Disability and the Human Rights Act: Transcript

**Daniel Holt (‘DH’):** Welcome to Disability and the Human Rights Act. Thank you for joining us on such a warm evening. We're very grateful that you are in attendance. Tonight, we plan on talking about the Human Rights Act and the impact on disability and how it's being used in disability cases. We will then look at the new Bill of Rights Bill and the impact that may have on disability in the UK. Tonight, we have got Dr Oliver Lewis from Doughty Street, Steve Broach from 39 Essex, Svetlana Kotova from Inclusion London, if you require BSL interpretation we are very grateful to Matthew Banks who is providing interpretation

tonight. You may want to keep an eye on him if you need BSL. First off, we will go to Dr Oliver Lewis can you introduce yourself.

**Dr Oliver Lewis (‘OL’):** Sure, thank you very much Daniel good evening everyone. Hope you can hear me okay my name is Oliver Lewis as Daniel said and I'm a barrister practicing from Doughty Street chambers. My area of work is almost all around disability in some way or another in particular people with mental health issues or learning disability or autistic people and I'm very often in the Court of Protection. I do public law challenges around human rights and disability and discrimination claims civil claims about unlawful detention or Human Rights Act breaches which we'll be talking about today. The most sad and horrible part of my practice is representing grief families of disabled people in inquests

thank you

**Steve Broach (‘SB’):** Should I introduce myself next Daniel I wasn't sure if that was me

**DH:** Okay you go, thanks.

**SB:** Thanks Daniel. So, I'm Steve Broach. I'm a barrister at 39 Essex Chambers and I have a similar practice to Oliver. My focus perhaps is slightly more on the rights children and young people and have particular expertise around education health and social care for that group but I also do a lot of protection work like Oliver and judicial review cases for adults as well and my background prior to coming to the Bar was working in policy and campaigns particularly around autism issues the National Autistic Society and other charities so I’ve got a long background in thinking about making rights real for disabled people and their families

**DH:** Next we have Svetlana Kotova. Can you please introduce yourself.

**Svetlana Kotova (‘SK’):** Thanks Daniel. Hello everyone and thanks for having me here today I’m Svetlana, I’m Director of Campaigns and Justice at Inclusion London we are deaf and disabled people's lead organisation um we work on London wide and national campaigns and support grassroots campaigns that are led by disabled people I thought, I have a law degree, I am not a practicing lawyer, but Inclusion London was involved I several judicial reviews cases where Human Rights Act was used and we did a big education programme to help disabled people understand the Human Rights Act and how it can help change our lives

**DH:** Thank you. We are aware that not everybody attending tonight might well know about what the Human Rights Act is. The Human Rights Act got royal assent in 1998 and enshrined the European Convention on Human Rights into UK law. The European Convention is part of a European institute called the Council of Europe, which is separate from the EU, European Union. The European Convention on Human Rights protects the most basic of rights, including the right to life, freedom from torture and inhumane treatment, protection against slavery and enforced labour, the right to liberty and freedom, the right to a fair trial, respect for privacy and family life and the right to marry, freedom of religion or belief, freedom of peace and peaceful protest, no dissemination, protecting of poverty, rights to education and rights of freedom of expression. The Human Rights Act is a significant issue of all because it has several important roles in implementation of human rights. One of them is that courts must take into account cases of the European Court of Human Rights. That's the first key function. The second one is UK law has to be interpreted, where possible, interpreted in a way that is compatible with our rights under the Convention. Where that's not possible there can be a declaration of incompatibility with our human rights and then parliament can choose whether or not it wants to chance our law and very importantly it also places an obligation on public bodies to protect our rights. Tonight, we have a series of questions about the Human Rights Act and disabilities the first one for the panel is what is the significance of Human Rights Act and disability issues does anyone want to go first?

**SK:** Shall I go first as a non-lawyer so then there'll be no pressure on.

**DH:** Yeah, thank you.

**SK:** I think from a campaigning organization point of view from disabled people's point of view I think there are very significant things that Human Rights Act did well as Daniel says incorporated European Convention and actually allowed us to bring cases here which then helped um first of all to convey Human Rights Act and the Convention so they can be a very important message because human rights are universal so Human Rights Act offers universal protection to people no matter who they are where they come from what they do and we as society agreed that all these basic standards will be protected for everyone and I think we probably thought before corvette that things moved on and disabled people kind of are treated better and so our lives kind of matter but we saw during covert pandemic how easily it could collapse and how our lives could be very quickly sacrificed to save the system and Human Rights Act of course helps to challenge that and to bring perspective again to the fact that everyone's life no matter how much it was to sustain it how much it was to protect it or whatever we contribute in other people's view to society or whatever um uh even potentially harm in other people's views we cause the society should be protected.

Second, I think what the Human Rights Act helped to do it helped gives us some ammunition to change the system and it helped this in many kind of mental health and mental capacity related cases where there was little protection and it was improved. Of course, it did not change the system completely but it definitely helped to improve situation there. It helped to shift some standards in terms of what is seen acceptable. Of course, human rights, the Convention was written at the time when well society was very different and disabled people lived in the institutions that was acceptable to Medicaid people even for the fact that they're gay and so this was a very different society then, but in many respects some of those prejudices and the systems stayed and what Human Rights Act helped to do is to shift this. So, for example, the case of Bernard, the housing case, where local authority obviously thought it was quite acceptable for a family to live in a situation where a disabled mother could not properly perform her functions as a mother and could not use basic facilities in her house that was acceptable but the Human Rights Act helped to challenge that also Human Rights Act helped gave us to gain tools to hold public bodies to account for the policies that they make. This is all welfare benefits types of cases not only they helped to shine the light on discrimination but also they helped us to expose how policies that are made not really supported much by evidence and often are based on some kind of prejudice judgments for example medicine case how was it possible to assume that um children in hospital do not need extra do not have extra costs and do not need disability benefits. And I think we do have to admit though that Human Rights Act is just is not the ideal, our experiences because we do need much more support because society was not built for us do require uh positive much more resource intensive positive action and of course courts did not always want to go that far to uh in in this space, so Human Rights Act often failed us. But, of course, the protections that we've got helped to change many aspects of our lives

**DH:** Thanks that was a really helpful overview of how the Human Rights Act can apply to disability in a various amount of ways. Dr Lewis, could you tell us about some of the issues that you are familiar with and how they've incorporated the Human Rights Act to deal with disability issues.

**OL:** Definitely, thanks very much. I've sort of got two examples. Maybe I could do one of them and maybe Steve could come in and then I could do the other one just to split it up if that's alright. The first example is from the world of inquests and then the second is from the court of protection so maybe I'll just talk about inquest now if that's okay. As is well known an inquest is the legal process that happens after a non-natural or violent

death or where there's a death in state custody and inquests is not a criminal procedure and it's not civil litigation it's a sort of neutral fact-finding mechanism of the State and a

coroner or if the coroner is sitting with a jury, then the jury needs to answer four questions. The first three are usually quite easy to answer and they're who was the person,

who died, when did they die and where did they die and then the fourth one is much

more difficult to answer. Sometimes, it's how did the deceased come by their death and

historically the task of figuring out how the person died was understood quite narrowly

as meaning by what means. So it really focused on the medical cause of death and perhaps what happened in the minutes, hours or perhaps days before the death that led up to it and

then in 2004 there was a case called Middleton in the House of Lords which became the UK Supreme court that held so the court decided that in order to comply with the UK's obligation under Article 2 of the European Convention of Human Rights, that's the right to life. The purpose of the investigation the inquest extended to figuring out under or in what

circumstances the deceased came by their death and that's how Article 2 inquests came to be called Middleton in quests and for disabled people who have died perhaps in state custody or in a care home or detained by under the Mental Health Act in an independent hospital. An Article 2 inquest means that the state has to carry out an enhanced investigation so what the court needs to do is look at in what circumstances the deceased came about their death so that really opens up the scope of the investigation and so you can look at, for example, the staffing provision if it was a mental health institutional

death, the training of those staff, perhaps underfunding and under resourcing of the system, the policies in place, whether the policies complied with or were in line with national

standards and guidance and how the policies were actually implemented. And Article 2 inquests also allow the coroner or the jury to express a judgmental or critical conclusion so the coroner or jury can use words like failure inappropriate inadequate unsatisfactory unacceptable etc whereas in non-Article 2 much narrower inquest. They're not allowed to do that and the other advantage of human rights in inquests is that without Article 2 there would probably be no legal aid available to bereave families. And, in fact, non-means tested legal aid even in Article 2 inquests was only introduced a few months ago before that you had to sort of plead with the legal aid agency to get funding. So, Article 2, the right to life, has been really important for disabled people in this country because of what we call

the investigative obligation under Article 2 the right to life to investigate the circumstances

in which um people have died and that's really important because the theory is that lessons

are learned and services improve and future. deaths are prevented. Thank you.

**DH:** Thank you, Dr Lewis. The investigated duty plays an important role in finding out what happened, as you said, and in preventing further violations in the future. One of the lesser known aspects of the Human Rights Act is as you say the obligation to make positive steps to make sure rights aren't violated, even before they've happened and that is important not only for protecting people but it's a way of preventing cases from going to European court on Human Rights because we deal with issues before it happens another area in which human rights Human Rights Act is used is court of protection cases and Steve is our expert on court of protection, Steve could you tell us a little

bit about that

**SB:** Thanks Daniel. I'm actually going to leave court of protection to Oliver, if that's okay. I was going to talk about what the way in which the Human Rights Act has or has not impacted on access to care and support for disabled people and also a little bit about the right to freedom from discrimination under Article 14 of the Convention which I think has probably been the most fruitful human rights avenue for disabled people under the Act along perhaps with Article 5 in terms of the right to liberty following the Cheshire West case. Just in your chat box now, thanks colleagues, is a link to a blog post of mine which I'm going to share if the screen share lets me as well hopefully you can all see that too. And for the rightful lives campaign, I wrote a blog about uh at that time since September 2018 with the while ago now all the judgments where the rights of autistic people and people with learning disabilities have been upheld under the Human Rights Act. It's not a very long list and I think that definitely reflects some of the points that Svetlana was talking about in terms of difficulties and access to justice but there are certainly some very important cases here that I will just begin to mention. And the first one is the A, B, X and Y case which was a case about manual handling of two profoundly physically and learned disabled young women and Mr Justice Mumbi, who was involved in many of the early human rights cases in this area, talked about the recognition and protection of human dignity as one of the core values in truth the core value of our society and indeed of all the societies that have embraced the Convention so that this idea of dignity and the enhanced degree of protection that disabled people required for their human dignity was very important in some of the early cases. The date of this was 2003 but what I think we came to discover was that there was a cost limit to the protection of dignity under the Convention certainly unless the situation was so bad like in the case of Bernard. That's what I mentioned that we were very close to if not at the threshold for inhuman and degrading treatment under Article 3 which was an absolute right but when we're looking at Article 8 and the protection of people's private life right. It's very easy to talk about the physical and psychological integrity of the individual their ability to function socially but where it comes to the state having to actually spend money to make that real the courts have been very reluctant and to go there and perhaps most famously or notoriously that's what happened in the case of Elaine McDonald in the Supreme Court. Kensington and Chelsea were providing Mrs McDonald with night-time care decided instead of that they would provide her with incontinence pads because it was cheaper the difficulty with that was the Mrs McDonald wasn't incontinent. She was perfectly able to control her bodily functions what she needed was assistance to get to the commode at night but the attempt that we made to argue that that change in service and that what we said disrespect for Mrs McDonald's human dignity breached her human rights uh fell absolutely flat and nowhere in the Supreme Court. However, Mrs McDonald did win when she took her case to Strasbourg. I think that's really important an area that we could explore more because the Strasbourg court looked at it rather more narrowly and said well hold on this is an interference with the human rights because we the state were taking away care and in that context it had to be in accordance with the law and it wasn't for a period because there hadn't been a reassessment and so although that's rather technical it didn't mean that for a period of time at least there was a breach of Mrs McDonald's human rights so there was no need for a positive obligation to be established to actually provide the care in the first place so said the Strasbourg court. Now when we get on to the British bill of rights, which is before Parliament, one of the things the government's very opposed to is positive obligations and, in fact, if the Bill goes through the courts will be directed not to identify any new positive obligations and to take a very narrow approach to any existing ones so positive obligation being the duty on the state to actually do something which will really probably put the final nail in the coffin of all the efforts to try and establish duties on the state to actually provide care and support under the Human Rights Act.

But there may be more creative ways around that in terms of like in Mrs McDonald's case showing that her rights have been interfered with by the withdrawal of care. That's really where we are in terms of care and support. There are then a number of cases like GME and, very importantly, Hillingdon and Neary, which were really about disabled people's rights to liberty but also their right to perspective private life under Article 8 and if I take Steven Neary's case still being one of the most striking examples of a human rights violation for a

disabled person by keeping Stephen away from his home between the 5th of January 2010 and the 23rd December 2010 so almost a year that they unlawfully bridged his right to respect for his family life contrary to article 8. They unlawfully defined his liberty contrary to Article 5. They failed to refer them act to the court or conduct an effective review of his of the best interest assessments and that breached his right to have the lawfulness of his detention determined on a speedy basis so a series of human rights violations in Stephen's case when he was kept away from home of the quotes support unit contrary to his family's wishes. In terms of young people, the C case very important. I would say, as well the blue room cases, it's sometimes referred to an eight-year-old boy who was regularly secluded in a padded room in his school and there was a denial of the Article 3 and Article 8 breach claim. But there was an acceptance that there was a breach of his right to liberty under Article 5 and the school was doing this so the judge held without any power to deprive him of his liberty so very serious interferences with the child's human rights there and those issues of seclusion and restraint in schools continue to be major concerns and potential rights violations for disabled people. The case of an autistic young man who was detained having become distressed a swimming pool importantly and interestingly there a very short period of detention even in the misguided belief that it was in Zlatan's best interests did result in a human rights violation because in part of that H's particular vulnerabilities and then we come to Cheshire West perhaps the most celebrated or notorious depending on your perspective of the disability human rights cases and really what Cheshire West was all about I would suggest is actually non-discrimination because the conclusion of the majority was that disabled people's rights to liberty is the same as everyone else's it's really what it boils down to and no matter how well-intentioned the gilded cage might be if a person is not free to leave a place and subject to continuous supervision and control they are deprived of their liberty and that needs to be authorised. And that really did result in a recognition that thousands more disabled people were deprived of their liberty than had previously been understood following the court of appeals judgments in those two joint cases. And then moving on to Article 14 and the right to be free from discrimination is the express right to be free from discrimination.

CNC I think is a really interesting case because what we did there was show that a regulation under the Equality Act was itself discriminatory and resulted in a breach of my client's human rights because the way in which the courts have interpreted the phrase tendency to physical abuse which is one of the exclusions from the definition of disability under the Equality Act brought in. For example, autistic children who may be more likely than others to behave in a way that would fit within this broadly defined term physical abuse and we argued successfully in the Upper Tribunal in that case that was wrong because it resulted in a breach of Article 14 of the European Convention in that autistic children and others were being treated differently in a way that couldn't be justified because they were simply excluded from all the protection of the Equality Act. And there was no requirement on their

schools their teacher governing body to justify treatment like exclusion that resulted from their behaviour. And the case perhaps under Article 14 was most the highest profile

and against what Svetlana mentioned was the Matheson case where we established in the Supreme Court having lost at every other level of the system. First did tribunal after tribunal and Gordon Field we then won five nil in the Supreme Court in showing that the rule that took away payment of disability living allowance for children who were in hospital for more than 84 days breached their human rights and again because it discriminated against that group without any justification. And in that case, there was evidence that if a parent of a child in hospital sought to leave that child in the hospital then children's services would be informed it would be treated as a child protection issue so the idea that those families are somehow providing less care because the child was in hospital was just an absolute nonsense and the Supreme Court said as much in more legal terms that there was no justification for that difference in treatment. Now the Article 14 case law might have been thought to come to quite an abrupt stop with the relatively recent decision of the Supreme Court in a case called SC which is about to child benefit policy. The limits on child benefit payments benefit payments to the first two children and Lord Reed in that case gives a very lengthy and very detailed judgment, which perhaps at first glance might be seen to make it very difficult for successful Article 14 claims to be brought. But buried within that judgment is a recognition that disability is a suspect ground. And what that means is that, although it's not listed within Article 14 itself, it is one of the classes or the types of discrimination that the courts will give particular attention to because it is so offensive to human dignity and I think that's really important for us as lawyers and activists in this area because it does show that where there is difference in treatment or failure to treat differently in relation to disabled people that will always need to have careful scrutiny in terms of the reasons for that whether it can be justified. And there's a case that will perhaps be going on appeal shortly called AANCC which I’m junior counsel, where we're looking at whether or

not the fact that the only group of people who can't claim damages for disability discrimination are disabled school pupils whether that could be justified. Because if you're discriminated against by your school in relation to every other protected characteristic, you can claim damages in the county court and other disabled people. For example, those in FE colleges, universities or goods and services can claim damages too so again the question is whether Article 14 allows that difference in treatment of in this case disabled children effectively so watch this space we'll see how SC plays out in a disability context hopefully in the Court of Appeal relatively soon.

**DH:** Thank you Steve for those brilliant examples of how the Human Rights Act is being used in the context of disabled people. Dr Lewis, can we come back to you for your second example?

**OL:** Yeah, thanks very much. thanks, Steve for that. One thing that I was thinking when you were going through those cases is firstly how few cases there are and if you read the press the public would think that Human Rights Act is this great sort of panacea of, you know, is it provides remedies to everyone who you know all you have to say is oh I've got a chipped toenail and then you get lots of money whereas actually what you've said and I totally agree is that the Human Rights Act is actually interpreted really um restrictively in some cases in this country and it's really difficult. I found it really difficult to successfully

argue Human Rights Act points so just bear that in mind please everyone when you read about and we'll come on to this in a few moments when you read about the reforms to the Human Rights Act. But just really quickly I wanted to just give an example about how the Human Rights Act is used on a daily basis in courts around the country and how it affects disabled people's lives. And that's in the court of protection is the court that makes decisions about whether someone has or lacks capacity to make a certain decision. For example, a decision about where to live, what care to have, about whether a person has capacity to enter into sexual relations, to use social media and so on. And where someone lacks such decision-making capacity and there's some kind of dispute about what should happen, the court of protection is the body that makes decisions in someone's best interests. That's the load style they shine the sort of guiding principle about how decisions are made best interests which is very controversial in international law and so Article 8 which Steve has mentioned is about the right to respect for private life and family life and home and correspondence. And at the heart of Article 8, are two principles really. One is necessity is this thing which the state is proposing necessary and the second principle is proportionality. So is the thing proportionate to meet the aim what other ways can that aim be met and one is, this one the best one, why does this proposal strike the right balance so Article 8 is used on literally a daily basis in the court of protection when deciding about where someone lives or what sort of care they should have or elements of their care package. For example, the use of CCTV in a care home or a supportive living arrangement or indeed in someone's private home, what's the aim of the CCTV is it to protect the person against abuse, is it to keep an eye on them, what are the pitfalls and how might that invade or encroach upon their privacy. Or, for example, should there be two staff members at any one time supporting and caring for the disabled person or is one staff member adequate or there might be a decision that needs to be made about what sort of contact a disabled person should have with their family members who might pose some sort of risk to the disabled person. But the disabled person can't take decisions to mitigate the risk and the court has to decide okay well clearly, it's important for the person to see their family but how can we strike a balance between the risk that they may pose and the fact that clearly everyone loves each other and it's good for them to see each other. So, it's really helpful the courts have said to stress test matters not just by the best interest criteria set out in the Mental Capacity Act but also by the European Convention on human rights requirement under Article 8 to consider the necessity and proportionality of the relevant interference with the right to autonomy as enshrined as an important aspect of the right to private life protected by Article 8 so it's really important. And Article 8 adds a lot of value, I think, to decisions that are made in disabled people's so-called best interests and in particular the close regard that has to be had to the autonomy and the rights of the disabled person which is at the heart of Article 8 and indeed at the heart of the UN Convention on the rights of persons with disabilities and which we may come back to later, thank you.

**DH:** Thank you, Dr Lewis, thank you for pointing out how the media often portrays human rights in the way human rights often get bad publicity and the way that can impact the public perception of human rights and the role it plays in protecting people in the UK one thing I think is important about human rights is that it protects everyone and when Steve was talking about the case of A, B, X and Y it reminded me of a case I became familiar with quite long time ago now I can't remember exactly what the case was around Article 3 right not receive inhumane treatment and article 14 right now to be discriminated in the human protection where a disabled person was imprisoned and unable to get support they needed within the community and to be able to get appropriate support while in prison and I just wanted to bring that up because human rights protection is so significant in that everyone is protected regardless of any moral views that might be associated with

their situation.

Now that we've provided and overview of the Human Rights Act and its impact on disability, we're going to move onto the new bill of rights and the changes that it will bring forth or proposed changes that are being put forward by government the bill is quite significant in that it has no interpretative duty that means there is no obligation on court to interpret the law in a way that is compatible with the European Convention

How do you think that will affect the human rights protection of disabled people in the UK?

**SB:** If I if I maybe go first on that one because I've had the privilege of sharing a discussion with lots of my colleagues in chambers told me the answer to these questions a few weeks ago. I think that the first thing to stress is that the bill of rights repeals would propose to repeal the Human Rights Act it doesn't do what the last conservative manifesto said would be done which was to update the act. In terms it repeals it so it would get rid of the Human Rights Act and replace it with architecture which is much less effective in terms of protecting people's rights and deliberately so obviously and one of the things that Daniel's already rightly pointed out that would be missing from a bill of rights if it replaced the Human Rights Act is anything equivalent to the interpretive obligation in section 3 of the Human Rights Act which requires courts to interpret legislation as far as possible to do so in accordance with Convention rights and that has been a very powerful tool in terms of achieving effective protection of human rights. And it effectively requires Parliament to legislate very expressly against people's human rights if they want to avoid a Convention compliant interpretation being given because the courts can't cut across the express language of the Act or do anything that would go against the key purpose legislation but they can adopt and must adopt at the moment a strained interpretation of legislation to find the Convention in blinds and that would go but there are lots of other things that would go as well. One point, I think that's really important picking up against Svetlana’s very powerful opening is that the courts would be told under the bill of rights to rely on the original interpretation of the Convention, told to look at the preparatory materials very much great echoes here of what's going on in the states as well in terms of the originalist approach to the U.S constitution. The issue for us that because we didn't have any disability rights in 1946 in any meaningful way and everything that's happened about disability rights post dates the Convention so it would be majorly problematic for anyone trying to, for example, use Article 8 in any kind of creative way if that clause stays in the bill of rights and we have to only apply the Convention using the language and the interpretation that was given to it in the 1940s when as I was saying it was largely expected that disabled people would be in institutions. We treated many disabled children as ineducable in this country until the 1970s. It's very important not to lose sight of how recent much of the progress has been and we would lose that if that clause stayed in so there's nothing good about the bit of rights literally nothing. I’ve tried to find something positive to say about it. It's an entirely retrogressive, retrograde proposal and I very much hope that it's voted out or if it's not voted out the worst bits of it are removed and we end up with a Human Rights Act light as opposed to what is essentially at the moment just a shell a facade of human rights protection. There are lots more reasons like going to real time as to why if the bill went through unamended and it would be almost impossible for people to implement their rights in this country but I’ll get off my soap box now.

**DH:** No, the bill of rights bill is far from being progressive as you say it's putting limits on rights protection that we have the protection to the most basic rights that we can have and that is seriously alarming particularly now some of the candidates for future Prime Minister have also suggested coming away from the European Convention as well so that equally not good. Svetlana can you talk about the new bill of rights and the impact that will have?

**SK:** Yeah, thanks Daniel. So, many of you probably know that in the companion circles this is called removal of rights bill which is what exactly what it is as Steve said, I think. Steve already mentioned some things which I think will be particularly concerning for disabled people is this curtailing of positive obligations and that kind of means that it will be very difficult for us to progress our rights because as I said society was not built for us. And so in order to be equal, we need changes made or support provided to for us to be able to do the things that non-disabled people just do because society was built for them and that requires resources so that requires positive action which was underdeveloped but now there will be a stop to it completely. I think also changing proportionality tests and kind of placing greater focus on public interest, how far it will go and what is in public interest, I think, might have a huge impact on again on disabled people's rights because the public interest is not to for example, provide something expensive support or even the case about tendency to physical abuse. I don't know how that would be interpreted if that proportionality test was modified, how it will be now I, well obviously I’m not a lawyer so I might not interpret it well, I think obviously putting different barriers to justice and creating these deserving and non-deserving kind of classes. I don't know essentially you mentioned Miss Price and her case, and I wonder how whether she would get damages or whether the court would consider the fact that she did not, she committed offence and she was in prison and although she was

treated appallingly maybe her damages should be less now. Well, this is how potentially a

similar case might be treated under the new proposals if they go through and so any kind of barriers to justice that are putting that the Bill will put in will have a huge impact. I don't know it I guess it's a question to see and others here or I wonder though if this Bill will make it easier to bring cases to Strasbourg because, kind of, what's the point arguing here when courts are not really able to interpret the law in the right way. But, of course, we know how difficult it is anyway and how long it takes to get cases heard in the European Court so it's not a solution. It's not about legal action, it's about what is happening on the ground and how life is changed on the grounds. I guess I really think the dent frame is dangerous how, for example, positive duties are framed as something that prevents good public bodies to spend their resources guest resources in the most effective way is really dangerous because exactly what Human Rights Act allowed to do us to do is to change the way they spend resources so instead of, for example, spending resources on medicating someone, keeping them in the cage, they would spend resources on helping them to be in the community thanks that's initial thought.

**DH:** There's a question in the chat that I just very quickly want to raise before we move on. There is one question about what all the issues are, and I just wanted to clarify that Steve addressed three main issues with the Bill. The first one is not having an interpretative duty, which you went through quite comprehensively. And in that, you mentioned about the lack of positive obligations, which is the second issue with the Bill. And you also mentioned how the UK courts have been limited in how they interpret the European Convention to its original meaning. And there's also limits on how we use the case law in the European Court of Human Rights. Steve mentioned all of them in his answer, but I just wanted to clarify that for the audience. Dr Lewis, would you mind coming in and sharing your thoughts on the issues with the Bill?

**OL:** Sure, it's a bit like um one of those radio shows where everyone agrees with each other. [We] should have invited a government minister. Are there any government ministers actually? I'm not sure but I agree with everything that's been said um this Bill is first of all, it's completely unnecessary. There is no actual problem with the Human Rights Act and this Bill doesn't actually fix any problems associated with the act so it's just it's made up there's and in fact the cross party committee that was established to look at um the Human Rights Act said essentially, it's fine, it's working well - Don't tinker with it but of course the government didn't listen to that the funniest part of the Bill is right at the top um where uh Dominic Raab, who's the relevant minister, has said that uh quote in my view the provisions

of the Bill of Rights Bill are compatible with the Convention rights so he's saying that this Bill which seeks to strip away our rights onto the ECHR is itself compatible with the European Convention on Human Rights. I find that very funny indeed and I wonder whether the European Court of Human Rights would agree that the Bill complies with Article 13 of the European Convention on Human Rights, which guarantees that there needs to be an effective remedy before a national authority and so if one of the purposes is to make it more difficult for people to get remedies domestically of breaches of their Convention rights by forcing people to demonstrate that they've somehow suffered greatly and I think that is in and of itself a breach of Article 13 because all that's required is for a violation to be shown and that's it and you can have a declaration just a statement from the European Court that your Article 8 or your Article 5 whatever rights have been breached. There's no requirement to prove anything further so I think that this is purely political. I think that

the government is playing with people's rights in a very disingenuous way and the true objective of the Bill is not to restore Parliamentary sovereignty to bring foreign rights. And by the way British lawyers took part and were at the core of drafting the European Convention on Human Rights in the late 1940s but what this Bill does and, indeed, its purpose is to consolidate executive power and reduce scrutiny in a way which can only benefit one thing and that is government. And so we'll have a chilling effect on judicial independence and the ability of judges to safeguard our rights one of the most important things that you should know about the Bill one of the most dangerous aspects is that

the Human Rights Act requires our courts to interpret legislation compatibly with the European Convention and it says so far as is possible and so allows judges to be

judges and, generally speaking, judges are very intelligent people who do a good job of evaluating the case before them but the new Bill scraps that obligation um the

Human Rights Act requires the UK courts to take account of the jurisprudence the case

law of the European Court of Human Rights and the new Bill removes that requirement it wants courts in this country to simply ignore or disregard judgments of the Strasbourg

court and its precedence which is completely bonkers because um the Strasbourg court issues very many decisions and judgments, and all of those judgments are used in all member states all 46 member states of the Council of Europe and so um this bill is a very dangerous idea and puts the UK in the company of Victor Auroban and his government in Hungary and if Russia were still part of the Council of Europe this would be music

to the ears of a dictator like Vladimir Putin.

So, obviously, there were political considerations and obviously the government was really unhappy with the European Court of Human Rights when it stopped the flight taking off to Rwanda at great expense and embarrassment of government. That's the whole point of any court system, isn't it? That there is an arbiter a neutral and an independent arbiter and sometimes the European Court of Human Rights by the way exceedingly rarely when it comes to the UK but sometimes it disagrees with the UK government and that's a really important protection for disabled people but of course not only for disabled people but for everyone.

**DH:** Yeah, you quite rightly point out that the European Court very rarely disagrees with the UK government. The main reason for that, I imagine, is our interpretative duty, because we can deal with it in our own courts before it gets to the European Court of Human Rights. The interpretation duty will be removed by the Bill, should it pass. Without an interpretative duty, that may cause courts to rely on declarations of incompatibility much more than they do now. Courts will often use declarations of incompatibility on section four of the Human Rights Act. A declaration of incompatibility where a court decides a UK law is not being interpreted compatibly with the European Convention on Human Rights, and then it asks Parliament to address the issue. Given that one reason, or one narrative around the law is "taking back control" of our courts, etcetera, do you think Parliament is capable of dealing with the potential increase in numbers of declarations of incompatibility?

**OL:** Can I jump in? I don't think it will increase the numbers of declarations of incompatibility. First of all, I hope this bill will go nowhere and so we're just having a theoretical discussion but, secondly, I think that courts will find a way around the Bill and clearly it will just increase the numbers of applications to Strasbourg, right? And so people like Steve and me will, I mean, I like Riesling wine, I'm a great fan of Strasbourg and I like going but it will mean that we will have to make way more applications to Strasbourg and we'll win more cases so the government will lose more cases in Strasbourg and so what's

the point of all of that it doesn't, as I said, it doesn't fix any problem that currently

exists. It's just ridiculous and just have a look at the Bill. I've put it on in the chat and there's also the 39 Essex Briefing on the Bill of Rights but just have a look at Section 1 and it says this is what the Bill says this act clarifies and rebalances the relationship between courts in the UK the European Court of Human Rights and Parliament think about that did you know that there was a non-balance between Parliament [and] the courts in this country and Strasbourg. I mean the Human Rights Act, let's not forget which was brought in, it came into force in 2000. It did not change the constitutional makeup of the country it retained Parliament as the supreme body. It didn't give courts any great power like most European constitutional courts in continental Europe have the power to strike down legislation, right? No court in this country has the power to strike down legislation. All it can is all it can do is, as you've said Daniel, issue a statement saying, “Oh, we don't think this is compatible” and it sends it back to Parliament to decide so there's no there was no constitutional rearrangement when the Human Rights Act came into force and so it's completely um disingenuous for the government to suggest that now is the time to, you know, take back control of Parliamentary sovereignty. There was no removal of it in the first place. This is purely political, and we should with every fibre in our body resist it and there'll be lots of opportunities, I’m sure. And I just want to encourage everyone to join advocacy groups like Liberty and Justice and disability rights organisations will be rallying around and opposing this Bill and I encourage everyone to take part in those advocacy initiatives

**DH:** Completely agree, Oliver, particularly the last point.

**SB:** Daniel, can I just jump in to show everyone, if I can, this really is Alice in Wonderland stuff. I think clause seven of the Bill, it really is just politics poured into legislative form. Decisions that are properly made by Parliament so we're the court's determining an incompatibility question which means we're then told whether it's the provision is incompatible with the Convention right or a public authority is acting in a way that's incompatible what they have to do is regard Parliament as having decided in passing any Act that the Act strikes an appropriate balance between different policy aims different Convention rights and the different Convention rights different persons so without any evidence or any consideration of the language of the legislation section 7 if it became

section 7 would require courts to start from the basis that Parliament's got it right and then give the greatest possible weight. I can imagine the judge is being delighted with that instruction to the principal in a parliamentary democracy decisions about how such a balance should be struck or properly made by Parliament. Now, if anyone's read Lord Reed’s judgement in SC, I don't think we have a problem with that. I think that the Supreme Court has always and certainly Lord Reed's supreme court is extremely clear that Parliamentary sovereignty is very important, and the court needs to be courts need to be extremely careful in terms of overstepping the boundaries of proper judicial accountability. What's all this about, as others say, it doesn't begin to solve any real problem. It's merely signalling to a certain sector of the electorate and the media that the government's on their side against people who need or want to enforce their human rights who are generally seen as bad people and it's very distressing to see this kind of language in actual legislation not in policy proposals or stuff coming out of think tanks but in an actual bill before Parliament. Like Oliver, very much hope it doesn't go anywhere.

One of the things I wanted to mention though is that certainly back to “what the point is of all this”. I would agree with was what certainly was saying about how litigation is only one part of the story and I wanted to plug another NGO, the British Institute of Human Rights just done so much work on trying to make human rights real outside the court and in the small places close to home to puerto rico roosevelt and he's doing brilliant work on explaining why the Bill of Rights is so dangerous in practical terms as well because my experience has been for my clients throughout my practice and I’ve only ever practiced under the Human Rights Act that people are much more concerned about breaching human rights than acting unlawfully in other ways. There are two things that people really don't want to do. One is breach people's human rights, and the other is discriminate against them under the Equality Act. That's good but the reason for that is because those pieces of legislation are seen as having a higher value sometimes at least and that's what we need to preserve is this idea that human rights are really important and need to be universal and protected for everyone and that can't possibly be done generally through litigation. But we must have litigation there as the safety net and that's what these cases that we've been looking at demonstrating is that when all the negotiation and all the discussion hasn't work at the end of the day, disabled people and others need to be able to go to an independent tribunal and ask that straightforward question I was saying, “have our human rights been breached”. That's all we need and all of this deliberate complexity and obfuscation in the Bill is just political smokescreen. It's getting the way of people having their human rights respected.

**DH:** One of the questions that keeps popping up, not in the chat but in the conversation, is, "What is this all about?" Svetlana, have you got any thoughts about what all this is about?

**SK:** I guess this this is politics. It's about pleasing parts of electorate who don't really know what human rights are and playing into kind of certain frame and I guess that this may be this is the time is really green for us. But hopefully we will be able to stop it and also in a way maybe that this gives us opportunity to talk more about human rights and educate everyone what human rights are and how they actually protect how Human Rights Act protects us all with big things in our life and with little things in our life.

**DH:** Thank you, Svetlana. And thank you to the panel for sharing their thoughts on and really explaining the impact of the Bill on the human rights of people, and disabled people specifically.

We're at the point in the proceedings where we ask questions to the panel, and I know the audience members have been busy sending in questions. We have a question from Deborah for Steve specifically, but I think all panel members are able to jump in. How many of the cases we've mentioned in this webinar will get through with the Bill of Rights?

**SB:** It's a great question well hopefully it all got through in Strasbourg which is another of the questions that's come in and Oliver’s already made the point that the likely outcome of all this and I would suggest a deliberate outcome because the government wants there to be conflict with the Strasbourg court is more cases going to Strasbourg and more wins in Strasbourg so hopefully the answer is 100 eventually. In terms of how many would have succeeded in domestic courts if the Bill of Rights went through as it's currently drafted I think it's incredibly hard to say because there's so much in it that is deliberately messy and that the courts will spend a long time trying to work through because the judges will honestly seek to apply legislation, all legislation, and so we'll have to try and grapple with some of this drafting that's almost impossible to understand. I would think a significant portion of them would still succeed because as I say a number of the attempted safeguards for the government weighing the scales in the government's favour are there already. For example, the degree of deference that's given to decisions that have parliamentary approval. Primary legislation, in particular, but also secondary legislation so I think Matheson will be decided in the same way. Although, the way in which Lord Wilson used the UN Convention on the rights of the child in Matheson has already been disapproved by the Lord Reed in SC so it has to be decided more narrowly in terms of “can the government explain why this would be treated differently?” I think the answer to that still would be “no”. A really interesting point, I think, is whether Cheshire West will be decided the same way when that issue goes back to the new Supreme Court. We know it was a majority decision already. We know the government doesn't like Cheshire West and thinks that it's created too broad a definition of declaration of liberty so I’m afraid I’m going to give the lawyers answer of “not sure” but we would you know we will fight them of course. We will continue to fight all the cases and dig in the way that we've always had to. It's just that there may well now be an extra layer whereas Strasbourg for most of my practice hasn't been particularly relevant I mean I can only think about one of my cases that's gone to Strasbourg in a meaningful way which is McDonald. Actually, it could be about to get much more relevant for practitioners in the UK.

**DH:** Did anyone else want to contribute to that answer?

I wanted to make a comment I suppose maybe like just also a question, I guess. The outcome in terms of breaches might be the same. In terms of remedies, I don't know I would say especially in with regards to benefits related cases where court squashed secondary legislation because it breached Article 14 together with the first protocol I guess now it will not be possible and it will be up to the relevant Secretary of State to change their regulations which they of course will not do, not necessarily to

**SB:** Svetlana, I think that one of the things that we've been told for a number of years and are doing is not to put all our eggs in the human rights basket anyway and, for example, Casey one uh Johnson where the court of appeal found that one of the regulations in relation to universal credit was irrational common law and this applied it on that basis so the legal profession is created and we will find other arguments to bring if we need to ensure that there are effective remedies for our clients but fundamentally those should be under the Human Rights Act. So, what's really annoyed me when judges have said “oh well we should look at the common law first and not always go to the Human Rights Act.” There's a very important principle in this country which is that we start with legislation and the Human Rights Act is legislation and so I’ve always railed against that trend that's come in more recently to say no we should try and find these common law rights. No, we should apply the Convention rights as enacted by Parliament but if Parliament changes the game, then we'll respond. It's not that we're going to roll over and say to our clients “there's nothing we can do”. There will always this the system we operate in is not straightforward but there will always be ways in which we can see through enforce and protect our client's rights.

**DH:** Thank you, Steve. Thank you, Svetlana. I have a question of my own, but before we get to that, there's a question in the chat. Could the panel recommend some books that people could read about disability rights that will enhance their understanding, not just of the Human Rights Act, but of human rights in general?

**SB:** Well, if no one else is jumping in I’ll plug my own book with Professor Luke Clements on the co-op for disabled children a legal handbook published by Legal Action Group available in all good bookshops and also downloadable free of charge on the Council for Disabled Children website. so that's disabled children a legal handbook. And there's also a brilliant book published by legal action group by Camilla parker on children, young children and young people with mental health problems. That is up for an award at the moment that I’m a huge fan of. I can recommend very heavily uh slightly more academic book here. Well I have to turn my Zoom background off so you can actually see it one time. There we go and it's also probably coming up the wrong way around but it's called The Intervention On the Rights of Persons with Disabilities In Practice. Very interesting comparative analysis.

**OL:** I wrote a chapter in there.

**SB:** There you go including contributions from our very own Dr Lewis and there are some books about this area. Not as many as there are in other areas. I think it’s fair to say that disability rights has been rather a neglected aspect of human rights law for many years and there are not that many of us, you know, plugging away in this area and the focus and the attention does tend to be on other areas. You know the more controversial areas, terrorism immigration etcetera. So yeah, more power to everyone who is working in this field. I'm sure some of them I’ve missed. There's lots of others. I don't know if you can immediately think of any others.

**DH:** Has anybody else got any recommendations for reading?

**SK:** I guess maybe I should plug in some resources developed by Inclusion London. They are they're more practical resources. Not necessarily would be helpful for lawyers and academics but well I guess would be helpful for lawyers who are not very familiar with the legal framework. So, we have a Disability Justice Project website which includes information about the Human Rights Act and UN Convention and Inclusion London was part of a UK coalition of deaf and disabled people's organizations who are involved in regular reporting and monitoring of the Convention, so we have a section on Inclusion London website so it's [inclusionlondon.org.uk](http://inclusionlondon.org.uk/) which is devoted to Convention and it includes a lot of material including reports and shadow reports inquiry findings evidence different guides on how to do this and what Convention means, information in alternative formats and so on which I guess might be helpful to those who want to get involved with this and know more

**DH:** Thank you, Svetlana.

**SB:** Thank you. Yeah, just to jump in one more time on, Daniel, on that question. There's a lot of really good books about themes. So, for example, Professor Clements and a host of colleagues write the bible on Community Care Law. There's the Court of Protection handbook which all practitioners in that court have glued to their sides is the Mental Health Act Handbook and what's interesting is that there perhaps isn't a kind of overarching disabled people's rights book. There should be anyway that might be a conversation for another day but I can't think unless Oliver can point out to me that I’ve missed something of a kind of disabled people's rights overview text. I mean the disability rights handbook is very important but it's about welfare benefits for example.

**OL:** Yeah, and then there's also there's also books on the equality act um which cover

all of the protected grounds including disability but yeah, you're right Steve. Maybe we should write one but then I think that right as Svetlana as you said there are there's

lots of really phenomenal information online whether it's British Institute for Human Rights, Inclusion London, other organizations have great you know very practical guides on human rights about, not theoretical, but like what to do in particular situations which are super helpful for people

**DH:** Thank you, all. Two books that cover disability rights more generally that I would recommend are, Disability and Equality Law: A Duty to Provide Reasonable Adjustments by Professor Anna Lawson. Also by Professor Anna Lawson is "Disability and Non-discrimination in the European Union". Now, we know the European Court is not part of the European Union, but the European Union has its own set of rights and talks about disability in that context as well. My preferred Human Rights Act book is by Merris Amos. It's simply called Human Rights in the UK by Merris Amos is an accessible book applying the Human Rights Act to cases. My question for the panel was, the political nature of the Bill of Rights keeps coming up, and it's an evident issue in this debate about human rights. At the moment, very few cases make it to the European Court of Human Rights. If the bill goes through, more cases are likely to go to the European Court. From a political perspective, what impact will that have on the UK's reputation or place in the wider world as a leader on human rights?

**OL:** I don't know if anyone else wants to go but the UK's reputation within the Council of Europe is already trashed so reputation wise, it won't make a difference because the Council of Europe member states think that the UK government is already completely off its trolley but I'm more interested in what difference it will make to people who have suffered some kind of injustice and the first thing I can think of is that it will introduce a delay, a pretty enormous delay in obtaining or seeking trying to obtain justice. A delay of maybe three to four to five to six years and that can't be in anyone's best interest. I mean what that that is embarrassing I think in terms of if the UK parliament passes this Act which makes it more difficult for people to seek and gain justice then surely what was the point of it. Again, coming back to my point like an Act of Parliament needs to be purposeful it needs to identify what a problem is and actually provide a solution to the problem but, in this case, I don't really see what the problem actually is. And the solution to whatever problem it is seems to be making the situation worse for people who have experienced um a violation of their rights.

**DH:** Thank you, Dr Lewis. Steve, Svetlana, have you two got any additional comments?

**SB:** It's all too depressing. I think all of us said it all.

**SK:** Yeah, I guess I could only say that, yeah UK, our experience with the UN Convention on the Rights of People with Disabilities says that reputation is bad but unfortunately government at the moment does not really care that much about international reputation and that's a big problem.

**DH:** We are probably on the last question, and I do want to end on a more positive note if possible. We've already established that the Bill being proposed isn't an attractive proposition. If we were writing a Bill of Rights to replace the Human Rights Act, in a hypothetical scenario, what would you like to see in a bill of rights?

**SK:** Can I start? I think it's easy. I think the best thing that could happen for disabled people is the bill of rights that incorporates international treaties including U.N. Convention on the Rights of Disabled People then things would fundamentally change

**SB:** Yes, completely agreed to Svetlana one chink of light perhaps is that the draft Mental Health Bill does include some provisions that go some way towards for example Article 19 of the Convention in terms of promoting a right to community inclusion for distant people with learning disabilities. It's nothing like the full fat version of Article 19 but it does show at least a direction of travel. Picking up Daniel's point that is positive as opposed to negative and we perhaps need to grasp onto those straws when we find them and perhaps push at those doors which might be opening a little more readily so the focus meeting admitting tragedy and bleakness of the fact that there are still far too many autistic people with learning

disability in institutional settings and the outcomes for them were terrible and nothing's

changed in that regard ever since. One more view, this bill is yet another, I was just imperfect attempts to deal with that but there is at least some provision in there requiring a focus on community provision so I’m going to grasp onto that as our flicker of hope. I'm really desperate to find a flicker of hope.

**OL:** I wish, I wish I could agree with Steve that the mental health bill is going to change

people's lives in any way because I think what will happen is people with learning disability

and autistic people who are detained under the Act now will just be detained after the Mental Capacity Act in the future because the Act doesn't place any financial incentives or penalties on local authorities and, not CCGs, but integrated health boards who have the obligation on getting people out of hospital and getting community placement set up so I’m probably a bit more pessimistic but I am optimistic because of organisations like Svetlana’s and many others up and down the country who are becoming aware of the British Bill of Human Rights nonsense and are attending webinars like this and I hope are going to lobby their MPs and expose the nonsense that that the Bill is. And hopefully it can just go away because I think the new Prime Minister, whoever he or she is in September, is going to have a lot of other things on their plate and hopefully this can just be brushed under the carpet and not taken forward so I hope that is the case, but we will see. But that's my flicker of hope is about the activism and ingenuity of people to stand up and fight for their rights.

**DH:** I think that the main message coming across is the Human Rights Act really does provide the bare minimum, and anything that detracts from that is inadequate. Any future bill of rights that is a positive move would have to incorporate the Human Rights Act and build on that with other international obligations like the UN Convention on the Rights of Persons with Disabilities, or the UN Conventions around women and children, for example. It seems, right now, we need people to challenge the government and to oppose the bill being put forward if we truly want to protect our fundamental human rights. Thank you all for taking part in this discussion, it's been extremely insightful. I've enjoyed it; I hope the audience has enjoyed it. Thank you to everyone for watching. I hope you've got something out of it and feel that you have more clarity around what the bill means and the impact it will have on us as citizens of the United Kingdom and also as disabled people. Thank you for watching.