



OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities and Human Rights Committee

Thursday 3 May 2018

Session 5



The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 3 May 2018

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EQUALITIES AND HUMAN RIGHTS COMMITTEE
13th Meeting 2018, 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)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*Gail Ross (Caithness, Sutherland and Ross) (SNP)

*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Alan Miller (Scottish Government Advisory Group on Human Rights Leadership)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Sir Alexander Fleming Room (CR3)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 3 May 2018

[The Convener opened the meeting at 09:30]

Human Rights and the Scottish Parliament

The Convener (Christina McKelvie): Good morning and welcome to the 13th meeting of the Equalities and Human Rights Committee in 2018. I make the usual request to switch mobile devices to airplane mode and ensure that phones are off the table.

Agenda item 1 is continuation of our human rights and the Scottish Parliament inquiry. We have one witness today, which is a marked difference from the big round tables we have had for the past few weeks. Today we welcome Professor Alan Miller, who is the chair of the Scottish Government advisory group on human rights leadership. Thank you for coming today. We know that you have a long-standing professional and personal interest in the subject, so we are keen to hear from you. Can you give us an opening statement and tell us a bit about the work that you are doing in the advisory group?

Professor Alan Miller (Scottish Government Advisory Group on Human Rights Leadership): Thank you very much for the invitation. I have been on this journey for quite a few years. This year, of course, marks the 20th anniversary of the Scotland Act 1998 and the Human Rights Act 1998, so it is a good time to reflect on and reset how we can make much more progress.

I will say a bit about the origin of the First Minister's advisory group on human rights leadership and what stage we are at. I suppose that the not-so-good news is that the committee's work will perhaps be more important to the advisory group than our work will be to you, because of the timelines. We are just beginning our work and the committee is just coming to the conclusion of its inquiry. We are looking forward very much to learning from your conclusions; I am just sorry that we cannot share more with you that might help you in reaching your conclusions.

What is the origin of the advisory group? In a word, Brexit. The referendum was in 2016; as the committee knows, the First Minister quickly established a standing council on Europe, made up of disparate individuals including myself, to give advice on the impact of Brexit and what Scotland

could do about it. My brief was on rights and social protections generally.

In the council, Grahame Smith, who is the general secretary of the Scottish Trades Union Congress, and I proposed three guiding principles for how Scotland should respond to Brexit from a rights point of view. We then organised a series of round-table meetings in Brussels and Glasgow with Scottish and European civic society, European Commission officials, Government ministers, lawyers and academics. Those three principles flew, in effect.

The principles are as follows. The first is that Scotland should find the ways and means to ensure no regression from the current level of protection of rights that is provided by European Union membership. The second is that Scotland should explore the ways and means of keeping pace with progressive developments in the EU once we have left the EU, so that no one in Scotland is left behind those progressive developments. The third is that Scotland should continue to show leadership in human rights—which, by and large, it has done over the past 20 years, since devolution.

We presented the findings to the First Minister, who very quickly decided to establish an advisory group on human rights leadership in order to operationalise the three principles, and to make recommendations by 10 December—which is international human rights day, this year—on concrete steps that Scotland can take to do that, not only in civil and political rights but in economic, social and cultural, and environmental rights. She asked us to make recommendations on how the principles could be implemented in whatever the post-Brexit scenario is from a constitutional point of view: under the status quo, under enhanced devolution or under independence, how would human rights progress be developed?

The First Minister specifically asked us to consider giving effect to United Nations human rights treaties that have been ratified by the United Kingdom, but have not yet been given legal effect within the UK. She asked us to consider what might be the benefits, risks and challenges, and to present recommendations on how that may be done, if there is merit in doing it.

In essence—as committee members will know—Scotland does not have a constitution. The closest thing that we have from a rights point of view are the two pillars that are provided by the Scotland Acts: compliance with EU legislation and compliance with the European convention on human rights. Brexit will remove one—EU compliance—at a stroke. In my view, it also imperils our continuing adherence to the European convention on human rights. It will be easy for the UK to leave it once the UK is no longer a member

of the EU, so a new framework will need to be constructed post-Brexit. That is the thinking that the First Minister has asked us to do in a fairly challenging, but welcome, timescale.

The Convener: Thank you very much, Professor Miller. That is interesting work. We have a number of questions from committee members.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning, Professor Miller. It is good to see you again. I have a couple of areas that I would like to ask questions about.

First, I say off the bat that I am sure that the committee would absolutely subscribe to your remarks on the three principles. My concern is, with regard to the latter two—keeping pace with and demonstrating leadership in human rights, in particular with our European partners—that we are not doing those now. There are gaps in domestic law, which is adrift of where we need to be in observance of human rights. For example, on prisoner voting the ECHR has a directive that says that all states need to get right with that. Similarly, there are treaties and international conventions to which we are party that we are still adrift of, in terms of our obligations. Do you have a role in advising the First Minister in order to bring us up to scratch, before we even begin to consider keeping pace, following our exit from the EU?

Professor Miller: We have been asked to present recommendations on a post-Brexit framework that ensures no regression, keeping pace and demonstrating leadership. That, by my way of looking at it, includes the areas that Alex Cole-Hamilton has mentioned. It is implicit that if we are to recommend to the First Minister ways in which to give further effect to UN treaties, or to keep pace with European developments, existing commitments that the UK and Scotland have should be part of implementation and realisation.

Alex Cole-Hamilton: The second area I would like to cover is rights literacy within the other decision-making bodies of this country. As part of our inquiry, we have a mandate to find out how to thread human rights through the work of Parliament. I think that the committee is coming to a range of recommendations, but there is another part of the firmament that we do not have much control over—the workings of the Scottish Government. Rights literacy in the Scottish Government is important to the committee, and is not always evident in what we see coming out of the Government.

For example, the Age of Criminal Responsibility (Scotland) Bill is, on balance, a great piece of prospective human rights legislation, but it contains an error that the committee has identified, which would see us come adrift of our commitments to the United Nations Convention on

the Rights of the Child. It is a basic error and one that would be easily made, but is indicative of a fundamental lack of rights literacy among the drafters of Scottish Government legislation. What mandate do you have to thread human rights through the workings of the Scottish Government, as the committee has for the Scottish Parliament?

Professor Miller: We have a very broad mandate. It would be premature for me to even suggest what the recommendations might look like, because we are in the very early stages of our work. However, Alex Cole-Hamilton has identified something that the advisory group has already identified, which is the need for increasing awareness of human rights throughout all of society. That clearly includes the Government. It also includes Parliament, and the committee's ECHR role is critical in that. What is probably most important is that that includes the public.

As you know, I was chair of the Scottish Human Rights Commission for eight years. One of my daily frustrations was that time and again people would tell us that they did not know what their rights were. A lawyer might know what the rights are and where they come from—the Charter of Fundamental Rights of the European Union, the European conventions, or the UN. However, for everyday people who are making ends meet day to day, they are not set out anywhere. It is not set out anywhere what they can do to exercise their rights and how they can go about doing that. There is a big role for Scotland in raising awareness throughout all the decision-making processes, but also, most critically, in doing so among the public. If the public do not know what their rights are, that lets others get away with it, to be blunt.

Having said that, I do not want at all to attach a negative connotation. As I said, I have been on the journey for the 20 years since the Scotland Act 1998 and the Human Rights Act 1998. When we started out, human rights was seen as something that belonged in the field of criminal justice: it was the Justice Committee that dealt with human rights. There was a compliance culture: how do we make sure that what we do is not incompatible with the civil and political rights that are provided by human rights legislation? It was the courts, judges, lawyers and prisons that were preoccupied with that, understandably.

However, over the years, and especially recently, that reactive approach has developed incrementally into a more proactive approach that considers the broader range of rights—economic, social and cultural, and environmental. Other committees in the Parliament that deal with the environment, health and social care, and social security are now looking at how we ensure these rights—that we do not just react, and that we do

not do things wrong and harm people's rights—and how we realise those rights better.

Several acts—the Land Reform (Scotland) Act 2016, the Community Empowerment (Scotland) Act 2015, the Social Security (Scotland) Act 2018, for example—refer to the International Covenant on Economic, Social and Cultural Rights. There has been progress and Parliament has been broadening its understanding of human rights, as has the Government, so we are moving in the right direction.

I now work mainly internationally with the UN. Every country is on a journey in terms of realising human rights. By and large, Scotland is obviously moving in the right direction and has made good steps forward. Our recommendations will renew the impetus and will deal with the post-Brexit environment, in which Parliament will have to do more than it has been doing.

I will explain. When the framework of EU compliance and European conventions are taken away, our coat will be on a shaky peg. I hope that the peg will stabilise, but it will be shaky. Parliament will continue—it will do so increasingly—to look to the UN human rights system for how to give effect to the treaty rights that people enjoy, and to the recommendations that come from the UN to the UK and Scotland. Once we are out of the EU, Parliament is going to have to keep abreast of progressive rights developments in Europe.

09:45

I also think that we will lose the EU comfort blanket, in that many of the rights that we get from the EU on equality, immigration, data protection and consumer standards are reserved to Westminster. The relationship, therefore, between this committee and the Joint Committee on Human Rights at Westminster will become an increasingly important relationship: you can already see, when you take away the comfort blanket of EU protection, that the differences that have emerged through devolution in Northern Ireland, Wales, Scotland and the rest of the UK are much sharper now. There is already evidence that Scotland and Wales, for example, are saying that they do not want regression of the rights that the EU has provided, that they want to ensure that Westminster maintains that level of protection, and that they want to keep pace with progressive European developments. Parliament will have to monitor an awful lot more within the UK and Europe and at the UN, which means that the committee will need strengthened resources in order to be able to take a lead in Parliament in that respect. That may have been a long answer, but I am a lawyer.

Alex Cole-Hamilton: Nevertheless, it was a good answer. Thank you. I have a final question. You articulated very well the need for a kind of metanarrative of raising awareness, and I think there is generally a recognition that that is being achieved. You just have to look at the rights-respecting schools agenda and how young people can recite the various articles of the United Nations Convention on the Rights of the Child. That is great and needs to continue; we cannot roll back from that.

However, I think that there is another level that we need to focus on as well, which we are not doing so well on—the granular level. There is the idea that if something is not specifically somebody's responsibility it becomes nobody's responsibility. The committee is already talking about suggesting to the other committees the idea of a human rights rapporteur who would take that responsibility, and who would receive training to understand the treaties to which we are signatory, and the conventions. Would such a person also be required within each of the directorates in the Scottish Government? Would such a person be required even within each bill team that develops legislation for the Scottish Government—somebody who is rights literate and who would be specifically responsible for observance of rights in drafting a bill?

Professor Miller: Before the Parliament was established, I was involved in the conversations about it, when various bodies were trying to frame the best foundation for the Parliament. There was a big discussion: do we have a human rights committee or do we mainstream human rights and expect that all the committees will integrate human rights in their thinking? The view was we should not have a human rights committee and, thereby, put human rights in a silo, but that it should breathe everywhere. That did not happen, which is why we are where we are this morning.

It is the same within Government. Until there is a culture and a norm of understanding human rights and how to operationalise them, mainstreaming will not be credible. There must be very explicit and well-resourced expert focal points within Government, Parliament and many other bodies in order that we can move towards human rights actually being mainstreamed.

I was at an event a couple of weeks ago that gave me great heart, just on the point that Alex Cole-Hamilton has been raising. The Scottish Youth Parliament held an event at Dynamic Earth two weeks ago, at which members of the Scottish Youth Parliament from every constituency talked about what was happening to young people. They linked everything—from mosquito devices to mental health, to bullying of lesbian, gay, bisexual, transgender and intersex young people, to the

need to incorporate the UN Convention on the Rights of the Child and the practical impact that that would have on young people's quality of life.

About two thirds of the Scottish Cabinet were there, respectfully listening, just as the youth listened to what Cabinet members were saying they were trying to do. I was just sitting there, and it was such a privilege. A lot of the work that I do now is with the UN in many different countries. I was asking myself what other countries would create such a forum, let alone show the mutual respect that was on display there. That gave me great heart for the future because those young people see the connections and they think big—they think globally about what will make a difference on the ground. Raising of awareness and getting to where we want to be are doable in the future.

The Convener: I met Scottish Youth Parliament delegates yesterday and the new chair of their equalities and human rights committee. They gave me their post-Brexit "Right Here, Right Now" manifesto. It was incredibly interesting to hear their views. We will have them at committee next week. We are continuing work with young people and the committee.

Professor Miller: Excellent.

Gail Ross (Caithness, Sutherland and Ross) (SNP): Good morning, Professor Miller. Thank you for coming along. Over the past few weeks, the committee has heard some really compelling evidence as part of its inquiry. A suggestion that has been made that you probably have a strong opinion on is that the role of the Scottish Human Rights Commission should be strengthened. The submission in question said that the commission's powers

"should be extended to address the unmet need for free advice on human rights and be given the power to take forward cases."

Do you agree with that statement?

Professor Miller: I read the commission's submission to the inquiry, and I would highly commend that to you; it is very comprehensive and should be given a lot of serious weight.

Any recommendations that come out of the advisory group will be directed towards the First Minister rather than the commission, but there is no doubt in my mind—looking back to the time when I was chair and looking forward, as we seek to make human rights increasingly relevant on an everyday basis—that there is a huge role for a national human rights institution. Just as Parliament and Government should be strengthened from the point of view of resources, commitment and know-how, the strengthening of a national human rights institution—if it is given

commensurate resources to take on that role—is clearly part of what we would be looking at.

As a former chair, I want to take a step back and not cast a shadow in any way when it comes to what particular aspects of that strengthening process might look like. I do not want to go too far down that road, but in all the countries that I work in with the UN, one looks for various things as a barometer of the country's health from a human rights point of view. Does it have a free press? Does it have an independent judiciary? Does it have a civil society that is vibrant? Does it have an independent national human rights institution that is effective, influential and well resourced? That is one of the key pillars of a human rights society.

Gail Ross: We also received excellent evidence from the Northern Ireland Public Services Ombudsman. She has a number of powers in relation to human rights that we were very interested in. Could we adopt such a system here in Scotland?

Professor Miller: I do not know in detail what that evidence was, but the ombudsman in Northern Ireland enjoys a very good reputation. In the discussions that we are having in the advisory group, although we are not yet at the stage of making recommendations, we are considering what new framework or structure we might need post-Brexit in Scotland and how we can operationalise that and make it relevant through laws, policies and practice. That is a messy area. There are all kinds of public bodies, inspectors, regulators, adjudicators and tribunals, each of which would have to have an increased human rights capacity, if not powers or duties, if we were to realise such human rights leadership and to create a culture of human rights.

Everyone has to do something to improve the outcomes for people in everyday life, and such bodies and ombudsmen institutions—I am meeting our ombudswoman next week—are critical actors in turning human rights commitments into practice that leads to improvements in people's lives. We should be completely open minded to anything that we can learn from the experience of others of things that have worked and, from what you said, I am sure that you already are.

Mary Fee (West Scotland) (Lab): Good morning, Professor Miller. One of the things that interest me is the role that education can play in all of this. Alex Cole-Hamilton's point about the proposed human rights rapporteurs on each committee was interesting, because we would obviously want human rights to be a thread that runs through the Parliament, such that a committee takes account of human rights in every piece of scrutiny or legislative work that it does. In order for that to happen, we as parliamentarians need to have a full grasp of what human rights

means, so education will be a thread running through the approach that we take. It is almost the case that committees will need the framework that you talked about earlier to be able to measure and assess what they are doing.

How important do you think that the role of education is? What suggestions do you have for properly educating parliamentarians and members of the Government so that they have a real understanding of what human rights are and what they mean for the people for whom we are doing our job? There is also the role that schools play. I know that some schools are very successful in the programmes that they do to raise awareness of human rights. We have had young children in here whose knowledge of the issue would really surprise you. We need to make human rights tangible to make the issue understandable for parliamentarians, for children and for the public. How do we go about doing that? I know that that is a very large question.

Professor Miller: I remember once walking along a street in Glasgow on a dark night, near the end of my term as chair of the commission. I was approached by a young woman whom I vaguely knew from the past. She said, "Alan, your term as chair of the commission is coming to an end. I just want to thank you." I said, "That's very nice. It doesn't happen every day. Why?" She said, "Because you told me several months ago about the UN Convention on the Rights of Persons with Disabilities, and I'm a councillor in a poor part of Glasgow who deals with the mental health problems of many of the residents." She said, "I went home and googled it. I read it and it was transformative. It brought out the best in me, because it justified what I was trying to do every day, and when I tried to put it into practice and let the people I was working with know that they had rights to the highest attainable standard of physical and mental health, it brought out the best in them. They sat up and said, 'Right, so I'm no longer asking for charity or whatever. I have a right to this'." She said, "I know you go off to Geneva and New York, but the convention makes things better on the streets. Thanks for introducing me to it."

For members of the Scottish Parliament, two things should be done. A programme should be put in place that gives an introduction to what human rights are. It should not be in general abstract terms but should show how human rights are relevant to the work and role of MSPs and how they will help them to do what they want to do.

There should also be an on-going resource, because we are all very busy people and no one is going to become a human rights expert overnight. MSPs need to have an independent, authoritative resource at their disposal as and when they need

it that can translate all the treaty stuff into particular bills or policy areas. In part, that is the role of a national human rights institution—the commission is trying to do that—but I think that the committee might also need a strengthened human rights resource on an on-going basis.

As far as the schools are concerned, I go back to what I said about the Scottish Youth Parliament. I have been in and out of schools over the years, and the great thing about schools is—I say this with no disrespect to any of us here—that there is no world-weary cynicism among young people. They are open, they are fresh and they empathise with young people around the world in a way that is just as it should be. They are very sharp and they ask questions that adults do not ask, because we have all been conditioned over life to think that we should just not bother with some things because nothing is going to happen. They are the jewel in the crown. The more they can be encouraged to have open, inquiring minds, the better.

10:00

I go to Berlin quite a lot, and I went to the Topography of Terror, which tells us how Nazism came into being and what it did. Every schoolkid in Berlin has to go to that museum. The kids used to be told, "This is what happened in the name of your country. Make sure you don't do the things your grandparents did," and the kids got that, but that was stopped. Now, the school students are allowed to go through it by themselves, to look at the photographs and to listen to the testimony. They can ask questions, but they form their own impressions. The young people now take things on board much more than they did when there was a guide taking them around and saying, "This is what you should be thinking about this." Empowering young people to have that kind of attitude is the future and, as I said, we see that in spades in the SYP.

Mary Fee: You mentioned a conversation that you had with a councillor. Do you think that the Convention of Scottish Local Authorities has an important role to play in this process as well?

Professor Miller: Councils are at the coal face. With limited resources, they have the hard task of making sure that people's rights are respected, protected and fulfilled. They always have to be kept in the mind when the Scottish Parliament is passing laws and thinking, "How is this going to be operationalised? What resource is needed? What skill sets and capacity are needed?"

Over my years as chair of the commission, many good laws were passed and lots of good policies were developed. The follow-through involves checking that it actually works and that

those who are expected to deliver it—whether we are talking about care workers, nurses or whatever—have the capacity, the time, the skill set and the leadership to fulfil the potential of the legislation or the policy. We used a traffic light system. We found that, on law, there was a green light and, on policy, the light was green/amber, whereas on outcomes—having a positive impact on everyday lives—the light was amber into red. That was the disconnect.

The Convener: One of the things that the committee has talked about is that, when policy is formulated and a bill starts its process through the bill team, it is always necessary to have a financial resolution with a bill, so why do we not have an equality and human rights impact assessment with every bill? That would mean that, at the very earliest stages of the process of turning a smart idea into law, that journey would start from the firm foundation of looking at things through the filter of a human rights-respecting process. What are your thoughts on that?

Professor Miller: The journey that I think the Parliament is on—which will be given renewed impetus, I hope, by the recommendations that come out of the advisory group and the need to deal with the realities of the post-Brexit situation—is moving from a compliance culture of checking things to ensure that we are not doing it wrong to a culture that is not reactive but proactive. That will involve thinking about how we make sure that people's rights to an adequate standard of living, a high standard of health and adequate housing are considered at the very beginning of whatever policy or bill we are contemplating. It is a case of being less reactive and more proactive, and asking how we fulfil those rights.

The old impact assessments were about asking whether what was proposed was compliant with ECHR. If the lawyers said that it was, the view was, "Okay—let's hope it doesn't get challenged." Instead of taking that approach, we should say, "We are legislating in the area of health and social care. There is a right to the highest attainable standard of health. What does that mean? What do the UN treaty, the general comments and the interpretation say? How have other countries tried to fulfil that right? How can we do that?" It should be a positive impact assessment, not a negative impact assessment—or rather, it should be both.

I agree. There should be fuller human rights impact assessments, but they should be carried out with a fulfilling, positive motivation; they should not just be about what we all know in our day-to-day lives—the box-ticking stuff.

The Convener: That is very helpful.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I am interested in your views on

human rights in immigration law and policy, particularly in the context of Brexit. Will the advisory group consider that issue?

Professor Miller: Immigration is largely a reserved area. This is where I think there is a big role for this committee—in that regard, I am glad to see who your adviser is. The relationship between this committee and the Joint Committee on Human Rights at Westminster is important. There are a lot of rights that the EU has looked after for a long time, such as equalities, data protection, consumer standards, workers' rights and some parts of immigration. When you take away that comfort blanket, those areas are left with Westminster, but there are devolutionary differences of aspirations, different legal systems and so on. I think that there will need to be a constructive relationship between Holyrood and Westminster to ensure that in those reserved areas, such as immigration, we do not regress in a way that means that people living in Scotland are not enjoying the rights to which they have been entitled or to which people elsewhere are increasingly becoming entitled.

I do not think that we will have any specific recommendations on immigration, because it is a reserved area. However, I think that the context in which we are doing our work is that Northern Ireland, Wales and Scotland are all going to be looking to Westminster and basically saying, "We do not want the ball dropped here; we want to go forward." Standing still these days is actually going backwards, so I think that that kind of conversation needs to take place, not least in the area of immigration.

Fulton MacGregor: That goes back to Mary Fee's question in terms of MSPs, councillors and the public in general knowing what those rights are and how they can take them forward. I have been dealing with the case of a young family facing deportation, which people might have seen some coverage of. It turns out that their case was the result of a mistake, which is another issue altogether, but they were facing deportation for quite some time—we are talking about a young child and a mother being separated and sent home. They come to me as their MSP, they have gone to their MP and they have come to Parliament to ask questions of the First Minister and Government officials. They want to exercise their rights, but they are being told that immigration is a reserved matter, not a devolved matter. That is an issue. How can we make sure that people are able to exercise their rights in immigration circumstances?

Professor Miller: As I said earlier, by and large, people in Scotland do not know well enough what their rights are or what to do about it when their rights are not being respected. With regard to the

case that you are involved in, the matter is presumably not within the competence of the Scottish Parliament or Scottish Government; it is within the competence of Westminster. That does not mean that you do not or cannot do anything about it; it means that you have to bring it to the attention of Westminster and public opinion.

If we look at the Windrush experience, for all of the negative interpretation of the Brexit vote—that there was a virulent anti-immigrant sentiment running riot throughout the UK, in some areas more than others—when the human dimensions of getting immigration wrong are presented to the British people, as they were, dramatically, in relation to the Windrush situation, it touches a chord. When that human dimension is seen, people see things differently from the rhetoric and the populism that they are fed day and daily.

Bringing those cases to the attention of the public and then of the competent authorities, whoever they are, is an important part of the work of an MSP. I think that we can see, with what has happened with Windrush, that people are fair. They are decent. They do not like stuff like that going on in their name. Sometimes we do not give people the credit that they are entitled to and we think that, because the UK voted for Brexit, all that kind of Windrush stuff is somehow condoned or accepted by the people. It is not.

Jamie Greene (West Scotland) (Con): Good morning, Professor Miller. I will start with a technical question. You said earlier that you are a lawyer, which is great. What is your understanding of the implications of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill that was passed and the issue of how policies that continue in Europe, but not in the UK, after the end of the transition period, can or cannot be incorporated into Scots law if they concern devolved or reserved competences? One of the debates that we had around that piece of legislation concerned which pieces of EU law could be transposed into Scots law directly in a post-Brexit scenario, and I think there were still no clear answers at the end of that. In relation to human rights and equalities, what is your understanding of which areas could or could not be incorporated into Scots law?

Professor Miller: Schedule 5 to the Scotland Act 1998 lists the areas that are reserved, and everything else is non-reserved. That includes human rights. Schedule 5 also provides Scotland with an exemption from foreign affairs and international obligations being reserved. Under that legislation Scotland has the duty to not breach international obligations and the power to observe and implement them. Within the devolved areas of competency, there is a broad scope for Scotland to implement what it wants from United Nations

treaties and developments in EU law. I am not a constitutional law expert but my reading of the continuity bill was that it was trying to ensure that the Scottish Parliament did not fall behind but could keep pace with developments within its areas of competence.

More broadly, I think that this reserved/devolved issue is just the beginning of a conversation that is going to be taking place day in, day out. As I say, when you remove the EU comfort blanket, the realities of devolutionary developments over the past 20 years, not only in Scotland, are laid more bare. When the UK Government is seeking common frameworks—the necessity for common frameworks is easily understood—those devolved/reserved matters and the 20 years of development of devolution are now perhaps a bit clearer than they had been before because they were mitigated by the EU frameworks. These are very real conversations. The fact that a lot of the EU rights sit within reserved areas—there is no doubt about that—means that those conversations between Westminster and Holyrood are very important to making sure that there is no regression and that we keep pace—that has been my mantra for the past 40 minutes. I think that the continuity bill was trying to reflect that.

Jamie Greene: That leads nicely to my next area. I presume the purpose of the advisory group was to focus on the post-Brexit scenario and scenario building around that.

Professor Miller: Yes.

Jamie Greene: Okay. The purpose of our inquiry is to look at what is currently being done. As Alex Cole-Hamilton said, we are interested in the things that are already within our power in the devolved competences. My view on this, after a number of weeks of taking evidence and meeting various stakeholders, is that the issues are less around the wording of human rights and more around the everyday application. That is something that we have explored somewhat today: the provision of human rights in everyday life in areas such as health care, social care, education, access to justice, housing and various other areas that are already devolved to this Parliament and to the Scottish Government.

How do you think committees and parliamentarians can better exercise the powers that we already have within the devolved competences to ensure that, at the policymaking level—bearing in mind that that legislation is generally reflective of the policy decisions of the Government of the day and the bills that we are dealing with are mostly Government-led bills rather than members' bills—those existing competences have human rights and equalities at the forefront of the development of that policy? I

think that your view on that would be more practical to us as MSPs.

10:15

Professor Miller: Earlier, the convener was talking about human rights impact assessments, negative and positive, in draft legislation. That clearly is part of your role. I think that there is a bit of a gap in Scotland in terms of the follow-up—that is, the question of whether a well-intentioned policy or law actually did what we expected it to do and, if it did not, why not, and the lessons that can be learned from that.

Perhaps as good a way as any of ensuring that a bill or a policy is as good as it should be would be to enable the participation in the framing of a policy in law of people with lived experience of the problem that you are trying to solve, be it in health or social care or housing. They should have a great degree of meaningful participation at an early stage so that they can talk about the problems that they have encountered and the solutions that would make the biggest difference on an everyday basis to them. They will recognise that the resources are limited, but they can suggest what might be the most effective way to deploy those resources and the ways in which they should be measured and reviewed by the users themselves, as they are supposed to be the beneficiaries.

I saw a presentation of user panels for the Social Security (Scotland) Bill, which asked how we can make sure that the treatment of people by a Scottish social security system is what it should be and that their dignity is front and centre. Having people who have lived experience say what they do not think has worked very well in terms of how they have been treated in the social security system and what they think would work better is probably as good a help as you would get from any source with regard to how to frame a policy in law, and it would also be helpful to have it constantly reviewed by the people who are living with it every day. That would let you know whether the approach is working or whether there are unintended consequences that we should be aware of.

I think that Parliament, Government and a lot of bodies are more cognisant of the need to ensure the meaningful participation of those with lived experience and the rights holders themselves. It is not easy to find real ways and means of doing that and to not be tokenistic, of course, but that represents a big thing that should be built into the law-making and policy-making process.

Jamie Greene: That is reflected in the work that we are doing as a committee.

Professor Miller: Absolutely, yes.

Jamie Greene: We are holding various focus groups around the country, and it is those very individualised experiences of talking to people at the coal face of everyday life that are helping to shape our views as well. It has been a very helpful experience.

One of the things that you have mentioned a few times this morning is the important need for improved or continued relationships between Scottish parliamentary committees and Westminster structures. At the moment, really the only formal protocol for that is the joint ministerial committees, which we do not get terribly involved in and which are very much centred at the moment on the constitutional discussions on Brexit between the relevant ministers in both Parliaments. In the two years that I have been here, we have had very little discussion with our sister committees. I am sure that a lot of work goes on behind the scenes with clerks and research and so on. For example, the expertise that we have taken on board is very helpful and useful. It is something that I am acutely aware of that we do not do much of in the Scottish Parliament across any of the thematic committees. How can we improve that situation?

Professor Miller: We are all going to have to do that better for all the reasons that I have laid out. Post-Brexit, there will need to be an awful lot more interaction than has been the case in the past when we had the EU as a sort of umbrella for it. We need to find the ways and means of having regular meetings and communications, and not only with Westminster. I was speaking to a colleague from Wales. There is a lot to be learned from the Welsh Assembly and what it is doing. Equally, it is very interested in some of the things that are happening here and beyond the UK.

If we are going to keep pace in the devolved areas with developments in Europe, it would be good if you had a relationship with your peers in the European Parliament or in the Council of Europe and the relevant committees there and other Parliaments throughout Europe and beyond. All of us need to lift our heads in these new times to learn as much as possible and to be a constructive actor and to share. Scotland has various stories to tell, which are helpful to others as well. The more interaction there is among Parliaments and human rights committees—I think that you are going to hear from the Inter-Parliamentary Union—the better. That is a very good initiative to take. Of course, you need time and capacity and resources to do that; I think that you need strengthened resources in order to take on what I hope will be additional responsibilities post-Brexit.

The Convener: We visited Strasbourg last week. We met a number of organisations,

including the Committee on Legal Affairs and Human Rights in the Council of Europe. This Parliament has one delegate to the Congress of Local and Regional Authorities in Europe, but we do not have any to the Parliamentary Assembly of the Council of Europe. One of the things that we realised last week is that there are many parts of the institution of the Council of Europe that we have to strengthen our relationship with as well. We are already looking at that, so it is helpful that you put that on the record.

I know that we are running over time. Are you okay to stay for another few minutes?

Professor Miller: Yes, absolutely.

The Convener: I was not sure whether you needed to be somewhere else. We have a couple more questions and then that should be us.

Annie Wells (Glasgow) (Con): Good morning and thanks for coming. The route that I want to take is to ask about how we balance human rights. We have said that it is important to get the people and the lived experiences, but we have to look at the community as well as the individual. We heard in evidence that some rights are absolute but that not all are, and sometimes we have to find the balance between rights. As parliamentarians, how do we know that we are making the right decision about different rights? Does one trump another? Do we have to take everything into account? Should we have legal advice when we make decisions because it really should be the judiciary that make that decision?

Professor Miller: That is a great question, and it comes up all the time—it came up yesterday. How do we balance competing claims and rights, and how do we balance the public good and the public interest with the individual? Human rights law and practice have over the decades developed means of reconciling competing claims and interests, such as proportionality—we want to achieve an improvement in this area, but if we do it in this way, it might have a negative impact on that part of the community, so is there another way in which we could achieve that aim?

I remember that, years ago, I was asked to do work to try to change the culture in the state hospital at Carstairs, because it was not a happy place. I went in and I said, “This will take some time.” The chief executive said, “How will I know when it is better and there is a changed culture?” I said, “Well, there are various measurements that you could put in place, such as number of complaints, but you will feel it and you will see it and you will hear it when it is there.” She said, “Right, okay,” and was not immediately impressed with that answer. Six months later, she said, “I was on a coffee break today. There were two nurses talking to one another and one was explaining to

the other that she had had to restrain one of the patients in a violent incident. She said to the other nurse, while they were having a cup of coffee, ‘I am sure that I handled it right. I am sure that I restrained him properly because I was using proportionate force’.” The chief executive had never heard chatter between nurses in a coffee shop about proportionality.

It is getting that into our minds about how you make these balances. Having a resource on hand would help, but it is not that complicated. It is by and large how we live our lives and how we develop relationships in a family or a neighbourhood. It is a lot of common sense.

With proportionality and what that means in the various specific contexts you are confronted with, human rights over the years has developed ways of thinking to resolve competing claims on rights. It is not that tough.

The Convener: Mary Fee has a supplementary question.

Mary Fee: Yes. It follows on very nicely from the question that Annie Wells has just asked.

Since I came to Parliament, I have been very vocal in advocating on behalf of Gypsy Travellers. It is clear to almost everyone, I think, that Gypsy Travellers’ rights are not being upheld and that they are still an extremely discriminated against group in Scotland. When you are developing the framework to ensure that rights are upheld and that there is no regression, are you taking account of groups such as Gypsy Travellers whose rights are not being upheld? How will you ensure that there is a level playing field when the framework is put in place?

Professor Miller: That is a good follow-up, because there you have a perceived public interest and then the interests of Gypsy Travellers in having decent conditions on sites and so on, and it is a matter of how those two legitimate perspectives are reconciled. I think that we have all wrestled with that over the years, although not effectively enough. It is a good example, as you say, of the need to get things right and to be honest with ourselves in saying that today we do not have things right. When we construct something for the future, we should understand why we do not have some of today’s things right.

In my experience over the years, one of the biggest pieces of work that I was involved in as chair of the commission was with the survivors of historical child abuse. There were a lot of similarities—people had wrestled with that problem for a long time and had not solved it. The commission developed human rights-based approach interactions whereby, for the first time ever, we gathered round a table like this survivors, representatives of religious institutions, local

authorities and the Government and said, "Survivors have various rights. We will listen to their experience and then we will develop an action plan that gives them access to justice." We had a series of meetings and the relationships that developed over those meetings could be seen in the body language—there was a development from suspicion and no trust to an understanding of each other's point of entry into trying to find a solution. An action plan was then developed with complete consensus, and it is now being executed in various ways.

We were talking about Windrush earlier. When you get people together within the framework of human rights to understand and put themselves in the shoes of others, that is when solutions can be found. If you just have policy makers here and Gypsy Travellers there, and local newspapers and communities there, it does not work. It is about being quite bold and ambitious and getting around the same table and, therefore, having a real understanding and a commitment to follow through with an agreed action plan. That can be done at a local level, or at a broader and national level. The tools of proportionality in human rights interactions could be scaled up as we go forward, in order that we can learn the lessons from what we do not have right and the things that we do have right.

The Convener: I have a final question for you, Professor Miller. Although we talked about not just having a compliance attitude, how do you think that the Scottish Parliament could monitor and audit compliance and the roles of the different organisations in ensuring that there is an overall monitoring and audit process in everything that we do? Again, that is a big educational shift for public bodies. Your example of the work you did at Carstairs was a perfect example of that.

10:30

The essence of this inquiry is how we make the Scottish Parliament the guarantor of human rights for people. Obviously, there are different aspects to that—there is education, awareness, the work that we do in committees and the work that the Government does in formulating policy. There is also the monitoring and auditing work, and ensuring that we are making progress. How can we do that?

Professor Miller: That is one of the areas that the advisory group is looking at under various headings—participatory governance and what that would actually look like, and the practical and proportionate use of resources and time. I think that there are a lot of lessons.

I am certainly interested. Yesterday, I had a meeting with the minister, Jeane Freeman, on the Social Security (Scotland) Bill, which contains

quite a lot of interesting, innovative stuff. To begin with, there are the user panels to frame how the system should function and what we can learn, and then there is the establishment of a social security commission to have oversight of the regulations; the secondary legislation; how the charter is applied on the ground; reference to the International Covenant on Economic, Social and Cultural Rights; the right to social security; reports to the Parliament on how the system is working and whether it is meeting its desired goals; access to independent advocacy; and complaints, if need be, to the ombudsman's office. How that plays out in the next few years will be very interesting, because I think that quite a serious attempt has been made to apply a human rights-based approach. Like everything, it is not perfect and I know that there have been critics, but I think that we can learn a lot from that.

The essence of this is meaningful public participation and the ways and means of doing that. If you can crack that, a lot of people around the world will be beating a path to your door to learn from that because that is what everyone is trying to do in different contexts. If we can make some progress here, as I think that we are doing, we are contributing internationally.

The Convener: That is a good place to finish up. Thank you very much for your evidence this morning. You stayed on a wee bit later and we are very grateful for that. As you can see, we all have clear areas of interest in this topic. If you go away and find yourself thinking, "I should have informed them of this or told them about that", please do not hesitate to come back to us. The inquiry will run for a wee bit longer. We hope to produce the fullest report that we possibly can, so any other evidence or information would be very gratefully received.

Professor Miller: I am very appreciative and I look forward to seeing the committee's report. Our recommendations will be beginning to be shaped in September and October, to be given to the First Minister by December, so what comes out of the committee's work will be very instructive for us. I am just sorry that we cannot share more of our work with the committee before its deadline, but we will certainly pick up anything from your report that we think will help us in our recommendations.

The Convener: We got a lot from you this morning, and we are very grateful. Thank you very much.

10:33

Meeting continued in private until 11:18.

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