

# **JUSTICE 1 COMMITTEE**

Wednesday 14 December 2005

Session 2

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# CONTENTS

Wednesday 14 December 2005

Col.

<b>SCOTTISH COMMISSIONER FOR HUMAN RIGHTS BILL .....</b>	<b>2467</b>
<b>SUBORDINATE LEGISLATION.....</b>	<b>2515</b>
Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2005 (SSI 2005/584) .....	2515
<b>FAMILY LAW.....</b>	<b>2517</b>

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## JUSTICE 1 COMMITTEE

41<sup>st</sup> 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:

Rosemary Burnett (Amnesty International Scotland)  
David Cobb (Scottish Human Rights Centre)  
Kathleen Marshall (Commissioner for Children and Young People)  
Muriel Robison (Equal Opportunities Commission)  
Lynn Welsh (Disability Rights Commission)

### CLERK TO THE COMMITTEE

Callum Thomson

### SENIOR ASSISTANT CLERK

Douglas Wands

### ASSISTANT CLERK

Lewis McNaughton

### LOCATION

Committee Room 6



## Scottish Parliament

### Justice 1 Committee

*Wednesday 14 December 2005*

[THE CONVENER *opened the meeting at 10:21*]

### Scottish Commissioner for Human Rights Bill

**The Convener (Pauline McNeill):** I welcome everyone to the 41<sup>st</sup> meeting in 2005 of the Justice 1 Committee. All committee members are present and I welcome once again the committee's adviser, Professor Jim Murdoch, and Sarah Harvie-Clark and Murray Earle from the Scottish Parliament information centre, who join us for item 1. I remind members to switch off anything that will interfere with the sound system if they have not already done so.

I welcome our first panel of witnesses on the Scottish Commissioner for Human Rights Bill and apologise for keeping them waiting. Lynn Welsh is from the Disability Rights Commission, Muriel Robison is from the Equal Opportunities Commission and Professor Kathleen Marshall is Scotland's commissioner for children and young people. I thank them all for their written submissions and for coming to give oral evidence this morning. Bruce McFee has the first question.

**Mr Bruce McFee (West of Scotland) (SNP):** I want to tease out your views on the need for a commissioner for human rights in the first instance. What powers should a commissioner have, do you think that there should be a commissioner, and what are your views on the bill? Given the plethora of organisations—ombudsmen, inspectors, trade unions and other pressure groups—that currently take up many of the cases that a commissioner might take up, why does Scotland need a human rights commissioner?

**Muriel Robison (Equal Opportunities Commission):** The Equal Opportunities Commission has a specific interest in the interplay between equality—sex equality in particular—and human rights. Since 1999, we have been part of the Scottish human rights forum, which is an informal organisation that has been in existence for a number of years. We have been arguing since we became involved in that forum that it is important to have a human rights commission, or equivalent body, in Scotland.

There are specific reasons for having a commission in Scotland, whether or not there is one for Great Britain. One of the main reasons is

to do with the role of Parliament and the Executive in relation to the European convention on human rights. Of course, the Parliament must not legislate in contravention of the European convention on human rights, and our courts in Scotland can consider whether legislation is within the competency of the European convention. There is therefore a specific reason in Scotland for having a commissioner that can supervise and oversee such issues.

We do not have an organisation in Scotland that looks at the broad overall picture of promotion and protection of human rights. Some organisations deal with the matter, but they have limited roles, either as a result of their statutory powers or because of limited resources. Some non-governmental organisations that have limited resources and other organisations, some of which Bruce McFee mentioned, can deal with human rights issues that relate to their remits. However, an organisation that considers human rights across the board and which can increase its authority and expertise on the matter is important for Scotland.

**Mr McFee:** The other panellists might want to answer, but I have another question for Muriel Robison before they do. You say that other organisations are limited by their statutory powers, but given the limited functions and powers that the commissioner will have under the bill, how much more powerful than the existing bodies will the commissioner be?

**Muriel Robison:** That is a good question. You may have noticed from the Equal Opportunities Commission's response that we welcome the creation of a human rights commissioner, but that we are concerned that the bill will not give the commissioner the required scope to operate. Two different questions arise: the first is whether a commissioner is needed and the second is whether the bill is fit for what is needed. We argue that it is not in its current form.

**Lynn Welsh (Disability Rights Commission):** We agree that, in principle, a Scottish commissioner for human rights is required. The Disability Rights Commission obviously has concerns about the human rights of disabled people. Huge issues exist that connect human rights and disability, but we cannot take action on any of them and we have seen no one else take action on them. We would welcome a body that could take such action but, like Muriel Robison, we hope that the commissioner will have more power to carry out essential work.

**Kathleen Marshall (Commissioner for Children and Young People):** I agree with the proposal to establish a Scottish commissioner for human rights who will, as I tried to explain in my written submission, complement my functions. I

certainly hope that the commissioner for human rights and I will have a fruitful collaboration once the post is established.

I want a commissioner to be established for three main reasons. The first is about awareness raising. In my work, I come across many situations in which people wave the human rights flag inappropriately—people sometimes do not understand what human rights are about, so we need to raise awareness of what they are. A second reason is that it is important that we have somebody who is a constant reminder of human rights and who is almost the voice of our conscience. It is easy to make broad statements about human rights and then to put them in the background when their implementation becomes inconvenient, uncomfortable or expensive. We need a commissioner to keep saying what has been promised and what is required to respect the promises.

The third reason why we need a commissioner is that the commissioner will highlight the consequences when public authorities do not respect human rights in their work. That role is not as important in the Scottish Commissioner for Human Rights Bill as it is in the Commissioner for Children and Young People (Scotland) Act 2003, because a breach of the ECHR carries more explicit legal consequences than does breach of the United Nations Convention on the Rights of the Child. However, the fact that the commissioner will be able to ask formal questions is important. In my work, doing so has already given the Convention on the Rights of the Child higher status, because people know that someone is looking and will ask questions. That will also be the case if a Scottish commissioner for human rights is established.

**Mr McFee:** You say that broad statements are made, but when it comes to implementation, the statements can start to lose their shine. If the Executive does not change its view on the powers and remit of the proposed commissioner, should the commissioner still be created or will that be, frankly, just another sop or another broad statement that will not be backed up?

10:30

**Kathleen Marshall:** What is proposed would be better than not having a commissioner, although there are questions about the scope of the commissioner's remit. It will depend largely on how the commissioner's post is implemented and how their role is taken forward in the public forum. There are questions about who will be appointed, how the office will be set up and how it will decide to operate. The role of the commissioner could be stronger as, I am sure, the other witnesses will agree.

**Lynn Welsh:** I agree. As Muriel Robison said, it is important to have a body that interacts directly with the Scottish Parliament. That will be a great bonus of having a Scottish commissioner for human rights, and it is better to have a commissioner even in the form that the bill proposes than to have no such commissioner that is answerable in this forum.

**Muriel Robison:** We need to consider the interplay between the Scottish Commissioner for Human Rights Bill and the Equality Bill that is currently before the Westminster Parliament. There is an expectation in the Equality Bill that a body of this sort will be set up in Scotland. As that bill stands, there would be a massive gap in the protection of Scottish citizens if no Scottish commissioner were set up. As an alternative, the powers of the commission for equality and human rights, which will be set up by the Equality Bill, could be extended to Scotland in relation to equality issues only. Otherwise, there is importance—even if it is only symbolic—in having a Scottish commissioner.

**Mr McFee:** Can we examine part of that gap? I accept that there will be a gap if the position of commissioner is not created, but will not there be a gap even if the position is created as it is proposed? Many people identify a gap in that the commissioner will be unable to investigate individual cases. Should the commissioner be allowed to investigate individual cases? What other powers are missing from the proposed commissioner's role?

**Lynn Welsh:** We believe that the commissioner should have the power to consider specific issues that are brought to their attention. As drafted, the bill would not enable the commission to do that. We are also concerned about the restriction on the bodies that the commissioner will be able to investigate: the commissioner will be restricted to consideration of an individual organisation only if another organisation carries out the same functions. That means that the commissioner will not be able to examine a local authority or a health board. We have concerns about that. That is different from the powers that the British body is likely to have, which we would like to be extended to the Scottish commissioner.

There is also the issue of the commissioner's ability to support cases in court and to raise judicial reviews. The British body is being given the power to intervene and to raise judicial reviews.

**Muriel Robison:** The commissioner ought, broadly speaking, to have enforcement powers. Beyond that, there are several gaps, one of which Bruce McFee identified. The British commission for equality and human rights will have the power of judicial review in relation to human rights

questions, which the Scottish commissioner will not have. We are also concerned about the scope of the Scottish commissioner's power to conduct inquiries. The United Kingdom commission will be able to examine individual organisations, to report whether they have breached human rights and then to challenge that through judicial review. The Scottish commissioner will not have that power, so there will be a gap in protection.

**Kathleen Marshall:** The ability to investigate individual cases was central to the debates that led to the setting up of my post. About half the children's commissioners around the world can investigate individual cases and half cannot. Parliament decided that my role would be more strategic, but that it would keep an eye on it. The argument against the human rights commissioner having that power is similar: they could be swamped by individual cases. So far, I have not found that not having the power is a restriction, but it is early days and I will keep an eye out for situations in which I might feel that it would be helpful to be able to investigate individual cases. We do receive individual inquiries; I have an inquiries officer who tries to guide people towards the appropriate place and who monitors what happens.

The scope in the bill of the bodies that the commissioner will be able to investigate is narrow. My investigatory powers extend to service providers that could be in the public, private or voluntary sector. I appreciate that public authorities are perhaps specified because convention rights are a particular focus of the bill, but the bill states that human rights also include

"other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom."

The bill has special regard to convention rights, but it recognises that there are other human rights instruments, so it may be worth while to ask why the bodies that are subject to investigation are defined so narrowly.

**Mr McFee:** That is an interesting point. If a case arose in which a local authority was not observing children's rights, you would have the power to investigate but the proposed human rights commissioner would not. If somebody was denied housing because they were black or because of their sexuality or religion, the human rights commissioner could not intervene, but if the housing department applied thumbscrews to that person the commissioner could intervene because torture would be involved. Have you had any indication of why the provision is so restrictive? Do you understand the rationale behind it, other than the potential for the commissioner to be swamped by individual cases?

**Kathleen Marshall:** I do not understand it, given that the bill is concerned with the policies and

practices of authorities and not necessarily with individual cases. If it came to my attention that a local authority had cut its budgets for children's services without taking account of article 3 of the United Nations Convention on the Rights of the Child and without consulting children, I could investigate the authority's policies and practices. I could not examine the individual case, but I could use it as an example of the general issue. I am concerned that the human rights commissioner will not be allowed to take that approach.

**Lynn Welsh:** It is not clear to us why the restriction exists.

**Muriel Robison:** It is interesting that you used the word "swamped". Obviously, individuals can take cases to the other equality commissions. It is important that the commissioner be able to operate strategically and that the commissioner has appropriate powers, which should act as a deterrent, as they do in the New Zealand Human Rights Commission; its promotional role is paramount and its enforcement role is secondary. Recently, I spoke to the chief commissioner of the New Zealand Human Rights Commission; she said that it rarely uses its powers because the fact that the office exists is an extremely powerful deterrent.

**The Convener:** I have a supplementary question on that. I hear what you are saying and you are giving helpful examples, but I presume that you accept that, if that dramatic scenario happened and an agency stopped providing children's services, Parliament might have something to say about it. I just thought that you might want to set the context, which is that there are elected members. If a local authority stopped providing children's services, it is inconceivable that Parliament would not be able to achieve something.

**Kathleen Marshall:** I am not saying that such an event is likely. A more likely scenario is a disproportionate cut in children's services. MSPs bring situations to my attention, as do members of the public and community organisations. If there was such a cut, MSPs would look to me to ask questions and to intervene. I accept that legal questions would arise if a local authority were to cut all its children's services. I am not saying that that would happen—

**The Convener:** If services were cut in Stewart Stevenson's constituency, he would be the first to get on his feet.

**Stewart Stevenson (Banff and Buchan) (SNP):** They would not dare.

**Kathleen Marshall:** Stewart Stevenson might ask for a public inquiry or an investigation. The questions are what he would ask for and what mechanisms are in place to deliver that. We would

have to consider the options that were available and ask which was the most appropriate.

**Mr McFee:** Absolutely. MSPs raise cases all the time but, of course, the results depend on whether anybody pays attention and implements measures.

**The Convener:** Speak for yourself.

**Mr McFee:** Well, the issue of equal pay in Glasgow is a classic example. It has been raised for many years but nothing has happened.

I will move on. If there were enough cases out there to swamp the commissioner, would that be added justification for the power?

**Lynn Welsh:** We must consider the difference between taking cases and undertaking investigations or inquiries. We have talked mainly about conducting an inquiry into a body. Cases may prompt an inquiry or be the focus or basis of one. As Muriel Robison said, both our commissions support cases strategically so that we are not swamped. That power is useful and has proved to be invaluable in working out what the legislation is and how it should work, for example. There should be a power to consider individual cases strategically, but that is separate from conducting inquiries.

**Mr McFee:** You would expect the commissioner to exercise a little restraint in taking cases, so that they were not swamped.

**Muriel Robison:** Yes. The particular value of a commissioner is that they can have an overview of the good test cases to progress. In contrast to that is the situation when individuals who can afford it choose to take their issue to court. The bill provides the power to intervene, but a case must reach court before the commissioner can intervene. The value is in having the overview and the ability to progress the best test cases, to encourage the culture of human rights in Scotland appropriately.

**Mrs Mary Mulligan (Linlithgow) (Lab):** My question will be brief, because it was almost answered by the previous comments about having an overview. Bruce McFee said that other people have addressed human rights issues but that it is recognised that a gap will arise. You have made clear your feeling that the commissioner should fill that gap. However, would further resourcing of, and additional powers for, your organisations be an alternative to having one office that takes a broader-brush approach? Given your experience, would it not be better for you to look at matters from your perspective?

**Lynn Welsh:** We are looking ahead to a time when a single body, rather than individual commissions, operates. My answer to the question is no, because what Mary Mulligan suggests

would lose the crucial interaction with the Scottish Parliament, which is the idea that the Parliament, not the Executive, will be responsible for the commissioner. The commissioner will be responsible to Parliament and will be able to assist and advise. That would not be available from a British body—the CEHR, for example, will not be able to do that. It will be invaluable to have a body in Scotland that understands Scotland in its widest social sense.

**Muriel Robison:** As I think I said at the beginning, our powers are limited. We can consider human rights only as they relate to equality, like the bigger organisation, so the scope is limited. As I said, the value is in having an overview and broader consideration of all human rights in the convention and beyond that, which the Equal Opportunities Commission would not have the power to examine in any event. Other existing bodies that deal with human rights also have a limited remit.

**Kathleen Marshall:** I agree. There is a point in having a Scottish commissioner for human rights. My remit is focused on a particular group in Scottish society; that is also legitimate, because a democracy involves a debate in which we must hear different voices, and sometimes we must give added strength to the voices that are most likely to be drowned out. Children and young people, people with disabilities and other people who are within the equalities remit fall into that category.

That is a balancing act. The rights are not necessarily conflictual; the human rights commissioner would have an overview, but there would be different voices in the debate. That balance is valuable.

**Mrs Mulligan:** You think that debate is helpful, too, and would not mean that opposing views were put forward.

**Kathleen Marshall:** There could be opposing views on some issues, but that would be part of the debate. As I have travelled around speaking to people, one of the main messages that I have tried to send is that children's rights are part of human rights and that children's and adults' rights do not necessarily conflict. There will be situations in which one tries to achieve a balance, but in general, there is a community of interest. The point is that if there is not a specific focus on groups of people who are inherently disempowered and cannot vote—such as children and young people—the chance is that their voices and interests will be overlooked by people with louder voices. Debate is valuable and democratic.

10:45

**Stewart Stevenson:** Your psychic powers have pre-empted one of my questions. However, I



would like to pick up on a narrow point that Muriel Robison, I think, made earlier about oversight of the Scottish Parliament's legislation. To what extent is there a problem that you are trying to solve in that respect? A duty of the Presiding Officer's office is to ensure that our legislation is ECHR compliant; indeed, this very day, I have seen that office's hand in a manuscript amendment for Thursday's debate on the Family Law (Scotland) Bill that was produced because there was an omission in what the amendments covered. Of course, that is ante hoc; post hoc, the process by which a bill gains royal assent also involves review for ECHR compliance. What gap are you pointing us to and have you in mind examples that show that existing processes have not delivered in the 60-odd bills that Parliament has so far passed.

**Muriel Robison:** There will be value in a commissioner contributing to consideration of legislation because of their knowledge, expertise and overview of human rights, the convention and so on, and because of their knowledge of what is happening on the ground in Scotland. Perhaps a commissioner would be close to what is happening on the ground in Scotland in a way that people in the Parliament are not. An external, independent and objective body that considers legislation will provide additional value. I do not know whether my colleagues have particular examples to give in that context.

**Stewart Stevenson:** I would like to bottom out what you have said. It appeared that you were making a point about processes, but you now appear to be suggesting that there is a role for the commissioner in influencing formulation of policy—in other words, what will go into bills—rather than in simply auditing whether a bill is compliant with ECHR, which appeared to be what you were initially talking about. Will you clarify whether the commissioner should have a role in one of those areas or in both areas? What exactly should their role be?

**Muriel Robison:** I would have thought that they should have a role in both areas. My written submission gives examples of what the commissioner's role could involve, but there would be value in their providing input to policy and in considering the detail of proposed legislation as it goes through Parliament.

**Stewart Stevenson:** Are you not content with the existing audit processes, which involve the Presiding Officer's office, scrutiny by members in committees and in the chamber, and scrutiny in the royal assent process?

**Muriel Robison:** I simply think that having an additional objective and independent view has a value.

**Stewart Stevenson:** What is that value?

**Muriel Robison:** As I said, knowledge of what is happening on the ground in Scotland and perhaps throughout Britain and in other countries in the world will be brought into the process. There should be a centre of expertise on human rights issues that has expertise that another organisation cannot possibly have unless it wholly focuses on human rights.

**Stewart Stevenson:** In order to justify your remarks, can you give examples of where we have failed in the 60-odd bills that we have passed?

**Lynn Welsh:** I do not know where you might have failed, but it is true that all of us can always do better. I agree with what Muriel Robison said about having an independent voice. Considering human rights issues is only part of the Parliament's job—having someone independent from the outside to consider such issues is always useful. The Disability Rights Commission already contributes to formulation of policies and comments on issues that Parliament is considering. The Scottish commissioner for human rights could do the same in a valuable way.

**Stewart Stevenson:** Are you suggesting that the elected members of the Parliament do not have an independent voice?

**Lynn Welsh:** I am sure that you have an independent voice, but I am also sure that you do not have absolute expertise in human rights. It may be useful to have an outside body that combines independence and expertise.

**Stewart Stevenson:** I am prepared to accept the thesis but I cannot get my hands on examples of where a commissioner would make a difference. That is my dilemma and that is why I am being fairly robust in challenging what you say.

**Kathleen Marshall:** In my office, we consider the reactive agenda and the proactive agenda. The reactive agenda involves doing a kind of audit of what comes from the Executive or goes through the Parliament, to assess whether it complies with people's rights. We are developing a children's rights impact assessment, which we have used on a couple of bills so far. I am not sure of the extent to which that kind of detailed impact assessment is already done for rights under the ECHR; it may be that a commissioner could give a fuller and more informed assessment.

However, there is also a proactive agenda. One of the basic functions of the Scottish commissioner for human rights will be to promote respect for human rights, and one thing that we do is to look for gaps in a bill. An example would be our work on the Prohibition of Female Genital Mutilation (Scotland) Bill. What was in that bill was fair enough and was consistent with human rights, but

we examined it and said, "There's something missing here—the protective aspect. The bill has no mechanisms for protecting children." Therefore, we facilitated a discussion and made some recommendations that were taken on board. It was about adding to what had been done and having a fuller debate.

**The Convener:** Those are important points. I am convinced by what you say about awareness raising and about taking an overview. However—and I do not want to misinterpret what you have said—we, as elected members, think that we do an okay job of scrutiny. We are required by law to scrutinise each bill that goes through the Parliament. Each bill will have input from the Equal Opportunities Committee. We are expected to take an overview, and we test the Executive. For each bill we ask, "Is this ECHR compliant?" We have passed more than 60 bills and, to my knowledge, none of them has been struck down. It is important to set the context for your arguments.

I think that you are saying that a human rights commissioner would be another voice. However, the part of your argument that is not very convincing is the part that says that the commissioner will provide an overview. Can you say where the parliamentary process is failing?

**Lynn Welsh:** There is a difference between legislation that is only compliant and legislation that promotes human rights issues. The different commissions have added value—

**The Convener:** I have to press you on that: what issues would a human rights commissioner tackle in the first five years?

**Lynn Welsh:** If we are talking about the commissioner taking an overview of the work of the Parliament, I suppose that that would depend on the Parliament's work.

**The Convener:** So it would be only parliamentary work.

**Lynn Welsh:** The commissioner would examine your work and, I would hope, assist you.

**The Convener:** You have said that there should be awareness raising and that an overview should be taken, and I can understand why you are arguing for additional powers to be included in the bill. Which areas beyond the work of the Parliament do you think are lacking? Would a human rights commissioner draw up a list of three or four areas in which work was required?

**Muriel Robison:** That question would be better directed at an organisation such as the Scottish Human Rights Centre, which is considering the overview. My organisation has a relatively narrow remit and, frankly, I admit that I have not given a lot of thought to the question that you ask; some organisations will have given it much more thought.

**The Convener:** Let us move on to another issue.

**Marlyn Glen (North East Scotland) (Lab):** I want to ask about the remit of the commissioner and the commissioner's relationships with other bodies. My question is for the witnesses from the EOC and the DRC.

Some international commissions have responsibilities for both human rights issues and equalities issues, as will the proposed GB commission. However, devolution means that the situation in Scotland is different; the Scottish commissioner will be purely a human rights commissioner. Will that be problematic?

**Muriel Robison:** The Equal Opportunities Commission's formal position is that there should be separate equality and human rights commissions for Britain and the devolved Administrations. Although there is to be a combined commission in Britain, we take the view that the ideal would be two separate commissions partly because, in this country, the starting point has been discrimination in employment. The Human Rights Act 1998 is relatively new. We feel that it would be valuable to have a body with a specific focus on human rights and the 1998 act in order to build up understanding, knowledge and culture before the two organisations come together. Countries in which the two commissions have come together, such as New Zealand, have a different historical background, which has led to the two roles being combined.

**Lynn Welsh:** That is not the view of the Disability Rights Commission. For as long as we have been in existence, we have lobbied hard for the DRC to have rights in relation to human rights and disability, as we consider that important. That has not yet happened, but it will happen, to an extent, in the new body. There is added value in having a single UK equality body with some human rights powers and a separate Scottish body that can work with it. The two could work together successfully if the gaps in the present legislation were sorted out. That would put both bodies in a better position to work out their individual working arrangements.

**Marlyn Glen:** It is difficult to see how the new body is going to work because so much is changing at the moment. Do you think that, to ensure effective co-operation between the Scottish commissioner and the GB commission, co-operation should be made a duty in the bill?

**Lynn Welsh:** It is not essential to do that. In Scotland, we have an excellent history of co-operation. For years, the equalities co-ordinating group has been drawing together all the equalities strands to work together effectively. It would do no harm to create such a duty, but I am fairly certain

that the bodies would co-operate effectively without being demanded to do so.

**Muriel Robison:** One of our concerns is the gap between the powers of the two bodies. The Equality Bill states that the commission for equality and human rights will not be able to take action in relation to human rights in Scotland without the consent of the Scottish human rights commissioner. I am concerned that, given the fact that the CEHR will have more powers than the Scottish commissioner, the Scottish commissioner might well put pressure on the GB commission to do the work that they do not have the power to do. That will make for an awkward relationship. The problem will not be insurmountable but, as things stand, it will be quite an odd relationship.

**Lynn Welsh:** It would be better to have two equal bodies than to insist that two unequal bodies somehow co-operate with each other.

**Muriel Robison:** One of the interesting differences between the two bodies is that it is proposed that the Scottish commissioner will be accountable to Parliament, whereas the human rights element of the commission for equality and human rights will be accountable to Government. There is a difference in the status of the bodies, which might play out differently in practice.

**Marlyn Glen:** So, the relationship will be problematic and we will have to wait and see how the whole thing works out, which is worrying.

I have a question specifically for Kathleen Marshall on something that has been touched on already. Do you see any points of overlap between the functions of the proposed commissioner and your work?

11:00

**Kathleen Marshall:** There will be points of overlap given the fact that my role, as set out in statute, is to promote and safeguard the rights of children and young people. Those are not specified. The explanatory notes to the Commissioner for Children and Young People (Scotland) Act 2003 state that my remit is not limited to the UN Convention on the Rights of the Child, but includes other human rights instruments, although I must have special regard to the UN Convention on the Rights of the Child.

Similarly, the bill talks about other international treaties on human rights in a general way but states that the commissioner should have special regard to the European convention on human rights. The human rights commissioner and I will obviously have overlapping areas of responsibility, but we will also bring different emphases. However, that is natural, given that there is a whole web of international and national law. The question is what one's point of entry to it is.

I envisage that I would work closely with the commissioner for human rights. I envisage that, on general human rights issues that involve children and young people as well as other groups in society, we would talk about who would take the lead on specific parts of the issue and that it would depend partly on how it fitted into other work. I have an added role, in that the 2003 act puts a huge emphasis on involving children and young people in my work, which is consistent with the United Nations Convention on the Rights of the Child. There is a sense in which, if a general body took on some of the reactive and auditing work, it would—as long as I was happy that it was done in a way that respected the UN Convention on the Rights of the Child—leave me more free to do the proactive work, which involves getting matters on the agenda.

There is a balance to be struck. There is some area of overlap but, because of the way in which the bill and the Commissioner for Children and Young People (Scotland) Act 2003 are written, they fill some respective gaps. I have already mentioned the investigative power. My investigative remit is much wider than the one that is set out in the bill, because it is about whether, how and to what extent a service provider respects the rights, interests and views of children and young people; it is not restricted to public authorities.

My remit and that of the human rights commissioner are like two intersecting circles: there is an area of overlap in the middle, but there are also big discrete areas. The overlap is a natural one on which we would have to work together. It reflects the fact that children are human too but that, as children, they have a special characteristic of which special account must be taken.

**Marlyn Glen:** Do you not envisage that the overlap will be a difficulty? Will it not have to be sorted out formally?

**Kathleen Marshall:** I do not. We have already been through that discussion with the children's commissioners for the different jurisdictions of the UK. There have been debates about how the children's commissioner for England interacts with us, because there is an overlap in some areas. We have discussed that and are talking about having a memorandum of understanding. It makes sense to have such a memorandum but, ultimately, the issue will come down to personal relationships and whether we can work closely with each other. We can have all the memoranda in the world, but if people are determined to be entrenched in their views, they will not work.

An overlap is not avoidable. We can see that even in attempts to draw a clear line between devolved and reserved issues. We get into grey

areas, because human life is more complex than such distinctions. It is the same with the interface between children's rights and general human rights; there will always be areas that we will not be able to define as one or the other and which we will have to work through in good will.

**Marlyn Glen:** You obviously think that the bill will add value.

**Kathleen Marshall:** I think that it will. In some instances, there is also a point to making it clear that children are entitled to human rights. People sometimes think that the European convention on human rights is an adults and parents charter and that the UN convention is for children; they think that they are always in conflict. There is a point in showing that children are human too. Sometimes it is better to embrace them in the wider debate and sometimes it is better to have a specific voice; it depends on what the issue at stake is. The human rights commissioner and I would discuss that as we went along.

**The Convener:** I do not disagree with what you have said. It will depend on the relationship between you and the human rights commissioner. However, might there be the need for one commissioner to take a lead on some areas? I am thinking about young people in detention, for instance.

**Kathleen Marshall:** It is not possible to specify that in advance, because it would depend on the issues. We are embarking on a project on young people in detention. One of the aspects that we will examine is how their interests as children are respected and how their views are taken into account. Both of those points will be examined in the context of the UN Convention on the Rights of the Child. There might be broader issues on detention with which the human rights commissioner would deal and in which it might be appropriate to include young people. We would have to consider that as the issues arose and see what was on the agenda.

At the moment, I am proactive. I do not just respond to things that come from the Parliament or the Executive. I take account of other concerns that are expressed, given that the United Nations Convention on the Rights of the Child defines children as being up to the age of 18. I want to continue to have the freedom to do that. If it was decided that the human rights commissioner was the lead on detention and I had to go and get permission to do something, I would not be happy about that. The Convention on the Rights of the Child gives added value because it contains additional rights with respect to the particular status and vulnerability of children and young people. I am confident that we can work out the overlaps as we go. I am sure that other interfaces will crop up that no one has thought about. That is

human nature. If we approach the matter in good faith, things should be all right.

**Margaret Mitchell (Central Scotland) (Con):** I want to clarify the relationship between the human rights commissioner and the courts. You said that there is a case for the commissioner being able to bring a test case because they will have an overview. What do you think of the commonly held view that it is for the courts to enforce human rights?

**Muriel Robison:** I do not think that the human rights commissioner will usurp the role of the courts. If the commissioner has the necessary powers, they will identify the most important cases. However, ultimately, it will be for the courts to decide whether human rights have been breached. The commissioner will have a strategic overview of which cases are the most important and will be able to have those cases tested by the courts. However, the courts are the ultimate arbiters and they will decide whether human rights have been breached.

**Margaret Mitchell:** The bill proposes that the commissioner will have the power to intervene with the leave of the courts. I take it that you do not think that we should go further and give the commissioner the power to intervene in civil proceedings without the leave of the courts.

**Muriel Robison:** No. I understand that the commission down south will be required to have the leave of the court to intervene and we accept that the Scottish commissioner will be expected to have the leave of the court too. The experience of the commissions down south is that, increasingly, they are intervening and the courts are accepting the value of those interventions. In a recent human rights decision by the House of Lords, one of the judges, Baroness Hale, was looking for someone who represents the rights of children to intervene. Increasingly, the courts see the value of interventions by expert organisations.

**Margaret Mitchell:** I have a question for Kathleen Marshall. Section 11 contains the power to intervene except in children's hearings. Do you have a view on that?

**Kathleen Marshall:** I do not understand why children's hearings have been excepted. Criminal proceedings are excepted, but children's hearings are civil in nature, although some of them may proceed on offence grounds. The exception needs to be explained rather than being something that I should have to justify. In recent years, it has increasingly been recognised that human rights issues arise in children's hearings, and there is an additional power to appoint legal representatives for children. Someone will have to justify the exclusion of children's hearings from the power to intervene. Unless I hear an argument that explains

the exclusion, my basis is that they should be included.

**Margaret Mitchell:** That is a fair comment.

**The Convener:** I have a question on the extended powers of the commissioner. Earlier, you said that the commissioner should be able to declare that something contravenes the ECHR or another convention. How would that be done?

**Muriel Robison:** I do not remember saying that.

**The Convener:** I think that Kathleen Marshall was concerned that the commissioner would not have the power to declare that something might be contrary to ECHR. Did I pick you up wrongly?

**Kathleen Marshall:** I am not sure where that comes from either.

If I held an investigation, I would put recommendations and conclusions to Parliament at the end of it. In most cases, apart from excepted cases, I think that the human rights commissioner would do so as well. We would declare our determinations. In my case, although what has happened might have breached children's rights, I do not have any enforcement powers. I cannot see any objection to the human rights commissioner having a declaratory power, and I am not aware that such a power has been excluded.

**The Convener:** Should the commissioner have a declaratory power, or is that a matter for the courts?

**Kathleen Marshall:** If it is a declaratory power without a power of enforcement, I cannot see any objection. I think that that is what I have. After holding an investigation, I can present my conclusions and say that children's rights have been breached. It would then be up to Parliament to decide what to do. Parliament would no doubt seek other views before deciding whether something had to be done to remedy the breach.

**The Convener:** The children's commissioner has that power at the moment.

**Kathleen Marshall:** Yes—at the end of an investigation. I imagine that the bill gives the same power to the human rights commissioner and that, at the end of an inquiry, the commissioner would be able to report on whether there had been a breach. It would then be up to Parliament to decide what to do, and it might want to ask further questions at that point or seek further views.

**Lynn Welsh:** The CEHR—the British body, if you like—will be able to carry out investigations and say that an act has been unlawful. It will then be able to serve notices in respect of that act. However, the Scottish commissioner certainly will not have that power.

**Muriel Robison:** The Scottish commissioner will not be able to do that. There seems to be no scope for the commissioner to investigate whether there has been an unlawful act or not—unless, perhaps, it is in relation to torture.

**The Convener:** Section 9 contains something about “findings” as a result of an inquiry. You have spoken about extended powers for the human rights commissioner. Is your view that the bill should give the human rights commissioner the power to declare, at the end of an investigation, that something has been in contravention of the ECHR or another convention?

**Kathleen Marshall:** My reading of section 9 is that the “findings” would be whether the commissioner thought that there had been a breach. However, there is no power to enforce. A declaratory power basically enables a person to say that their finding is that there has been a breach. However, as in my case, that does not lead to enforcement. The wording is different—as I recall, the act that created my post talks about conclusions and recommendations rather than findings.

Whether it is called a declaratory power is a question of terminology; the important thing is whether there are consequences. In my case, the matter goes to Parliament and it is then up to Parliament to decide what to do. I understand that it will be the same for the Scottish human rights commissioner. The power is not backed up by the enforcement powers that the CEHR has.

**Lynn Welsh:** The Scottish commissioner will be limited in carrying out investigations or inquiries. The commissioner cannot investigate an individual body unless it is the only body that carries out a function. It will be quite difficult for the commissioner to say that there has been an unlawful act because, in most of the inquiries that it carries out, it will be looking at too broad a picture.

**Mike Pringle (Edinburgh South) (LD):** In evidence, people have referred to “commission” and “commissioner”. London is setting up a body that will have a commission and that will have an office in Glasgow. Has the Scottish Commissioner for Human Rights Bill got it right, or should there be a commission rather than a commissioner?

**Lynn Welsh:** I am afraid that I am not absolutely clear on why there is a difference.

**Muriel Robison:** I assume that it has something to do with accountability to Parliament, but I do not have a clear understanding of why the two things are different.

11:15

**The Convener:** I can clarify the matter. Apparently, the difference is the fact that we have

a commissioner and two deputies who act for the commissioner rather than a group of commissioners with independent commissioning powers.

**Lynn Welsh:** We know what the difference is, but we do not know why there is a difference.

**Mike Pringle:** I question whether the bill has got it right. Should we have a commissioner and, possibly, two deputy commissioners, or should we have a commission—a group—to address the issues?

**Kathleen Marshall:** One of the reasons for having a commissioner instead of a commission that was given during the work that led to the creation of my post is the fact that a commissioner can be more flexible and dynamic and does not always have to work by committee. The counter-argument is that different interests can be represented on a commission.

There are voices for different interests and we want an overview. With a commission that has some interests represented on it and not others, there is a question of who is in and who is out. Is it not better to have one person who has an overview of human rights, with deputies who also have an overview? If we created a commission with a number of people on it, we would have to ask whether all the different interests were represented. A judgment must be made about how big we are willing to make the commission, the context and so on. That is a matter of judgment rather than something to which there is a clear-cut answer.

**Marlyn Glen:** I have a question for Kathleen Marshall about the legal status of the commissioner. In paragraph 3.5 of your written submission, you refer to the problems associated with defining your legal status. Will you elaborate on what those problems are and suggest how they could be avoided in the creation of the new commissioner?

**Kathleen Marshall:** The problem is a technical, legal one—as a lawyer, I picked it up immediately. I was going to ask about it at my interview but I decided that it was too complicated.

Someone can have responsibilities as an individual or as a limited company, in which case they have corporate status. In other parts of the UK, there is a specific legal status called corporation sole, whereby an individual can have corporate status. Implications arise from the fact that, as the legal person, the individual holds the moneys and is liable. There are issues about the interface of personal liability and organisational liability. In the legislation that set up my post and the posts of the other commissioners, our legal status is not clear. There are issues about whether we can enter into contracts, and in the

negotiations for leases, questions were asked about the capacity in which we were negotiating.

The question is unresolved. I wrote to the Scottish Parliamentary Corporate Body about it and about the implications for liability and indemnity. The answer that I received was that it was up to me to take personal advice on the matter. Therefore, a technical question lingers about my legal status. I have, informally, asked various legal academics, who are well clued up, but I have received no conclusive answer.

**Mr McFee:** That is surprising.

**Kathleen Marshall:** It is a difficult question, but what is our legal status? We have been asked questions when entering into contracts and setting up bank accounts. What is this person? What is this office holder? If I enter into a contract and get sued, am I sued as an individual? Do I employ people as a corporate person or as an individual? What is my liability? There are practical implications. A company that is limited by guarantee, as most charities are, would have professional indemnity insurance for its trustees. We do not have anything like that. There is an unresolved technical issue. I would not expect the committee to deal with it, but somebody must address the matter and tell us what our status is in comparison with the legal status of commissioners in other jurisdictions.

**Marlyn Glen:** That is a question that we can ask before we set up something else along the same lines.

**Mr McFee:** I wonder why the question was not asked before.

**Kathleen Marshall:** I knew better than to ask it.

**Mr McFee:** Everything is fine in hindsight.

Let us return to the power to carry out inquiries. Earlier, I gave the example of housing departments. The commissioner would not be able to inquire into those unless they had the thumbscrews out. However, people do not hang about in housing departments to get tortured—that is more likely to happen in a place of detention. I understand that the bill will give the commissioner the power to enter premises but that they will be able to insist on exercising that power only if they give 14 days' notice. If people are detained—legally or otherwise—in a place where torture is being conducted, what is the prospect of the evidence of torture disappearing in the 14 days of notice that the commissioner must give? What is the prospect of any organisation or establishment that performs torture allowing the commissioner to enter as soon as they appear at the door?

**Kathleen Marshall:** I agree completely. I do not know why 14 days' notice is specified. The power to enter unannounced should be available. As far

as I can see, the appeals procedure in the bill could delay entry even further.

**Lynn Welsh:** I do not think that the Disability Rights Commission has an official view on the matter but, as an individual, I agree that 14 days is an incredibly long time.

**Mr McFee:** Will you hazard a guess at why the provision is in the bill?

**Kathleen Marshall:** You would have to ask the drafters of the bill that—I presume that they got the provision from somewhere.

**Mr McFee:** We have attempted to do that.

**Kathleen Marshall:** I do not understand the provision. By the way, I am the only children's commissioner in the UK who has no power of entry—the Children Act 2004 recently gave the children's commissioner for Wales that power. I do not recall anything like a 14-day notice period in that act, but I cannot say that for definite. It might be useful to look at other legislation on announced and unannounced visits, because the other commissioners are similar in that they are more watchdogs than inspectorates. On the sheer practicality, it does not seem helpful that the commissioner should have to give 14 days' notice of their intention to enter premises to look for evidence of torture.

**Stewart Stevenson:** My questions on money neatly segue from what we have discussed. To give context, I will quote paragraph 116 of the Finance Committee's report on next year's budget, which was published at 8 o'clock this morning. It says:

"The Committee ... recommends that there should be a review of the powers of direction in relation to the various parliamentary appointed commissioners and ombudsman in the legislation which set them up. On the assumption that there is a gap in the legislation with regard to budgetary control, then the necessary steps should be taken to strengthen the budgetary powers of the SPCB in relation to the bodies it funds."

That opens up the question whether the funding streams that have been discussed for the commissioner are likely to be adequate to allow him or her to fulfil the powers in the bill. As the witnesses have broadly argued for more powers, what level of funding would be appropriate for more powers?

**Kathleen Marshall:** You raise two questions: one is about assessing the adequacy of function and the other is about budgetary control, which is discussed in the Finance Committee's report, which I too obtained at 8 o'clock this morning.

I was puzzled and taken aback by the issues that were raised to do with my budget recently. I fully acknowledge that the balance between accountability and independence is delicate. That

is underlined by the Paris principles, which are referred to throughout the SPICe briefing on the bill and which say that it is necessary to ensure, for example, that financial controls are not so rigid or extreme as to undermine the independence of a body that has been established as a national human rights institution.

In some ways, I wonder why I should even talk about the appropriateness of what is proposed for the human rights commissioner, because the status of the debate is open to question. I was given the clear message recently that the discussions that preceded the passing of the bill that created my office and the financial memorandum to the bill, which the Finance Committee and Parliament discussed, should not be regarded as a guide to what Parliament expects. As commissioners, we have been established in a context in which we are not quite sure what guidance exists and what the parameters are.

The debate about accountability and independence has not been fully worked through. Perhaps people are afraid to give guidance or set parameters in case that undermines the commissioner's independence, but if we appear to overstep the mark, we are told that we have made a mistake. I am not sure what we are supposed to look at. When the post of the new commissioner has been set up and the new commissioner is about to establish their office, I am not sure what guidance they will have on their available budget, staff numbers and so on.

The debate about budgetary control, accountability and independence has to be entered into in an objective way with all the commissioners and that should inform whatever happens with the human rights commissioner. Rather than having the issue arise in the context of particular budgets, we need to sit down and say, "How do we get the right balance between accountability and independence?" That is central to the role. I do not have an answer, but the question needs to be asked.

The question whether the £1 million that is mentioned is adequate is partly related to the functions that the office is expected to undertake. I do not know whether the other witnesses want to comment on that.

**Stewart Stevenson:** Before the others comment, I wonder whether I could attempt to nail you down. Do you think that the proper approach is for the Parliament to say, "You have £2 million this year; do what you can with that money and be accountable for what you have done," or should expenditure be driven by need under a system in which, in essence, there is a blank cheque, or the commissioner has to come back and talk to us if they have spent, say, £5 million? Which approach

should we take? Ultimately, MSPs live in a climate in which we have to account for every paper clip, so naturally we are cautious about signing blank cheques for others.

**Kathleen Marshall:** I used the phrase “blank cheque” to the Finance Committee. I do not think that anyone who draws on public funds should have a blank cheque. Some of the issues apply more to my role than to the role of the human rights commissioner. Some of the ombudsmen have a more defined remit; although the roles of the Scottish information commissioner and the Scottish public services ombudsman have certain promotional aspects, they largely involve responding to complaints and appeals. Those are quantifiable and it is possible to have some idea of the trajectory.

If one has a promotional role, as I do and the human rights commissioner will do, there is a much wider spectrum of things that one can do. At one point, people were talking about the commissioner for children and young people having regional offices, but I could not possibly do that with the budget that I have at present. It is a question of setting some parameters and having some idea of people's expectations. If there are broad parameters at the beginning so that one knows what is expected, one can draw up a budget, on a needs basis, within those parameters. As time goes on, functions develop, one sees what the needs are, and one consults—my role has a huge consultative element—so one might have other ideas.

I do not expect to be able to state what funding I need to perform my role with no limits and without challenge. There is obviously an element of practicality there, but one has to have some parameters at the beginning when things are still fluid and one is working out the best way to do the job. I am talking from my point of view. We need a more objective debate that takes into account things such as the Paris principles and the Parliament's mechanisms so that we can arrive at some clearer guidance. I would certainly welcome that and I am happy to be a part of that debate. I hope that when the post of human rights commissioner is established, there will be a clearer vision and clearer mutual expectations than there have been to date.

**Stewart Stevenson:** What is the view of the Equal Opportunities Commission?

**Muriel Robison:** On that point?

**Stewart Stevenson:** What funding is needed on the basis of the proposals in the bill? What would be needed on the basis of some other proposition? Concisely, how best can we as parliamentarians interact to enable and not to prejudice the commissioner's independence?

11:30

**Muriel Robison:** When I researched the issue of the £1 million budget in producing my written response, I considered the budget for EOC Scotland. Our promotional role is the only part of our work that is funded in Scotland; the enforcement role is funded from the GB body. The budget for that promotional role is almost £1 million, which gives me a sense that, even with the limited powers in the bill, the £1 million budget might not be enough, given that the commissioner's remit would be broader than ours. Should the commissioner be given greater powers, the Equality Commission for Northern Ireland would be a good model, as it has a promotional and an enforcement role. Particular issues arise in Northern Ireland, but the body has a £1.3 million budget for 1.3 million people, so that is a penny each.

**Stewart Stevenson:** It is a pound each.

**Muriel Robison:** I beg your pardon—I cannot do sums.

**Stewart Stevenson:** I hope that you do not do the accounts for your organisation.

**Muriel Robison:** Precisely.

**The Convener:** I should say that Mr Stevenson is a former computer manager for a bank.

**Muriel Robison:** When I am asked to get into accounts at the EOC, I am told to do bottom-up budgeting, which means working out a strategic plan and then costing it. That is one way of working, but I am not sure that it works in practice, because we always have our eye on the figures in the previous year's budget and we work to them.

**Stewart Stevenson:** I want to nail you down on the issue. You say that you are not sure that that approach works, but what would work? Based on your experience, how should we approach the matter?

**Muriel Robison:** The commissioner needs a specified overall budget, although I am not sure exactly how that would work.

**Stewart Stevenson:** So we would give the commissioner the money and say, “See what you can do with it.” That is putting it crudely, but is that your suggestion?

**Muriel Robison:** Yes. I hope that the Scottish commissioner for human rights would be able to make the right kind of strategic decisions that achieve the best value for money for the organisation. The Equal Opportunities Commission has done an awful lot of work on a small amount of money, particularly in law enforcement, which is my area of work. We receive a lot less money than the other commissions but, because we work strategically,



we have done a lot with it. The idea would work, as long as there was a limit on the amount and as long as careful strategic thinking and prioritising were done. The discipline of having a budget is a good one.

**Stewart Stevenson:** What does the Disability Rights Commission think?

**Lynn Welsh:** I agree. We find it difficult to say exactly how much it costs to run our Scotland office, for the reasons that have been given: our salaries are paid from elsewhere and our legal budget comes from elsewhere. We receive money in Scotland only in relation to particular pieces of work that we do here. The amount approaches £1 million, so I do not think that £1 million is enough for the new commissioner. The use of our formal investigation power—for example, we have carried out investigations into health boards in England—is expensive. I absolutely agree that the commissioner will have to have a budget figure. They will have to know the figure that they are trying to work to when they consider their work strategically; otherwise the budget will just grow like Topsy—there will be no end to it.

**Kathleen Marshall:** That is what I thought I had. From what was anticipated in the financial memorandum to the Commissioner for Children and Young People (Scotland) Bill and the initial discussions with the SPCB, I thought that I had a set budget to work with. The sums that I have proposed were within parameters that were set in 2002. However, that has subsequently been questioned.

A contradiction already exists in relation to the new commissioner. Paragraph 87 of the policy memorandum states:

“Accountability to the Scottish Parliament will involve the following: ... the SCHR's budget being determined by the Scottish Parliamentary Corporate Body”.

I cannot remember whether this was in written communication or in my debate with the Finance Committee, but it has emerged that the SPCB sees its role as being not to justify or defend commissioners' budgets, but more to be a conduit to Parliament.

What is the role of the SPCB? Is it to determine the budget? Does it have a role in justifying or defending it? One reason why I asked to be heard by the Finance Committee is that if questions arise about my budget and the SPCB does not see its role as either to justify or to defend it, I want to be in a position to defend it and ask questions about it. There is a muddy area around how budgets are developed, how they are scrutinised and what leeway there is, and that has to be looked at. I would be happy to be part of that process so that everyone has clearer expectations.

**Stewart Stevenson:** May I express a personal opinion? I suspect that the SPCB fulfils the role in the Parliament that management accountants do in a large company. In other words, it draws together all the financial strands of its business and does not directly make policy. I suspect that colleagues who are on the SPCB would express the situation in those terms, and could only do it in that way.

**The Convener:** Do you have any costings for a medium-sized inquiry, or any figures at all?

**Kathleen Marshall:** There are so many different inquiry models. I have thought about costings. When I chaired a statutory inquiry—the inquiry into the abuse and protection of children in care that was set up by the City of Edinburgh Council—I looked for guidance but did not find much. What little there was referred to different models. I know from my own experience that the model that one adopts, the time that the inquiry takes and the personnel that are required will be related to the issue.

One of the main reasons for having an investigation is to get answers and information. I can envisage wanting to do something short and snappy, but inquiries can be much more drawn out. In my evidence to the commissioner for children inquiry, I gave the example of the Fife inquiry, which was about the policies of the local authority and was more complex. In cases such as the Orkney inquiry or the on-going Western Isles case, individual rights are at stake, so there is a much more formal setting, with people having representation.

There are so many different models that it is not possible to have just one. One might adopt a model and say, “These are the kinds of things that we think we will inquire into or investigate, and this is how we will do it.” I have some ideas about how I would do that, but a particular case might not fit the mould. That is one of the issues.

**The Convener:** I hear what you are saying, but how would you guide us?

**Kathleen Marshall:** In terms of the other funding issues, that may be a question for the human rights commissioner rather than me. However, I note that the decision of the children's commissioner for Wales to chair a formal inquiry was questioned because it was thought that he would be partisan on the side of children and young people. Given that, I would have to get an external chair.

I discussed with the SPCB having a budget that I could draw on for particular investigations that would not be filtered in terms of policy but that would not be part of my core budget. As far as I am aware, we have generally agreed that, but it was always expected that such investigations

would be rare. I might not have even one inquiry in the course of a year, but the human rights commissioner might be expected to have more. It might be possible for the commissioner to develop a model.

Three of us worked part-time on the Edinburgh inquiry that I chaired in 1998-99, and I think that it cost about £100,000 over the course of the year, but we were using the premises and staff of other bodies. I think that the Orkney inquiry cost about £10 million, and the Fife inquiry cost about £5 million. There are so many different models that I would have difficulty putting a figure on the costs. All I will say is that, from my point of view, I would not try to do something like the Orkney inquiry, which, in the circumstances, was appropriately judicial. However, I cannot speak for how the human rights commissioner will do it.

**The Convener:** That is helpful. I hear what you are saying about the models of inquiry. We need to give some thought to your comment about whether there should also be a draw-down budget.

We have to draw this session to a close. I thank all three of you for your helpful evidence. You will appreciate that at stage 1 we have to push you quite hard on some of the questions because we have to report on the general principles of the bill. As elected members we always like to test the issues. Even if all of us in this room agree on the need for a human rights commissioner in some shape or form, we have to represent the view outside. It is the Asda test—we like to examine what it means to the person in the street. Thank you for your written and oral evidence.

11:41

*Meeting suspended.*

11:48

*On resuming—*

**The Convener:** I welcome our second panel: Rosemary Burnett from Amnesty International Scotland and David Cobb from the Scottish Human Rights Centre. Rosemary Burnett asked whether she could make a short statement. I explained that we do not normally allow that, but as it will take only a couple of minutes, I have agreed to the request.

**Rosemary Burnett (Amnesty International Scotland):** Our statement is specifically about accountability and independence, which the committee discussed at its previous meeting. Lines of financial accountability are a problem for the commissioners who are in post already. That may be due in part to the way in which the appointments were made over time.

We believe that a case can be made for accountability to be handled by a committee that would be established along the lines of the Scottish Commission for Public Audit to which Audit Scotland is responsible. The main responsibilities of that commission are: to examine Audit Scotland's proposals for the use of resources and expenditure and report on them to the Parliament; to appoint a qualified person to audit the accounts of Audit Scotland; and to lay before the Parliament and publish a copy of Audit Scotland's accounts and the auditor's reports on them.

We suggest that a similar body could be established to audit the various commissions and ombudspeople in Scotland. That would ensure that accountability would be dealt with by a committee that was familiar with how such bodies work. Such a new body would reconcile the need for independence with the need to hold the commissioners and ombudspeople accountable to the Parliament.

I do not think that that took me two minutes.

**The Convener:** Thank you; you were true to your word. I like that.

**Mr McFee:** You have had time to think about my question, because I asked the last panel the same thing. It would be helpful if, when David Cobb answers, he would briefly outline the work of the Scottish Human Rights Centre.

Leaving out for the moment whether there should be a commission or a commissioner, I want you to concentrate on the straightforward question of the need for a Scottish commissioner, the powers that that commissioner should have, and the present proposals. You should also take into account what the elements of the protection and promotion of human rights should be. The discussion would be more free-flowing if you could address all those issues at once.

**David Cobb (Scottish Human Rights Centre):** The Scottish Human Rights Centre is a voluntary NGO. It is primarily an advocacy group for human rights. In particular, it provides an advice service that is essentially for members of the public who phone in. It also studies certain human rights-related issues and provides training. Clearly, when the commissioner takes office, one must ask what SHRC's role will be. However, that is a matter for another day.

Despite the fact that it leaves us with a question about our future, we welcome the bill. Our great concern is that it will create a person whose focus is human rights. I do not need to go over what the previous witnesses from the commissions, including Kathleen Marshall, said about that; we endorse it. The significant thing is that human rights issues may or may not arise in the

operations of the commission for equality and human rights and may or may not be a priority there. It is the other way round with the human rights commissioner—human rights are the priority. That could help to inform the other work that the commission for equality and human rights will do in Scotland.

Also, another voice is required. As I am sure we will cover later, ultimately the courts will declare whether something is or is not a breach of human rights, but it is not always a straightforward matter to get the horse into that particular starting stall. That is why the commissioner should be able to consider individual cases and either to fund or to take cases in his or her own right. For example, everyone knows that there is no more vehement opponent of slopping out than HM chief inspector of prisons, Andrew McLellan. Ultimately, his ability to have that opposition crystallised depends either on the Parliament's willingness to address slopping out as a primary issue, or the courts telling the Executive that it is a breach of human rights that requires correction. From our point of view, it is significant that the commissioner will be able to be more involved in the legal process.

A further point is that in Scotland, one's ability to get through the court door—or, as it is technically known, one's title and interest to sue—is narrowly defined. In the English High Court, groups such as Amnesty International, Greenpeace or Friends of the Earth frequently take actions. That does not happen here because the courts do not normally regard such groups as having qualifying title and interest.

There is one further consideration. Some human rights issues raise very delicate personal matters about a person's gender, sexuality, religious persuasion or immigration status. Classically, people in those situations do not want to raise their heads above the parapet and put themselves in the firing line, so a firewall is sometimes important.

I am sorry, but in the course of that lengthy answer I have forgotten the other points that Mr McFee wanted me to address.

**Mr McFee:** I will come back to those shortly.

Can I clarify that it is your contention that in Scotland it is much harder to take individual cases, or even test cases, so there is a greater requirement for the Scottish commissioner to have that ability than there is south of the border, where it is easier to take an individual case?

**David Cobb:** No. It is someone acting on somebody else's behalf, or class actions, that are more difficult to achieve in Scotland. If I, as an individual, think that my human rights are being violated, in theory I can go to court and say that in my own right. The practical difficulty, apart from

someone making themselves visible, is how to fund the case. We do not as yet have a tremendously developed bar or corps of lawyers who can act pro bono. Therefore, a person is dependent on the Scottish Legal Aid Board being willing to support them. SLAB can find itself in an invidious position, as it also has budgets to manage and priorities to determine. With all the professionalism in the world, it may have a different view of the importance of what I might say is a significant human rights case.

Although I have the ability to go to court and sue in my own right without the support of SLAB, the EOC or, in this case, the human rights commissioner, that can be very difficult. Consider, for example, recent developments on equal pay. I am sceptical whether those developments would have occurred without the support that the EOC provided to litigants to clarify the law on that significant matter.

**Mr McFee:** Are you saying that the differences between the systems north and south of the border are purely about having resources to take the case to court? Or do the differences exist, particularly in relation to class actions, because the terms in which a class action can be taken in Scotland are far narrower than they are south of the border? Is it about finance only, or is it about finance plus process?

**David Cobb:** It is both.

**Mr McFee:** The other issues that I asked you to reflect on—you have dealt with part of the question in respect of test cases and individual cases—were whether the balance is right between protection and promotion in the bill and, if it is not right, how you would change it. What other powers would you like the commissioner to have?

**David Cobb:** We would not want the promotion aspect to disappear, but we would not be content to accept the position of the Scottish Executive that the role is about promotion and awareness raising. Those are laudable and desirable ends, but without a much more specific ability to inquire into human rights abuses the commissioner will find it difficult to achieve substantive progress.

The terms of the inquiries that the commissioner can conduct are potentially troublesome. As someone who worked for a number of years in local government, I know that if the commissioner knocked on the door and I heard what he or she wanted to investigate, I might well spend a lot of time saying, "That is not within your terms of reference. Are you sure that this raises a human rights issue?" Potentially, we could wind up in the courts arguing about whether the commissioner should be dealing with the issue at all. I want the commissioner to be armed with much more specific powers to look at individual cases,

because those are sometimes the symptom; it is occasionally more difficult to address the issue from the other direction.

12:00

Another issue is the 14-day notification that must be given before places of detention are inspected. We cannot see a use for a provision that—again—has the potential to act as a significant fetter on the powers of the commissioner. Ann Owers, Her Majesty's chief inspector of prisons for England and Wales, reported recently on what she called the fight-club mentality in a high-security prison. I understand that she found that out only because she is able to conduct unannounced visits. In common with other investigative agencies, the commissioner for human rights needs to be able to enter premises and on occasion, as we said in our submission, to compel people to give evidence or produce documents. The power would not be used frequently; classically, people do not co-operate when they have something to hide or are nervous about something.

The focus of the commissioner for human rights should be more protective. We do not necessarily want the commissioner to be in the business of enforcement in the same way that the commissions are at present. As I said at the outset, we would rather see the commissioner having powers to go to court or intervene; that is how human rights abuses and breaches are put right.

**The Convener:** The Executive has told us that primary legislation would require to be amended, because it is normally the victim who sues. Obviously, the commissioner for human rights is not the victim. How would we get round that?

**David Cobb:** Ultimately, of course, an act of the United Kingdom Parliament would be required to change the Scotland Act 1998 or the Human Rights Act 1998 as necessary. As I understand it—I am sure that Muriel Robison could have been more specific on the subject—the Government has got around the problem for the UK commission for equality and human rights simply by saying that it can raise an action or a judicial review without being the victim. A legislative technique has been used in that case, albeit that Westminster was required to act to remove the fetter—acts of Parliament are changed all the time.

**The Convener:** Is your question on that point, Stewart?

**Stewart Stevenson:** If I may, convener, I want to challenge something that was said about slopping out, which David Cobb has made a flagship issue. Robert Napier raised a successful legal challenge in 2001 against the Scottish Prison Service. Over £1 million was spent on legal aid to

achieve a judgment that ultimately gave Napier £2,000 in compensation. The interim judgment required that he be moved within 72 hours from the conditions in which he was being kept. The Scottish Prison Service addressed the need to budget for subsequent claims by allocating £28 million in 2003-04, £44 million in 2004-05 and so on.

To paraphrase Lyndon B Johnson, "When you've got them by the wallet, the hearts and minds follow." SPS management are now running around like headless chickens making sure that the human rights of prisoners conform to the legislation. You used that case as a key example of what is at the core of what the commissioner needs to do. What added value is there in having a commissioner who can address a problem that appears, *prima facie*, to have been dealt with entirely satisfactorily under the existing processes?

**David Cobb:** Everyone has heard of the Robert Napier case, which made it an easy example to give. I used the example to illustrate that, despite the fact that the chief inspector of prisons is vehemently opposed to slopping out, he could not bring the practice to an end. As to what value is added, the Legal Aid Board funded Napier's litigation. What would Napier have done if SLAB had refused him legal aid? The human rights point would have remained and, as the courts have found, the breach of human rights would have remained. We see the commissioner adding value in circumstances where there is an issue of significant human rights merit and someone cannot get themselves into court by other means.

**Stewart Stevenson:** For example?

**David Cobb:** There are various issues that one can consider. I am fairly familiar with the new Mental Health (Care and Treatment) (Scotland) Act 2003. Earlier, you raised the issue of the commission having some sort of oversight of the law. I am in no way querying the professionalism of the advice that members got about whether the 2003 act was compliant with the European convention on human rights, but such advice can only be an opinion; there are no absolutes in this world. In any human rights issue, a key test is whether an act is reasonable and proportionate, and there will be challenges in relation to the 2003 act.

Feeding regimes in hospitals, the closure of rural hospitals, illegal migrants working for poor or no wages, some of the proposals on blood testing—

**The Convener:** You mentioned the closure of rural hospitals, which surprises me. I am not saying that it is right to close rural hospitals, but I am interested in the route by which you would argue that point. Do you not have to refer back to

a convention of some kind if you are going to suggest that that would be a breach of human rights?

**David Cobb:** I am putting forward theoretical possibilities; I am not saying that all those issues are necessarily challengeable, but that they could be looked at in that way. The closure of rural hospitals could be an issue under article 2—

**The Convener:** That is what worries me. I am keen that the parameters of what counts as a human rights issue should be fairly clear. Of course, I know that there are conventions that I know nothing of that we, perhaps, should make ourselves familiar with in the course of this bill.

**David Cobb:** You can track back all the examples that I have given to articles in the European convention on human rights. Because those articles are broadly expressed, we must have an eye to how they manifest themselves in the real world.

If we confine ourselves to the concrete example of the Mental Health (Care and Treatment) (Scotland) Act 2003, as a practitioner in this area, I can say that there will definitely be challenges at some point in relation to whether compulsory treatment orders, as imposed in some form, violate the right to freedom and liberty. How that will be tested is the issue. I am not simply picking examples out of thin air. Certain questions that arise from the provisions of the ECHR might need to be dealt with at some stage.

**Mr McFee:** We have asked a number of people for such examples and you are the first person that has come up with any. I realise that you are not advocating anything one way or the other, but it is useful to have the examples because, as a Parliament, we have signed up to the ECHR.

I apologise to Rosemary Burnett for going through the whole section without referring back to her and invite her to put her views on the record.

**Rosemary Burnett:** You asked about the balance between the promotion and the protection of human rights. We believe that the bill's provisions for the promotion of human rights are fine, but that the provisions for the protection of human rights are inadequate.

In terms of the promotion of human rights in the advice to Parliament, which you discussed earlier, I would point out that members of the Scottish Parliament have come to me for advice on their members' bills because it is not easy for individual MSPs to get advice on human rights issues from the Scottish Parliament information centre and so on. It would be useful if members of the Scottish Parliament could get such advice from a specialist human rights lawyer.

Another area relating to the promotion of human rights that is important and has not been tackled

well until now is that of reports to the United Nations human rights bodies. For example, Kathleen Marshall will report on the UN Convention on the Rights of the Child and the human rights commissioner will report on the Convention relating to the Status of Refugees. Previously, such reports have been done by civil servants in London, with advice from civil servants in Scotland. Human rights problems in Scotland, particularly slopping out, have not been reflected adequately in those reports, as they have tended to have an English slant. In 1994, the UN Committee against Torture recommended that slopping out be done away with. In England, that was done by 1996 but, in Scotland, it still will not have been done in 2006. If we had had a human rights commissioner in Scotland in 1994, the issue would have been given much more importance and something would have been done about it, which would have saved the Scottish Legal Aid Board £2 million. That is a good example of how a human rights commissioner may save money that is spent through the Scottish Legal Aid Board.

On the protection aspect, the power in the bill to conduct inquiries is restrictive. It is interesting that the Commissioner for Children and Young People (Scotland) Act 2003 talks about service providers, which gives much wider protection than will be provided under this bill, which mentions public authorities. For example, if the commissioner wants to consider care homes for the elderly, they will be able to consider care homes that are funded through public authorities, but not privately funded care homes. Similarly, the commissioner will not be able to consider privately funded educational establishments. That considerable gap in the provision would be filled if the words "public authorities" in paragraphs (a) to (c) of section 5(1) were substituted by the phrase "Scottish service providers". As Kathleen Marshall said, the phrase "public authorities" is probably used because of the connection to convention rights, but the Scottish commissioner could investigate matters in relation to other rights.

As has been mentioned, big gaps exist between the proposed powers for the commission for equality and human rights that is to be set up for Britain and the proposed powers of the Scottish commissioner. For example, the CEHR will have powers to carry out inquiries relating to any human rights issue as well as investigations where any unlawful act is suspected. The CEHR will be able to inquire into any matter that relates to its general duty and into any relevant body and it will be able to investigate particular cases in which a breach of human rights is suspected, while the Scottish commissioner will not be able to do so. As has been said, the CEHR will be able to find that the Human Rights Act 1998 has been breached and, if necessary, take judicial review proceedings

against the authority that is involved, but the Scottish commissioner will not be able to do that. The proposed powers for the Scottish commissioner are gravely lacking. The post would be much more effective if the commissioner was given the powers that the CEHR will have.

Another issue is that, if a court refuses to grant the commissioner permission to intervene in a case, the commissioner will have no right of appeal. Many of the written submissions to the committee point out that some form of appeal should be allowed to the House of Lords or the Privy Council. We also wonder why children's panels have been specifically excluded from the power to intervene. The commissioner for children and young people does not have power to intervene in children's panel proceedings, but human rights issues often arise in them.

12:15

**Mr McFee:** I have a final question. As I understand it, the bill will mean that, if someone in Carlisle believes that their human rights have been abused by—to use the example given earlier—a local authority housing department, they will be able to ask the UK commission to take up their individual case. However, anyone who lives on the other side of the Solway firth in Dumfries will not be able to do that unless they are also being tortured. Is that defensible?

**Rosemary Burnett:** No. As I have just said—

**Mr McFee:** Would that be a breach of their human rights?

**Rosemary Burnett:** As I said, the authorities north and south of the border should have similar powers, otherwise we will have two different regimes.

**Mr McFee:** In other words, citizens of Scotland whose human rights are abused will potentially not have an organisation with the power to investigate their case and to intervene on their behalf by taking a case to court for them. There is a danger that people who live in Dumfries rather than in Carlisle will be second-class citizens.

**Rosemary Burnett:** One aspect of the bill that worries me—unless I have not understood it correctly—is that if the Scottish Executive is able to give a power to the Scottish commissioner for human rights but has not done so, the UK commission for equality and human rights will not be able to intervene. I think that that is correct.

**Mr McFee:** That is an interesting point. Does David Cobb share that view?

**David Cobb:** We are certainly concerned that gaps might appear between the two bodies. If we have both a UK commission for equality and

human rights and a Scottish commissioner for human rights, it will be incredibly frustrating if something falls down the gap between them. Difficulties might arise because the Equality Bill mentions only six specific equality strands. Those are all important, but issues could also arise due to, for example, a person's political persuasion, social origin or any other matter to do with status. If the UK commission decides that it cannot deal with a particular matter, we need absolute clarity that the Scottish commissioner can step in. Otherwise, in qualitative terms, people might have a second-class status because they will have no one to whom they can turn.

**The Convener:** I want to pick up on that phrase, which people have chosen to use this morning. Like many elected members in Scotland, I have always been interested in defending human rights, so it concerns me that both panels of witnesses have suggested that people in Scotland could be second-class citizens. Like other members round the table, I have raised the issue of slopping out with the Executive. We have been hard on the Executive on that. We were not totally happy when funds that would have ended slopping out sooner were diverted, but the Executive made that decision for reasons that were put in the public domain.

Does the panel not accept that the context in Scotland should at least be taken into account? Devolution has meant that we can do things differently. Arguably, we have challenged every bill that has gone through the Parliament on whether it complies with the ECHR. It is perhaps inevitable that differences of opinion will arise between the commissioner, the Parliament and, perhaps, the Scottish Human Rights Centre over whether something is a human rights issue. I am quite happy to accept that dynamic, but I am unhappy to accept a broad convention under which something is deemed a breach of human rights just because the commissioner for human rights declares it to be so, without giving the foundation for that decision.

Is it not important to consider the backdrop in Scotland? I accept that some gaps may exist that need to be filled, but we are not doing too badly, in that we have a Parliament, trade unions and commissioners that challenge human rights abuses. Is it not fair to say that we at least have that context in Scotland?

**David Cobb:** That context certainly exists. In addition, the Scotland Act 1998 and the Human Rights Act 1998 lay down requirements in relation to the actions of the Scottish Executive and other public bodies. That is a good background, but the important point is that the commissioner will be able only to make declarations and issue reports.

Ultimately, the two bodies that can make law are the Parliament and the courts, which can say

whether something is unlawful. It is clear from reading Lord Bonomy's judgment in the Napier case that he was influenced by the fact that the Scottish Executive had the money to end slopping out and decided to spend it on something else. That is a matter of political choice and, ultimately, it is for politicians to make such choices.

**The Convener:** You argue that the existence of a human rights commissioner might have brought about a change sooner. That is your view, but I could give another view: although we have not had a human rights commissioner, Stewart Stevenson, I and—many moons ago—Dorothy-Grace Elder raised such issues very vocally. If I used a search engine to check, I would find numerous challenging questions that have been asked of the Executive. I would be prepared to accept that a human rights commissioner is an important voice that adds some weight to that scrutiny but—I am only playing devil's advocate—I have difficulty with the suggestion that, if we had had a human rights commissioner, all those issues would have been resolved. I am not convinced about that.

**Rosemary Burnett:** If I were a member of the Scottish Parliament, I would think of the Scottish human rights commissioner as somebody to whom I could go for guidance and who would add weight to pronouncements that I might wish to make in Parliament on a particular issue. How much more weight would a motion of yours carry if you were able to quote the Scottish human rights commissioner's view? My personal view is that it might have carried more weight with the Executive if there had been a Scottish human rights commissioner to say that it was acting outwith the law by allowing slopping out to carry on.

**The Convener:** I accept that. It would be helpful to agree on that, because I am concerned that the impression that the previous panel of witnesses gave was that we would almost rely on the different commissioners to do all the work. I know that that is not what you are suggesting, but that is what is coming across. It is extremely important to define the role of the commissioner—whatever powers they may have—as adding value. That is what I am trying to tease out.

**Rosemary Burnett:** Since the cross-party group on human rights was set up, it has been supportive of the idea of having a commissioner. Many MSPs who come to its meetings have said that they are looking forward to the Scottish human rights commissioner being able to give them guidance when they are preparing or scrutinising a bill. None of you can be human rights experts as well as housing experts, transport experts or all the other kinds of experts that you are expected to be; you go to people for guidance.

**The Convener:** Yes—we have our own adviser who is an expert in human rights, too.

**Rosemary Burnett:** And very splendid he is.

**Mr McFee:** I thought that there might have been an element of confusion during that exchange. Is it the case that, regardless of the commissioner's ability—or inability—to take action or make an inquiry on an individual's behalf, the body that will determine whether there has been a breach in the legislation will remain the court?

**Rosemary Burnett:** Yes.

**Mr McFee:** That is fine. I just wanted that on the record.

**Mike Pringle:** I have a question for David Cobb. In your written submission, you make suggestions for changes to subsections (5) and (6) of section 6. Will you explain a bit more about that? On page 2 of your submission, you say:

"Clause 6(5) should begin 'Where it is necessary or appropriate'."

You go on to say:

"Clause 6(6) should be less restrictively drafted."

Will you add a bit of flesh to that?

**David Cobb:** It is perhaps as much a lawyer's point as anything else. The proposed amendment to section 6(5) would simply make it clear from the beginning that, if the commissioner is conducting an inquiry, that is because he or she considers that it is necessary or appropriate to do so. It is not simply the case that the commissioner has decided to go on a fishing exercise or anything like that; there is a reason for the inquiry. The proposed amendment would strengthen the commissioner's role.

On section 6(6), Kathleen Marshall made the point that the United Kingdom Government has signed up to a whole web of international conventions. To some extent, we would prefer the focus to be less explicitly on rights under the European convention on human rights, given that there is that web of conventions, which includes, importantly, as Kathleen Marshall pointed out, the United Nations Convention on the Rights of the Child. We would prefer the wording in section 6(6) to be directed at all international treaty obligations, so that there is no question of people saying, "These rights have priority over others." As far as human rights issues are concerned, we regard all the conventions as having equal value, given that the Government has considered it worth while to sign up to them. Does that answer the question?

**Mike Pringle:** Yes.

Kathleen Marshall completely avoided the issue of how much the commissioner will cost. The figure of £1 million has been stated, but is that amount adequate, or is it too much? Last week, I asked whether, in view of the fairly restricted

amount of work that the commissioner will be able to do, there would be enough work for a full-time job. Is £1 million adequate? Do you have any idea of the likely costs? Perhaps both David Cobb and Rosemary Burnett could answer those questions.

**David Cobb:** Our view is that £1 million is not adequate. As I explained earlier, we deal with a lot of advice-related queries from the public and a lot of consultations and such like that emanate from the Executive or the Parliament.

Rosemarie McIlwhan, our director, who unfortunately is not able to be here today, has examined the budget. She considers that, within the parameters in the bill, the budget undershoots by about 50 per cent. On the basis of her knowledge of the area, she thinks that a budget approaching £2 million would be appropriate. If the commissioner was to have the wider role for which we argue, the costs would rise. Muriel Robison's point about £5 million, which represents a pound per head—she eventually accepted that the cost was a pound per head in Northern Ireland—is perhaps not a bad yardstick.

I will row back from that slightly. The SPICe briefing that committee members have in their papers says that, because the Northern Ireland commission addresses individual grievances or issues, it has found itself overwhelmed. Of course, the recent history of that country is very different from ours, and I would not expect the wider powers that we propose for the commissioner to generate quite the same amount of business. We might be looking at a figure of about £3.5 million to £4 million. Even if the role is as proposed in the bill, there will be work for the commissioner to do, and he or she will need more than £1 million to do it.

**Rosemary Burnett:** It is a matter of looking at the funding that other commissions around the world have received and what they do with the money and considering how the discussion over the balance of the role in Scotland plays out. It is like asking, "How long is a piece of string?" Before the commissioner is in post, it is hard to know how far £1 million will go.

I will disagree with David Cobb and say that we should have a regime under which the commissioner starts with £1 million, and we can see what they can do with that. An application for more funding could be made if the commissioner found that they were unable to achieve certain objectives without more money.

**Mike Pringle:** I presume that you would agree that if the commissioner is going to have the right to intervene and to go to court and so on—all the rights that I think that he should have; I am sure that you both agree with that—he will need more money.

**Rosemary Burnett:** Yes. If the commissioner has the ability to conduct investigations and take test cases, much more money would be needed.

12:30

**Mike Pringle:** And you think that he should have that ability.

**Rosemary Burnett:** The bill as drafted will create a commissioner who is quite toothless.

**Mike Pringle:** Would you like to expand on that?

**Rosemary Burnett:** As Brian Peddie said last week, as it stands the bill is about awareness raising and the promotion of human rights. It is not about the protection of individual human rights: that is not seriously attempted in the bill. If the Scottish Parliament wants a bill to promote and raise awareness of human rights, that is what you have in front of you. If you want a bill that will protect the human rights of individuals in Scotland, you have to expand the bill to give the commissioner the powers that we have talked about this afternoon.

**David Cobb:** As I said in my initial statement, awareness raising and the like are good enough ends in themselves, but given that we see the court process as the essential hinge between rights and reality, the commissioner needs the power to support and intervene. I am strongly in favour of that.

I will correct one slightly odd thing that the Executive witnesses said last week.

**Mike Pringle:** You are welcome to say as much as you like about what the Executive said last week if you think that it is wrong.

**David Cobb:** An Executive witness was asked whether any tribunals had been set up under devolved powers, but could not think of any. I point to the mental health tribunal for Scotland and the additional support needs tribunals for Scotland, which have been set up under devolved powers. The important point in the case of the mental health tribunal for Scotland is that the Mental Welfare Commission for Scotland recently released a letter—understandably, in the interests of avoiding duplication—saying that it was taking a back seat in relation to detention, because the tribunal now exists. That is good governance, but if the tribunal in an individual case or as a matter of practice goes off the rails in relation to human rights, who—unless we go back into the courts—will intervene at an early stage? The Executive suggests that civil court actions should be used and, in relation to those tribunals, if not others, that there is no reason why that should not be the case.



**Mike Pringle:** It is interesting that you raise that point. I am awaiting a reply from the chair of the Scottish Committee of the Council on Tribunals on that specific point because I do not think that the situation is right. However, as was illustrated earlier, I am not an expert in all these fields, therefore I have to go to an expert to ask the question.

I have a question for Rosemary Burnett. I can probably anticipate her answer, but it would be nice to have it on the record. Let us have a unanimous answer from our witnesses, because I have strong feelings about the matter. What is your view on the human rights commissioner having to give 14 days' notice before they can enter a prison?

**Rosemary Burnett:** As has been said before, the situation is not ideal. If somebody has something to hide, they can hide it within 14 days. It will be interesting to see how the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment functions. I am afraid that I do not know the answer. However, that committee, which is a committee of the Council of Europe, has the power to inspect prisons, and my feeling is that it has to ask permission of the relevant Government before doing so.

**Professor Jim Murdoch (Adviser):** That is not quite the case. The committee has to give notice, but it can give notice and visit thereafter, without further delay. The power to visit in that way is exercised when the committee feels that there is an urgent need to carry out a visit.

**Rosemary Burnett:** Does it not have to specify the particular institution? We raised the point at a meeting with Brian Peddie, who said that the thinking behind the relevant provision in the bill was to allow the Scottish commissioner for human rights to carry out inspections for that committee. It seems odd that different regimes will operate.

**Mike Pringle:** It seems bizarre that 14 days' notice is required before someone can find something out. It was suggested earlier that that notice would apply in torture cases. I hope that torture is not, has not been and will not be an issue in Scotland. However, there could be all sorts of circumstances, and as you say, people can hide things quickly.

**The Convener:** Do members have further questions on the functions of the commissioner, before we move on?

**Margaret Mitchell:** We have explored thoroughly the power of intervention, and we understand that the witnesses clearly feel that the new commissioner should have that power, with or without the court's leave. The Scottish Human Rights Centre's submission states that anybody

can apply to the court for leave to intervene, but have either of the witnesses been refused such leave?

**David Cobb:** I am not aware that the Scottish Human Rights Centre has ever tried to intervene in any action. The commissioner would not take lightly the decision to get involved in civil litigation. We can presume that the commissioner would turn up in court because a serious matter had arisen. Given that that would be the commissioner's view, and given their expertise and responsibility, the question is whether the court should be able to say, "We do not want to hear you. Go away."

**Rosemary Burnett:** The *amicus curiae*—that is, someone who intervenes in court proceedings—appears a lot under English law. I have been told that the Scottish equivalent is the McKenzie friend, but it is seldom used. It is not that the ability to intervene does not exist but that it is seldom used. It is a question of the attitude of the Scottish judiciary as opposed to that of the English judiciary.

**Margaret Mitchell:** So it is almost a third-party right. However, you work on human rights issues, and we have heard that judges already invite people to comment on such issues. I have some difficulty: you have the power, but you have not used it.

**David Cobb:** In fairness, the rules in England are different from those in Scotland, and lawyers who practise in this area recognise that difference. Muriel Robison was right to say that the EOC and other commissions have made good use in recent years of the fairly liberal approach that has been adopted in England. However, without the support of provisions in the bill, I would have a hard time if I turned up and asked to intervene, unless I could prove that I had a very direct interest in the outcome. Generally, the courts in Scotland have been reluctant to allow people to intervene. Theoretically, although the opportunity to intervene is available, it is very difficult to use it in practice without legislative support.

**Margaret Mitchell:** I hear what you are saying. However, you have not tested that power; you have had it all these years, and you want more from the bill. You say that you would intervene only if you had a real reason to—I would not want you to intervene in the court unless you had a really good reason to do so.

**David Cobb:** A lay person's definition and a judge's definition of a really good reason are not necessarily the same. It is a question of a judge saying, "I allow you to become a party in this litigation, but I cannot obviously see how its outcome will affect you." We are back to the question of access and of giving support to a

litigant who raises an issue that they might not be able to deal with properly.

For example, in a child custody case, there may be a dispute over the religious persuasion in which the child is to be reared. The parents may see the dispute as being limited to the question of where the child will live, with the question of the religious persuasion within which the child will be brought up being an incidental issue. Neither the parents nor the Scottish Legal Aid Board will direct resources towards litigation if the question of religious persuasion is considered unimportant. However, from the point of view of the child's human rights or those of the parents, the issue may be important.

If I, as a private person, were to go to court and say, "This case raises human rights issues", the court is likely to say, "You are not the child's parent. He is not living with you. Go away." That is a fairly clear rule of law. We can bash our heads off the brick wall as many times as we like, but the answer will be the same. However, such litigation is needed if we are to achieve a step change in culture.

**Margaret Mitchell:** With respect, that is an assertion. The fact that you have not tested out the position, even with the powers that you have to do so at present, is a huge stumbling block for me. Why on earth are we passing legislation when you have the power to litigate and yet you have not bothered to use it yet?

**David Cobb:** Let me say that, as a private individual in the example that I gave, I—

**Margaret Mitchell:** No. I am not talking about you as an individual. You are representing the Scottish Human Rights Centre, which has a specific remit and expertise in the field.

**David Cobb:** Yes, but expertise on which money needs to be spent. We are not a well-funded organisation.

**Margaret Mitchell:** So, you are saying that you have not intervened in cases because you do not have the money to do so.

**David Cobb:** Well, I cannot speak historically—

**Margaret Mitchell:** What do you do with your time if you do not intervene in such cases?

**David Cobb:** If we had the resources, I am sure that we would be carrying out the testing that you suggest. What we have to do—

**Margaret Mitchell:** What are your priorities for your current resources?

**David Cobb:** Certainly, we provide a lot of comments on the legislative and policy proposals that the Executive produces. We also provide training to various organisations, including the

Scottish Police College, and we provide an advice service.

**Margaret Mitchell:** So, you comment and you advise the Executive, but although you have the power to intervene in order to make a difference to an individual's life, you have not used it.

**David Cobb:** Rosemary Burnett may have had some experience of trying to get Amnesty International involved in such cases. Perhaps she is more aware of the practicalities.

**Rosemary Burnett:** No, I have not had any experience of that. Amnesty in Scotland consists of two people.

**Margaret Mitchell:** That is my difficulty.

**David Cobb:** The point is that the commissioner will be able to do things that the Scottish Human Rights Centre, as it is currently constituted, cannot do.

**Margaret Mitchell:** With respect, you cannot say that. You have not tried.

**David Cobb:** Well, we could pretty well destroy our budget on one case, if we were to try to litigate.

**The Convener:** I suppose that we are trying to tease out the robustness of the argument that we should instead spend £1 million on the Scottish Human Rights Centre and Amnesty International, split fairly between you. I am sure that you would love that. Both your organisations are playing the kind of role that the commissioner will play and, with more resources, you could do more. It is important for us to tease out the argument for setting up a new organisation instead of extending additional funding to existing bodies.

I have more questions about the role of the commissioner. The judiciary in Scotland has dealt with cases under the ECHR since 1999. I can understand why, prior to that, an expert witness may have been required, but I am not convinced of the need now for an expert witness in human rights. I am not saying that I agree with every decision that our judges take, but they have a fairly good and deep grasp of convention rights.

**David Cobb:** Yes, they do, but that does not always make the situation any less difficult. Especially in Scotland, the system of pleading is very much directed at the particular—general principles of law are applied to specific situations. That narrowing of the argument can mean that, even with the best will in the world, the solicitors on either side and the judge do not always fully appreciate the situation that they are looking at. That is not because they do not care about human rights; it is because human rights are not the first thing to spring to mind. The commissioner would intervene only in rare instances, not in every

litigation. The interests of the parties and the outcomes that they wish to achieve mean that human rights issues would not necessarily be canvassed on each occasion.

**The Convener:** If the Parliament was to concede the argument and extend the commissioner's powers to allow him or her to intervene, the commissioner would have a pretty open-ended power.

12:45

**David Cobb:** Yes, but—

**The Convener:** You have also said that any treaty or convention should be regarded as a source of powers. I would almost be happy to extend the commissioner's powers if the sources were more clear cut on how the commissioner would use their powers.

**David Cobb:** Yes. They cannot—

**The Convener:** The examples that you have given are fairly broad and wide.

**David Cobb:** The bill has a catch-all provision. I meant that we are concerned that, as the bill is cast at the moment, everything is focused on the ECHR. All that I am saying is that the human rights corpus involves more than the ECHR. Section 6(6)(d) mentions

"other international conventions, treaties or other international instruments".

If you found those, you would know what the commissioner would be looking at.

**Rosemary Burnett:** To give an example, if we had a case involving somebody who was applying to seek asylum in this country, the Convention relating to the Status of Refugees would apply. We imagine that the commissioner might want to intervene in a tribunal as an expert on the convention and the rights of the person under that convention.

**The Convener:** What would make them an expert? Would it be the fact that they were the commissioner or would they have to demonstrate expertise in the area?

**Rosemary Burnett:** The Scottish commissioner for human rights would presumably be able to employ an expert on the Convention relating to the Status of Refugees to make that intervention. There are hundreds of conventions that might usefully apply in certain cases, such as the UN Convention on the Rights of the Child, the UN Convention on the Elimination of All Forms of Discrimination against Women or the International Convention on the Elimination of All Forms of Racial Discrimination.

**The Convener:** What should be the effect of the human rights commissioner making a statement

on any area that they regard as involving human rights? Notwithstanding the provisions that the commissioner's statements are not subject to the laws of defamation, should the statement be a declaratory statement or should it simply be a statement of the commissioner's view, which would carry a lot of weight because it came from the human rights commissioner?

**David Cobb:** The commissioner's power is to make a submission to the court and to say, "When coming to your decision, consider this." As with any other submission that a lawyer makes in court, the judge can decide whether to accept it. Ultimately, if the case goes wrong in the law, the decision can be appealed elsewhere. The situation is not quite the same as in the European Union courts, where what the advocate general says turns out to be what the court says 99 times out of 100. As the bill is constructed, the commissioner makes a submission that is to be treated exactly the same as anything else that is said to the judge.

**The Convener:** My final question is about how the human rights commissioner would arrive at a decision on what areas they want to take a view on. What should trigger that? As you demonstrated, there are many areas that could be chosen; what should trigger the commissioner's interest in one or another? Should it be entirely a matter for the commissioner or should there be some criteria?

**Rosemary Burnett:** It should be based on the importance of the test case in forming part of Scots law. The commissioner should consider anything that would contribute to Scots case law.

**David Cobb:** Section 12 indicates that the commissioner can, in their annual report, set out a programme of work or statement of priorities. Ultimately, it is not possible to know what will arise, but that would at least give some guidance on the matters that the commissioner would regard as important in the immediate or near future.

**Stewart Stevenson:** Finally and briefly, the Scottish Human Rights Centre has talked about whether the commission could be a national human rights institution. There has been some discussion of class A, class C and class D. If it is possible to explain concisely what all that means, could you do so?

**David Cobb:** That is a question that Rosemary McIlwhan could answer much better than I can. There is a set of criteria, and her view, as expressed in our evidence, is that the commission as set up, in terms of the extent of its remit, independence and powers, will not achieve class A status. I know that the Scottish Executive thinks differently, so there is simply a dispute of views.

**Stewart Stevenson:** Would you suggest that, as a committee and as parliamentarians, we

should seek to incorporate changes as the legislation moves forward to enable it to deliver a commission with class A status?

**David Cobb:** Absolutely.

**Rosemary Burnett:** The class rating relates to how closely the human rights institution fulfils the guidance laid out by the United Nations in the Paris principles. If it meets everything on that checklist, it is class A. If it does not, it is classed further down. The fact that there is so little in the bill about the protection of human rights means that the commission certainly would not achieve the class A status that we were told the Scottish Executive wanted it to have.

**Stewart Stevenson:** You will forgive me if the answer is that I should already know, but are we aware of anyone having asked the United Nations where the proposed commission would be likely to end up?

**David Cobb:** No.

**The Convener:** I have one final question. A theme that has emerged this morning concerns the role of your organisations and of other organisations whose work crosses over into human rights. You mentioned the role of Andrew McLellan as chief inspector of prisons in Scotland, for example. Is it your view that the commissioner should try to avoid that kind of duplication? I ask because both Andrew McLellan and the previous inspector have been particularly vocal about conditions in Scottish prisons and I would argue that they have been effective in doing so. I wonder what a human rights commissioner would do in relation to prisons. I can envisage different areas that he or she might want to look at, such as the right to vote, but do you think that a commissioner should avoid duplication?

**David Cobb:** I hope that the commissioner would avoid duplication. As with the UK commission, there will be memorandums of understanding. In the case of the Mental Health (Care and Treatment) (Scotland) Act 2003, the relationship between the Mental Welfare Commission for Scotland and the Mental Health Tribunal for Scotland is set out in a fairly short letter, which seems to be common sense; there does not need to be a massive tome on the relationship between the two. If it were necessary, I hope that everyone could agree which area belonged to which body.

**Rosemary Burnett:** The inspector of prisons is concerned with how prisoners are looked after in prison, but there is the whole issue of how prisoners get to prison in the first place. I would like an investigation into the whole question of women in prison. There is some evidence to show that women are sentenced to terms of imprisonment for lesser crimes than men are. That

is something that the human rights commissioner could link into—they could have a direct influence on how people arrive in prison and on the prison population.

**The Convener:** That is a good note to end on. I thank both witnesses for their excellent evidence. I thank Rosemary Burnett in particular for her opening statement, which added something to our discussion on the bill. The written evidence is also important, as we go through each stage, to remind us of the views that have been submitted.

## Subordinate Legislation

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

12:54

**The Convener:** Item 2 is consideration of subordinate legislation. I refer members to the clerks' note on the Criminal Legal Aid (Scotland) (Fees) Amendment (No 2) Regulations 2005. At our previous meeting, we discussed the matter at length with the dean of the Faculty of Advocates and Scottish Executive officials—members should have had a chance to look at the evidence in the *Official Report*. Do members have any other comments to make?

**Stewart Stevenson:** I note the suggestion that the regulations will save £150,000 in one year. If that is the case, I welcome them.

**The Convener:** I learned a lot about the situation from last week's helpful evidence-taking session, and certainly feel that it was important to get the Executive and the Faculty of Advocates around the table. I am clear about the issues that are still to be negotiated on, but I am quite happy to note the regulations. That said, the paperwork could have made it clearer that, as we now know, the first set of regulations that we passed were the interim regulations and that these regulations are not the final ones. The reference in the title to "No 2" indicates that the Executive has had a second go at the issue, but these regulations are not the final set. Are members happy to note the regulations?

**Mr McFee:** I am happy to do so. However, I should say that, although it was useful to hear evidence from both parties at the same meeting, I am not sure that they came to the same conclusion on the outstanding issues. There seemed to be a gap between them in that respect.

**The Convener:** I agree. For example, there was a clear difference of opinion over the role of the auditor of court.

**Mr McFee:** The role seems to have evolved over time.

**The Convener:** A further set of regulations will be laid, which means that we will have another opportunity to comment on them. Bruce McFee is quite right to point out that the Executive and the faculty did not necessarily agree on certain matters. The committee will simply note that for the time being.

I should also make members aware of the Subordinate Legislation Committee's opinion. The committee wondered whether the regulations were

not *intra vires* because they are retrospective. However, the Executive feels that they are fine as long as no one loses out retrospectively. Indeed, the regulations have been introduced primarily because the faculty was unhappy with the first set of regulations and, because these regulations seek to correct the situation temporarily, the provisions have to be backdated.

**Mr McFee:** I acknowledge the case that the Executive has made. The Executive seems to feel that because the regulations disadvantage no one, no one will challenge them and so they will not be ruled *ultra vires*. The only remaining question is whether a challenge could be made on behalf of the public purse, which will clearly be disadvantaged by the regulations as it will have to pay out more money. After all, if someone receives more money, either someone has to pay more or someone has to receive less. Money is not magicked out of thin air. That said, although we should note the concerns of the Subordinate Legislation Committee, I am quite happy to proceed on the basis of the advice that we have been given.

**The Convener:** Are members agreed?

**Members indicated agreement.**

## Family Law

12:58

**The Convener:** Item 3, on family law, has been put on the agenda at the request of Mary Mulligan, who unfortunately has not been able to stay for it. It concerns the provision of family support services, which the committee discussed in relation to the Family Law (Scotland) Bill.

Although the committee is busy, I agreed to put the item on the agenda because I felt that other members might wish to comment on the matter. If Mary Mulligan had been able to stay, she might well have asked the committee to consider carrying out a series of short pieces of work on certain issues that run alongside and beyond the bill, particularly with regard to family support services.

We will debate that issue in the chamber tomorrow; indeed, Stewart Stevenson has lodged an amendment on the matter and other members hope to contribute to that debate. Although we might vote differently on various amendments, we were unanimous at stage 1 that this aspect of the bill was important and might require more work. We should wait and hear what the Executive has to say tomorrow, but this is an opportunity for members to say now whether our business is finished or whether we should do a wee bit of work on the matter.

**Mr McFee:** We will clearly need to do some work on the matter, because I do not think that the whole question of the services that will be provided will be determined tomorrow. The speeches will be short, if not sweet, and the prospect of being able to form an overview, never mind a forward direction, is somewhat remote. I am sorry that Mary Mulligan is not here, because we had hoped to discuss the item last week and did not get the chance to do so. It could be argued that, irrespective of what happens tomorrow, this is unfinished business, although perhaps we should wait until after tomorrow's stage 3 proceedings before we decide what work should be carried out.

**Mike Pringle:** I agree. Indeed, it might not be the only business left unfinished after tomorrow's stage 3 proceedings. We might well have to consider other matters.

**The Convener:** I see that members are nodding at that.

**Margaret Mitchell:** When we started our consideration of the bill, we found that it placed a heavy emphasis on mediation and, as we progressed through stages 1 and 2, we began to feel that the counselling process and reconciliation

mechanisms had not been taken into account. That ties into the question of how best to support a wide range of different services to meet the needs of people who have an interest in the bill's provisions. The issue will be debated to some extent under Stewart Stevenson's amendment and I am glad to have the opportunity to discuss questions such as whether local authorities should take the role of the voluntary sector into account in this matter. Like other members, I doubt very much whether the issue will be resolved tomorrow, but we will be able to flag up aspects that need to be examined.

**Stewart Stevenson:** My amendment is amendment 44 and, by my estimate, it will be debated at 3.45 pm tomorrow, so be there or be square. Of course, it is not really my amendment; it was provided to me and I simply lodged it in my name. I hope that, whatever the outcome of the debate tomorrow, its relatively comprehensive focus on relationship counselling, family mediation and contact centres will provides a locus for discussing the various issues. I certainly know that there is wide interest in the matter out there. Representatives from my local mediation services will be sitting in the gallery, watching our deliberations, and I know that they will not be alone. I believe that, even if amendment 44 is agreed to, more discussion on these matters will be required.

**Marlyn Glen:** I agree with other members that there will be lots of unfinished business to attend to after the bill is passed. However, what kind of work will we be able to carry out effectively? I presume that, after stage 3 and after we see exactly what has emerged from the debate, we can once again put the matter on the agenda.

**The Convener:** Marlyn Glen has raised the most important point. We are simply putting down a marker that we know that more work will almost certainly have to be done. The question is whether we will be able to do any justice to that work in the time that we have available. Members will want to hear how the debate goes tomorrow, so I suggest that, on that basis, we should put the matter back on the agenda. However, when that happens, I will be looking for proposals for work that will add value to the subject area and members' thoughts on whether, for example, we should have a short or long inquiry. If members feel that we need to examine areas other than family mediation and relationship services, they should be able to specify what those areas are. Do members agree to that suggestion?

**Members indicated agreement.**

**The Convener:** We will move into private for a very brief discussion with our adviser of some of the evidence that we have heard and to check whether members are aware of the arrangements for next year.

13:04

*Meeting continued in private until 13:28.*





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