JUSTICE 1 COMMITTEE

Wednesday 21 December 2005

Session 2

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CONTENTS

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JUSTICE 1 COMMITTEE
42nd 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 GAVE EVIDENCE:

Professor Alice Brown (Scottish Public Services Ombudsman)
Carolyn Hirst (Deputy Public Services Ombudsman)
Lord McCluskey
Dr Rachel Murray (University of Bristol)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 5

Scottish Parliament

Justice 1 Committee

Wednesday 21 December 2005

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

Scottish Commissioner for Human Rights Bill: Stage 1

The Convener (Pauline McNeill): Good morning and welcome to the Justice 1 Committee's 42nd and last formal meeting of 2005, although I am sure that we will have more work to do this year. All members are present. I ask them, as usual, to switch off their mobile phones.

Agenda item 1 is the Scottish Commissioner for Human Rights Bill. I welcome our first panel, which comprises Alice Brown, the Scottish public services ombudsman, and Carolyn Hirst, who is one of her deputies. Thank you for attending and for your written submission—it is helpful to have notice of what you will say. This morning, we will put your comments on the record.

Margaret Mitchell (Central Scotland) (Con): Good morning. Professor Brown, your submission says:

"Human rights are fundamental to the concept of good public administration."

Do you have practical examples of that?

Professor Alice Brown (Scottish Public Services Ombudsman): Yes—we have quite a number of practical examples. If you have looked at the newspapers today, you will have seen reports on health service complaints. Issues that arose in some of those complaints concerned basic dignity in the treatment of patients while in hospital, which is a fundamental human right.

It is important to say that we consider economic and social human rights every day—such consideration is built into our office's work. Some complainants do not necessarily articulate their complaints in human rights terms, but once the complaints are analysed and investigated, human rights aspects of the day-to-day delivery of services emerge.

If a local authority or other public authority failed to take into account a duty under human rights legislation, that would in our view be maladministration and would be a finding against that authority. If an authority did not deliver the same kind of services to one section of the community as it did to another—for example, if we think of diversity and equality issues, a person might raise through the Commission for Racial Equality the complaint that they had not got the same type of house as someone else—that would be a human rights and service failure matter that the ombudsman's office could examine. Carolyn Hirst has one or two specific examples to share.

Carolyn Hirst (Deputy Scottish Public Services Ombudsman): My examples might help. The first relates to a report that we issued recently. If an older person who is in hospital cannot eat unaided and her teeth are on the locker next to her but nobody comes to cut up her food, she cannot eat the food that is on her plate. Another example is basic: a person calls for a bedpan, but wets the bed because the bedpan does not arrive in time. The result in both cases is loss of dignity.

There might be an issue in respect of if a home for older people is to be closed or a property is to be demolished without appropriate consultation of the people in those properties. Such matters, which we encounter daily under the heading of maladministration, can also be interpreted as breaches of human rights.

Margaret Mitchell: I will tease that out. Professor Brown mentioned economic and social human rights. Is it fair to say that you also cover civil and political human rights—the so-called moral human rights?

Professor Brown: We cover the moral human rights less directly. We need to consider human rights in the context of the country in which we operate. We would not, for example, examine a person's claim that he or she was being tortured because we do not cover such matters. We have to be clear about what areas we cover.

Our point is that, rather than view human rights as an abstract concept, we should recognise that it is a day-to-day issue for most people as they go about their business, and that aspects of human rights arise through delivery of services to those people. For most people in Scotland, that is the most direct way in which they will encounter human rights issues, which indicates the type of issues that we deal with daily.

I should stress that Scotland has very much led the way in creating a one-stop-shop ombudsman service. We cover the delivery of public services across the board, including services that are provided by local authorities, the health service, housing associations and the Scottish Executive. We provide a wide range of cover and we offer an important alternative to the courts.

If you consider our work in the context of the whole administrative justice system, you will be aware that people can raise their problems using a number of different mechanisms. First, they should raise their complaint with the body with which they have encountered a problem. That might escalate

through a continuum of options. An ombudsman office offers a very important option; it provides an independent, accessible and free service. It is an alternative to going further down the line to the courts. It might be that the courts provide the only way to resolve certain cases, but most day-to-day issues for most people in Scotland can be resolved much earlier.

Margaret Mitchell: If a human rights commissioner were appointed, what would the pecking order be? Would the new commissioner be responsible to you, or would you be responsible to the commissioner?

Professor Brown: I do not like to think of the matter in terms of a pecking order; I like to think of it in terms of our having complementary roles. In our submission, we argue that the human rights commissioner, should one be appointed, should come under the jurisdiction of the public services ombudsman.

A number of different offices have been created during the early years of devolution and we can deal with complaints about the operation of some of those offices; for example, the operation of the freedom of information commissioner would come under our jurisdiction, as would the work of the Auditor General for Scotland. Of course, we are also under their jurisdictions. It is about complementarity.

If people have a problem with regulators and others, we are the office that they can come to, because how those bodies have operated and conducted their business is subject to our investigation. I see the role of the Scottish commissioner for human rights as a complementary one. Nonetheless, I would argue that the new office, if it is created, should come under the jurisdiction of the ombudsman's office.

Margaret Mitchell: We are getting to the heart of the matter now. There is a plethora of different organisations that includes pressure groups, trades unions, the courts, public sector lawyers, law officers and privy councillors, which all have a duty to implement the law with respect to human rights. Is there a need for a commissioner, or should we follow the European model, as you suggest in your submission? In some of the European Union accession countries, the public services officer is also the human rights officer.

Professor Brown: You missed MSPs and councillors out of that list, who also play a crucial role. We must acknowledge that many people will come first to you or councillors about certain issues, as is appropriate. It is a matter of proportionality and of what the most appropriate thing is for the person and for the issue in question. We should not suppose that one system will work for all cases.

I return to the fundamental question that you asked about the role of the new commissioner. Before establishing any new office, we must be clear about what its specific duties and remit are to be. The first principle is to ask whether it is possible to achieve what we want with bodies that already exist. Our answer to that, in relation to human rights, is that we can—certainly in relation to individual complaints. It would therefore be a duplication to create another body to consider individual complaints.

If we do create the new body—in my view, and as we stated in our submission, the importance of the advocacy and promotional roles that such a person or office could provide should be stressed—and if the person heading it was allowed to stand back from day-to-day issues and to examine good practice in Scotland and how Scotland could learn from other countries in some aspects of human rights, that would be a very specific role. That would be advocacy, however. Our role is to investigate, adjudicate and do preventive work, which is a different, quasi-judicial role that involves considering specific cases. It allows us to comment on systemic problems that we see and, crucially, on where lessons have to be learned.

If a new office of commissioner for human rights is to be created, it must be seen as part of the governance and regulatory structure of Scotland. We must be absolutely clear that it fits into that framework and that the roles of those in the structure complement, rather than duplicate, one another.

10:30

Margaret Mitchell: Is there a better way to perform the advocacy role? We know that expertise exists in local authorities, where there are highly paid lawyers who have the expertise to deal with human rights. Do we need to create a commission or commissioner when that expertise exists and those people could perhaps take on the training and advocacy roles that are envisaged for a commission or commissioner?

Professor Brown: Fundamentally, that is a question for MSPs to answer. I can see the benefits of having a commissioner, in that we would have an advocate—an individual, perhaps—who would be known throughout and outwith Scotland. That would provide a focal point for the debate about human rights, but we must acknowledge that there are many other players who deal daily with human rights in local authorities or other public authorities. Whether they give legal advice or do other work, they will be part of the debate, as that is part of their work.

There is a good reason for having a figurehead role, but the real trick is to mainstream human rights into everyday practice, which is where the roles of individual human rights advocates within organisations are particularly important. A figurehead would allow for the promotional, advocacy and public awareness-raising role. It would not be an alternative to having individuals with expertise; it would be complementary. That is the crucial point.

Margaret Mitchell: It has been suggested that advocacy will not be taken much notice of if the commissioner does not have enforcement powers.

Professor Brown: I do not necessarily accept that, because there are other ways to build relationships with organisations that are under one's jurisdiction, as we do. The commissioner could acquire credibility through the work that they will do, and people will then be prepared to accept the recommendations that they make. Most public sector workers in Scotland want to deliver good public services and want part of that to be good administration that conforms to human rights practice. I think that we might encounter a problem only in exceptional cases, not necessarily in the economic or social spheres, so we should design systems not for the exceptions, but for the majority operation.

At this stage, the lack of enforcement powers does not cause me great concern. Under the Scottish Public Services Ombudsman Act 2002, we do not have full enforcement powers. Parliament debated the point—with which I agreed—that it is up to Parliament to enforce some of the recommendations that we make and to hold people publicly and democratically accountable. So far, we have not had to use our full powers. We can lay a special report if someone does not agree with and implement our recommendations. We have never had to do that, although we have had a dialogue with Parliament about what it would do should we enter that territory. Enforcement can come through a democratically elected body.

Perhaps Carolyn Hirst has other points to add.

Carolyn Hirst: Perhaps I should define what the ombudsman does. The Scottish Public Services Ombudsman Act 2002 sets out what we do, which is to examine maladministration and injustice on the part of public authorities. Another way of saying it is that we protect the rights of individuals who believe themselves to be the victims of unjust acts by the public administration. If an individual believes themselves to be a victim of an unjust act, we consider that to be maladministration in the main, but it can have a human rights element.

Because we do not exist to enforce a remedy, we are able to talk to the individual and find out what outcome they are looking for, determine what it is feasible for the body that has been complained about to do and then come up with a recommendation that will, most of the time, be implemented because it is reasonable and seen to be so by both parties. That gives a large degree of flexibility and practicality in what we can do to remedy injustice. Most individuals not only want their personal injustice to be remedied but want to ensure that the injustice does not happen to somebody else. The latter is the second part of our job: we go back to the body and ensure that the lessons have been learned.

Margaret Mitchell: That is great. There is just one final area on which I seek your opinion. At the moment, the commissioner's remit extends only to public authorities. Should it be extended so that the commissioner can examine voluntary non-governmental organisations?

Professor Brown: Again, that is a very interesting question. If I may, I will answer it in relation to our remit, which may be helpful to the committee. Under our remit come public authorities—listed authorities, as they are called in our legislation. However, when we give presentations on our role, we always add an "and …." at the end to cover the voluntary organisations or private sector bodies that deliver services on behalf of public authorities; in other words, the organisations or bodies that are paid to do so. I am thinking of private hospitals, for example. In those cases, such organisations or bodies come under our jurisdiction because they are publicly funded.

Of course, increasingly in Scotland and elsewhere, the line is blurred between the private and public sectors. In fact, our jurisdiction is much farther-reaching than would appear to be the case on the face of our act. Any body that acts on behalf of a public authority automatically comes under our jurisdiction. That is a route that the committee might want to think about.

Margaret Mitchell: Thank you—that is very helpful.

Stewart Stevenson (Banff and Buchan) (SNP): I want to pick up on some of what you said about the national health service in Scotland. I will explore the issue by means of an example. Two days ago, I received information in a parliamentary answer that showed that all the health boards in Scotland conform to the standard that the Scottish Executive has set for provision of in vitro fertilisation. However, the answer also showed that, although the maximum waiting time for IVF in the Highlands is six months, the maximum wait in Grampian is five years. Is that unjust to someone in Elgin compared to someone in Nairn?

Professor Brown: That is a very good exam question. My answer is the usual ombudsman answer: it depends on the circumstances. We are not in place to second guess how people allocate their resources. We can examine how they have reached a decision on prioritisation of one aspect of their services over another, but under our jurisdiction we have a broad remit that says that we can examine failure in a service or failure to provide a service that is a function of the body in question.

If such a case were to be brought to us, we would consider whether the body's actions were reasonable in the circumstances. There is always a tension between what should be available to everyone who lives in Scotland and being sensitive to the pressures and needs in different areas. We are a small but diverse country; the tension in service delivery is to ensure that everyone gets a basic delivery of certain services and that resources are allocated in a way that recognises the particular circumstances of rural and urban Scotland. In that type of case, we would consider it to see whether a decision had been reached without maladministration and whether what was done was reasonable in the circumstances.

Stewart Stevenson: So the answer is maybe.

Professor Brown: Yes.

Stewart Stevenson: Right. I am asking the question for a fairly obvious reason. In both cases, the performance conformed to the required standard, but the end result was dramatically different—the ratio was 10:1 in favour of the person concerned.

Professor Brown: But the health board might give a counter-example, in which it says that, although it is taking longer to deliver on this treatment, it is delivering in six months on another one. Part of the debate that boards have is on prioritisation and allocation of resources. That is what we appoint boards to do. It is not therefore right for us to second guess that judgment.

Stewart Stevenson: I will move on. You said that the Scottish public services ombudsman was comparatively—you might even have said this without qualification—unusual in having a one-stop shop. To what extent does that make the public services ombudsman here more effective than comparable bodies in other jurisdictions? So what? Does that help the so-called customer?

Professor Brown: Indeed it does. As members might recall from the debate in the Scottish Parliament, the decision to set up a one-stop shop was very much driven by the customer point of view. It was argued that it would be confusing for people who had a problem to be required to go through many different doors. The previous system lacked clarity, was insufficiently straightforward and was not always accessible. That is no criticism of the previous individual offices, which were established in particular circumstances. However, when Scotland asked itself fundamental questions about what kind of complaints system it wanted post devolution, the key principles that were set down were clarity, simplicity and accessibility. Those principles should apply to the creation of the office that we are debating this morning.

It is interesting to look at Wales—which followed Scotland's example and, encouragingly, learned from what we did—because we can learn from certain improvements that have been instituted there. If we think back to the early days of devolution when we were planning how Scotland should run its political system differently, the aim was not simply to open up the policy-making and policy-design processes at an early stage to encourage debate on things such as what kind of education or health system we want. The aim was also to ensure that, once legislation was passed, we would be grown up enough to consider after a few years whether the legislation was doing what we wanted it to do and whether parts of it were effective. We have particular proposals on how the Scottish Public Services Ombudsman Act 2002 could be improved by what we have learned from good practice in Wales and from what is now being done in Northern Ireland and England, where consideration is being given to the different ways in which—given the restrictions that apply—the activities of the different ombudsman services might be combined.

Let me give a practical example. If an elderly person requires care and something goes wrong with the delivery of that care—the problem might involve their medical treatment in hospital, the support that they received in the community after discharge or some aspect of housing—the person can now come to our office to deal with everything. People do not need to go through a multiplicity of doors to get answers to their questions, because we can do everything for them.

Stewart Stevenson: You make the case for simplicity of access, but let me suggest an almost caricature situation. If a racial minority gay female disabled pensioner is not receiving the treatment that they require from the health service, but the basis on which treatment is being denied is unclear, which door should they go through? They could choose to knock on a considerable number of doors. Is there a case for having a single door? Are you trying to argue that we should have a single office holder who holds all the posts under the various pieces of legislation so that we avoid complications for the customer?

Professor Brown: That gets to the heart of the point that I made at the beginning. At the moment, the individual whom you have caricatured can come to our office to complain about a problem on all those grounds. Even if they voice their complaint in terms of discrimination, they need not go to the Commission for Racial Equality, which is unable to do much about individual complaints. We can deal with individual complaints because an authority's failure to comply with a duty to treat people fairly and without discrimination is maladministration. For example, in the recent cases that were brought against Glasgow City Council for discrimination in pay, people could have come to us as an alternative to going to the court or tribunal. That brings us back to my point that people have different options so they need to consider which is the most appropriate and proportionate route for them.

However, the fundamental issue behind your question is the extent to which other roles could be wrapped up with that of commissioner for human rights.

10:45

It is quite instructive to look at other countries, and if you look at other European models you certainly find, as we say in our submission, that the newly emerging states have gone down the human rights route—that is where context matters, because there are some big human rights issues—and have wrapped together the role of the ombudsman with a human rights role. Of course, the types of human rights issues that people in other countries are dealing with are quite different from the human rights issues that we are talking about today; we are in a privileged position. For example, on Monday we had a visitor from the ombudsman's office in Malawi, which has the same extensive remit as we have but is dealing with issues that are, for obvious reasons, of quite a different order to those that we are dealing with.

One interesting European development, which was highlighted in a speech by the new European ombudsman, is that some states have now incorporated a human rights dimension into the role of the ombudsman—not just the new states, but more traditional, older states, including Sweden, which in 1809 created the first ombudsman—by changing their legislation. There are different models in different European states and around the world, but it is now recognised that elements of separation must be carefully handled, and that it must be clear why roles are being separated and what role a human rights commissioner would have. That is why we argue that, if there is a role for a commissioner, we will support that role if it is clearly defined. It is important that there is a distinctive commissioner's role and that we are clear about why we want it and how we are going to support it, but it must not duplicate the role of others. Examination of individual complaints would be duplication.

Stewart Stevenson: Given that you are already dealing with human rights issues, would there be merit, at the very least, in an administrative integration?

Professor Brown: Yes.

Mr Bruce McFee (West of Scotland) (SNP): Let us take that a wee bit further. Rather than just an administrative integration, could there be full integration of the work of a human rights commissioner and the work of a body such as yours? Is your contention that that would not only be possible but more desirable than setting up a separate office for a separate commissioner with a promotion-only aspect to the work?

Professor Brown: One has to make a distinction between an office holder, who might be called a commissioner for human rights, and the office. The office could be shared with someone else. There would be more than one option, but if the office was shared with us we could clearly offer to provide services such as information technology. We have designed a whole new IT system that very much suits our purposes and we have shared our ideas with ombudsmen in other countries and with some commissioners in this country. We have already shared quite a lot with the offices that currently exist, but the real trick is in the creation of the new office and in weighing up the possibilities. We could share IT, human resources and finance services.

Another possibility is to move slightly beyond that and to say that the other key function that we fulfil is investigation. The bill foresees a commissioner with the power to carry out inquiries, but it is unlikely that the commissioner will have a pool of people sitting waiting to carry out an inquiry and not doing anything until an inquiry arises, because one would not expect that to happen every day. However, if there was a pool of investigators from which to borrow, the commissioner could head an inquiry using some of the resources and investigation expertise that we have. In our case, an inquiry is initiated by the complainant and conducted in private, whereas for the commissioner it would be initiated by the commissioner and conducted in public. Nonetheless, the processes involved would not be dissimilar. Economies could be made if the office holder was able, under an umbrella system, to draw on the shared services that he or she required to fulfil the function of the office, as well as on a pool of investigative capacity.

The third strand is joint working, which we already do with other commissioners. We have a

memorandum of understanding that allows us to work collaboratively. We are a one-stop shop, but the field is becoming crowded. For good reasons, there will necessarily be distinct offices, but we need to be able to join up our investigations. For example, if a complaint comes to me that relates to the Auditor General for Scotland's remit and my remit, with the agreement of the complainant we will work closely together on that.

Mr McFee: So you are more of a department store than a one-stop shop.

Professor Brown: You could say that.

Mr McFee: You suggested that one of the add-on values, if not the only add-on value, would be the figurehead role. How much weight would you attach to the argument that the creation of a figurehead could be counterproductive, in that the commissioner's role should be shared across a range of bodies that have a human rights remit? Indeed, having a figurehead may make others think that somebody else is taking care of the human rights aspects across a wider area than is in fact the case.

Professor Brown: I do not see the situation as an either/or. I have a long history in the equality and diversity movement and have long heard the argument that if someone has the job of doing it, the rest of us do not need to bother. We often need both. We need someone who can articulate a vision of what a human rights culture would look like and who raises the aspirations in the public bodies under jurisdiction. However, on a day-to-day basis, that vision has to be mainstreamed into the culture, attitudes and behaviour of staff who are delivering services. That is where the real trick lies.

Carolyn Hirst: The real trick is whether public authorities in Scotland—as they go about their daily business, do their job and make decisions—ask themselves whether they have taken human rights aspects into account. That is about mainstreaming.

Mr McFee: Is there anything in the bill that your office, given the promotional finance, could not do?

Professor Brown: We are not advocates. We have to be seen as independent and not on anyone's side. We have to be clear that an advocacy role is different.

Carolyn Hirst: That applies to the inspection powers, too—we are not inspectors.

Mr McFee: I am talking about what you could do if you had the powers in the bill to inspect. You are saying that your concern would be about the advocacy role only.

Professor Brown: Mainly.

Mr McFee: Can you elaborate?

Professor Brown: Advocacy, promotion, education, awareness raising—

Mr McFee: Those are part of the same package.

Professor Brown: Yes, but we already do awareness raising, which we would be integrating as well. That is where the complementarity would come in.

Mr McFee: What are the main differences between the human rights commissioner's proposed power to inquire and your power to investigate?

Professor Brown: There are some important similarities. We have powers similar to the Court of Session's to require information, to get access to people and to interview them. The main difference would be that the human rights commissioner's inquiries are likely to be held in public. We usually hold all our investigations in private, mainly because there are strong confidentiality rules. Many people do not want everyone to know that they have a problem; even when it comes to issues to do with their human rights, they do not necessarily want to advertise it. They want someone to deal with their problem confidentially. We always anonymise people in our reports. Some people tell the press that they have been to the ombudsman and what happened, but in our experience most people do not want that.

Carolyn Hirst: Under the Scottish Public Services Ombudsman Act 2002, we can only investigate if somebody brings a complaint to us; we cannot do it on our own initiative. That was discussed when the legislation was going through the Parliament and it was decided not to give the ombudsman that role. We can only react to complaints that come to us. We can carry out another type of report to talk about general systemic issues, but we cannot initiate investigations.

Professor Brown: That is one area about which we would like to return to talk to the Parliament. Having reflected on three years' experience, I think that it would be useful to have that option available to use in particular circumstances. The Northern Ireland ombudsman is arguing for such a power in his jurisdiction. We come across things that we know are happening, but unless someone makes a complaint, we can do nothing. That means that we cannot move quickly.

As part of revising and improving our processes, we are keen to find ways to quicken the process for people. Most people have a problem that they are upset about; they want it to be handled as quickly as possible and they want to get on with their lives. We add no value if we add to the anxiety that they feel. We would like the ability to

fast-track complaints and the additional power to make own-initiative investigations if no one has complained about an issue that has not been addressed.

Mr McFee: You think that acquiring such a power would be desirable.

Professor Brown: Yes.

Mr McFee: If you acquired that power, we would simply return to advocacy and promotion.

Professor Brown: In the main, but a human rights commissioner might feel more strongly about some issues than an ombudsman did. The grounds on which to do an inquiry would have to be clearly chosen.

Carolyn Hirst: The commissioner for human rights would consider not just convention rights, but the whole range of human rights instruments, in which we have no locus. There are crucial differences between what we do and what is proposed for the commissioner.

Mr McFee: You say that if the commissioner's proposed inquiry function were strengthened by its being allowed to take up individual cases, that would result in quite a crossover between your role and the commissioner's role. Does the bill propose that the commissioner could cover any subjects that you cannot, apart from those in self-initiated investigations?

Professor Brown: I am trying to think of examples.

Carolyn Hirst: The bodies that we investigate need to fall within our jurisdiction. Those bodies are listed in the 2002 act.

Mr McFee: I will rephrase the question. Does the bill specify any subjects on which you cannot take up individual cases?

Professor Brown: None immediately comes to mind.

Marlyn Glen (North East Scotland) (Lab): I presume that your powers will not change in the near future, unless we suddenly—

Margaret Mitchell: Scrap the bill.

Marlyn Glen: It is always possible that we will go off at a tangent.

If you made an investigation that you thought should have a follow-up inquiry, could you pass it on to the commissioner?

Professor Brown: That is interesting, because it links to a point that Carolyn Hirst made. If we keep seeing many cases on the same subject, we can lay what is called an "other" report before Parliament, which says that we think that there is a systemic problem. The commissioner might decide to do an inquiry into such an issue—that could be a complementary role. However, that would require good relationships between the office holders.

The Convener: Bruce McFee has a brief question.

Mr McFee: I apologise—I meant to ask this earlier. Is there any reason why the advocacy role could not be undertaken by voluntary organisations with increased funding?

Professor Brown: I never rule out any options, but the decision is not for us. My immediate response is that the status of the office holder is a signal that parliamentarians hold an issue in high regard and that society thinks that it is important. Further down the line, we may question whether the post is still necessary, but given how other European states are developing and given all the charters, you as parliamentarians are showing leadership by taking the matter seriously. You are saying that you want the rest of the public services and others to take it seriously and you are recognising it by giving it the status of an office. However, the decision is for the Parliament.

11:00

The Convener: You make an interesting case for expanding the powers of the ombudsmen. No offence is intended—in fact, I am sure that you will agree with me—but the term "ombudsmen" is not appealing. It does not give the impression to the public that you are about promoting human rights. You explained well what you do—as MSPs who refer constituents to you, we are all familiar with your role—but you do not have expertise in the application of the European convention on human rights, or do you?

Professor Brown: That is a good point, which relates to the question of where the specialism lies. The trick is to ensure that we have specialists and generalists and that the two work together. We talk about having knowledge champions in our office, because we need to be specialists in lots of areas, whether it is European law, the delivery of health care or housing and planning regulations. We have a lot of specialists, whose knowledge we have to use wisely. We cannot all be specialists in everything, so they are the people to whom others in the office go when they are examining specific areas.

The Convener: Are you arguing that you could fill the gap in your body by employing someone with the relevant expertise?

Professor Brown: That is not the argument that I am making. I am saying that we would look for the power to pursue own-initiative investigations, which can be about anything. That is a separate

issue. We have expertise in human rights issues within the office, because we deal with them on a day-to-day basis. However, if you are asking whether we have someone who is called the human rights person, Carolyn Hirst is closest to that role, in the sense that—

The Convener: No. Let me be clear. Given what you have said, which side are you coming down on? I am sympathetic to your case. You argue well that we should not create something that results in duplication. That is clear. Because the commissioner—if that role is created—will do a great deal in the public sector that you already do, I wonder where the gaps are. It would be good to receive guidance from you. Do you err towards extending the powers of the public services ombudsman—such as by adding the power to intervene in court cases as described in the bill—and providing expertise and resources to deal with human rights, or do you think that our work lies in identifying where we can place clear duties on a human rights commissioner that do not duplicate your work?

Professor Brown: My apologies, but I misunderstood your clear question. Our submission states that we would go for the latter, with the strong caveats that I have just articulated. However, if the Parliament considered the former, we would be happy to engage in a discussion about it.

Mr McFee: For my benefit, what was the latter and what was the former?

Professor Brown: The latter was the option that we list in our submission, which is that we support the creation of a Scottish commissioner for human rights, with the caveat that the role is clearly understood and that it is distinct, complementary and focuses on the advocacy, promotional, educational and awareness-raising aspects.

Mr McFee: But the preference is for the former.

Professor Brown: That is for you to decide. We are not saying that. Our submission makes the point that we support the creation of the office but, should you consider the former—integrating human rights with our office—we would be happy to discuss it with you.

The Convener: That is helpful.

Mr McFee: On cost, you mentioned—

The Convener: You need to make this very brief, because we have to stop.

Mr McFee: I will. Do you have any idea of the average cost of conducting inquiries, or could you give us ballpark figures at either end?

Professor Brown: Our budget is roughly £2.5 million. About 2,500 cases came to us last year, although they did not all involve investigations or high-profile inquiries. The question is what is proportionate for a particular issue. It is difficult to put an average figure on the cost of an investigation. We can do it, but we would have to add so many qualifications that it would not be particularly helpful. Much of the cost would be associated with staff time, because that is what most of an investigation is. We can pay expenses to people who come to inquiries, but investigations can be costed in staff time.

Mr McFee: What is the most that you have paid?

Professor Brown: Do you mean the most that we have paid for an individual investigation?

Mr McFee: Yes.

Professor Brown: The longest investigation that we have had probably took about a year, but that is unusual in current circumstances.

Carolyn Hirst: That would not take up all of an investigator's time.

Professor Brown: No, it would only be a small proportion, so we are talking about £10,000 to £15,000.

The Convener: Perhaps if there are more questions on cost, we could write to you, as you obviously have experience of that.

Professor Brown: I would be happy to answer. If anyone wanted to visit the office, I would also be happy to go through the details with them.

The Convener: That is a kind offer. When it comes to writing our report, we might have one or two detailed questions on which we would value your experience and view.

I am afraid that we have to leave it there. I thank you for coming this morning and for your evidence, which was clear and helpful.

I welcome our second witness. We have switched the witnesses round: we will hear now from Lord McCluskey, as he has to leave a bit sooner than anticipated. We are grateful to Rachel Murray for agreeing to come later.

Thank you, Lord McCluskey, for your clear written submission and for coming to speak to the Justice 1 Committee. You provide an interesting perspective on the bill and we are grateful for your evidence.

Lord McCluskey: Before you begin, I will make one thing clear. I have a reputation in some circles as being against human rights. I am totally in favour of human rights and have been involved in human rights for many years. I helped to found the human rights institute of the International Bar Association and was its vice president for the first five years of its existence. I have lectured on

human rights in many parts of the world. I was against—I wrote a book about it—trying to deliver human rights through the judiciary rather than through democratically accountable bodies such as we have in this country.

I wanted to make my general position clear. I need not make an opening statement because it is clear from the questions to which I have listened that the committee is familiar with the concerns that I have raised.

The Convener: Thank you for that. From my reading of your submission, it is clear to me that you argue for a different way of achieving a culture of human rights.

Although you have said it in your submission, I ask you to put on the record your view on what a Scottish commissioner for human rights would or would not add to existing mechanisms.

Lord McCluskey: In a word, nothing.

The Convener: Okay. That is pretty straightforward.

Lord McCluskey: However, if I could add a sentence to that, the reason is that there exist numerous other bodies—not least of which are the courts—that have responsibility for vindicating human rights as I understand them. You have just heard from one such body. I deal with that general point in paragraph 8 of my submission. I can deal with that now, but perhaps it is not appropriate to do so.

The Convener: Will you tease that out a wee bit more? You say that the creation of a human rights commissioner would add nothing and that there are other ways of promoting human rights. How would that be done?

Lord McCluskey: I was the chairman of the Scottish Association for Mental Health for nine years. I was also the chairman of Age Concern and of Fairbridge and I have been involved with Safeguarding Communities Reducing Offending and voluntary bodies for refugees. All those bodies are strapped for cash. All of them have particular interest in and knowledge of the complaints and problems of their client base, to use a technical term. It seems to me that the money could be far better spent by helping those bodies to realise possible solutions to the problems that they face and to take those problems to the right arena. As I have made plain, there already exists in Scotland an extremely good judicial training body—I cannot remember its precise name—which had to teach judges, prosecutors and others about human rights. We knew nothing whatsoever about human rights until about 1998—nothing at all, or almost nothing—so bodies were set up to teach lawyers, including judges, sheriffs and prosecutors, and those bodies have done an excellent job. The job of training can be done by existing bodies that have the expertise and know what they are talking about. I am not at all sure that the lowly paid commissioner would know what he or she was talking about.

The Convener: I would like to ask about a well-known judgment—the Napier judgment, on slopping out. You will be familiar with that decision.

Lord McCluskey: Yes, indeed.

The Convener: Other witnesses have suggested that, if we had had a human rights commissioner, we would have had an earlier judgment on that case. I have questioned that suggestion quite closely, because I cannot see why that would be the case. Do you want to comment on that example?

Lord McCluskey: Let us imagine that we had never introduced the Human Rights Act 1998 or brought in the convention. No democratic body that I have ever encountered would enact a provision to the effect that somebody who was detained in prison in the conditions, including slopping out, that Napier was in should be paid £50 per day, which is more than the warders looking after him were paid, for the insult to his dignity of requiring him to slop out. It is a piece of nonsense. The Napier decision is a nonsensical decision. I am not necessarily talking about its immediate merits, because if you follow closely the reasoning, which extends to 30 or 40 pages, you go logically from one step to another. However, the end result is that people are being paid compensation totalling £40 million or £50 million—money that should be spent on prison development, hospitals and schools. It is just a nonsense, and no democratic body that is accountable to its punters—the electors—would have enacted such a provision.

The Convener: As you have said, the courts are getting used to dealing with the European convention on human rights. One of the powers that the proposed commissioner will have is the power to request to intervene in civil proceedings. In your view, would such a person add anything to the court procedure?

Lord McCluskey: No. Who is this commissioner supposed to be? As I point out in my submission, the salary is not one that will attract anybody of any great quality. That is why I refer to the article in *The Scotsman*. The two comparable figures are those for the Crown Agent, whose salary is £100,000 to £115,000, plus pension, and for Robert Gordon, the head of the Scottish Executive Justice Department, whose salary is £125,000 to £130,000. Sheriffs are paid something of the same order, and High Court judges are paid more. The commissioner will be paid what, in terms of the

competition, is a pittance. Of course, it is a large sum of money compared with what members of the Parliament earn.

The Convener: Let us suppose that we could fix that. We could say, "Okay, let's try to attract someone of the calibre of the Crown Agent, and let's pay £100,000 to £120,000 plus." If the salary was the issue when it came to attracting the right person, would such a move make any difference to the authority or effect of such a person giving evidence as an expert on human rights in any civil proceedings?

Lord McCluskey: A good example is the Scottish Law Commission or its English equivalent. Lord Scarman was the initial chairman in England; Lord Hunter held that position in Scotland, where the position has always been held by a judge of the High Court, with High Court status and a High Court salary. Those people carry considerable weight and employ expert staff. If a human rights commissioner were to intervene in a court case, would he or she turn up in person and say, "I'm the commissioner and I want to intervene"? No, that person will instruct counsel—a human rights lawyer—who will be paid substantial fees to appear in court. Such intervention is not necessary. The court can, and occasionally does, decide that it needs extra submissions that are different from those from the two parties, in which case the amicus curiae—a friend of the court—who is usually an experienced counsel or solicitor advocate, makes representations on an impartial basis.

11:15

The Convener: You heard the evidence of Alice Brown, I think.

Lord McCluskey: Yes.

The Convener: She put an interesting case to us. Her final submission was that she would prefer to identify the gaps without duplication and to define clearly the role of a human rights commissioner. However, she suggested that, as an alternative, we might want to extend the powers of the public services ombudsman. Would that be a better way of getting value for money in the promotion of human rights?

Lord McCluskey: I am not an expert on that, but my short answer is yes. The ombudsman already exists and has a good reputation and a functioning office. I would prefer an evolutionary approach to be taken by developing that office.

There is a general point that it is important that I make, which I mention in paragraph 8 of my written submission, on the vagueness of the so-called rights. Section 2(2)(b) refers to

"other human rights contained in any international convention".

I have just counted 20 such conventions, in addition to the European convention on human rights. We have ratified international conventions on discrimination in education; on racial discrimination; on discrimination against women; on the rights of the child; on employment; on refugees; on torture; on forced labour; on economic, social and cultural rights; and on civil and political rights. The commissioner will come into a field that is already huge—the European convention field—and bring in all these other so-called rights, which are not rights in any legal sense.

Stewart Stevenson: Let me signal the punch, Lord McCluskey, by saying that I simply do not accept your monosyllabic answer as to whether the bill adds rights. I posit the case—unlikely as it may be—of my being arrested and held on remand in conditions similar to those experienced by Robert Napier. Unlike Robert Napier, I have assets. The Napier case cost—if my memory serves me right—around £1.3 million in legal aid, with an award to Napier of £2,400. With my assets, it seems unlikely that I would get the kind of legal aid that Napier got; neither am I wealthy enough to be able to pay the £1.3 million. Would not people such as I—the middle class, if you want to use the traditional jargon—who can not afford to go to law and are not impoverished enough to get legal aid benefit from the creation of the human rights commissioner in circumstances such as those in which Robert Napier found himself?

Lord McCluskey: I do not really think so. The people who are vulnerable are the aged, the mentally ill and ex-prisoners. They can go to mental health organisations—I have mentioned one substantial organisation—Help the Aged and Age Concern or, for former prisoners, SACRO and the Apex Trust. There are numerous bodies to which vulnerable people can go.

Like you, I probably could not afford to pay for a lawyer. On the whole, however, I am not a vulnerable person; I am not the person for whom these human rights were created. In a real sense, human rights ought to confer legal rights on the vulnerable that they cannot otherwise vindicate. Our system permits them to do that.

Stewart Stevenson: If I recall correctly, the interim judgment in the Napier case required that the Scottish Prison Service remove Robert Napier from the conditions that he challenged within 72 hours. What kind of recourse would I have in similar circumstances to achieve a similar outcome if there is no one to whom I can have access at no cost?

Lord McCluskey: I suppose that, if you have the funds, you could seek judicial review. If you do not have the funds, there is not very much that you can do, but if you were to go to a body such as the

commissioner, it would hardly be likely to act within 24 hours. It would not possess the expertise or machinery to handle the case rapidly.

Stewart Stevenson: I accept that, in law, the remedies, processes and professionals exist and are available to pursue all the issues but, in practice, they are not available in a way that respects the human rights of people in Scotland, in that they are not equally accessible to everyone. You have conceded that point yourself in saying that you could not afford to employ a lawyer to do what Robert Napier did, just as I could not. Although I have yet to be convinced that we need to solve that problem in the way that the bill proposes, I am not prepared to accept that the law provides the kind of remedy that removes from the equation the need to do anything more, as you seem to think. Is my challenge reasonable or unreasonable?

Lord McCluskey: There are many ways of trying to vindicate a right—as distinct from, but including, a pure legal right, which can be vindicated in a court. I can go to my member of Parliament. I have a problem—I will not go into detail—to do with my sister-in-law, who suffers from profound deafness and is in an old people's home. I wrote to her MP and got an instant reply. He wrote to the local health authority and things are going rapidly and well. There is appropriate machinery; that is what MSPs and MPs are for. They can use the heavy hammer of the ombudsman if they want to do so. It is also possible to go to the press. There are 1,000 ways of bringing attention to what an individual supposes to be a violation of their human rights.

The Convener: You have time for one last question, Stewart.

Stewart Stevenson: I was going to say "finally", convener.

Does that not illustrate, Lord McCluskey, that there is still a concept of public service—I halved my salary to come to the Parliament, for preference—and that it might therefore be possible to find a retired judge who would be prepared to supplement their pension by fulfilling the role that would be created by the bill, if passed?

Lord McCluskey: That might be possible, but a retired judge either would be, like me, too old to accept the job or, if he was young enough, could be paid much more for sitting daily in a court of three and saying "I agree" from time to time.

However, the responsibility for vindicating people's rights, if it is not done through the courts, lies with the public authorities themselves. It strikes me as bizarre that the Parliament should enact a provision to appoint a commissioner

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

when, for God's sake, it is their duty to comply with section 6 of the Human Rights Act 1998. They probably have reams of people ensuring that they are complying with it, so it is a piece of nonsense to have a gadfly coming in every few months to tell them that they are not.

Margaret Mitchell: Your submission has been refreshing for me. You are clear that there would not be any added value in establishing a commissioner for human rights, given the limited remit that is envisaged in the bill. Would there be any adverse spin-off effects of creating the post and appointing somebody with few powers?

Lord McCluskey: The point that I make in the submission might not have been clear. In the United States, legislators find that roughly half the people support abortion and the other half do not, so they do not want to get involved. That also applies to many other matters, so it has become an unwritten convention that they bat things off to the Supreme Court and let the judges sort them out.

There is a sense in which local authorities or other public bodies to which section 6 of the Human Rights Act 1998 applies might bat things off and say, "Well, the commissioner hasn't raised this point so there can't be much in it." I am not saying that the commissioner is a negative thing; I just regard the position as a waste of money. At least £1 million will be spent on the commissioner, and there are the costs of conducting inquiries and joining in litigations. That will lead to snowballing public expenditure on a quango, which I am not in favour of, given that there are so many ways of progressing other than with a quango. I accept that establishing the commissioner could do something to improve the understanding and even the achievement of human rights, but it is not a question of perfection or of filling every gap; it is a question of whether that is a wise way to spend £1 million or £2 million a year.

Margaret Mitchell: I was looking at the part of your submission in which you address the potential for the gaps to be filled by pursuing political correctness as opposed to real human rights issues, like the ones that you highlighted in relation to non-governmental organisations and voluntary bodies. Could you elaborate on that?

Lord McCluskey: I take a close interest in human rights in countries where there are no human rights as we understand them. I go to many countries in the former Soviet Union and I bring people from them here. When we went to Saughton prison and saw the facilities, people were flabbergasted by the quality of our prison provision—so much so that they thought that the

prison was fake and was just for visitors like them. However, they became convinced that it was real. In their hotel the next day, they picked up *The Scotsman* and saw that the Executive and the Scottish Prison Service were being criticised and had been found liable to pay damages for breaches of prisoners' human rights, at which they fell about laughing. We have got things totally out of proportion. Perhaps that is not a clear answer to your question, but I do not want anyone to be in any doubt as to which are genuine human rights issues and which are matters of political correctness in my answers.

The Convener: Before we go any further, I believe that we have some broadcasting problems, so I will suspend the meeting until they are resolved.

11:27

Meeting suspended.

11:33

On resuming—

The Convener: I resume the meeting, now that the technical hitches have been sorted out. We have a brief question from Bruce McFee.

Mr McFee: Lord McCluskey, you will have heard the argument advanced by the previous panel that creating the figurehead of the commissioner would send out a necessary message on human rights. What message would it send out?

Lord McCluskey: I confess to a reluctance to send out messages. Judges are always thinking of sending out messages. Some will sit in Kirkcaldy and send out a message to youths about drinking on a Saturday night, but do they hear it? The answer is no. I am not keen on sending out messages. One should do things, rather than send out messages. I do not see how a human rights commissioner would send out a message to anyone.

Mr McFee: I will finish with one last issue, which was raised when I asked what the difference would be and what powers the ombudsmen did and did not have, and I was told that they did not have the power of advocacy. Would human rights be better advocated by redirecting some of the cash—if not all of it—involved in creating the human rights commissioner to the voluntary sector, so that if Stewart Stevenson finds himself in a middle-class Robert Napier situation he can go to an organisation that will take up his case?

Lord McCluskey: That is exactly my point. Each of the organisations in which I was involved, usually as chairman—or chairperson I should say nowadays—had an advocacy role. We developed that role, particularly in mental health, with Age Concern and in relation to SACRO. We have to give people a voice. One way to do that is to create a commissioner, but will people go to the commissioner? I do not think that they will. They tend to go to bodies such as Age Concern, Apex or SACRO; indeed, those bodies go to them. If you want to give the vulnerable a voice and if you want to provide advocates for the vulnerable, it is far better to send the money to those bodies. Almost every organisation with which I was concerned spent a heck of a lot of its time just trying to raise money for core projects. All of a sudden, millions are about to be spent on creating yet another quango full of ill-qualified people with ill-defined tasks. Some of those tasks are so wide that one of the commissioner's duties is to

"keep under review—

(i) the law of Scotland, and

(ii) the policies and practices of Scottish public authorities".

The commissioner may also

"recommend changes to the law and to those policies or practices."

What will the commissioner do on a Friday?

The Convener: We move on to the subject of resources.

Mrs Mary Mulligan (Linlithgow) (Lab): We were going to get to it eventually. I asked witnesses last week whether additional resources for their organisations might enable them to provide the advice and support that we intend to make available to people. However, they seemed reluctant. That may have been because they thought that too few resources were being dedicated to the commissioner's role. If the resources that are being suggested to support that role were divided between the various organisations that offer the kind of support that you have referred to—be it Age Concern or whoever—would there be enough to make a difference for each of those organisations? In other words, we may be in danger of spreading resources too thinly and not providing the support that we are seeking to give.

Lord McCluskey: I do not think so. In the Scottish Association for Mental Health, we engaged a good lawyer on a part-time basis and we had another lawyer who did a lot of voluntary work. They put in a tremendous amount of work in connection with the creation of legislation on so-called living wills. In other words, if one is working within a body such as Age Concern, Help the Aged or SAMH, one knows what the problems are because they keep coming to you from your client base. One can say, "Okay, this is something we ought to look into. How do we do it? We could do with some money to engage a lawyer, not

necessarily full-time, but part-time or on a project basis." One then ought to be able to come here and say, "You've got a fund available for human rights"—you must have, because you are prepared to spend the money on this item—"Why not give us access to that fund?"

One possible reason why NGOs such as those I have mentioned are slightly reluctant to take money for particular purposes is that they do not like the money to be ring fenced; they want core funding. There are arguments within those organisations about whether that is a wise stance to take. If we are talking about the vulnerable—whether it is children; immigrants; women in some circumstances; the elderly; the mentally ill; ex-prisoners; and the families of prisoners—we are talking about a relatively modest number. If we think of the lead organisations in each of those fields—you could name them as well as I could—there are ways in which one could say, "We've got a fund available to promote the understanding, realisation and vindication of what are truly human rights. Would you like to make a case for getting access to that fund for a year or two?" A chunk of money could be used to engage the right kind of person to do what is necessary to deal with the perceived problem, rather than to engage someone with a duty to review the entire law of Scotland and all local authorities' policies and practices and to go round just taking up space.

Mrs Mulligan: So you think that targeting a little bit of money in the right way would be more productive than wider spending on one individual or office.

Lord McCluskey: If it were known that human rights money was available, which is what this is, and if a system were devised or an existing system were used for some of the purposes, such as training—I mentioned the bodies that train judges—organisations could be asked to pitch for money for projects. A project might involve finding ways of dealing with elderly people—whether they are in hospitals or old people's homes—who are abused by their carers. That could be similar to Age Concern's elder abuse campaign, of which I am still the head. Money could be obtained for a project such as that, with a human rights dimension that ought to be explored and publicised.

Mrs Mulligan: That is clear—thank you.

Marlyn Glen: My question is about your opinion of the definition of human rights in the bill, which you have discussed at length. The bill defines the human rights of which the commissioner will have a duty to promote awareness and understanding. You have referred to the relevant section. Do you wish to add anything?

Lord McCluskey: The main emphasis of the provisions and particularly of section 2 is on convention rights—those that it is local authorities' duty to comply with under section 6 of the Human Rights Act 1998. However, for some reason, thrown into the bill in section 2(2)(b) are

"other human rights contained in any international convention".

As I said, I have a list of about 20 such conventions, which cover almost everything that one can think of. Just discovering what those conventions are is a big task. The book that contains the conventions is about twice the size of the book in my hand—it is not easy reading, I can tell you.

My point as a purist is that we must ask what a right is. I have a right to inherit money if my wife dies intestate. I have a right to recover damages if somebody negligently runs me down. I have certain rights in relation to objections to planning applications. Those are legal rights that I can vindicate. Once we move out of the field of legal rights and into human rights, which are not legal rights, the rights cannot be vindicated. If someone says to a local authority or other body that they have a possible right to IVF treatment—which has been mentioned—that body can say, "Go and boil your head; that's not a right that we recognise. We as a local authority have no function to spend money on things of that character."

The provisions are extremely vague. I do not know what canvas has been provided for the proposed commissioner to write on, which is why I am worried that they will dream up all kinds of politically correct notions and call them human rights that are of the character of those covered by an international convention.

Mike Pringle (Edinburgh South) (LD): You referred to the training of lawyers. Is it adequate? I ask because more human rights cases seem to have been taken south of the border than north of the border. Are Scottish lawyers reluctant to become involved in human rights cases? If so, is that because the training is perhaps not good enough or because they think that the subject is too complex?

Lord McCluskey: I am surprised that you should suggest that more cases have been taken south of the border than north of the border.

Mike Pringle: Proportionately.

Lord McCluskey: Do you think so? I am very surprised at that. I would need to be shown figures to persuade me that that was true. I do not think that there is a lack of education in the public sector, but there may be in the private sector.

I talked about the body that trains judges and sheriffs and the body that trains prosecutors. I am

not sure whether they are the same body or whether they just share personnel. Such people are trained in human rights and in how the 1998 act applies. Videos, books, pamphlets and courses are provided, which are valuable. I do not know what is done in the private sector, but I have not detected a lack of spirit among private lawyers to raise human rights questions.

One interesting fact, which has never been studied, is that, when the 1998 act was passed, its explanatory memorandum put the financial cost of the legislation at about £12 million. That failed to take into account the fact that it was going to cost the courts hundreds of millions of pounds in time spent considering human rights cases. In the first few years after the 1998 act came into force, the work of the court of criminal appeal almost doubled. It is tailing off to an extent, as things become clearer, but there is an immense cloud, as it were, surrounding human rights, and an immense amount of money has to be spent in the courts to deal with that.

11:45

Mike Pringle: Let us assume that we appoint a commissioner for human rights. One of the things that the bill does not do is give the commissioner at least those enforcement powers required to bring test cases or to support other people in doing so. If, or when, the bill goes through, should the commissioner have enforcement powers?

Lord McCluskey: I have not thought about that deeply. It is probably not necessary. The real instrument of getting things done in this country is publicity. If the commissioner for human rights exists and they can cause an inquiry to be conducted and publish the results of that inquiry, that will get into the press. Members of Parliament, members of the Scottish Parliament and local councillors will pick the matter up and ask what is being done about it. There need not be a formal legal sanction such as imprisonment, contempt, fines or damages. The instruments of publicity are probably sufficient.

Mike Pringle: One small issue that has been raised relates to schedule 3, paragraph 2. Let us again assume that the commissioner has been appointed. I am sorry; I gave the wrong reference. I will read from the top of page 17 of the bill. It says:

"Notice of intention to exercise the powers must be given by the Commissioner to the person having management and control of the place no later than 14 days before the day on which the Commissioner intends to exercise the powers."

That is about inspecting places of detention. Before the commissioner goes to a prison, he must phone up and say, "By the way, I'll be coming in a fortnight. Is that okay?"

Lord McCluskey: I hardly need answer that. If people are given 14 days' notice of an inspection, things are going to be tickety-boo by the time the commissioner arrives.

Mike Pringle: That was our view; I was wondering whether you concurred with it.

Lord McCluskey: I thought that you were referring to paragraph 2 of schedule 3, which refers to

"A person (other than the Commissioner) entitled to exercise any power under section 8(1)".

I can find no such person in the bill. I think that there has been a drafting error there. I can find no provision in the bill that entitles anyone other than the commissioner to exercise any of the powers, except perhaps the deputy commissioner.

Mike Pringle: We will consider that point with interest.

Lord McCluskey: I think that it is a drafting matter. There are one or two drafting points in the bill.

Mike Pringle: I was interested in your comment that the commissioner was going to have an awful lot to do. My thoughts were that, if the commissioner was investigating all the things that you mentioned, he might well have a full-time job to do. I had been wondering whether he would have enough to do.

Lord McCluskey: That is the other view. If the Scottish public services ombudsman, Scotland's commissioner for children and young people and various UK bodies all say, "This is my patch, so keep off," it may be that the person who is trying to justify the existence of the new body will be scrabbling around producing all kinds of politically correct notions under the banner of human rights.

Mike Pringle: So perhaps we could appoint a retired judge who would work two days a week for £75,000. Do you think that that would be more cost-effective?

Lord McCluskey: It might be. I do not know who you have in mind for the post—but I will leave you my card. [*Laughter.*]

The Convener: We will not suppose that this is an interview. You have an interesting technique if you are after the job, I will say that.

You are right to point out that most of the human rights issues that are debated in the Parliament and beyond tend to deal with vulnerable groups and other groups that require equality in the eyes of the law, but human rights go beyond vulnerable groups, although we might say that all groups are vulnerable to some extent. I believe that the legal aid fund has tested more than 300 ECHR cases, which have ranged from the right not to incriminate

oneself, to delay in the courts. The decisions on those cases would apply to any accused in any criminal trial. Do you accept that the legal aid fund has tested whether procedures comply with the ECHR on behalf of all Scots?

Lord McCluskey: Not only is the legal aid fund valuable, but it has been held in a case in Scotland—the Granger case—that legal aid must be made available to people who are being prosecuted by the state because of the principle of equality of arms, according to which, if the prosecution has policemen and paid prosecutors, the defence ought to have something similar.

The legal aid fund does a good job, but the point that was made earlier about the middle classes not being able to afford to go to court is very real. That is why the people who are most liable to be able to vindicate their rights using the legal aid system are those with the least money, which is why the Napier case was able to get off the ground. One does not earn a lot of money in Barlinnie or in Edinburgh prison at Saughton; it is not a highly paid job even for the warders, and certainly not for the prisoners, who will qualify financially for legal aid. However, if a member of the working classes of whatever status tries to vindicate their civil rights, they will not be able to get legal aid at all, because the money is not available.

Legal aid is another instrument for the vindication of rights, although it is not universal. However, you are right that, if a right is vindicated in the court, it is available to all, because all such rights are available to everyone.

The Convener: I will go through some concerns that you raise at the end of your submission. I start with your third bullet point, which asks:

"What is meant by 'question' in Clause 6(1)?"

Section 6(1) says:

"The Commissioner may not … question the findings of any court".

What are your specific concerns on that point?

Lord McCluskey: Although section 6(1) says:

"The Commissioner may not … question the findings of any court or tribunal",

if we turn back to section 3, we see that it says:

"the Commissioner—

(a) must keep under review—

(i) the law of Scotland, and …

(b) may recommend changes to the law".

It seems to me that it will be tough for the commissioner to keep the law of Scotland under review because, when they are about to recommend changes, they might say, "Wait a moment, I can't do that because section 6(1) says that I'm not allowed to question the findings of any court."

There is a contradiction between section 6(1) and section 3. The more that I look at the bill, the more superficially drafted it appears to be. I hope that I do not offend an old friend by saying that.

The Convener: Are you pointing out the contradiction, rather than expressing a view about whether that is the right policy position?

Lord McCluskey: Yes. In other words, could the commissioner, having discovered the Napier case, question it on the ground that the damages ought to have been not £50 a day but £100 a day? Would that be questioning the finding of the court?

The Convener: I would think that it would be. I would think that section 6(1) is designed to ensure that the human rights commissioner could not question Lord Bonomy's decision on the Napier case, however he arrived at it. That would be right. It would be very dangerous otherwise.

Lord McCluskey: In that case, how could the commissioner recommend changes to the law of Scotland if the Napier judgment is—as it is—the law of Scotland? There is a contradiction between the two sections that I quoted.

The Convener: The Napier judgment is the law only in that case. I cannot think of any legislation that—

Lord McCluskey: With all respect, the law that is contained in the Napier judgment is the law applicable to all people who fit into the broad Napier category until it is changed, and it will not be changed, because the Executive chose not to appeal the merits of the decision.

The Convener: But we would not be legislating for that specifically. We would be complying with the court decision. The Executive is attempting to do that now by setting aside a sum of money that it thinks will equal the costs for which it will be liable for those who fit into the Napier circumstances.

Lord McCluskey: However, I make the point that it is the law. It seems to me that there is a conflict between the denial of the right to question and the duty to recommend changes.

Mr McFee: On the point about the Napier case, a more likely scenario is that the commissioner would say, "Wait a minute. I still think that that is a breach of this man's human rights."

Lord McCluskey: That is a better example.

Mr McFee: Under the bill, the commissioner will be able to recommend changes to the law, policy or practice, but they may not challenge the law, policy or practice.

Lord McCluskey: It is just that the word "question" is such an amorphous word. It is a minor drafting point.

The Convener: In your submission, you ask:

"What rules (if any) of Evidence are envisaged under clause 7 especially 7(3)?"

Section 7(3) states:

"The Commissioner may, in the course of an inquiry, take into account any evidence, information or document which the Commissioner has obtained".

Are you concerned that we have not defined what evidence we are talking about? Is the provision too broad?

Lord McCluskey: When it comes to the field in which I have been operating for the past 56 years—the law—I know what evidence means. There are books about it and there are rules. The court decides what is evidence and what is not. That is a judicial decision. I do not know what is covered by the words "evidence, information or document" in section 7(3). Does it cover hearsay evidence? Does it cover evidence that was obtained by torture? As far as I am aware, not much torture goes on in the local authorities of Scotland, but I am not sure what is covered. There is no indication of any limit on the applicable rules. Is corroboration required? If the finding is that there is a breach of human rights because someone has committed a quasi-criminal or criminal act, how will that be established? Can the commissioner take account of hearsay or information from various other sources?

The concept is ill-defined. That is the trouble with all the human rights stuff. The ECHR is only four pages long—it is a few hundred words—but it has created a vast so-called jurisprudence of case law. Thousands of decisions by the court and the Commission have amplified the rules, but they are made by judges and others with no accountability. That is my worry about the human rights scene.

The Convener: I believe that Stewart Stevenson has a document that is even smaller than the ECHR.

Lord McCluskey: What is that?

The Convener: Is it the European Union fundamental freedoms?

Stewart Stevenson: It is the Charter of Fundamental Rights of the European Union, which was passed at Nice on 7 December 2000.

Lord McCluskey: Oh, that document. Yes, that is another one.

Stewart Stevenson: Conveniently, it is vest pocket sized.

Lord McCluskey: It goes beyond the ECHR in some respects.

The Convener: I think that it qualifies as the smallest document that we have seen so far.

Finally, you raise a concern about whether it is appropriate to allow a member of the House of Lords to hold office as the commissioner or deputy commissioner. Why do you think that that might not be appropriate?

12:00

Lord McCluskey: I was just raising the question. I hoped that it had not been missed. It probably would be appropriate. I have been in the House of Lords for a long time, but in recent years it has become the practice to put people of real merit into the Lords and it would be a pity to waste them by saying, "You can't do this job because you're a member of the House of Lords." There are some quite good people in there, despite appearances to the contrary.

Moreover, can the commissioner take part in proceedings in the House of Lords or the supreme court? After all, if the commissioner is to be allowed, at the court's invitation, to take part in proceedings of the Court of Session, he or she ought to be allowed to go to the House of Lords. The Court of Session and the High Court decide what the law is, but the House of Lords decides to a much greater extent than we appreciate what the law ought to be. In that sense, it is a quasi-legislative body, because it examines fundamental issues and makes judgments on any conflict of principles and it is the place where people who have a deep concern about human rights ought to be listened to. Indeed, that is why, in its consideration of the Pinochet case and the torture case, the House of Lords invited bodies to make representations from their standpoint. That evidence assisted the court. Of course, that is an old tradition in the United States Supreme Court.

The Convener: That is helpful.

We have no further questions—in fact, we have run out of time. Would you like to make any concluding remarks?

Lord McCluskey: No. I thank you for inviting me to give evidence, although I am not really sure why I am here. After all, I am just an individual, although I have been interested in this field for a long time.

I repeat the point that I made at the beginning: I am totally in favour of human rights. That said, when I talk on this subject to people around the world, I try to persuade them to use the term "legal rights", not "human rights". After all, if you have a right, you have something real that can be properly vindicated in a court of law. However, something that is vaguely described as a human right is much less real and less valuable to people.

The Convener: Thank you for attending this morning's meeting and for providing a written submission. We are very grateful for your very clear and straightforward views. It always helps to have witnesses who speak their mind. However, if we decide to take your points on board, we might have to answer to the Finance Committee for any recommendations on uplifting the commissioner's salary.

Our final witness this morning is Dr Rachel Murray of the University of Bristol. I thank Dr Murray for agreeing to switch her position in the evidence taking to allow Lord McCluskey to leave at 12 o'clock. We are also very grateful for her clear and helpful submission. As ever, we will move straight to questions.

Mr McFee: You will have heard Lord McCluskey's evidence. In Scotland, a plethora of organisations protects people's rights and, on top of that, there are various pressure groups, trade unions, lawyers and so on. In your submission, you say that human rights institutions have to find a space, but do you think that there is a space in Scotland that needs to be filled?

Dr Rachel Murray (University of Bristol): It is very difficult for me to comment specifically on Scotland, as I do not live here and do not have intimate knowledge of the Scottish system. However, from my consideration of human rights commissions in the UK, Ireland and abroad, I do not think that it is necessary to establish a human rights commission or commissioner just for the sake of it. They have to play some role or fill some gaps that are not already filled by existing statutory or constitutional bodies, voluntary sector bodies, the judiciary, the media and so on.

Picking up on points made by previous witnesses, I think that human rights commissions and commissioners elsewhere play an important role and have an impact by acting as a focal point for human rights and providing a first port of call for people who might not associate human rights with the ombudsman or other statutory and voluntary agencies.

However, some human rights commissions and commissioners elsewhere have found it difficult to carve out a niche for themselves, particularly where their remit is broad and where a number of other statutory or constitutional bodies exist. It might be easier for a commissioner to carve out a niche in the Scottish context, because, given that other bodies are already established, they will be able to see how they fit into the gaps and their remit might be defined more precisely in the bill. In contrast, the South African Human Rights Commission was established around the same time as other constitutional bodies with a remit in human rights, so finding a space for it amid all those other institutions was more problematic.

Mr McFee: I understand that your expertise lies elsewhere but, given what you know about the Scottish context and having read the bill, would you find it easy to identify where the space for the commissioner is?

Dr Murray: I think so. Although people focus on the Paris principles and say that human rights commissions and commissioners should have as broad a mandate as possible, that does not necessarily mean that we should go through all the Paris principles and tick them off one by one. Each commission has to be context specific and we have to consider what is necessary and relevant for each jurisdiction.

The UK context of the development of a commission for equality and human rights through the Westminster Equality Bill means that what is happening in Scotland has a different dimension. If there are gaps that the Equality Bill does not fill and there is a risk that Scotland will be left out of the loop, there will be a role for the Scottish commissioner in addressing that.

Mr McFee: Right. On the basis of your study of the Northern Ireland Human Rights Commission, what do you think makes an effective commission or commissioner?

Dr Murray: Too often there is a focus on one specific issue. A combination of factors makes an effective human rights commission or commissioner. First, there is the capacity of the commission and the context in which it was established. That relates not only to the powers that it was given in legislation but to the extent to which it had political support when it was established and whether political parties, such as the Government parties, see it as their baby and are happy to support it in its work. How the commission fits in with the other statutory agencies in the jurisdiction is also important.

Secondly, the effectiveness of the institution is to do with how it performs, which can depend on a number of factors, such as its remit and powers. Regardless of the extent of its powers, a key factor is how strategic it is. A commission will need to adopt a strategic approach. In some respects, human rights cover everything—everything can be a human rights issue—and giving a body the label "human rights commission" can raise expectations that it will cover a range of issues. Human rights commissions cannot do that; they have to be strategic and focused and identify a number of priorities. The ones that have done that are likely to have more of an impact and be more successful than those that try to do everything.

Finally, the legitimacy of the institution and how it is perceived by others is incredibly important. That relates to how it was established, how the commissioners are appointed, whether the

appointments process is transparent, who appoints the commissioners, who is appointed to the posts and whether they fit the commission's mandate.

Stewart Stevenson: The Scottish commissioner will be able to investigate only public authorities. Is that likely to be adequate or does your experience of the Northern Ireland Human Rights Commission suggest that the remit should be wider?

Dr Murray: As I said initially, a balance needs to be struck. In some respects, the human rights commissions that have been given a very wide remit are finding it difficult to act strategically and to focus on particular issues. Those that have been given a more narrow remit, on the other hand, are more focused in their attention.

The width of the remit also depends on the jurisdiction. The question that arises in Scotland is whether private, or non-public, bodies are already adequately covered by other institutions, or whether a gap still needs to be filled. In other jurisdictions, one way to assess the legitimacy of a human rights commission or commissioner is by examining the existing statutory or similar bodies, ascertaining whether they have similar powers, resources, functions and so on and then making a comparison. The powers and resources of the Northern Ireland Human Rights Commission were often compared with those of the Equality Commission for Northern Ireland, and the Human Rights Commission came to be seen as second best. That had an impact on how those in the commission felt they were perceived by the Government and on how much support they felt they were getting from the Government. Some people saw it as being a less important body than the Equality Commission. Such factors need to be taken into account in deciding whether the remit of a new body should cover private or public bodies, or both.

Another issue, which perhaps cuts across some more private aspects, relates to economic, social and cultural rights. This feeds into some of the points that the previous witnesses have commented on. Commissions that are able to deal with economic, social and cultural rights are sometimes seen as being more accessible to the public. People can identify more with health and education issues than they can with some of the other, so-called traditional human rights issues. That was certainly a factor in Northern Ireland, and it was relevant to the extent to which the Northern Ireland Human Rights Commission was prepared to deal with those sorts of rights. That seems to have been key to the commission's legitimacy and accessibility to the public and to the jurisdiction that it serves.

Stewart Stevenson: The proposals for the Scottish commissioner exclude the ability to investigate individual cases. Lord McCluskey has forcibly put it to the committee that, by and large, the law provides for appropriate remedies, although he qualified that later by agreeing that neither he nor I could afford to invoke the law. Is the situation different or similar in Northern Ireland? How would you say things pan out there in that regard, given your experience?

Dr Murray: As far as the casework is concerned, the powers of the Northern Ireland Human Rights Commission are broader than those contained in the Scottish Commissioner for Human Rights Bill. However, the impact that the Northern Ireland Human Rights Commission's casework function has had could be described as a mixed bag. The commission has supported the carriage of cases through the courts. Solicitors or others will approach the commission for assistance and support, rather than the commission having full control over cases. It can sometimes be difficult to appreciate the impact that the commission has, as its work is not necessarily all that visible.

There was a high-profile case in Northern Ireland that established the ability of the Northern Ireland Human Rights Commission to intervene in the courts as a third party. That was possibly a high-profile case for the wrong reasons, as it did not establish a point of human rights law but related simply to the commission's powers.

The Northern Ireland Human Rights Commission has been seen as having some impact in its involvement in cases involving the European convention on human rights and the European Court of Human Rights. The commission is treated with a great deal of respect in those cases. However, it is not always easy to see clearly what the impact of the commission has been. That might be partly due to the restrictive approach that the courts initially took to the role that the commission could play.

12:15

It is also worth pointing out that if a human rights commissioner does not have the power of litigation, that can have an impact on the way in which it is perceived. For example, the South African Human Rights Commission has extensive powers of casework, litigation and so on, but it does not use them often in high-profile cases. It withdrew from a treatment action campaign case involving the provision of drugs to pregnant women who are HIV-positive—it was criticised heavily for its failure to be involved in that case. There is a risk that the public will not know that the commission does not have the power of litigation but will think that it is choosing not to use its power. People expect such bodies to be involved in high-profile cases and, if they are not seen to be

involved, that can lead to a lot of criticism of the institution.

Stewart Stevenson: My question is a more workaday one. I accept what you say about perception, but I want to focus on reality. By denying the commissioner the right to intervene in individual cases, we might leave a gap and certain individuals might have no effective remedy. In other words, the bill will add nothing for those people. Does the Northern Ireland experience illuminate that question for us in Scotland?

Dr Murray: I do not know. That depends on a number of factors, including the other possibilities that exist in the jurisdiction to enable individuals to get the remedy that they need. The power to intervene in cases needs to be balanced against what happens if the commission has a shopfront and anybody can request the commission to take on a case. That is the situation in South Africa, where people can go through the doors—particularly of the commission's provincial offices—to ask for assistance. Where that is allowed, commissions can be swamped by a huge number of cases, some of which might not be relevant to their mandate. It is relatively easy to phrase anything as a human rights issue, but the commission has to identify a strategic approach to its work and litigation can be more problematic. If we allow everyone to approach the commission and we tell them that it might support their case, we will raise expectations of what the commission can achieve. That might not be an appropriate way to go.

Stewart Stevenson: You used the South African example to illustrate the issues and you discussed the tension between strategic and tactical approaches. You used the phrase "can be swamped". Are you saying that the danger of human rights commissions being swamped with cases is not just a theoretical danger but something that happens? Do you think that, in considering the proposal for Scotland, we should take account of that?

Dr Murray: Yes. There is evidence that the commission in South Africa—particularly in its provincial offices around the country, which are more accessible than its headquarters—feels swamped by a variety of cases over which it does not feel that it has any jurisdiction. If one wants a commission to be accessible, one needs to examine the other powers that it should have, such as powers of mediation. In the South African context, that is important. If a commission is to deal with people who come in from the street to ask for advice, it needs a mediation role.

Mr McFee: Are you saying that you can make practical comparisons with the South African experience? In South Africa, there are not as many bodies that people can go to as there are in Scotland, so is South Africa the best example? Can you infer from the South African experience that if the Scottish commissioner had the power to investigate individual cases, they would be swamped? I am finding it hard to make a direct comparison between the situation that existed in South Africa and the situation that exists today in Scotland.

Dr Murray: I understand the point that you are making. A balance has to be struck—that applies in Northern Ireland too. One of the key points about a commission is that it has to be strategic and selective in the rights or themes on which it chooses to focus or, if it has a casework function, the cases that it chooses to take. It has to balance being accessible in opening the doors, setting up helplines and allowing people to approach it to take cases with being strategic. That applies in Scotland as much as it does in South Africa and Northern Ireland.

Mike Pringle: You might have covered this, but I want to clarify the point. The Scottish commissioner will be able to intervene in civil court cases brought by others, where she is permitted to do so. In Northern Ireland, can the commissioner go to court on behalf of others, or on his own behalf? The bill states that the Scottish commissioner can intervene when asked to do so by the court, but not otherwise.

Dr Murray: Yes. The commissioners in Northern Ireland can go to court on behalf of others as well as being able to intervene.

Mike Pringle: My next question is about the relationship that the Scottish commissioner will have with the courts. There is a fear that the commissioner will not be as well placed to address human rights as are members of the judiciary. Have you found that to be the case in Northern Ireland?

Dr Murray: That depends on what the judiciary sees as its role in human rights protection and, to a certain extent, promotion. In Northern Ireland there was a perception that the judiciary was not particularly supportive of the commission or of human rights. In contrast, in countries such as South Africa, the judiciary was crying out for the commission to bring cases to it, to become more involved and to litigate, which was not necessarily happening previously. Whether a human rights commission or commissioner will fit any gaps will depend on the context, how much the judiciary takes on board human rights standards in its work and how proactive it is in that regard.

Mike Pringle: You heard me ask Lord McCluskey about the 14-day notice period. Does the commissioner in Northern Ireland have to give 14 days notice before he visits a prison?

Dr Murray: Not that I am aware of. The 14-day notice period struck me as long and, as others have said, it provides the opportunity for things to be changed or moved around. I am not sure what the notice period is for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, but I think that it is shorter than 14 days. The European committee might provide a useful model in relation to visiting places of detention and giving notice.

The Convener: I call Margaret Mitchell. [*Interruption.*]

Margaret Mitchell: Sorry, that is my phone—I know that I have it in my bag somewhere.

Mike Pringle: Just kick it.

Mr McFee: Do you know the words to that tune?

Mike Pringle: Just stamp on it. That will turn it off.

Margaret Mitchell: I was asking a question when you asked whether we had switched off our phones, convener. Sorry about that.

Dr Murray, for clarity, will you outline exactly what is in place in Northern Ireland with the commission and commissioners?

Dr Murray: Do you mean their general powers?

Margaret Mitchell: Just the structure.

Dr Murray: In Northern Ireland, there are a number of commissioners as opposed to just one commission, although the chair of the commission is the only full-time commissioner, as it were; the others are part-time. The commission's mandate combines a variety of powers of protection and promotion, which covers education and awareness raising. Moreover, although the commission has dealt with the bill of rights process in a controversial way—indeed, it has not yet concluded the arrangements—it has not only the casework function that we have been discussing but an investigation and research function. However, it has had no powers to demand documents, call witnesses or compel evidence, although the Government has suggested that it might change the legislation to allow that.

Margaret Mitchell: Although the consultation paper on the bill set out proposals for a commission, the published bill proposes the establishment of a commissioner. What are the problems and advantages of having either a commission or a commissioner?

Dr Murray: The problem with having a commission instead of a single commissioner is that in some jurisdictions it can be difficult to reach agreement and consensus among commission members. Indeed, having individual commissioners in a group called a commission means that there must be a degree of representiveness among the individual commissioners, which, as we have seen in Northern Ireland, can lead to huge problems in working out what a representative commission might consist of. For example, should the commission in Northern Ireland represent only the two main religious communities in the country or should it cover the Chinese community? Should it comprise an equal number of men and women? Should the representation take account of sexual orientation? Such hugely difficult issues can result in a body coming under a huge amount of criticism, which can impact on its ability to gain respect and legitimacy before it has even got off the ground. To an extent, some of those difficulties can be avoided by having one named individual.

If the jurisdiction is small, a disadvantage of having a commission rather than a single commissioner is that the pool of candidates from which commission members and staff can be taken is small. As a result, it might be useful to have one individual commissioner instead of a group of commissioners. One model does not necessarily fit all; you have to consider the context of what you are trying to achieve.

Margaret Mitchell: What would be the pitfalls of having a single commissioner who would be the commission's public face?

Dr Murray: One interesting question centres on the role played by the commissioner, rather than by his staff. Indeed, the issue is confused if there are deputy commissioners or part-time commissioners, or if the commission is made up of a mixture of part-time and full-time commissioners. Often, that aspect is not properly teased out in the legislation that sets up the commission and, indeed, beyond that. The presumption is that the commissioner or commissioners in general will be the commission's public face. If so, they need to have experience of and be au fait with working in such a public forum, with the media and so on. Moreover, they also need to be comfortable with working in a very political environment. A special element of a human rights commission that can add value is its status as a semi-official body; as a result, it should operate on an inside track with Government and other official bodies in a way that the voluntary sector cannot.

However, you need a commissioner who is both comfortable with that position and able to maintain a degree of integrity and independence. For example, although someone who has previously acted in a political capacity might be comfortable with the situation, they might find it difficult to maintain their independence in the position.

Margaret Mitchell: Does the representation of the commission in Northern Ireland cover voluntary and non-governmental organisations?

Dr Murray: The commissioners come from a variety of backgrounds, including civil society.

Margaret Mitchell: Is there an overarching requirement to ensure consistency? I believe that, in that respect, you highlight paragraph 5(1) in schedule 1 to the bill, which refers to an acting commissioner who steps into a vacancy.

12:30

Dr Murray: Yes, I think that there is such a requirement. From looking at other commissions elsewhere, we know that one thing that has an impact on the way in which a commission is perceived by others and the degree of respect that it receives is whether the commission acts as a body. It needs to ensure that everyone—whether the commissioners, if there are a number of them, or other staff who act as the commission's public face and speak on its behalf—speaks with one voice rather than coming at issues from different perspectives and at different angles. They might do that in their capacity as individuals but, when they speak on behalf of the commission, they must act as one.

Margaret Mitchell: In previous evidence, you suggested clearly that there should be a strategy to manage tensions, sort out the various roles and minimise any conflict. Should there be something in the bill to strengthen strategic planning? From what you have said, I take it that such a strategy would be essential to the smooth running and success of the commissioner's work.

Dr Murray: Having a specific section in the bill to say that the commission or commissioner should be required to adopt a strategic plan would certainly help. It might also be useful to include provisions in the bill to give the commission some time to be established before it is formally launched. A huge amount of attention is paid to the early months and years of such a body and there are huge expectations of what it can achieve. Such bodies need time not only to appoint staff, but to let them get to know each other; to set out their strategy and priorities; to explore how they fit with other existing bodies; and to draft memoranda of understanding with other institutions and bodies. It might be useful to do that slightly out of the media and public spotlight so that, when the commission is launched officially, there is a clear indication of what people's roles will be rather than those ideas being thrashed out under the pressure of expectations and hopes for what the commissioner will achieve in the early months.

The Convener: Given your knowledge of human rights commissions throughout the world, I will ask a few questions about how they work. An individual who thinks that their right to be in a trade union or their right to smoke is a human rights issue might write a letter to the human rights commissioner asking them to say something about it. I am a bit concerned about what you are saying. What should the mechanism be for the commissioner to determine what areas they will promote, given that human rights are so broad? How would that work?

Dr Murray: Are you asking how the commissioner would decide what their strategy and priorities would be?

The Convener: I presume that the existence of a human rights commissioner might provoke groups and individuals who think that certain matters are questions of their human rights to ask the commissioner for a view or a statement on a matter. How would the commissioner determine what to choose as a serious human rights issue?

Dr Murray: Considering the way in which other commissions have dealt with drawing up a strategic plan, I would say that it needs to be done early on in the body's history. If the commissioner is going to be accessible and take calls from the public or allow people to come in through the doors, they need to give out a clear message about how they will do that and to be clear internally about how such approaches will be processed. If the commissioner is going to set up a helpline, they need to make it clear to individuals that they might not necessarily assist callers, but might pass on their information to other statutory or voluntary bodies that can assist them.

Such decisions can be made only when the commissioner and the staff sit down together to consider their jurisdiction and powers, to determine the gaps and to set the priorities on which they will focus for a certain number of years. They need to be honest about the fact that they cannot do everything. One of the mistakes comes when commissions sell themselves as the be-all and end-all of human rights. No commission will be able to achieve that, even if it is the only body that deals with human rights. The commission has to figure out where it fits in and what it can add, so its priorities and strategic plan must be thrashed out early in its existence. In doing that, the commission must consider the powers that it has and the other bodies from which it can feed.

The Convener: Should the commission's plans include the way in which it will deal with inquiries? For example, a group that campaigns for something that it thinks is a human right might ask the human rights commissioner for a statement in support of its campaign. Should the commissioner have a policy about the way in which they deliver such opinions?

Dr Murray: Yes. It is important for such policies to be drawn up in advance. The commissioner will need a strategic plan with a number of policies

that feed off it. One of those policies should set out the way in which the commissioner will interact with the media—that is, it should contain a communications strategy and a media strategy. That policy will be a key element of the commissioner's profile and of the way in which they are perceived by others in society, including people who might want to approach them. It is important for that to be worked out early on because it can make or break a commission.

The Convener: The bill proposes a commissioner and up to two deputy commissioners but no committee. Should those three people decide what the priorities in the area of human rights should be?

Dr Murray: The strategic decision making should be the job not of the commissioner but of the body as a collective, including the chief executive and the staff. They should all be involved. That takes us back to the question of what a commission is. Is it just the public face of the commissioner or does it make policy? To what extent should the commissioner get involved in the daily work of the commission? Will it be left to the staff to implement the commissioner's ideas? If the commissioner's role is set out clearly at the start, that will help to deal with some of those tensions and it will help to identify which staff need to be appointed and what other expertise is needed.

The Convener: Should the bill or the guidance specify the way in which the commission is expected to determine its priorities? I do not know how many members of staff will be needed to run the organisation, but the number will not be huge. I like to think that the commission will be required to canvas people's views or to do a survey before it determines its priorities. Should that requirement be included in the bill or in the guidance?

Dr Murray: I do not think that you need to be prescriptive about the way in which the commission should set its strategic plan. One of the proposals in the Equality Bill is quite prescriptive—it says that the commission should consult widely and so on—but it might be sufficient to state that the commission should adopt a strategic plan early in its existence. That would give the commission the independence to determine the way in which it wished to do that.

Marlyn Glen: My question is about the Scottish commissioner's accountability to the Parliament. In your submission, you make a number of suggestions about how to ensure that the relationship between the commission and the Parliament operates effectively. Will you outline and expand on those suggestions?

Dr Murray: It is often stated that such a body should be accountable to Parliament, but we need to recognise a number of things if the relationship is to work as effectively as possible. First, it is useful to give the commission or the commissioner the opportunity to liaise with Parliament in a number of ways, so that there are regular exchanges and debates with Parliament. Those ways could be outlined in the legislation.

Secondly, the process should involve more than simply laying an annual report before Parliament. Members of the Parliament who have knowledge of, and expertise in, what the commission or commissioner does should have the opportunity to debate reports in a meaningful way. In other jurisdictions, parliamentarians sometimes do not have enough time to read the commission's documents; indeed, they are sometimes not aware of what the commission does or what it can do. Sometimes, rather than testing what the commission has done and so on, parliamentarians ask questions that are led by their political affiliations. Carefully considering to whom a commission or commissioner will be accountable—specifically in Parliament—whether there should be an additional committee and the remit and composition of that committee can be important.

Parliament must achieve a difficult balance in its role of making a commission accountable. On the one hand, it should ideally support a commission and give it visibility. A commission will obtain a certain amount of credibility as a result of interacting with Parliament, being tested by it and having its work supported by it. On the other hand, Parliament must test what a commission has done and question it on matters such as its use of resources and how it has spent its money. That can take time and lead to tensions between the commission and the committee that is involved. The role can be difficult. Parliament should be supportive, but it should also question.

Marlyn Glen: You are talking about ensuring that a commissioner retains independence but is also accountable. Is there any best practice to which you can point us?

Dr Murray: Opportunities for regular interaction with Parliament are the key. The process should involve more than simply laying reports. There should be a meaningful way of debating the content of what the commissioner presents before Parliament and careful consideration of the composition of the parliamentary committee that will deal with the commissioner. The backgrounds and knowledge of that committee's members should be considered.

Mrs Mulligan: Your written submission deals with funding and staffing. I understand what you have said about identifying a sum of money for a commissioner or a commission while allowing daily expenditure to be decided by those involved. I think that we would accept what you suggest.

You will be aware that we have identified that £1 million will be needed to support the Scottish commissioner for human rights. In the light of your experience of what happened in Northern Ireland—I understand that further resources are already being sought there—do you think that £1 million will be sufficient for the model that the bill envisages?

Dr Murray: Identifying a clear pot of money that will be required is difficult. One concern that has been raised in Northern Ireland is control over the number of staff who are appointed. The bill as it stands does not put that matter in the hands of the commissioner. In Northern Ireland, the Government agreed to remove the provision relating to staff numbers as opposed to the provisions relating to conditions of employment. It has been accepted that such a control puts too much of a restriction on the commissioner.

Comparable bodies within the Scottish jurisdiction should be considered. I spoke earlier about the Northern Ireland Human Rights Commission's resources being compared with those of the Equality Commission for Northern Ireland and there being a big disparity in the funding that was provided. One reason for that was historical, but it created a sense of hierarchy in the perceived importance of the bodies. That needs to be taken into account in funding. Funding must match the commissioner's remit and mandate, but whether it matches the budgets of similar statutory bodies in the jurisdiction must also be considered.

12:45

Mrs Mulligan: So you think that it would be more appropriate to compare the funding that is allocated to bodies in Scotland than to compare the commissioner in Scotland with the commissioner in Northern Ireland or South Africa.

Dr Murray: You need not choose one or the other option; that is just one issue that needs to be taken into account. It is difficult to compare the money that commissions have, because they have different mandates, compositions, staff numbers, strategies, focuses and priorities. The decision cannot be as straightforward as saying that because £1.25 million, for example, works in Northern Ireland, it will definitely work in Scotland. However, that is one factor that needs to be examined.

Mrs Mulligan: Given what is in the bill, will the £1 million that has been identified for the Scottish commissioner be sufficient?

Dr Murray: It is difficult to say. I return to my initial point that determining numbers should be within the commissioner's control. From the outline in the explanatory notes, the approach seems suitable, but a balance must be achieved to avoid being too prescriptive, as the notes say.

It is often helpful in legislation to have the possibility for a commissioner to review their powers and resources in the not-too-distant future. In Northern Ireland, it helped to have a stage two years on or four years on at which the body could say what had and had not worked, what amount of money was adequate and so on. If legislation could provide for at least an automatic regular review, that might help.

Mrs Mulligan: I have a final question that it may be unfair to ask you. Our previous witness, Lord McCluskey, suggested that it might be better to give the funding to established organisations to fulfil the role. If we used the £1 million in that way, would that be a viable way in which to meet the need, or is having a commissioner better value for money?

Dr Murray: That depends on the gaps in the jurisdiction that need to be filled. Directly comparing voluntary sector organisations with a body such as the commission does not always work. A key part of such a body is its semi-official status: it acts on an inside track with, but independently from, the Government and it works closely with, but independently from, civil society. We would expect such a body to have more clout with the Government, because of how it was established. In that sense, using money to establish such a body may provide more added value than would be the case if the money were simply given to voluntary sector organisations. However, that will depend on whether a commissioner can fill gaps.

Mrs Mulligan: That is helpful—thank you.

Margaret Mitchell: My question is on the same subject as Mary Mulligan's. In discussing the strategic plan, you said that the commissioner's office would sometimes need to staff up if particular expertise was needed, which would have a resource implication. I return to Lord McCluskey's point: would it be better to use non-governmental organisations such as Age Concern and Children 1st, which have expertise, know the pitfalls and have a role to play in the advocacy that is envisaged for the commissioner? Would that achieve better value for money?

Dr Murray: One of the roles of a body such as the SCHR will be to identify the available expertise and see what it can add to existing provision. The body will also use and exploit that available expertise. Many of the human rights commissions and commissioners use existing expertise. They commission research and investigations and bring in people from outside to work on their behalf, but there are potential pitfalls in that such bodies need to maintain some control over the people whom

they commission to do particular types of work. Various options are available to a human rights commission or commissioner in terms of how they use available expertise and co-operate with existing bodies. A human rights commission must not duplicate existing provision, however.

Margaret Mitchell: The commissioner will have jurisdiction only over public bodies. In terms of the commissioner's ability to pull in expertise, will their lack of jurisdiction over non-government organisations pose a problem or will they simply ignore the issue?

Dr Murray: Difficulties could arise; I am thinking of the tensions that can arise between civic organisations. There are differences of context, however—the issue may be less controversial in England than it is in Northern Ireland, where human rights is not necessarily seen as a neutral issue and organisations are perceived as having a particular viewpoint. If they become involved in the work of the commission, it can be perceived that they are trying to put a particular slant on the work of the commission. That problem may not arise in Scotland. As long as the commissioner is clear about the basis on which he or she will use other expertise—by setting it out in a contract or other documentation, for example—difficulties may be avoided.

The Convener: I have a question on the status of a commission decision. Earlier, I asked about the process by which priorities are arrived at. One of our previous panel members used the word "declaratory", which worried me a wee bit. I will use smoking as an example—I always do, although I am not sure why, because I am not a smoker. The human rights commissioner could declare that smoking is a human right, but that would not make it a human right, although I assume that such declarations would carry weight or influence. Surely someone who does not comply with such a declaration cannot be in breach of it. Will you comment on that?

Dr Murray: That is definitely the case. We are talking about an official body whose viewpoints will carry a certain amount of weight. NGOs such as Amnesty International may comment on matters, but the commissioner's viewpoint will carry more weight because of the manner of its establishment as a statutory body. I agree with what you said.

The Convener: I am not sure whether you heard the evidence of our first set of witnesses.

Dr Murray: I did.

The Convener: Is it credible for us to consider alternative ways of creating the human rights function, perhaps by extending the role of the ombudsman into the human rights arena?

Dr Murray: Too often, the presumption is that a country has to have a human rights commission, but clearly that one-model-fits-all approach is not the only option. We need to examine the other institutions in a jurisdiction to see whether their mandates could be expanded and so forth. That might be a useful and cost-effective alternative, as long as what is put in place fills the gap and fulfils the role that the commissioner was initially seen to fulfil.

The remit of a particular body could be expanded by changing its title to reflect that expanded remit. To rule out that possibility would not necessarily be helpful. Expansion of the remit of an ombudsman to protection of human rights has worked elsewhere. Scotland might find that that option works.

The Convener: I do not know how the system works in other jurisdictions

Is it fair to say that the provisions of the bill are mainly concerned with public sector bodies? Is that because we cannot intervene in private bodies?

Dr Murray: I do not know. I am not aware of the political background, but I do not think that there is a problem with the bill's provisions reaching beyond the public sector. Economic, social and cultural rights make up one area where the bill straddles that more traditional public role.

Returning to a point that was raised by one of the first witnesses, it is not always clear what a public body is. There is not necessarily a difficulty with the bill's provisions going further, but whether a broader role is needed depends on the jurisdiction and context.

The Convener: So you can think of no reason in principle why the bill's provisions cannot be extended to include the private sector in particular.

Dr Murray: That is not necessarily a problem, although it is seen as controversial in some contexts. It was considered controversial that for political reasons the human rights bill in Northern Ireland included non-state actors and their responsibilities in human rights. From a human rights perspective, I do not see a difficulty with that; it might appear more consistent to others if the bill took that broader approach.

The Convener: That is helpful. We have asked all our questions. I thank you very much for your oral and written evidence. You have particularly emphasised that we should look at other jurisdictions, how they operate and what the parameters and options are. Thank you again for attending today.

12:58

Meeting continued in private until 13:26.

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