolved level — I know that you have heard evidence about it already — in Wales and Scotland, where some of the international standards that incorporate economic and social rights have been incorporated into domestic legal standards and have been protected and are enforceable to one extent or another. That is another example of where we have fallen down at a barrier to progression.

There is a fear of not having some element of justiciability or a legal redress. There are concerns as to whether rights are judicialised. However, the flip side is that, without that backstop or last resort — bear in mind that most people, including us, think of it as a last resort — instead of judicialising rights, you politicise them. That has been what has happened in Northern Ireland for so long, and that is where some of those toxic and binary debates that Chris was talking about emerged from. We had that emerging political narrative that x rights are for one community or the other when, in reality, rights are universal and should apply across the board.

To go back to your point about transgender healthcare, access to proper healthcare provisions for the transgender community in Northern Ireland has been a long-running issue. There are weaknesses in all of the models that we have put forward, and Chris has, rightly, identified those. There are strengths in the Human Rights Commission's provisions as well, that could and should be explored. One of the issues that go across all the models is the idea of progressive realisation, which means that although something is not immediately realisable, it should be implemented over time. The flip side of that is that if there are not concrete, affirmative steps being taken and proven and shown publicly to be taken, there should, therefore, be access to other models of redress, including judicial remedies under some of the models.

That is where we need to be careful that we do not put together a bill of rights that does not allow for some element of redress that would make the rights effective after a period of time where the Assembly or public authorities have a period to find the resources and implement them over time. We need to be careful when developing those models that we do not miss out that step, because that is the thin end of a wedge for individuals being able to access rights. We need to have some sort of backstop that protects them if no action is taken at a political level or where there is no level of political consensus. That is really where the rights come into play. I think that it is a really important question, and some of the models that Chris has put in the paper reflect some of those weaknesses and some of those strengths.

Ms Bradshaw: I appreciate that. I maybe came across as if I was anti-rights, and I am absolutely not. On Saturday, we are going to have the new legislation on provisions around the removal of the defence of reasonable chastisement. I would love to see smacking banned, and I am working with our Justice Minister on that. I totally take the point, and I suppose that you are right to say that we have to look across. Potentially, those issues will come through our legislative processes through the Departments anyway, but I very much take on board everything that you have said.

Mr Durkan: Thank you, Kevin and Chris, for that very interesting presentation. I think that it was a bit less abstract than some that we have received, and that is not being in any way critical of the others. It was kind of a change of approach and a change of pace in some ways. A lot of the stuff that I am interested in has been asked and answered. It has been answered very well, I might say. I was particularly interested in the point that Kevin made in response to Paula, just there now, about the politicisation of rights. Sadly, when we have a zero-sum approach to politics, there is also a zero-sum approach to rights. Where someone sees something as a right, someone else will see it as a wrong.

Sorry, I do not have the notes in front of me, but I think that it was model 3 that Chris referred to, on the application of socioeconomic policies in making laws. Chris, you cited a couple of jurisdictions, India, and, a bit closer to home, down South. You touched on a different model, that of Finland, and you said that you might expound on that. Could you possibly do that?

Professor McCrudden: Absolutely. Thank you, Mr Durkan, for the question. The starting point for the discussion here is trying to get identification of practical examples that do not rely on a purely judicialised approach. We are trying to identify alternatives that nevertheless take these rights as important and even constitutionalise them but do not necessarily rely on the judicial enforcement of them. However desirable that may be in other circumstances, if we cannot get a consensus around them, we have to look at potential alternatives.

The starting point here was the approach that was adopted by Prime Minister de Valera in the drafting of the Irish constitution, and he was equally sceptical, as some people are now, of overly judicialising what he considered to be political issues. So, the Southern constitution essentially divides up rights between those that are enforceable in courts and those that are not. What we would now call economic and social rights are referred to in the Republic as "directive principles", and they are not directly judicially enforceable. That approach that was taken of dividing up the rights into two groups, as it were, was then reflected in the Indian approach as well. So, de Valera's model was adopted quite explicitly in the drafting of the Indian constitution. So, you have those two examples.

The alternative model that we sketched out, the Finnish model, is similar, to some degree, but it is a bit more developed in its institutional mechanisms that surround it. The Finnish approach has a set of economic and social rights identified in Finland's constitutional framework that are set out as constitutional rights, but the legislature essentially retains a very considerable degree of control over how those rights are interpreted and enforced.

Mr Nesbitt's point about health is a quite good example. We have a right to health that is in the constitutional structure, but what does that mean? The traditional answer is that you go to the courts to find out. Finland has taken a rather different approach. Finland is saying that the legislature should, first of all, be thinking about what that means. It should not simply be a matter for lawyers; it should be a matter for political decision-making. Forgive me, I am a lawyer; I kind of like lawyers, but I realise that lawyers cannot solve all problems, however much they may think that they can. The Finnish approach says that the legislature is the first port of call for interpreting the rights and applying them seriously.

The Finnish courts have a role, but, essentially, they fulfil the role of what is called ex post judicial review, so after the legislature has decided what the approach is, they can have a degree of scrutiny over whether what the Finnish legislature has agreed upon looks as though it will comply. Very considerable discretion is given to the legislature to decide what those rights should mean. So, there is very weak judicial involvement there.

Here is the critical point: there is a very strong constitutional scrutiny committee in the legislature that assesses the legislation in light of the constitutional requirements. Again, that is a politically composed committee, with a strong scrutiny function. It is not as though you simply say to the legislature, "Go and do what you think is wise or reasonable with regard to economic and social rights". There is a backstop, and the backstop is provided by that constitutional scrutiny committee. If you are willing to put up with a serious scrutiny committee of that kind, which is reviewing, on constitutional grounds, compliance by the legislature with a constitutional requirement, that is the Finnish model.

We talked to several people in the Finnish context who saw the potential problems with it but were quite enthusiastic about the potential for it to resolve the idea that it should not be over-judicialised and that there should be heavy political involvement, whilst, nevertheless, constitutionalising those principles and therefore giving them a degree of importance in the political debate that they might not otherwise have. I am not sure whether that answers your question, Mr Durkan.

Mr Durkan: That is pretty interesting. That scrutiny committee comprises elected representatives, yes? It is a democracy, obviously, so the political composition of the committee is liable to change. Have there been examples that you are aware of where the committee may have taken a particular view and then, a few years and an election later, the same committee, albeit made up differently, takes a contradictory view on the same thing?

Professor McCrudden: That is a really good question. We will respond to that question in some detail once we check back with our sources in Finland, because we have not looked at that particular question. It is a way into a larger point that I want to make about future involvement, which is that, if your Committee has those kinds of questions about the detail, we would be happy to supply answers based on research, as the rest of the report has been. I cannot answer your question in the detail that I would like to, but I am very happy to get back to you with further detail, if that would be useful.

Mr Durkan: That would be great, if you could, Chris. Thank you. Thanks, Kevin.

The Chairperson (Ms Sheerin): All right, Mark. I can see that John is on StarLeaf as well. John, do you have any questions or comments?

Mr O'Dowd: No; I am OK.

The Chairperson (Ms Sheerin): No problem. That is us. Chris and Kevin, thank you very much for your time this afternoon, for presenting to us and for answering all the questions so carefully and extensively. Thank you very much. We will let you go at this point.

Professor McCrudden: Thank you, Chair. Thank you very much for saying right at the beginning that we were identifying a practical approach. That is exactly what we wanted to do. Let me just reiterate one of the points that I made to Mr Durkan: we are happy to respond to any further questions or be involved in any further way that the Committee would find helpful. Thank you.

The Chairperson (Ms Sheerin): Brilliant. Thank you.

Mr Hanratty: Thank you very much, Chair.