JUSTICE 1 COMMITTEE

Wednesday 7 December 2005

Session 2

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JUSTICE 1 COMMITTEE
40th Meeting 2005, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Karen Gillon (Clydesdale) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Professor Jim Murdoch (Adviser)

THE FOLLOWING GAVE EVIDENCE:

Simon Braunholtz (MORI Scotland)
Andrew Dickson (Scottish Executive Justice Department)
Ian Duguid (Faculty of Advocates)
Roy Martin (Faculty of Advocates)
Jane McLeod (Scottish Executive Legal and Parliamentary Services)
Brian Peddie (Scottish Executive Justice Department)
John St Clair (Scottish Executive Legal and Parliamentary Services)
Ed Thomson (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 5

Scottish Parliament

Justice 1 Committee

Wednesday 7 December 2005

[THE CONVENER *opened the meeting in private at 09:52*]

10:53

Meeting continued in public.

Scottish Commissioner for Human Rights Bill

The Convener (Pauline McNeill): Good morning. I welcome everyone to the 40th meeting in 2005 of the Justice 1 Committee. We have one apology today from the deputy convener, Stewart Stevenson.

Item 2 is consideration of the Scottish Commissioner for Human Rights Bill. I welcome the bill team: Brian Peddie, Ed Thomson, Ross Truslove and John St Clair. Brian Peddie will make a brief presentation to the committee. I ask for a presentation of no more than 10 minutes' length, which is our usual time limit—we never have enough time for these things—before we move on to questions from the committee.

Brian Peddie (Scottish Executive Justice Department): Members should have a copy of the main presentation headings, which summarise the main points of the bill. Perhaps unsurprisingly, given the bill's title, its purpose is to create a Scottish commissioner for human rights. The commissioner will have a promotional and awareness-raising role, rather than an enforcement role.

It may be helpful if I give the committee a little background information. In 2001, the Executive conducted a public consultation on whether Scotland should have a human rights commission and, in December of that year, announced that such a commission would be established. A commitment to establish a human rights commission was then included in the partnership agreement. A further consultation by the Executive in 2003 set out the main elements of the proposals and sought public comment on them. An analysis of the responses to that consultation was published in May 2004.

From the point of view of accountability, the commissioner will be similar to other commissioners that have been established post-devolution, such as the Scottish information commissioner and the commissioner for children and young people. In other words, the human rights commissioner will be independent and accountable to the Parliament rather than to ministers. He or she will not be subject to direction from the Parliament, except on specified procedural and administrative matters that are detailed in the bill. For example, the Parliament will give consent to the number of staff and the location of the commissioner's offices. The commissioner will be required to submit to the Parliament annual reports on his or her activities, as well as reports on any inquiries that he or she may conduct.

I turn briefly to structure and funding. It is proposed that there will be one commissioner and up to two deputy commissioners. The commissioner will be appointed by Her Majesty on the nomination of the Parliament. A similar model was adopted for the commissioner posts that have already been established. In addition, the bill provides that the commissioner will have a chief executive. Although the commissioner's office will be funded by the Parliament, the Executive has announced that it will provide the Parliament with an additional £1 million per year, starting in 2006-07, to cover the commissioner's costs.

It is proposed that the commissioner's remit will cover all the international human rights instruments that the United Kingdom has ratified, but the bill states that the commissioner will be required to have particular regard to the European convention on human rights. The reason for that is that the ECHR is the only instrument that is directly enforceable in Scots law under the Human Rights Act 1998 and the Scotland Act 1998 and is therefore the one that is of greatest legal importance to public authorities and to the public at large. The remit will cover devolved matters, but will not extend to reserved issues.

The commissioner is to operate under the general duty

"to promote awareness and understanding of, and respect for, human rights and, in particular—

(a) to encourage best practice in relation to human rights, and

(b) to encourage Scottish public authorities to comply with section 6 of the Human Rights Act 1998",

which is the provision that places a legal duty on public authorities to operate in compliance with the ECHR. Section 3 of the bill seeks to place a specific duty on the commissioner to keep under review the law of Scotland and the policies and practices of public authorities. The commissioner will be able to recommend changes to the law and those policies and practices on the basis of such review.

The bill seeks to establish an information-giving function, under which the commissioner will be

able to disseminate information and ideas, provide advice or guidance, conduct research or provide education and training. To enable the commissioner to perform his or her functions properly, the bill proposes giving him or her a number of powers. In particular, the commissioner will have the power to conduct inquiries into the policies or practices of Scottish public authorities and will be able to require the provision of information for the purpose of such inquiries. For example, someone could be required to give oral evidence. The commissioner will also have legal power to gain access to places of detention such as prisons for the purpose of conducting an inquiry. That was not part of the Executive's original proposals for the commissioner as published for public consultation. However, in the course of considering the responses to the consultation and developing the proposals for the bill—as well as taking into account the experience of the Northern Ireland Human Rights Commission, for which the issue became significant—it was felt that it would be helpful for the commissioner to have such an explicit power of access.

11:00

The commissioner will also have the power to intervene as a third party in court proceedings. That goes wider than the original proposals, which mentioned the ability to intervene in court proceedings in a rather more restricted way and specifically in connection with judicial review proceedings. The proposals as set out in the bill apply to all civil proceedings, except for children's hearings. The commissioner's ability to intervene in court proceedings will not be restricted to judicial review proceedings.

A brief word on what the commissioner will not be able to do under the proposals may be helpful. He or she will not be able to investigate complaints by individuals; to bring legal actions for alleged breaches of human rights in his or her own name; to provide support for individuals who bring cases; or to enforce legally the findings of commissioner inquiries. We expect inquiry reports and recommendations to have considerable force, but not to the extent of being legally enforceable: authorities will not have to comply legally with any findings. That is because the essential vision for the commissioner is that he or she will have a promotional and awareness-raising role, but not an enforcement role.

It may also be helpful if I were to say something about the proposed Great Britain commission—the commission for equality and human rights—that will be set up under the Equality Bill, which is being considered at Westminster. The GB commission will have similar functions with regard to human rights as the proposed Scottish commissioner. The GB commission will also have a role in connection with equality issues, such as race discrimination, in relation to which it will take over the enforcement role of the existing equality commissions. Essentially, however, such matters are reserved. They are separate from the human rights function, although there is a certain degree of interface between human rights and equality issues.

The GB commission will be accountable to United Kingdom ministers, not to the Westminster Parliament. It is expected that the GB commission will not assume its functions before October 2007. The relationship between the Great Britain commission and the proposed Scottish commissioner has given rise to significant discussion and comment and is seen as an important component of the proposals here and south of the border.

The Great Britain commission will have a Scotland committee, and the Government announced last week that the main Scottish office of the Great Britain commission will be in Glasgow. The GB commission will deal with reserved human rights issues in Scotland, while the Scottish commissioner will deal with devolved issues. However, they will be expected to work closely together on issues of mutual interest that might involve both devolved and reserved aspects. It is expected that the GB commission and the Scottish commissioner will enter into a memorandum of understanding that will set out the arrangements for such co-operation.

It is also worth mentioning that, according to the provisions of the Equality Bill, the Great Britain commission will not be able to look at a devolved human rights issue or otherwise exercise its functions in connection with such an issue without the consent of the Scottish commissioner.

Co-operation with other bodies is also seen as a key part of the role of the Scottish commissioner for human rights, as is the case with the GB commission. The bill would give the Scottish commissioner a general power to consult and co-operate with "any other person", which would include not only the GB commission but other relevant interests such as the commissioner for children and young people. The Scottish commissioner could enter into memoranda of understanding, or similar arrangements, with such other parties in order to set out arrangements for co-operation. The bill will place a duty on the commissioner to avoid duplication of the activities of other parties.

At this point, that is all I want to say about the main headings of the bill. I am happy to take questions.

The Convener: Thank you—that was a helpful summary.

Mr Bruce McFee (West of Scotland) (SNP): I will direct my questions at Mr Peddie, whom I thank for his paper. I will cut straight to the chase: why do we need a Scottish commissioner for human rights at all, particularly given that their powers will be promotional only?

Brian Peddie: Human rights are at the heart of the devolution settlement. As I said, there is a legal duty on public authorities, Scottish ministers and the Parliament to act in compliance with the European convention on human rights. It is therefore important that public authorities are fully aware of what that means for them and of what their obligations could be. Similarly, the public at large should be aware of what it means. We must retro-inform them about their rights and about how they might go about enforcing them.

The Executive's proposals were very much about the commissioner being part of the process of creating a human rights culture in Scotland. That ties in with wider activities—for example, activities on the equality front in connection with anti-racism and anti-sectarianism and activities that are anti other forms of discrimination. All such activities have human rights aspects.

Mr McFee: So we just need somebody to inform us about the issue and to advise public bodies. There is nothing more than that.

Brian Peddie: No, I think that the bill goes further than that. The bill will give the commissioner the ability to conduct inquiries into particular issues. I mentioned the duty on the commissioner to keep the law and policies and practices under review. The commissioner will therefore be able to consider specific areas that he or she, or others, feel are of concern or are significant. The commissioner will be able to make recommendations on how practices in a particular area might be improved so as to comply better with human rights requirements.

The bill is not only about general awareness raising. The commissioner will be able to focus clearly on specific areas and to make recommendations to public authorities on how to improve their activities.

Mr McFee: If we believe that there is a need for a commissioner—and I assume that the Executive has established that there is such a need—why will we require the commissioner only to comment or to make recommendations, without giving them any powers of enforcement? Why are we establishing a commissioner rather than a commission, and, if the role is so important, why will the commissioner not have powers of enforcement?

Brian Peddie: There is already a mechanism for the enforcement of human rights through the legal system. Rights under the ECHR are directly enforceable in Scots law. If people feel that their rights have been breached, they can take their case to court. Whether giving the commissioner direct enforcement powers would add any value is, to be frank, questionable, when there is already a well-established mechanism for people to enforce their rights through the legal system. The bill is more about ensuring that people and authorities know what those rights are, in the hope that helping authorities to be more ECHR compliant will avoid, or at least reduce, the need for any enforcement action.

The Convener: I take the point that the primary role of the commissioner will be to promote awareness of human rights. That covers a whole range of areas. To your knowledge, has the Executive identified any failings so far?

You mentioned a number of other commissions that deal with equal rights in areas such as race. People have also used the legal system to challenge criminal procedures using the ECHR. I believe that more than 300 cases are going through the courts on the ground that criminal procedures may have contravened people's human rights. Recently, Lord Bonomy made a notable judgment on slopping out. It seems that human rights issues appear daily in our courts. Where are the existing bodies and forums for challenging human rights failing?

Brian Peddie: First, it is clearly important to have a legal mechanism that enforces convention rights, and that is what we have at the moment. However, it is not necessarily the most effective or efficient mechanism for ensuring that public authorities comply with human rights in everything that they do, as it depends on individuals taking cases through the courts. To secure compliance, it would be more efficient to assist authorities with their efforts to comply and therefore, one hopes, to reduce the number of challenges that arise in the first place.

You quite rightly mentioned the number of cases that have been brought before the courts, but it is relatively small compared with the total volume of court cases. Some predicted a flood of human rights cases immediately after devolution, but that has not materialised. There have been some important cases, including those on slopping out. However, it is better to see the whole picture. The points about legal enforcement through the courts are important, but that is not the only, and may not be the best, way to ensure that all authorities meet their obligations.

The Convener: A human rights commissioner might work with the Scottish Prison Service, for instance, if they took the view that slopping out

contravenes human rights. Is that the kind of area that is envisaged?

Brian Peddie: That would be possible, given that the SPS is a public authority.

The Convener: It is helpful to get examples, but that was not a particularly good one. Her Majesty's chief inspector of prisons has done a good job so far of bringing to the Parliament's attention his repeated and consistent view that slopping out is fundamentally wrong. I cannot remember whether he said that slopping out is a direct breach of human rights legislation, but many members have supported his view and have felt that the Executive should have acted quicker. Regardless of whether slopping out contravenes human rights law, most of us think that it is inhumane. It is perhaps not a good example, but it might help the committee to identify the kinds of areas on which the commissioner could work. However, would that work duplicate mechanisms that already exist?

Brian Peddie: I appreciate your point. Some time ago, the Executive conducted what was effectively an audit to identify areas that might give rise to possible human rights concerns. We are not sure whether local authorities have done anything similar. The definition of public authorities, of course, includes local authorities and other bodies that are not part of the Executive. Clearly, their services and the things that they do for their communities can raise human rights issues. A significant part of the commissioner's role will be to reach those parts of the public sector that so far may have not received the same attention as particular areas of Executive activity, such as prisons, have received. In the absence of a commissioner who has done that kind of work and in the absence of studies produced by local authorities, it is rather hard to give specific examples. However, examples might include discrimination in the provision of local authority services, such as housing, or in the treatment of people in hospitals or care institutions.

11:15

Mike Pringle (Edinburgh South) (LD): On that point, if someone wants to complain about housing, they can now go to the Scottish public services ombudsman.

The convener talked about Dr McLellan, who looks at prisons, and various other institutions. Surely an awful lot of the proposed commissioner's functions are already carried out by an awful lot of the people who work in the human rights area. Will the job of the Scottish commissioner for human rights be full time?

Brian Peddie: As you rightly say, there are a number of commissioners, ombudsmen and other interests out there in different sectors. Perhaps a key difference in respect of the commissioner for human rights is that he or she will not be restricted to a particular sector of activity but will be able to consider the human rights implications of a whole range of activities. For instance, the commissioner might look at a housing issue. Human rights issues that might arise in that area might also arise in other areas of activity. The commissioner will be able to take a broader view than a purely sectoral body, such as a housing ombudsman, might take.

The Executive has said that it expects the appointment to be made on a full-time basis. That decision is not one for the Executive to make, but one of the provisions in the bill is that the commissioner cannot hold any other office or employment without the consent of the Parliament. The clear indication is that the job is expected to be full time.

The Convener: Bruce McFee will need to be brief.

Mr McFee: I am more than happy to be brief.

Is it not already the case that local authorities are required to comply with human rights legislation? Is it not also the case that there is a prospect of considerable crossover or duplication between the work of the commissioner and that of local authorities?

Brian Peddie: The commissioner will not duplicate the work of the local authorities, given that he or she will not deliver services in the way that local authorities do. Clearly, there is—

Mr McFee: I was not suggesting that; I was talking about the commissioner overviewing what a local authority does, to ensure that it is compliant.

Brian Peddie: That is certainly true. During the Executive's consultations, which involved local authorities, a number of authorities said that they would actively welcome being able to obtain advice from a human rights commissioner as that would assist them in becoming more aware of what their obligations mean in practice and how they can adapt their policies and practices to become more compliant.

Another important point is that the Scottish commissioner for human rights will be independent. That is the case precisely because he or she will not be responsible for the provision of services. The commissioner will be accountable only to the Parliament; he or she will therefore bring to bear an independent perspective that will add to any scrutiny that local authorities themselves might undertake.

Some authorities have undertaken some work, but other authorities have not—or at least they have not done so to the same extent.

Mr McFee: Could you put that into context? I would not like this to be represented as—

The Convener: Bruce, we do not have time.

Mr McFee: I wanted to check the statement that local authorities are in favour of the proposal. The evidence is that their support is far from universal.

The Convener: I am sorry, but I need to move on.

Mr McFee: I understand.

The Convener: I allowed you time to ask a brief supplementary—you took advantage of me.

Margaret Mitchell (Central Scotland) (Con): My colleagues have established that the commissioner will not have any enforcement powers, but will have the power to monitor the law; the practice and policy of public authorities; promote awareness; disseminate information and ideas; and even—in some circumstances—require information. Is there a danger that it will be a huge paper-pushing exercise that will, instead of being of advantage to the public and private sector bodies that are trying to get on with their business, land them with yet more bureaucracy and regulation? The commissioner will have no teeth whatever, so how will he or she enforce a principle or attend to a breach of human rights?

Brian Peddie: The added bureaucracy and paper chasing would be much more acute if the commissioner was to have an enforcement role, but that is not proposed. The bill would not add to the existing substantive human rights obligations on public authorities. The only additional obligations would be to respond to requests for information from and reports by the commissioner, for example, but that is a small load compared with what compliance with human rights means for the activities of local authorities or other public authorities. Part of the objective is that the commissioner should help public authorities to improve their awareness of their obligations and how to comply with them and, therefore, possibly to reduce bureaucracy rather than increase it.

Margaret Mitchell: I am puzzled by that. You suggest that, if the commissioner had enforcement powers, more paper pushing would go on. How do you intend to educate public authorities and private business and to disseminate information and ideas to them?

Brian Peddie: Precisely how the commissioner would go about that would be a matter for the commissioner, not for us.

Margaret Mitchell: Are there any ideas about that? We have a bill in front of us and it is said that we will disseminate information and educate; it would be nice to have an idea of how we will do that.

Brian Peddie: A specific example might be helpful. The Executive is already funding a non-governmental organisation—Human Rights Scotland, which used to be called the Scottish Human Rights Trust—to provide voluntary sector staff with education and training in human rights issues so that they are better able to take such matters into account in dealing with their clients. That work has been deemed to be successful because of the numbers of people who are going for the training and the interest that has been shown in it. I understand that it is now going beyond the voluntary sector and that people from other sectors are also taking part. The running of training courses on human rights is a specific example, but the Executive undertakes similar activity to inform its staff about human rights so that they are better taken into account in development of policies. That will ensure that policies are convention-rights compliant.

Margaret Mitchell: Are we to assume that education, awareness raising and dissemination of information will be limited to a memo going round that says, "We have great training courses that will tell you all about human rights and get you right up to speed with them"?

Brian Peddie: There will have to be far more than circulation of a memo. There are real issues with measuring the effectiveness of such activities, because human rights is a soft area in which it can be difficult to develop measures of activities' effectiveness. Nevertheless, it is important that such activity be engaged in. It is not only about telling people about human rights; some kind of follow-up is required to ensure that human rights are being taken into account. If one is running training for staff in an authority or a particular sector, it might well be appropriate to revisit them a year or three down the line to try to ascertain what effect the training has had on service delivery and policy development.

Margaret Mitchell: I will leave that line of questioning, but I am far from satisfied that we have a clear picture of how many pieces of paper and e-mails will cross people's desks and end up detracting from their core purposes in service provision and enterprise. I really would like more on that at some time.

How were the powers that are intended for the commissioner arrived at? You mentioned that the ECHR is overarching legislation to which you have to adhere, but what account did you take of the Paris principles in determining the commissioner's proposed powers?

Brian Peddie: We took close account of the Paris principles in developing the proposals, because the Executive wishes the commissioner to be perceived as an effective human rights institution and, potentially, to secure accreditation as such at the United Nations, which I understand the Northern Ireland Human Rights Commission, for example, already has.

The Paris principles are not a detailed blueprint; they set out guiding principles that are broadly acknowledged as being appropriate for the establishment and operation of human rights institutions. However, that is not to say that the Paris principles are the end of the story or that they are necessarily perfect; it has been suggested that they focus unduly on the strictly legal aspects of an institution's powers and role. Nonetheless, it is widely recognised that they are sensible guiding principles for the establishment of human rights institutions, which is why the Executive paid close regard to them in developing the proposals.

Margaret Mitchell: Promotion and protection of human rights are key principles, but the protection angle has been left out. What is the rationale behind that?

Brian Peddie: That is true, but that does not necessarily mean that human rights institutions are necessarily expected, under the Paris principles, to have a direct enforcement role. Several human rights institutions throughout the world do not have such a role.

Margaret Mitchell: What is your rationale for leaving out that role?

Brian Peddie: As I said, a legal mechanism already exists for enforcement of human rights in domestic courts, which includes being able to challenge acts of Parliament and acts of Government. Therefore, it is questionable whether a separate legal enforcement power for the human rights commissioner would add significant value. Under the Paris principles, the prime role of human rights institutions is to promote awareness of and respect for human rights. That has been the guiding principle behind the proposals in the bill.

Margaret Mitchell: I am a little puzzled by that. You say that the promotion aspect is right up there and that we have other people who can do the protection bit. In response to a question from—I think—Bruce McFee, you said that some of the people who would do the protection work, such as Her Majesty's inspectorate of prisons or other ombudsmen, are directly responsible to ministers. You almost suggested that there is less independence. The commissioner will be responsible to Parliament and will, therefore, be more independent. Does not that translate into the argument that the commissioner should have an enforcement role?

Brian Peddie: The Paris principles mention independence from Government as being one of the key principles of a human rights institution. The other people whom you mentioned are not concerned solely with human rights, but are clearly seen as having an independent role. However, the fact remains that not having a direct enforcement function is not incompatible with the role of promotion and protection of human rights. The Paris principles do not contain a specific expectation that a human rights institution should have legal enforcement powers. That is not in the list of key features that are looked for in human rights institutions.

Mr McFee: The commissioner will deal with matters that fall within the devolved remit, but I understand that, under the Equality Bill that is going through the UK Parliament, the commission for equality and human rights will have enforcement powers—the bill makes provision for such powers in relation to notices and action plans. In other words, if human rights have been breached in relation to a reserved matter, the appropriate body will have enforcement powers, but if human rights are breached in relation to a devolved matter, the appropriate body will not have such powers.

Brian Peddie: It is important to differentiate between the equality and the human rights aspects of the Great Britain commission's remit. As I said, on equality, the Great Britain commission will take over the enforcement role that is presently carried out by statutory bodies such as the Commission for Racial Equality. Clearly, it will have an enforcement role, because that role already exists under equality legislation. The references to items such as action plans relate to the equality side of the remit rather than the human rights side.

11:30

Mr McFee: You are telling me that if the Scottish Commissioner for Human Rights Bill and the Equality Bill go through in their present form, there will be no enforcement procedures for dealing with human rights matters, whether they are devolved or reserved, other than recourse to court.

Brian Peddie: Do you mean recourse to court by individuals?

Mr McFee: I mean recourse to court by individuals or organisations.

Brian Peddie: There is a difference between the two proposed regimes. A provision that was not part of the original proposals for the GB commission but was introduced quite late on in the passage of the Equality Bill would indeed give the GB commission the power to bring legal proceedings in its own name in connection with

alleged breaches of human rights. On that particular point, there is a difference.

Mr McFee: It is a substantial difference.

Brian Peddie: I would not argue with that; it is a substantial difference. The Executive's proposals do not provide for the Scottish commissioner having that role for two main reasons, one of which is legal and one of which is broader. The legal reason is based on what is normally known as the victim test, whereby a legal action for an alleged breach of human rights can be brought only by the victim of that breach. Under the Human Rights Act 1998, that right is restricted to the victim of such a breach, and because amendment of that act is a reserved matter under the Scotland Act 1998, it was felt to be outwith devolved competence to give the Scottish commissioner an ability similar to that which is now proposed for the GB commissioner.

The wider reason is that, in any event, the vision for the Scottish commissioner is that he or she will play what is essentially a promotional and awareness-raising role. I mentioned that the GB commission would play an enforcement role on equality legislation, which in practice will probably account for the bulk of its work. From the outset, the GB commission was always going to have a legal enforcement role, which the Scottish commissioner was not going to have. It remains the Executive's view that to give the Scottish commissioner the ability to raise legal actions in his or her own right would detract from the vision of the commissioner having a promotional and awareness-raising role.

If the commissioner had the ability to raise legal actions, that would create expectations that that role would be exercised to a significant extent, which could detract from the other areas of the commissioner's activity. The fact that people would expect the commissioner to be going to the courts on various issues all the time would mean that the commissioner would not be able to devote as much time and resources to what we consider to be the main parts of the remit.

Mr McFee: You would regard taking a test case to court as being a fairly unimportant part of any commissioner's remit, if indeed the commissioner had powers that permitted that.

Brian Peddie: If you are asking whether I think that bringing test cases would in itself be unimportant, I would not necessarily say that it would. I am really saying that there is already a mechanism for doing that in the domestic courts, so there is no need to give the Scottish commissioner such a role, especially as it is thought that the Scottish commissioner will have a promotional and awareness-raising role and that it should focus on that.

Mike Pringle: In your answer to Margaret Mitchell, you suggested that you had found examples of other countries and Governments that had set up a commission or commissioner that would carry out a similar function to the one that will be performed by the proposed Scottish commissioner. I would be grateful if you could furnish the committee with that list of countries.

Brian Peddie: We will provide that list.

Mike Pringle: I want to ask one or two questions about inquiries, which are dealt with in sections 5 to 10 of the bill. It seems that the commissioner will be able to carry out only a highly restricted range of inquiries. The restrictions, as set out in section 6, on the scope of any inquiry are extensive.

Section 6(2) says:

"The Commissioner may conduct an inquiry into the policies and practices of a particular Scottish public authority only if … the authority is the only Scottish public authority with functions in relation to the subject matter of the inquiry".

I was a local councillor for 10 years, and I am trying to think of an example in which a Scottish public authority had a function that none of the other 31 local authorities had.

Brian Peddie: The example that immediately springs to our minds clearly does not relate to local authorities. One might think of the state hospital at Carstairs, which I think is the only institution or authority in Scotland that operates as it does in its particular area. That is not to say that there are necessarily a large number of such examples, but they do exist. If, for instance, the commission wanted to examine human rights aspects of the care and treatment of severely mentally ill people who are detained in secure institutions, it would look at Carstairs. Because the state hospital is the only authority that runs such an institution, it is of necessity the only one that the commissioner would look at. That is the sort of situation that is referred to.

Mike Pringle: Yes, but the bill talks specifically about

"a particular Scottish public authority".

I am sorry—I had been taking that as covering local authorities. I accept the point.

I turn to my second question, which was raised by the Disability Rights Commission following its investigations. Its reading of the bill is that the commissioner would be able to investigate only matters that relate to torture. Is that the way that you see it?

Brian Peddie: No—that is not the way we see it. The reason why the two conventions against torture are specifically mentioned in section 6 is

fairly technical. I apologise for that. The starting point in the bill is that the reports of any inquiries that are conducted by the commissioner will be published. However, it is envisaged that it is at least possible that the commissioner might undertake inquiries as part of monitoring of compliance with, let us say, the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, at the request of the relevant international body. In that case, the commissioner would essentially be conducting the inquiry in accordance with the expectations of that international body, but that body would be responsible for publishing a report; the commissioner would not publish a report separately.

Ed Thomson (Scottish Executive Justice Department): Section 6(6) refers to the optional protocol for the convention against torture, which allows each member state to designate bodies under their jurisdiction as national preventive mechanisms, which will undertake inspections of places of detention on behalf of the UN Committee against Torture.

Subsection (6) effectively allows a space within the inquiry function to let the Scottish commissioner fulfil that national preventive mechanism role on behalf of the UN, fully in accordance with the standard procedures of the UN committee. The difficulty lies in the fact that, as Brian Peddie was explaining, there is a requirement for the commissioner to publish reports of its inquiries, but publication of UN reports is often delayed. The inquiries are undertaken in confidence, and the reports are then submitted. The UN committee works in confidence until the full range of hearings has taken place. Only then is all the relevant documentation published. If we were to create such a space, there might be a problem in that the Scottish commissioner would be required to publish his report in advance of the UN package. That would run contrary to the general expectations of how such things work. As Brian Peddie says, this is a largely technical issue, but I hope that that has cleared it up a little.

Mike Pringle: My third question relates to section 8, which is on "powers of entry, inspection and interview". I suppose that this is a simple question. Why is 14 days' notice required? That seems a very long time. If someone thinks that an abuse is going on somewhere, they will surely want to be in on it as quickly as possible.

Brian Peddie: I understand that point, but it is important to remember that inquiries are to be general in nature. I think that the phrase in the consultation paper was "generic or sectoral".

It is not about investigating individual complaints. It is about considering concerns that may have been raised, but not about examining the conditions in which a person is held because they have complained. The process is more generally focused. For practical reasons, 14 days' notice should be given to ensure that an institution is sufficiently aware that the commissioner is going to visit. That is in no way to suggest that a cover-up would be going on. However, from experience elsewhere I know that there have been occasions when people who ought to have been given access to prisons have not got or have had difficulties getting such access, simply because the staff on the ground were not told that they were coming and were therefore reluctant to let them in for security reasons. The 14 days' notice is to ensure that arrangements can be made and proper access given.

Mike Pringle: Let us take the example of someone who approaches the commissioner and says that they think that there has been a serious breach of their human rights, which the commissioner decides to investigate. After the commissioner has examined the matter in private, he may decide that he needs to visit the prison. We are saying that he needs to give the prison 14 days' notice so that it can ensure that it can identify him correctly. I presume that everyone would know the commissioner and that he was interacting with prisons, in any case. Is the suggestion that if the commissioner knocks on a prison door and wants to ask questions about conditions in respect of a person who wants the commissioner to investigate his human rights, the prison will be able to say that the bill says that he must give 14 days' notice?

Brian Peddie: In practice, we would expect the commissioner to establish a close working relationship with other bodies, such as prisons. It is possible that, in practice, 14 days' notice would not be required. However, we are talking about the commissioner being able to enforce a legal right of entry. We thought that it was appropriate to allow 14 days to elapse before the commissioner sought to exercise that right. In practice, the commissioner may often get access sooner, but in the context of the legal right to entry, it seemed reasonable to introduce a period of notice of 14 days. We should remember that failure to comply with such a request can enable the commissioner to go to court to seek enforcement of that legal obligation. Such situations are potentially serious, so it is entirely appropriate that there be a period of notice before an institution or authority might be accused in court of having failed to allow the commissioner to exercise their legal right of access.

Mr McFee: Section 6(8) of the bill defines an "institution". I do not think that there is a similar definition of "Scottish public authority". It would be useful if you could briefly give us some information

on that. Section 6(3) of the bill states:

"The Commissioner may not conduct an inquiry into the policies and practices of any Scottish public authority in relation to a particular case."

He or she may take up a particular case in an institution, but not in a Scottish public authority. If someone is at a local authority nursery, which is an institution according to the definition in the bill, the commissioner can take up their case, but if a case relates to the housing department of a local authority, he or she cannot. What is the rationale behind that?

Brian Peddie: I do not think that your explanation is correct. The provision that an inquiry should concern policies and practices, rather than the case of an individual person, applies equally to inquiries into institutions and inquiries into public authorities.

Mr McFee: Section 6(3) does not say that. It refers to a "Scottish public authority". Section 6(8) goes on to define an "institution".

11:45

Brian Peddie: The overall power to conduct an inquiry, which is defined in section 5(1), would be used to conduct an inquiry into the policies and practices of a public authority rather than into an institution. The point about institutions takes us back to the earlier discussion about international conventions. The UN committee against torture, for instance, would probably stipulate which places it would expect the commissioner to visit as part of his or her monitoring activity. The committee would say that the commissioner should visit Barlinnie jail, Aberdeen prison and the police cells in Pitt Street, or something like that. It is that sort of activity that we are talking about.

Mr McFee: I am sorry to press you, but there is a specific definition in section 6(8). It states:

"In this section, 'institution' means a prison, hospital, school, college, care home or other such establishment."

Are you saying that all the institutions are Scottish public authorities? If not, what is the difference and why is a distinction made in section 6(3) as to where specific cases can be inquired about?

Ed Thomson: Perhaps I can clarify the matter. The definition of "institution" in section 6(8) is not intended to be read as a definition of a different type of body from Scottish public authorities. In that context, institutions are the kind of places that are run by Scottish public authorities. For example, the inquiry would be into the Scottish Prison Service as the Scottish public authority, but the power of access to institutions would relate to a specific prison such as Barlinnie. The two are not meant to be read as exclusive groups.

Mr McFee: So, are we saying that institutions—

The Convener: I think that you have had a go at that—three goes, in fact. I want to go back to Mike Pringle's question. I thought that your supplementary question was going to be on the 14 days issue, which concerns me a wee bit.

If the committee against torture can get immediate access, why are we stipulating 14 days' notice? If you have incorporated the convention against torture into the powers of the commissioner, a wait of 14 days seems to be—

Brian Peddie: The committee against torture does not turn up unannounced at a prison. The respective government will know weeks, if not months, in advance what the programme of visits is going to be.

The Convener: So, the UN committee against torture cannot turn up unannounced. If that committee suspected that torture was going on at Barlinnie prison, it would want to go there immediately. If it had to wait 14 days, any evidence of torture could be cleared away. Do you not see a problem in that?

Brian Peddie: It should be remembered that inquiries will be held into policies or practices rather than into individual complaints. Those are not the kind of things that could be swept under the carpet even in 14 days. Let us take the example of slopping out. If the commissioner said that they wanted to go to a specific prison to see how slopping out operated in that prison, the prison would not end slopping out within 14 days just because of the commissioner's visit; slopping out would still happen. It would also be open to the commissioner to ask for access sooner than that. We are talking purely about the legal right of access that is enforceable by going to the courts.

The Convener: The reality is that any member of this committee would be unlikely to be turned away from Barlinnie prison if we wanted to go in to see whether there was evidence of torture. Andrew McLellan, the chief inspector of prisons, would not be turned away either. I understand that we are talking about a power of entry for which there is usually a legal period before a warrant can be obtained but, using prisons as an example, it seems a bit odd. It is unlikely that I would be turned away from Barlinnie if I wanted to see what was going on there.

Brian Peddie: It is unlikely that the human rights commissioner would be turned away, either.

The Convener: Yes, but he or she might have a problem if the bill were to insist that an application be made 14 days in advance for a warrant or permission to inspect the premises. It would almost be better not to have it.

Brian Peddie: I do not think that it would be better not to have the provision. Do you mean that it would be better not to have the time limit?

The Convener: I agree that if the human rights commissioner were to turn up at a prison because they suspected that torture was being carried out there, it would be unlikely that they would be turned away, but I am not sure about having the requirement to give 14 days' notice in the bill.

Brian Peddie: The requirement to give 14 days' notice is about the exercise of the legal power. It is about the commissioner going to the institution or the authority and saying, "I am exercising my legal power to obtain access." That does not preclude the commissioner going on an informal basis, as the prisons inspector or prison complaints commissioner would do, and saying, "I want to visit such-and-such a prison this afternoon or tomorrow." We would expect that, in practice, the commissioner would obtain access.

The requirement to give 14 days' notice will give the commissioner a legal power to enforce access in what we expect to be rare cases—if they occur at all—where the commissioner encounters difficulties with access or thinks that there might be such difficulties and therefore wants legally to enforce the right of access. If the commissioner had to make use of that legal power to obtain access on anything like a regular basis, some serious questions would be asked about the authority concerned.

Mrs Mary Mulligan (Linlithgow) (Lab): Your introductory comments were helpful, but we have a number of points of clarification. My question is about the power to intervene in civil legal proceedings, which is outlined in section 11. Do you agree that the scope to intervene is quite narrow? For example, not even children's hearings are included. Section 11 states that the commissioner could intervene where matters are deemed to be in the "public interest". Who would decide whether a matter was in the public interest and on what grounds?

Brian Peddie: I do not accept that restricting to civil proceedings the power to intervene means taking a narrow view; it is a wide view because the power relates to the full range of civil proceedings. I will come back to the point about children's hearings.

We are talking about any proceedings that might be raised in the civil court. The power is not restricted to proceedings for judicial review, which is a common mechanism but not the only one for seeking enforcement of human rights. For example, not all the slopping-out cases that were taken to court involved judicial review. Nonetheless, the commissioner could offer to intervene in such proceedings.

Children's hearings are specifically exempted. As regards the domestic legal definition, we understand that children's hearings are classified as civil proceedings. However, they have some of the characteristics of criminal proceedings and, in particular, children's hearings can impose mandatory supervision requirements on children and to that extent they can be regarded as being more akin to criminal proceedings.

It is important to recognise that in considering whether proceedings are civil or criminal for human rights purposes, the European Court of Human Rights at Strasbourg has established that it would look at the entire context of the proceedings and their nature and would not be bound by their classification under domestic law. The arguments against extending the power to intervene to children's hearings were that they were regarded as more analogous to criminal proceedings. However, we appreciate that differing views on the matter have been expressed, by the Scottish Children's Reporter Administration, for example, so there will be discussion of that. Nonetheless, that was the reasoning that was applied.

Mrs Mulligan: Will you also answer my question about the public interest test?

Brian Peddie: It seems entirely right that there should be a requirement to satisfy some kind of test whereby the commissioner decides whether it is appropriate to intervene in a case.

Under the bill, the final decision on whether an intervention should be allowed will rest with the court, which will also have the discretion to invite an intervention from the commissioner. The criterion for the court's decision is simply that the court

"is satisfied that the intervention … is likely to assist the court."

A separate public interest test is not specified as a criterion for consideration by the court because it seems right for courts to take into account only whether an intervention would help the court. It would seem strange if the commissioner could offer to intervene in a case that involved no issue of public interest because, otherwise, there would be no rationale for intervention. The case needs to involve a matter that is relevant to the commissioner's wider remit. Similarly, one cannot readily envisage situations in which a court might feel that it was in the public interest for the commissioner to intervene even though that would not assist the court. It seems appropriate that the only criterion that the courts should apply is whether an intervention would help the court.

However, if we required the court to consider a separate public interest test, the court might need to hear separate arguments from both sides of the

case on whether an issue of public interest was involved. That could protract the proceedings and involve extra costs. Conversely, whether an intervention would assist the court is a question that the court should be able to determine reasonably quickly without hearing lengthy arguments from either side.

Mrs Mulligan: Further to your point about the children's hearings system, I appreciate that some hearings might be seen as criminal proceedings but others are more like civil proceedings. Is any consideration being given to how the commissioner could take part in hearings that might be considered to be civil proceedings?

Brian Peddie: The point is that children's hearings need to be considered as a class of proceedings rather than as a series of individual cases. I am not an expert on children's hearings, but I believe that one could not necessarily say in advance whether a hearing would conclude that it was appropriate to make supervision a mandatory requirement. Therefore, the decision on whether it was permissible for the commissioner to intervene could not be made by pre-judging the conclusion that the hearing might reach. It seems better to consider children's hearings as a whole, given the issues that they can consider and the decisions that they can take. That is the basis on which we decided that intervention would not be appropriate.

Mrs Mulligan: Why does the bill make no provision for the commissioner to intervene in appellate proceedings, criminal proceedings or references to the Lord Advocate?

Brian Peddie: On whether the commissioner should be able to intervene in criminal proceedings, it is true that there were differing views. However, as criminal proceedings are substantially different in nature from civil proceedings, it was considered inappropriate to allow intervention by a third party in criminal cases. It is fair to say that there is much less precedent for any third-party intervention in the Scottish courts than in the English courts, but such intervention as has taken place has been in civil rather than in criminal cases.

In appellate proceedings, the commissioner will have a right to intervene. The bill provides explicitly that such a right will apply in

"courts of first instance and appeal".

Therefore, that matter is dealt with in the bill.

Mike Pringle: I understand why you are not getting involved in children's hearings, but what will be the commissioner's role in regard to tribunals? More cases come in front of the myriad tribunals that we have in Scotland than before any other court. My understanding is that tribunals are almost exclusively civil.

12:00

Brian Peddie: I do not know the figures, but it would not surprise me if you were right about the number of cases. The tribunals deal with reserved issues such as immigration, social security and employment, on which the Great Britain commission would have a role but the Scottish commission could not.

Mike Pringle: Do all tribunals throughout Scotland deal only with non-devolved issues?

Brian Peddie: That is our understanding—all those that we have been able to identify relate entirely to reserved matters.

Marlyn Glen (North East Scotland) (Lab): My question is about the power to co-operate. Given the split between devolved and reserved remits that has already been discussed, it might be argued that a power, rather than a duty of co-operation, is insufficient. How do you anticipate that that will work in practice?

Brian Peddie: The commissioner is largely there to help authorities to comply with their human rights obligations. We hope and expect that public authorities will co-operate with the commissioner. However, to place a statutory duty upon other commissioners to co-operate would not be necessary, because that is the kind of issue that ought to be addressed by discussion between the bodies concerned. The prospect of legal actions between authorities would not be helpful. We have a provision in the bill to avoid unnecessarily duplicating activities undertaken by others, so there should anyway be discussion about how bodies ought to co-operate so as to get best value for their activities.

Marlyn Glen: The structure of the set-up concerns me because of the amount of co-operation that will be needed. Given that the structure of a Scottish human rights commission was an area of disagreement among respondents to the Executive's second consultation, could you explain further the rationale for the option decided upon?

Brian Peddie: Are there particular concerns that you want to raise in connection with that or do you want me to go through the general structure?

Marlyn Glen: Could you go through the general structure first? For instance, I was struck by the change from commission to commissioner and I would like to know what was behind that.

Brian Peddie: It is true that both the public consultations referred to a commission as opposed to a commissioner. The reasons for the change are, first of all, that it is in line with the precedents that have been set for the other commissioners established since devolution, be it the information commissioner, the standards

commissioner or the public appointments commissioner. There is now a well-established model of structure and accountability for commissioners and it seemed sensible in this case, not least in the interests of clarity, to follow that established model. We did not identify a clear policy reason for establishing something different. Secondly, if we were to create a commission as a free-standing body it would probably be necessary to have additional provisions in the legislation on the constitution and operation of that body. That might introduce unwanted complications in relation to how the body would operate, which would not add any value to the exercise of its functions.

There are also accountability issues. If we created a separate body, the accountability of, let us say the commissioners, would in the first instance be not to the Parliament but to that body. In turn, the body would be accountable to the Parliament. Given the role that is envisaged for the commissioner, it seemed on reflection more helpful to have a direct line of accountability between the holder of the office and the Parliament.

Marlyn Glen: What about the numbers at which you have arrived? One presumes that a commission would have more full-time workers. You are suggesting that there should be one commissioner with deputy commissioners. Who will decide how many deputy commissioners will be appointed, for example?

Brian Peddie: The question whether to have a commission, as opposed to a commissioner, would not necessarily have impacted directly on the number of commissioners and deputy commissioners. If we had a commission, it would not necessarily follow that there would be a larger number of commissioners. A range of views were expressed about how many commissioners it would be helpful to have. The Northern Ireland Human Rights Commission has about 14 commissioners, but most of them operate on a part-time basis. A very large part of the Northern Ireland Human Rights Commission's work is case work driven. That element, which drives up the number of commissioners, is not envisaged for the Scottish commissioner.

Clearly, commissioners must be paid and supported. Given the role that is envisaged for the Scottish commissioner for human rights, there did not seem to be a strong case for having a larger number of commissioners. We need to strike the right balance between fulfilling the role, use of resources and the internal operations of the commission. If there is a large number of commissioners, there can be significant issues in respect of how they interact and co-operate with one another. For that reason, it seemed more sensible to have quite a small number of staff—a commissioner and up to two deputy commissioners.

You asked who would decide how many deputy commissioners there should be. We are getting into issues that will be the responsibility primarily of the corporate body, rather than of the Executive. We expect that the process would start with the appointment of the commissioner and that there would then be discussions about whether the commissioner would seek the appointment of one or two deputies, or perhaps of one deputy now and another at a later date, if that was felt to be helpful. The final decision would be with the Parliament, as the appointments would be by Her Majesty on the nomination of the Parliament.

Marlyn Glen: It is quite confusing. I would like to think that the decision about the structure will be driven by policy, rather than by budget constraints or status.

Do you think that it will be essential to have lawyers and/or human rights specialists in the commission? The Law Society's submission suggested that there might be a need for ad hoc specialist commissioners. Presumably such commissioners would be appointed on a temporary basis, depending on the issues that were being considered at the time.

Brian Peddie: I will deal briefly with the point about resources. I did not mean to suggest that the limitation in the number of commissioners was driven primarily by a desire to keep costs down per se. However, we did not want there to be an undue tipping of the balance between resources for engaging in activity and resources for paying commissioners. We did not want to require there to be a structure that might be top heavy and might take away resources that would better be used for work in the field.

It is not for the Executive to say whether the commissioner's office ought to have in-house legal experts, instead of buying in legal expertise. There will be potential for it to do either or both. I suspect that there will probably be a mixture of both, particularly in cases in which one would not expect the commissioner's office to cover the full range of legal issues to the depth required. It might be appropriate for the commissioner to procure outside expertise from time to time, which would be possible.

The Convener: My question is on accountability, but it relates to Marlyn Glen's question about structure. How will the commissioner arrive at policy decisions? Suppose, hypothetically, that a discussion arose about whether smoking is a human right. The commissioner, who will not be accountable, might arrive at the view that smoking is a human right. What would be the process for arriving at the

decision? Do you expect a joint decision by the commissioner and the deputies, or will there be a process of consulting with people and then arriving at a decision?

Brian Peddie: It is difficult for the Executive to go into detail about how the commissioner and his or her office should go about their business after establishment, because many of those issues are for consideration by the commissioner in discussion with the Scottish Parliamentary Corporate Body. It will primarily be for the commissioner to take such policy decisions, after consulting as appropriate, as, for instance, the Executive is expected to do. The commissioner will be able to make recommendations and comments on policies, practices and the law, but they will not have a legal power to enforce the recommendations directly. However, I expect that, if the commissioner arrived at such a judgment, they would need to be able to justify it when questioned rather than just come up with ideas out of the blue.

The commissioner will be required to submit to the Parliament annual reports and other reports that they produce from time to time, which the Parliament could discuss. If it was felt that the commissioner had somehow strayed too widely or engaged in inappropriate activity, issues might arise about accountability, but they would be between the commissioner and the corporate body. I expect that the corporate body and the Parliament would have opportunities to comment if they felt that the commissioner might be engaging in inappropriate activity or making judgments that were not properly founded.

The Convener: So the commissioner will be independent in the main, except in relation to the money that they spend. How will the commissioner's decisions be questioned? Is the issue just the credibility of the decisions?

Brian Peddie: The issue is probably largely one of credibility. We should remember that the commissioner will make recommendations. We expect credibility to flow partly from the status of the commissioner and his or her perceived expertise or abilities in human rights, and partly from the recommendations themselves. If the commissioner made recommendations that people had problems with or thought were ill founded, I would expect them to respond and to say where and why they thought the commissioner was wrong. Any action that is to be taken on the commissioner's recommendations will be, depending on the context, for the public authorities concerned or perhaps for the Parliament in creating legislation. Any recommendations that the commissioner makes will not be legally binding and will be discussed before they go any further.

12:15

The Convener: I understand that, but I am thinking about the power to intervene in civil legal proceedings. In theory, if human rights issues arose in a tobacco case, the commissioner could intervene if they had something to say, which might be controversial. I imagine that if we create a commissioner for human rights and they declare that something is a human rights issue, that must have some weight. It is all very well if you agree that all torture is against human rights, but there might be one or two areas on which we do not agree. It would then be a question of public debate between elected members and public authorities that might take a different view. Is that how the commissioner will work?

I can understand why you want to create a level of independence that would give the public the confidence to go to that person and raise their issues. However, it is also frightening that that person will be accountable to no one. I must point out that although you have drawn an analogy with the Scottish Executive, elected members are at least accountable once every four years. We are seeking to create a commissioner who does not have that level of accountability. How do you envisage the more difficult and controversial issues being resolved?

Ed Thomson: I could offer something on that. The commissioner making statements and exercising informal functions is one thing, but with respect to exercising their formal powers to conduct inquiries or gathering information for those purposes, it would be possible under the terms of the bill for the exercise of those powers to be challenged if they were felt to be outwith the commissioner's remit. That is the first level of accountability. The commissioner will not have a free hand to decide what is or is not a human rights issue because the established remit of their job is human rights in relation to those international instruments that the United Kingdom has ratified.

On general accountability, you talked about the need for the re-election of elected representatives. There is provision within the bill for Parliament to remove commissioners from office, so there is a nuclear option, if you like. If the commissioner completely loses the confidence of Parliament, the option is there to remove them.

The Convener: So you would expect any decision or view of the commissioner to have foundation in a treaty or convention.

Ed Thomson: The commissioner's remit clearly defines human rights as those contained in international instruments that the UK has ratified. That is what the commissioner would look to to provide the parameters of their role.

The Convener: I will use smoking as an example, although it is not a very good one because we have already legislated on it. Some people believe that smoking is a human right, but there is no treaty that could be relied on to back that up; so, if the commissioner made a declaration on that, they would be acting outwith their remit.

Ed Thomson: I am afraid that I do not know enough about smoking to be able to say whether it falls within the remit of any of the international instruments that the UK has ratified.

In general, any topic on which the commissioner wishes to exercise their powers would have to fall within the definitions set out in any of the instruments that have been ratified by the UK. There are many of those instruments—in excess of 40 or 50, depending on how they are defined—and they cover a broad range of subjects.

John St Clair (Scottish Executive Legal and Parliamentary Services): I should add that advice coming out of a public body such as the commissioner is a public act and someone who is affected by it could challenge it through a judicial review. It is tricky to judge how successful that would be, but there would be such a right of challenge.

Brian Peddie: To finish on this point, the convener is right to say that this is an issue of credibility. If the commissioner was to make a habit of making recommendations or other pronouncements that were widely perceived to be ill-founded or just plain wrong, that could prejudice the commissioner's ability to perform his or her functions properly.

There is one consideration relating to the Executive's view on the term of appointment. A number of respondents felt that the commissioner ought to have a longer term of office—seven years rather than five. There are arguments both ways, but the model that is proposed in the bill—whereby the commissioner would be appointed for five years, but with the possibility of reappointment—could be seen as providing an additional safeguard in that respect. If a commissioner made a habit of behaving in an unfounded way, one would expect that that would not do much for his or her chances of reappointment.

Mrs Mulligan: Before I ask my questions on finance, I want to follow up the points that have just been made about the commissioner. In evidence from the children's commissioner, we were told that there is nothing in the bill about removal from office if the commissioner goes outwith their bounds. Can you point out where that is mentioned?

Brian Peddie: A commissioner or a deputy commissioner can be removed by Her Majesty at the request of the commissioner or deputy commissioner, or if the Parliament so resolves.

Mrs Mulligan: Sorry, can you say again where that is?

Brian Peddie: Yes. The Parliament can resolve that a commissioner or a deputy commissioner be removed.

Mrs Mulligan: But where is that in the bill, please?

Brian Peddie: That is in paragraph 4 of schedule 1.

Mrs Mulligan: Thank you. I shall read that schedule later.

If the Parliament agrees to the establishment of a commissioner, there will be a need to resource the position adequately, as you have said. There is an issue about the charges that the commissioner can make—I will come back to that. It has been intimated that the Executive will set aside around £1 million to finance the position. Can you tell us how that sum was arrived at?

Brian Peddie: The matter is dealt with in the financial memorandum. As members may be aware, it was also discussed by the Finance Committee last week. The starting point in relation to the figure of £1 million was our looking at similar bodies elsewhere, including the Human Rights Commission in the Republic of Ireland and the one in Northern Ireland. That gave us a feel for the activity that the commissioner could reasonably be expected to engage in and what would be a reasonable provision, in comparison to provision for other bodies, to enable that activity to be undertaken. That is how the figure of £1 million was arrived at. The Executive has said that it will provide an additional £1 million of funding from 2006-07 to meet those costs.

Mrs Mulligan: Okay. Will those costs include provision for training, or will that be one of the things that might be charged for?

Brian Peddie: We expect the commissioner to engage in training and similar activities. The financial memorandum gives an estimated breakdown of costs, albeit under relatively broad headings, relating to how the budget of £1 million might be spent. More accurately, perhaps, it details what we would expect a commissioner to spend, at least in the first two years of his or her operation.

The Executive could not give a more detailed breakdown of the costs in advance, as we cannot say that we expect the commissioner to engage in a specific activity to a certain level under a specific heading. Therefore, we could not say that we expect the commissioner to undertake a certain amount of training activity and to spend a certain

figure in relation to that. It will be for the commissioner himself or herself to decide the most appropriate allocation of resources. Especially in the initial stages of operation, it is likely that the commissioner will focus on more general promotional and awareness-raising activities, not least to make authorities and the public more aware of the commissioner's existence and what the commissioner is about.

Mrs Mulligan: You are absolutely right that the commissioner must take a view on how the funding is spent. I pursued the training aspect because, in response to an earlier question from Margaret Mitchell, you referred to Human Rights Scotland, which is funded by the Executive to provide training. When the commissioner is established, will the funding for that organisation stop?

Ed Thomson: The Human Rights Scotland project that we fund is a limited, three-year project in its first financial year, so it is due to come to an end in two years' time anyway.

Mrs Mulligan: That is at much the same time as the commissioner is to be set up.

Ed Thomson: That is largely by coincidence.

Mrs Mulligan: A happy coincidence.

Ed Thomson: The funding was not timed to end when the commissioner is established. The two are considered to be separate programmes.

Mrs Mulligan: That was probably a side issue.

You mentioned that, in arriving at the budget figure, you considered experiences elsewhere, including Northern Ireland. My understanding is that the Northern Ireland Human Rights Commission started out with one figure, but then quickly sought to increase it. Do you have any comments on that?

Ed Thomson: Yes. The initial budget allocation for the commission from the Northern Ireland Office was in the region of £0.75 million, but, after a year or two of operation, that was discovered to be inadequate. The budget has since gone up to about £1.3 million. In examining other bodies such as the Northern Ireland commission, we have taken into account the fact that they have different powers and remits, depending on their contexts. It is significant that, because of the context in which the Northern Ireland commission was established, it has a casework role, which is a particularly resource-intensive activity. We estimate a lower annual cost for the Scottish commissioner, because they will not have such a role.

Mrs Mulligan: Can you give a bit more detail on how the commissioner's power to charge for certain services would work?

Ed Thomson: That capacity is included in the bill for the commissioner to make use of should suitable opportunities arise. In our financial planning, we have not counted on the commissioner generating any income; we assume that the commissioner will be able to fulfil their statutory functions with the budget of £1 million. However, to give an example of the type of services for which the commissioner might charge, soon after the Scottish information commissioner was appointed, he undertook several seminars and workshops throughout Scotland to promote the Freedom of Information (Scotland) Act 2002 and his role. I believe that attendance at the events was charged for on a sliding scale, with private individuals being charged the maximum, down to public authorities and voluntary bodies at the bottom of the scale. That is the type of service for which the commissioner might charge.

Marlyn Glen: I want to play devil's advocate for a moment. You might have noticed the conditional tense creeping into some of our questions—they have not been about what will happen when the commissioner is established, but whether the post should be established at all. As I understand it, under the Equality Bill that is going through the United Kingdom Parliament, the Great Britain commission will be able to act on devolved human rights issues only with the permission of the Scottish commissioner. That presumes the establishment of a Scottish commissioner, so we seem to be in a catch-22 situation. Where would it leave human rights in Scotland if the Scottish Parliament decided not to go ahead with the bill? For example, would it be possible to amend the UK bill?

12:30

Brian Peddie: We worked closely with our colleagues in the UK Government on the drafting of the provisions to which you refer in the Equality Bill. We were careful not to make any assumptions about the creation of a Scottish commissioner, although we of course knew that a commissioner was proposed. The wording in the Equality Bill does not refer explicitly to a Scottish commissioner for human rights, because no such commissioner exists. If I may paraphrase, it refers to a person or body empowered by the Scottish Parliament to have a human rights remit. It is for the Parliament to decide whether there should be such a specifically Scottish person or body. As I mentioned, the GB commission cannot take action in relation to devolved human rights issues without the consent of that person or body. If the bill were not enacted and there were no Scottish commissioner, there would be no body with a remit in respect of devolved human rights matters in Scotland that was equivalent to the remit that the GB commission would have in relation to reserved matters.

Marlyn Glen: Is it possible to change the UK legislation, as it is still before Parliament?

Brian Peddie: The UK legislation is almost at the end of its progress. The opportunities for changing it have probably passed. Presumably, it would be possible for it to be amended subsequently by primary legislation at Westminster. I am not sure what you are getting at. You may have in mind amending the Equality Bill in order to give the GB commission a remit in relation to devolved human rights matters as well as reserved ones. Given that those issues are within the competence of the Scottish Parliament, it would appear that such a move would be at odds with the devolution settlement. The Equality Bill was framed as it was precisely because, under the settlement, it is for the Scottish Parliament to confer that kind of remit on a person or body.

Marlyn Glen: It is interesting that in our discussions we have returned to the fundamental principle. However, as you have said, the fundamental principle has already been established. Thank you for your answer.

Brian Peddie: If you mean the fundamental principle of having a Scottish commissioner, I think that it has not been established. If it were proposed instead to give the GB commission a remit in relation to devolved matters, clearly that could be done and the Scottish Parliament would be able to agree to it. I suspect that that would require a Sewel motion or whatever the mechanism is now called. The Parliament would have to agree to confer the function on a GB body. Given that the GB commission will be accountable to UK ministers, some eyebrows might be raised at such a suggestion. That is why it is regarded as appropriate for there to be a specifically Scottish body.

I make it clear that, in the preparation of the Equality Bill, it has not been assumed that there will definitely be a Scottish commissioner. If that did not happen and, as a consequence, it was desired that the GB commission should be given the remit that the Scottish commissioner would otherwise have had, technically that would be possible. However, it would require legislation at Westminster.

The Convener: I should have introduced our adviser, Professor Jim Murdoch, at the beginning of the meeting. You probably know who he is, in any case. Jim has a suggestion regarding the point that we are discussing.

Professor Jim Murdoch (Adviser): I wonder whether the point could be addressed at clause 7(1) of the Equality Bill by inserting the words "not exercised". The clause would then read, "The Commission shall not take human rights action in relation to a matter if the Scottish Parliament has not exercised legislative competence". Would that address the issue?

Brian Peddie: I need to be somewhat careful, as we may be entering lawyers' territory. The basic principle that a provision in the Westminster bill framed in such terms would confer a function relating to a devolved area on the GB commission would remain, with all the implications that that has, including a Sewel motion or its equivalent, to provide for the situation unless and until a Scottish commissioner is created. I do not think that the suggested amendment would address that specific point. It would, I suppose, address the situation in which, if the creation of a Scottish commissioner were deferred or did not happen at all, there would at least be a commission—albeit a GB body—that was able to exercise that function. However, we are still left with the fundamental principle that it would not then be a Scottish body that was accountable to the Scottish Parliament. Such a provision would confer on the commission a devolved function, which would be within the Scottish Parliament's competence and to which the Scottish Parliament would have to agree.

Margaret Mitchell: The Parliament passed a Sewel motion recently and I had understood that there was provision in the UK bill for what would effectively be a Scottish commissioner to be appointed by the UK authorities. That person would have regard to reserved matters but would, in certain circumstances, be able to consider devolved matters if they were seen to overlap. Will you confirm whether that is the case?

Brian Peddie: The issue about a Scottish commissioner in that context relates to prime responsibility for Scottish matters in relation to the GB commission. In relation to the human rights side of the remit, the GB commission will be unable, under the bill as framed, to take action in the devolved sphere without the consent of the Scottish commissioner or equivalent.

Margaret Mitchell: It has specifically been said that, in instances of overlap, the GB commission will be competent to consider devolved issues. That debate was only a few weeks ago and is on the record.

Brian Peddie: I am not familiar with that debate. The clause in the UK bill that relates to devolved human rights functions has not been changed, but we will be happy to get back to you on the matter.

Margaret Mitchell: That would be appreciated, because it is germane to the issue. Also, you refer to a Scottish committee being set up in Glasgow. I would like to know more about that. However, I wish to move on to what is disturbing me most. The bill at Westminster is at the committee stage. How long will that take? What is the role of the committee? Is it scrutinising the bill? Is it still

making changes? When do we expect the bill to complete its progress through Parliament? Why are we considering the Scottish bill before we know the final outcome of the UK legislation?

Brian Peddie: My understanding is that the UK Equality Bill is near the end of its consideration. It commenced in the House of Lords and had its Commons committee consideration last week or the week before last. We are just about at the end of the road. There is the Commons report stage still to come, but the scrutiny is virtually complete. The Equality Bill has been the subject of separate discussion in the Scottish Parliament in connection with the Sewel motion.

On your point about the timing of this bill and the Equality Bill, no assumptions have been made that there will or will not be a Scottish commissioner; it is simply that provision was made in the Equality Bill for the eventuality that there would be one. The GB commission proposals are not predicated on the assumption that there will be a Scottish commissioner and, similarly, the issue of whether there should be a Scottish commissioner is not dependent on there being a GB commissioner or a GB commission. In fact, the Scottish proposals predate considerably the proposals for a GB commission.

Margaret Mitchell: That is a different question. I am asking whether there is provision in the Equality Bill for creating a UK Scottish commissioner who will consider reserved matters and, in some instances, the overlap into devolved issues.

The Convener: We recognise that you are not responsible for the UK bill; you are responsible for telling us about the Scottish bill. It would be helpful if you could clarify which areas of competence we transferred to Westminster in relation to consideration of the bill.

Brian Peddie: I can certainly do that.

The Convener: You may answer the question—I just wanted to make it clear that you are not dealing with the UK bill. You can help us with it if you can, but you are here because you have responsibility for the Scottish bill.

Brian Peddie: It would be helpful to cover all those issues in written responses. We will get back to the committee as quickly as we can with those.

The Convener: That brings us to the end of those lines of questioning. I thank Brian Peddie and his team for their presentation and for answering all our questions. I am sure that we will have further questions as we take evidence and I am sure that you will not mind answering any other questions of clarification if we have any.

Brian Peddie: Indeed not.

The Convener: I welcome Simon Braunholtz, the director of MORI Scotland, who will make a brief presentation to the committee on MORI's findings on the Scottish Commissioner for Human Rights Bill.

Simon Braunholtz (MORI Scotland): Thank you for asking me along this morning. The study that we conducted for the committee was brief, so my evidence might not be as extensive as that from the previous panel.

We undertook a survey of 1,018 adults throughout Scotland and asked them about four aspects of human rights. First, we asked an open, free-ranging question about their overall impressions of human rights in Scotland. Secondly, we asked whether they felt that current protection of human rights was adequate. Thirdly, we asked whether they thought that there would be any benefit from establishing a body that had certain responsibilities. Fourthly, we asked who they thought would benefit from the establishment of such a body.

I have prepared a brief, one-page summary for the committee, which I hope is helpful in drawing out the key findings of the survey. I am happy to go through those key points now or to take questions. I am not sure which you would prefer.

The Convener: I understood that you were going to make a presentation, so I think that you should just continue.

Simon Braunholtz: That is fine. When people are asked what the term "human rights" means to them, the most common first response is to do with equalities—17 per cent of respondents mentioned something to do with equalities.

Interesting differences in views were expressed throughout the study, particularly by age group and socioeconomic class. In survey research, there are two socioeconomic class groupings—working class and middle class. Working class refers to respondents who live in households where the chief income earner is in unskilled work or where people rely on state benefits and pensions. Middle class refers to respondents who live in households where the chief income earner is in professional, clerical or non-manual employment.

I recognise that the groupings are archaic in some senses, but there is quite a lot of evidence that attitudes, experiences and educational achievement are still associated with socioeconomic class and the employment status of the chief income earner in the household. There are, indeed, interesting variations in the views that are expressed in the survey by people from different socioeconomic classes. For example, responses to the question of human rights differ according to the respondent's socioeconomic

class. Middle-class people are more likely to form and express a view about what human rights mean to them.

12:45

The second most frequently mentioned item is freedoms, rather than equal opportunities—freedoms of movement, religion, sexual expression and speech—which are also more likely to be mentioned by middle-class respondents. Then comes the issue of the protection of groups on the grounds of their ethnicity, sexuality, age, gender or disability. Again, the issue was slightly more commonly mentioned by middle-class people. Finally, mention was made of the rights of specific groups—asylum seekers, refugees and immigrants. Those, too, were more commonly mentioned by middle-class respondents.

Other comments were made that did not relate to what human rights meant to individuals—what human rights were—but which seemed to reveal people's attitudes. A small number of people said that human rights were a politically correct issue, that in some way human rights had gone too far, or that human rights were of little value or meaningless. It is also important to bear in mind the fact that about three in 10 respondents said that they did not have any impression of what human rights meant in the context of Scotland. The issue is perhaps not at the front of everybody's mind in the pubs and bars across Scotland—people's views must be interpreted in the light of that fact.

When we asked people whether they felt that rights were adequately protected in Scotland, one in six—17 per cent—said that they did not know and about half said that they were. About a quarter of respondents said that there was inadequate protection, which was about twice the number of people who felt that there was excessive protection. That gives us the balance of opinion on that subject. Slightly more women and people from working-class households felt that rights were not protected, whereas people from middle-class households were more likely to feel that rights were adequately protected.

We asked whether people felt that there would be benefit to Scotland in the creation of a Government-funded body—we phrased the question carefully—to inform the public about human rights and to investigate Scottish public bodies on devolved matters. The question incorporated two elements—informing and investigating—as well as the phrase "devolved matters". That phrase is not always familiar to people, who do not necessarily know what issues are devolved. Nevertheless, the phrase was used in the question and will have affected some people's responses.

Six out of 10 respondents thought that there would be benefit in setting up such a body. In the light of the fact that only a quarter of respondents felt that there was inadequate protection of human rights in Scotland, it is perhaps surprising that two thirds of respondents thought that there would be benefit in establishing such a body. My interpretation is that that view is based on the body's role in informing people about human rights in Scotland, not simply on its role in protecting human rights. Younger people, working-class people and women were more likely to agree that such a body would be beneficial.

There were some interesting variations in the groups that people felt would be most likely to benefit. The most commonly mentioned groups were immigrants and ethnic minorities—each of which was mentioned by about a quarter of respondents—followed by older people, children and young people, and those with disabilities. In broad terms, there were two patterns of response to the question. Middle-class respondents—who were more lukewarm about the need to establish such a body—were more likely to feel that immigrants and refugees were potential beneficiaries. Working-class and younger respondents—who, on balance, were more supportive of the establishment of such a body—were more likely to mention homeless people, children and young people.

I am happy to answer any questions but, as the survey was very short, I may not be able to give chapter and verse.

The Convener: Thank you. It is useful for us to see public attitudes towards human rights. I am sure that the survey will be informative for our work on the bill at stage 1. Do members have any questions for Simon Braunholtz?

Mr McFee: I have a brief question, although I am not sure whether you will answer it, as it is about your impression of the results. In your opinion, did a significant number of respondents equate human rights with equality and see those things as one issue? Was there a crossover on that? That might not be possible to quantify.

Simon Braunholtz: That is one of the interesting things that came out of that first, free-ranging question, for which we did not pigeon-hole people into certain responses but allowed them to answer in whatever way they liked. When we asked people what human rights meant to them, the most common association given was with equalities. Some 17 per cent—one respondent in six—said that they associated human rights with some form of equalities.

Mr McFee: Can you clarify whether that was 17 per cent of those who stated a view? I think that the column adds up to 115 per cent.

Simon Braunholtz: The total will add up to more than 100 per cent because people could mention more than one thing in their response. For example, they could mention something else in addition to equal rights. Some respondents had, as it were, a mosaic image of human rights rather than a narrow definition.

The Convener: I particularly liked the response "European mumbo-jumbo". Who thought up that response?

Mr McFee: Only 1 per cent of respondents.

The Convener: I see that "More work for lawyers" was given by only 1 per cent of respondents. That seems a very low score for that response.

Mr McFee: It was probably given by a lawyer.

The Convener: Only 2 per cent said that the creation of such a body would benefit "Those in power", which people might think means MSPs.

If members have no other questions, I will simply thank Simon Braunholtz for his presentation. We are grateful to him and to MORI for the survey, which will be helpful to our work.

Subordinate Legislation

Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2005 (SSI 2005/584)

12:53

The Convener: The next item is subordinate legislation. I refer members to the clerk's note on the regulations, paper J1/S2/05/40/5.

I welcome Roy Martin QC, dean of the Faculty of Advocates, and Ian Duguid QC, and thank them for appearing before the committee to discuss the regulations. I also thank them for the submission from the Faculty of Advocates and the copy of Roy Martin's recent article in *The Scotsman*. We will go straight to questions and give the witnesses an opportunity to supplement or emphasise any points that are made in the written evidence.

Mike Pringle: I was recently contacted by several advocates about this issue. I am not sure what the right phrase is for the senior advocate who is in charge of all the advocates, but I think that the person is called the dean.

Roy Martin (Faculty of Advocates): Yes.

Mike Pringle: In a particular case, the dean intervened. As I understand it, that was a somewhat unusual event. Will you explain why the dean intervened in that case?

Roy Martin: I am not entirely sure what might be meant by "intervened". The dean has a power to direct counsel to act in cases in which an advocate might otherwise be disinclined to do so. Although it is quite unusual for that to be done, it is not unique. I do not know the details of the case to which you and your correspondents were referring, but I suspect that what might have happened is that, as dean, I regarded it as my responsibility to do everything that I could to ensure that the courts were not disrupted and that people were not left unrepresented because of inadequate remuneration as a result of the original interim regulations, the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005. I spoke to many advocates to draw to their attention the importance of the duties that we all have to the court and, so far as I could, to impress upon them that they should adhere to those duties. I do not know whether that is what is being referred to. I did not issue any formal direction such as I might do in an extreme case.

Mike Pringle: My understanding from the correspondence was that you were very unhappy with the level of remuneration. When some advocates suggested that the remuneration was

not perhaps what it should be, quite unusually you supported that assertion. Is that correct?

Roy Martin: Yes. I now understand the point that was being made. In various respects, I regard the remuneration as being inadequate and unsatisfactory. In the submission, I have explained why reasonable remuneration is important. I have been dean only since last November and there has not been a review of legal aid regulations such as this for at least 10 years. The extent to which any intervention on my part might be said to be unusual perhaps reflects the fact that it is quite unusual for there to be such a thoroughgoing review that affects the faculty so intimately. It affects not only criminal cases, which are the most significant issue at the moment; there is also a review of civil legal aid that will affect members of faculty.

Holding the office that I do, I regarded it as entirely proper to express my view, which was that the regulations provided inadequate remuneration in certain respects; that counsel were required to represent in court only if there was reasonable remuneration; and that there would be a very small number of cases—because it does depend on the circumstances of each individual case—in which counsel could properly say that the remuneration was not reasonable. There are quite a number of examples in the newspaper article, but the most extreme example is of the junior advocate who was instructed to represent someone in a faraway sheriff court—I have to say that for confidentiality reasons—for which, under the interim regulations, the travel costs alone would have been more than the fee that he would have been paid for appearing. In such an extreme case, it is appropriate for the dean of faculty to intervene. There are many other examples of cases in which I was satisfied that the remuneration was not reasonable in the sense that it is required to be for advocates to carry out their duties to the court.

Mike Pringle: If that is happening, how is it affecting justice? People want to be properly represented in court. Is representation being delayed? Are people being left unrepresented because advocates are not being paid enough money? That would be a considerable concern for me. If that is the case, is it going to be an ever-increasing problem?

13:00

Roy Martin: You say that it would be of considerable concern to you; were that to happen it would be of the utmost concern to me, as the leader of the Faculty of Advocates. In the circumstances, only a small number of appeal cases have been affected. As far as I am aware—Ian Duguid may correct me on this—the situation has not resulted in someone not being represented in a criminal trial such that the trial had to be put off.

As far as I am aware, the handful of appeal cases—there have been three or four, I think—in which counsel indicated that they would not continue to take instructions were all cases in which delay was not a particular concern. For example, none of the cases involved an appellant who might spend longer in prison because his appeal was upheld only later. From my discussions with advocates, I know that individual members of faculty were concerned to ensure that there was no suggestion that they might withdraw from a case in which a person's liberty was at stake or in which the consequence would be damaging to the appellant.

Therefore, as a matter of fact, the answer to your question is that I do not think that the outcome for anyone has been prejudiced in a critical way. That is not to say that delay is a good thing but to accept that the pinnacle of our obligations is to ensure that everybody is represented, especially when their liberty is immediately at stake. I am not aware of anyone being prejudiced to that extent.

By allowing the coming into force of the emergency regulations that are the topic of the committee's present discussion—the Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2005—the committee will ensure that the critical problems that have been experienced with appeals will be addressed in a way that makes it unlikely that any counsel will withdraw from any case in the foreseeable future.

In the longer term, the permanent legal aid regulations that we seek would allow the adoption of a much more reasonable approach to levels of remuneration in a range of different types of representation. However, it must be acknowledged that the emergency regulations are intended to address the critical problems that have been experienced especially in appeals. It is my belief that they will do so and that, for the short term at least, the likelihood of anyone withdrawing from cases has been removed or significantly reduced.

The Convener: Let me just rewind a bit. You have highlighted to the committee serious concerns about the new rates, but how did we get to this position? From my reading of your submission, the problem seems to have been triggered by the reforms that were brought in on the back of the Bonomy report. Is that right?

Roy Martin: Madam, I am aware that the committee has limited time, so I will not recount the full history, as that would take a while. In essence, two things happened that brought about the introduction of the interim regulations, which

have been the cause of the particularly critical problems.

First, in early 2004, the Executive announced that it would initiate a review of all aspects of legal aid. It asked the various interested parties, including the faculty, to participate in the review and we agreed to do so. At that stage, the review included both civil and criminal legal aid, but particular consideration was given to replacing the criminal legal aid regulations, which had not been updated since 1992. The various possible replacements included what was referred to as a graduated fees scheme, which was largely modelled on equivalent legal aid regulations in England and Wales. That process continued.

It became apparent that the introduction of the Bonomy reforms in early 2005 would require a restructuring of the legal aid regulations to take account of the new procedures that would be brought into play. In July 2004, without prior notice, the Executive—at that stage, we had been dealing only with the Scottish Legal Aid Board—said that it wished quickly to introduce new regulations. The regulations would be based not on the graduated fees scheme that we had discussed but, to some extent, on the 1992 regulations with the added introduction of significant caps on the level of fees and the removal of the existing flexibility whereby the auditor of court had the power to tax fees. That power had, in effect, allowed the 1992 regulations to continue through to 2004.

The regulations were also designed to allow for the particular procedural innovations of the Bonomy reforms. The process that was begun by the draft regulations that were tendered in July 2004 led to the interim regulations, which came into force on 25 March in respect of proceedings concluded on or after 4 April 2005. The Faculty of Advocates' fees and legal aid committee was, of course, able to discuss a number of aspects of the regulations that were introduced and I certainly made significant representations on a number of topics, but other topics—particularly appeals—were not discussed. That was part of the reason why difficulties immediately arose when the appeals arrangements came in.

That is a potted history behind why we are here, but I hope that it at least gives a flavour of what has happened.

The Convener: I am grateful to you for summarising what was probably a long process. I suppose that you are saying that you entered the talks expecting that there would be an uprating of fees.

Roy Martin: Yes.

The Convener: But you have ended up with an across-the-board downrating of fees.

Roy Martin: That is right. We entered the negotiations expecting that, in aiming to modernise the 1992 regulations, they would address the issue of reasonable remuneration and take account of how fees had moved not only in criminal work, but in civil work over the previous 12 years or so. I recollect that the draft regulations were published in July 2004 and I think that the Bonomy report promoted the need for counsel's fees to be reasonable remuneration—

The Convener: I will stop you there to deal with a matter before I invite Margaret Mitchell to ask questions.

We have discussed your expectation. When Margaret Mitchell and I spoke directly to Lord Bonomy, he was absolutely clear that he expected an adjustment of fees to take into account the procedural change. I am clear about that—in fact, I have dug out a note on it. Would you have entered the negotiations on Bonomy's proposals so freely and made the changes in practices if you knew that there would be a reduction in fees?

Roy Martin: Ian Duguid wants to say something about that, but I will answer your question first. We welcomed the opportunity that the Executive provided to take part in the negotiations. We did not necessarily enter into them on a conditional basis in the expectation that we would get something particular out of them. On the other hand, we expected that the outcome would be satisfactory in all the ways that I have described.

I want to say something else about Lord Bonomy's proposals, if I may, but I will do so when you ask me to.

Ian Duguid (Faculty of Advocates): I want to correct the perception that the Faculty of Advocates went into negotiations with the Scottish Legal Aid Board on the understanding that fees would be uprated. That is not entirely correct. New procedures were being brought in as a result of Lord Bonomy's report and the figures and work relating to the 1992 regulations were so out of date that some adjustment was clearly needed. The Faculty of Advocates went into the negotiations on the understanding that the rates that would be paid under the new procedures would be roughly the same as those that the board already recognised. After all, the board did not have recourse to the auditor to tax any of the fees that were being charged. It was paying fees that were being charged by the counsel. The faculty understood that those fees would roughly set the parameters for the rates that would be paid under the new procedures, with certain adjustments, but that is not how things transpired.

The Convener: I will summarise the problem. Earlier, I said that I assumed that, during the review of the 1992 regulations, you expected at

least a minor increase in fees because there had not been one, but you are saying that you expected the new regulations broadly to mirror the 1992 regulations, and you have ended up with something far short of that. Is that a fair summary?

Roy Martin: That is a fair summary. If I may, I will explain why there was no problem in 2004, despite the regulations being so out of date. The reason was that, although the scale figures in the 1992 regulations were by then significantly out of date, because of the flexibility in the regulations and the power of the auditor to tax fees, fee levels had generally risen, which was recognised by all. As Ian Duguid said, in virtually every case in 2003-04, the Scottish Legal Aid Board paid fees that were reasonable because of the history of decisions and negotiations through the auditor of court. Clearly, any scale fees that were provided without that flexibility were not reasonable, which was the problem when we came to the regulations that were first proposed in July 2004. The rates were very much lower than they should have been for 2004 and the flexibility was much reduced. That is the problem.

Margaret Mitchell: The committee takes seriously anything that has the potential to jeopardise access to justice. As the convener said, we had a meeting with Lord Bonomy as a result of which our understanding was that, because the Bonomy reforms relate to a large extent to the front end of the process—they try to get as much agreement and as much business out of the way as early as possible to increase the efficiency of the courts—that early work was to be remunerated. There was to be no question of loss on the part of the advocates or anyone else who is involved.

You have provided a full paper, but it would be so much better if you recapped some of the points on the record. The interim regulations took away the flexible capped fees and introduced fixed rates. As a result of the Bonomy reforms, more work has been created that might not come under the category of the work that is deemed necessary at the early stage in proceedings—it is done at that stage, but it kicks in a little later. Is that one of the issues that was not covered in the interim regulations? Is another problem that there is now no right of appeal to the auditor of court, who could resolve many situations in which there was a grievance?

Roy Martin: That is the removal of the flexibility that existed previously. In a sense, that flexibility was the oil that kept the machine going. Ian Duguid should respond to the question, as he has more detailed knowledge of the precise ways in which the Bonomy reforms have changed the character of the work. It is right to acknowledge that, although counsel are expected to work in a particular way because the new procedure demands it, the regulations provide no basis for payment for that work. Because of the capping arrangements and the limited powers of the auditor under the interim regulations, counsel who have done such work will be told by the Scottish Legal Aid Board either that there is no basis for any payment, or, in many cases, that the payment for the work will simply be subsumed into the appearance fee, which may be due later. However, that does not acknowledge the significant amount of work that has to be done at the earlier stage.

Perhaps Mr Duguid will explain to the committee how the Bonomy reforms have changed the way in which counsel have to work.

13:15

Ian Duguid: A great deal of work is now substantially unremunerated—that is a fact of the changes. For example, the Bonomy procedure requires full disclosure to counsel of all statements that have been taken by the police, but counsel carry the responsibility for completing the written record. Members probably heard last week—it was widely expressed—that about 50,000 witness citations have been saved as a result of the new procedures. That is a good development, and the working of the courts has changed considerably because of it. The saving has come about because disclosure is given and because counsel are required, by a practice note of the Lord Justice General, to attempt to agree evidence and to explain where they have done so or why they cannot do so. Therefore, the reduction in the number of witness citations is largely a result of lawyers either agreeing that witnesses will not be required or agreeing the evidence.

A huge amount of work goes into the case before one gets to the first appearance in court, which is the preliminary hearing. That is essentially what could be called preparation, for which there is no basis for payment under the existing regulations, nor indeed under the emergency regulations. They simply do not address the issue at all.

A lot of work is involved. Although it is true to say that there are a good deal fewer cases going to trial and more are resolving themselves at an earlier stage, that is not to say that people are not doing work. They are working on cases to resolve them, and the general complaint of counsel is that a lot of work is being done for which there is no remuneration and no basis for remuneration. As much as that can be a subject of discussion in negotiation, it is a difficult matter to resolve. After all, one view is that somebody who is not working particularly hard could take a lot of time to prepare a case and, if preparation is judged on time,

people are rewarded for inefficiency. There are other ways in which preparation can be addressed and resolved, but that is one of the biggest issues.

Another issue is that the daily fees that are prescribed are said to cover written work—the drafting of minutes and documents of that type—which sometimes involves going through complicated and detailed medical records to prepare a document that must then be compiled. It may involve going along to a hearing or addressing a judge on that document, and one has to prepare for the argument by studying case law. Again, that work is not remunerated and there is no provision for its remuneration. Those are the difficulties that the Bonomy proposals have thrown up. However, I certainly do not suggest that those proposals have been a bad thing—not by any stretch. In fact, they are working to alleviate a number of problems that existed in the courts. Of course, co-operation by lawyers assists in that.

Members were talking about access to justice. If there is a problem in that respect, it will come in the long term, because one cannot attract people into criminal legal aid work if one is not going to remunerate them. If they are paid such small amounts at the bottom end of the scale, we will not be able to get people in to do the work. However, access to justice is not an immediate problem, and the emergency regulations resolve the issue. As the dean of the Faculty of Advocates has pointed out, the faculty takes its responsibilities for representation very seriously indeed and I doubt if anyone in the faculty would walk away from someone who did not have representation. However, the longer-term problem remains: if we cannot attract people in at the bottom end of the profession, eventually we will be in difficulty.

I am sorry that that was such a long answer.

Margaret Mitchell: That was useful and it is now on the record.

Is there any problem with the shift of work that was previously done in the Court of Session to the sheriff court? Is that kicking into the equation as well?

Roy Martin: I think that it is. Formerly, in any case in which the Crown judged that a sentence of more than three years was appropriate or likely, it would indict it in the High Court. A sheriff's powers on solemn conviction were limited to three years, and that was raised to five years, so there is a body of cases that the Crown will now indict in the sheriff court. Formerly, the accused in a High Court trial would be represented by an advocate or by a solicitor-advocate—someone exercising supreme court rights of audience. Now, despite the crime being identical, the individual being identical and the potential sentence being identical, the case may be represented only by a solicitor, unless the Legal Aid Board gives sanction for the employment of either an advocate or a solicitor-advocate. It is certainly the experience of members of faculty that the board has operated its sanctions policy in a way that has limited the opportunity for people to be represented by either an advocate or a solicitor-advocate in cases in the category that has changed from the High Court to the sheriff court.

I have corresponded with the chief executive of the Scottish Legal Aid Board on the issue and I have been assured that there has been no change and that the policies have been reviewed. Some time ago, there was a review in which the faculty was invited to participate, and I am not sure whether we did.

I would like to think that changing the sheriff's sentencing powers from three to five years has had a consequence on access to justice. However, the system should not distort the outcome of that; it should act not to distort it.

Mr McFee: The Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2005 are designed to alleviate the problems. Do you have any comments on the emergency regulations?

Roy Martin: Technically, the emergency regulations, which were laid on 18 November, are not yet in force. They will come into force in three days' time. As I said, they address the critical problems in respect of appeals, travel and subsistence and two other categories that we have not yet discussed—proceedings under section 76 of the Criminal Procedure (Scotland) Act 1995 and confiscation proceedings. We acknowledge that the Executive has sought to avoid an increase in cases being returned. However, as we have said, the regulations are merely a partial solution to the immediate problem; they do not address the overall approach of the interim regulations, which are inadequate in many other ways. I hope that our submission has assisted the committee, because we set out the various things that we think ought to be addressed when formulating any permanent regulations.

It must be acknowledged that the emergency regulations have addressed the critical problems. It is also to be appreciated that the transitional arrangements allow counsel whose cases concluded after 4 April, even if they were paid, to be remunerated if their fee was inadequate—if they simply did the work and accepted the fee. That must be acknowledged as a reasonable response to the immediate problem.

Mr McFee: That brings me from the immediate problem to the temporary resolution. The Subordinate Legislation Committee advises us that regulation 2(1) is retrospective and that, because there is no retrospective power in the

Legal Aid (Scotland) Act 1986, there are doubts about whether the regulations are ultra vires.

Roy Martin: I am aware that the Executive was anxious about that, so it considered the regulations extensively before it laid them. The practical and reasonable reason for that provision is that it allowed counsel who had been inadequately remunerated to be paid adequately. A member of faculty challenged the interim regulations in a judicial review, and that affected work that was done before the regulations were passed.

Mr McFee: McCall.

Roy Martin: The case was McCall v the Scottish ministers and it was successful. The court has yet to work out the procedural consequences of the case. I think that the regulations will be quashed only to the extent that they apply to work that was done before 4 April 2005. The interim regulations will remain, and the emergency regulations are an amendment of those. Regulation 2(2), which is the application provision, provides that the regulations do not apply if the result is a lesser fee for any work done since 4 April. They apply to allow counsel to claim a greater fee. If it helps the committee—you must forgive me, but my current view is not a formal legalised opinion—I do not see that as being retrospective in a vires sense, because the amendments are to regulations that had their effect after 4 April 2005 and they do not affect citizens' rights detrimentally. Counsel's fee since 4 April is not reduced. Indeed, that point was made about the interim regulations in the judicial review; no one can challenge the regulations on the ground of retrospection, by claiming that the regulations affected them detrimentally.

Given the time that the Executive has taken to consider the regulations, I hope that it has taken the matter into account. In fact, I am sure that it did because of regulation 2(2). At the moment, my informal view is that there is no question that the emergency regulations are ultra vires because of retrospection.

The Convener: You said that these are emergency regulations. I have to say that it does not say anywhere that they are emergency regulations; in fact, we have been confused by the whole matter, because we did not note that the previous regulations were interim regulations.

Would the faculty be satisfied if we reported to Parliament that the emergency regulations should remain in place until we and the Scottish Executive can agree a longer-term set of regulations?

Roy Martin: Yes. We called the regulations that came into effect on 25 March and applied to cases after 4 April the interim regulations because we expected permanent regulations to follow thereafter. Indeed, we still expect that to happen. We have called the regulations that we are now formally discussing the emergency regulations because they deal with certain critical problems. The faculty certainly supports the view that the interim regulations, as amended by the emergency regulations, should be in force and recognised as having legal effect until they are replaced by permanent regulations.

The Convener: So you are still concerned about fees in relation to the Bonomy reforms, the uprating of fees in the 1992 regulations and the consequences of sentencing powers in the sheriff court and suggest that the role of the auditor of court should be restored to provide flexibility over fees.

Roy Martin: Those are our main concerns. In a way, the final aspect overrides all the others. We support the restoration of the role of the auditor of court—although we have discussed other mechanisms such as a committee—because, if flexibility exists, there should be no problem. The problem lies with a lack of flexibility. In some cases, counsel are simply told, "You cannot be paid," or "You cannot be paid any more," and the advocate says, "That is not reasonable remuneration; I'm not taking the case."

Of course, even on a scale fee, most run-of-the-mill cases will not cause any difficulties. However, I am sure that the committee appreciates more than most that litigation is not predictable, certain or confined. Every case has its unique elements. If that is recognised, we ought to avoid problems in future. Indeed, that should perhaps be the first priority, because it covers all the other aspects. We need the mechanism that I have outlined. Introducing strict caps or limiting the auditor's powers beyond what is reasonable will only give rise to problems further down the line.

The Convener: That last point was helpful.

I thank the dean of the Faculty of Advocates and Ian Duguid for speaking to their paper. Their evidence has been helpful.

I know that we are running extremely late, but it would help to hear from Andrew Dickson, Gillian Mawdsley and Jane McLeod from the Scottish Executive Justice Department. I thank them for agreeing to attend the meeting and apologise for keeping them waiting. Did you happen to hear the evidence from the Faculty of Advocates?

Andrew Dickson (Scottish Executive Justice Department): Yes.

13:30

The Convener: Do you want to respond to what you have heard?

Andrew Dickson: Yes. I will run through the content of the regulations that are before us and the reasons for them, which to some extent will go over some of what has been said already. However, I will be as brief as possible.

The Convener: It would be helpful if you could point to areas where you disagree with the Faculty of Advocates.

Andrew Dickson: First, as has been said, the regulations on the work of counsel in criminal cases had not been updated since 1992 and were therefore out of date in terms of the amounts prescribed and the extent to which the categories of work set out reflected practice in the courts. We are at one with the Faculty of Advocates on that. In practice, over the period 1992 to 2005, the amounts that were paid by the Scottish Legal Aid Board were set by reference to the decisions of auditors of court and were more and more removed from the amounts that were set in the fee tables. There was therefore considerable uncertainty as to the fee that would be paid for any particular case or item of work. Frequently, there required to be negotiation on a case-by-case basis.

Secondly, overall expenditure on legal aid, and on criminal legal aid in particular, expanded considerably between 2000-01 and 2004-05. Payments to advocates and solicitor advocates in criminal cases rose by 104 per cent—that is, they more than doubled. There was therefore an issue about overall public expenditure.

It was recognised—the Faculty of Advocates would agree with this—that a new approach to the setting of advocates' fees was necessary. There was a considerable period of discussion with the Faculty of Advocates and the Scottish Legal Aid Board. As has been mentioned, that was given added impetus by the need to provide for a system of legal aid fees to complement the changes that were being made to High Court procedure as a result of Lord Bonomy's recommendations. As has been mentioned, those reforms introduced preliminary hearings and a system of fixed and floating trial diets, all of which were intended to stop the so-called churning of cases by repeated adjournments.

In examining those points, we also had to recognise that new regulations should encourage efficiency and value for money in the legal aid system. The reforms that were included in the regulations that were made in March—they have been described as the "interim regulations", but that is not a term of art—were made after extensive consultation with the faculty, and they introduced a new structure for advocates' fees. It was recognised at the time that the operation of the new table as it applied to first-instance cases would have to be carefully monitored, especially in the light of experience of the changed procedure in the courts. Ministers made it clear that they would be willing to make early changes should those prove necessary.

The regulations that are before you now address the four areas on which general agreement was reached between the Executive, the Scottish Legal Aid Board and the Faculty of Advocates that the levels of remuneration were not adequate. They deal with payment for work on appeals set down in court for a half day because of the complexity or length of the case; payment for work carried out in relation to sentencing following pleas under section 76 of the Criminal Procedure (Scotland) Act 1995; improvements to the arrangements for travel and subsistence payments for work at distant courts; and improved payments for confiscation diets in cases concerning the proceeds of crime.

The regulations, like those that were made in March, apply in respect of proceedings that were concluded on or after 4 April, but they have a provision allowing payment at the rates that were applicable under the previous system where that would result in a higher fee being payable. The Faculty of Advocates has mentioned that point.

You asked where we disagree with the faculty's description of the whole picture. In many ways, direct comparisons between the new system and the old system—which depended very much on the decisions of auditors of court—are difficult to make and frequently are not very helpful.

Obviously, the faculty has concerns, which we and the Scottish Legal Aid Board will continue to discuss with it. In essence we are talking about a block fee system which, to a large extent, is intended to subsume in the fee to be paid remuneration for necessary preparation. Therefore, the emphasis on how that is described that we and ministers would tend to place on that is slightly different from that of the faculty. We do not accept that there are large amounts of work for which no fee is payable. That has to be seen as a difference of view about the working of the new system as against the old system.

Mr McFee: I presume that the amendment regulations are an attempt to deal with an acknowledged problem in the system. Are you satisfied that because no unfairness is involved—although the taxpayer might disagree—the regulations are intra vires as opposed to ultra vires? As far as you are concerned, are the amendment regulations the final document, or are we going to see amendments to amendments in the foreseeable future?

Andrew Dickson: I will return to your second point, but I will first ask Jane McLeod from our solicitor's office to deal with the first point on vires,

on which we have responded to the Subordinate Legislation Committee.

Mr McFee: I am aware of that.

Jane McLeod (Scottish Executive Legal and Parliamentary Services): The short answer is yes. We considered the vires issue carefully before we made the regulations. I do not think that we would disagree with the informal view that the dean of the Faculty of Advocates expressed. Our consideration turned largely on the question of detriment. We took the view that there is the general principle that Parliament is presumed not to have intended to alter the law retrospectively in a way that is unfair to those affected by such a change. The enabling powers in the Legal Aid (Scotland) Act 1986 are such as to allow the approach that is taken in the regulations. We have ensured through regulation 2(2) that there is no detriment.

Mr McFee: Clearly there is no detriment to those who are the subject of the amendment regulations, but does that extend to the taxpayer?

Jane McLeod: The question of detriment does not require us to consider the wider issue of the taxpayer at large. We are considering more specifically those who are directly affected or concerned by the provision.

Andrew Dickson: Bruce McFee's second question was whether the amendment regulations were the final amendment regulations. The intention of ministers is that the essential points that are embodied in the regulations, read together with the regulations that were made in March, should remain as part of the system, with the possible exception of the issue of payment for appeals, which we acknowledge needs to be discussed further. As the dean said, the issue was not considered in great detail before the March regulations were made. We and the Scottish Legal Aid Board hope to engage in further discussions with the faculty about further changes, particularly in relation to appeals, which might be necessary. However, that does not mean that the whole content of the two sets of regulations made in March and November is up for reconsideration.

Mr McFee: So if the regulations go through without any problems, what is up for consideration is the issue of payment for appeals. That is what is outstanding.

Andrew Dickson: That is the main issue from our point of view.

The Convener: So you are not going to consider the restoration of the role of the auditor of court, which is the faculty's major concern.

Andrew Dickson: That would be a matter for ministers. As advised at present, I would say no. One of the major difficulties that the March regulations addressed was the escalation of fees as a result of auditors' determinations. It is not true to say that there is no place for the auditor of court in the regulations that have been made, but the auditor's discretion is limited.

The Convener: I understand the point that you are making about what has happened since 1992. Nevertheless, I express a key concern in relation to the Bonomy reforms. Lord Bonomy made it crystal clear—and his view was supported by the Parliament—that if the Faculty of Advocates agreed to change the way in which advocates operated in line with the new procedures, which would necessitate more preparation work, advocates should be adequately paid for the work that they did. The main adjustment would be that advocates would get less for being on their feet but would be paid more for the preparation that would be necessary if the reforms were implemented. We are not necessarily going to get that right in the first few years. We are not even a year into the Bonomy reforms. Do you not think that there is a need for flexibility? Lord Bonomy made it clear that the success and continuation of the reforms depended on their having the full confidence of the Faculty of Advocates.

Andrew Dickson: The changes that have been made are, in part, intended to reflect the changes that have been brought about as a result of Lord Bonomy's review. For example, there has been a substantial increase in the basic fee for a plea under section 76 of the Criminal Procedure (Scotland) Act 1995. The amount is now about £1,200—I am not absolutely sure of the exact amount. We must and will continue to monitor what is happening in the High Court with the view—which ministers would endorse—that there should be fair remuneration for the work that has to be undertaken. That remuneration should also be structured in such a way that it encourages the other positive aspects of the changes in High Court procedure. We hope to continue our monitoring of the issues and will discuss matters with the Faculty of Advocates.

The Convener: If the committee reports to Parliament that it is satisfied with the emergency regulations, can it do so in the knowledge that the Executive will continue to discuss with the Faculty of Advocates the concerns that the faculty has raised?

Andrew Dickson: Yes. There are a large number of issues, some of which are complex, but we nevertheless expect to continue to discuss them. The basic shift from an auditor-based payment system to a clearer and more certain system for the payment of the amounts that are set out in the regulations, which would normally be the amounts that are paid, is an important part of

the changes, which I expect that ministers will wish to adhere to.

Mr McFee: I sympathise with much of what you say about trying to control costs. As things operate at the moment and as they will operate in the future, what flexibility remains for the auditor of court other than in exceptional cases to keep an eye on fees to ensure that they do not run out of control?

13:45

Andrew Dickson: The auditor of court has some flexibility under the current regulations, although maximum fees are specified. The auditor of court also has a duty, which has been exercised many times, to obtemper claims for fees that are clearly above a reasonable level of remuneration. I could cite various examples of that.

The Convener: That concludes our questions. Thank you for coming to speak to the committee about the regulations.

The decision on the regulations will be made next week.

Act of Sederunt (Fees of Sheriff Officers) 2005 (SSI 2005/583)

The Convener: We have a note that has been prepared by the clerk and a letter from the Lord President. Are members happy to note the act of sederunt?

Members *indicated agreement*.

Civil Partnership (Modification of Subordinate Legislation) Order 2005 (SSI 2005/572)

The Convener: We have a note that has been prepared by the clerk on the order, which is subject to the negative procedure. The committee considered the order a couple of weeks ago, but it has reappeared on the agenda due to the comments that were made on it by the Subordinate Legislation Committee. Alex Mowat is here to answer any questions that members have on the order. I think that it is quite straightforward—it just lists amendments to various regulations as a consequence of the Civil Partnership Act 2004.

I thank Alex Mowat for coming along in case he was needed.

Family Law

13:47

The Convener: The final item, on family law, was put on the agenda at the request of Mary Mulligan. Given the time, she has kindly agreed that we can discuss the matter at our next meeting, but she might want to say something now.

Mrs Mulligan: I am grateful to the convener for putting the item on the agenda. I proposed the item merely to give members an opportunity to consider the discussions that we have had about support services in relation to the Family Law (Scotland) Bill. As we have completed stage 2 of the bill, I thought that it would be useful to discuss whether we want to continue consideration of the matter. I am happy to leave the discussion until next week, when we can discuss in more detail whether the committee wants to take the matter forward as an inquiry. We know that the Executive is also pursuing the matter.

Mr McFee: Given the timescale, I assume that you are not talking about discussing the matter in order to lodge amendments to the Family Law (Scotland) Bill. Your question is whether a separate inquiry should be opened.

Mrs Mulligan: Yes. I recognise that there might be things that need to be done that are not covered in the bill. We might want to consider those things as part of our on-going awareness of what is being offered on the ground. I do not propose to lodge further amendments on the matter.

Mr McFee: That is not unreasonable

The Convener: Thank you, Mary. We will discuss that next week.

I remind members that the deadline for lodging amendments to the Family Law (Scotland) Bill is 4.30 pm on Friday.

It has been a long meeting, but we have managed to resolve some important items. I thank members for their patience.

Meeting closed at 13:48.

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