OFFICIAL REPORT
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Equalities and Human Rights Committee

Thursday 30 November 2017

Session 5

The Scottish Parliament
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EQUALITIES AND HUMAN RIGHTS COMMITTEE
29th Meeting 2017, Session 5

CONVENER

Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Mary Fee (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Gail Ross (Caithness, Sutherland and Ross) (SNP)
*David Torrance (Kirkcaldy) (SNP)
Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

David Cabrelli (University of Edinburgh)
Murray Hunt (Bingham Centre for the Rule of Law)
Lynn Welsh (Equality and Human Rights Commission)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 30 November 2017

[The Deputy Convener opened the meeting at 09:30]

Human Rights and the Scottish Parliament

The Deputy Convener (Alex Cole-Hamilton): Good morning and welcome to the 29th meeting in 2017 of the Equalities and Human Rights Committee. I have received apologies from our convener, Christina McKelvie, and substitute member, Linda Fabiani.

Agenda item 1 is an evidence session on the committee's forthcoming inquiry, in which we will examine how the Scottish Parliament should scrutinise and uphold human rights. We are very pleased to be joined this morning, via videoconference link, by Murray Hunt, who is director of the Birmingham centre for the rule of law. Murray was formerly the legal adviser to the United Kingdom Parliament's Joint Committee on Human Rights and is a visiting professor at the University of Oxford. He is giving evidence today because of his extensive practical knowledge of and research experience in dealing with rule-of-law issues, nationally and internationally, especially in the context of the role of Parliaments.

Welcome, Murray. I will start with a soft opening question. What is your view of the current human rights landscape in Scotland, particularly in the context of Brexit? How can the Scottish Parliament, through the committee and beyond, act better as the guarantor of human rights in Scotland, particularly in the context of that landscape?

Murray Hunt (Bingham Centre for the Rule of Law): I thank the committee for the opportunity to give evidence. I make one very small correction for the record. I am director of the Bingham centre for the rule of law, not the Birmingham centre for the rule of law.

The Deputy Convener: That was my mistake, sorry.

Murray Hunt: The centre is named after Tom Bingham, who is very well known and gave a fantastically accessible account of the rule of law and what it means as a practical concept.

On your opening question, the current human rights landscape in Scotland, as in many places, causes concern to those who are concerned with the protection and promotion of human rights. We live in an age when many threats and challenges are posed to the rule of law and human rights. There is concern about the rollback of current levels of legal protections for human rights. There is a general retreat from international obligations; that seems to be a worldwide phenomenon. There is a rather alarming attack on many of the legal institutions, in particular, on which we have relied for many years to protect human rights and the rule of law. The general context is broadly one of concern for human rights protections.

That is why the committee's inquiry is so important. It is extremely important to focus on what the role of Parliaments—and elected politicians, in particular—is in relation to the protection and promotion of human rights. One of the most potent responses to the democratic critique of our institutions that protect human rights is to focus on what the role of politicians should be and try to embed in the political process proper consideration of human rights matters. Politicians can then begin to take more ownership of the concepts in human rights treaties and protections.

I know that the committee's next panel of witnesses is going to consider human rights in the immediate context of Brexit in more detail, in terms of its implications for equality and human rights. That context raises many questions and possible concerns about whether Brexit endangers the human rights protections that currently exist. It is extremely important to think about how Parliaments can take a more active role in protecting and promoting human rights.

On your other question, I have read some very interesting papers in advance of this session. In particular, the Scottish Human Rights Commission's submission to the commission on parliamentary reform contains a number of concrete suggestions and recommendations on how the Scottish Parliament could respond to the challenge and take a more active role in protecting and promoting human rights. I am sure that in the committee's questions we will come to some of the specific things that I want to talk about.

You are asking exactly the right question. There is a great opportunity for the Scottish Parliament to lead by example, and I am very encouraged by the commission on parliamentary reform's indication of the significance that it places on the issue and that the committee is taking it up in its inquiry.

The Deputy Convener: Thank you for that very comprehensive answer. Since the start of this parliamentary session, the committee has recognised how big and moveable a feast the human rights agenda is. If we are to act as guarantors of human rights, we have to have a weather eye on all of that agenda.

In the early days of the committee, we looked at the fact that there are some 700 concluding observations on our progress, or lack thereof, against several human rights treaties to which we are party. While we recognise that there is a potential roadmap for the work of the committee and the wider Parliament, in terms of effecting change that improves progress under those treaties, it is a bit difficult to know where to start and how to do so with efficacy—particularly as those concluding observations can be very big or deal with some of the minutiae of the treaties. Do you have any recommendations as to how we grapple with the issue and where to begin?

Murray Hunt: That is an excellent and very important question. I worked for 13 years as the legal adviser to the Joint Committee on Human Rights in the Westminster Parliament. Even by the end of that time, I was still grappling with that problem. The sheer number of recommendations, judgments and substantive considerations from a wide range of international instruments that parliamentarians need to grapple with is often overwhelming, even to those with human rights expertise.

It is very important to try to approach that rather overwhelming landscape through a very clear framework. That is one of the reasons why it is so important that there is a specialised human rights committee in every Parliament that can take the lead in mapping out that framework and help the less-specialised committees to identify their points of engagement with that international human rights framework. I am sure that we will explore in more detail the importance of mainstreaming and how that can be combined with a specialised human rights committee. The role of the specialised human rights committee is to make sense of the complexity of the rather overwhelming landscape by providing a very clearly understandable framework for other parliamentarians in its Parliament.

The best way in is possibly to take the universal periodic review process because in the current cycle the UK is particularly well situated. We have had just over 200 recommendations from the United Nations Human Rights Council to the UK as a result of the UK's third universal periodic review. That is an overarching review process that has generated a number of recommendations that cut across many different areas. That is the entry point that I would recommend for the committee. The committee could identify the recommendations that it can best take forward, identify those that other committees are perhaps better placed to take forward in substantive policy areas, and identify ways in which other committees, as well as your own, can engage with the follow-up process. The framework of the UPR recommendations will lead to more substantive engagement with the more detailed concluding observations of specific treaties. I would recommend that as being the window through which to approach the task that you rightly say can be rather overwhelming.

The Deputy Convener: That is very helpful.

Jamie Greene (West Scotland) (Con): Good morning. The Scottish Parliament is a relatively new Parliament and the committee is relatively new in the grand scheme of things. Given your vast experience of working in other jurisdictions and Parliaments, do you have any suggestions of best practice or things that other Parliaments have learned that would perhaps be pertinent to us, so that we do not go through some of the teething problems that other Parliaments have gone through?

Murray Hunt: Fortunately, there is an increasing number of collections of good practice. A number of international bodies, such as the Inter-Parliamentary Union and the Commonwealth, provide a very good service by collecting examples of good practice from around the world. The number of examples is steadily growing, as more Parliaments realise that they have an important role to play.

There are some useful—and some soon-to-be-published—collections of good practice. In the draft principles and guidelines on the role of Parliaments in relating to the rule of law and human rights, which the Scottish Human Rights Commission referred to in its submission to the commission on parliamentary reform, I tried to distil from my experience of working with Parliaments the main crucial features of best practice—without being prescriptive—to try to help Parliaments that want to do that work.

One of the most important headlines in respect of those principles and guidelines is to ensure that a specialised human rights committee, which is absolutely central and necessary, is not an obstacle to the mainstreaming of human rights throughout the Parliament. There is a danger that such a committee might encourage others in the Parliament to think that they can leave all that to the members of the specialised committee because they are the experts and they know what they are doing. The way around that is for the specialised committee to regard itself as having a special responsibility for mainstreaming so that, as well as dealing with certain issues that only it is best placed to deal with because of its expertise, it assumes responsibility for identifying opportunities for other committees to engage with the international human rights framework.

For example, if there is a recommendation in the latest UPR review that concerns the criminal justice system, that may be best dealt with in the

Scottish Parliament by the Justice Committee. However, for that committee to engage with the recommendation, the Equalities and Human Rights Committee and the expertise at its disposal may assist it by identifying the point of engagement for the Justice Committee and proactively trying to encourage that engagement. A human rights committee also has an important role as an engine of mainstreaming and in helping other committees and the Parliament as a whole to identify those points of engagement.

To cultivate that as a best practice—[*Interruption*.]

The Deputy Convener: Murray, forgive us—we lost you there.

Murray Hunt: No problem.

The Deputy Convener: Do you want to dial back 30 seconds and continue?

Murray Hunt: I had just finished saying that the important role of the human rights committee is to be an engine of mainstreaming. That requires the committee to be proactive in its relations with other committees and with others in the Parliament. I know from experience that that can be a slightly delicate matter for a committee—there are always concerns about treading on the toes of other committees. However, being proactive is necessary to cultivate relationships.

It also requires the expertise that is available to the committee, including human rights law and policy expertise, to be proactively available and deployable to other committees, to help them identify opportunities for engagement. That is absolutely crucial.

Jamie Greene: Thank you for that comprehensive and helpful response. A lot of heads were nodding around the table. I will follow up with a specific example and perhaps you could advise us on best practice. Is it more appropriate that on a number of portfolio issues, such as health, justice, housing and education, the Equalities and Human Rights Committee should hold the relevant—[*Interruption*.] The screen has gone blank, convener.

The Deputy Convener: I suspend the meeting.

09:44

Meeting suspended.

09:45

On resuming—

The Deputy Convener: We are back.

Jamie Greene: I will make my question brief. Is it better for this committee to hold Government ministers and, by default, Government departments, to account for other committees' portfolios, or would it be better for other committees to focus on the equalities repercussions of policy decisions that those portfolio holders make? I hope that that question makes sense. Is it better for us to request that those committees do that, with us advising them on the best way in which to do it, or is it more productive for our committee to have the ministers for justice, housing, education, health and so on tell us about equalities mainstreaming within their portfolios?

Murray Hunt: The ideal end state for me would be that human rights are so mainstreamed across everything that the Parliament does that all those committees do that job with their portfolio ministers. However, that will not happen overnight.

Especially because human rights was added to your committee's remit relatively recently, there will need to be a transitional phase in which it will be necessary to take things as they come, to a certain extent, but with that end state as the ultimate goal. That may mean that, in certain areas, there may be great overlap between your portfolio and the portfolio of, say, the Justice Committee—for example, on a matter such as prisoner voting. There may be issues in which the interest of the Equalities and Human Rights Committee is so great that it is appropriate for you to specialise and take the lead in the first instance. However, ideally, such issues will eventually be dealt with by the relevant subject committees.

I envisage something of a transitional period in which it will be a matter of feeling your way as you go, on a case-by-case basis. It will also be necessary to cultivate a relationship with other committees whereby that is not seen as a territorial conflict. The way to that will be eased if your expertise is deployable across committees, so that there are no rival claims on that expertise.

The Deputy Convener: That is good to hear.

Mary Fee (West Scotland) (Lab): Good morning, Mr Hunt. My question follows on quite nicely from Jamie Greene's question. Across the Parliament, individual committees have rapporteurs who look at particular issues. For example, we have European rapporteurs. Do you think that it would be beneficial to have rapporteurs in individual committees whose remit specifically included human rights, so that they could feed directly back to the Equalities and Human Rights Committee?

Murray Hunt: Yes, I do—very much so. The idea of human rights rapporteurs is an excellent one. I was pleased to see that proposal in the report of the commission on parliamentary reform. It would help the mainstreaming effort if there was

a point of contact on human rights issues within the membership of another committee. That would be an important institutional provision for making mainstreaming possible. It may not be necessary to have such a rapporteur on every committee, but, on the most relevant committees, in whose portfolios human rights issues come up, a human rights rapporteur would be of great benefit.

It would also be useful if, as well as a member of the relevant committee, a member of its support staff was a point of contact on human rights. I would encourage collaboration and sharing of information between points of contact at the staff level as well as at the member level.

Mary Fee: That is useful. If we have rapporteurs on other committees, will there be a need for some kind of training, given the breadth and complexity of human rights legislation? As we go ahead with Brexit and the implications for human rights in this country become more advanced, will there be a need for training for people who deal with human rights?

Murray Hunt: Yes, training is always extremely difficult for members, because they are so busy. Having worked for many years with members of the Westminster Parliament, I know that the claims on all your time are far more than there are hours in the week, so abstract training always poses a difficulty for members. There is a constant problem everywhere in getting members to attend abstract training.

However, I think that training is very necessary. I am a great believer in training on the job. I think that it is possible, especially with proactive secretariats, to combine an element of training with what members do as they go along and carry out their role. That makes it much easier for them to find the time to do the training. A self-conscious and reflective approach to, for example, developing the role of rapporteur, with support from staff who have done the training—it is much easier for staff to find the time to do training—is probably the way to do it.

In the Westminster Parliament, attempts that we have made to provide training for members have, generally speaking, not reached very many of them. In fact, a much more effective way of—training is probably the wrong word—spreading understanding of concepts such as the rule of law has been through the activity of all-party parliamentary groups. I know that there are many cross-party groups in the Scottish Parliament, too. I think that organising events through all-party parliamentary or cross-party groups on very topical issues, which are approached in those meetings through a human rights or a rule of law framework, is a very good way of engaging members and getting them to see things through the different lens that that framework gives them. I am more in favour of that sort of training than training courses at work, which it is unrealistic to expect members to engage with.

Gail Ross (Caithness, Sutherland and Ross) (SNP): Good morning, Mr Hunt. In section 3.1 of its submission to the commission on parliamentary reform, the Scottish Human Rights Commission said that there are "limitations" in the Scotland Act 1998

"in terms of ensuring that the Parliament is able to fulfil its human rights mandate to protect, respect and fulfil human rights throughout all of the Parliament's functions."

Could you explain that to us a bit more? Do you have any advice on how we can overcome those limitations, if they are set down in legislation?

Murray Hunt: That is a very interesting question. I have been interested in and curious about whether, under the devolution legislation, the way in which the European convention on human rights compatibility question needs to be addressed prior to a bill's introduction is an obstacle to parliamentary consideration and discussion of whether a bill is actually compatible with the ECHR. I do not think that there is an obstacle in the legislation, so I do not think that we need to change anything in the Scotland Act 1998, but we need to look carefully at the practices to see whether there is a way round what could, in practice, be an obstacle.

In that part of its submission, the Scottish Human Rights Commission has suggested that the legal advice that the Presiding Officer receives before a bill is introduced be made public, and that that would facilitate more consideration by the Parliament of the human rights compatibility of the bill. That is one of the few points in the submission with which I do not agree. I do not think that it is necessary for that legal advice to be made public in order to facilitate more parliamentary scrutiny and debate.

For me, the crucial document is the policy memorandum, which the promoter of the bill has to introduce. I will explain why. The way in which the Joint Committee on Human Rights in the Westminster Parliament approached the question was not to ask for the minister's legal advice before it signed the statement of compatibility—under section 19 of the Human Rights Act 1998—with ECHR but, rather, to ask for a fuller explanation, first in the accompanying explanatory notes, of why the minister thought that the bill was compatible.

Our starting point at Westminster was that the Government is entitled to legal professional privilege. That is the necessary starting point, which means that we do not expect to see legal advice as such. However, over time, we have persuaded Government departments that it is in

their interests to show the working behind the section 19 statement of compatibility. In the Westminster Parliament, we have now reached the point where we receive detailed human rights memoranda, which are based on the advice that goes to ministers that enables them to sign section 19 statements of compatibility. Such memoranda will have taken out anything that is legally privileged but will nevertheless contain a great deal of legal analysis. Departments have realised that it is in their interests to put that in the public domain, partly to avoid too many pesky questions from the Joint Committee on Human Rights about things that they have already considered. We now receive very extensive human rights memoranda that address the ECHR questions; in some cases, they also consider issues to do with the United Nations Convention on the Rights of the Child and other international instruments.

The way forward is to concentrate not on the legal advice that the Presiding Officer receives but on the policy memorandum. I have seen a reference somewhere to the policy memorandum generally containing only one to seven paragraphs explaining the human rights compatibility of the bill. Over time, the policy memorandum could be expanded, if the right questions were asked of the promoter of the bill, with a template of a human rights memorandum. That would be the crucial document that would enable and facilitate parliamentary scrutiny and debate. For me, the way forward would be to work out how to make the policy memorandum address in more detail the human rights compatibility of the bill.

Gail Ross: Okay. Thank you for that.

As you mentioned earlier, this is the first time that human rights have been given a place on a committee in the Scottish Parliament, and we are now the Equalities and Human Rights Committee. Do you see there being a place for a committee that would look only at human rights, or do you think that the area is compatible with equalities and that we should keep things as they are?

Murray Hunt: The area of human rights is perfectly compatible with equalities. If a specialised human rights committee has to incorporate another subject matter, it seems to me that equalities is the best one.

In response to your question, the abstract answer—if we had a blank sheet of paper for every Parliament—would be that an individual specialised human rights committee would be the ideal. However, every Parliament is, of course, different and Parliaments have different sizes and different resources. Member time is at a premium in smaller Parliaments. Therefore, we have to be realistic about it and not necessarily say that one size fits all. Combining human rights with equalities in one portfolio is a perfectly good way of doing things, particularly if the committee takes seriously what I described earlier as the engine of mainstreaming role and is proactive in encouraging and helping other committees to engage on human rights issues.

Gail Ross: Thank you.

The Deputy Convener: You mentioned the Scottish Human Rights Commission's submission to the commission on parliamentary reform. In recommendation 20, it suggested that the Parliament undertake

"systematic scrutiny of the Scottish Government's response to court judgments ... concerning human rights".

Are you aware of Parliaments that do that as a matter of course? How effective is it, and how big a job is it? Even though my background is in human rights, I am not aware of how many judgments there are on the subject. If we were to undertake that scrutiny, how arduous a task would it be?

Murray Hunt: That is a very good question. For me, it is an extremely important part of the task of a human rights committee—and of that of Parliament. As I said at the outset, one of the problems that we face is concern that Parliaments are being bypassed by courts and that courts are having the final say on human rights matters, whereas, in fact, most human rights judgments leave an enormous amount of space for political decision making, choice and discretion after the judgment. There are very few judgments that prescribe a particular outcome. Some do, but very few do in the human rights context.

Following a judgment, the role of Parliament is very important. It is also very important—not only for parliamentarians but for the public—to understand that the ball then goes back to the parliamentary court and that there is still a lot to be decided, so it is very important that Parliaments get involved in what should happen next.

The number of judgments that require parliamentary involvement is relatively manageable. It is probably impossible to put a number on it in any one system, but it is certainly manageable. In the first instance, the work could be done by the specialised human rights committee, which, over time, could develop a template for identifying the points that the Parliament needs to address. It could send those points to other relevant committees that might be better placed to question their ministers about why they were not doing this or that in response to the judgment.

There are some other Parliaments that do that. The Parliamentary Assembly of the Council of Europe has been strong in recommending that the member states of the Council of Europe develop

mechanisms in their national Parliaments to follow up judgments of the Strasbourg court, and there are now some examples, which the parliamentary assembly has gathered in some of its reports, of mechanisms being established in some of the 47 Council of Europe member states to follow up on Strasbourg court judgments.

For me, that is one—[*Interruption.*]

The Deputy Convener: I suspend the evidence session until we can re-establish the connection.

10:00

Meeting suspended.

10:00

On resuming—

The Deputy Convener: Murray, we lost you when you were starting to tell us about how the Strasbourg court judgments are applied.

Murray Hunt: There are now mechanisms in some member states of the Council of Europe specifically for following up Strasbourg court judgments, and there are good examples of Parliaments beginning to do that. For me, Strasbourg court judgments are one important source that human rights committees need to have regard to, but judgments of national courts, too, often raise questions that Parliaments need to get involved in. Therefore, national judgments on human rights are also very important.

This is all of a piece with what your first question concerned, which was recommendations from international human rights treaty bodies. What should be the response to those recommendations? Court judgments are particularly important because they are legally binding on the state, and Parliaments have an important role in deciding how to respond to those judgments. Therefore, they are at the top of the priority list. However, the question that that raises is similar to the question of how Parliaments should get involved following treaty body recommendations, special rapporteur recommendations or UPR recommendations. They are all really of a piece, and a solution can be fashioned that deals with all those different sources of international human rights laws that the Parliament needs to grapple with.

The Deputy Convener: I remind members of my interest in the matter, having been a past convener of the Scottish Alliance for Children's Rights and having sat on the leadership panel for Scotland's national action plan on human rights.

One of the reasons why we have few court judgments to respond to is that there is still an absence of access to justice around human rights because many of the treaties are not incorporated into Scots law. We are signatories in principle to the general idea of the treaties, but we are not actually legislating to give people access to justice through the courts.

Do you think that incorporation of, for example, the United Nations Convention on the Rights of the Child would be a way of sweeping up all our outstanding obligations that the periodic review identifies? Would that give us appropriate access to justice, or is that too simplistic?

Murray Hunt: The incorporation question is always a difficult one. Because the political reality has been, for many years, that there is a reluctance at Westminster to incorporate further international human rights treaties, I have been used to trying to find ways of making them more effective and instantiating them more into policy making and decision making without their being incorporated.

There is a tendency to think that incorporation would cure everything overnight, which it would not do. There are undoubtedly some provisions of the UN Convention on the Rights of the Child that do not immediately lend themselves to enforceable legal remedies, so I would shy away from seeing incorporation as an immediate panacea. Nevertheless, there are a huge number of ways in which Parliament is getting more involved in implementing what is in the treaties, which take us almost as far down the road as incorporation would take us.

Taking the UN Convention on the Rights of the Child as an example, I know that Scotland has legislation that imposes a duty on ministers to have regard to the convention, to keep policy under review and so on. That is a very important way of giving Parliament a role in scrutinising what the Government is doing to implement some of those positive obligations. We do not have that in England and Wales—or, I should say, we do not have it in England; Wales has its own thing. In fact, the Joint Committee on Human Rights used your model and the Welsh model to recommend an amendment to the Children and Social Work Bill in the last Parliament that imposed the same duty on ministers in order to facilitate parliamentary scrutiny of what they were doing. Many treaties such as the UNCRC require active steps to be implemented, and the duty in the Children and Young People (Scotland) Act 2014 represents a very important way in which Parliament can help to do that and brings into the political process serious scrutiny of what the state has signed up to in those international treaties.

My energies will be spent on trying to enhance Parliament's role in implementing the obligations that have been assumed by the state in those treaties instead of allowing incorporation to be

thought of as a quick and easy answer. After all, incorporation might enhance legal remedies to some extent, but it does not solve the problem of how we ensure greater public participation in such issues.

The Deputy Convener: So it is just an arrow in the quiver, as it were. Thank you for that.

If no one has any other follow-up questions, I will move on to the issue of budgetary scrutiny. Every year, the committee is tasked with looking at the draft Scottish budget—or, I should say, work on the draft Scottish budget—through an equalities and human rights lens. We do that quite well, and we have some very in-depth discussions and submissions of evidence to that end. However, the committee has only newly taken on human rights responsibilities, and its focus up to now has been predominantly equalities based. What would be your recommendations on looking at a draft budget through a human rights lens?

Murray Hunt: That is a very important question, but I am afraid that I have no easy answer, as I have very little experience of it. The Westminster Parliament has simply not gone down that road. There is an urgent need to address the question of how Parliaments scrutinise budgets through a human rights lens. In some of the papers that I read before today's meeting, I saw that the issue might be the subject of a further inquiry by your committee, and I think that it is certainly worthy of detailed consideration.

Some very good academic work has been done on budget analysis through a human rights lens. At the Westminster Parliament, I tried to interest the secretariat of the Treasury Committee in incorporating a human rights dimension to budget scrutiny, but I found it very difficult to persuade it that the issue was its concern and part of its business. Mainstreaming often comes up against obstacles such as how human rights are relevant to the Treasury Committee's scrutiny of the budget.

I therefore have no easy answer to your question, but I think that the issue is very important and would be a good subject for a further inquiry. Incorporating it into the work of those committees that carry out detailed scrutiny of the budget would be the way forward. I imagine that your committee is expert at many things, but it will not be expert at scrutinising budgets, so this sort of work really needs to be incorporated into the work of the committees that do that scrutiny. That is probably the biggest challenge as far as mainstreaming is concerned, because people often do not recognise the relevance of human rights in that respect.

Many of the human rights obligations in the unincorporated treaties impose positive obligations on the state to do certain things, and many of the recommendations of the treaty bodies and of the Human Rights Council in the UPR require the state to spend some money. We have to face up to the fact that the state has assumed a lot of obligations, some of which are quite expensive, and we need to work out how we make sure that such things do not go unscrutinised in our Parliaments.

The Deputy Convener: Thank you for that. The clerks have asked me to ask you for a note of the academic work on budget scrutiny that you referred to. You can tell us about that now, or you can email the clerks after the meeting.

Murray Hunt: Of course. I can easily send that information to the clerks.

The Deputy Convener: That would be very welcome. I will move on to the issues that you have just explored around mainstreaming. The baseline that we are at in the Scottish Parliament is that every piece of legislation has an equality impact assessment and, more recently, as a result of part 1 of the Children and Young People (Scotland) Act 2014, a children's rights impact assessment. That is really the limit of what we are doing now.

This committee is in the business of future proofing human rights so that if less progressive Parliaments emerge in the future, we have human rights built into the fabric. However, it is fair to say that I have found—from when I was a lobbyist trying to influence the processes and since then, as a parliamentarian—that sometimes, a degree of lip service is paid to those assessments and they are a tick-box exercise. I accept that some legislation is not really relevant to human rights, but those assessments still need to be carried out.

How do we improve or add to the process? How do we make it a living, breathing function of the Parliament, so that whether it is at a Government level or through the institutions of this Parliament, the process is meaningful?

Murray Hunt: Again, that is a very pertinent question. The trouble with impact assessments is that without the necessary bureaucratic will and commitment, they turn into tick-box exercises very readily and then are seen as just another pesky bureaucratic requirement that a decision maker has to go through.

The key is to work with the departments that are producing the bills to make sure that the consideration of human rights matters, human rights obligations, and relevant human rights standards is mainstreamed and embedded in their policy formation process at the earliest possible stage.

Impact assessment is one way of doing that. For me, it carries another risk as well as the bureaucratic tick-box exercise problem. It tends to make civil servants rather defensive, so that they think in terms of compliance and take a purely negative approach, asking, "Are we doing anything wrong here?" I would much prefer a more positive approach that looks not just at whether a bill will get caught out for doing something that is incompatible with human rights but at whether—as they often are—it is doing something positive to advance and promote human rights.

In my dealings with bill teams in Westminster, I have been keen to encourage them to think about not just impact assessment but opportunity assessment and to explain in their memoranda what opportunities are being taken in a bill to advance and promote human rights. Very often, the rationale for a piece of legislation includes a human rights-advancing rationale. Once we encourage civil servants to think in positive terms about how they are promoting human rights, their attitude changes. They tend to think less in terms of negative compliance and they engage much more proactively and positively with the human rights framework.

If we can encourage the promoters of bills, including Government departments, to frame each policy memorandum in a way that identifies the positive human rights benefits and advantages of a particular bill, as well as identifying possible problems, that gets us off first base.

The template for that sort of policy memorandum is a really crucial—[*Interruption*.]

The Deputy Convener: We will suspend the meeting until we re-establish a connection.

10:13

Meeting suspended.

10:14

On resuming—

The Deputy Convener: The connection is back, so just pick up where you left off.

Murray Hunt: It goes back to the importance of the policy memorandum. We need to build on impact assessment methodologies to see how they can incorporate opportunity identification for the promoters of bills, including Government departments. Doing that changes the whole framework in which human rights scrutiny takes place. It is particularly fitting in relation to Parliament's role, of course. Parliament has a particular responsibility and it also has the capacity to set the legal framework and to follow up when a treaty obligation requires positive steps. Parliament can actually take the implementing measures.

Parliaments should be less interested in whether a bill interferes with human rights and more interested in whether it has missed an opportunity to advance human rights, or whether it has gone far enough in advancing human rights. If that is done through the UPR framework, the specialised human rights committee, with its understanding of all the recommendations, is well placed to identify—[*Interruption*.]

The Deputy Convener: I suspend the meeting while we re-establish the connection.

10:15

Meeting suspended.

10:15

On resuming—

The Deputy Convener: Thank you for sticking with us, Murray.

Murray Hunt: That is quite all right.

The Deputy Convener: You were just finishing your remarks on the opportunity assessment, which we are all interested in as a proactive step that we could take. Please continue.

Murray Hunt: I was saying that I think that the specialised human rights committee is very well placed—if it is familiar with the wide range of recommendations that are contained in treaty body concluding observations, outstanding judgments and so on—to identify those opportunities. It can often work with Government departments that are introducing bills to encourage them to explain what they are trying to do in that framework. In my experience, bill teams often do not realise that a measure that is contained in a bill goes towards implementing a recommendation. Once that different way of approaching things is in place, it enables much better scrutiny and much better ministerial and departmental engagement with Parliament.

The Deputy Convener: Fantastic. Thank you.

Mary Fee: I share Alex Cole-Hamilton's frustration with the lip service that is paid to equality impact assessments. Can we change equality impact assessments to make them more relevant? Should we use a standard format for carrying them out? Could we make changes?

Murray Hunt: The difficulty lies in the culture in the departments. That is why it is such a tricky issue. As long as the impact assessment is regarded as something that has to be done at the end of the process—[*Interruption*.]

I do not think that there is an easy answer. A cultural change is necessary, and, in a way, it is the Parliament's role to bring about that cultural change by asking questions at the earliest stage of policy formation and making the promoters of legislation realise that such matters need to be addressed, because the answers need to be there. It is not a very satisfactory answer, but I think that change can be brought about only by Parliament doing its job and asking those questions.

That raises another point, which is the importance of Parliament and its committees engaging before bills are introduced. They should engage on the human rights issues that are raised in consultation papers and get involved at the very early stage of policy formation in all relevant areas in order to ask the right questions. The key thing for any human rights committee is to identify the right questions and to ask them in a public and transparent way. The earlier in the policy formation process that is done, the more we will get to an end state in which we do not have tick-box impact assessments. I am afraid that it is a long process, but it could certainly be accelerated by all committees taking the approach of asking those questions at the earliest possible stage.

The Deputy Convener: Jamie Greene has a final quick question.

Jamie Greene: Your comments about the culture in the civil service were very interesting. You suggested that civil servants might take a defensive line. When we probe impact assessments or ask whether they have taken equalities and human rights into consideration in a policy decision and the application of that policy, they often adopt the defence mechanism of asking, "What have I done wrong?" or "Why are you asking me those questions?"

How do we achieve a culture shift from the top-down approach so that the ministers, cabinet secretaries, directorates, or directors of directorates instil within their departments a positive view that those policy decisions will be taken with equalities and human rights in mind at the beginning of the policy-making process rather than asking retrospectively at the end what they did not do? Do you have any experience of examples of other civil service departments, such as at Westminster, that have really taken this on board and achieved a massive culture shift in the department? How do we ensure that our Government ministers instil that same positivity?

Murray Hunt: I will come back to whether I think that there are any really good practice examples in the UK Government.

One of the crucial levers to achieving a cultural change is to persuade, in the first instance, civil servants and then, eventually, ministers. It is in the Government's interests to encourage parliamentary debate about the human rights compatibility of legislation. That is little understood but there are signs that it is becoming understood.

Courts are increasingly influenced by the amount of democratic consideration of and debate about of laws before their enactment. Under the doctrine of the margin of appreciation in human rights law, that is clearly a consideration to which the Strasbourg court increasingly has regard, not as a purely procedural matter about whether a law has been discussed and debated, but on the correct basis that laws are likely to be better and more democratically defensible if the difficult balances that they strike have been properly debated in Parliaments.

I have found that the bill teams that are most engaging, encouraging and forthcoming with the information that they provide about the human rights compatibility of legislation are the ones that have understood that message. The best example that I can give is in relation to the Protection of Freedoms Bill, which was a Home Office bill that implemented the Strasbourg court judgment on Marper and the DNA database. There is a passage in the human rights memorandum for that bill that explicitly says that the Government recognises that, if the human rights compatibility of this solution is debated in Parliament, that is a positively good thing and something to be welcomed. That is based on the insight that subsidiarity means that courts respect properly taken democratic decisions when there has been proper consideration of human rights issues, not as a purely formal thing, but when it is clearly relevant.

Governments are beginning to realise that it is therefore in their interests to provide the information and detail of why they think something is compatible, to encourage parliamentary debate about it, and to respond to real concerns as they are raised. That is the biggest lever to the culture change that you describe.

On good practice, the Department for Education in Westminster is the best example of a department that has embraced explaining—in a positive sense—its legislation's compatibility with international human rights law, including the UN Convention on the Rights of the Child. There are some good examples of human rights memoranda voluntarily provided by the Department for Education, in which they have explained why, in their view, the bill positively promotes children's rights and—[*Interruption*.]

The Deputy Convener: We will suspend briefly while we re-establish the connection.

10:24

Meeting suspended.

10:24

On resuming—

The Deputy Convener: Murray, you are back. You were just concluding your answer to Jamie Greene.

Murray Hunt: The Department for Education is probably the best example and I can provide your clerks with some human rights memoranda that have come from the Department for Education that are good examples of positive engagement with the requirements of the UN Convention on the Rights of the Child. They explain the provisions in bills in terms of their furthering of recommendations in the UNCRC's report and the UK's implementation of some of the positive obligations in that treaty.

The Deputy Convener: Great stuff. Unfortunately we are going to have to leave it there. I thank you for persevering with the technology; it has been difficult. I am grateful to our audiovisual guys for helping us along the way. I am sure that I speak for the rest of the committee when I thank Murray Hunt for his contribution this morning. It has been incredibly illuminating and it will help us to frame a view on how we proceed as the human rights guarantor in Parliament. I hope that this will be the beginning of a long and productive relationship. We would certainly like you to come and see us in person at the earliest opportunity.

I suspend the meeting for a short comfort break and I invite the next witnesses to take their seats.

10:25

Meeting suspended.

10:30

On resuming—

Departure of the United Kingdom from the European Union

The Deputy Convener: Welcome back to the meeting. Agenda item 2 is on the implications for equalities and human rights of the departure of the UK from the European Union. This is one of a series of evidence sessions that we are undertaking on the potential impact of Brexit on equalities and human rights in Scotland. I welcome—she is no stranger to the committee—Lynn Welsh, the head of legal in Scotland at the Equality and Human Rights Commission, and David Cabrelli, a senior lecturer in commercial law at the University of Edinburgh. I thank you both for taking the time to come and see us today.

Human rights is a changeable landscape, but I ask you to address, in your opening remarks, where you think we are right now with human rights in Scotland and what potential changes and implications Brexit might bring as we move towards departure.

Lynn Welsh (Equality and Human Rights Commission): That is a broad question.

The Deputy Convener: Yes. I am full of them.

Lynn Welsh: You will have to excuse me, but I am a bit croaky this morning.

Gail Ross: We all are.

Lynn Welsh: We will spread our coughs.

The commission has concerns about the effects of the European Union (Withdrawal) Bill and Brexit generally on equality and human rights across Great Britain. There is an undertaking that neither the Equality Act 2010 nor the Human Rights Act 1998 will be changed as a direct result of the European Union (Withdrawal) Bill, but we are concerned about what will happen after that and what protections can be built in at this early stage to ensure that equality and human rights generally across Britain are at least preserved—if not enhanced, which would be the ideal position.

The briefing paper that you have before you sets out the five different areas where we think the bill should be amended to ensure that those protections are built into the legislation. I can take you through those individually, if you would like me to do that.

The Deputy Convener: That would be helpful.

Lynn Welsh: Grand. We have been looking at rolling out the use of delegated powers to amend equality and human rights law; including a principle of non-regression in the bill; retaining the

EU charter of fundamental rights; introducing a new constitutional right to equality; and looking at how the courts can continue to take account of EU case law. All those areas have some element of devolution relating to them, and we must look at how the Scottish Government and the Scottish Parliament will use the powers that they will receive or how they will interact with the bill more generally.

The use of delegated powers to amend equality and human rights law has been talked about a lot in a general sense in the context of the Henry VIII clause that allows amendment without the need to return to Parliament. We think that that is not the way to go, especially around equality and human rights legislation, so we are drafting amendments to ensure that those delegated powers cannot be used. That will include—we hope—preventing those delegated powers from being used in the Scottish Parliament as well as at Westminster. Delegated powers will be given to the Scottish Parliament, and we want to ensure that they are not used inappropriately to cut back on the protections that are currently in place.

The principle of non-regression in effect means the introduction of a duty on ministers at Westminster to certify that new legislation that they bring in specifically as a result of Brexit does not diminish human rights or equality law. Obviously, the UK Government has said that those rights will come directly from EU law, but the question is what will happen as we move forward. A no-regression requirement would ensure that, at the very least, as a direct result of Brexit, those rights cannot be reduced as we progress.

Like a lot of organisations, we would also like to retain the protections in the EU charter of fundamental rights. The Westminster Government has indicated that it believes that most of those rights are somewhere in UK law or come in through United Nations treaties, but we believe that neither of those is entirely the case. The EU brought in the charter because it recognised that all of the law that it was passing required underpinning fundamental principles of non-discrimination, rights for children and rights to an effective remedy for people when they take EU law cases. The EU created the charter to ensure that that underpinning existed.

If the charter does not come in to UK law along with the rest of EU law, a lot of that underpinning will be gone and some direct and useful citizens' rights will disappear. Obviously, it is true that the UK state has signed up to various international treaties, but generally those cannot be enforced directly in the courts here, whereas at the moment the EU charter can be. Therefore, it will be a huge loss if the charter is not brought over along with the rest of EU law.

To help with that, we would like a constitutional right to equality to be introduced, which would work similarly to the Human Rights Act 1998. There would be a right to equality and, through that lens of equality, Parliament and all public authorities would have to consider whether what they do, including any legislation, takes forward that right to equality. In the Scottish Parliament, that would mean that, when Government ministers gave a statement that proposed legislation was compatible with human rights, added to that would be a statement that the proposed legislation did not breach the right to equality.

If legislation was challenged, the courts down south could find that it was incompatible with that right to equality. In Scotland, it is likely that that would lead to an ability to say that the legislation was not law, as happens with human rights challenges. That would build in a direct right to equality, which would underpin a lot of the EU law that is being brought over.

The final area is the interaction between UK courts and the European Court of Justice, which has been a sensitive subject in many ways. There is a general recognition that there needs to be some way for courts to look at what is happening in Europe and at where they can use the case law that is going through in Europe for the benefit of citizens. We would therefore like a clause to be included in the bill that allows courts in Britain to look to decisions of the European Court of Justice where there might be doubt as to what the legislation in Britain means for us.

The Deputy Convener: Thank you.

Before I bring in David Cabrelli, I want to pick up on that last issue. It is fair to say that international court judgments and case law, particularly on issues such as prisoner voting, were something of a catalyst to the anti-EU feeling in this country. How confident are you that we can mitigate that and still find a mechanism that allows us to look to international case law to ensure that we do not fall far behind?

Lynn Welsh: It is partly about educating citizens and governments, in that we are talking about EU rights, rather than human rights more generally. It tends to be European Court of Human Rights decisions, such as the prisoner voting decision, that make headlines in certain places. We are looking at something slightly different in that it is about legislation that is already in place in Britain, coming from EU law. We are not saying that the UK courts have to follow what is said in the European Court of Justice in relation to legislation; rather, it is about UK courts considering what is said there and whether they might find it helpful. The final decisions in relation to all that would always lie with the UK courts.

The Deputy Convener: David Cabrelli, what are your views on how Brexit will affect our human rights landscape?

David Cabrelli (University of Edinburgh): Thank you for the opportunity to come and give evidence to the committee.

Before I say a little bit about the potential impacts of Brexit on equality law in the UK, I want to set the scene in relation to the current legal position. I apologise if I am insulting your intelligence—it is fairly basic law.

There are two angles. One is the devolution of competence from Westminster to Scotland, which I will cover in a moment; and the other concerns how the interaction between the Westminster Parliament and the European Union is currently framed, which I will deal with first. Competence to create policy and pass legislation in equality law is shared between the Westminster Government and Parliament on the one hand and the EU on the other. The relevant articles on equality law in the Treaty on the Functioning of the European Union are articles 19 and 157. Both those articles have direct legal effect between horizontal parties—basically between private citizens. That means that the articles can be invoked by a citizen against an employer, for example, in a local court.

Article 19 enables the EU to pass European legislation in relation to equalities law and the nine protected characteristics, of which I am sure that the committee is aware. The EU does that using European directives, rather than regulations. That is because rather than seeking maximum harmonisation of equality laws in the EU, the EU is seeking minimum harmonisation, by giving each country scope to make decisions about how it implements the directives.

Article 157 is the equal pay measure, which enables primarily female employee claimants to claim that they have been paid less than a comparator male. That is the basis of equal pay. Those are constitutional rights. Essentially, Westminster lends sovereignty to the EU. When we leave the European Union, that sovereignty will be repatriated to Westminster. The question is whether that is retained at Westminster or whether part of it is devolved to Scotland. That is an open question.

That takes me to the second scene-setting point, which relates to the current devolution settlement. I am sure that the committee is aware that one of the main areas of equality law that is devolved under the Scotland Act 2016 is the power to legislate in relation to gender representation on public boards. The power is actually wider than that because it covers each of the nine protected characteristics. It would be possible for the Scottish Government to create policy in respect of the other eight protected characteristics. For example, if the Scottish Government wanted to promote disabled participation in non-executive appointments to public boards, that would be perfectly legal under the current devolution settlement.

The second area where power is devolved from Westminster to the Scottish Parliament is a little tricky given the wording of the legislation, which says that the Scottish Parliament has the competence to pass legislation on equal opportunities in relation to the Scottish functions of any Scottish public authority—a local authority or some other public body—or a cross-border public authority that is UK-wide but has a specific Scottish remit. There is an exception to that in the 2016 act, which is where it gets a bit tricky, because competence to amend the Equality Act 2010 is reserved in relation to the Scottish functions of any public authority or cross-border public authority, so the Scottish Government does not have power in that regard. However, there is another exception to that, which says that the Scottish Parliament has power to pass legislation that proposes to improve on the rights that are provided by the Equality Act 2010. What that actually means is a bit difficult to figure out. It seems to be saying that where a Scottish public authority is exercising a public function—that is, a public sector organisation is exercising a devolved competence in relation to Scottish public power—it can improve upon the rights that are granted by the Equality Act 2010. In other words, it can ratchet up the protection. That is the current position.

10:45

There are a lot of potential downsides to Brexit but, ironically, one of its effects would be to make it possible, with the consent of Westminster, for the Scottish Parliament to introduce positive discrimination measures. At the moment those are specifically precluded; there is no power in that regard because of EU law, and positive action is the extent of what is possible. However, if we leave the EU, it could be possible for the Scottish Parliament to pass legislation that promotes persons with the nine protected characteristics to the extent that people without those characteristics are discriminated against—in other words, to introduce positive discrimination. Of course, that depends on what the settlement is with regard to how we take account of European Court of Justice decisions—whether we need to take them into account at all or whether they will simply be persuasive—because the EU will continue the embargo or prohibition on positive discrimination measures. However, in theory, it would be within the gift of the Scottish Parliament to pass legislation or create policy that would enable

positive discrimination in favour of persons with disabilities or various other characteristics on public boards.

As regards the general impact of Brexit, as I have said in my written submission, I suspect that, if there are no protections in the withdrawal bill in the terms that Lynn Welsh has mentioned, it is likely that, over a period of years, some of the current incarnations of the equalities regime will be diluted. For example, there was a specific provision in the Disability Discrimination Act 1995 that said that small employers did not need to comply if they had 15 employees or fewer. That exemption was in place until 2004. I suspect that, over a period of time, legislation might be passed to introduce those small-employer exemptions in relation to protected characteristics across the board and not just to disability.

Secondly, under the current EU law settlement, it is impossible for compensation or remedies to be diluted or reduced in their power. I suspect that that will also be diluted over the course of the next two decades. We have caps on compensation under the domestic unfair dismissal regime, and there is a potential for that to be introduced in the area of equality law as well.

Also, a perennial issue in equality law is that of which individuals are protected. On the face of it, lots of people are protected, but in reality, when you dig deep and look at the law, there are quite a few people who you would think would be protected but are actually excluded. In EU law, the concept of the individual who is protected is very broad. Again, there is a potential for that to be narrowed down, and there are a number of ways in which it would be possible to do that.

The Deputy Convener: In this committee, we focus on future proofing the processes and the policies of this Parliament. Those become part of the fabric, so we lock in any future regimes that are potentially less progressive. I gather that a negative outcome of Brexit is that that future proofing is unravelled and successor regimes in the UK, irrespective their political hue, will be unencumbered with regard to rolling back some of the provisions and protections that our citizens enjoy. Is that right?

David Cabrelli: Yes. The European Union (Withdrawal) Bill does not have a preamble that entrenches the current incarnation of the equality regime, there is no non-regression clause and no constitutional right to equality has been inserted.

There is an argument that even having those elements would not be legally sufficient to protect citizens' rights in those areas. However, let us imagine that they are not there. In that case, there is absolutely nothing to prevent future Governments or Parliaments from removing, or diluting, equality rights.

The Deputy Convener: That is very troubling.

Mary Fee: Good morning to you both. I also sit on the Justice Committee. Earlier this week, the committee was down in Westminster, where we met our counterparts across a number of different committees to talk about the impact of Brexit on, for example, access to justice and information sharing. Those are human rights-related topics. The people who we met and the views that were expressed were fascinating.

There is huge concern among the people who we talked to about citizens' rights. I am interested to hear your opinion on that. Concerns were also raised about information sharing on human trafficking for forced labour or sex.

A concern was raised about the references to the EU in the Scotland Act 2012. No indication is coming from Westminster, or from the EU, of what the references to the EU will be replaced with. Will they just be removed? Will something else be put in? Will some other protection be put in?

I am interested in everyone's views on those issues. I know that I am asking a lot of you—that was a lot of questions in one go.

I am also interested in Mr Cabrelli's submission and his comment that the prohibition of associative discrimination may be affected. For 12 years, I was a tribunal lay member, and we grappled with the issue of associative discrimination. I am interested in his view on that matter.

Who wants to start on my round-up of the issues?

Lynn Welsh: On your comments about the Justice Committee's experiences, as I have said, if we lose the charter, the withdrawal bill will certainly have an effect on human rights across Britain in a way that we would not like to see.

The Human Rights Act 1998 remains. As yet, there is no change in that legislation, or what it means for citizens of the UK. We need to be firm—now and going forward—that the rights should not be diluted in any way. That may be a separate argument to come at a different time.

Mary Fee: People think that, because we are withdrawing from Europe, all those rights will be lost. The perception is that they will all go, even though we know that they will not.

Lynn Welsh: That is absolutely true. My organisation and others have a job to do to be clear about the rights that are still in place for individuals. We have looked at the issue to some extent, but we could consider it again as we go forward.

What will replace the references to EU law in the Scotland Act 2012? I do not think that we have looked in detail at that issue. I am not aware that the UK Government has suggested anything in that regard. I presume that the wording may simply be removed, but I am not sure. That is the short, and unhelpful, answer.

David Cabrelli: I will respond to the first question and then, obviously, the final one.

On the first question, it strikes me that this is an issue about access to justice and the extent to which citizens can access and enforce their equality rights. What is often overlooked is that tucked away right at the end of each of the European directives is a little article or sub-article that says that, when a member state implements that particular equality law in its jurisdiction, it must ensure that the enforcement mechanisms are effective and dissuasive—and there is a third word that I cannot remember. Effectively, it means that citizens in those countries must have an effective means of enforcement.

You might recall that some reports were issued around the time of the establishment of the coalition Government. There was the Beecroft report, which made various recommendations on limiting the compensation available in equality claims; at the moment, there is no maximum cap. However, the proposal was a non-starter, because of the clauses tucked away in the directives that state that there has to be absolute access to justice. Once we leave the EU, those clauses will no longer be effective, which means that, in theory, it would be possible for a future Government to place limitations on the compensation that can be claimed and perhaps limit the remedies and so forth.

Having said that, I should add a caveat. If you had asked me this question before 26 July, I would have said that, without the protections in the directives, the Government would have the power to make access to justice difficult. However, since 26 July, my belief in the judiciary and the common law has been restored; the decision in the Unison case with regard to the abolition of employment tribunal fees reminded us of the common law's power to ensure that every citizen enjoys access to justice. Therefore, the caveat is that, although things look bad, there might be a silver lining in the guise—ironically—of the common law and the judiciary. It is interesting, but the decision that I have mentioned reminds us of the liberties that every citizen has and the importance of access to justice.

Finally, on the impact of leaving the EU on associative and perceptive discrimination, the current wording of the Equality Act 2010 makes it abundantly clear that associative and perceptive discrimination claims are perfectly legal. However, they are supported and buttressed by underlying EU law, which specifically says that the legislation of each member state must recognise associative and perceptive discrimination.

Once we leave the EU, decisions such as that on the Coleman case, which concerned discrimination against a care worker with a disabled son—the case was successful because the discrimination related to the disabled son—and other EU and European Court of Justice decisions such as that on the CHEZ case, the Romanian case relating to electricity meters, will no longer be part of our law. They ensure that associative discrimination and perceptive discrimination are protected, but once they go, a future Government could amend the 2010 act to remove associative and perceptive discrimination. These are controversial issues, and there is no underlying theory about how you determine that someone is associated with another person with a protected characteristic or how you determine whether and why someone who is perceived to have a protected characteristic should be protected.

Lynn Welsh: However, there would have to be an amendment to the legislation, because the court decisions obviously stand as they are, including court decisions in the UK that have followed on from Coleman and similar decisions.

Mary Fee: Yes, but, given how controversial the issues are, the chances are that nothing will be done. Is that not a possibility?

Lynn Welsh: It certainly is.

11:00

Jamie Greene: Good morning, panel. I want to explore Ms Welsh's comments on the proposal for a constitutional right to equality. In principle, it is an admirable ambition, but I want to discuss its practical application, its implications and, in particular, whether parity is achievable for everyone. In the Islands (Scotland) Bill, for example, there is an understanding that parity or equality is not always achievable; someone living on an island might not have access to, say, the same social care as someone who lives on the mainland. Would a constitutional right to equality create issues for local authorities, public bodies and Government bodies if they produced policy that was contrary to it? Implementing that could become difficult and rather expensive. Do you have any views on that?

Lynn Welsh: It is certainly not the intention for a constitutional right to equality to have that outcome. I suppose that it would be mitigated by having a non-discrimination clause that contained a right to give justification, as happens with indirect discrimination at the moment. There would always be a balance between ensuring equality

and non-discrimination and recognising that a difference in treatment can be justified on some occasions.

David Cabrelli: Following up on that—and I should put the committee on notice that I am about to say something that sounds very controversial but which is actually legally true—there is no such thing in this country as a right to equality. There is only a right to equality for people who are perceived to have one of nine protected characteristics. It is not possible for me to go to an employment tribunal or court and say that I have been treated less favourably than, say, Lynn Welsh if I have no particular reason and I just feel that I have been treated in that way; I always have to show that the less favourable treatment or the disparate impact that I have suffered relate to one of nine protected characteristics. If there were a constitutional right to equality, I would imagine that it would follow the same scheme, meaning that it would be a constitutional right to equality for those who possess one of the nine protected characteristics. I assume that that is the intention.

Lynn Welsh: That is potentially true. However, there has been discussion about the constitutional right to equality being wider and following the system in the Human Rights Act 1998 and the ECHR, which covers any other personal characteristic. In theory, people can use human rights law to argue for discrimination in human rights terms under article 14 of the ECHR, but there are justifications built into that in relation to state action. A constitutional right might not just relate to the nine protected characteristics, but there would still be the justification issue.

Jamie Greene: In our previous evidence session, we talked a bit about budget scrutiny and scrutiny of Government. I was intrigued by the Scottish Human Rights Commission's submission; indeed, I found your comments helpful and insightful. In paragraph 6.3, you state:

"Budget analysis is a critical tool for monitoring gaps between policies and action".

However, you go on to say in paragraph 6.4:

"in monitoring Scottish Government spending, the Parliament can, if necessary, hold the Government accountable for inadequate performance in the area of human rights."

Will you enlighten the committee as to how you think the committee can and should hold the Government to account for inadequate performance? In my short time in this Parliament, I have seen that happen very rarely in practice, so I am intrigued to hear your views on how we can do that much better.

Lynn Welsh: I am afraid that that is not in our submission—it is in the Scottish Human Rights Commission's submission.

Jamie Greene: I apologise. However, if you have any views on that matter, I would welcome them.

Lynn Welsh: The Equality and Human Rights Commission and the Scottish Human Rights Commission are regularly confused. It is our sister organisation, and it is responsible for that submission.

Jamie Greene: Pardon me. It is an interesting paper, though.

Lynn Welsh: I am sure that the people in the SHRC will come and explain it to you if you ask them.

Jamie Greene: I would still welcome your views on how you think the committee and, indeed, the Parliament can ensure that the Government is held to account. The Scottish Human Rights Commission states:

"the Parliament can, if necessary, hold the Government accountable for inadequate performance in the area of human rights."

What practical steps can we as a committee take to hold the Government to account?

Lynn Welsh: I am sorry, but that is not an issue that I have put my mind to for today's meeting.

David Cabrelli: I imagine that you could construct human rights key performance targets and assess the impact of policy against them but, like Lynn Welsh, I have given no time to thinking about that.

Mary Fee: What is the panel's view on the potential impact of Brexit on the working time directive? The directive was hugely beneficial but also hugely controversial. A number of organisations, one of which I previously worked for, jumped through hoops to get people to sign opt-outs and thought up all sorts of intriguing ways to ensure that they did not sign up to it.

David Cabrelli: The working time regulations, which were introduced in 1998, have two elements: limits and rights or entitlements. The main limit is the 48-hour working week. The difficulty with it is that it is more or less ineffective, because there is an opt-out, which is built into an employment contract when someone first enters employment. They sign the contract and by doing so they effectively opt out of the 48-hour working week, and, even if they do not opt out, there are still various derogations and exceptions. For example, professionals are exempted because they are what are known as unmeasured working time workers, and there are other exceptions.

Secondly, there are entitlements to things such as daily and weekly rest breaks. That is fairly uncontroversial, but the most controversial right is on annual leave and holiday pay. There have been

many cases over the past seven years relating to holiday pay and annual leave, some of which have been extraordinary in the scope of protection offered to workers. For example, there is no right for an employer to pay rolled-up holiday pay. Rolled-up pay means that, if someone is employed for six months, they do not get holidays; instead, the holiday pay is added to their wage and then smoothed out across the six months. Also, people on annual leave are entitled to receive their ordinary remuneration, including commission as well as voluntary and compulsory overtime. People can claim that as part of their holiday pay.

Once we leave the EU, the position regarding the authority of the ECJ in the settlement and the withdrawal bill will largely determine how we treat those recent quite controversial cases, which are far-reaching in respect of their protective capacity for workers. If we no longer have to have regard to the ECJ's decisions, we will not have the future decisions to take into account. We have to honour the past decisions but, in reality, as soon as a case comes before the Supreme Court, it can easily depart from the previous jurisprudence of the ECJ, its own decisions and the decisions of the lower courts. It would be possible to strip back holiday leave and holiday pay rights.

Lynn Welsh: We would have concerns about changing that relatively quickly. Those regulations and rights are not contained in the Equality Act 2010, but are equality law in its broadest sense. There is no suggestion at present that the withdrawal bill will protect those rights unless we can build in some of the other protections.

Mary Fee: Thank you—that is helpful.

The Deputy Convener: In respect of the 111 powers that are coming back as a result of Brexit and that should technically be devolved to the Scottish Parliament—although that is still the subject of debate at Westminster—number 46 is equal treatment legislation. That is quite an opaque term and I have not got to the bottom of what it means, although it sounds like something that the committee should be interested in. Can you give us a quick summary of what equal treatment legislation means?

Lynn Welsh: We have looked at it to an extent. You are right that equal treatment legislation can mean a variety of things, depending on where you start from. Scottish legislation currently contains some equality legislation. The equal opportunities opt-out relates to discrimination but not all equality law relates to discrimination. For example, there are provisions in housing legislation that allow tenants to ask for reasonable adjustments and there are provisions on taxis having to take guide dogs that do not relate to discrimination but were brought in separately in Scottish legislation. There are also separate specific duties. There are currently pieces of equality law in Scottish legislation that would certainly come under equal treatment legislation.

The committee briefing paper notes that there are also other pieces of EU legislation on rights to accessibility for disabled people in transport and other areas that do not relate to discrimination and that would be introduced through Scottish legislation and action, because transport is devolved. It would be the responsibility of the Scottish Parliament to ensure that those obligations were met.

Equal treatment legislation would cover all those equality areas in the broadest sense that do not directly relate to discrimination legislation that can be found in the Equality Act 2010. However, as David Cabrelli said, there is now a right to pass discrimination law in Scotland, so I presume that the broad term would include those powers.

David Cabrelli: Just so that I am clear, convener, when you refer to item 46, are you are referring to powers being repatriated to Westminster from the EU?

The Deputy Convener: Item 46 is one of the 111 powers that the Scottish Government currently contends should be devolved directly to the Scottish Parliament under the principles of the constitutional convention of 1997. However, it is still a matter of debate at Westminster.

David Cabrelli: If we start at the beginning and ask ourselves what happened in 1972—or whenever it was—we see that the UK lent some of its sovereignty to the EU and one of the areas in which it did so was in equality law. The UK said that it had the power to pass legislation related to equalities and so did the EU. That is now article 19 of the Treaty on the Functioning of the European Union. We can then say that what is being repatriated to Westminster is what was passed under article 19, which is the equality directive, the racial equality directive of 2000, the recast equality directive of 2006 on equal pay and sex discrimination and the framework directive of 2000 on discrimination in respect of sexual orientation, disability, age and religion. There have been other directives as well, such as social security directives and directives in relation to access to services. Those are the bits of legislation that have been passed under article 19 and that will come back to Westminster.

Under item 46, the Scottish Government is saying that, when that comes back to Westminster, it should then be devolved to the Scottish Parliament. The argument for that would be that some elements of equal opportunities law have been devolved to the Scottish Parliament. However, the powers that the Scottish Parliament has in that respect are very limited. It is true that

equalities law is devolved, but it is only a minute element.

I can see the argument but, at the moment, most of the legislative competence is with Westminster. When the EU competence comes back, it will probably be split 99 per cent to Westminster and only 1 per cent to the Scottish Parliament. Those are just ballpark figures.

Lynn Welsh: It is an important 1 per cent, even if it is only that.

The Deputy Convener: Absolutely. That was helpful. If it is okay with the committee, I will ask the clerks to write to the Scottish Government to ascertain what it understands equal treatment legislation to mean, what it hopes to get out of the repatriation of that power and, if the issue really is just about equalities, which is largely reserved, what its case is for having the whole of item 46 returned to Scotland.

11:15

Jamie Greene: Mr Cabrelli, is this paper that I am holding up your submission?

David Cabrelli: Yes.

Jamie Greene: The labelling of items is sometimes confusing, so I apologise.

Your submission contains an interesting point about section 37 of the Scotland Act 2016. You conclude:

"On balance, the terms of section 37 of SA 2016 appear to go beyond the recommendations in Smith. As such, it casts the net of the Scottish Parliament much wider in relation to legislative competence."

Is that a positive statement or a criticism of section 37?

David Cabrelli: It is just a statement of fact. I am not really expressing any opinion on the desirability of the legal position under section 37. Smith was clear that competence in equal opportunities law should be devolved but only as regards sex discrimination on the boards of public sector organisations, and only in relation to non-executive appointments. However, section 37 goes beyond that.

Lynn Welsh: I am not sure that we would completely agree with that. From memory—I do not have it in front of me—Smith talked about devolving gender representation on boards as a minimum. In fact, the act applies to not just gender but all protected characteristics. There was something in Smith that suggested that it could go further, which is why the Westminster Government put in the extended delegation. I cannot remember the exact wording.

David Cabrelli: Yes—it was a bit cryptic.

Lynn Welsh: That was what led the Westminster Government to go further.

David Cabrelli: Paragraph 60 of the Smith commission says that equal opportunities would be reserved to Westminster, with the exception of

"gender quotas in respect of public bodies in Scotland"

and the power to legislate

"in relation to socio-economic rights in devolved areas."

As Lynn Welsh says, there are probably other relevant parts of the Smith commission report. I may have overlooked those, but I just saw paragraph 60. On the face of it, section 37 goes beyond that. There is no doubt about that.

Jamie Greene: I asked because, in your opening comments, you said that there is already devolved competence to legislate across all protected characteristics and not just on the issue of gender balance or sex, and I was not sure where that competence came from. I was trying to dig deeper as to its source.

David Cabrelli: Yes. That is basically section 37 of the Scotland Act 2016, which goes on to set out all this elaborate architecture about Scottish public functions and Scottish public authorities and when they can and cannot pass legislation. It is a little bit cryptic, to be perfectly honest.

Lynn Welsh: It is, but we would encourage the Scottish Government to look at what it can positively do with section 37. There are possibilities there. We know that it can do things such as add protected characteristics. For example, there has been discussion around covering care experienced young people, who we know are discriminated against. Although section 37 is restricted to public authorities and discrimination, I hope that protection from discrimination in that area could have huge implications and improve people's lives. We would certainly encourage thought and enthusiasm about that.

The Deputy Convener: I thank you both for coming. It has, as ever, been an illuminating session. We clearly have a lot of work to do on the issue. If you think of anything that you would have liked to have said but did not get the chance, please contact us. I am sure that we will see a lot more of you both as the months go by.

We received notification from Annie Wells during the meeting that she was unable to make it, so we record her apologies.

11:19

Meeting continued in private until 11:35.

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