Northern Ireland Assembly

Ad Hoc Committee on a Bill of Rights

OFFICIAL REPORT (Hansard)

Briefing by the Bar Council and the Law Society

10 December 2020

NORTHERN IRELAND ASSEMBLY

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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 Peter Coll	Bar Council of Northern Ireland
Ms Maria McCloskey	Law Society of Northern Ireland

The Chairperson (Ms Sheerin): Peter and Maria, you are very welcome.

Mr Peter Coll (Bar Council of Northern Ireland): Thanks very much.

Ms Maria McCloskey (Law Society of Northern Ireland): Thank you.

The Chairperson (Ms Sheerin): You can begin your briefing when you are comfortable.

Mr Coll: The plan was for me to take off, if that is OK with the Committee. Good afternoon, everybody. Hopefully you can hear me OK.

The Chairperson (Ms Sheerin): We can.

Mr Coll: That is good. First of all, thank you very much for the opportunity to present to the Committee — virtually, as it turns out, unfortunately, in the current circumstances — on your consideration of issues relating to a bill of rights for Northern Ireland. I will just say something first about who I am and the organisation that I represent. My name is Peter Coll. I am vice chair of the Bar of Northern Ireland and of the Bar Council of Northern Ireland. The Bar Council is an elected body of 20 barristers. We act as a representative body for the Bar of Northern Ireland, which comprises over 650 self-employed barristers. Our independent practising barristers specialise in the provision of expert legal advice and advocacy, aiming to serve the public interest by upholding the rule of law and the administration of justice.

By way of background, I was called to the Bar in 1996. I was called to the senior Bar and became a QC six years ago. In my legal practice, I specialise in administrative and public law. I have some

experience in representing government bodies, primarily, but also sometimes appearing against them in court, relating to judicial reviews, inquests and the occasional public inquiry.

Hopefully, members have had the opportunity to review the written submission that we filed with you. It was referred to by the Chair a short time ago. You will be glad to hear that I do not propose to read that out or take time to do that. However, there are a few points that I would like to highlight by way of opening remarks, and then I think that Maria is going to speak after that. We are obviously happy to answer any questions or queries that you might have for us. I am conscious that the particular subject that I have been asked to address is the justiciability and enforcement issues relating to a bill of rights. I appreciate that you have heard previously from others in respect of that, and many people much more expert in the field than I, so I hope that you will bear with me in respect of what I have to say at this point.

In the context of what you are currently undertaking, it is the view of the Bar that the Committee must develop a clear and coherent approach towards what it ultimately aims to achieve through a bill of rights before it can really reach any conclusions on the justiciability of the socio-economic rights or potential models of enforcement. The issues surrounding the incorporation of those rights into legal systems have been the subject of extensive research and commentary in jurisdictions across the world in various different models, offering helpful comparators for your consideration. I know that you have already taken some evidence in respect of that. However, as an organisation, we consider that it is essential that the community settles upon the approach that works in the context of the specific jurisdiction in Northern Ireland.

As everybody in the Committee will be well aware, discussion on a bill of rights in Northern Ireland has been ongoing for over 20 years. While the Bar, as an organisation, does not express a particular opinion at the moment on how the work of the Committee should proceed in that regard, we very much hope to be able to contribute to an open and frank discussion on the practicalities that will surround the development of any bill of rights in due course, and, as that process continues and proposals become crystallised, we hope to be able to fulfil a further consultative role in being able to assist the finalisation of that towards legislative effect.

It is also worth commenting on the role of the courts in considering the merits of adopting a new bill of rights. Whilst it might legitimately be argued that accountability is the cornerstone of human rights, ensuring that those noble ideals transfer themselves from pieces of paper and worthy principles into actual practical application, we ask you to remember to acknowledge that the courts are the accountability mechanisms, so really the accountability mechanism of last resort, in holding other branches of the state to account; the executive branch and, indeed, on occasion, the legislative branch.

The creation of socio-economic rights through a bill of rights would not, in itself, necessarily result in those rights becoming easily justiciable. It is the underpinning of those headline rights that would, perhaps, be crucial. I watched the Lord Chief Justice giving evidence to you previously, and he talked about the granular detail. That resonated with me. The devil of all this will be in the detail of how the bill of rights comes together and what the actual bite of those rights will be. The role of the courts as a potential enforcement mechanism as regards rights being justiciable cannot be entirely divorced from the political obligations that, primarily, must arise in respect of rights of that nature becoming legally consequential and justiciable. As you have probably gathered already, this is obviously not going to be a straightforward task. There is ample evidence to show that the ability to realise the ambition and scope of public policy is subject to constraints such as, primarily, for example, public expenditure and the dynamic that is associated with the system of government that exists in this jurisdiction. There is a range of case law that highlights the fact that it is not the function of the courts to take decisions on questions relating to the executive branch's budgetary arrangements and the competing priorities around the management of the expenditure of public funds. Those will often, obviously, involve complex decisions that are taken in the context, very often, unfortunately, of challenging economic backdrops. Primarily, we would say that the immediate accountability mechanism in respect of that is that which is exercised by you as legislators and decision-makers in the Assembly in holding the executive to account in political terms for the budgetary expenditure of public funds.

By way of an example of that, we have referred in our written briefing to a 2017 Court of Appeal case here — Department of Justice v Bell and Police Ombudsman for Northern Ireland. In that case, the judgement delivered by Lord Justice Gillen highlighted a number of important principles in distinguishing between decisions of the executive and the role of the court which, perhaps, bear briefly repeating here:

"Normally, the question whether the Government allocates sufficient resources to any particular area of state activity is not justiciable ... There should be little scope or necessity for the Court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. These are matters for policy makers rather than judges: for the executive rather than the judiciary."

I understand that Sir John Gillen may be giving evidence to the Committee in the coming weeks, and no doubt that is territory that you may wish to explore further with him. For what it is worth, from my perspective, in the court setting in terms of enforceability, much will always depend on the wording. Again, back to this point of the granular detail of the statutory right. The tighter that it is, the more likely that the court will approach it as a hard-edged matter of pure legal entitlement as opposed to a matter of discretionary executive branch decision-making, which the court is, perhaps, not well equipped to deal with. The justiciability issue is one where, traditionally, the courts have been, perhaps, wary of interfering in the political field. At the same time, it is not to the extent that justiciability or legal enforcement in the courts of legislative rights will be determined in the negative because the matter gives rise to political interest or, indeed, political controversy on occasion. One might say that, in a public law or administrative law setting in particular, courts make day-by-day decisions on matters that are of great political interest and, indeed, on occasion, concern matters of great political controversy.

The Committee will probably be aware of the independent review of administrative law at Westminster, which is really about the scope and extent of judicial review powers, primarily in England and Wales, but potentially with wider impacts. In the Bar's recent submission to that review, we made reference to last year's Supreme Court parliamentary prorogation case, Cherry/Miller (No 2). When you read what was said by the Supreme Court in respect of that decision — the context in which it had to look into critical matters *[Inaudible].* Courts cannot decide political questions. The fact that a legal dispute concerns the conduct of politicians, where it arises from a matter of political controversy, has never been sufficient reason for courts to refuse to consider it. Almost all important decisions made by the executive have a political hue. Nevertheless, the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries, and many, if not most, constitutional cases in our legal history have been concerned with politics in that case. In respect of this issue, the Bar says that the courts are competent to answer questions where the legal effect of political decisions is proper, and statutory provisions will not be immune from the court's review simply on the basis that it strays potentially into political territory.

There is a balance to be struck. For example, this is very hot off the press, but yesterday's leave application in the High Court in Belfast in relation to a challenge to the Prime Minister's signing of the Brexit withdrawal agreement was reported in the papers today. Mr Justice McAlinden found that the court really has no constitutional role or function in delving into the mindset of the Prime Minister at the time when he signed the withdrawal agreement. The argument in that case had been that there was an allegation that the Prime Minister never planned to stick to the terms of the European Union (Withdrawal Agreement) Act 2020 that was passed by Parliament and that he was planning to take a different course. The counterargument put forward on behalf of the Government was that issues of that nature relating to foreign policy and the Prime Minister's actions in signing the agreement should not be subject to judicial scrutiny because he was exercising the will of Parliament, it is a sovereign Act, and it is not for the court to seek to engage in some kind of almost psychological inquiry into the Prime Minister's mind at the time. That is effectively the view that the court took yesterday, and leave was refused.

In summary, what I am trying to get across is that, if the Committee ultimately decides that there is merit in developing a new bill of rights, that process must take account of the need to be very careful in drafting the scope of the legislation that might give effect to any socio-economic rights, because those rights engage complex areas of policy that are relevant to not just freedom of the legislative capacity of the Assembly but also, within the executive branch, the ministerial decision-making on the expenditure of public funds, primarily. That necessitates, on your part, a thorough exploration of the potential consequences of enforcement by the courts, particularly when you are considering any financial repercussions that it could have for other branches of government, potentially outside of the devolved function in Northern Ireland and into the central UK function that still remains in Northern Ireland.

It might also be said that a well-crafted and tightly drawn bill of rights would reduce the likelihood of any dispute as to what that document provides for and reduce the need for judicial interpretation and determination of any dispute, but it would be unrealistic to assume that the limits of any new rights and how they should be applied in any individual set of circumstances would not be tested in our courts on a regular basis, and that is the very clear experience of practitioners and, indeed, many Departments

and public agencies more generally in the context of the model that we have on human rights law in this jurisdiction through the Human Rights Act 1998. The Committee should be realistic in anticipating that there is every expectation that that will also become the norm for judicial consideration with any newly created rights. In particular, one might say that, if the legislation were to be drawn in a very determinative fashion with hard-edged rights rather than vague rights, aspirational rights or target duty rights, the tighter and more determinative the approach that is adopted, the more we can expect enforcement to follow at a practical level through the courts, and the greater the impact, therefore, that that will have on freedom to create policy and, indeed, freedom in the expenditure of public funds. One must be careful of the legislative straitjacket that could come from this. In that sense, it certainly could give rise to fertile territory for lawyers and the ingenuity of the legal mind to push the boundaries of what those rights should mean in practical application.

In summary, I would say that you — I mean, generally speaking, those who might be involved in bringing about a bill of rights, if that is the decision — should follow the old maxim of being careful what you wish for, because you might get it. On that pithy note, I end my brief summary of the written briefing that we provided to you. After Maria's contribution, I will be delighted to answer any follow-up questions or queries that you have for me.

The Chairperson (Ms Sheerin): Thanks very much, Peter.

Ms McCloskey: Thank you very much, Peter. Thank you, Chair and Committee, for inviting the Law Society of Northern Ireland to present evidence to you. As a bit of background on me, I am an immigration solicitor at the Children's Law Centre. I am also chair of the Law Society of Northern Ireland's human rights and equality group. That sits as an informal group rather than as a formal committee of the Law Society. It is discussions within that group, rather than wider consultation with the entire membership of the Law Society of Northern Ireland, that have formed the basis of this presentation. Thank you nonetheless. It is a nice coincidence that today is, of course, International Human Rights Day. I am coming very much from a human rights perspective.

I wish to highlight three main points in my presentation. The first is that a rights-based approach was part of the DNA of the Belfast/Good Friday Agreement. The second is that we think that the loss of the Charter of Fundamental Rights and the gaps that that is likely to leave can potentially be addressed through a bill of rights for Northern Ireland. The third is the importance of the enforceability of rights.

I will give some context to our position. There has been a very clear and worrying disintegration of human rights protections in the UK over recent months and years. Despite assurances that human rights would be on an equal footing following the UK's exit from the European Union, there are strong reasons to suggest that that might not be so. On Monday, the Government announced a review of the Human Rights Act 1998. In the past, this has been framed as wanting to consider the relationship between the European Court of Human Rights and domestic courts. It will certainly be sold as an appropriate time to review the Human Rights Act. However, essentially, from our perspective, the Government do not like losing challenges, particularly when those challenges are based on article 8 rights to private and family life. When the Government lose a challenge, they can frame human rights such that they are a threat to society rather than existing to protect members of that society. Very often, there is complete disregard for the context and circumstances of certain legal challenges, so that the nuances and difficulties of balancing competing rights can get completely ignored.

Another threat might be seen in the commencement, earlier this year, of the independent review of administrative law on the judicial review mechanism. The Law Society has responded to that consultation and outlined its concerns that the Government's agenda is to limit the powers of the court to review administrative decisions in order to shield the Government and those decisions from scrutiny. Judicial reviews should be seen as a way to rectify unforeseen breaches of the law, precisely because elected branches of government cannot foresee every application of a policy. Not only does a judicial review mechanism resolve unforeseen breaches, it increases the legitimacy of the Government by providing independent oversight. I come to the first of my main points. A rights-based approach was the core tenet of the Belfast/Good Friday Agreement. That peace agreement grew out of conflict here. That is a history that has shaped us and will continue to shape us. At the time, there was, understandably, a lot of emphasis, in discussing the bill of rights within the text of the agreement, on the "both communities" aspect. However, in discussing safeguards, the main text of the agreement was specifically about the protection of equality for all sections of the community. The landscape of Northern Ireland has changed significantly in the last 22 years. It is vital that all sections of the community are represented and considered in this discussion. The thing about a bill of rights is that it confers benefits on everyone. It does not take something away from one group and give it to another. I

urge you to hold that rights-based approach framework within your sights as you continue your work on this Committee.

That brings me to the second main point, which is the loss of the Charter of Fundamental Rights. The justification for not including the charter in domestic law following the UK's exit from the European Union was that the rights that the charter confers would not be weakened. That was supported by the argument that many of the rights of the charter are directly replicated in the European Convention on Human Rights, which is incorporated into domestic law through the Human Rights Act. As I have outlined, we think that there is now a threat to the Human Rights Act in and of itself, but I have other key points to make about the charter.

First, the charter provides fundamental rights. It is a basis on which a direct challenge can be brought to domestic law. That ability to strike down domestic legislation does not exist in the European Convention on Human Rights. Secondly, the charter functioned in such a way that it could create new rights and allow for developments and changes within society; for example, the right to be forgotten relied on charter rights. Thirdly, despite the assertions of the Government, the rights that the charter confers will not be directly replicated in their entirety in domestic law. For example, in children's rights, which the Children Law's Centre has been at the forefront of campaigning and advocating on, the best interests principle is no longer available as it was through the charter. The Court of Justice of the European Union had the ability to read in the United Nations Convention on the Rights of the Child. That, of course, is an international treaty that has been ratified by the UK, but it has not been incorporated into domestic law. We believe that the loss of the Charter of Fundamental Rights needs to be counterbalanced by strengthening the statutory enforcement of human rights in Northern Ireland. The impetus for a bill of rights should be obvious now more than ever. This should be seen as a golden opportunity to guard against further weakening of rights.

My third main point is about enforceability. Unenforceable rights are not really rights at all. It is, of course, for the Assembly to determine the nature, scope and operation of the bill, but I wish to make a few points. The less ambiguous that the bill is, the less likely that it is that individuals will need to seek legal intervention. It will require the granularity that Peter and the Lord Chief Justice have spoken of and the legislative framework to support whatever is in the bill. A number of models have already been considered and presented to you in detail by other experts, particularly the Human Rights Centre at Queen's. It should be remembered that courts are a measure of last resort. The first port of call is on the implementation of and the adherence to any bill of rights. Pre-legislative scrutiny and the role of a Standing Committee at Stormont would be key components of this.

The greater the level of commitment and compliance by the Government, the less need that there will be for individuals to come to lawyers and seek assistance by way of legal intervention. Neither the courts nor legal professionals invent or create obligations. They are the means by which individuals can seek to review the decisions made by Government. There are many examples of how this can work based on models around the world. There are also some inventive and novel suggestions such as by Professor Kate O'Regan in relation to localised, accessible tribunals. That is not only a tangible and accessible method for individuals to access their rights; it would also act as a filtering mechanism for potential legal challenges. When it gets to the stage of legal proceedings, as undoubtedly it would, there is already a natural filtering mechanism at the lead stage of a judicial review.

There are, of course, barriers to legal challenges posed by funding constraints and a lack of legal literacy, and access to justice, which is a wider issue, should remain a key consideration in the outworkings of the bill of rights.

Accessibility and clarity are key ingredients, both for our legal professionals and the public. That would require a commitment to embedding the bill of rights in this jurisdiction by providing training and working with the various legal professionals. Human rights should not be an abstract concept but should be accessible and tangible.

Whatever the bill contains, we, as legal professionals, will fulfil our duty by advising clients as to whether they might use it to resolve their particular issue or complaint. On that point, I wish to touch upon threats, not only to human rights but to the wider principle of the rule of law. I am referring to the ongoing attacks on the legal profession, particularly the comments by the Home Secretary and the Prime Minister, which completely undermined the role of solicitors and barristers and thereby the rule of law itself. As a result, there are real fears about safety, and bearing in mind the particular circumstances of Northern Ireland and the catastrophic toll borne by the legal profession in the past, this issue warrants serious reflection.

In 1990, the UN Commission for Human Rights set out a number of basic principles on the role of human rights lawyers. It referred specifically to criminal proceedings, but the principles apply across the board for human rights lawyers. Within it is the principle that:

> *"Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice."*

So, for human rights to be meaningful, they must be enforceable. That requires lawyers being willing to take on unpopular causes without facing attacks from Government Ministers.

In conclusion, protecting human rights should not depend on a whim of the Government. The short-term nature of elected politicians must give way to long-term commitments to a human rights framework for Northern Ireland. The hostile environment and the threats to human rights are undermining those protections, and that, taken in the round, should be deeply concerning to all. The bill of rights presents an opportunity to redress the imbalance and protect citizens here in future.

I want to finish by quoting the late Lord Brian Kerr, whose passing the Law Society mourns, and I extend our sympathies to his family and friends. In a relatively recent interview, Lord Kerr said:

> *"Lawyers are not activists ... They are re-activists. People bring problems to lawyers and lawyers decide whether they can be fitted into some sort of legal framework in which a legitimate challenge can be taken.*
> *I can understand the government is less than pleased when challenges are made to decisions they have taken frequently after very considerable deliberations … But it doesn't seem to me that attacking lawyers who provide the services that allow those challenges to be made … is particularly profitable."*

He continued by saying that Ministers might be:

> *"irritated by legal challenges which may appear to them to be frivolous or misconceived" —*

but —

> *"if we are operating a healthy democracy what the judiciary provides is a vouching or checking mechanism for the validity of laws that parliament has enacted or the appropriate international treaties to which we have subscribed".*

Thank you very much for the opportunity to present to you. The Law Society would be happy to continue working on this, and I am happy to take any questions along with Peter.

The Chairperson (Ms Sheerin): Thank you very much to you both for two interesting presentations. If you do not mind, I will divide my questions. Peter, I will direct my first question to you and then move on to Maria.

I noticed that, in your oral presentation and in your submission, you made reference to the different remedies. There is a focus on accountability in a bill of rights, and you made specific reference to the pre-legislative scrutiny model. I got from the presentation that you would see a judicial review (JR) as being a last resort. Will you expand on that?

Mr Coll: In the final analysis, when you have either administrative executive decision-making or — to the extent where it might be subject to challenge — legislative decision-making, particularly by bodies such as the Assembly, which does not carry the "sovereignty of Parliament" type tag that Westminster might have, but even with that, Westminster, with the Human Rights Act, can find its laws coming under direct attack.

The point really is that, when decision-making, the law itself is given practical application. It is its impact on the life of the individual that is affected that brings the question of law to the fore. Maria touched on this a little when she mentioned accessibility to the law. There is little point in having all the panoply of rights if, in fact, the practical means by which a member of society can actually have those rights protected and enforced is not open to them.

Judicial review, in that sense, provides one of the main protections for the individual, the citizen, against the state and unlawful actions or decision-making by the state, but it is, perhaps, not the only

means by which that can be done. There are obviously other models that are perhaps slightly less legalistic that could also be incorporated into it, such as the idea of clearer scrutiny in advance.

I know that the way that the Assembly works at the moment, for example, is that laws being passed by the Assembly go through a process of scrutiny under the Committee system, which you all be very familiar with, more so than I am, However, even with that in place, there are always the opportunities for error and for interpretation. When it comes down to it, if you move into territory of creating rights, you have to expect that they will give rise to legal action by way of enforcement of them.

The clearer and more determined those rights are, in one sense, the better, because they leave perhaps less room for ambiguity or interpretation. As against that, the more determinative you make those rights, the more hard-edged they are in that sense, and the easier they are for the courts to grapple with and to enforce. You move away, effectively, from the aspirational right and target right and away from that sort of political or public policy forum. You move more squarely into the legal enforcement world of, "What does the law say?".

Remember that, really, when it boils down to it, that is what the lawyers and the judges are there to do, they are there to see the upholding of the rule of law. The legislative branch makes the laws, and the judicial branch and the lawyers deal with the enforcement and interpretation of them.

It is a *[Inaudible]* last resort, but I do not think that you should take from that that I mean that it is going to be the occasional or rare beast. I do not think it will be. As I said in the presentation, the Human Rights Act has marked itself over the last 20 years or so of its operation by being present in so many fields that, when it was initially set up in 1998, becoming effective in 2000, it might never have been thought possible or that they would even be brought into court.

These things have a way of expanding and growing. I think the Chief Justice took on this in his presentation to you a while ago, when he said that it is very difficult to predict just exactly what the implications of creating these kinds of rights will be and putting them into the legal sphere, in that sense.

I do not know whether that answered your question, but —.

The Chairperson (Ms Sheerin): I suppose, further to that, you use the example of the South African model, and we have had presentations from people who are involved in that process and former judges in South Africa, and we talk about the progressive realisation model. To my mind, it could somewhat be used as almost that measure of accountability for Governments, Ministers or Executives so that, if there is a clear bill of rights there, then a Government knows what their responsibilities are, and they will have to bear it in mind when legislating.

Mr Coll: Yes. Well, I think that that is undoubtedly right. At the moment, for example, under the Human Rights Act 1998, you have a series of mostly civil and political-orientated rights that are enshrined in domestic law and have a very high standing in that setting. That is so that, if, in the passing of laws or the taking of Executive decisions, there is conflict with what those provide for, then a government agency that enters into that does so at risk. That is because those rights are hard-edged and enforceable. It is the meat and drink of our courts nowadays to take on that kind of territory.

It really touches back in with the point that I made in that, if you create rights that are hard-edged and determinative, then you can expect them to be enforced in a proactive fashion because that is what the law would require. If the rights are more generic, target rights, then it becomes more difficult for the courts to grapple with them; you a more into the issue about whether they really are just as simple, or whether it involves the courts traipsing into the territory of politics and public policy. In some of the older models — I am not an expert on the South African approach, and you have heard from experts on this — it seems to me that they suggest, at times, something that is more about enforceability in political terms or in policy terms, rather than in pure legal terms. Therefore, in other words, they almost become — maybe this is not a great way of putting it — an enhanced Programme for Government or something like that. It comes the standard bearer against which Government policy is gauged and judged. However, the enforceability of that might not necessarily be hard-edged in court, and it might be something that is dealt with in the Assembly in a Committee-type structure. Alternatively, of course, in the final analysis, it might be enforced by accountability from the people at elections.

The Chairperson (Ms Sheerin): Thank you very much, Peter.

Maria, we have obviously had a number of these presentations at this point, and I have asked a lot of the presenters about the gaps that were are going to have as a result of Brexit and whether there is scope in the creation of a bill of rights to plug some of those gaps. You explicitly said that you believe that we are going to have some gaps as a result of the loss of the Charter of Fundamental Rights, and that a bill of rights could plug some of those gaps. We are 21 days away from the end of the transition period, so is it reasonable that we have the time to do that when we leave the EU so that we can hold on to some of those rights via a bill of rights?

Ms McCloskey: My view is that, when we exit from the European Union, there is going to be an element of delay, and it is going to take some time to become clear on how that impacts on rights as we go forward. Obviously, the work of your Committee — I know that you are not due to submit your final report until February 2022 — is an opportunity to look at what we are losing from the Charter of Fundamental Rights and the statutory framework that is here at the moment and what we can then build in. The things that I was focusing on, with regard to children's rights, the stand-alone clause on equality and the fact that we have not implemented the race equality strategy here are the key things that we need to look at with regard to plugging those gaps. Yes, I think that it is difficult with regard to timing, but I think that that should drive the Committee on with regard to thinking about what we are losing and what we can then bring in through a bill of rights.

The Chairperson (Ms Sheerin): So you are saying that it nearly increases the motivation?

Ms McCloskey: I think so. I think that it should increase the motivation.

The Chairperson (Ms Sheerin): The second thing that I wanted to ask you about is, perhaps, slightly removed from your presentation. Following on from Brexit, we can see the British Government's EU settlement scheme, and the challenges that that is presenting. Concerns have already been raised by different human rights organisations and people in the law about the time frame and accessibility of that, particularly for frontier and migrant workers who are here. I think there is a clause in it that means that you cannot apply if you are an Irish citizen in the North who has never expressed British identity, but people have applied and have been granted it. Have you any thoughts on that or on the implications that it has for people's rights as we move out of the EU?

Ms McCloskey: I have not been working specifically on the EU settlement scheme, but I know from colleagues that the ability to apply through that scheme is time-limited, and we are coming up on that time limit. At the end of June next year, you will not be able to apply for the EU settlement scheme, as it stands.

In the Emma De Souza case, the challenge was withdrawn on the basis that she could remedy her issue because the EU settlement scheme was open. That is going to close, so the potential for legal challenges beyond that still exists.

From the perspective of children's rights, for example, that I do know about, we are working, and my colleague is working on that issue. A significant amount of work is going into trying to apply for the EU settlement scheme on behalf of looked-after children, a group of vulnerable people who have been largely forgotten or who have not been to the forefront of this issue.

For those vulnerable individuals and children who do not have documentation, the ability to apply through the scheme is much more difficult. It requires paper application and different types of evidence, so it is not as smooth as you might think. If you apply through the app, it is fairly straightforward if you have some sort of document. If you do not, it is not straightforward. The other major concern is that a large number of people who can apply through the scheme will not know about that until the deadline has passed.

I know that I have gone off point, and you are talking about Irish citizens, but there are certainly concerns about that, going forward.

The Chairperson (Ms Sheerin): I am asking questions like that because the Committee is here to consider creating a bill of rights as per 1998, considering the particular circumstances of the North and the impact of Brexit. As you pointed out at the beginning of your presentation, the demographics of the North and the situation here are a lot different from those in 1998.

Brexit will have massive implications, and we have an increasing population of migrant workers here. People from those communities are incredibly worried. When we talk about rights, it is important to

consider the loss of rights to populations that may be usually ignored or forgotten. If there is potential for us to expand on the rights to which those people have access, it is incumbent on us to do so.

Thank you both very much. I will now pass to the Deputy Chair, Mike.

Mr Nesbitt: Chair, thank you. Maria and Peter, thank you for engaging with us.

Peter, I take your point that the more tightly and clearly we use our language in a bill of rights, the less room there will be for ambiguity and successful legal challenge. When it comes to economic and social rights, however, it seems to me that, inevitably, there would be a form of aspirational writing in there. How comfortable and well equipped do you think your members would be to argue concepts such as progressive realisation and the use of maximum available resources?

Mr Coll: I suspect that many of my colleagues would feel very happy to have the opportunity to make arguments along those lines, Mike. As we indicated, the ingenuity of the legal mind is such that, if provided with tools that allow the opportunity to achieve a result for one's clients, there will be no great reluctance whatever on the part of the lawyers in this jurisdiction to use what is available to them to achieve those aims. If you have creation of legal rights, even if they are of that more aspirational nature rather than hard-edged, specific rights, such as a right to a particular type of benefit in particular circumstances or something of that nature, which is usually reasonably straightforward, you look to what the law says and to the individual circumstances and you apply them together and get a result.

If you have a more aspirational aspect to it, there are two interrelated points. Yes, you can certainly expect a lot of litigation in relation to them, but, alongside that, there will be a cultural battle, maybe, in the sense of the generalised historical reluctance of the courts and the law generally to engage with matters that sit in the political sphere rather than in the legal sphere. That is the key point that we are trying to get across about disability. You have asked us to think about this today. If you are going to create rights and if those are not hard-edged, how do they fit in to accountability and enforcement mechanisms? That will not necessarily be straightforward in the legal sense and may also require some of the other accountability or enforcement mechanisms that you are receiving evidence and advice about.

What I can bring to this is from the legal perspective, and, from that perspective, there is certainly an opportunity to develop those aspirational rights, but that will not necessarily lead overnight to hard-edged outcomes. That has been the experience, perhaps to an extent, in some of the aspects of article 14 of the European Convention, which touches on discrimination. A hard-edged right under the convention may not apply specifically to that individual's circumstances, but they can compare themselves with somebody else who does benefit from that right in a different way. That is fertile territory for dispute and difficulty, and it currently provides a lot of difficulty in legal interpretation. I could see a risk of that kind of situation developing if you have more aspirational rights.

Mr Nesbitt: Thanks, Peter. You are crystal clear, as many others are, that it is not for the courts to get involved in the allocation of budgets by an Executive. However, is there not a tension between that statement and perhaps having to argue that a specific Minister or Department has not used maximum available resource?

Mr Coll: I suppose that it depends on what the right says and its depth or granular detail, to again use that phrase. At the moment, if there is a choice between expenditure in one field and expenditure in another, the courts might say that that is not really territory that a judge can engage with. The judge is not elected by the people to distribute public funds. That is primarily a political matter for Ministers. The ministerial decision-making on that, if that is what we are talking about, may be constrained in circumstances, depending on the statutory backdrop, so, the statute provides a clear steer on what must be provided for the individual. If, in the circumstances, the Minister or the Department concerned has money available, it may be more difficult for them to argue that they are not in the territory of divvying up public money that the courts should leave for Executive decision-making.

Mr Nesbitt: Thanks, Peter. I have a question for you both. Perhaps I will go to Peter first and then Maria. With regard to JRs, it has been put to us that one possibility would be to build in a sunrise clause in the legislation on a bill of rights, whereby you could not take a JR for a period of, for example, five years. What is your view on that, Peter?

Mr Coll: It is quite ingenious in one respect. I suppose that it depends on how it would be done. Would it be subject to some sort of grounds for potential challenge? That goes back to the ingenuity of the legal mind. I would not rule that out. It really comes down to whether the bill of rights is made through a Westminster rather than an Assembly enactment. That might give it more of a hard edge, and it might be said that that is the clear will of Parliament and the way that it is. That might also allow an opportunity for a lot of it to bed down.

Mike, the major problem with that is that there may not be a legal issue and it may just be more of a matter of practicality. Until the decision makers would be faced with circumstances in which their decision-making on those rights could be subject to enforcement, the pressure may not be on them to engage with it. You might have that opportunity for a slow burn and for people to get their head round the idea, as opposed to a year zero-type approach or sudden running start.

I can see all kinds of practical problems arising from it, and you could not rule out the possibility of some legal issues. It might even be seen to bring in elements of convention rights. One of the interesting aspects that you have to consider is how the rights in the bill of rights will fit in and sit alongside the rights that exist under the European Convention. Is it possible that the European Convention might impact into and drive what is meant by the new rights that are created? It is fascinating stuff, and what might come from it is very interesting.

Mr Nesbitt: OK, Peter. Thanks. That was very interesting. Maria, what about you? You spoke positively about JRs.

Ms McCloskey: Yes, I did. It is going to sound like I am echoing the comments of the QC, but I think that the suggestion of a sunrise clause is a pretty ingenious idea. I know that it has worked or is working in other scenarios around the world, and I noticed that the Lord Chief Justice has talked about avoiding the big bang. Against that, there are potentially some difficulties.

In circumstances in which the Government might be concerned about challenges being brought, it makes sense to have some element of delay to allow it to be embedded and for certain Departments to get their house in order and to ensure that they are compliant with a bill of rights. It would probably make sense in the context where there is that concern, but that is not to take away from the potential difficulties or issues that that would present.

Mr Coll: Maria made a very good point, and, if it is acceptable to the Committee, I would like to add to it briefly. I draw you to the example of the Human Rights Act. It was passed in 1998, but it did not come into effect until 1 October 2000. Of course, it is not uncommon for statutes to be created but not commenced until some time thereafter. Without the drama that comes from a sunrise clause, the roots are there giving an opportunity to create the bill one day but not to expect it to come into operation the next and to allow everybody in Northern Ireland, not just Departments, the opportunity to work out what it will mean for them and how they could use it. Maria is quite right about that, and that would be almost essential. I am sure that that is something that you would all easily recognise.

Mr Nesbitt: OK. That would be a form of post-legislative scrutiny.

Mr Coll: Yes.

Mr Nesbitt: Maria, you are keen on pre-legislative scrutiny. Will you expand on that and on how you see that working, not just with a specific new Stormont Committee but in engaging with bodies such as the Children's Law Centre?

Ms McCloskey: On pre-legislative scrutiny, I am talking about maybe rolling that in with a Standing Committee that, when reviewing new legislation, will consult the likes of the Children's Law Centre on the level of compliance with the bill of rights, so that, if there are issues in the legislation that require it to be amended to complement the bill of rights, that can be done at a pre-legislative stage before that legislation passes. By doing so, you can find out if there is a problem, and any challenge can be avoided from the outset. That is what I was talking about in that regard.

Mr Nesbitt: You and, I think, Dominic Grieve said that we do not know what the full impact on rights will be post the transition period. How do you counter an argument that we should wait and see rather than continue with the work of this Committee?

Ms McCloskey: Again, from a personal perspective, there has been some waiting and seeing with certain things only for us to be disappointed. When you take these things on an individual basis and people consider them in silos, you might think that there will not be a huge impact, but, from my perspective, it feels like a continual chipping away at rights. I would be concerned that, when we get 10 years down the line, if that trend continues, it could, at that stage, potentially be too late, because opportunities like this may not be around, and the time to act is always now.

Mr Nesbitt: If there is a bill of rights, that is not the end of the journey, because rights evolve over time.

Ms McCloskey: Absolutely. That is exactly where the role of lawyers and the courts comes in, because you cannot foresee every impact. Bills of rights exist around the world, and they exist in post-conflict societies. They work to a greater or lesser extent, but there are certainly plenty of models from which the most positive aspects can be taken for the purposes of informing your work.

Mr Nesbitt: Maria and Peter, thank you both very much.

Miss McIlveen: Thank you very much to both of you for your presentations. My questions have primarily been addressed through the presentation and the briefing that was provided by the Bar in advance. I want to pick up on one point that was raised in Peter's paper; the point about a preamble. You said in your presentation that the devil is in the detail, yet, in your paper, you are talking about the scope for a general preamble. Could you expand on what you perhaps anticipate being in a preamble or suggest what should be in it?

Mr Coll: I certainly can give an idea of the concepts, but the content of the preamble will primarily fall to politicians to decide. The idea behind it is that, even if you have hard-edged rights in the body of the bill of rights, you might still want to set the tone, in a preamble, for what you see them meaning in practical terms on the ground, even more so if the bill of rights does not include hard-edged, granular, detailed rights and the rights are more of an aspirational nature. A preamble might set out something along the lines of why we are here, why we have the bill of rights, what the purpose of having the bill of rights is and what it seeks to achieve. It might also provide some steer to the courts on how they might go about interpreting those rights and what they might do or not do in making them effective. The preamble would provide an opportunity to set the parameters within which the rights created in the document will have actual effect. That is really where we might see the role of a preamble coming in.

Obviously, there are dangers in that. If you look at it in the normal sense, in your day-to-day business of creating laws, the statutory arrangements that you create do not generally have preambles. They pretty much get to it. There might be a very brief setting of context but maybe not, and maybe an explanatory note might cover some of that territory. Ordinarily, the explanatory note will have a limited role in legal interpretation. The preamble idea would allow you an opportunity to do something different in that regard to set the tone and parameters of how the document might become a living document as opposed to something that gathers dust on lawyers' shelves.

Miss McIlveen: Thank you. Maria, have you given any consideration to what a preamble may look like?

Ms McCloskey: Honestly, before Peter spoke, I was thinking that it is about setting the tone and context. Within that, sometimes, the preamble can be more accessible to individuals than the finer detail of the rights. I do not really have anything further to add to that.

Miss McIlveen: OK. Thank you.

The Chairperson (Ms Sheerin): We will now move to the members who are with us via StarLeaf.

Ms Bradshaw: As you outlined, today is Human Rights Day, and the Human Rights Commission launched its annual statement. Unfortunately, I was at the Health Committee and could not see it, but I had a quick look online when you were speaking. There are 46 actions, for want of a better word. Some of those are the responsibility of the Home Office, but it strikes me that a lot of the actions, such as a single equality Act or a new disability forum, could be done to address deficiencies or perceived deficiencies in human rights here in Northern Ireland without a bill of rights per se. How do you respond to that?

Mr Coll: If you are asking me that, Paula, I think that you are right. Absolutely. Very many pieces of what might be described in a non-pejorative way as "ordinary legislation" do exactly what you have just described and provide rights for individuals that are not at all trivial and, in fact, are of great practical, meaningful importance day to day for thousands of people in this jurisdiction. I think that you are absolutely right to identify that it is not an either/or situation — either you have a bill of rights or all the rights that you might want to create will fall away.

Maybe the issue for you all to grapple with — in fact, the Chair dealt with it in passing a short time ago — is that you are looking to what is required of a bill of rights in the particular circumstances of Northern Ireland. That operates in the context of what rights already exist, primarily, for example, the Human Rights Act and the European Convention, being incorporated through it.

Maria talked about the EU charter, which will be of more limited effect, potentially, depending on what happens in any deal that may or may not be done in the next few days. Alongside that, you have a whole panoply of statutory rights and, indeed, common law rights, which are recognised by the courts outside of pure statutory form in this jurisdiction. They all exist, and they are all there. You have an ongoing opportunity to add to those, and I know that you regularly do that.

You referred to the single equality Act idea that exists in England and Wales and whether that should be replicated here. There has also been some recent public discourse on the anniversary of the Disability Discrimination Act 1995 and its impact, which has been very far-reaching. It is showing its age a little bit and, perhaps, needs to be refreshed. Those matters are very important and should not be lost sight of. I know that you will not lose sight of them, given the very fact that you have raised it today.

Ms Bradshaw: Thank you. I will follow on from that. You mentioned the Human Rights Act, for example. Last week, I asked Professor Brice Dickson whether it would be useful to codify a number of human rights into one Bill or Act, adding in the particular circumstances and a few tidying up exercises; not making it too expansive but putting all the human rights into one focal Bill. Do you think that we could deliver that here, and would it achieve the wider community's expectation?

Mr Coll: I made a point a short time ago that maybe touches on what you have said. You need to think carefully about how any new rights created in a bill of rights will interact with, be influenced by and developed by the Human Rights Act and the European Convention. Is it possible to effectively take the Human Rights Act and put it into a new statutory framework? Possibly, yes. There are all kinds of technical issues that might come from that. Obviously, the Human Rights Act is an Act of Westminster. It is probably still an open question as to whether a bill of rights here, if enacted, would be done through Stormont or Westminster.

The Human Rights Act carries with it a very powerful mechanism whereby Acts of Westminster, which carry that tenure of parliamentary supremacy, can be declared incompatible with the European Convention and with the Human Rights Act. That has a political impact, primarily, in that Parliament has to address what it will do about that. It does not necessarily strike the Act down, because parliamentary sovereignty is maintained.

There are all kinds of very technical interplays with that, and you will need to be careful about how that is done. I did not get the opportunity to see what Brice said. He is very well placed to have spoken to you about those very important technical issues, and he may well have done that. I am not entirely sighted of how you might take those technical aspects through, other than to say that they are factors that the draftsmen would need to be very careful of.

Ms Bradshaw: Thank you very much.

Ms McCloskey: Paula, I will come in on your first question. In the recent polling on the issue of a bill of rights, 83% of those polled thought that a bill of rights was important for Northern Ireland. It sets a tone for Northern Ireland and the type of society that we are and want to be. It is important for people. I do not want to take away from the legislation that you talked about — they are important — but the bill of rights will be the place to have them tied together. They can then be supported by other legislation, but they are there in one bill of rights that people can access and say, "OK, this is what my rights are" or, "These are the rights that we have as individuals". Again, that goes back to what came out of the Good Friday Agreement and what we have been talking about for 22 years, the position that we are in now and the need to protect human rights and to protect them going forward.

Ms Bradshaw: Thank you.

Mr Durkan: Thank you for the presentation. I do not have any questions per se this afternoon. I have been listening, and it has been extremely interesting. Anything that I was going to ask has either been asked or been answered without being asked. Thank you.

Mr Coll: Thanks, Mark.

Mr O'Dowd: Thank you, Peter and Maria, for your presentation. I am not sure whether I have a question; it may be more of a commentary. You might get a question as I make that commentary, so bear with me.

As a legislator, the first question that I ask myself is this: is legislation necessary to solve the problem? If the answer is yes, what I want to end up with is legislation that is workable and enforceable. This week in the Assembly, we saw a well-intentioned amendment to a piece of legislation that might have had huge financial consequences for the Executive, and there had to be a bit of negotiating and politicking to resolve that. I want to see legislation that is workable and enforceable. Understandably, elected representatives are concerned that the courts take power away from them. There is a democratic imperative that elected representatives are there to make laws, but there is also a danger that they make unworkable or unenforceable laws. This is not simply about the bill of rights. There is concern that the bill of rights will take away power, but, if we make the wrong laws in the Assembly, we will end up in court anyway.

The point that I am trying to make — it is a point that you made, Maria, and, in fairness, Peter covered it as well — is that rights have to be enforceable, whether it is a bill of rights, section 75, the Rural Needs Act, the Human Rights Act or even educational rights. In your role in the law centre, Maria, you will be aware of educational needs. Legislators have to ensure that the legislation is proper, but how do we ensure that we have a bill of rights that is both useful and enforceable?

Mr Coll: When making those points, John, you mentioned section 75 and the Rural Needs Act. It occurs to me that, generally speaking, the enforcement mechanism for them is not the traditional hard-edged one. They require certain identified government bodies to "have regard to" needs to secure equality or to ensure reflection of rural needs, etc. That is perfectly valid. It reflects the reality that, often, lawmakers want to set the tone or project soft power. That is how they look to achieve objectives. However, they do so in a way that recognises that we live in an imperfect world, that there are financial constraints, and that, at times, there will be different ways of achieving things. There is more than one way to skin a cat.

Much of this will depend on the model that is eventually adopted across the spectrum, from aspirational rights to hard-edged rights and where you find the bill of rights sitting on that spectrum. It might be mixed. In the bill, some rights may be more hard-edged than others. The more hard-edged they are, the easier it is to enforce them. Right x might say, "An individual has a right to" whatever it might be. If individuals do not get that right, they can go to court, and the courts enforce the right. In that situation, I would say to you, respectfully, that elected representatives are not having power taken away from them by the courts. In fact, what is happening is that the courts are reflecting the reality that the elected representatives want to achieve and are enforcing it.

Therefore, there is an opportunity for the judicial branch of government to work hand in glove with the legislature and executive to achieve that which is to be achieved. As the Chief Justice made clear in his presentation, judges do not make the law. They are not there to promote the code; they do not have the democratic accountability to do that. They do not have what you have. They are not tribunes of the people who make laws on behalf of the people. However, they do have the independence and the power under our system of law to make sure that that which has been brought into law is upheld and enforced. That is vital, and our courts have never shied away from doing that. A future bill of rights will be met with that kind of alacrity from the courts.

If you want it to be enforceable, make it so, but, in making it so, you have to recognise the impacts that that will have. For instance, if the bill of rights has a fundamental role and sits above what might come afterwards from the Assembly — if the Assembly makes a law afterwards — one option might be to mirror the Human Rights Act approach. If the law is incompatible with the rights under the bill of rights, it will have to be addressed in some shape or form. It will be either a declaration of incompatibility or, if

it is secondary legislation, the courts are given the power to strike it down. That is the kind of enforceability that can be exercised.
If the rights under that law are vague — I do not mean that in a pejorative way, but in reality — they become more difficult to enforce, because it brings into play more of the variables and factors that are recognised by section 75 of the Northern Ireland Act, for example, or the Rural Needs Act, as opposed to some provision of a social security Act, for instance, that provides a specific right to a particular benefit at a particular rate in particular circumstances.

Ms McCloskey: John, you asked how you can make a bill of rights useful and enforceable. There are a couple of factors. It is a matter of consulting with the public. I know that you are doing that with a public consultation. People have to have a sense of involvement, if not ownership, in it. The theory that human rights are not an abstract concept has to mean something; it has to have granularity. What does that right mean to me? That has to be set out in whatever way you decide, although I do not deny that that is not an easy task.

You can have different remedies. I was interested in what Professor O'Regan had to say about localised tribunals. Oftentimes, people have problems and believe that their rights have been breached. I was at the airing of such a problem before a tribunal chair, for example — it might not be a judge — and people might be satisfied by that outcome. It does not necessarily lead to being in court at every turnabout, from the Government's perspective. As I say, there are various remedies.

As set out in the briefing by the Bar Library, the range of alternative dispute mechanisms can be built in. Mediation, for instance, can be used. Oftentimes, the challenges do not come before a judge, because, if people feel that they have been wronged and that it can, in some way, be put right within the confines of the bill, they choose that option. Challenges do not always end up in court.

My other point relates to the fear of power being taken away from the Government and handed over to the courts. I do not mean to be dismissive, but it must be maintained that this is not about the whim of the Government, because this Government will not be the same as the next Government, and so on. It will change. However, rights should remain consistent and, potentially, evolve. They should be set in legislation, and they should continue on into the future.

Mr O'Dowd: I have no difficulty with that. A bill of rights is a constitution whereby everybody knows the rules of the game. You made some comments earlier, Maria, about the identification of lawyers as activists and the criticism of lawyers by the Government. I fully agree with you that that is unacceptable. As a Minister, I was legally challenged several times in court and, at times, I did not like the challenge, but I understood and fully appreciated and endorsed people's right to challenge me. That is part of the democratic system. There have to be checks and balances to ensure that the laws that I enforce or those which I have introduced are properly administered. You do that through legal scrutiny; sometimes it is not legal challenge but legal scrutiny.

That leads me to the next point. We already have several mechanisms in our legal framework for resolving disputes rather than going to court. There is a tribunal in the education system that is not a court system but which resolves disputes at different levels. I fear, sometimes, that concerns that a bill of rights would block up the courts have taken on a life of their own. That is not necessarily so, and I do not believe that that will be the case. If there are legal challenges in the first number of years of a bill of rights, so be it. That sets the precedence for future challenges that, perhaps, will improve or tidy up the laws.

That was more of a comment than a question. Thank you very much for your presentation. You may want to respond to some of my rambling; I do not know.

Ms McCloskey: The only thing that I would add — Peter has already mentioned it — is that courts, judges and lawyers do not create new rights; they look at the rights that have already been put in. When it comes to challenges, it is not about challenging the ability or the power that a government has; it is about challenging the legal limits of that power.

Mr Stalford: Thank you very much for your presentation and your answers. I was encouraged to hear John O'Dowd's very conservative legislative philosophy that we should pass laws only if we absolutely need to. I absolutely agree with that. He is now going to come back at me for calling him a conservative *[Laughter.]* John talked about creating a constitution. You will know that in the United States of America there are, effectively, two schools of judicial thought. There are originalists, who believe that the American constitution should be interpreted through the prism of what those who

authored it expected it to deliver; and there are textualists, who assert that, for example, the second amendment of the constitution, which allows for gun ownership, is a dated concept that goes back to a time when America was a new country and faced the very real possibility of invasion by the United Kingdom. In that context, when authors — in this case politicians — put down provisions, they often cannot envisage where they end up. For example, I very much doubt that the people who wrote article 8 of the European Convention on Human Rights could have envisaged a circumstance where that article would be used to prevent the deportation of people from this country who came here and stood on street corners demanding the murder of Jews and Christians and other groups that they do not like. Perhaps you might talk to that in terms of what was originally intended and then how those things can end up being interpreted.

Mr Coll: The Human Rights Act 1998 incorporates many provisions of the European Convention on Human Rights into our domestic law. The European Convention was created in 1950, and I think that it is fair to say that the world of 1950 is very different in many ways, if not every way, from the world that we inhabit today. The convention and the jurisprudence that has developed around it has happened, maybe not at pace with society, but it certainly has striven to reflect developments in societal approaches and norms. I think that you could probably expect that that would be how a bill of rights is more likely than not to develop over time in our jurisdiction. Again, that may be something that a preamble might touch upon. It might specifically try to guide the courts on how the document might live and breathe as years go by.

I think that you are right, Christopher, to say that, in doing that, you move into territory where, although you might be creating that document in 2022, it will resonate through the generations and could still be open to interpretation 100 years or 200 years later or beyond, without the legislature having really interfered with it. Perhaps that is how it has to be. We do not know what the world will be like in 50 years' time and the type of life that our children will have, so should we set parameters now on what rights they should enjoy in the time to come? I think that there must be room for it to become a living document.

When you were making those remarks, I was struck by some of the obituaries that I have read in the past few days for Lord Kerr. Maria quite rightly referred to Lord Kerr in her remarks. He was a colossus in the law in this jurisdiction and further afield, and he sadly died last week. His was an untimely and sudden death, as he had much more to offer to the law in this jurisdiction. During his time as a lawyer and a judge both in Northern Ireland, and then in the UK Supreme Court, he was one of the drivers in developing the law as a living thing and not as, to use my phrase from earlier, dusty documents on lawyers' shelves, particularly with some of the cases that he dealt with in the Supreme Court. He was often a dissenting voice in the Supreme Court, and he recognised the need for the law to reflect and touch upon the society that it serves.

A bill of rights would, and should, do that, but it does carry risks because it means that you are legislating without really knowing what the implications will be. The current Chief Justice touched on that in his presentation to you when he said that it is not really possible to predict how rights will develop over the years to come.

Mr Stalford: I think that "constitution" was the important word that the previous speaker used. If you move in the direction of a written constitution, which a bill of rights, in a very real sense, is, it opens up questions about the appointment of who would interpret the constitution, does it not? If you have a written constitution that is interpreted in two different ways, you will have two different schools developing. You are then into questions about what wing or what school the judges who will be appointed to interpret are in.
I foresee that, if you are not careful, you will end up in a similar situation to that which exists in the United States of America, where the interpretation of the constitution is highly politicised and is right at the heart of the political process. People are elected president on the basis of promises to appoint judges of certain opinions and philosophies. One of the advantages of our system has been that we do not have a written constitution and that it evolves organically over time. Experience elsewhere in the world indicates that written constitutions can end up highly politicising the judicial process.

Mr Coll: The United Kingdom and, in that sense, Northern Ireland do not have a written constitution in the way that — to use an example that is close by — the Republic has. We do have the European Convention on Human Rights, incorporated through the Human Rights Act, and it gives voice to the recognition, interpretation and enforcement of many fundamental rights that might otherwise, in other parts of the world, be founded in constitutional or fundamental law.

I appreciate what you say about the American experience, but I have to say that — I suspect that most of my colleagues and Maria will agree with me — we do not really see it as harming our judges' ability to interpret and operate the Human Rights Act. They still do so very much on legal principle and not on any kind of political aspect — far from it. In fact, they would nearly say, "God forbid", as they would be horrified to think of the prospect of that, as would all lawyers in this jurisdiction.

I appreciate your point and the concern that it gives rise to, but experience here has, fortunately, been somewhat different and more legalistic. You would expect that, more likely, to be way into the future, particularly if it is addressed specifically in a preamble that gives life to what the legislature expects from the judiciary in dealing with a bill of rights.

Mr Stalford: That is grand. Thank you.

The Chairperson (Ms Sheerin): Peter and Maria, we have dragged you both over the coals and taken up a lot of your time this afternoon. Thank you both for joining us, for your presentations and for answering all our questions.