OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities, Human Rights and Civil Justice Committee

Tuesday 1 October 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
20th Meeting 2024, Session 6

CONVENER

*Karen Adam (Banffshire and Buchan Coast) (SNP)

DEPUTY CONVENER

*Maggie Chapman (North East Scotland) (Green)

COMMITTEE MEMBERS

*Meghan Gallacher (Central Scotland) (Con)
*Marie McNair (Clydebank and Milngavie) (SNP)
*Paul O'Kane (West Scotland) (Lab)
Evelyn Tweed (Stirling) (SNP)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Katie Boyle (University of Strathclyde)
Nicole Busby (University of Glasgow)
Neil Cowan (Amnesty International UK)
Emma Hutton (JustRight Scotland)
Professor Aileen McHarg (Durham University)
Alan Miller (University of Strathclyde)
Lucy Miller (Human Rights Consortium Scotland)
Professor Angela O'Hagan (Scottish Human Rights Commission)
Dr Andrew Tickell (Glasgow Caledonian University)
John Wilkes (Equality and Human Rights Commission Scotland)

CLERK TO THE COMMITTEE

Katrina Venters

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 1 October 2024

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Karen Adam): Good morning, and welcome to the 20th meeting in 2024 of the Equalities, Human Rights and Civil Justice Committee. We have apologies from Evelyn Tweed.

Under agenda item 1, do members agree to take item 3, which is consideration of the evidence that we will hear today, in private?

Members *indicated agreement.*

Human Rights (Scotland) Bill

10:00

The Convener: Agenda item 2 is an evidence session on the delayed human rights bill for Scotland. I refer members to papers 1 and 2. We will hear from two panels of witnesses, and I welcome the first panel: Neil Cowan, Scotland programme director, Amnesty International UK; Emma Hutton, chief executive officer, JustRight Scotland; Lucy Miller, policy and communications lead, Human Rights Consortium Scotland; Professor Angela O'Hagan, chair, Scottish Human Rights Commission; and John Wilkes, head of Scotland, Equality and Human Rights Commission Scotland. You are all very welcome. Thank you for attending.

Our time is at a bit of a premium this morning and we will head straight into questions. I will start. What has been your involvement in the development of the human rights bill? I will start with Neil Cowan.

Neil Cowan (Amnesty International UK): Thank you very much for inviting me to take part in the session today. Amnesty International has been extremely supportive of the proposals for many years and, with organisations and individuals across Scotland, we have been campaigning for incorporation. With the Human Rights Consortium Scotland, we co-convened the civil society working group on incorporation, which brings together civil society organisations and academics from across Scotland to discuss, work on and campaign on the proposals. That has been running since 2019.

On our formal involvement with the architecture of the bill, we fairly recently became a member of the human rights bill advisory board. Regrettably, the board has not met since we became a member in April, due to the various delays. We are also a member of the wider implementation group. As I say, we have been involved in campaigning for the proposals from a very early stage and have been supportive of them from the very outset.

Emma Hutton (JustRight Scotland): Thank you for having us here today. For those who do not know, JustRight Scotland is a human rights organisation. We use the law to defend and extend people's rights. We work with hundreds of people every year who experience violations of their rights and we have partnerships with about 50 organisations around Scotland.

We have been very keen and willing to share our experience and expertise with the Scottish Government and others in the development process for the bill. We have tried to bring our perspective as front-line legal practitioners to make sure that the bill that emerges from the

process is practicable, useful and as strong as possible in providing real teeth when it comes to enforcing people's rights.

Practically, we have been active members of the human rights bill advisory board since it was established in September 2021. I am the lead representative from JustRight Scotland on that board but when I have not been available, other colleagues have stepped in for me. We have had several bilateral meetings with the cabinet secretary and senior officials from the human rights directorate over the past 36 months to explore specific issues.

We host a panel of people with lived experience of the migration system called Just Citizens, and we have supported and facilitated their engagement with the process. We are also active members of the Scottish Association of Law Centres and have been proactive in facilitating dialogue between the bill team and that network.

Like many other organisations, we have taken part in various round-table discussions, meetings and working groups to look at, explore and provide our perspective on numerous aspects of the bill, including the formal consultation process that took place last summer. We produced a 53-page response to that formal consultation.

Lucy Miller (Human Rights Consortium Scotland): The consortium's job is to promote and defend human rights across Scotland. We have more than 220 members of civil society who help us do that.

Collaborating with the various stakeholders, the consortium has played a hugely proactive role, if not the leading role in shaping the human rights bill in Scotland. We strongly support the incorporation of all international human rights treaties into Scots law, along with the right to a healthy environment. That effort aligns with the aim of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 and works towards a framework that recognises and enforces economic, social, cultural, environmental and group rights alongside existing protections under the Human Rights Act 1998 and the Scotland Act 1998.

Throughout the development process, we engaged in comprehensive consultations, contributing valuable insights alongside civil society organisations, legal experts and marginalised groups. We facilitated the lived experience boards for the Scottish Government, which provided crucial advice on conducting a human rights-based consultation. Although the Government implemented some of those recommendations, including the availability of different formats for feedback, there remains a need for broader engagement strategies to ensure that the voices of marginalised communities are effectively included in the bill.

It is also important to note that we developed a consultation toolkit last summer and engaged with more 100 organisations that worked with the toolkit to answer the 44 question consultation. We have done a massive amount of work on the bill. Our stakeholders have also voiced significant concerns about the bill, particularly on access to justice, which we have raised repeatedly with the Scottish Government.

Professor Angela O'Hagan (Scottish Human Rights Commission): Good morning and thank you for the opportunity to be here in my first committee appearance as the chair of Scotland's national human rights institution.

The Scottish Human Rights Commission has a long-standing involvement with the bill and its principles, championing and providing advocacy for the incorporation of rights throughout the historical trajectory over the past 17 years of calls for incorporation. My predecessors in this role and others have been heavily involved with successive proposals and successive Governments and other structures on incorporation.

The technical expertise of the commission's expert legal and policy staff has been heavily committed to engaging in technical advice and responding to consultations on the bill and in the wider discussions about the institutional and structural mechanisms that are necessary to support the effective landing of a bill in Scotland.

We have been consistently supportive of incorporation because it is about bringing rights into law and bringing effective remedy for on-going breaches of rights, as colleagues have described, and ultimately making those rights real in people's everyday lives. The role of the commission is to promote awareness and engagement with rights and the enjoyment of rights.

I also want to acknowledge the immense contribution that colleagues in civil society have made to developing expertise across their own membership, their engagement in the bill process and the building of aspirations and requirements for incorporation.

John Wilkes (Equality and Human Rights Commission Scotland): Thank you for inviting us to speak to you today. The Equality and Human Rights Commission has two functions. We are the regulator of the United Kingdom Equality Act 2006 across Scotland, England and Wales. We are also, like the Scottish Human Rights Commission, an accredited national human rights institution. Our human rights mandate in Scotland, as defined in the Equality Act 2006, relates to reserved matters unless we have the consent of the Scottish Human Rights Commission.

Our approach to the process of incorporation of treaty rights has focused on the aspects of where the proposals would interface with existing UK equality legislation. We have been involved in the process since the national human rights task force, which we sat on. We very much welcomed the task force report's recommendations on incorporation of treaties, in line with our view that anything that improves the realisation of rights is a positive thing.

Since that report, we have been involved in all the Scottish Government's working groups: the bill executive board, the advisory board and the implementation working group. We have met with Government officials regularly, and again our focus and remit have been to try to advise on how the proposals would engage with existing equality legislation.

The Convener: Thank you all very much. We now move to questions from Maggie Chapman, please.

Maggie Chapman (North East Scotland) (Green): Good morning. I thank the witnesses for being here this morning and for everything that they have outlined they have done in this space so far.

I am interested in teasing out why everybody thinks that the bill is such an important piece of legislation. The simple question is what difference such a bill would make. In your answers, could you think about where there are deficiencies in the current human rights landscape in Scotland, and whether those are deficiencies of law, service provision or implementation of policies or strategies? Until we learned that there was not going to be a bill in this session, we heard that so much hope was pinned on this piece of legislation. What difference do you think that the bill could have or should have made for Scotland because of existing deficiencies and gaps in the landscape? I put that to all of you. I do not know who wants to go first.

Emma Hutton: I am happy to go first. It is important to recognise that the bill would not and will not be a panacea for all the problems and gaps that exist when it comes to making everybody's human rights a reality in Scotland. Certainly, JustRight Scotland would never have described it in those terms. That said, we think that it is an important part of the picture and the range of solutions and measures that need to be taken to make people's rights a meaningful reality.

JustRight Scotland currently uses human rights legislation—and the Human Rights Act 1998, in particular—to seek accountability and remedy when things go wrong with people's rights. That is not easy to do. I am sure that the committee is aware of the range of barriers to access to justice for people. Just because rights are protected in law, they are not necessarily easy to claim and enforce. Nonetheless, it is important that that legal backstop of protection is there and can be used where no other measure is available.

The bill is important because it would provide legal protection for a much wider range of internationally recognised human rights—economic, social and cultural rights as well as specific rights for people who face particular barriers to exercising their rights, such as disabled people and people who experience racism. For us, the bill would be an important way of strengthening accountability and people's rights.

In Scotland, hundreds of thousands of people rely on food banks to feed themselves and their families, there is a national housing emergency and racism is still an endemic and stubborn problem. These are real issues that affect millions of people in Scotland. Anything and everything that we can do to strengthen accountability and give people some sort of redress and remedy when violations take place is crucial.

Lucy Miller: The delay in introducing the human rights bill for Scotland is concerning, as it directly affects immediate and long-term outcomes in Scotland. As Emma said, many people in Scotland currently lack the necessary power and agency over their own lives. The absence of a comprehensive economic, social and cultural rights framework means that vital decisions affecting people's livelihoods—decisions around homelessness, health and access to essential services, for example—remain disconnected from the voices of those who are directly impacted by them.

The delay also perpetuates existing inequalities, as marginalised groups continue to struggle without the legal tools to demand their rights and hold decision makers accountable, as highlighted in various reports. I am sure that Angela will come on to that point from the Scottish Human Rights Commission's perspective. The lack of robust rights protection leaves many people vulnerable to on-going violations of their fundamental rights.

In the long term, the absence of that framework risks depoliticising critical budgetary and policy-making processes. By prioritising human rights in that constitutional way, we would create a system where it does not matter what party is in government because human rights are put first. It does not matter if we fall short of money for the budget, because things such as homelessness and health have to be put first—that is where the Government's priority will be. Most importantly, with an ESCR framework, we cannot regress on human rights, so cutting things such as the winter fuel payment—which we have seen in the past few weeks—would be against human rights law.

10:15

I want to talk about what that framework would mean for human rights budgeting across the Government. Applying it to Scotland's current challenges, particularly resource prioritisation—we are constantly told we do not have the resources for it—would mean that human rights budgeting would depoliticise that decision making. Instead of resources being driven by political motives, they are directed towards the areas that need them the most, such as homelessness and hunger. Placing people and their rights at the centre ensures that financial decisions are not about gaining votes but are about creating meaningful and long-term change.

The bill will compel public authorities to embed human rights into their budgeting, planning and service delivery through a human rights-based approach. Essentially, that means that public services in Scotland will have to make the right decision and will do so by taking a human rights-based approach. That is incredibly important.

Maggie Chapman: I will pick up on your last statement that public bodies would have to prioritise human rights—that there would be the risk of legal action if they did not. Emma Hutton might want to come back on this point as well. On access to justice, does the current landscape allow individuals to seek remedy, which has instead to be done through organisations or some other mechanism?

Lucy Miller: No, it does not. Access justice in this country is an absolute labyrinth for people. There are individual routes, but they are incredibly complex and the legal routes are often full of jargon, which is hard for lawyers to understand as well. I do not think that the system is set up for people to access justice effectively. Even if they go through groups to access justice, as you say, that can sometimes be incredibly difficult as there is no resource. The framework is not in place to ensure that resources are directed to that. I am sure that you will hear the Human Rights Consortium talk about this a lot more over the next few years, but that means that provisions that would help to increase access to justice in this country, such as the reform of civil legal aid, are not appropriately looked at and considered as they should be. The bill would make that so.

Emma Hutton: I will expand a little bit on what Lucy said. The reality is that if you, as an individual, are in a situation where your rights have been violated, the number of hurdles and barriers that you have to overcome to get redress and remedy are almost unfathomable. You have to know that you have those rights in the first place, and we have a huge gap around that. Secondly, you have to know where to go to get advice and support when your rights have been breached, and there is a chronic shortage of consistent sources of specialist, free, confidential, trauma-informed and person-centred advice services in Scotland. A number of us are doing our best to fill the gaps but it is certainly not a nationally resourced, sustainable and available service that anybody can access.

Even if you know that your rights have been breached and find somebody who can give you some advice, if you want to take legal action you have to try to navigate the civil legal aid system, which is a whole other labyrinth in itself with very complex eligibility rules. That is before we even get into things such as time bars on claims and so on. Individuals have to navigate huge hurdles.

It is also really important to remember that anybody who is in that situation is also, by definition, experiencing a significant degree of trauma and disadvantage, which makes even taking the first step in that process very challenging. Systemic change is very important.

Neil Cowan: Lucy and Emma have articulated the value of the bill perfectly, so I will just reflect on what they have said. As Emma said, the human rights bill is not a silver bullet, but it could go a long way towards addressing some of the major issues that we face in Scotland. It is important to give the context. In Scotland, we have more than 1 million people living in the grip poverty. We have a declared national housing emergency and there are record levels of homelessness. We have unacceptably high levels of food insecurity. Those are all the responsibility of all levels of government. The bill is not a silver bullet, but it could go a long way towards addressing lots of those issues.

The specific value of the bill is that, by placing clear duties on public authorities, it would embed rights into decision making and law making in a way that we do not currently have. That could have a transformative impact on decision making, on outcomes and, ultimately, on people's lives. That is why the legislation is so important and why it is so critical. It would have the effect of making the rights that we all have a reality in a way that does not exist currently. That is why the decision on the bill is so disappointing and concerning.

Maggie Chapman: The committee has talked about the fact that certain groups of people might have easier or better access to rights than others. Does Amnesty face particular challenges in the work that it does with immigrants—people who have come here for a range of reasons, by choice or otherwise—that such a bill could have supported you with? We talk about human rights as a universal concept, but we do not apply human rights universally. Could you say a bit more about that?

Neil Cowan: Emma Hutton might be able to address your point about migrants. I think that the bill would help to build a human rights culture—a culture in which everyone would be much better able to name and claim their rights and individuals and groups would be better able to access justice when their rights are not respected or are violated. The bill would definitely help to address the issues that particular groups face.

Maggie Chapman: Thank you. I turn to John Wilkes. What difference do you think that such a bill could or should make to Scotland?

John Wilkes: As others have said, no one piece of legislation will be a panacea; the issue is about the signals that it sends. The bill would ensure that public authorities were more focused on their obligations in relation to the human rights that the Human Rights Act 1998 gives; it would provide another set of levers.

We know from our experience of equality legislation that it is important to have legislation in place and important that people have access to seek redress against discrimination, but it is a slow process. The fact that the Equal Pay Act 1970 has been in place for more than 50 years and that we have had 40 years of sex discrimination and race discrimination legislation and 30 years of disability discrimination legislation suggests that it is a slow process, but it is important that we have such legislative frameworks and levers, because they provide the ability for people to seek redress. I think that the bill would send a signal about the importance of a human rights culture in Scotland.

As others have said, another potential outcome of the bill would be that it might help citizens on the journey to better understand the rights that they have and to feel more empowered to seek redress. However, there are plenty of other things that would need to be put in place alongside the bill in relation to access to justice, as well as adequate powers for the organisations that would seek to regulate that legislation.

Maggie Chapman: Do you want to say anything more about the powers, or should I move seamlessly on to Angela O'Hagan?

John Wilkes: As I have said, our remit and focus in this area is very much about the interface with equalities. Our colleagues at the Scottish Human Rights Commission have the human rights mandate. We have tried to share with the Government our experience of the powers, duties and responsibilities that we have as a regulator of equality legislation and how those might be a model in taking forward a human rights bill.

Maggie Chapman: Thank you—that was helpful.

I turn to Angela O'Hagan. Given where the SHRC has been over the past several years, not only in the bill process but in the work that you have undertaken to focus on areas of failure, which I suppose is what we are talking about, what difference would the bill have made? Why were so many hopes pinned on it?

Professor O'Hagan: There are a number of threads to that, one of which concerns the enduring and entrenched violations of rights and the failed realisation of rights that people in Scotland have experienced in their everyday lives, which colleagues have mentioned, whether in relation to poverty, hunger, being cold, not being housed or not having shelter. The fact that those are all everyday realities for so many people in this country points to a failure of law, services—both the design and implementation of services and service provision—and policy, as you said in your introduction to the question.

We need to think about human rights from the very beginning—we need to think about how we structure and resource our public services and the implementation of people's rights in such a way that all groups can realise their human rights. The realisation of rights through an intersectional lens is the starting point for policy making, revenue raising and resource allocation. It has been a significant failure of the approach of mainstreaming that it has not delivered that way of thinking and doing, because that is what taking a human rights-based approach is. It involves thinking about rights realisation from the start, understanding the data that is available and where there are data gaps, and applying that in the evidence process.

We have very limited powers of inquiry and investigation, but, through our spotlight series, we have been evidencing the very significant gaps that exist—the deficiencies in rights realisation in places of detention and in access to economic and social rights, particularly in health provision, especially in rural areas. Through our spotlights, we have been looking at the deprivation of rights in long-term residential care, despite the Government's repeated commitments, the resources that have been allocated and the legislative provision that has been made. Our treaty monitoring work has consistently highlighted the racialised discrimination and rights violations that people of colour and black and minority ethnic people experience daily. Alongside that is the fact that disabled people's rights are consistently not being met.

In its current form, the bill would perhaps not have delivered on all those rights, but it would have provided an opportunity to ensure that there was better incorporation of the existing conventions.

I am very pleased to hear colleagues talk so much about human rights analysis in the budgetary process. The raising and allocation of revenue is essential, but in order to do that effectively, public authorities, as duty bearers, need to better understand and be less resistant to their obligations that already exist in law and to take a human rights-based approach that is seen not as an encumbrance but as an enabling approach to better service design, delivery and, subsequently, the realisation of rights. That has not been a priority, either discursively or from an awareness-building point of view, which means that the human rights culture that we have at the moment is one whereby rights are seen as something other—something alien—rather than as the means of realising the political narrative that exists across parties on dignity and autonomy. We have that in some of our legislation, but we do not have it in the implementation.

The limited powers of the national human rights institution undermine a key aspect of all of this, which also relates to the Parliament—accountability. The absence of the bill means an absence of accountability. We do not rely solely on the incorporation bill to provide accountability. That is the role of the NHRI, but it is also the role of the Equalities, Human Rights and Civil Justice Committee and the Parliament to act as guarantors of rights and of human rights in Scotland. The promotion of a human rights culture and the amplification of the potential of legal reinforcement—legal underpinning—of what should be the everyday rights of people in Scotland would have been a hugely significant motor and a hugely significant part of that infrastructure.

Maggie Chapman: I could go on, but I probably should not do so. I simply want to highlight what you said about the fact that all of us in this place are guarantors of everybody's human rights. I do not think that all 129 of us think of ourselves in that way, and maybe we need to.

10:30

Paul O'Kane (West Scotland) (Lab): Good morning. A number of reasons were given when the Government announced that it was not proceeding as expected with the bill. I am keen to hear our witnesses' views on those reasons. Do you find them convincing or do you think that there were other factors at play? I appreciate that you have touched on those issues in your initial answers. Do you think that there might be other factors at play, such as the budgetary pressures on the Scottish Government, that might explain why the bill is not proceeding?

Neil Cowan: The first thing to say is that, as you have probably picked up, the decision not to proceed with the bill is one that we strongly and firmly disagree with and are deeply concerned by. It is important to be clear that the decision to delay the bill was a choice. It was not something that the Scottish Government had been completely forced into. There were other options available.

On the rationale, it is undoubtedly the case that there were complexities and challenges. That is completely apparent, but we do not believe those to be insurmountable, and we do not believe that they required the bill to be delayed in the way that it has been. We think that there were and are ways of navigating those complexities—I am sure that you will come on to those in your session with the second panel—that would have allowed the bill to be introduced this year. It could certainly have been introduced in the current parliamentary session.

The fact that that decision has been made suggests to us that the bill has not been deemed a sufficient priority. That is a perfectly legitimate decision for a Government to take, but I think that it needs to be honest about the fact that that is what has happened here. We are in a situation in which we are currently being told that the proposals remain a priority and that the Government's commitment to the proposals is unwavering, but it is hard to square that with the decision that has been made and with where we are. It is difficult to escape the conclusion that if the Government's commitment to the proposals was indeed unwavering, some of the complexities and challenges could have been navigated and overcome.

I come back to the context that we are in. More than 1 million people are living in poverty, a national housing emergency has been declared and we have record levels of homelessness. The bill is urgently needed. As a result of the decision that has been taken, faith in the Government's commitment to human rights has been undermined. More broadly, I think that the decision undermines the Government's stated priorities of tackling child poverty and the climate emergency and improving public services. For all those reasons, I think that the decision is a deeply concerning one.

To answer your specific question, we accept that there are complexities and challenges—we see and understand them—but they are not new, and we think that they were navigable. That is why the decision is deeply disappointing.

Emma Hutton: I echo a lot of what Neil Cowan said, but I will add a bit of contextual colour. It is important to remember that it is almost nine years since the then First Minister first committed the Scottish Government to embarking on the process of exploring options for incorporating more international human rights. That commitment was

made at a conference at Dynamic Earth in December 2015. Since then, a First Minister's advisory group has explored the issues. That was followed by the national taskforce for human rights leadership, which led to the recommendations for the bill. We then had the bill development process, which we have already described.

We have not been engaging and grappling with these issues only over the past few years; we are talking about a process that has been going on for quite a considerable period. As Neil Cowan said, the stated reasons that have been given by the cabinet secretary for the decision not to introduce the bill before the next Scottish Parliament elections are not new. There is nothing in there that has not been around for a couple of years now.

My organisation and others have engaged in good faith in the process of consultation and engagement on the proposals, knowing that complexities exist, and we have worked hard to engage on those complexities, to provide our perspective on them and to make suggestions on how to navigate them. Having put so much time and effort and energy into that process, it is really challenging for us to now be told that the bill will not go forward when nothing material has changed since this time year last year or, indeed, two years ago.

To answer your question, we are not convinced by the reasons that have been given for the delay. I cannot really speculate on what the other reasons might be, but the reasons that have been given do not make sense to us.

Paul O'Kane: I appreciate that you do not want to speculate. However, do you think that budgetary pressures perhaps played a role in the overarching programme for government, if not in this decision?

Emma Hutton: It would be impossible to ignore the repeated messaging on budgetary pressures. We all understand the fiscal constraints that we are operating under. As third sector organisations, we experience that as much as, if not more than, others. However, whether or not that has been part of the Government's reasoning, it is important to remember that human rights are even more important at times of pressure on resources, because that is when difficult decisions need to be made about priorities. As other witnesses have talked about, that is where a human rights-based approach to making decisions is really important. If it is a budgetary concern underpinning the decision, that is a misplaced concern, and this is a missed opportunity to embed a human rights-based approach into future financial and budgetary decision making.

Paul O'Kane: Does Lucy Miller want to add anything on those questions? I will pivot slightly when I come to Professor O'Hagan, if that is possible.

Lucy Miller: Yes, please. Like Amnesty and JustRight Scotland, we are deeply disappointed by the decision. The Scottish Government's reasoning for delaying it centres around legal constraints on the devolution settlement, particularly following the 2021 UK Supreme Court ruling on the United Nations Convention on the Rights of the Child. The ruling admittedly significantly curtailed the Scottish Parliament's ability to legislate on devolved matters in a way that might impact reserved powers, but the Government has cited a need to ensure that the human rights bill avoids similar legal challenges and aligns with the limits of devolution under the Scotland Act 1998, which we see as not credible at this point.

We see a new UK Government as a new opportunity to push the bill forward. The cabinet secretary has described the relationship as being in the foothills, but it does not make sense to our organisation that the bill would not be introduced, given that the new Government is more to the left on human rights-based policies. Our concern, like that of John Wilkes, is that the delay sends the message that human rights are being deprioritised. We saw that with less human rights language throughout the programme for government itself.

The legal challenges, although real, should not prevent the Government from taking a strong stand on advancing human rights elsewhere. We believe that the Scottish Government should have pursued a bolder approach, addressing the constraints through careful drafting—again, it has had years to do it—while still moving forward with urgency.

The Government cited the reason of needing to do more engagement with stakeholders before progressing with the bill. There has been swathes of engagement—almost too much engagement. Although we appreciate the effort that has been made to engage our stakeholders throughout the process, there is a persistent concern that the consultation has had limited influence on the outcomes, with many people feeling that their voices have not been sufficiently heard or acted on. It raises a risk of the process becoming tokenistic, with engagement more symbolic than impactful.

Despite the repetition of consultation, communities are not seeing real change on the ground. That is the most important thing: there is an implementation gap between the human rights levers that we have across the UK and what people are facing in Scotland. As we said in

response to Maggie Chapman's question, the human rights bill would have made a difference to that.

Paul O'Kane: Let us briefly expand on that. On the interaction with the UK Government, the Scottish Government has at times said that the relationship with the previous Government was too difficult in this space, and you seem to be suggesting that the relationship with the new Government provides the opportunity to be more successful. I am not sure that those two things can be entirely true. Are you saying that there is a need for the Government to move forward, state its aim and try to work with the incoming Government regardless, in order to move the bill forward?

Lucy Miller: To answer your first question, I do not think that it is a secret to anyone that, when we had a Conservative Government at Westminster, it was difficult for the Scottish Government to work with it. That is not me placing blame on the Scottish Government for that. It was all over the media, and you just have to look back through the past few decades of headlines to see that difficult relationship.

On the second question, yes, this is an opportunity to dive right in, and I think that, instead of delaying it, the proposal should have been put forward.

Paul O'Kane: I turn to Professor O'Hagan. You commented in a previous answer on the Government's statement about trying to do more to protect disabled people, women and people who experience racism. The Government has stated that it feels that more work is needed in that space. I think you said that you felt that, yes, of course there is more work to be done on those treaties but that we have made progress as well. Can you capture some of that as an excuse for delay? What can be done in that space?

Professor O'Hagan: I will not stray into the equalities dimensions, which are the domain of the Equality and Human Rights Commission. It is part of the more generalised argument that there were legal complexities that had not been worked through in the draft bill, which none of us are able to comment on because we have not seen a draft bill, just as we have not seen a financial memorandum. We therefore cannot really comment on whether budgetary costs or envisaged costs around implementation have been a motive. Across the course of the conversation this morning, we have also highlighted the significant resources that have already gone into getting a draft bill to where it did not get to.

I appreciate that this is not the question that you asked, but, on resourcing, it is about taking the perspective that I elaborated on in my previous answer. There are complexities—legal complexities and complexities around supporting implementation—but complexity is not a reason not to do the right thing. The complexities were well known to the Scottish Government prior to 4 September when the decision was announced on the programme for government, which came in contrast to the expectations across the sector in relation to what was happening with the bill.

What else can be done in this space? We have given a long list of where rights are not realised in the everyday lives of people and where rights are not being considered in the formulation of policy making. Colleagues elsewhere in the Parliament today are giving evidence on the national outcomes, which are another potential driver for a human rights-based approach. The National Care Service (Scotland) Bill is going through the Parliament, with committees taking evidence on the national care service. There is an opportunity to act much more decisively and clearly on the incorporation of the United Nations Convention on the Rights of Persons with Disabilities in the national care service, as there is in the social security legislation. There is plenty of existing legislation that must be read and delivered through a human rights lens.

Colleagues have mentioned the housing crisis and food crisis, and we have all talked about resourcing. I have been in front of this committee I do not know how many times in the past with different hats on, talking about equality and human rights-based budgeting. What we saw the day before the programme for government in the spending decisions that were made to remove asylum seekers' access to free bus travel and to remove free school meals echoes what Neil Cowan said about where the coherence is between the political priorities and the resourcing decisions that are made.

Nobody will deny the tight fiscal space—that is real—but, as the Scottish Fiscal Commission has also been highlighting over a number of years, we have to change how we think about policy making and about raising and allocating resources if we are to address widening inequalities and the widening gaps from the failure of rights realisation.

There is a lot to be done by committees in this space, to use Paul O'Kane's phrase, and in the process of scrutinising policy and legislation that comes forward from any government. I am not making political points here; I am talking about the efficacy of and approach to policy making, which is a cross-party responsibility. It is the responsibility of the whole Parliament to amplify what should be the approach of the Government in implementing existing human rights requirements and taking a

human rights-based approach to policy and law making.

Paul O'Kane: Does John Wilkes want to add anything on those two questions?

10:45

John Wilkes: We, too, are disappointed that the Government decided not to proceed with the bill at this stage, given the amount of work and effort that has gone in over many years. We noted that one of the reasons given was the challenges of the equal opportunities aspect of the bill. As that is potentially in our space, we recognised that there was an issue in how the bill—obviously we have not seen a draft bill yet, so we could not comment on what the final proposals were going to be—would engage with existing equalities legislation, noting the reservations in the Scotland Act 1998. There are potentially ways forward, but it is complicated.

That was the situation two or three years ago. We raised those very issues in the national task force report that was published in 2021. We hope that the delay is not going to be too protracted so that the momentum is not lost. We remain willing and keen to help to advise on those particular aspects of any bill that comes forward.

Marie McNair (Clydebank and Milngavie) (SNP): Good morning. The driving principle behind the incorporation of economic, social and cultural rights was to ensure non-regression from rights guaranteed by membership of the European Union. What impact will the non-introduction of the bill have on those aims? I will go to Neil Cowan first.

Neil Cowan: Can I come back on that one?

Marie McNair: Sure. Does anyone else want to start?

Emma Hutton: Could you repeat the question?

Marie McNair: The driving principle behind the incorporation of the ESC rights was to ensure non-regression of rights currently guaranteed by membership of the European Union. What impact will the non-introduction of the bill have on those aims?

Emma Hutton: Thank you. From our perspective, the driving principle behind the introduction of the bill was about advancing and strengthening protection for a wider range of rights recognised in the international human rights framework, not just those that are set out in the European convention on human rights or in the context of the European Union. That would be our starting point.

The impact of the bill not going forward in the timescale that we were expecting is that we will not see the progress that we were hoping to see, and we will not have the same steps towards greater accountability to ensure that non-regression that you are talking about. It is an absence of something that we were hoping would help to strengthen everybody's ability to ensure that that principle is protected.

Marie McNair: Thank you. Neil Cowan, do you want to come in now?

Lucy Miller: I can come in. Like Emma Hutton, that is not the main thing that we saw as the driver of the bill. I want to talk a bit about the reasoning in relation to the scope of devolution being a reason for delay and say that if, the non-introduction of the bill is going to have an impact on those rights that you talk about, the Government needs to be far more transparent about its conversations with Westminster on the limitations that are imposed by the devolution settlement, which mean that we are not protected by European mechanisms, which I what I think you were implying.

The Supreme Court judgment on the UNCRC incorporation should not be treated as an excuse but as a challenge to be overcome through collaborative dialogue. It is really important to note here that the Parliament has successfully incorporated the UNCRC already, so this country has a basis that incorporation can work from. Of course there were challenges with that, but challenge should not stop the Government taking risks when human rights are the priority. The Government must openly share where those barriers exist within devolution. We have been told that there might be barriers and, as the cabinet secretary said, we are at the foothills of this relationship but, if we could have some clarification on how the Scottish Government plans to negotiate those conversations with the UK Government, that would be helpful. Using our expertise and that of civil society as a bridge for intergovernmental relationships will be important in order to get this right.

Neil Cowan: I have nothing to add.

Professor O'Hagan: Colleagues have effectively covered some of the legal points and policy issues. The principle of non-regression should absolutely apply across all law making, policy development, resource allocation and service design. The point is that things should not be made worse by future interventions or by the absence of intervention and the failure to act, which is what has happened in this case. When we go through the litany of failures of rights realisation, it is clear that across policymaking and legislation, there is a need, on the part of this Parliament, the Scottish Government and duty bearers, to consider those principles. One of the things that required some further development and

stewardship had the bill been introduced, was the consideration of minimum core obligations, that is, the most basic of basics that people should be enjoying in terms of rights. In some ways, it is quite bizarre to think about it, but we needed to actually bottom out what are the very basics that people should have. Do they include housing, shelter, food, warmth? We need to bottom out those very basics, both in law and in terms of how services are provided.

To link back to Mr O'Kane's question about what can happen, we can regard this delay in the bill—we have been promised that it is a delay—as an opportunity to start to shift the narrative, the culture and the practice of duty bearers and public authorities that need to think about what is the very minimum in terms of rights, and how we work up from that. That is a reasonable aspiration for Parliament as well. What is the very basic that we need to work up from? At the moment, we are failing on some of those basics. What the bill might have done, with careful stewardship, is reinforce what we in Scotland understand those minimum core obligations to be.

Marie McNair: Thank you; I appreciate your comments. The committee would also be grateful for your comments on how the non-introduction of the bill has been communicated to stakeholders and those who have been developing the bill over the years. You have commented on that already but I am giving you the opportunity to expand. Neil Cowan, do you want to come in?

Neil Cowan: I am happy to come in on that. Speaking totally frankly, the decision took us all by surprise. I do not think that any of us expected the bill to be delayed to the extent that it has been, and I think that that caused some anger. Trust has been, if not broken, certainly frayed, and that is trust not just between Government and civil society, but also between civil society and communities. Many organisations that were involved in the development of the bill expended a huge amount of time, resource and energy engaging with communities, bringing people in, supporting them to overcome suspicions around engagement in this type of process. Ultimately, a lot of people feel let down.

On how it was communicated, it was an unexpected decision—there was not necessarily much warning to it. The concerning thing is that, at the moment, there is not necessarily a firm offer in place. We are not necessarily clear on what the Scottish Government's plans are, beyond that broad commitment to continue to develop the proposals. What we would like to see from the Scottish Government, with urgency, is a clear sense of where it is at and where it is going. If we can see a draft bill, that is fantastic; let us have that in the open so that we can see where we are working from, because, at the moment, we are a little bit in the dark about what happens next.

Professor O'Hagan: Neil Cowan has captured it. The cabinet secretary came to an event that was organised by the Human Rights Consortium Scotland the week after the programme for government. Colleagues were appreciative of the cabinet secretary honouring that commitment to come to the event, even though it was to offer reasons why the commitment to the bill had not been honoured.

A commitment to bring forward a bill in the next parliamentary session has been articulated. I am not sure how a sitting Government can commit future a Government to legislation, but what we maybe can do collectively is work with Government and with Parliament on what needs to be done to get this bill finally over the line in a shape that can start to deliver the access to justice that colleagues have eloquently outlined.

Perhaps there is a role for the committee here, as well as for the various organisations around the table, in terms of receiving regular updates from the cabinet secretary about what is happening and engaging, in line with rules and regulations, in conversation with the Secretary of State for Scotland on what engagement there is with the UK Government on smoothing those relations and any legal or other constitutional obstacles, so that there is greater preparedness for the introduction of a bill in 2026. Those actions by the committee and across Parliament would certainly help to maintain momentum. There is a lot to be asked of civil society organisations that were led up the hill and expended a huge amount of resource, and, in terms of maintaining that momentum, other voices are required to amplify the need for a robust human rights framework in Scotland and to contribute to the development of that human rights culture and that narrative that is about the ways of thinking and doing in Scotland.

Lucy Miller: My point might lead nicely into what Emma Hutton will say. As I have said, we are deeply disappointed by the developments, and our messaging has been that the delay represents a deep breach of trust between the Scottish Government and ourselves. However, not only is there a breach of trust there, there is a breach of trust between us as an organisation and our members, because we have facilitated countless hours of workshops with people who have faced true and horrific human rights violations and have retraumatised themselves by retelling that story to us with a promise that we would see incorporation of their economic, social and cultural rights within the framework and timescale that was given to us.

It is also deeply disappointing that the Government seems to have been aware of the decision for a few months before springing it on us

on programme for government day, alongside other legislation cuts. That is, frankly, not on. We should have been told about it before that day, when it was sunk within other news. As Neil Cowan said, it was a shock. Communicating back to those members who have traumatised themselves by telling us their story stories is deeply hard for us and creates a breach of trust between us and our members at a time when third sector funding is scarce—I note that the Human Rights Consortium is totally independent of any public sector funding. As I said, it is deeply disappointing.

Emma Hutton: I will add to that. I participated in the advisory board for the bill for a number of years, and the decision came out of the blue for us. Literally the day before it was made, we still expected to see the recommitment to the bill in the programme for government. We at JustRight Scotland had written privately to the First Minister over the summer seeking reassurances about the Government's continued commitment to human rights and to the bill, and I know that a number of other organisations did that, too. Although the response that we got was somewhat vague, it was still in the same vein of committing to continuing to take forward the incorporation of human rights.

The decision was certainly unexpected. I would go as far as to say that many of us felt quite blindsided by what happened. Lucy Miller has talked about the breach of trust that has been felt by many across the third sector and civil society, and that is really deeply felt. A week after the announcement, when we gathered at the first annual Scottish human rights conference, there was a sense of betrayal in the room. The anger across the sector was also palpable. That is because of the time, commitment, effort and energy that so many people have put into this process over many years.

As Lucy Miller has said, organisations such as mine and others have asked our clients, beneficiaries and people who use our services to come with us on this journey, to turn up to events, to share their own experiences, to share their trauma, to give their time and to give their effort to trying to develop proposals. In doing so, we have asked them to invest some faith in us in that process. However, we have now been left in a position where we are essentially being asked to communicate the Government's decision back to them without really understanding that decision or being convinced about the reasons for it. That is a difficult position for our organisations to be placed in.

On where we go from here, it is absolutely the case that Scotland's civil society remains committed to this agenda. That was palpable when we gathered a few weeks ago, but the onus now really sits with Government to rebuild and repair the breach of trust that has taken place here. Collectively we are now recognising that, when it comes to leadership of Scotland's human rights journey and this agenda, we need to see that as a shared endeavour across civil society, Parliament, other sectors and Government, and perhaps not rely so much on the leadership coming from the Cabinet.

11:00

Marie McNair: John Wilkes, do you want to come in?

John Wilkes: I do not have much to add. You have heard articulated extremely well the disappointment and frustration, particularly among organisations in civic society that have marshalled lots of work and individuals in the process. It is ultimately a matter for Government to decide its priorities, but we hope that there is not too much delay in moving forward.

Marie McNair: I appreciate the strength of feeling as well, and we will feed that back through the committee.

The Convener: Meghan Gallacher has a supplementary question.

Meghan Gallacher (Central Scotland) (Con): Good morning. I am interested in the conversation, and the exchange with Marie McNair, about the reasons why the bill has not progressed, and the feelings within the sector, which I sympathise with, in relation to the bill being halted for now.

Do you think that perhaps the Scottish Government has bitten off more than it could chew with the bill? I was looking at the consultation responses with interest to find out the range, breadth and depth of the types of areas that people wanted to see incorporated. You have mentioned some of those things this morning, such as housing and the right to food, but of course there were other elements in the responses, including those to do with women's rights and women's single-sex spaces. Do you think that there is an element of the bill being too large in scope and perhaps the Scottish Government not knowing how to home in on those particular areas to formulate and bring together legislation that would work for every single sector that wanted their rights to be incorporated? There was a lot in there. Who wants to start?

Emma Hutton: I am happy to say a few words and I am sure that others will have things to add.

The Government's rationale says something about stakeholders having expressed concerns that proposals do not go far enough—there are particular concerns around the proposals as we understood them last summer, in relation to, for

example, disabled people's rights, women's rights and the rights of those experiencing racism. We are one of those stakeholders who, in our consultation response, said that we are concerned that the proposals, as we understand them, do not go far enough. We said that we think that more can be done and here are views, suggestions and ideas on where things could go further. Our understanding is that that is the purpose of a consultation process. We would have expected, as a result of that consultation process—to which hundreds of organisations responded—that the Government would have presented its proposals in the form of a draft bill, which we could then all look at and scrutinise further, and that the Parliament could look at and scrutinise further. That is, as we understand it, what a legislative process is designed to do.

I do not think that the bill shows that the Government has bitten off more than it can chew. It was always going to be a complex piece of legislation, but there is a vast wealth of expertise in Scotland and beyond that can help with that process. Unfortunately, without a draft bill in front of us, we are all a little bit stymied in how much we can now engage in that process.

Professor O'Hagan: Incorporating human rights should not mean biting off more than any Government can chew—it should be the core business of Government. That is baked into the structure of the Scottish Parliament and the act that created it. After 25 years of devolution, we should be experiencing more mature governance and government, including having more confident and engaged relationships at all levels of Government, including the UK Government, whatever the political parties involved.

There have been impediments to that on all sides, but it should not be about sides. It should be about how to work to what I believe to be a devolution dividend. It has been possible to do things differently in the devolved Administrations. Extending rights in Scotland is within the domain of the Scottish Parliament and the Scottish Government. It is not a threat elsewhere but could be leverage elsewhere. Reviewing the constitutional arrangements should be part of a mature relationship where all parties—political and other entities—enter into that with a mature and positive aspect and priority.

The other dividend from this lengthy process—and colleagues sitting behind us in the public gallery have been involved in this for many years—is the huge policy innovation produced through the engagement that colleagues on this panel have been discussing today. I really encourage colleagues all around the table and across the Parliament not to lose sight of that; there have been discussions on a healthy environment and colleagues have taken really innovative and distinctive positions on that, by raising questions on issues such as housing, and around children's rights, for which we have already secured incorporation. How do we extend that? None of those things should be viewed as impediments, but as levers and as tools to develop.

Lucy Miller: I agree with everything that has been said. This was a promise. Regardless of whether it was more than the Government could chew, which I do not think it was, it was a promise that was made. The Scottish Government has failed in providing the people of Scotland with information about their human rights and why that is so important. It should be higher up the agenda than it is. We could be using accountability functions, such as the committee, and other levers such as international monitoring, to improve human rights here. We have had scant engagement from the Scottish Government on UN reviews, which has been disappointing given that we are a country seeking to incorporate so many rights. I trust that that will get better and I hope that the Equalities, Human Rights and Civil Justice Committee can hold the Government to account on implementing the UN recommendations.

A second thing is that our national human rights institution needs more power, and that is something that the Scottish Government can address through the current Human Rights Act 1998. At the moment, the Scottish Human Rights Commission is one of the least powerful national human rights institutions within the UK—if not the least powerful. We should be pushing that agenda forward as well.

We have so many levers we can pull and so many things to make human rights better within this country. As I stated in my first answer, the bill is hugely important to creating that framework. However, in the next year, transparent and viable steps forward should be communicated to us about how we are going to work to make human rights more widespread, so that they are a priority.

Neil Cowan: I support the comments that have been made and I absolutely support Lucy Miller's comments around additional powers for the SHRC.

On your question, I do not think that the Scottish Government has bitten off more than it could chew. The proposals are significant, as they should be, because they are potentially transformative and they are, as touched upon, complex as a result. As has been mentioned, a lot of work has been put into this and it has been a real journey.

In 2018, the First Minister's advisory group on human rights leadership published its report. In

2021, the national task force for human rights leadership recommended the bill. Consultation took place last year with 400 responses. There have been advisory groups, an executive board, lived experience boards, implementation groups and so on—if the Government has bitten off more than it can chew, it has been chewing for quite a while now. None of the challenges that are being presented are new. That takes me back to an earlier point around it being about political prioritisation. All the challenges and complexities are navigable, as I am sure your second panel will touch on. It is not too difficult and it is not too complex; it can be done. It is a simple case of prioritisation, and it is important to be clear on that.

Meghan Gallacher: Thank you. John Wilkes, do you want to come in on that point?

John Wilkes: I do not have anything to add to what colleagues have said.

Meghan Gallacher: Convener, if you will indulge me, I have one more, short, question.

The Convener: Absolutely.

Meghan Gallacher: Thank you. If a bill were to be introduced in future, given that the consultation period started a significant time ago, as Neil Cowan mentioned, would it be appropriate for the Scottish Government to have to go back and reconsult? Is that what would have to be done? We have had a pandemic and other big issues that have faced the country since then. Is there a distinct possibility that all those consultations and all of those insights that have taken place would have to be redone because there would be so much of a difference between when the process started and where we had got to? I do not know who wants to take that. I know that question is very hypothetical.

Professor O'Hagan: We would encourage the committee to be looking for sight of some kind of draft bill in the remainder of this parliamentary session. The formal consultation on the bill was post pandemic, and the evidence generated across both the formal consultation and through all the other processes that colleagues have touched upon has raised many issues that could be resolved in the formulation of a draft bill. There is plenty of evidence and plenty of material there to know what is needed—as we touched on today—whether that is in access to justice and being clear about the remedies, the clarity for duty bearers on implementation, the reporting cycle and reporting formats that need to be clarified, or minimum core obligations. A number of those technical implementation issues have already been surfaced. We would urge both Parliament and Government to make use of this so-called pre-implementation period to address those matters in practice and to provide resourcing to support implementation across the sector and build that capacity and competence, including within public authorities.

Will there need to be additional consultation? That is about transparency, accountability and engagement, so, yes, absolutely. However, I hope that if there is a bill to be consulted on in the future, it would have taken on board the many suggested changes and recommendations that have come forward through a very rich engagement process. I would hope to see the Parliament very much more engaged in the discursive scrutiny of a future human rights bill.

Meghan Gallacher: Thank you.

Lucy Miller: I know that we are running out of time, so I will be very brief. We would not appreciate a second consultation based on the one from last year. We want concrete proposals and we know that parts of this bill have been drafted already. If we were able to consult on those, that would be appropriate. Angela O'Hagan has referred to the minimum core obligations and we would be happy to consult on that sort of work, but we do not want to respond to a 44-question consultation like last year, because we would not have anything new to say.

Meghan Gallacher: Thank you very much.

The Convener: We will move on to questions from Annie Wells.

Annie Wells (Glasgow) (Con): Convener, I do not have any questions this morning. Everything that I had has been answered. It has been very comprehensive.

The Convener: That brings us to the close of this evidence session. Is there is anything that you feel that you have not got across that you would like to say before we wind up? You all seem content, which is great.

We will suspend briefly for a change of the witnesses.

11:13

Meeting suspended.

11:19

On resuming—

The Convener: Welcome back. We will now take evidence from our second panel. I welcome to the meeting Professor Katie Boyle, who is the chair of human rights law and social justice at the University of Strathclyde; Nicole Busby, who is a professor of human rights, equality and justice at the University of Glasgow; Professor Aileen McHarg, who is a professor of public law and human rights at Durham University; Alan Miller,

who is a professor of practice and human rights law at the University of Strathclyde, and a former co-chair of the national task force for human rights leadership; and Dr Andrew Tickell, who is a senior lecturer in law at Glasgow Caledonian University, and is joining us remotely. Thank you all for joining us.

As with our first panel, we are really pressed for time and we have a lot to get in, so we will move straight to questions. The first question is from me. What has been your involvement in the development of the bill? Can I ask that of Dr Andrew Tickell first, please?

Dr Andrew Tickell (Glasgow Caledonian University): Hi, there. It is great to be with you again.

I have had very little involvement in the development of the bill. My particular interest in this topic is around what it means for human rights and co-operation in Scotland in the wake of the United Nations Convention on the Rights of the Child judgment by the United Kingdom Supreme Court. I come in on the devolved constraints and how they shape what the Scottish Parliament can and cannot now do in incorporating fundamental rights.

Professor Katie Boyle (University of Strathclyde): I was a member of the First Minister's advisory group for human rights leadership, where I advised on models of incorporation from my research expertise, which covers legalisation on economic, social and cultural rights. I was subsequently a member of the academic advisory panel to the national task force.

Nicole Busby (University of Glasgow): Thanks for the invitation to speak today.

I, like Katie Boyle, was a member of the First Minister's advisory group for human rights leadership, and I chaired the academic advisory panel, which advised the national task force. I am a current member of the Scottish Government's implementation group for the bill. I am also a member of the civil society working group on incorporation and am academic lead on a series of projects, in partnership with the Human Rights Consortium Scotland, on the impact of the bill on civil society. My particular interest is in domestic equality law and its interaction with the international human rights framework.

Professor Aileen McHarg (Durham University): Thanks from me for the invitation, as well.

My involvement in the bill has been towards the later stages. I think that I gave evidence to the First Minister's advisory group on one occasion, but my involvement has mainly been more recent. Along with Nicole Busby, I am on the Scottish Government's reference group and have had a number of briefings from the bill team over the past couple of years. I have also written published briefings for the Scottish Human Rights Commission and for the Human Rights Consortium Scotland, specifically on the legislative competence issues that the bill raises.

Alan Miller (University of Strathclyde): Congratulations to you, convener, and the committee on having this session. I welcome it and thank you for the invitation.

It seems that my involvement has been about half my life in preparing for the bill—that is not too much of an exaggeration. To be a bit more serious, I was elected by the Parliament in 2007 as the inaugural chair of the Scottish Human Rights Commission. The commission gave a call at the outset for incorporation of our international human rights treaty obligations. I left office in 2016. There may be a lesson in there for me—more progress seems to have been made after I left office, to get us to where we are today.

The then First Minister, after the Brexit referendum, asked me to chair an advisory group to advise on Scotland's human rights journey post-Brexit. That led to my being appointed as the independent co-chair, with Shirley-Anne Somerville as the other co-chair, of the national task force for human rights leadership, which made 30 recommendations on the bill, which were accepted. We then went forward with preparation of the bill and the consultation process—and here we are, today.

The Convener: Thank you very much. We will now move on to questions, with the first from Maggie Chapman, please.

Maggie Chapman: Thank you for joining us this morning.

We had conversations with the previous panel of stakeholders about the difference that human rights legislation can make to communities and to individuals. I am interested in your views on the difference that a bill in this space—human rights incorporation into Scots law—will make to people's lives. I suppose that part of the question is to ask where—within the current landscape of policy design, legislation and all of that—you see gaps or failures of the system to deal with issues that people have around realising their rights. Alan Miller, I will start with you.

Alan Miller: That is a great opening question. Thanks, Maggie.

I will give a very concrete example of the impact that the bill could still make. For the past two and a half years—having been appointed to this by Nicola Sturgeon when she was First Minister—I

have been helping to build and leading a process to establish a charter of rights for people who are affected by substance use. I have been chairing the national collaborative and have been working with people who are affected by substance use the length and breadth of the country, and with duty bearers and decision makers, on how substance use services are designed, delivered and monitored.

After a lot of engagement with people the length and breadth of the country, and having raised their hopes, we will launch a charter of rights this December. It will include the rights that exist under our present law, but it will also include the rights that we are anticipating under the bill—in particular, the right to the highest attainable standards of physical and mental health.

As a result of the bill not coming to Parliament before the election, the charter of rights, which would have been underpinned by that bill, will stand alone without the accountability framework that it would otherwise have had. Therefore, implementation of the right to health will be left to be voluntary for those who design, deliver and monitor substance support services, and they will not be accountable in that way.

The charter will still be an extremely big step forward in reducing stigma and the power imbalance, but it will not achieve its full potential until such time as the right to health is brought into law. In relation to drug deaths, the impact that the bill needs to have in that context is not only to improve lives but to save lives.

Maggie Chapman: May I unpick that a little bit and maybe broaden it out? You are saying that without accountability people would not have the legal right to health, which seems like a pretty stark statement. We are in the 21st century in a country that says that it takes the human rights of its citizens and all who live here seriously, so where are the gaps in the legislative landscape or the policy landscape? Are they around accountability? Are they around implementation? Are they around design? How have we got things so wrong for the people whom the charter that you have spoken of is designed to help, and for other people including disabled people, people of colour and other groups of people whose rights have not been realised?

Alan Miller: Some groups in our society have been left more invisible than others, and their specific needs and specific rights have not been given the priority that they need and that we would assume they have been given. In the context of the big public health emergency of drug deaths, we are shifting away from a criminalisation process involving criminal justice services, prisons and courts, which has failed, and have been moving belatedly—it is, nevertheless, very welcome—to a public health approach.

The experience for people who are affected by substance use has been, however, that the public health approach can still be full of clinical medical models that do not see persons as they are or the trauma that they have been through. They need wraparound support, including in relation to housing and their income, in order that they can engage effectively with services that see them for who they are and that see what their needs are.

Even within the public health model, there is a further step that needs to be taken: there should be the right to the highest attainable standard of health. We need to address the power imbalance between the person coming off the street and the professional who has good intentions, but thinks that they know better than the person about whose life decisions are being made. There is the stigma that comes from feeling that you do not have rights, but that others have rights, therefore you do not seek and demand what you are entitled to, as everyone else does. The right to health would—not just legally, but culturally—empower people to assess what they need and what they should get from services.

Maggie Chapman: Thanks, Alan. That point about culture was raised a few times earlier, as well. It is clearly very important.

11:30

Professor McHarg: I am perhaps a bit more agnostic on the benefit of rights instruments than some other people you might have heard from, or will be hearing from.

The value of broad frameworks of rights is that they add to the existing ability to legislate to improve people's rights, which can be done through individual pieces of legislation and individual policy initiatives. The bill is modelled on the Human Rights Act 1998, so we can draw some lessons from what the Human Rights Act 1998 does, which is to broaden and decentralise the mechanisms for protection of rights.

There is the possibility of legal challenge working in tandem with mechanisms to raise the profile of rights issues in the political process. Sometimes the legal process does not provide a remedy, but it might raise the political profile of an issue, which then leads to political change. I think that the evidence in relation to the Human Rights Act 1998 is that the impacts have not been huge, but they have not been unimportant. They have been important particularly in filling the gaps that you talked about by allowing people to raise issues that have somehow been missed in other processes.

I will give two caveats on the comparison with the Human Rights Act 1998. The first is that we are talking about different kinds of rights and we do not yet know how the courts will interpret the rights in the treaties that it is proposed will be incorporated. They might be found to be more difficult to enforce judicially than convention rights: we do not know.

The other difference relates to the scope of the bill. This is where issues about devolved competence become important. For framework legislation like the bill to do its job effectively, its scope has to be as wide as possible. The competence issues that arose in relation to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 arise here as well, and are potentially very serious because they narrow the scope of the bill and therefore narrow its ability to perform the backstop function.

Maggie Chapman: That is really helpful.

Nicole Busby: The bill will make a difference in the context in which I work most commonly, which is provision of public services. The bill could and should do a lot to integrate human rights and equality, particularly in relation to duties that are imposed on public service providers.

We live in a Scotland where the Joseph Rowntree Foundation's latest estimate is that over a million people live in poverty: there is deep poverty and intergenerational poverty, and poverty is racialised and gendered. Many of the policies and legislation that are designed to help with that are also ableist and exclude disabled people from their scope. We need a mechanism that improves, or leads to some improvement in, the provision of public services, and which prioritises human rights and real equality by mainstreaming human rights and equality in public services.

Aileen McHarg is absolutely right to outline the legislative difficulties that we might see in the rights framework itself, but the bill gives us an opportunity to catalyse the current equality duties—I do not want to call them "softer" duties, because they are really important—such as the public sector equality duty and the fairer Scotland duty, which are not working very well. We have great difficulty in measuring or showing any impact of those particular duties in the provision of public services, although providers tell us that they are doing lots of work and we have no reason to disbelieve them. They are doing lots of equality impact assessments, but we are not sure what impact in terms of change those assessments are providing or leading to.

The current equality framework is not working well in Scotland for a variety of reasons. It takes a very narrow approach. In terms of the duties, the human rights framework could open the space up in order to impart a different approach and a more substantive approach to equality, in contrast with the current formal equality approach. It could provide a very good framework and be a very good starting point or basis for looking at improvements to provision of public services.

Maggie Chapman: Will you elaborate on that a little? You talked about the failures of the current equalities mechanisms and said that the duties do not actually work because they are too narrow. You also said something about the challenges of mainstreaming and how we understand that. We heard earlier from Angela O'Hagan about some of the failures of mainstreaming in the broad rights and equalities landscape. How could the proposed legislation have allowed us to take a view that was not different to mainstreaming but would enable that embedding—I was going to use the word "foundationing"; sorry, that is a terrible word—that would make us take human rights and equality seriously from the start rather than see them as an add-on or as something fluffy and extra down the line?

Nicole Busby: The theory of mainstreaming is good, but the practice of mainstreaming has not been so good. Part of the failure there lies in the way in which equality is dealt with under the current framework. It is a single-access framework, with one right to equality based on one protected characteristic or one particular ground at a time. We are more or less reliant on private party civil litigation—private cases being brought by individuals. The committee heard from the previous panel about the difficulties with access to justice, for example, and the advice and representation deserts that exist across Scotland in respect of different rights holders. There is a real difficulty there.

Of course, the intention of any such legislation should be to keep those issues away from the courts and tribunals, which should come in only as a last resort. That is why I put the emphasis on public service provision and mainstreaming. The human rights framework gives us much more opportunity to look at an intersectional approach to equality, so that we are not looking at those single-issue, single-access approaches that we currently have under the Equality Act 2010.

As I said, the framework opens up the space to a more substantive equality. The treaties are based on a much more holistic approach to the achievement of equality and looking at outcomes rather than inputs and processes. It is about looking at what we are seeking to achieve, whether we are achieving that and how we can measure that. That approach would give much more opportunity for not just a human rights bill

but other legislation to be subject to a proper approach to developing mainstreaming.

Maggie Chapman: That is helpful. Katie, can I come to you?

Professor Boyle: On the benefits of incorporation, it is important to note from the outset that we are discussing incorporation of international obligations that the UK as a state party has signed up to. Ultimately, an incorporating bill is attempting to close the accountability gap for the UK state's obligations, in relation to devolved areas. That has become slightly more complex because of the UNCRC bill reference judgment, which we can discuss in greater detail, but it is also helpful to consider important empirical evidence that helps us to understand the importance of incorporation.

No model of incorporation is a panacea and nothing will transform overnight and solve all the problems that we encounter in relation to social injustice in one fell swoop. You will always have struggles to achieve social justice. A human rights bill embeds accountability in decision making—it takes a normative approach, and so has higher standards. For example, if you say that everyone should have social security but you do not apply a substantive standard to that, you can see the invisibilisation of injustice. A bill would make injustice visible by ensuring that decisions are held to standards that map on to a human rights framework.

That addresses the fact that, as you will see in your work in your constituencies, people face clustered issues relating to health, housing, education, employment, debt and poverty. Those issues are interrelated and are often systemic in nature, so they apply not just to one person but to multiple people. Applying a normative human rights framework to those scenarios helps us to overcome hurdles to improving people's everyday lives in a holistic and accountable way.

The empirical evidence on that is very much within Scotland. We have already looked at much of the what, why and how of incorporation. There has been a deliberative process for 10 years, with much lived experience being embedded. The "All Our Rights in Law" report that was produced as part of the national task force process explained all the things that people with lived experience of those clustered and systemic issues tell us: that they need more accountability and that they want to be able to rely on the law to claim their rights and hold power to account.

Looking at it from a different perspective, epidemiologists at the University of Glasgow estimate that there have been in excess of 350,000 deaths as a result of austerity. We can see that through the Marmot review, which looked at the social determinants of health, and shows that people are dying earlier, that their health outcomes are worse and that that is compounded in areas with socioeconomic deprivation. The reasons for addressing the issue holistically and empirically are there.

I have done UK-wide research with practitioners, ranging from people who advise rights holders in food banks all the way up to lawyers who advise them and to barristers and advocates in the highest courts in the UK. Those practitioners say that we need an accountability framework that we can use when we address those issues because, at the moment, we are trying to shoehorn arguments into the rubric of something else. Instead of looking at housing issues through the right to adequate housing, they look at it through article 8 of the European convention on human rights, which is not fully comprehensive. Ideally, it would be preferable to meet the UK's international obligations across the whole state, but the Scottish Parliament has an opportunity to close the gap in so far as that is possible within devolved competence.

Empirically, we also know that decision makers would be empowered by a framework that helps them to make decisions that comply with human rights. Often, decision makers are faced with what is called street-level bureaucracy and feel the managerial issues of cost efficiency and trying to deliver services in difficult circumstances. Normative standards, which are about dignity and human rights compliance, can empower people at the front line of decision making. Empirically, a holistic framework helps to address some of those issues where we know there is evidence to suggest that we need to do more.

Dr Tickell: To return to Maggie Chapman's opening question, which was about what difference a bill would make, my answer is that it depends on what bill we are talking about. We do not have a bill in front of us. We cannot talk specifically about the accountability mechanisms that may or may not be in the bill—I know that that was a major topic of the last consultation. It all depends.

The themes on what embedding human rights in law could mean in practice are all out there but, again, it depends. It depends on mainstreaming in practice. Do decision makers, whether they are involved in street-level bureaucracy or in the allocation of resources, think and use human rights deliberatively? You as a Parliament, for example, have the foundation of the European convention on human rights, which says that you should take into account those civil and political rights in deciding whether legislation that you are looking at is within or outside competence. We know that politicians often find themselves treating

the issues not as broad themes or values that need to be explored and battled with but as a legal tick-box exercise about whether something is within the law or outside it.

As you all know, the human rights principles are not rules; they are broad principles. In the context of social and economic rights, that is with a view towards progressive realisation, recognising that different states and societies have different levels of economic activity and different abilities to realise rights to health and what have you. It really all depends on what happens in practice. That is why those "technical issues" of the scope of the bill are not technical issues, because they are about what rights you can argue about and what rights you can use the accountability mechanisms for if something comes to court.

That is where the UNCRC bill judgment, which I am sure we will expand on in due course, has made a huge difference, as I said to you when I was at the committee previously. The debate cannot simply treat the devolution issues as if they are technical ones that do not go to the fundamental question of what any bill can achieve because, in my view, those technical issues are fundamentally about the kind of justice that can be achieved by a human rights bill.

Maggie Chapman: Thank you.

The Convener: We will move on to questions from Paul O'Kane.

11:45

Paul O'Kane: Good morning. Perhaps quite neatly, we will move on to the Government's reasons for not introducing the bill. I am keen to understand whether the witnesses find the reasons that have been given for that to be convincing or whether they think that other reasons were at play. With the previous panel, we heard some speculation around budgetary concerns, for example. With this panel, it would be useful to cover the Supreme Court's UNCRC bill judgment. I will start with Alan Miller.

Alan Miller: Do I find the Government's reasons for not bringing the bill to Parliament now convincing? No. I do not underestimate the challenges that the Government has faced—there have been multiple challenges in recent times. I do not underestimate the points about the implications of the UNCRC bill judgment from the Supreme Court. The issue is not just what the court determined in its judgment, which limited the scope of the UNCRC bill and therefore the human rights bill, but the uncertainty that it has created. No one can say with confidence what is devolutionary, what is reserved and what the parameters are.

We have a number of lawyers and academics here, but you could get another five in and I am sure that they would all have their interpretations. The situation is completely unsatisfactory for the ordinary person on the street, who has the right to ask, "What are my rights and what duties do these people have towards me, so that I know how to hold them to account?" We have been left in limbo land, not knowing where Westminster sovereignty ends and devolutionary competence begins.

I do not underestimate all that. The Scottish Government needs to see whether the new UK Government can be more engaged in trying to find some shared understanding and putting that into law so that people do not have to be a professor or whatever to make sense of it. I would welcome that, and it should be possible, because we are dealing with an international legal framework that the UK has signed up to and is obliged to give effect to one way or another within the UK and, therefore, the devolved Governments have the same obligations. It is not as if we have competing priorities, interests or drivers. It is the same framework, and it is just a question of giving that effect. I would welcome anything that comes out of that.

However, the big issue about the Scottish Government's reasons not to introduce the bill is that that reasoning about trying to get an agreement with the UK and a shared understanding of the sovereignty of Westminster need not and should not lead to the conclusion that we cannot introduce the bill to Parliament this side of the election. That is the crunch. I was talking to 15 members of the change team in the national collaborative who are not lawyers or academics or whatever, but are people who have been through the mill in life and have real life experience. They said, "Tell us, Alan—what's this all about? Why can't the bill come this side of the election?" I went through all of that and they said, "Right, right, right," and then they reduced it to a simple point: "So we have to wait for the outcome of the next election to see whether we get our rights?" I said, "Yes, that is it."

The negotiations with the UK Government need to go on, should go on and will, I hope, yield something—time will tell. However, that is not a reason for not introducing the bill this side of the election. The task force was clear that the current Government and Parliament have a responsibility to get the bill over the line. It would then take three to five years before the procedural and substantive duties in the bill came into effect. There is a long timeline for anything that comes out of the Scottish Government and UK Government discussions to then come to you in Parliament to strengthen the human rights bill, in the same way as you could strengthen the UNCRC act.

The discussions between the two respective Governments, welcome as they are, need not and should not have led to the bill not being introduced this side of the election. We do not know what the landscape will be on the other side of the election and whether the incoming Government will be committed to introducing the bill.

Professor McHarg: My view is probably a bit different. I said earlier that for a bill of this nature to work, it needs to be as broad as possible in its scope. It also needs to be as simple as possible; an analogy would be the Human Rights Act 1998, which is beautifully simple. Its application, of course, is complicated in any individual case, but the act itself is simple and easy to understand. The starting point for the UNCRC bill was the Human Rights Act 1998. It went beyond it in some respects, but it was equally simple, elegant and comprehensive. The UNCRC act that we ended up with was anything but simple and comprehensive and was very narrow in scope.

The issues that affected the UNCRC bill are only some of the competence issues that have to be grappled with, so this bill is at severe risk of ending up excessively complicated. If it is excessively complicated, its impact will be undermined. The time and resources that should be spent arguing about what people's rights require will be spent arguing about whether there is an obligation to do anything at all. That is bad.

If a delay means that you can get a better bill at the end of the day, that is worth having. There are things that you could do to try to fix some of the problems, but none of them are as good as the original model. They are all partial. They are all complex. Many of them carry competence risks of their own.

I keep banging on about this, but the competence risks do not come just from the UK Government. Some of them do. The UK Government has particular powers to stymie the enactment of any bill, but challenges can come down the road from anybody else who has an interest. That might be a public authority that says, "We do not have the money to meet this claim that you make of us, so we will argue for a narrow interpretation of the bill, which means we do not even have to engage in the substantive discussion about whether we have breached your rights."

A human rights bill risks being bogged down forever in competence difficulties. If we can deal with the issues at source—the equalities issues are more difficult, but the UNCRC competence issues can in principle be dealt with at source—we will get a much better bill at the end of the day.

Paul O'Kane: Would anyone else like to comment?

Nicole Busby: Your question was whether we were convinced by the rationale given for not introducing the bill. I am not convinced. I take Aileen McHarg's points absolutely and agree with them. However, having gone this far down the road—as you heard from the previous witness panel; I sat in on that evidence—civil society has invested a lot of time, resource and energy in this process at the invitation of the Scottish Government. It has upskilled hugely and so we have a well-informed, dynamic civil society sector ready to engage and participate. It has done that over many years now. Losing the trust and confidence of that sector is a risk that should be borne in mind.

I am not convinced by the reasons given by the cabinet secretary. One reason is that the UNCRC case, as Aileen McHarg has outlined, makes it difficult for a cohesive, coherent piece of legislation to be introduced without taking further steps to look at the risks and try to fix some of them.

The other concern is that the proposed approach to incorporation did not go far enough in protecting disabled people, women and those who experience racism. That was clear from the consultation exercise that the Government conducted in 2023. We saw a lot of disappointment in the responses to that consultation about the perceived weakness of approach. We have not seen a draft bill, but we saw the proposals at that stage. There is still a lot there that could have been put into legislation at this formative stage by way of a framework, a beginning point.

I come back to the positive duties approach that I spoke about earlier. That was outlined in the consultation exercise in relation to what we now call the equality treaties: the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; and the Convention on the Rights of Persons with Disabilities. That would have been a good underpinning for the Equality Act 2010 that we currently have.

The only other point that I will make is that there is incoherence here because the Scottish Government said in its programme for government that priority number 1 is to eliminate child poverty. It will struggle to do that without better and clearer enforceable rights. The human rights bill would have taken us one step further to achieving that. We have heard that it is a process, not an event, and the bill would have been one step, but it would certainly have given priority to the achievement of the eradication of child poverty.

Professor Boyle: There is no legal impediment to introducing legislation. The decision to delay is

political. Although the complexities around the devolution issues are difficult hurdles to overcome, they are not insurmountable. There is a decision to be made whether to delay or press ahead while those devolution issues are resolved.

Rather than take a view on whether the decision was correct or not, I am keen to understand the barriers and the paths forward—in other words, where the solutions are. You could introduce a bill much like the UNCRC act and accept that, although its scope will be limited, you can build on it over time. You could introduce a bill while the UK and Scottish Governments try to agree on clarifying the scope of devolution.

If you delay the bill, I am concerned that the election period is a difficult hurdle to overcome because no one can predict who the next Administration will be and who will have responsibility for this area. It may be the same Administration, but portfolios could change. We could have a different form of cabinet. We could lose a lot of the knowledge that has been built up. People can change roles. I am concerned that, ultimately, if a delay occurs and you do not introduce the bill within this parliamentary session, you need some form of custodianship that takes it from before the election to after the election.

Several participatory processes have resulted in a national task force, the First Minister's advisory group and lived experience boards. There has also been involvement from the national human rights institution. A form of independent custodianship between election periods would be extremely helpful to make sure that nothing is lost. Also, you could introduce a committee bill under rule 9 of the standing orders so that the Parliament could deliver as a guarantor of human rights.

We have not seen a draft bill, but the scoping issues are unwelcome and complex. There is no doubt that the UNCRC reference and the difference that that made to the UNCRC act was a watershed moment. It is important to understand that that barrier means that ultimately, the scope of a human rights bill will be restricted to acts of the Scottish Parliament and powers conferred on decision makers under acts of the Scottish Parliament. Prior to the UNCRC reference, it was thought that you could incorporate rights in relation to devolved areas. A decision maker would need to ask whether the area was devolved or reserved and, if it was devolved, incorporation legislation would apply. Now, however, a decision maker needs to look at the source of the function. If the source of the function or power is held in a UK act of Parliament, even if that is in a devolved area, it is beyond scope.

12:00

That is problematic because, throughout our period of devolution, acts of the Scottish Parliament have exercised devolved competence by amending acts of the UK Parliament in devolved areas. For example, the Housing (Scotland) Act 1987 contains amendments that the Scottish Parliament has passed throughout its devolved history, but that would be beyond competence because the 1987 act is an act of the UK Parliament. It comes down to whether the provision is hosted in an act of the UK Parliament or in an act of the Scottish Parliament. Even if it is a devolved area, if something is in an act of the UK Parliament, the human rights bill would not apply.

To come back to where I started, however, this is about state obligations. These are already UK state obligations. Decision makers should already be working to seek to comply with UK state obligations unless a piece of UK Westminster legislation prohibits them from doing so. There are ways to try to move past the difficulty with the scoping issue.

In the same way, that barrier applies to the UNCRC act and there are three options to move past it. First, over time, you could codify, repeal and re-enact all those acts in relation to children and homelessness and all the other areas covered by acts of the UK Parliament and pull them over into acts of the Scottish Parliament so that the bill bites and is brought within scope. That would be really time and resource intensive.

The second option—Aileen McHarg has written an excellent paper on this, so I defer to her on the options—is either primary legislation to clarify section 28(7) of the Scotland Act 1998 to make it clear that the bill can apply to acts of the Scottish Parliament even if they amend UK acts in devolved areas, or a section 30 order.

Thirdly, I want to bring your attention to two other processes that we might learn from. One is the bill of rights process in Northern Ireland that had a 10-year participatory process, which ended with recommendations in 2008 to have a new act for rights in Northern Ireland. After that 10-year process, it was given to the UK Government, which was a Labour Government at the time, and the Northern Ireland Office said that it did not see those rights as being particular to Northern Ireland and saw difficulties about the incorporation of economic, social and cultural rights that would not apply UK-wide. As soon as you open the door to bringing the discussion to the UK Government, that will, in a good way, open the discussion of asking the UK as a state to close its accountability gap but, ultimately, that will not be a quick process.

The second process was the section 30 order to clarify the Scottish Parliament's power to have a referendum in Scotland. Even when everyone was in agreement on that, it took 30 months to reach the legislation that enabled the Scottish Parliament to pass the Scottish Independence Referendum Act 2013 so that a referendum could be held here. None of the timelines is short. I agree with what Alan Miller said at the start. Ultimately, you can have two processes concurrently, but it will take immense political stewardship to try to clarify the issues on a UK-wide basis—it is not just devolution in Scotland that is at issue but also that in Northern Ireland and in Wales—while at the same time doing as much as you possibly can to close the gap on accountability in those areas where the Scottish Parliament can.

Paul O'Kane: Thank you. I am conscious of the time, so I will bring in Dr Tickell.

The Convener: Yes, Andrew Tickell has indicated that he would like to come in.

Paul O'Kane: I am keen to get from Dr Tickell his view of the possibility of solving the problems that have been created.

Dr Tickell: Katie Boyle outlined a range of the particular challenges and Aileen McHarg has described them as arbitrary. The only bill that you can pass will be an arbitrary one about who can take it to court, who can challenge the issue and which rights fall within the bill or not. The ways forward are not generally within the gift of the Scottish Parliament. That is the first and simple thing to say. The source of all these problems is the UNCRC judgment and Katie Boyle outlined its main force.

Let us go back to the basics. The reason why the Supreme Court held that the UNCRC act exceeded competence was because of the interpretation of section 28(7) of the Scotland Act 1998, which says in effect that Westminster retains the right to legislate for Scotland. Most people and, I suspect, many of the MPs who passed it and even the Westminster Government that sponsored the bill thought that that was simply a declaration of what we all know: that Westminster is sovereign under the constitutional system. But in the hands of Lord Reed in the Supreme Court, that was reinterpreted in a much more expansive way to say that the Scottish Parliament cannot condition that legislative power by the Westminster Parliament. You cannot subject acts passed by Westminster, even in devolved areas, to the rights in the UNCRC act or, indeed, in the bill that we are discussing right now.

That is a fundamental problem. That approach to devolution by the Reed court is, in my view, completely incoherent and impractical. It is one of the worst devolution judgments that has ever been handed down. If we want devolution to work better within the UK, there is a powerful argument that reversing that decision by the court—and there are different ways to do it—would be one way of fixing the problem in a straightforward way that would mean that we did not have to get into the weeds and difficulties of whether this act falls within competence and that act does not and the bafflement and confusion that that is guaranteed to generate for rights holders and for duty bearers.

The Scottish Government should engage, in my view, with the Westminster Government—and indeed others, including the Parliament and other interested parts of the sector here—to try to point out that we can fix this problem quite straightforwardly. The Scotland Act 1998 recognised that although foreign affairs are a reserved matter, giving effect to international agreements was within devolved competence. The Scotland Act 1998 as originally framed—over 25 years ago now—recognised that this Parliament might wish to incorporate new rights into law. It is the judgment by the Supreme Court, knocking on its head the expectation of most academic public lawyers in the UK about how devolution would work, that has generated the problem.

There is no reason why we should simply stick with it, but it would require an amendment to the primary legislation set out in the Scotland Act 1998, which would require Westminster to legislate. Aileen McHarg sets out a cunning plan in her evidence for how that might be done in a more straightforward way, by using a section 30 order to amend schedule 4 to the 1998 act. She is much better placed than I am to give you the detail of that cunning plan. Either which way you do it, there are practical solutions, but it will require engagement with the Scottish Government and with the UK Government to get it done.

You may remember that the discussions that we had at the return to stage 3 of the UNCRC act were about deciding which public authorities have responsibility, which laws they are subject to and, in terms of the right to challenge legislation, which acts of the Scottish Parliament fall within scope. If you introduced a human rights bill right now, you would have to have all that detail in there from stage 1. You cannot avoid doing that. The idea that the Scottish Government should have proceeded with a bill, thinking that it might need to be radically amended down the line depending on a political conversation that has not happened yet, does not feel terrifically realistic to me.

Paul O'Kane: That was comprehensive. Thank you.

The Convener: Yes—that was a comprehensive answer.

I thank everyone for their questions and answers but, as time is now tight, I ask you to be as succinct as possible. Of course, answers need to be well-rounded, so I do not want to cut off anything that you really have to say, but I would be grateful if you could keep it succinct, because we still have another three members, possibly, to ask questions and we have only a few minutes left. Marie McNair is next.

Marie McNair: I will be brief, convener. How was the non-introduction of the bill communicated to you? There we go—that was very brief.

Professor McHarg: In my case, I read the programme for government. That was it.

Nicole Busby: Because I am a member of the implementation group, I got a letter from the cabinet secretary. That was the letter that came to the committee.

Professor Boyle: I was in the same circumstances as Nicole Busby. As a member of the implementation group. I received a letter.

Marie McNair: Okay. Thanks.

The Convener: Is that you? That was really succinct. Thank you. We move on to questions from Annie Wells.

Annie Wells: We were disappointed when we received the letter and heard that the bill was not being introduced. What were your initial thoughts when you received the letter or, in Professor McHarg's case, read the programme for government? How was the communication for you?

Nicole Busby: It could have been better. Two meetings of the implementation group were cancelled, so I suppose we had begun to feel that things were maybe not as straightforward as they had seemed to be. It was not a huge surprise, but we were disappointed by the lack of attention to the subject in the programme for government, even in the absence of a bill. There is mention of the human rights legislation, which is good, but there is no real elaboration on that. It is disappointing.

Professor Boyle: In relation to our roles professionally, it is important to be able to separate a personal reaction from a broader reaction. When I was able to do that, I noted that every stage of the process had been incredibly participative. It had been genuinely informed, inclusive and deliberative, and it had included people with lived experience who had given up their time when they were facing these types of issues. They had been empowered through that process. To have no consultation or notification about a delay is essentially disempowering. Rather than calling it disappointing, I would call it disempowering.

Alan Miller: For me, it is not personal, because it is not about me. It is about the impact on people's everyday lives and the frustration that is experienced out there as a result of what was communicated. I am less concerned about how it was communicated, although that is clearly an issue.

The complex, challenging constitutional and legal issues cannot be overstated. However, I have been on this journey, with many others, since the Human Rights Act 1998 and before, and when there is a moment to take a big step forward—it may not be as big as we would like, for various reasons—we want to secure that base camp on the journey up the mountain. Once we have secured that base camp, we can go on and take the next step towards the summit. We never reach the summit, but we are always going there. This was an opportunity to secure a big step forward.

The Human Rights Act 1998 has a lot of deficiencies too, as it contains only civil and political rights and not the everyday, bread-and-butter economic and social rights. However, that act combined with what the bill would achieve would give rise to all kinds of innovative policy developments, creative policy making and development of good practice. In a sense, that is below the radar of all the legal and constitutional discussion that will take place here, important as that is. In everyday life, it would free a lot of duty bearers and rights holders to engage very differently from how they have been able to engage before, and to come up with things that actually improve people's lives. Securing that base camp would have been a stimulus for all of that. That is the reason for the frustration that is felt.

Annie Wells: I am happy with those answers, convener. Thank you.

Meghan Gallacher: May I ask a short question, convener?

The Convener: Yes. We have an extra few minutes. I will not rush you or cut you off.

Meghan Gallacher: That is great.

Good afternoon, panel. Given that we are roughly 18 months away from an election and we were perhaps about to embark on stage 1 of the bill, should the Government have included it in its programme for government? Would that have allowed sufficient time to get a bill of such breadth and scope through Parliament? Might the Scottish Government have run out of time to embark on something that is so wide-ranging?

Alan Miller: I am not an expert on parliamentary procedure, but the advice that we were given until the decision was made not to put the bill in the PFG was that there was sufficient time in the legislative timetable to get it through. That was

never presented as an obstacle. Enough obstacles in the road were presented, but that was not one of them. No concerns were widely felt that the time between now and the end of the parliamentary session was too short. Introduction of the bill had been left later than many of us wanted, although we understood some of the reasons for that. However, the idea that we were running of out time was never aired as a big issue. I do not think that that underpinned the Government's reasoning at all.

12:15

Dr Tickell: Thus far, among the particular technical challenges that we have discussed, we have focused primarily on the UNCRC implication. It is right to do that, because it is probably the most fixable of the problems that we have in front of us, with good will between the different parts of the British state. However, in the context of discussing the timeline, it is worth highlighting that, as Aileen McHarg mentioned earlier, that is not the only competence challenge with the legislation. The other, which is also substantial but has been less scrutinised in public thus far, is the issue of equal opportunities being a reserved matter. That poses particular and different challenges for those parts of the incorporation agenda that focus on rights around disability and race and the rights of women, which are also in play here. You cannot pass a bill until you have resolved those fundamental issues.

If the Scottish Government had introduced a bill, I think that we can say with a degree of confidence what strategy it would have adopted for the mainstream social and economic rights. It would have replicated the approach that we saw for the UNCRC bill, inadequate and problematic as that is. However, we also have to take account of that second strain around equal opportunities and precisely what that reservation means that this Parliament cannot do in the field of equal opportunities. That is also an area of significant ambiguity. If we are trying to track a constructive route forward, that also needs to be explored and clarified. If change is to be put on a sure footing, it may also require further action by the Westminster Government to clarify the devolved settlement and make clear what this Parliament can and cannot do in relation to those rights that are rooted around issues of equality.

The Convener: I will wrap up the questioning. What are your suggestions for a way forward? A wealth of organisations have said that they would like the Scottish Government to commit to introducing the bill in February 2025. Emma Hutton has suggested that the human rights movement leads work on the bill and Katie Boyle has suggested that a working group be custodians of the work to date to ensure continuity after the election. I ask each of you to give your suggestions, starting with Andrew Tickell.

Dr Tickell: You heard from the previous panel that nothing has really changed around the legal issues in recent times to prevent the Scottish Government from progressing with the bill, but I think that that is politically not true. A new Westminster Government has been elected and, as part of its agenda, it has made clear that it is concerned about Sewel motions and other things to do with devolution and how it is working, as well as intergovernmental relations more generally. The Scottish Government could pass the issue to civil society and make the Scottish Human Rights Commission the custodian of it, but that would not deal with the fundamental problems, which are not really about the merits or demerits of bringing human rights into devolved law but about devolution and its limits and constraints.

The best way to do this simply and, as Aileen McHarg said, to get the best bill at the end of it is to explore approaches to fixing the devolution problems that were created by the UNCRC judgment and by the ambiguity around equal opportunities in schedule 5 to the Scotland Act 1998. Only the Westminster Government can do that, and only UK ministers can make those changes. For me, that is the place to start, because that is our last, best hope of incorporating the rights meaningfully into Scots law in a way that will achieve the goals that we outlined at the beginning, which are maximalist and expansive, but also simple and clear. That will mean that rights bearers and duty holders know what they can and cannot do and know the legal consequences and risks of not mainstreaming the rights in their practice or not reflecting them in their decision making. That is the best route towards having the best human rights bill that is possible, and it relies primarily on politics driving legal change.

Alan Miller: We need momentum, vision and renewal, with the Government taking its responsibility to put in place a collaborative, problem-solving process—which the task force process was—to ensure that, at the earliest opportunity, a bill can be presented to the Parliament that is as maximalist as it can be in the current circumstances but which reflects the need to legislate where we are, under the current constraints, with a view to strengthening the legislation and the human rights framework over a longer period of time.

If the Government does not reverse its decision, which does not look likely, we should do everything that we can over the next 18 months to ensure that the momentum is not lost, that we are not sitting on our hands waiting for something to

come out of the discussions between Westminster and Holyrood and that, rather than being disempowered, people continue to be engaged in problem solving and taking responsibility so that we have a bill that is in as good a shape as possible as early as possible in the new session of Parliament. That means that all the political parties must look at their manifesto commitments. The party that presently forms the Government should certainly have in its manifesto a commitment and clear intent to introduce a bill at the earliest opportunity.

I work a lot with the UN in different parts of the world, and we have to recognise that, in getting to this stage, Scotland is setting an example in affirming the international human rights system. To a certain extent, the world is looking at what progress Scotland is making, and the Scottish Government should be given credit for taking us to this stage. It has stalled, but we are going into extra time, and we should still be working collaboratively to get the bill over the line for our own purposes as well as because of the international message that it would give. I see Maggie Chapman nodding, and I note that the Greens encouraged the Government to go ahead with the bill. If the committee and the Parliament as a whole did something similar, that would be very helpful.

Professor McHarg: Not surprisingly, I agree with Andrew Tickell that the important thing is to resolve, as far as possible, the competence problems at source. I say that because it is not just a matter for this bill. The UNCRC judgment puts the competence of this Parliament into a state of serious doubt across the board, and that needs to be resolved. As Andrew said, that is dependent on the agreement of the UK Government, and the imperative is therefore to persuade it that change is required, to tell it why this matters to you and—this is something that confuses me—to make it realise that it does not really matter to the UK Government what you do in devolved areas. It has been standing on a point of principle that does not seem to me to be a point of principle because it is a misinterpretation of what section 28(7) is about. This is a political process. If you, as a Parliament, care about the bill and about your competence generally, you need to be bringing that pressure to bear on UK Government ministers.

There are ways of doing this. Primary legislation is a possibility, but it is not necessary. A section 30 order can be made, and there is no need for that to take 30 months, as Katie Boyle said. Once the Edinburgh agreement was in place, it was only a few months before the section 30 order in that case was passed. Section 30 orders are passed quite frequently and they do not take that length of time. We could fix this quickly if agreement can be reached to do so.

Nicole Busby: Given where we are, I agree with that approach, but I come back to the point that I started with, which is that we need to think about what can be done while we are waiting for a bill to be introduced.

In the programme for government, priority 4 is to ensure high-quality and sustainable public services, and there is some detail on a framework to embed equality and human rights across the Scottish Government and wider public services, with mention of an action plan, a tool kit and linking that to the public sector equality duty. That really important preparatory work needs to be done anyway, regardless of the bill, and we should do it. We should be looking at the frameworks that we have for the duties around equality, including the fairer Scotland duty, and linking those to human rights duties for all duty bearers in Scotland. That preparatory work would clear the way. The previous panel talked about the necessary change in culture within public services, and that work would also be important groundwork in that regard.

We know from the public sector equality duty consultation that took place a couple of years ago that public authorities and the civil society sector have a real appetite to support changes to the PSED approach, and we could work on that in the meantime. It would be a valuable piece of work that we could all get stuck into while we wait for the legislative approach and the work with the UK Government that Aileen McHarg and Andrew Tickell have outlined.

Professor Boyle: We need clarification of the scope of devolution and clarity from the UK Government on the legacy of the UNCRC reference. However, that process does not need to be completed before we can press ahead with embedding rights, which can already apply to those pieces of legislation that are within scope. The bill should be treated as a stepping stone and it should be passed expediently. At the same time, work should be done to clarify the scope.

At this point, we need a clear plan, milestones and deliverables. What is the path that is being taken? If it is a section 30 order, that can help to address section 28(7) issues and the equal opportunities reservations. However, if that is the process that is being followed, it would be helpful to know that so that we can start to engage around it. We need clarity on the path forward and on when we might hope to see the objectives being reached. We also need to work towards incorporation without delay and, if we have to wait until after the next election, we will need some form of custodianship so that we do not lose all the work that has been done to date.

The Convener: Thank you all for your participation this morning. It is much appreciated.

That brings the public part of our meeting to a close. We will move into private to discuss the remaining items on our agenda.

12:26

Meeting continued in private until 12:41.

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