



Northern Ireland
Assembly

Ad Hoc Committee on Conformity with
Equality Requirements, Welfare Reform Bill

OFFICIAL REPORT (Hansard)

Human Rights Commission Briefing

3 December 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Trevor Lunn (Chairperson)
Mr Robin Swann (Deputy Chairperson)
Ms Paula Bradley
Mr Mickey Brady
Mr Tom Elliott
Ms Bronwyn McGahan
Lord Morrow
Mr Alastair Ross

Also in attendance:

Ms Megan Fearon
Mr Conall McDevitt

Witnesses:

Mr Colin Caughey	Northern Ireland Human Rights Commission
Professor Michael O'Flaherty	Northern Ireland Human Rights Commission
Dr David Russell	Northern Ireland Human Rights Commission

The Chairperson: I welcome Professor Michael O'Flaherty, chief commissioner of the Northern Ireland Human Rights Commission; David Russell, deputy director; and Colin Caughey, policy officer. I invite you to make your presentation. I am sorry that we kept you waiting. I know that you are tight for time.

Professor Michael O'Flaherty (Northern Ireland Human Rights Commission): Thank you very much, Mr Chairperson. I thank the Committee for inviting us. We are giving our advice today, pursuant to the provisions of the Northern Ireland Act 1998, where, under section 9, we are instructed to advise the Assembly on whether a Bill is compatible with human rights. In so doing, and by human rights, we refer only to those human rights treaties that have been ratified by the United Kingdom, many of which are engaged around the work of this Committee.

Before getting to that, the Human Rights Commission warmly welcomes the establishment of the Committee. We consider that employing the ad hoc device in the 1998 Act is a very welcome step by the Assembly in ensuring compliance with international human rights standards. Before I begin, if I may, I should say that the standards that we have in mind today are the European Social Charter; the European Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the UN Convention on the Rights of the Child; the UN Convention on the Elimination of All Forms of Discrimination Against Women; and the UN Convention on the Elimination of All Forms of

Racial Discrimination. All those treaties, which have all been ratified by the UK, will inform what we present to you today. We will capture our comments in written form during the week and ensure that that is delivered to you.

Let me begin with four general observations, some of which have been triggered by the benefit of listening to the Equality Commission's dialogue with you. The first of those observations is that, in assessing the Bill's compliance with human rights obligations, I invite you not to take an overly narrow interpretation of compliance — in other words, compliance of the bare language of the text with international human rights obligations — but also the application or possible application of the Bill in terms of the international treaties. I say that because it is the approach that is taken by the Joint Committee at Westminster. It looks as much at possible compliance or application issues as it does at the bare letter of the Bill that is before it. It is on the basis of both that it draws its conclusions.

Secondly, the Joint Committee is also very willing to look at issues of legal certainty. There have been a number of instances when it has been concerned that the principle of legal certainty has been insufficiently protected or honoured by a Bill. That has caused it to express concern. Although nobody challenges the function of an enabling law, it seems to us that it would be well within your remit to consider that even though it is enabling, it is missing a level of detail which is required to ensure that it is applied in a human rights compliant manner.

Third of the four general observations is that, as it is an enabling piece of legislation, and, to a very large extent, dependent on the nature of regulations, including in terms of assessing whether it is human rights compliant, we think that it is important that you look at putting stronger elements in the Bill whereby the regulations come before you by way of the affirmative resolution procedure. You have been asking our predecessors whether the Bill is compliant or not compliant with human rights. I will give you my first compliance and non-compliance view. If we do not get sturdier use of the affirmative resolution procedure in the Bill for the purposes of the Assembly's control of regulations, a serious issue of compliance would certainly arise.

Finally, in terms of general introduction, we are concerned that your job is being made all the harder by the absence of basic resource material which you would have if you were in Westminster. According to Treasury guidelines, it is required for the relevant Departments to undertake distributional impact assessments of a Bill, which look at the impact of a Bill across any number of different categories, one of which is human rights. Within the category of human rights, the Treasury regulations at Westminster stipulate that the human rights assessment should take account of rights under the socio-economic treaties: the European Social Charter and the Covenant on Economic, Social and Cultural Rights. If we were in Westminster, you would have a number of those impact assessment documents, developed by the relevant Departments. It is our understanding that that has not been done by the Executive. That raises an issue. You will be the judge of whether that raises an issue of compliance with regulations. However, if such impact assessments exist, they are not in the public domain. Certainly, we have not been able to access them.

If you will allow me, I will turn to some specific points in terms of human rights compliance of elements of the Bill. They are in no particular order and are quite disparate. The first has to do with the rationale for the disability living allowance adjustments and the introduction of personal independence payments (PIP). The Department for Work and Pensions (DWP) stated at Westminster that the purpose of the change to PIP is to ensure a 20% reduction in the budget. We understand that the same rationale is being presented with regard to Northern Ireland. However, we have no evidence that that 20% has been calculated taking account of the specific situation of disabled people in Northern Ireland. Until it is disaggregated and individuated to the situation of Northern Ireland, that 20% would appear to be arbitrary, and that would constitute an inconsistency with human rights obligations.

Again, however, we lack the knowledge. If it can be demonstrated to this Committee that that 20% is a scientifically calculated assessment based on solid, disaggregated data for Northern Ireland, then it is fine. However, that information does not appear to be in the public domain.

Next, issues of equality. I will raise just one, because obviously the Equality Commission spoke to this in detail. Equality is not just a matter of section 75. Equality is a matter of ensuring that this Bill will not be likely to discriminate across all the grounds of non-discrimination. The equality assessments that have been done with regard to the Bill in Northern Ireland have not engaged the discrimination grounds of race or religion. Therefore, you do not have data before you to determine whether the welfare reform provisions would raise issues of discrimination on the grounds of race or religion.

For example, you do not have the information before you with regard to the impact on Travellers, who have been identified by the UK Government and the United Nations as an ethnic group and, therefore, within the category of race, or of migrant workers, for example those migrant workers who do not have any competence in the English language. We are not saying there is any deliberate targeting; we are saying that you have not been delivered the material you need to make your assessment.

It has been stated by the Government that the whole welfare reform project is intended, among other things, to assist people back into work. However, the Human Rights Commission suggests to you that you have been given no evidence as to how these precise provisions will assist people back into work. We are concerned here, not in just general terms but also because I think everybody would agree that the statistics for the success of return-to-work programmes in existence now are dreadful. Right now, the statistics indicate that 3-5% of participants in return-to-work programmes find work within six months. If that is the rate of success of the current projects and programmes, what is it about welfare reform that is going to have such an extraordinarily better impact? We suggest that that is information that needs to be put to you by the relevant Departments.

The issue of carers of small children has already come up this afternoon. It is an issue that has received considerable attention in the Assembly, so I do not need to speak to it at any great length. However, the Bill as it is currently fashioned in the light of Northern Ireland and its situation is not human rights compliant. It is as simple as that. At the moment, the average cost of full-time childcare is £156 a week. What is more, supply does not match demand. Therefore, depriving a mother or parent of benefits because of unwillingness to go to work, when the childcare that they would require to contract is of the sum of £600 a month — £7,000 a year — is very troubling. That has not been addressed as of yet and is specific to Northern Ireland, because there is better access to affordable childcare elsewhere in GB.

Private sector actors are, potentially, given a large place in the delivery of the welfare services under welfare reform, including in undertaking the assessments that may result in the sanctioning of individuals. There is nothing inherently wrong with that. That problem is that the Bill fails to make clear that when those private sector actors are carrying out that vital public function, they are subject to the Human Rights Act 1998. If the Department carried out the function, there would be no issue; the Human Rights Act 1998 would apply to how the Department would treat those people. At the moment, the Bill does not make clear that the privately contracted agents would be so covered. Again, that is needed to achieve human rights compliance.

In the case of a sanction being applied on an individual, there is a risk, under the current provisions, of a person falling into destitution. That is a profound human rights issue. The problem is that the legislation does not make adequately clear the bridge between the imposition of the sanction and the engagement of the hardship payments. Under the terms of the Bill as we currently have it before us, there could be a considerable gap before termination of benefits for the purposes of sanction and the kicking in of those hardship payments that are designed to prevent destitution. The regulation of that potential gap period is where the problem is.

Social housing is a matter that Assembly Members have looked at length at already. Again, it does not require any vast detail from me. Let me instead put some figures to you. I refer to the manner by which having an excessively large domicile will cause you to be penalised for purposes of social welfare. Taking an average rent, the tenant on full housing benefit who is underoccupying by one bedroom will see their benefits reduced by £8.25 per week. For a tenant underoccupying two or more bedrooms, the figures would be £14.70 per week. It is estimated that the group of people that we are talking about is not tiny; the group of people affected by the penalisation scheme for unnecessary housing space is likely to be 32,668 tenants. That, of itself, does not raise a human rights concern. The concern arises because of the particular structure of housing in Northern Ireland. Traditionally, housing units have been built bigger than in GB. Where in GB it is a two-bed flat, here it has been a three-bed terraced house or something of that nature. The evidence suggests to us that there are just not enough alternative suitably sized housing units. Secondly, there is the issue with which you are much more familiar than me: the de facto sectarian segregation of housing, which further limits the pool of alternative housing and leaves people potentially in the situation of having to stay in their original home and losing benefits as a result.

One last point, if I may. Again, it has to do with housing. The commission is cognisant of the many contexts in which a person who would normally be perfectly appropriately housed in a small unit has exceptional needs whereby a bigger housing unit is required. One example is a disabled person who has a live-in carer. We do not see in the present structure of the Bill an acknowledgement of exceptional circumstances such as those. Another example would be a separated parent whose child

occasionally visits. Perhaps the other parent has the custody, but the child comes on the weekend or whatever. The need to have another bedroom for that child does not appear to be currently identified as an exception for the purpose of the imposition of the penalties.

Those are the concerns. I realise that all of them have been put to you by us before. However, we spoke on human rights the last time round. You are the ad hoc human rights Committee, so we have no choice but to bring them back to you again. We also consider that the Bill is fixable. With your scrutiny, its elements can be tightened up. The regulatory system can be brought under the tighter scrutiny of the Assembly. As a result of all of that, we might then be confident that the Bill would be compliant with the United Kingdom's international human rights standards.

The Chairperson: Do either of your colleagues want in?

Professor O'Flaherty: My colleagues will come in to answer questions if I do not have the required level of detail.

The Chairperson: Thanks, Michael. You have been very forthright.

In the various points that you made, you often said that there are unique circumstances in Northern Ireland. If our circumstances were not unique, we could just follow the UK legislation. Are there any of those points on which you do not think that the issue is the difference between us and the UK? To put it another way, are there any areas in which the UK legislation is questionable as well?

Professor O'Flaherty: If you look at the analysis of the equivalent Committee — the Joint Committee on Human Rights — you will see that it raised a number of the concerns that I have brought to you today. For example, it raised concerns about the high degree of subsequent regulation, the need for very close scrutiny of the subsequent regulation, and so forth. Those concerns are generic across the United Kingdom.

The Chairperson: To pick one of them, there is a question over the whole concept of assisting people back into work. You mentioned that only 3-5% of people get back to work within six months under the present scheme. Surely that rate is a consequence of our economic situation. The Bill is for good times and for bad. What is the point that you are making?

Professor O'Flaherty: The point I am making is that if the Bill is intended to get people back into work and if it were likely to succeed, that would be a human-rights positive, because people have a right to access to work. It is difficult to make that human-rights-positive argument in the light of the failure to make clear what is so different about this strategy from previous strategies that makes it any more likely to be successful.

Mr Colin Caughey (Northern Ireland Human Rights Commission): Under international human rights law, there are obligations on the state to ensure that there is access to adequate training for the people who wish to exercise their right to work — effectively, to be employed. The key point that we are highlighting is the need to ensure that the mechanisms in place are robust in assisting people into work.

The Chairperson: That is for another Department.

Professor O'Flaherty: That is right.

Mr McDevitt: Paragraph 10 of the commission's original submission struck me. It states:

"The Bill has significant implications for the enjoyment of socio-economic rights as recognised in the ICESCR and European Social Charter. International standards, ratified by the UK Government and binding on the NI Executive, require the removal of barriers so as to ensure the progressive realisation of socio-economic rights."

If I heard you correctly, Michael, you were saying that the Bill as drafted — because of its permissive nature and the fact that it is not clear that all enabling legislation would require affirmative action and therefore a guaranteed future level of parliamentary scrutiny, and because of its impact on childcare provisions and the other stuff — fails to meet that basic test.

Professor O'Flaherty: We have no quarrel with the legislative scheme. The Commission has no position on whether welfare reform is a good or bad thing. That is well outside our competence. The Bill, on the face of it, raises concerns, which I have outlined.

Mr McDevitt: Delving into some of the specifics, one scenario that has been testing colleagues of mine is that where someone who is in a hospital or a care home has their disability living allowance (DLA), or PIP as it will become, docked while they are in care. Would taking away such a payment from someone while they are in care or in hospital affect their right to be fully involved in public life? Would it undermine a right to participate fully in society, simply because they are in hospital or in care?

Dr David Russell (Northern Ireland Human Rights Commission): Under the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD), there is a protection of the right to independent living, so there is a potential for the rights of disabled people to be engaged under article 19.

Professor O'Flaherty: This is the Committee at which we should be very legal and very correct. Article 25 of the International Covenant on Civil and Political Rights (ICCPR) is the right to participate in the public life of society. If it were determined that the removal of benefits from a person in care precluded or seriously impeded them from enjoying public life, such as standing for election, choosing representatives, and so on, that would raise the possibility of a violation of the ICCPR.

Mr McDevitt: Am I hearing you correctly when you say that the two policy dimensions of the Bill that are most concerning to you, because of the uniqueness or the differences in circumstances here in the North versus GB, are childcare, because of the very poor provision of childcare here, and the housing changes, again because of the unique circumstances with our housing stock, the fact that we tend to have larger public housing and the unfortunately segregated nature of it?

Am I right in saying that those are the two specific areas of the Bill where you think that, because of our local circumstances, there is most risk that the legislation could be injurious or in potential breach of certain human rights obligations or international human rights standards?

Professor O'Flaherty: They are two of the more obvious ones in the Bill itself, and in the absence of the Bill to take account of them. There are any number of other concerns that our colleagues in the Equality Commission have brought to you that are in elements of our submissions about which I have not spoken today that could, in a context of bad regulation, be equally problematic, but those two are already self-evident before we see any regulations.

Mr McDevitt: Finally, to be sure that we do not misunderstand Michael, you are saying that unless the Bill makes the secondary legislation such that it requires affirmative resolution procedure in the Assembly, there would be a basic question over its compatibility?

Professor O'Flaherty: That is correct, and I am confident that if the scenario that you have just described were to come about, the matter would be eventually condemned by the UN Committee on Economic, Social and Cultural Rights (CESCR) when it next reviews the United Kingdom's record.

Mr McDevitt: In other words, if the Bill did not require affirmative resolution?

Professor O'Flaherty: OK.

Mr McDevitt: Thank you.

Mr Elliott: Thank you for your presentation. I seek one point of clarification. Quite near the beginning of the presentation, Michael, you said something to the effect that a serious issue of compliance would arise. I cannot recall what that actually was.

Professor O'Flaherty: I said it so many times.

Mr Elliott: I know that. Anyway, I will check it in Hansard afterwards.

Just for clarification, the Bill is undergoing the same human rights scrutiny as it does in the United Kingdom Parliament. Is that right?

Professor O'Flaherty: Now that we have established this Committee, it is, yes.

Mr Elliott: It is within the same human rights competence, and it is directed under the same human rights requirements, regulations and legislation?

Professor O'Flaherty: They are the same treaties, yes.

Mr Elliott: I assume that it has been through all the human rights processes in the United Kingdom Government, and you highlighted some of the issues for which the Executive have been to individual Departments. Is there a requirement for the Executive to do this here, if it has already been done in the UK Parliament?

Professor O'Flaherty: On the technical matter of the rule, David will speak. However, I say to you that, even if there were not a formal requirement — I did not say that there was a formal requirement, because I am not sure — and even in the absence of a formal requirement, there are differing circumstances and conditions in Northern Ireland that would mean that —

Mr Elliott: I am sorry to stop you there. Are there any differing circumstances that the regulations determine? For the European Convention on Human Rights (ECHR) and the International Labour Organization (ILO), and all those areas that you have specified in paragraph 2 of your submission, are different regulations or different levels of scrutiny required in Northern Ireland from what is required elsewhere in the UK?

Professor O'Flaherty: No. However, the problem is that Northern Ireland is a devolved Administration, and therefore you are not going to get the same degree of scrutiny of the situation in Northern Ireland from a Westminster Department as you would if there were a parallel or mirrored scrutiny, at the level of the devolved Departments, which we understand did not take place, at least in the form of impact assessments of the type that I referred to earlier.

David may wish to add something to that.

Dr Russell: In our original submission, we highlighted that there is a requirement, because it is within the competence of the Assembly, so, under sections 6 and 24 of the Northern Ireland Act 1998, it is required that all Northern Ireland Assembly and Executive legislation should be compatible with the convention. In addition, sections 14 and 26 require compliance with international human rights obligations.

Mr Elliott: Sorry, what are those two sections?

Dr Russell: Sections 6 and 24 with regard to the European Convention, and sections 14 and 26 with regard to international human rights standards.

Mr Elliott: What specifically are they about?

Dr Russell: They are about the obligation of any legislation to be deemed compatible. In answer to your first question, it is the devolved competency of the Executive and the Assembly, and it is the responsibility within that competency to ensure compliance with the ECHR and all the ratified UN standards.

Mr Elliott: The only point that you are making is that the Northern Ireland Executive have not carried out that scrutiny and assessment role.

Professor O'Flaherty: As best we can tell.

Dr Russell: Some of the actions undertaken by DWP about following the green book of Treasury guidance were to undertake an economic appraisal that would assist in ensuring compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR) may not have been replicated by the Department of Finance and Personnel (DFP).

Mr Elliott: OK. Therefore, the only argument that you are making so far is that the Northern Ireland Executive have not gone through the process of carrying out that scrutiny and those assessments. Is that reasonable? Apart from that, you have not found anything that specifically breaches any of these human rights issues.

Dr Russell: The Bill has passed through Westminster, but that does not mean that it will not be subject to a judicial review on some points. It just means that the legislation has passed. The Northern Ireland Assembly now has the opportunity to ensure that the Welfare Reform Bill here is compliant as far as possible and deals with any issues that may have been similar in the Westminster context; for example, issues that the Joint Committee on Human Rights would have raised. Therefore, part of the answer to your question is that we do not know, because so much is left to secondary legislation, and what may arise as a consequence of legislation having passed in Westminster, if it were non-compliant, could easily be replicated here. We see this as an opportunity to ensure the best human rights-compliant legislation possible by the Assembly.

Mr Elliott: To be fair, Michael said on several occasions that the Bill as it stands is not human rights-compliant for Northern Ireland.

Professor O'Flaherty: Not several: one or two.

Mr Elliott: Let me finish. Is that specifically just around procedure that is being carried out?

Professor O'Flaherty: No, no.

Mr Elliott: Let me finish. Is that simply because of the process that has been carried out by the Executive, or are there any other specific issues that you have found in the Bill that are not human rights-compliant?

Professor O'Flaherty: Yes. You built the procedural matter that you mentioned up into something much bigger than we intended. We were simply —

Mr Elliott: It was you who built it up, Michael, not me.

Professor O'Flaherty: No. I simply drew to your attention that you lacked a resource, which were the local departmental analyses. When I spoke to non-compliance of the Bill, I was referring to specific substantive matters, such as the failure of the Bill to deal with the peculiar situation of housing in Northern Ireland or the issue of parents of young children returning to work.

Mr Elliott: Were any of those issues flagged in the UK Bill?

Professor O'Flaherty: These issues are particular to Northern Ireland, for reasons that I gave earlier. One is the peculiar issue of the housing stock. I will not repeat it, because I said it just a moment ago. There is also the fact that there is not the same level of access to affordable childcare in Northern Ireland as there is in GB, so, even if the issues were flagged, that would not have raised the same human rights considerations elsewhere in the United Kingdom as it does here because of the particular circumstances here.

Mr Elliott: What you are saying is that the Bill could breach human rights regulations under the whole raft of things that you mentioned in paragraph 2 of your submission? It could breach the legislation in Northern Ireland but the UK legislation.

Professor O'Flaherty: We are looking at the Bill only as it is applicable to Northern Ireland. That is all that we are speaking to. We are not speaking to the —

Mr Elliott: This is very important. You are saying that there are specific circumstances in Northern Ireland. Are you saying that it could breach some of the issues in Northern Ireland but not the UK legislation?

Professor O'Flaherty: With respect, it is a false question. It is a Bill applicable to Northern Ireland about Northern Ireland. I can speak only to that context.

Mr Elliott: Yes, but the UK as a whole is subject to all these treaties. Therefore, we in Northern Ireland are subject to them. The point that I am trying to make is that, in respect of the treaties, the Northern Ireland Executive and Assembly are on the very same basis as the UK Parliament and Government. Are you saying that one of those treaties could be breached in the Northern Ireland Executive and Assembly legislation but not in the UK legislation? I find it strange that, if they are all the same treaties, the legislation can be breached here but not in mainland UK? I am only asking the question.

Professor O'Flaherty: Let me answer that by way of an analogy. There have been a number of cases where international monitoring bodies such as the UN Human Rights Committee, which I serve on, have found that particular state legislation in the United States was in violation of the United States' international obligations because of the situation in that state and because the same regulatory framework and the same violation would not exist under similar regulation in another state of the United States.

The treaties do not impose a homogenised obligation across the country. The treaties are there to ensure respect for the human rights of the individuals in that country in the light of the circumstances in which they find themselves. There is no problem, as a matter of international human rights law, with the notion that a devolved statute for a particular jurisdiction would raise international human rights concerns that would not be raised in a different part of that jurisdiction where the circumstances are different.

The Chairperson: I have received a request from Hansard for someone to turn off a mobile phone, please. Hansard is having difficulty picking up some of the conversation, so I give that gentle reminder.

Mr Elliott: From what Michael is saying, am I right to suggest that your answer is yes and that some of these treaties could be breached in Northern Ireland but not in the UK by using the same legislation.

Professor O'Flaherty: Not in GB — not in another part of the United Kingdom.

Mr Elliott: Yes, by using exactly the same legislation.

Professor O'Flaherty: Yes, that is correct.

The Chairperson: You mentioned the variations between individual states in the United States, but each state passes its own legislation. It is not a case of a general law across the USA breaching human rights compliance issues in one state but not another. The fact that they pass different legislation means that it may not be compatible.

Professor O'Flaherty: That is the problem with plucking examples out of the air. You may well be right, Mr Chair, so let us park my example. It will not help us.

The Chairperson: I think that I am right.

Professor O'Flaherty: My colleague David has been brave enough to say that he has an example.

Dr Russell: I will try. I will use the example of childcare responsibilities to try to explain it. In our previous submission, we said that, although there is the same onus under the Welfare Reform Bill introduced here as under the Westminster legislation, the circumstances are different in Northern Ireland for, first, the availability of childcare and, secondly, the circumstances by which the state supports childcare. In England and Wales, the Childcare Act 2006 imposes a duty on local authorities to identify and meet the needs of childcare. However, Northern Ireland has no corresponding childcare legislation, no lead Department for childcare and no implementation of a childcare strategy agreed by the Executive.

At the same time, we know about the disproportionate cost of childcare in Northern Ireland and the requirement for it. Therefore, a breach would be less likely to occur in England or Wales because the circumstances are different. In Northern Ireland, the difficulties and barriers to parents, particularly those of small children, will be greater. The circumstances in which there is the potential for a human rights breach are more likely to present themselves here.

Mr Brady: Thanks for the presentation. I was actually going to make that point. In Britain, there is legislation that is incumbent on the local authorities. If someone can identify a gap, the local authority there has to supply childcare.

You raised many specific issues. There are obvious difficulties with housing, for instance. You mentioned the size of the units. There is the whole issue of segregated housing, with people reluctant or unable to move for many reasons.

An interesting point that was raised in a presentation to the Social Development Committee — perhaps you will comment on it — is that, when the legislation was being considered at Westminster, the House of Commons Joint Committee on Human Rights criticised the absence of a detailed human rights memorandum. Given that that criticism is on the record, the view was taken that it was not unreasonable to expect the Department here to produce a memorandum when the Bill came in front of the Assembly. Obviously, those warnings had been flagged. I think that the point also was made that if that kind of scrutiny is done, there are less likely to be legal challenges at a later stage. That seems a very sensible way of proceeding. There was, and is, the opportunity for that memorandum to be put in place, and that would obviously deal with a lot of the issues you have raised. Had it been put in place, it would have made this a much easier progression.

It is a devolved matter, and there are many different circumstances here, which have been flagged by almost all the groups — in fact, by all the groups, I am sure — that came in front of the Social Development Committee. They flagged the particular circumstances that pertain here. We have higher rates of disability. We have more people on DLA. The 20% issue was flagged up. If someone has a long-term, chronic condition, that is not going to go away because of economic circumstances. That is an issue. Therefore, if you cut benefits by 20% to save money, by definition, you will possibly impact on 20% of disabled people. That may be a fairly broad analogy. The memorandum might have gone some way to enlighten us.

Professor O'Flaherty: I can only but agree. We would like to have seen a memorandum that took account not only of European Convention on Human Rights aspects but other UK treaty obligations, such as the International Covenant on Economic, Social and Cultural Rights. Such treaties are legally applicable to and binding on the UK, albeit they do not have the same force in the courtroom. They are not going to trigger a judicial review in the same way in which a violation of the ECHR might, but that does not make them any less binding on the state.

Mr Brady: I have two more points. One is on the single-room rent. We were told, as is already happening, that that could make 6,000 people a year homeless. The other point that you raised was about the bridging gap and hardship payments. The whole point about hardship payments in this legislation is that they will be recoverable. If we start with the premise that benefit is subsistence level, which is the government definition, people paying back will be below subsistence level.

The same applies to people living in an underoccupied property. If they do not move, they will have to find that money out of their benefit. The other thing on underoccupancy is that the Housing Executive, in its presentation to us, said that if underoccupancy were introduced in the morning, it simply could not cope with it. That goes back to your point that the housing units are not available. In areas where there are smaller housing units and people could transfer, they simply cannot, because of the nature of housing in the Six Counties.

Professor O'Flaherty: I will just say a word on the hardship fund. That is a really important provision in the Bill. It is an important element of making the Bill human rights-compliant. If it works properly, it will provide a safety net so that people do not fall into destitution, which would violate human rights obligations. I suggest that this Committee has the important job of seeing whether the framework for the hardship fund is one that works. That is a policy matter. We welcome the fact that it exists. We see some problems with the terms of the Bill. I am sure that those can all be corrected and adjusted, but, again, that is something better left in your hands than seeking a technical response from us.

Mr Swann: Thanks for your presentation, gentlemen. You referred to the Joint Committee at Westminster. Are you aware of any of the recommendations made by it having been actioned?

Mr Caughey: I believe that some further analysis has been carried out, as the Equality Commission referred to, on the impact of the reforms. Some of that may be available, and we can certainly look into that for you and report back.

Mr Swann: You are not aware of anything that has flown out from the recommendations?

Professor O'Flaherty: We have not done a systematic examination of its very comprehensive survey or the extent to which elements of it have been dealt with systematically at Westminster.

Dr Russell: We can certainly check for you. However, the truth is that our focus is on the impact of the current welfare provision on people in Northern Ireland.

Mr Swann: Michael, you referred a number of times to the clauses of the Bill that are peculiar to the people in Northern Ireland. How have you made that assessment?

Professor O'Flaherty: It was just the two issues, which we have discussed at length.

Mr Swann: Was it a comparison with England and Wales?

Professor O'Flaherty: Yes, in comparison with other parts of the United Kingdom.

Mr Swann: You spoke to my colleague Tom Elliott earlier on and said that you are not looking at how the Bill pertains across the water; rather, you are looking solely at how it affects Northern Ireland. Did you carry out some sort of assessment of the two situations?

Professor O'Flaherty: Our mandate and remit is only for Northern Ireland. We engaged with Westminster originally on welfare reform only to the extent that we saw issues that could raise problems down the line in Northern Ireland. That has been the exclusive focus of our attention.

Mr Swann: Therefore, those issues may not be peculiar to Northern Ireland? I am just thinking that, if some of the recommendations are introduced in Wales, they may also be specific to there.

Professor O'Flaherty: There is no such thing as a Welsh human rights commission, but you would need to ask Wales that. We have not done a study on other parts of the United Kingdom. That is not within our competence.

Mr Caughey: It is worth saying, to amplify Michael's point, that a number of studies have identified childcare as an issue. We have drawn on an Employers for Childcare study that carried out that analysis. It identified the lack of available childcare in Northern Ireland in comparison with other regions of the UK.

Mr Swann: I want to make one final small point. You said that the private actors that were being brought in were not subject to the Human Rights Act. How difficult is that to correct?

Professor O'Flaherty: My understanding is that it is as simple as a specific provision in the Bill. This is what has been done in the other professional sectors, if my understanding is correct.

Dr Russell: It would be wrong to say that they are not subject to the Human Rights Act. A private contractor is subject to the terms of the Act in carrying out a public function. The Bill proposes that some of the services that would usually be undertaken by the Department — for example, the personal independence payment assessment — will be contracted out. All that we are asking for here is legal certainty.

A precedent has already been set for that. A judicial review was taken as to whether nursing care homes were covered by the terms of the Human Rights Act. Subsequently, the UK Government moved, under the Health and Social Care Bill, to ensure that they were. All that the commission recommends is that the precedent that has been set for the Human Rights Act is carried through for private sector contractors under this Bill in order to provide a degree of legal certainty. They would probably be covered anyway.

Another alternative would be for the Department to ensure that Human Rights Act compliance is assured under social clauses in the contracts.

The Chairperson: I understand your point about legal certainty, but is it difficult to identify the particular groups that need to be identified? If the Human Rights Act already applies to private

organisations that carry out a public duty, how would you want that strengthened and what particular formula works?

Professor O'Flaherty: The difficulty is that, at the moment, because it is not rendered explicit in the Bill, there is a danger of it being tested in the courts. One can only speculate, but that is what has happened with the nursing homes. One might say that it was obvious that publicly funded nursing homes were acting as agents of the state, and therefore the Human Rights Act applies. However, it was not so obvious that it did not go to a courtroom and end up in an expensive judicial review, which ultimately went where it should have gone.

You are the legislative drafters. We are suggesting that, borrowing on similarly crafted elements in equivalent legislation, it would be useful and helpful to make that explicit here as well.

The Chairperson: You said that it was obvious in the case of nursing homes. Did the court not find it obvious as well?

Professor O'Flaherty: It still had to go through an expensive court process. We are simply proposing it to you as a way of providing certainty where there is a potential for ambiguity.

Ms McGahan: I live in a rural area, and, to the best of my knowledge, the population there of around 7,000 or 8,000 people does not have one full-time daycare child facility. In fact, my sister drives 16 or 17 miles to access such a facility. As well as that, if she did not have a car, she would have serious problems with access to public transport. In the wintertime, our roads are not gritted because of a lack of volume of traffic, but we get on with it.

You talked about one recommendation about resolution procedure. How would that enhance the Bill's human rights compliance? Can you give me a practical example of that?

Professor O'Flaherty: In making that recommendation to you, we were simply suggesting that you can do a better job of ensuring human rights compliance if the Assembly gets to consider all those regulations when they are put before it. It should by no means be an automatic or rubber-stamp exercise or anything of that nature. That is what we were getting at. I will ask David to speak about it in more detail.

Dr Russell: It is our understanding that an affirmatory procedure allows for a higher level of scrutiny by the legislature, and it was for the Committee to consider, given that so much is unknown and is left to the secondary legislation. That is where the potential for a lot of those breaches lies. The Assembly could be minded to ensure a heightened level of scrutiny by favouring affirmative action rather than negative.

The Chairperson: I am fascinated by the issue of a reduction in housing benefit because someone has too many bedrooms. If that situation [*Inaudible.*] At what point is a person's benefit cut? If people are living in a house that is too big, the only way out for them is to put their name on a housing list, at which point it is up to the state to find them a new house. In Northern Ireland at present, and I guess in some parts of England as well, that could take months or even years. Living in a house that is too big is not a major criterion at the moment when you start to clock up the points. It is usually the other way around. Would it not be a pretty clear breach of people's human rights if their benefits were cut and they were not able, through no fault of their own, to find suitable accommodation?

Mr Caughey: You have identified the issue to which we were alluding. People may encounter difficulties. If people are judged to require a two-bedroom house, for instance, they may have difficulties in identifying a two-bedroom house in the area in which they live or further afield, simply because of the nature of the housing stock here. The exact details of how the cut will be applied will be identified in the regulations, but I think that you have identified a perfect example of why it should be an affirmatory procedure to allow for that level of detailed scrutiny of those issues and their practical outworkings.

The Chairperson: Fair enough. ???I can feel another nursery school provision coming on here. If somebody lives in Kilkeel and they cannot find a house but say that they have one in Knockloughrim.

Lord Morrow: On that point, it must also be understood that, for one reason or another, thousands of houses are lying vacant in this country at the moment, not least the Housing Executive having a big housing stock.

The Chairperson: Not social housing.

Lord Morrow: Yes, social housing. I can take you to my own town, where houses are lying vacant. I suspect that that is no different from any other region here. The Housing Executive has a big stock of houses lying vacant, not to mention the private sector.

Mr McDevitt: One point did not come up, which Michael and his colleagues raised in their introductory remarks. Michael, you were talking about the way in which our sister Committee at Westminster would apply the legal certainty process in its scrutiny of legislation. If I heard you correctly, you described it as the process that allows consideration of whether enabling legislation is sufficiently clear. What advice do you have for us, specifically in the context of this Bill, beyond the question of affirmative resolution, which we take on board, about applying that legal certainty process to this Bill? What other aspects of the Bill do you think that there is lack of clarity on, or is there a lack of process clarity beyond that point of affirmative resolution for the secondary legislation?

Professor O'Flaherty: We consider that there are only a few issues, and ours are only indicative. I think that other witnesses will raise further issues. There could be a formula in the Bill to avoid a human rights abuse of application of the Bill. We keep coming back to the same old examples, but take the issue of childcare, for instance. An acknowledgement of the particular problem could be crafted and inserted so that the subsequent regulations are constrained by a recognition. There are a couple of examples of that kind.

Although I had not planned to raise this issue with you today, we would welcome a stipulation in the Bill that the regulations under it will at all times be compliant with the UK's international socio-economic treaty obligations. Frankly, that would be unusual in UK legislation, but it would be very helpful.

Mr McDevitt: This is a devolved matter, and part of the technical argument that you are making to us is that, because welfare is devolved, we have to consider this ourselves as the primary legislature, even though the model may be a hand-me-down. You said that that would be a strange thing for the UK to do, but why would it be a strange thing for Northern Ireland to do?

Professor O'Flaherty: By "strange" I only meant unusual.

Mr McDevitt: Unusual because of the political dynamic?

Professor O'Flaherty: Just the legal culture. It happens in some other jurisdictions. References to international treaties can be found in constitutions or in basic legislation, but it would not be part of the received tradition in this part of the world.

Mr McDevitt: However, there is absolutely nothing to stop us, as a devolved Assembly, from putting them in. If we made reference to them, it would bind us only to those that are legally binding, but it would hold us — I am paraphrasing — morally and politically committed to those which are not. Is that correct?

Professor O'Flaherty: Indeed. To the extent that you want to explore this idea, the only instruments to which I would refer are the ones that the UK has already ratified, not those that are lying out there that are not engaged in this jurisdiction. The UK ratified the International Covenant on Economic, Social and Cultural Rights in 1976. That is a long-standing obligation.

Mr McDevitt: That is very interesting. Thank you.

Mr Brady: The point was made about housing. There is one example, which we were given in the Committee for Social Development, to do with underoccupancy. There are areas in north Belfast, for instance, where the houses are smaller but because of the nature of housing here, people simply cannot move, for whatever reason. That is one of the big issues that faces us with the Bill.

Most of the underoccupancy rules are predicated on what happens in the south-east of England, and in London in particular. There was story in the news about six months ago of a landlord of a three-

bedroom terraced house who was being paid £2,000 by the local authority. That was the example that was given as to why underoccupancy rules were being introduced and why people had to downsize. That simply does not happen here because we are in totally different circumstances. So, yes, there are plenty of empty houses, but it is simply not possible for people to downsize in them.

I will go back to a point that you made earlier. Although the housing associations and the Housing Executive have not built for a long time, historically they built three- and four-bedroom family-sized houses. The only reason why they built the old person's dwellings (OPDs) is because they got a subsidy for them. Now they are single person's dwellings, but they are so few and far between that they do not come into the equation in any shape or form.

The Housing Executive told us very clearly that if underoccupancy rules were to be introduced, it would not have the housing stock to deal with it. In my constituency, where a housing stock of about 12,500 was held by the Housing Executive because of the policy of selling off, there are fewer than 3,000 houses left. That is diminishing all the time, and it is a huge issue here. It may not be the case in England or Wales or wherever else.

The Chairperson: Thank you very much. You have been very helpful.

Professor O'Flaherty: Thank you very much.