UNCORRECTED TRANSCRIPT OF ORAL EVIDENCE

To be published as HC 1074-ii

HOUSE OF LORDS
HOUSE OF COMMONS
ORAL EVIDENCE
TAKEN BEFORE
THE JOINT COMMITTEE ON HUMAN RIGHTS

IMPLEMENTATION OF THE RIGHT OF DISABLED PEOPLE TO INDEPENDENT LIVING

TUESDAY 14 JUNE 2011

MIKE SMITH, MONICA McWILLIAMS, BOB COLLINS and DUNCAN WILSON
DIANE MULLIGAN OBE, DAVID RUEBAIN, PAULINE THOMPSON OBE and KAREN ASHTON

Evidence heard in Public Questions 38 - 77

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Members present:
Dr Hywel Francis (Chairman)
Rehman Chishti
Mike Crockart
Mr Dominic Raab
Mr Virendra Sharma
Baroness Campbell of Surbiton
Lord Lester of Herne Hill
Lord Morris of Handsworth
Baroness Stowell of Beeston

Examination of Witnesses

Mike Smith, [Commissioner and Chair, Disability Committee, Equality and Human Rights Commission] Monica McWilliams, [Chief Commissioner, Northern Ireland Human Rights Commission] Bob Collins, [Chief Commissioner, Equality Commission for Northern Ireland] and Duncan Wilson, [Head of Strategy and Legal, Scottish Human Rights Commission].

Q38 The Chairman: Good afternoon and welcome to this second session of the Joint Committee on Human Rights dealing with our inquiry on independent living. Could I give you all a very warm welcome and could you in turn please introduce yourselves for the record?

Mike Smith: My name is Mike Smith. I am a Commissioner at the Equality and Human Rights Commission, and I am also chair of its statutory Disability Committee.
**Monica McWilliams**: Monica McWilliams, I am the Chief Commissioner for Human Rights in Northern Ireland.

**Bob Collins**: I am Bob Collins, Chief Commissioner of the Equality Commission for Northern Ireland.

**Duncan Wilson**: Hello, I am Duncan Wilson, Head of Strategy and Legal at the Scottish Human Rights Commission.

**Q39 The Chairman**: Thank you very much, and thank you for coming such great distances to London to give evidence to us on what we consider to be a very important inquiry. I am sure you share that commitment. This first panel of course deals with the UN convention and national implementation mechanism. I understand that you have come to an agreement that you will, I think in the words of our brief, agree to give joint answers to most questions, but that should not prevent you, if you feel you wish to demur or add something to the person who intends to speak on your behalf, from doing so. I will begin by asking a very straightforward question. Thank you for your submission. You all talk about the right to independent living in Article 19 of the convention as a combination of economic and social rights and the legal recognition of the right to equality for disabled people. Can you explain what the right to independent living in Article 19 of the convention means for disabled people, and what exactly it requires the UK to do?

**Mike Smith**: Yes, Duncan is going to answer that one.
Duncan Wilson: To interpret Article 19 of the convention, which of course is a new convention, I think we should have recourse in the first instance to the general rules of treaty interpretation, which the Committee will know are found in the Vienna Convention on the Law of Treaties. In essence these require interpretation in good faith according to the ordinary meaning, bearing in mind the context and the object and purpose of the treaty as a whole. Applying those principles to Article 19, that article should be understood at least in the context of Article 1 of the convention, which is the purpose; of Article 3, which establishes the general principles of dignity, autonomy, participation and so on and which can be understood as an indication of the object and purpose of the treaty; and of Article 4, which of course includes the general obligations under the convention.

With regard to the specific requirements of Article 19, it is useful to bear in mind the finding of a major study that was conducted under the auspices of the European Commission and published just last year, which applied those rules and found in general terms, as the Committee will be aware, that Article 19 recognises the right of disabled people to live independently and to be included in the community. It is closely linked with Article 12, which in essence restores the power—that is the legal capacity—to disabled people to make decisions, but Article 19 builds on that to provide that disabled people have the right to choose how to live their lives, to be fully included and to participate in society. It focuses in particular on the choice of where and with whom to live and being able to live in a community in a manner that supports and fosters inclusion and participation. That in turn requires that there
should be access to support services and that general services should be equally available and accessible for disabled people.

In practice, as the Committee has no doubt noted, there are different interpretations applied across the United Kingdom to independent living. While this is not of itself necessarily a concern, the members of the independent mechanism have some concern that not all of those are rooted in the convention and draw directly on a human rights-based approach.

Turning briefly to state obligations that flow from Article 19, as I already mentioned, we should have reference to the general obligations in Article 4, which apply equally to Article 19—the review of existing laws, policies and practices, and the establishment of or measures to adopt new laws, policies and practices and so on in a comprehensive list, which includes among other things impact assessment. I hope we have the chance to return to that. All of those apply to the right to independent living, and I will not run through them all.

Some detail in terms of what is required with Article 19 was drawn out in the European Commission’s supporting study that I referred to. That has specified that the obligations under Article 19 should include, among other things, taking effective measures to make a variety of living arrangements available to disabled people. If you look to the reporting guidelines, the UN committee developed a range of options for residential, shared sheltered accommodation, and for providing the same choices as are available to others. There are obligations for undertaking a screening exercise to determine the most appropriate measures to remove the barriers that
disabled people face in realising the right to independent living, undertaking housing audits, involving disabled people in a process to assess difficulties in being included in community life and finally assessing whether disabled people are in practice compelled or obliged to live in any particular form of living arrangements. That includes assessing the availability of the support services, access to in-home support and safeguards against isolation. I want to check whether any of my colleagues have anything to add. No, thank you.

**Q40 The Chairman:** Following up on that, can you explain more fully how this particular right relates to the ability of the UK Government and the devolved Governments to take economic decisions which may engage many different rights of both disabled and non-disabled people?

**Duncan Wilson:** I will start to answer that question and see if anyone has anything to add. The whole of Article 19 should be read through the lens of Article 4. Some of the elements of Article 19—the obligations that I just enumerated—would be considered immediate obligations, and others would be considered akin to economic social and cultural rights and as such would include both immediate and progressively realisable obligations.

In terms of the steps that the UK ought to be taking to fully realise or achieve progressively the full realisation of the economic, social and cultural rights aspects, the state ought to be devoting what is called the maximum available resources towards the full realisation of those rights. In the current context it may be that those
resources have to some extent diminished, whether in reality or according to policy. First, the actual availability of resources ought to be scrutinised and, secondly, the allocation of those resources should be subject to some scrutiny as well to ensure that adequate priority is devoted to those in the most marginalised or vulnerable situations, that non-discrimination is applied and that the measures that the state has put in place are reasonable and proportionate.

Q41 Baroness Stowell of Beeston: Are you satisfied that there is a uniform understanding across the UK Government, the devolved Governments and local authorities that disabled people have a right to independent living and of what that right entails? To put it another way, in your view are there any gaps in current law, policy or practice in the UK which are clearly in violation of the right to independent living protected by Article 19?

Mike Smith: I will start on that one and then we will see if any of my colleagues want to join in. On one level we are not quite sure that each of the devolved Governments has necessarily realised that there is a right of independent living. Moving on to your more general question about whether there are any specific violations, we think it is difficult at this stage to pinpoint anything that amounts to a specific violation, but we feel that across the UK there perhaps are a number of areas of policy or practice which either appear inconsistent with Article 19 or do not appear to contribute to its realisation. Duncan can tell you about the presumption that there was an intent from the drafters to promote de-institutionalisation and you will be aware of the BBC
Panorama programme on the Winterbourne View case, which showed that in some situations there can be very inhumane, cruel and degrading treatment.

We think that human rights are placed at risk in closed communities where disabled people are segregated from the wider community. There are quite a significant number of such institutions in the UK. While we do not necessarily anticipate that that kind of treatment is prevalent, the continued existence of them as a mode of living arrangements for disabled people seems at odds with the aspirations of Article 19.

The second area we might focus on would be highlighting the requirement that disabled people should not be obliged to live in a particular living arrangement. At one end there is the very serious issue that deprivation of liberty be safeguarded. This has been highlighted in the recent case the commission brought involving Steven Neary, which has shown that actions by the local authority have affected his rights under the European Convention Articles 5 and 8. The issue there is basically people not being given the right choice to have a right to family life. That has been a case in the last week.

Duncan was also referring to the question of whether there may be coercion to accept an obligation. It is true that no individual disabled person would ever be forced to live in a particular residential care situation, but if the resources are not there it may well be the reality that some local authorities will apply what is called the usual cost review procedure, whereby if the costs are too great they will say that they will not provide care in the home and they will only provide it in a residential
situation. Arguably that person has no choice but to accept it because if they did not accept that level of care they would probably starve or die.

Disabled people do not currently have the legal right to transfer their assessment of care and support from one local authority to another. That clearly does impede people’s choice of where and with whom they live because there is no guarantee that they would get equal provision of service between one local authority and the next. So we think there are many things that indicate that people’s rights are not fully realised, or people do not have the same right, which is probably reflected by the increasing number of cases that have been brought under the previous disability equality duty and now the equality duty. We know, for example, that increasing numbers of local authorities in England and Wales are cutting their eligibility criteria to only critical or substantial, with some to only critical now. That clearly has a serious impact for whether or not the article can be fully realised by different individuals.

**Q42 Baroness Stowell of Beeston:** Can I just ask a supplementary to that? Have you or any of the other organisations commissioned any legal advice on the cases that you have referred to that you might be willing to make public or share with us?

**Mike Smith:** I would be very happy to review that afterwards and get some information back to you.

**Monica McWilliams:** We would be happy to do that, too. We have intervened in a number of cases and we would be happy to show you the legal advice.
Q43 Baroness Campbell of Surbiton: In our last evidence session, somebody said that they were very worried that they thought the language of rights in the narrative was disappearing from policy and practice. Is that your feeling or experience at all?

Monica McWilliams: When you ask someone from Northern Ireland about human rights, there is a long legacy in relation to the meaning of human rights and equality. Clearly in Northern Ireland I have had some difficulties in getting comprehensive attention beyond political and civil rights to the area of economic, social and cultural rights, which clearly this convention also covers. That is a very interesting point that you are making. On the enforcement mechanism, one of the points that we would make is that really in order to look at Article 19 you need to look at the Human Rights Act. We have used Article 8 in particular to intervene there and to give some meaning to the notion and the enforcement of independent living.

In relation to the policy-makers, it would remain the case that my commission would have enormous difficulty getting our policy-makers, particularly in the Office of the First Minister and Deputy First Minister, to take on making rights real, as we would say. We have had to remind them of their duty to do that under this convention in the reports that they make in terms of both the UN and the ODI. That is a concern, and Duncan, Bob, Mike and I have spoken about the need to have an integrated approach to this. There is a much greater understanding of the need to have equality impact assessments than there is to have rights impact assessments. In the absence of that, your question is very pertinent.
**Mike Smith:** If I might add to that, the four of us have jointly written to Maria Miller in the last week expressing our concern that the current draft report on the UN convention issued by the ODI is perhaps failing in a number of areas. One of our disappointments is the lack of reference to human rights in that document.

**Q44 Lord Lester of Herne Hill:** I have an interest because I had the privilege of advising Monica McWilliams’s commission about its draft Bill of Rights some time ago. I would like to ask two questions. First, regarding what Duncan Wilson was saying, our Committee will be trying to measure the extent of the real gaps, as far as we can, in a real, practical, hard-law and soft-law sense. One of the things that you did not say, but I hope you would agree with, is that our courts will seek to give effect to the object and purpose of the convention when interpreting legislation in order to ensure that there are no gaps. I hope you would agree with that, because it would seem to be an important way of filling what some of you have said are gaps, as a matter of interpretation. That is my first question.

**Duncan Wilson:** I completely agree with that. The approach of the superior courts in the UK is consistently to look to interpret to the extent that that is possible—as the Committee is well aware—domestic legislation in the light of international obligations. Interestingly, the Strasbourg court—the European Court of Human Rights—has begun to take note of the convention in interpreting the European Convention of Human Rights in at least two cases that I am aware of, one involving Switzerland and the other involving Slovakia, I believe. The Human Rights Act, for
example, can be used as a lens at least through which to interpret the rights that it includes in the context of the more detailed provisions of the convention as they apply to disabled people.

**Mike Smith**: There is also the way in which the courts have been happy to apply the Human Rights Act when determining whether cost-based decisions are fair or not. One of the cases EHRC is currently supporting is that of McDonald v Kensington and Chelsea, which, as you will be aware, is going through to the Supreme Court. Sometimes in that situation judges seem a little reticent to use the HRA when there is a question around the application of resources, and whether or not that was fair or appropriate. We would also be happy to provide further information to the extent that it is appropriate.

**Bob Collins**: To make the response to Lord Lester’s question more comprehensive, a couple of months ago the High Court in Northern Ireland invoked the convention and the rights of persons with disabilities in the PF and JF case, precisely so as to underline the importance of the gap that was identified in the domestic law of Northern Ireland, even though the convention was at issue in the case. I think that it made a very helpful and enlightened judgment in terms of identifying ways in which a resolution could be found above and beyond the call of duty, which is a clear indication of what you have identified.

**Monica McWilliams**: The judicial review judge found in that case that there was a disparity in relation to the direct payment for carers between Northern Ireland and England. We intervened as a third party in the court, drawing attention to the
convention rights and we are now allowed to follow up the judgment with the trust, asking the trust to what extent it is taking on board the rights in the convention in order to apply the judgment.

**Lord Lester of Herne Hill:** Thank you. Could I ask my second question?

**The Chairman:** I thought that you had asked two questions.

**Lord Lester of Herne Hill:** No, only one so far.

**The Chairman:** This is a very brief supplementary then.

**Lord Lester of Herne Hill:** I will ask it later.

**The Chairman:** Okay, thank you. Lord Morris.

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**Q45 Lord Morris of Handsworth:** You have all highlighted the role that equality legislation, particularly the Equality Act of 2010, will play in securing the rights to independent living. But you have all stressed that this protection is only part of the legal policy framework that secures the right to independent living in the UK. Can you briefly explain how these various forms of protection work together, and whether there are relevant gaps in the protection that exists? Can you also say what, if anything, Article 19 of the UN convention will add to domestic law?

**Monica McWilliams:** This is a question in relation to Equality 2010, which I think is more relevant to somebody from EHRC, because, as you know, that legislation did not extend to Northern Ireland. Then we can pick up our particular difficulties in relation to our more home-grown legislation that still applies.
Mike Smith: I will pick that up then. First of all, there is no overarching domestic or legal protection in relation to Article 19—no direct right to independent living—as set out in our written evidence. But we believe there is some potential for those rights to be included in the interpretation of the Human Rights Act, particularly Article 8. The relevance of Article 8 to the right of independent living was demonstrated in the judgment handed down by the Court of Protection concerning Steven Neary, which I mentioned earlier. Hillingdon Council was judged to have unlawfully deprived Steven, who has autism, of his liberty and of failing to respect his rights to private and family life by detaining him in the support unit. That was quite an important case that raised this point.

Each of the UK’s national human rights institutes promotes and protects the full range of civil and political as well as ESC rights. These rights, which are instrumental to the realisation of Article 19, were not incorporated into domestic law. The point we are noting is that there are considerable variations in, for example, the law regarding community care across the UK. They may significantly influence the realisation of Article 19. We have quite a lot of detail that we are happy to provide later, but there are issues such as policies on whether charges are being made for social care, the existence of national eligibility criteria, which are being proposed in Wales but not in England, the variation of application of those criteria across local authorities and some of the underlying principles in community care law between the devolved Administrations. So there is variation in terms of the legal issues and the extent to which Article 19 can be realised through the range of laws that we have.
Q46 Lord Lester of Herne Hill: We have agreed so far that the courts in their interpretative role, while recognising the separation of powers with the political branches, will interpret our legislation where they can compatibly with this convention among others. You say that there has been no direct incorporation of the right to independent living. Would you agree that, although the equality and human rights legislation differs between us here and Northern Ireland, it will be interpreted and given effect in a way that accords with the convention where it is the proper role for the courts to do so rather than the political branches?

Duncan Wilson: While I would agree with that, I think the point Mike was making was that it depends on the interpretation that one puts on the final part of your question. If it is one that excludes the possibility of courts determining whether measures to progressively realise economic, social and cultural rights are not properly within the domain of the courts, then I would disagree with that. That is the aspect of Article 19 that is not currently incorporated into domestic law. Unlike the Constitutional Court of South Africa, which has famously done so repeatedly, our courts cannot determine the reasonableness of steps that the state is taking to realise the ESC rights dimensions of Article 19. The flipside of that, of course, would be whether any steps further away from the full realisation of that right are reasonable and proportionate, and the strong presumption against retrogressive measures, which of course is consecrated in international human rights law.
Mr Sharma: In the submission you highlight that the Equality Act 2010 does not apply in Northern Ireland, where the DDA continues to have effect. However, you also told us that the 2010 Act does not go far enough. Can you explain further how you think the application of the DDA as opposed to the 2010 Act will impact on the right to independent living for disabled people in Northern Ireland?

Bob Collins: This is uniquely an issue for Northern Ireland since the enactment of the Equality Act 2010. The reality is, as a consequence, the people in Northern Ireland, across the entire range of disability legislation, are disadvantaged relative to those who live in other parts of the United Kingdom. There are a number of points that could be made specifically in relation to disability. The first is the more general point: the fact that the legal framework that is in force is the 1995 legislation provides a context for public policy formulation that offers a quite different context from that which obtains in Great Britain. That is not without its significance, and touches upon aspects of the point Lord Lester made a moment ago.

The second issue is that there are protections available to citizens in Great Britain now that are not available in Northern Ireland. On the face of it, it seems to be quite at variance with the richness that can be implicit in the notion of separate jurisdictions within the United Kingdom if one of the consequences is that people who live in one of the jurisdictions will be significantly disadvantaged because of the fact that the legislation has failed to keep pace. Without going into considerable detail in relation to the differentials between the two—and we can provide
information to the Committee separately on that—I think that there are a number of issues that are worth mentioning.

The first is that the House of Lords decision in the Malcolm case had significant impact on disabled people and the extent to which the protections envisaged in the legislation became no longer available to them. That has now been resolved in Great Britain but continues to be the case in Northern Ireland, where it represents a serious inhibition on the life and potential of people with disabilities.

The second area where the Equality Commission had long advocated change was in removing the specific list of capacities in the DDA, which could serve to delimit the area of application of protection under the Disability Discrimination Act. That still obtains in Northern Ireland but does not in Great Britain. The absence of sensible harmonisation across the various measures and within the measure is an issue still to be addressed in Northern Ireland.

All these issues, it seems to us, represent difficulties in terms of frustrating the intentions of the convention and the capacity to fully realise the objectives of the convention. Even if the devolved Administration were enthusiastic about the independent living provisions, they would simply be incapable of being represented in the day-to-day reliefs available to people. Even if it is the case that the courts may interpret individual circumstances in the light and against the background of the convention’s provisions, recommendations and requirements, the reality is that, for most individuals who are either going about their lives or who are engaging with public bodies or with Government, the position remains as it was. There is a
disadvantage laden on an area that is already laden with difficulties in any event. So this is a serious issue, which is also reflected in a very good paper on disability that was brought forward by the Promoting Social Inclusion Working Group 18 months ago—it still has to be vouchsafed a response from the Office of the First Minister and Deputy First Minister. I am not saying that that would not have happened had the legislation been changed, but I think that the context within which those kinds of decisions were taken would be more easily amended.

The final point on this is that not only is there a difference between the Equality Act 2010 in Great Britain and the DDA in Northern Ireland, but the statutory duty in respect of disability in Great Britain is distinctly different from that which now obtains in Northern Ireland, to Northern Ireland’s disadvantage.

**Monica McWilliams**: It is good that we have this opportunity in front of the Joint Committee because, as I have said before, we are never able to make this point in Northern Ireland, where there is no committee such as this. It is only here that we can make the point about disparity between the devolved regions.

**Q48 Mr Sharma**: To follow up on that, what do you think the limitations of the 2010 Act are and how will these impact on the right to independent living?

**Bob Collins**: Let me just identify two issues that we have made the focus of attention over the years. The first is in relation to the preference for the social rather than the medical model of disability. The social model is reflected in the convention but not in the Equality Act 2010, and less still in Northern Ireland. We believe that to be a
limiting factor that makes it much more difficult to fully incorporate the intentions of the convention.

The second area to which I have drawn attention is that, within the definition of disability, the emphasis is on disability of a long-term character, which overlooks the real issues and concerns of people who may have short-term but intense disability for which there is no formal protection under the current definition. For some people that is an issue of real substance and in the judgment of the Equality Commission for Northern Ireland it should be amended. There were other areas of exemptions in the legislation that still obtain, which in part gave rise to reservations in relation to the convention being registered by the United Kingdom. The first two, in terms of the model that underpins the legislation and the persistence with the inclusion of “long-term” in the definition, represent weaknesses in the legislation that in our view could act to make the full realisation of the potential of the convention more difficult.

Mike Smith: The EHRC pursued that same point on long-term and short-term conditions when the Equality Act was going through, and in relation to those people who had fluctuating conditions that may not have been covered.

Chairman, may I make a request? Someone in the room has a mobile phone or a BlackBerry on and the data is interfering with the induction loop. Perhaps they could switch it off.

The Chairman: Can everybody double-check?

Mike Smith: Thank you.
Q49 Baroness Campbell of Surbiton: I am going to ask about the public sector duty. During our last evidence session, witnesses told us that they were concerned that the new public sector equality duty to involve could slip back from the old disability equality duty. Do you agree with this assessment? If so, what steps are you taking to ensure that the general equality duty and any specific duties provide effective tools to support equality and independent living for disabled people?

Mike Smith: Perhaps I might start at the end of that question and move back. We are in the middle of finalising our recommendations and guidance on the equality duties. As you will be aware, the English-specific duties are yet to be finalised, so the guidance in that area is still being worked on. Going back to the substance of your question, we think the general duty in the Equality Act remains broadly equivalent to the previous disability equality duty. In reference to Article 19, it is relevant particularly in promoting disabled people’s participation in public and community life. You will be aware that the duty is supported by the secondary legislation, and that this is devolved in the cases of the Scottish and Welsh Governments. This means that there will be three distinct approaches to the so-called specific duties across Great Britain in addition to the maintenance of the previous equality duty in Northern Ireland.

This might present significant challenges for various bodies that work across the country, including the EHRC itself, because we are subject to the equality duty and need to work across all three nations, and those differences will provide some potential challenges. The GEO has recently consulted on the specific duties for
England, and we are yet to be advised of its final conclusions on the matter, but in the EHRC’s response we highlighted the fact that the duty to involve was an issue of particular importance to the role of the Equality Act in implementing the UNCRPD. The disability equality duty was quite unambiguous in its requirement of public authorities to involve disabled people in meeting the duty. It is unclear from the Government consultation whether we really can anticipate a similar level of clarity in the new duties, but we really hope that we will get that. We think it is incredibly important. Scotland has yet to publish its proposed specific duties. However, Wales published its specific duties on 29 March, which include clear requirements to involve disabled people in setting the objectives and impact assessments and in developing a strategic equality plan. So we do have some concerns and reservations, but we await the remaining detail from the Government.

Q50 Mike Crockart: I refer back to a previous session we had where disabled people’s organisations told us that they were particularly worried about the inclusion of the Equality Act 2010 in the Cabinet Office red tape challenge. None of your submissions mentioned that particular aspect in your evidence. Why was that? What do you think about that exercise? In particular, have any of you been consulted by the Cabinet Office in relation to the exercise?

Mike Smith: I am starting on this one as well. Our starting point is that we have no desire for bureaucracy to stand in the way of achieving improved equality outcomes and human rights. The convention itself makes frequent reference to measures that
are either appropriate or effective in order to realise rights, so there is a real emphasis on doing things well. If there are more effective and appropriate means of realising the rights of disabled people, then they should be implemented, and that should be something that is welcomed.

We understood the red tape challenge in the first place to be about regulation, not primary legislation, so we were a little surprised to find the Equality Act to be considered by that review in its entirety, which we consider somewhat anomalous. The Act was passed by Parliament a little over a year ago and key elements have yet to be implemented. We would have thought it perhaps a little premature to review its impact already. We are quite heartened by the majority of the responses that have been included on the red tape challenge, which are significantly positive towards the Act and towards its aims and objectives. At least we know that the majority of people out there are on our side.

Monica McWilliams: The answer to the other part of your question—whether we have been consulted—is no.

Bob Collins: And no.

Mike Smith: I understand that commission officers have been participating behind the scenes for the GEO, but I would not say that we were formally consulted.

Q51 Rehman Chishti Outside the public sector equality duty, can and should the UK Government, devolved Governments or local authorities assess the impact of
proposed policy changes on the right to independent living before they are implemented?

**Mike Smith:** I get a break; Duncan is taking this one.

**Duncan Wilson:** There are measures which we feel could and should be implemented just to that end. I would highlight four—impact assessment, indicators, monitoring and action plans—but in the interest of time I will focus on impact assessment. As the Committee will know, Article 4(1)(c) of the convention explicitly requires that the state take into account the impact on the rights of disabled people of all policy and programme decisions. In order to ensure that that happens, the development and use of human rights impact assessments alongside equality impact assessments is something that a number of the commissions are pursuing in our jurisdictions. In our case in Scotland, the Scottish Human Rights Commission has commissioned a review of international and domestic practice on the use of human rights impact assessment, which recommended that in the UK context human rights impact assessments should always be aligned with equality impact assessments, and set out an eight-stage process that would ensure that a human rights approach was taken both to the process and to the outcomes of impact assessment.

The approach which we have taken based on that study was welcomed by the Scottish Government, who are pursuing and developing an integrated approach to impact assessment through the Convention of Scottish Local Authorities and other key partners including National Health Service Scotland and the Scottish Government Health Directorate. We worked with them throughout last year to develop an
integrated impact assessment process, which was piloted in eight policy areas with some success.

The key benefit of integrating human rights in addition to equality impact assessment is that it allows consideration of differential impacts of a policy or programme on different people based on their identity or status, and an assessment of any disproportionate or degrading impacts on an individual based simply on their common humanity. On one hand, it allows an assessment of whether any policy or programme would risk a level of treatment which fell below the red lines in human rights and interfered with or impeded the realisation of absolute rights, and on the other hand it ensures that any impacts on qualified rights are proportionate. Basically, from the alternative choices that are available, the one that is least restrictive of the rights of the individual is chosen.

The process of impact assessment is also important. A participatory process helps to ensure that the cumulative impacts of a range of different policies and programmes rather than their discrete impacts can be understood through the lived experiences of individuals. Gathering evidence and analysing the outcomes of that consultation or participation process through the rights analysis would avoid any negative impacts on absolute rights and would allow a process of mitigation for any impacts on qualified rights to ensure that they are the least restrictive. I would link back to the answer to a previous question asked by Lord Lester. So far as the decision would impact on the realisation of economic, social and cultural rights, it would allow a structured process by which public authorities could consider whether any
retrogression, retreat or reduction in the realisation of those rights was reasonable with regard to the full range of human rights and the allocation of the state’s resources to realise those.

In conclusion on the benefits of integrated impact assessment, as well as reducing the risk of a successful judicial challenge in the way that Lord Bingham indicated in the Shabina Begum case, the integrated impact assessment of human rights and equality impact assessments would help public authorities to make the right decision the first time and would improve the quality ultimately of public service delivery to make it more person-centred by putting the individual human being at the centre of public decisions. It would enable them not only to ensure or be more confident of compliance, but to move towards best practice.

Q52 Baroness Campbell of Surbiton: In a recent decision against Birmingham City Council, the Administrative Court quashed a decision to limit access to funding for social care for non-compliance with the disability equality duty. I have a few questions that flow from that. Do you think the same decision would be taken under the new public sector equality duty? Birmingham said that there was no money in its budget and that cuts will need to be made. Can you explain how you think a local authority should properly approach its decision-making responsibilities in order to comply with the public sector equality duty and support the rights of independent living? What steps are each of you taking to ensure that the rights of disabled people
are considered by central Government, devolved Government and local authorities in their decisions on money savings?

**Mike Smith:** The Birmingham case is very interesting and to an extent it echoes the Hammersmith and Fulham case a few years ago. There are some interesting things to consider. We know that local authorities have got finite resources and need to work out how to deploy those across their statutory, social and other responsibilities and objectives. If the different impact on different groups has been properly considered in an open and transparent way it is more likely that the impact of the various options and perhaps any unintended consequences or disproportionality will also have been considered, and decisions would be made in a more transparent way. That would hopefully give greater transparency and accountability in respect of local citizens, which would obviously be to the advantage of promoting the localism agenda, because decisions are seen to be made with full understanding of their impact.

I hope it would not be different under the public sector equality duty, because if the general duty of the new duty is broadly the same, hopefully local authorities would come to the same conclusion as I have just talked about. That will depend to an extent on what the final details of the specific duties are, particularly for England, and whether it indicates any particular processes. We hope that there will not be process for process’s sake and that those extra guidelines will give some level of good clarity on the sort of things authorities need to consider when making those decisions.

In terms of what we are doing at the commission, we are currently in the middle of a Section 31 assessment on the Treasury and its spending assessment in the
Comprehensive Spending Review. We want to ensure that it has adequately considered equality impact decisions while doing the Comprehensive Spending Review, particularly their cumulative impact. That will be reporting later this year; we will be sharing the results with the Treasury and then making them public. We also wrote to all local authorities this January asking how they have had paid due regard to the previous equality duties when making their final decisions. We will be doing that over three key areas: transport services for disabled people; violence against women and girls; and organisations that provide information and advice to ethnic minority groups. We are currently collating those responses and will be reporting on that.

Last October, the commission launched new guidance to help decision-makers to put fairness and transparency at the heart of these difficult financial decisions, and the guidance sets out what is expected of them and others to comply with the public sector Equality Duties by ensuring that the processes that they follow to assess the impact of equality on those financial proposals are robust and that the impact that the financial proposals could have on protected groups is properly considered. So we have been doing a fair amount. Bob, you may care to pick up on Northern Ireland.

**Bob Collins:** I would like to make a few relatively brief points to complete that answer. First of all, the convention contains provisions for the close consultation and involvement of disabled people and their representative organisations in decision-making and policy formulation and in full participation in the conduct of public
affairs. It was to facilitate that purpose that the disability duties were introduced in Northern Ireland under the DDA 1995. There are duties on all public authorities under Section 75 of the Northern Ireland Act to give due regard to the necessity of promoting equality of opportunity for a range of categories, including people with disabilities.

Within the Equality Commission we enjoy a much greater opportunity to have a structured engagement with public authorities in respect of their Section 75 duties than is available in relation to the disability duty because of the formal mechanism that they need to provide equality schemes, which we must approve, and because of our capacity to investigate complaints made in relation to any failure or perceived failure to honour those commitments. That discipline does not exist in relation to the disability duties, which is another of the abiding differences between Northern Ireland and Great Britain. Having said that, we clearly see the potential of both of those duties as areas within which we can situate the convention more clearly.

The second point that I wanted to make was that part of the work that the Northern Ireland Human Rights Commission and the Equality Commission, which jointly are the independent mechanism for Northern Ireland in respect of the convention, are doing is finding ways in which we can more effectively integrate the convention and the obligations under it within the duties that are placed on public authorities and within their responses to them. We are preparing a formal guidance on a joint basis. As the Equality Commission, using our statutory capacity, we will issue that to all public authorities to make clear how the provisions of the convention should be
incorporated into the statutory duties that they have in respect of both the disability duty and the Section 75 duty, which includes promoting equality of opportunity in respect of disability.

**The Chairman:** I have to stop you at that point. We need to ask one final question. I am very conscious of the time. I do apologise to you. We will be writing to you with the questions we have been unable to ask, but I want to be fair to the next panel as well.

Lord Lester, you wish to ask a supplementary and then a substantive question.

**Q53 Lord Lester of Herne Hill:** It is important, and would help the Committee enormously, in my view, to distinguish between aspirational or political matters and matters of legal entitlement and rights. It would be very helpful if, after giving evidence today, one or all of you were able to produce a note—and Duncan Wilson came closest to following what I am trying to ask—seeking to distinguish between hard law, the kind of law that judges can and should interpret and apply, and soft law, which is largely aspirational and which the political branches of the Government should heed. If that can be done I personally would be very grateful.

You have all talked about the disparities between Northern Ireland and Britain, and the difference in legislation and so on. In terms of the machinery of Government, and forgive me if I get this wrong, I assume that the equality legislation is not devolved but is a matter that is addressed by the UK as a whole. Am I wrong about that?
Bob Collins: It is devolved.

Q54 Lord Lester of Herne Hill: So your complaints about the lack of consistency and uniformity under the devolution scheme are complaints really to the Northern Ireland devolved authorities.

Bob Collins: And are consistently and uniformly made to them.

Q55 Lord Lester of Herne Hill: So if we as a Committee were to be critical of the situation we would essentially be addressing that part of our Report to the Northern Ireland authorities rather than to Westminster and Whitehall. Is that right?

Bob Collins: Yes, it is entirely within the competence of the Executive and Assembly in Northern Ireland to amend the disability legislation in the way that it has been done in Great Britain.

Monica McWilliams: However, Lord Lester, your question raises an interesting constitution conundrum that both Bob as Chief Commissioner for the Equality Commission and I as the Chief Commissioner for Human Rights constantly have to deal with. I am not devolved—our Commission is not devolved. I rest here with Westminster and am responsible to Parliament, and therefore the UN convention and the state duties under it fall here. Therefore we respond, both in parallel reports and in shadow reports, to the ODI, but our devolved Administration has responsibility for seeing through those duties, which fall to the Office of the First Minister and the Deputy First Minister. Equality is devolved; human rights is not devolved.
**Duncan Wilson:** To further clarify or confuse the picture, in terms of Scotland equality remains a reserved matter, although elements of equal opportunities are devolved. In relation to the obligations of the state under the convention, while the international obligation remains with the UK, the Scotland Act clarifies that the responsibility for implementing international conventions lies with the Scottish Parliament and Scottish Ministers within their areas of competence.

**Q56 Lord Lester of Herne Hill:** Again, in order to avoid the wrath of the Chair in my asking too many questions, it would be helpful, to me at any rate, if all of you could produce a kind of map, taking some practical examples and showing how there is a denial of equal protection under the law because of the mess created by different jurisdictions, different Government machines, and so on, when we are dealing with a single duty to comply as the UK as a whole with the convention obligations. That would assist the Committee as a whole if that could be done, and you may have done it already in written evidence, in which case I apologise, but I would certainly like to see the wood for the trees.

**The Chairman:** Thank you Lord Lester. That is now one hour. I am most grateful to you all. I apologise to you as there are a number of written questions that we will be sending to you, but beyond that, as Lord Lester has quite rightly pointed out, there may well be other issues, including his, that you may wish to add as a consequence of this evidence session. I now ask the witnesses for the second panel to come forward please.
Examination of Witnesses


Q57 The Chairman: Good afternoon and welcome. Could you all introduce yourselves please?

Diane Mulligan: My name is Diane Mulligan, and I have been nominated as the candidate to stand for the UN convention's expert committee elections in 2012. I am also a member of Equality 2025, which is a group of independent advisers to the UK Government.

Karen Ashton: My name is Karen Ashton. I am a solicitor from Public Law Solicitors in Birmingham, and I specialise in community care law.

David Ruebain: My name is David Ruebain. I am currently the chief executive of the Equality Challenge Unit, which is the higher education sector’s equality and diversity resource. I was the director of legal policy at the Equality and Human Rights Commission until last year.
Q58 Pauline Thompson: I am Pauline Thompson. Until recently I was a policy adviser at Age Concern, and latterly Age UK. I am now a freelance trainer, and I am also co-author of Community Care and the Law.

The Chairman: Thank you. As you know, this panel is going to focus on protecting the right to independent living in the UK. This is a question addressed to all of you, but you do not all necessarily have to answer: please feel free to duck out of the question if you feel that another person has answered it for you. We obviously want to focus on the implementation of the right to independent living under the UN convention by the existing legal and policy framework. Are you all broadly satisfied that the current legal and policy framework in this country supports the right to independent living, and, if not, are there any crucial areas that you would suggest need amendment?

Karen Ashton: I am happy to kick off. I specialise in community care law. In my view, community care services are key to achieving the right to independent living, in the right to state support services for people with disabilities. I am not satisfied that the approach to eligibility for those services is Article 19 compliant, if I can put it that way. Please forgive me if I am repeating material that the Committee is already aware of, but I wonder whether it might help to set out the basic framework for determining eligibility for community care services, although there is a fundamental statutory duty to assess and decide whether such services are called for in relation to any individual who appears to be potentially in need of such services.
The way local authorities should approach determining eligibility is set out in statutory guidance, and what that requires of an assessor is for there to be an assessment of the risks to independence and wellbeing if services are not provided to meet any particular specific presenting need—for example, a need for support to be able to get out and about into the community. The assessor must grade the risks into one of four bands: critical, substantial, moderate, and low. We can probably talk more later about the Birmingham case, where Birmingham decided to move to what was called a critical-only policy.

The guidance itself defines what risks count as critical, substantial, moderate and low, and I thought it might be helpful to set out the definitions in the statutory guidance of a substantial risk. A substantial risk arises if abuse or neglect will occur if: there is, without the provision of services, an inability to carry out the majority of personal care and domestic routines; involvement in many aspects of work, education, learning et cetera will not be sustained; the majority of social relationships will not be sustained; the majority of family and social roles will not be sustained; and there will be only partial choice and control over the immediate environment.

What the guidance permits is for each local authority to set its own eligibility threshold; most local authorities, until now, have had an eligibility policy whereby they will provide services to meet needs that give rise to substantial and critical-level risks. The guidance on its face would permit a local authority to move to a critical-only policy. The consequence of that is that those kinds of risks to independence that I have just described would not qualify for eligibility for support
services. I question whether that can be compliant with Article 19—for example, the
requirement that the state ensure that persons with disabilities have access to a range
of in-home residential community support services, including personal assistance to
prevent isolation or segregation from the community.
To take you back, a substantial level risk could be one where the majority of social
relationships will not be sustained, but in a critical-only policy you would not be
eligible for a community care service to ensure that that risk did not arise. In terms of
the statutory guidance, I do not think that promotes independent living that is
compatible with the vision of Article 19, and, if one treats Article 19 as an aspiration,
rather than obviously conferring an immediate domestic right, nonetheless there is
nothing in the statutory guidance which promotes a progressive realisation of that
level of independence either. It is significant that statutory guidance post-dated the
UK’s ratification of the convention. I am sure there are other points that people want
to make.

Q59 The Chairman: Could you be brief, because I am conscious that we have got
lots of questions, and there is a danger that you might be anticipating some other
questions.

Pauline Thompson: With my background for older people, where I am concerned
that it is not working in practice is the routine age discrimination that we see. First,
the amount of services that older people actually get still seems to be very much
concentrated purely on the absolute basic personal care needs of getting out of bed
and going to bed at night. Therefore, even if the local authority can tick the right boxes that they are giving direct payments, and can say, “Yes we are promoting independent living”, the direct payment will reflect that very small level of service. The other thing is to be aware that there are about 400,000 people in residential care, most of whom are older people, and Article 19 does talk about having access to residential services. We need to be very conscious, and it does often get overlooked, that when you are commissioning residential care you need to be looking at independent living aspects, and helping a person to have control and choice within that residential situation. I want to point out those two points at the moment.

Q60 Lord Lester of Herne Hill: This really follows from what Karen Ashton was saying before. Would you think that Article 19 imposes a target or aspirational duty that is designed to guide socio-economic policy rather than a directly enforceable legal duty with a relative legal right?

Karen Ashton: Certainly my view is that it does not confer a direct domestic right to independent living. There are a number of ways that it is relevant in a domestic setting—you mentioned one earlier about interpreting primary and secondary legislation—but it is also relevant to the public sector equality duty, for example, where there is a proportionality exercise to be undertaken. It seems to me that not only convention rights under the Human Rights Act but also rights under the UN convention would be relevant in that context. It is very underused at the moment
domestically; practitioners are not yet that familiar with it, but that will develop over time.

**Q61 Lord Lester of Herne Hill:** If a public authority just put it in the waste paper basket, even if it was only a target duty, would that not be a public law wrong?

**Karen Ashton:** Yes, I agree.

**Pauline Thompson:** One of the things that I find when I am training is, when I talk to social workers about the UN convention and Article 19, they have often never heard of it before, and sometimes come out with comments like, “In your dreams”. This is news to them. One of the things that I was concerned about is how little there is on the Department of Health website. As far as I could find, there is nothing about the UN convention that actually gives local authorities a bit of guidance.

**Q62 The Chairman:** Diane Mulligan, do you wish to respond to this?

**Diane Mulligan:** I will briefly. I would like to talk more in the round of what Article 19 is and how it also relates to other articles in the convention, if I may at some point. One of the obligations of the state having ratified this disability convention is to review its current legislation and policy, and see how that relates to independent living, and living with dignity in the community. The Government has so far not done that. What it has provided is a draft report to the UN on its reporting duties to the UN committee. For me that report really lacked the language of human rights within it; it did not adopt a rights-based approach, and in terms of Article 19 it did not fully address some of the gaps that need to be closed to ensure that disabled people in the UK can realise that right.
For me, there is a need for disabled people themselves to know what their rights are around independent living, and living as part of the community, so that they can demand those rights. However, the Government as the duty bearer also needs to be able to provide that, and currently I do not believe that to be the case.

**Q63 Baroness Campbell of Surbiton:** Do you think that the existing legal framework—whether that be the Equality Act 2010, the Human Rights Act 1998, or the general principles of judicial review—provides an adequate means for disabled people to challenge treatment that is incompatible with the right to independent living? For instance, EHRC told us that the HRA 1998 had played a limited role in protecting the rights of disabled people. Would you agree with that assessment? What are the key barriers? Are they substantive or are they practical?

**David Ruebain:** Let me kick off with some thoughts on that. Until recently the direction of travel, if I can characterise it in that way, was to afford disabled people strengthening rights to independent living, in the matrix of arrangements that arise. That would be through the public sector disability equality duty that you have heard about under the Disability Discrimination Act, through incremental use of the Human Rights Act and through the matrix of community care provision and welfare benefits support such as disability living allowance and also, I would say, through a slow but growing realisation among the judiciary of the meaning and importance of independent living for disabled people.
However, recently we have seen a number of proposals that give cause for concern in that regard and suggest that the progress that has been indicated, and is evidenced by some of the cases such as the Birmingham judgment, may be slowing or even stopping. For example, I point to the proposals to limit the scope of disability living allowance for disabled people, whether it be for disabled people in residential care homes or more widely, which may reduce their independence substantively—I have regard not only to Article 19 but to Articles 26 and 30, the rights to habitation and to participation in social and cultural life. There are also the proposals to limit housing benefits and the practical steps that Karen and others have referred to where social services departments are, in fact, limiting the availability of resources to disabled people. The constellation of all of these developments, obviously in a political environment where there is fiscal retrenchment, means that disabled people are at the very hard edge of being affected by legislative and economic changes.

To answer the question, do I think that the legislative framework now is sufficient to ensure independent living? I would say no. We need more, whether that be further guidance on interpretation of community care legislation, or a strengthening of the law, for example, in public sector duties or otherwise.

**Q64 Baroness Campbell of Surbiton:** Do you think Article 19 will play a significant role in this?

**David Ruebain:** I hope it will. One of the things that we obviously have not seen yet is the actual operation of the optional protocol. As far as I am aware, we have not had any cases taken yet, and I have no doubt that at the point where a complainant is
able to bring a case under the optional protocol to the UN regarding the operation of Article 19, the relevant UN committee will give a strong steer as to the meaning and importance of independent living.

Q65 Baroness Campbell of Surbiton: Do you think that disabled people and their organisations understand the right to independent living as it relates to domestic calls in this way?

David Ruebain: I do not think they do. On the one hand the legislation, whether it be through the UN convention or otherwise, is very aspirational, and promises a model of inclusion and participation for all, including disabled people. In fact, on the ground, disabled people are finding the position to be very different.

Q66 Mike Crockart: The next question is particularly aimed at Karen Ashton; it is one that you thought was coming, and you were right. You acted in the recent decision against Birmingham City Council, where the administrative court quashed a decision to limit access to funded social care for non-compliance with the Disability Equality Act. This is essentially the question we asked of our previous panel, which you were here for: have you yet formed an opinion as to whether the same decision would be taken under the new public sector equality duty? Does that decision therefore mean that, where it impacts significantly seriously on people with disabilities, a local authority may now be directed to drop a particular funding decision in favour of an alternative that the court considers has a less detrimental impact on disabled people?
Karen Ashton: I will answer the questions in order and hope that does not confuse. I would agree with the answer given by the first panel that the new public sector equality duty is equivalent. Yes, I would hope the same decision would be made. I have a serious concern about the scope of the proposed specific duties in England: as they are currently framed they lead to a reduction in transparency, and they might make it more difficult to identify and challenge failures to comply with the public sector equality duty. For example, under the old public sector equality duty, the specific duties included a requirement that each public authority have an equality scheme, and that they set out in that scheme how they would go about complying with the general duty and how they would go about assessing the impact of policy decisions and so forth on the statutory equality objectives.

The proposal is that the new specific duties will sweep all that away in the interests of reducing red tape—I will go back to that in a moment—and there will be a reduced, at least in its specificity, requirement to provide information about what the public authority is doing in relation to, for example, impact assessments. My concern is that there will be a reduced transparency, which might make it more difficult to bring a challenge of that kind. I will make one more brief point to that before going on to the Birmingham case. There is a conceptual misunderstanding in the Government’s thinking about the new public sector equality duty and the specific duties. The recent review paper has said that their interest is in substantive equality—we would all agree with that—to reduce unnecessary bureaucracy, with less interest in process. But, of course, the public sector equality duty is primarily a process duty, and a very
important one at that. I think that conceptual misunderstanding has led to a sweeping away of too much in the specific duties.

I will talk briefly about the Birmingham case in particular. The judgment is very long and it is very difficult to get to what the judge is actually saying about the general implications of the Birmingham case. The court said that the question the councils needed to ask was whether a critical-only policy was compatible with the public sector equality duty. To answer that question they needed to properly understand what the judge described as the “potentially devastating consequences” of moving to a critical-only policy. Only by having that understanding could they then decide whether they needed to find these less draconian, alternative ways of making savings. The implication of that judgement is that, although it is primarily a process duty, some policies may be incompatible with the public sector equality duty, and critical-only policies are one such policy. The reason is this: it is difficult to envisage circumstances where local authorities, even in these difficult financial times, will not have alternative ways of making savings that have less draconian impacts. In fact, it was conceded by Birmingham in the course of the case that there were difficult choices, but there were choices to be made. When looking at a move to a critical-only policy, where you are looking at a withdrawal of quite essential community care services, which are fundamental to the promotion of equality of opportunity—the statutory quality objective—it is difficult to see how a council could rationally justify choosing to adopt a critical-only policy rather than the alternative, less draconian method of making the savings. The answer to your question is that it would be very
difficult for a council now to move to critical-only and be able to satisfy a court that that was compatible with their public sector equality duty.

Q67 Mike Crockart: That moves us to the next question I was going to ask. We understand there are numerous similar challenges being brought to local authorities in the UK, and some people have argued that there is a real gap—I think that is what you were saying there—between the strategic aim and what is actually happening in practice. In your experience, are you aware of any particular examples of good practice where the two match up far better?

Karen Ashton: To ask a solicitor is probably asking the wrong person, because I tend to see the problems rather than the good practice, and policy people are probably more aware of good practice—

Mike Crockart: We can open up the discussion more widely to other members of the panel.

Karen Ashton: I am certainly aware of better practice in terms of a process for going about making the move; at the same time as Birmingham was considering moving to critical-only, Liverpool was considering moving from a policy of moderate, substantial and critical to a policy of substantial and critical. Its consultation paper was, in my view, more transparent, as it was very clear on the face of the consultation paper what the proposal was and what the implications were. As you are probably aware, the Birmingham case was successful not only on a failure to comply with the public sector equality duty but a failure to undertake a lawful consultation as well.
**David Ruebain:** There are a number of examples of public bodies generally using the public sector duty creatively as a tool to drive forward the equality agenda. I know that this is not within the remit of this Committee’s inquiry, but certainly in the higher education sector there are a number of that are doing that. However, my particular concern about the new duties is, to take the example afforded by the proposals in Wales versus the proposals for England, the specific duties that we have in Wales under the new public sector duty require public bodies to engage, as has already been mentioned, and to create an evidence base. I am aware that some public bodies are using the duty to create an evidence base to think more widely about what they are looking for—that can include, for example, the requirements of the UN convention—and then to go on to set equality objectives and to impact assess and to prepare a strategic equality plan. The tools available to Welsh public bodies are likely to drive forward the agenda for disabled people, including having regard to the convention. If you take the direction of travel for England, conversely, not only did we have a much more denuded set of duties proposed, but even those were withdrawn three weeks before implementation in March, under the justification that they were too onerous. Although we have not seen what the proposed specific duties in England are—we do not know—the implication is that, in all likelihood, they are to be so “light touch” that they will have virtually no specific impact at all. In that event, while many public bodies will continue to do right by disabled people and others, they will not have the legislative underpinning to encourage them in the way
that I have described. I fear very much for the advances that have been made with
the public sector duty in England specifically.

Q68 Lord Lester of Herne Hill: You anticipated my question about the specific duties, but
that enables me to ask you a specific question, because none of you has had a good word to
say about the new regime compared with the old regime. Is the case, which you have not yet
dealt with, for having more specific and denuded duties that under the old regime large paper
mountains were being accumulated that were incapable of being monitored efficiently, for
example, by the Equality and Human Rights Commission? Let us take just the example of
London. Under the old regime, the 32 London boroughs, the Mayor of London, the
Department for Transport and Transport for London, for example, would all have the duty
obligations, and each one would produce its own separate and voluminous, or not so
voluminous, documents. They would lie in the cupboard of a body like the Equality and
Human Rights Commission as one of many unused documents. Is it not the advantage of the
specific duties that are contemplated that they are at least capable of leading to action by the
bodies that are meant to do something with them, as well as those who are thinking about it?

The Chairman: Lord Lester, could we have a question?

Lord Lester of Herne Hill: I have asked the question.

David Ruebain: I will be very brief. I absolutely agree that the old specific duties
were not perfect, and I am not sure that anyone was collecting any of the documents
in the way that one fears. I agree that in some respects there was an emphasis on
process over outcome. I fear that in short we have gone the other way. I think that
there are tools that could be used from the old duties which lend themselves very
well but are not being adopted. The other big positive about the new duty, it should
be said, is that it covers more than just three protected characteristics, but of course we are here today to think about disability.

**Q69 Baroness Campbell of Surbiton:** Outside the public duty, can and should the UK Government, the devolved Governments and local authorities assess the impact of proposed policy changes or funding cuts on the right to independent living before they are implemented? If you think so, I wondered if you thought the Government has taken adequate steps to monitor the impact of policy changes and cuts to funding on disabled people and their right to independent living. If not, what should they have done?

**Pauline Thompson:** I think one of the difficulties is the whole tension that you see in the Government’s vision for social care, which is littered with references to living independently yet makes no mention whatsoever of the Article 19 rights but just generally puts them there. So often you hear, “Well it is the local authority’s decision, and local authorities do not need to cut because they did have the money”. You are in that double bind at the moment. I think to actually see how much it is affecting, when there is so much denial going on that it is affecting disabled people, is a very difficult situation.

**Q70 Baroness Campbell of Surbiton:** What steps should the Government be doing to take independent living forward? You said they are not doing anything and that it is all rhetoric, so what should they be doing?
**Pauline Thompson:** I certainly think that they should be offering far more advice from a departmental view. As I say, the Office of Disability Issues is issuing all its guidance, but that does not get through to the people that are actually commissioning services. For instance the ODI recently did a survey of older people in care homes and had some commissioning recommendations, but it was not put on to the Department of Health’s website nor were the commissioners actually told about it. It is a question of there being much more leadership from the departments. We know that local authorities do have difficult decisions to make, but I think there should be much more leadership as to how they could go about thinking about it in the round as well. We are not just talking about social care. That is the one that is most obviously affecting disabled people, but with all of the other departments there is the cumulative effect.

**Q71 Baroness Campbell of Surbiton:** That leads into my second question. Disabled people’s organisations have told us that the impact of the Government’s proposals to reform the benefits system together with the cuts to funding will lead to a breach of Article 19 of the convention. Do you agree with that conclusion? If so, is there a particular proposal which you think will violate the convention, and why?

**Diane Mulligan:** As I stated earlier, Article 19 needs to be looked at in relation to other articles within the convention, some of which have been touched on. For example, Article 28 is around inadequate standards of living and social protection. A lot of the new reforms that are being proposed are around social security and social
protection issues. Article 12 is around equal recognition before the law. Currently we have a reservation on that article as well as a lack of clarity about whether the Mental Capacity Act is actually compliant with the convention. It also relates to many other articles of the convention, in particular if there are violations of other human rights—for example in employment settings, through transport, healthcare, housing, education and attitudes et cetera. They all intersect and impact on the right to live independently and to live with dignity as part of the community.

In some of the proposed changes—and I agree with the previous evidence that Baroness Campbell refers to—for me there would be a clear breach of Article 19 through the accumulation of a proposed number of different cuts, some of which have already come into effect, such as the closure of the independent living fund and the lack of a clear independent living strategy that was put in place in 2009—there is no clear status on that report at the moment. The reform of disability living allowance is proposing a cut of 20 per cent of its budget in the new personal independence payment. On the special educational needs Green Paper—the consultation for which was not even available in an accessible format—we have an Article 24 reservation that relates to independent living, in as much as children educated outside their own community could intersect with that. Currently, looked-after children have no independent right to appeal against their special educational needs statements so, in terms of their right to living independently and live in the community, that too intersects.
Baroness Campbell, there is no specific right to the portability of care packages at the moment, which is an issue that is close to your heart. On the disability living allowance higher-rate mobility component, the proposals that are being reconsidered at the moment—and I have undertaken a number of interviews with people in residential care settings about these proposed changes and how they would be affected—could affect over 80,000 people in the UK. Because of the eligibility criteria and the changes to social care, one gentleman I interviewed was not able to continue to live at home because his care package had been cut at the weekend; it was in place during the week. His wife tried to provide the care for him at the weekend but became exhausted and had a breakdown, so he moved into residential care. He has young children at home, as well as grandchildren, and his only way to maintain his independence is through his Motability adapted vehicle which he exchanges for his disability living allowance higher rate. People like him will be directly affected.

In addition there are reforms around legal aid, and there is the realigning of support for mortgage interests payments that have affected a disproportionate number of disabled people who are living in adaptive homes and have had to move. Regarding the reduction of local housing allowance and the capping of housing benefit, around half of all private households in the private sector claiming housing benefit have a disabled member. The availability of community care grants and crisis loans are disproportionately affecting disabled people too. For me, I would like a human rights approach to the impact assessment of how those changes are going to affect disabled people in the UK.
**Pauline Thompson:** We have not mentioned carers and the effect that some of these cuts will have. Family carers will have to take on so much more care and therefore you are making people far more dependent on their family carers then they have had to be in the past when they have been able to get services.

**Q72 Mike Crockart:** You have given a long list there of things you think are potentially impacting upon the disabled. I think it is generally accepted that the UK has had a good record on disability issues in the past. Do you think that what is happening, with the list that you have given, does actually raise a serious risk that the UN will criticise the Government for its performance? If so, what do you think the implications of that would be?

**Diane Mulligan:** It is a long list. I think the UN expert committee will take that list—presumably provided in some sort of shadow report or parallel report provided by either the independent mechanism or disabled people’s organisations—and I am sure it would look very carefully at all of those different proposed changes in the round and look not only at a potential breach of Article 19 but the other breaches that I mentioned, such as the right to adequate housing and social protection, which is better known as social security in this country. The UN expert committee could issue advice to change that within a particular framework and timeframe. As Duncan mentioned earlier, these are around progressive rights and progressive realisation, but we need to bear in mind Article 4(2), in that there must not be any retrograde steps and maximum resources must be allocated. This is a clear indication that
maximum resources are actually being reduced rather than provided for independent living and living in the community.

**Q73 Lord Lester of Herne Hill:** Are adequate mechanisms in place to ensure and inspect the right to independent living across the different countries of the UK and across local authority boundaries?

**David Ruebain:** I have already mentioned my view about the divergent approach to the operation of the public sector and the new public sector duty. We do not have the specific duties for Scotland yet, but the indication is that they will be fairly robust unlike, in my view, the indication for England. The ones for Wales are pretty robust. Incidentally, I hope they will avoid some of the difficulties that Lord Lester has raised regarding the operation of the old duties. Northern Ireland obviously has a separate set of arrangements. The other thing I would want to say about the different approaches in the four countries is the anecdotal information that the approaches of the different jurisdictions afford different levels of importance to independent living. That may or may not translate into action and in many respects it is too early to say yet because certainly with the elections that have happened recently we are still waiting to see what impact the new Administrations will have for disabled people. It may well be that we will see a more divergent approach in the coming period, so a range of things including opportunities for disabled people to live independently.

**Karen Ashton:** I just want to pick up on the issue you are raising. Across local authority boundaries there is huge variation in very small geographical areas. If you
go across local authority boundaries, you may face a completely different eligibility policy for community care services—there will be a different charging policy, a different cultural and institutional approach and different political colours of the administration. That impacts very directly on very basic elements of independent living, which is choice about where you will live—very much part of Article 19. Those barriers of localism should not be underestimated. There is a proposal or recommendation by the Law Commission to include in any new community care legislation a power for the Government to make national eligibility criteria for community care services through secondary legislation. At the moment I think it is a bit unclear whether or not that is going to be taken up. Of course, although it would be counter to localism, that could help enormously on the barriers caused by that very close geographical variation.

**Q74 Lord Lester of Herne Hill:** What I am not clear about from what you have said is how much scope the convention allows for localism and diversity within a member state.

**Karen Ashton:** I think it is a real problem because it is not a directly enforceable right. It does not directly constrain through the legal framework the choices that are made within that locality. It allows for huge variation; that is the problem. I think there is a real tension there.
Q75 Lord Lester of Herne Hill: Turing to Article 4(3) of the convention, the duty to consult and involve disabled people in forming law and policy, do you think that the Government and local authorities are currently meeting that obligation? If not, can you give examples of their failure?

Pauline Thompson: I point to the example of the independent living fund, which was to all intents and purposes closed last year and suddenly ended for new applicants. I cannot say that there was much consultation on that. Regarding the equality impact of the change, it just said that to make no offers on funding will have an adverse effect on all equality groups, and then said, “We must get round to asking the local authorities”. They assumed that the local authority would be able to pick this up, but of course local authorities were facing cuts at the time. They had not even consulted with local authorities let alone disabled people.

Q76 Lord Lester of Herne Hill: On the other side of the coin, perhaps this is a stupid question perhaps but what do you think Governments should then be doing positively to encourage compliance with Article 4(3)?

Pauline Thompson: I certainly think they should be really making it quite clear—this is their own department—that you absolutely must do the right amount of consultation and make sure that they are aware that they would be in breach of their duties on the consultation issue.

Karen Ashton: I do think that, with the current general theme of Government policy of doing away with red tape, the problem is that what can be drawn into that are very
important elements of process such as consultation with people with disabilities, which actually requires a lot of careful thought and resources to ensure proper inclusion of people with different kinds of disabilities that affect them in different ways. For example, what would be required in terms of consultation process for a deafblind person would be very different to that required by somebody with autism. My worry is that an overarching theme of “Let’s reduce bureaucracy and red tape” may perhaps unintentionally adversely impact on consultation. I think the Government has got to be very careful to distinguish between essential elements of process like consultation of this kind and unnecessary red tape. It is a baby and bath water scenario.

Q77 Baroness Campbell of Surbiton: Diane, you have already told us that disabled people have not really been effectively involved in the preparation of the UK’s periodic reports to the UN and the work of the national implementation mechanism. What should they have done? What could they have done? What should they do in the future?

Diane Mulligan: The Government do involve disabled people through some mechanisms currently. One of those is Equality 2025, of which I am a member. They have a working group on the convention but it is made up primarily of large disabled people’s organisations that do not fully represent disabled people. For me what the Government should be doing, if I may say so, is to be developing a framework for action for the implementation of this convention, involving disabled people from the
outset. They are about to submit their report this year and there is not a national plan of action in place. It is not clear, either, whether the new disability strategy that is coming out from the Office for Disability Issues will promote, monitor and implement the convention with the involvement of disabled people. I suppose that is particularly worrying. Did you ask about the independent mechanism as well?

**Baroness Campbell of Surbiton:** Yes I did.

**Diane Mulligan:** On the independent mechanism, you had evidence earlier from Mike Smith who is the Chair of the Disability Committee; so that Committee is involved. There has been a number on stakeholder engagement events around the convention—I think seven in total—as well as a guide written on what the convention means to you. There have been some grants for a Scottish independent living project as well as an expert panel on the convention. Currently there is an inquiry into older people’s rights and care and support at home. It has also supported a number of legal cases but you can always do more to involve disabled people. I think the major issue in the UK is that disabled people do not know about the convention, our legal professionals in the country are not up to speed with it and the Government does not fully understand its obligations under it.

**The Chairman:** On that critical note, I will bring this session to a conclusion. I thank you all very sincerely for all your evidence. Some of you have spoken both eloquently and long. I recognise the importance of that subject, and I am not criticising you for that, as I welcome the comprehensive way in which you have answered the questions. If, however, you feel that we have not adequately covered anything, please feel free
to write to us. We will certainly be writing to you not only to thank you but also to ask a few more questions.