JUSTICE 1 COMMITTEE

Wednesday 11 January 2006

Session 2

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JUSTICE 1 COMMITTEE
2nd Meeting 2006, 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:

Michael Clancy (Law Society of Scotland)
Christine O'Neill (Law Society of Scotland)
Valerie Stacey (Faculty of Advocates)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 1

Scottish Parliament

Justice 1 Committee

Wednesday 11 January 2006

[THE CONVENER *opened the meeting at 10:02*]

Scottish Commissioner for Human Rights Bill: Stage 1

The Convener (Pauline McNeill): Good morning and welcome to the second meeting in 2006 of the Justice 1 Committee—in case anyone wonders, our first meeting was at 8 o'clock this morning, when we had a videoconference with the chief human rights commissioner of New Zealand. We all found that session interesting and members might use some of the points that arose from it in their lines of questioning.

I welcome our witnesses and wish them a happy new year. Michael Clancy, who is known to members, is from the Law Society of Scotland; Christine O'Neill is a member of the law reform committee of the Law Society of Scotland; and Valerie Stacey QC is the vice-dean of the Faculty of Advocates.

Thank you for your submissions and for coming along to answer our questions on the creation of a human rights commissioner for Scotland.

Mr Bruce McFee (West of Scotland) (SNP): I will begin with some of the fundamentals. What value would a Scottish commissioner for human rights, as proposed in the bill, add to the work of the Scottish public services ombudsman and the proposed United Kingdom commission for equality and human rights?

Michael Clancy (Law Society of Scotland): Good morning, and a happy new year to you all, too.

That is an interesting question. The bill will create a new body with a range of powers and it will be interesting to see how that body will fit with the existing geography. It is clear from the structure of the bill that the new body will follow closely the Paris principles, which the United Nations issued to recommend to national Governments ways in which human rights matters can be promoted within national states. I know that you have all read the Paris principles assiduously—the University of Edinburgh has a course on comparative law, so you have probably read them in French.

The Paris principles cover many of the aspects that are contained in the bill. For example, the general duty to promote human rights does not lie with the other institutions in Scotland that you mentioned, but it is reflected in the first Paris principle. Under the Paris principles, national institutions should set standards in the field of human rights,

"act as a source of human rights information for the Government and people of the country … assist in educating public opinion and promoting awareness and respect for human rights"

and

"consider, deliberate upon, and make recommendations"

on human rights.

There are issues around how the Scottish commissioner for human rights will interact with the commission for equality and human rights that will be established by the United Kingdom Equality Bill. As members know, that bill is currently in the House of Commons—the report stage should take place on 16 January.

The Equality Bill is a far-reaching bill that will bring together all the existing commissions—the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission—and add a power to those specific sectoral interests to promote human rights matters in many aspects of UK law. The Equality Bill will create a Scottish committee and there will be a Scottish commissioner; it will be interesting to see how the relationship between the commission for equality and human rights and the Scottish commissioner will work out in practice.

When the bill was going through the House of Lords, we raised certain issues with the Lords committee that dealt with it. In response to Baroness Carnegy of Lour, Baroness Ashton of Upholland made certain commitments about what she expected would happen in the event of the Equality Bill and the Scottish Commissioner for Human Rights Bill becoming law. It was stated:

"There will be a memorandum of understanding to tie up the loose ends, which are an inevitable outcome of the Scotland Act 1998".—[*Official Report, House of Lords*, 19 October 2005; Vol 677, c 761.]

One would want to watch carefully how that relationship progresses. The committee might want to ascertain from the Department for Constitutional Affairs the extent to which the memorandum of understanding has been floated or the extent to which the DCA and the Scottish Executive have discussed it. I do not know whether that answers your question.

Mr McFee: Not entirely, but I will come back to it. The question was about added value.

I was interested in what you said about the creation of the commissioner being in accordance with the Paris principles. Is that the case or will a gap in the UK bill simply be closed? The Paris

principles mention, for example, protecting and promoting human rights, but the bill is aimed entirely at promoting human rights as opposed to protecting them.

The third paragraph of the Law Society's submission quotes the Paris principles:

"A combination of parliament and the judiciary only is imperfect as an apparatus for upholding fundamental rights."

We would agree with that statement, but is it the society's view that that combination is all that we currently have in Scotland?

Michael Clancy: Only the Parliament and the judiciary?

Mr McFee: Yes.

Michael Clancy: No. Other institutions, including non-governmental institutions, are involved in upholding human rights. I would not gainsay the value of those institutions; indeed, I fully support many of them.

Mr McFee: Given that you recognise that and that that was not made clear in the third paragraph of your submission, what added value would the proposed commissioner bring?

Michael Clancy: One needs to look at the powers that the bill will give to the commissioner. For example, the commissioner will be under a duty to

"keep under review … the law of Scotland, and … the policies and practices of Scottish public authorities".

No such duty is imposed on NGOs, so that is a clear instance of how the commissioner will fill a gap that is not filled at the moment. No other organisation carries out that kind of review on such a broad scale. Although the Law Society of Scotland attempts to comment on some aspects of law reform, the society does not have the resources—nor do my colleagues and I have the energy—to keep under review the whole law of Scotland.

Similarly, no other organisation is charged with the duty that is given to the commissioner under section 4, which provides that the commissioner may

"publish or otherwise disseminate information or ideas, … provide advice or guidance, … conduct research, … provide education or training".

No other body is charged by statute to perform that function in relation to human rights. The commissioner will make a difference by filling that gap.

Mr McFee: I think that you said that, under the UK bill, the UK commission for equality and human rights will be given the ability to promote human rights. Will the UK commission be given the ability or the duty to promote human rights?

Michael Clancy: A general duty is given to the commission in clause 3 of the UK bill:

"The Commission shall exercise its functions … with a view to encouraging and supporting the development of a society in which … people's ability to achieve their potential is not limited by prejudice … there is respect for and protection of each individual's human rights".

However, that general duty is tempered by the provisions of clause 7. Clause 7(1) states:

"The Commission shall not take human rights action in relation to a matter if the Scottish Parliament has legislative competence to enable a person to take action of that kind in relation to that matter."

Therefore, clause 7 imposes a limitation on the UK CEHR by excluding devolved competences to a certain extent. However, clause 7(5) states:

"Subsections (1) and (3) shall not prevent the Commission from relying on section 13(1)(f) so as to act jointly or cooperate (but not assist)"—

I am not entirely sure about the difference between co-operation and assistance—

"for a purpose relating to human rights and connected with Scotland."

In any event, if the CEHR wants to operate within Scotland, it will do so in conjunction with a body that is established in Scotland, which I think means the Scottish commissioner for human rights.

Mr McFee: So you argue that there would be a gap if the Scottish Commissioner for Human Rights Bill was not passed.

Michael Clancy: Yes.

Mr McFee: I want to get this absolutely straight, so let me paraphrase your argument. The Scottish commissioner for human rights would add value by keeping the law of Scotland under review—I am not sure how an individual could do that—and by promoting human rights in devolved-only issues. Is there something wrong with the scope of the area in which the commissioner will be able to work? Is that scope limited?

Michael Clancy: The commissioner's scope will be limited, but giving a body that is created by the Scottish Parliament powers to reach beyond the Scottish environment would raise issues of legislative competence.

Mr McFee: I might have confused you by using the word "limited". In your submission, the second sentence of the fourth paragraph states:

"It is inappropriate for the Scottish Executive to wholly assume that responsibility as human rights issues, by their very nature, can involve challenges to the actions of public bodies such as the Scottish Executive."

For the benefit of the record, if for no other reason, will you explain what you mean by that?

10:15

Michael Clancy: I was trying to express the necessity for the body to be independent of the Scottish Executive. Indeed, it is quite important that it is not ruled by the Executive. I do not expect it to be some all-powerful being—some statutory Wotan—that will stand in between the citizen and the Government. It will not provide justice in the way that a court provides justice. However, we need a body that is independent of the Executive and which allows the citizen to have a voice on human rights issues.

Mr McFee: You say that the citizen must have a voice. However, under the bill's provisions, the commissioner cannot take up individual cases.

Michael Clancy: Indeed.

Mr McFee: Is that not a deficiency in the bill?

Michael Clancy: It might be.

Mr McFee: I wonder how the citizen can acquire a voice if the commissioner's powers to investigate a particular matter are somewhat limited.

Michael Clancy: We should remember that this will not be an Executive appointment and that the Parliament will have a lot of involvement in it. As a result, one could postulate that, because the commissioner is appointed by Her Majesty and funded by the Parliament, the citizen is connected through Parliament's mediation.

I sense that you are not convinced by that response.

Mr McFee: I suggest that that connection is somewhat tenuous.

Michael Clancy: I accept that it is a wee bit tenuous.

The Convener: Yesterday, we discussed this matter with the Department for Constitutional Affairs and the Joint Committee on Human Rights and exchanged some interesting views with MPs and members of the House of Lords. I have been concerned that some people who have made the case for creating a Scottish human rights commission or commissioner have come to the table almost with the view that, if this body is not established, we will not be able to deal independently with human rights and citizens' human rights will not be protected. However, I do not see it that way at all; I think that, so far, we have done a good job. After all, we have had no successful challenges to any acts of Parliament. A range of bodies deals with human rights and, of course, I would have thought that the Scottish Law Commission is as legally bound as we are to review Scottish law in the context of the various pieces of human rights legislation, declarations and so on. There are many checks and balances in the system.

As a result, I argue that a human rights commissioner should add something to the existing equation. However, their establishment should not create a hierarchy; it should not become what you might call the overall police authority with regard to human rights. Do you agree?

Michael Clancy: Before I let Valerie Stacey take the stage to answer your question, I should say that I agree with you. I do not think that this body should be the ultimate source of all knowledge on human rights. Many co-operating bodies in Scotland have a role to play in advancing and promoting human rights.

Valerie Stacey (Faculty of Advocates): That is correct. If the human rights commissioner is set up in the way that is suggested in the bill, it will not be a policing body that ensures that everyone else is carrying out their duties.

As members know, the bill, among other things, places on the body the duty to review Scots law. Mr McFee's question about how that will happen is a good one. Presumably, a commissioner will consider a proposal and pursue certain matters that he or she considers to be important. Moreover, under section 11, the commissioner will have the duty to seek to intervene in civil proceedings if he or she thinks it appropriate and if the court agrees that such a move would be helpful.

The Faculty of Advocates suggests in its submission that, if this body is to be created, it might be useful to give it the ability to bring cases. Mr McFee asked about that issue. Certain difficulties would be involved, because of the definition of a victim in the Human Rights Act 1998. However, empowering the commissioner to bring cases rather than simply to intervene in them could be a useful provision.

As the convener suggested, the general idea of human rights is that they are supposed to pervade our every word, thought and deed. Everything that everybody does and how they live their lives should be done in a way that has regard to other people's human rights as well as their own. Human rights are not a separate compartment that people look into to find out what those who might be called the human rights people have to say on an issue: we must all look at issues on a human rights basis.

Mr McFee: That is exactly the point of setting up a commission to deal specifically with the promotion of human rights. Perhaps some of my colleagues will ask where else but with a human rights commissioner responsibility for human rights should lie.

The Convener: A subject that arose yesterday was the relationship between the UK bill and the

Scottish commissioner. The committee asked the Department for Constitutional Affairs to look at the matter. We want to debate further the powers of a commissioner to initiate judicial review proceedings. The bill does not grant that power, but the UK body, with the consent of the Scottish commissioner, can take up an issue that has been devolved to Scotland. The committee thinks that there may be a technical issue in that. Would it be right for the Scottish commissioner to be able to give their consent for the UK body to initiate court proceedings on a matter over which the Scottish commissioner has been refused power to act?

The Department for Constitutional Affairs said that that was not its intention, but the committee thinks that the bill's drafting could allow that to happen. You do not need to comment on that issue now, but you might like to think it over.

Michael Clancy: That is a very interesting point, and I would like to think about it as it might involve issues of competence. I do not think that the intention of the bill is to circumvent the powers that the Scottish Parliament will give to a commissioner or that people should be able to weave their way round a lack of power on the part of the commissioner.

Christine O'Neill (Law Society of Scotland): We say in our submission that it appears to us, from the drafting of the bill, that such a scenario is a possibility. The UK bill would allow the UK commission to take proceedings in Scotland in circumstances in which the Scottish commissioner could not. It is for the Scottish Parliament to decide whether to give the Scottish commissioner the power to initiate court proceedings independently. The Law Society of Scotland thinks it very odd and does not consider it a useful policy result that the UK commission could do in Scotland what the Scottish commissioner could not do.

The Convener: We agree with you. The Department for Constitutional Affairs said that it was not its intention to oblige the Scottish commissioner to circumvent their lack of powers by giving consent to the UK commissioner to act on their behalf. We may have to look at the drafting of the bill to see whether we can rectify the anomaly.

Marlyn Glen (North East Scotland) (Lab): May I suggest an alternative approach? The Faculty of Advocates argues in its submission that there is currently no body with responsibility for the development of a human rights culture in Scotland. The New Zealand commissioner said that the New Zealand commission's surveys showed that 80 per cent of the public thought that the Human Rights Commission was important or very important.

However, the bill will create a commissioner in Scotland who will have responsibility over devolved issues only. We could argue that a culture of human rights will be promoted by the CEHR Scotland committee based in Edinburgh. Moreover, the remit of the Scottish public sector ombudsman can include a human rights element. Would an alternative approach not be to merge the remit of the proposed commissioner with that of the ombudsman?

Michael Clancy: The faculty has no policy on that, but when we considered the matter we did not specifically compare the powers of the potential body with those of the Scottish public services ombudsman, partly because the bill had not been published when we made our submission. When we reached our policy decision, we were working on the basis of past consultation papers, so I do not have a specific view on the comparison between the Scottish public services ombudsman and the proposed new body. We took the view that a commissioner would be a useful addition and that having a specific identity for a commissioner who would promote human rights, as opposed to having other duties, would be a good way for the culture of human rights to be identified and furthered. If the commissioner had too many duties—a merged body might fall into that situation—the core purpose might get lost among other functions.

Marlyn Glen: There was concern about overlaps as well as gaps.

Michael Clancy: It will be extremely important for the commissioner and other commissioners—Parliament has taken the concept to heart and there are commissioners for a range of interests, of which children and public services are just two—to work out a modus operandi that will ensure that any overlaps are respected and buffered away and that any gaps can be filled.

The Convener: I turn to the relationship with the courts. You might be aware that we had an interesting witness, Lord McCluskey, at our previous meeting. In giving his succinct and definite views, he was pretty much against the idea of creating a Scottish human rights commissioner, on the grounds that the courts and other bodies have dealt quite well with human rights issues.

We asked Lord McCluskey why Scotland has had proportionally fewer legal challenges on the grounds of the European convention on human rights. He refuted that, but we have substantiated evidence for it. Do you have any comment to make on why that would be the case?

Valerie Stacey: Do you mean Scotland having fewer cases in the European court? I did not quite understand the question.

The Convener: Apparently, there have been proportionally fewer legal challenges in domestic courts in Scotland on the grounds of ECHR than there have been in courts in England and Wales. I wondered whether you could provide any account of why that might be the case.

Valerie Stacey: I do not think that I can give you any useful evidence about the challenges that may have been brought in England. I would not care to say that I was an expert on what cases have been brought in England or on why the situation should be different in Scotland. I know that there have been many challenges on what I regard, broadly speaking, as human rights matters in courts in Scotland since the Human Rights Act 1998 came into force. You will know that there have been challenges in both criminal and civil cases in relation to a variety of things. There will, of course, have been more cases in England, because it has a larger population than Scotland's, but if you are telling me that there have been proportionally more cases in England I am afraid that there is nothing I can usefully tell you about why that might be. Perhaps Christine O'Neill has something to say.

10:30

Christine O'Neill: I do not have any empirical evidence to offer. One thing that strikes me—just as you ask the question and without my having thought about the matter in detail beforehand—is that there was, in the English legal system, prior to the coming into force of the Human Rights Act 1998, a greater appreciation of the ECHR and human rights issues than there was in Scotland. It is fair to say that, even prior to the coming into force of the Human Rights Act 1998, the English courts were more willing than the Scottish courts to entertain human rights arguments. There was a greater pre-existing awareness and culture around the ECHR in the English legal system than there was in Scotland prior to the coming into force of the Human Rights Act 1998, which gives some explanation for the differential. I would not have expected the legal system in Scotland to turn around entirely simply because the Human Rights Act 1998 and the Scotland Act 1998 had been passed. That is just an observation that may or may not help.

The Convener: What is your view on the current attitudes of the judiciary and the broader legal profession towards dealing with human rights issues?

Michael Clancy: The legal profession considers the bringing of human rights into our domestic law to be an extremely important development. It features in university courses, it is taught in further education courses that are run by institutions such as the Law Society of Scotland, and the profession is highly appreciative of it in certain circumstances. Scottish lawyers have taken to heart many aspects of the import of the ECHR, and that is shown in the number of devolution issues that revolve around cases emanating from human rights questions. Not all such cases are successful, however.

Following the passing of the Scotland Act 1998, there would have been a sort of novelty quotient about human rights issues and one would expect that, over time, such cases might decrease in number. The practitioners with whom I come into contact have a pretty high appreciation and knowledge of the ECHR, although that may not be others' experience. Christine O'Neill, as a practitioner, may have had a different experience.

Christine O'Neill: It is difficult for me to say, as I have a particular interest in the field and, therefore, would expect people to have the same awareness of human rights issues as I have. I think that people's awareness may be patchy, and I am not aware of on-going awareness training in all parts of Scotland for the legal profession and for those who work in the advisory sector. As Michael Clancy says, it depends on the sectors in which people work. Those who work in certain sectors, such as criminal law, immigration and housing, will be especially familiar with human rights issues simply because they deal more frequently with public authorities, which are the bodies that are subject to the ECHR.

The Convener: I believe, as Michael Clancy suggested, that more than 300 devolution points have been taken on human rights cases in Scotland, yet few of those cases have been successful. Have you any concern about the judgments that have been passed? Do you think that the judiciary are not dealing with challenges to human rights?

Valerie Stacey: No, I do not think so. There might be some cases about which any lawyer could say, "I don't agree with that; I don't think that was the right decision", but I do not think that there is a general feeling among the profession that judges are side-stepping or not dealing with the issue.

Christine O'Neill has a particular interest in human rights, but most lawyers, even if they do not claim to have a particular interest in human rights, are well aware of the import of human rights in whatever area of law they deal with. As Christine said, lawyers in practices that deal with public law issues, of which housing, immigration and crime are good examples, will be well aware of human rights. I can tell you from personal experience that those who practise other areas of law that are not obviously affected by public law issues, such as personal injury litigation, have also had to consider human rights implications.

The Faculty of Advocates has run courses and held conferences on human rights for its members since the passing of the Human Rights Act 1998. We are all trying to see human rights as part of the fabric of the law, rather than as a separate section of it. I dare say that there are young lawyers who have just graduated who would not understand the distinction, because they have been taught by Professor Murdoch and others that human rights are part of the whole fabric of the law. Those of us who graduated well before the Human Rights Act came in had to consider what it would do to our practices. We are all reminded of human rights continually, because devolution issues are frequently raised in cases; they might not be immediately obvious to lawyers, but they read about them in other cases and learn about them.

The Convener: Would it be helpful if the commissioner could serve the court as an amicus curiae? Do you see value in that?

Valerie Stacey: Yes, there might be something to be said for that. An amicus curiae is a friend of the court who is there to assist the court; they are not a party and do not have a direct interest in the outcome of the case but are there to assist the court by putting forward whatever arguments would help it in making a proper decision. It might be that the new office of human rights commissioner could be useful in that regard.

The Convener: Is it your view that the commissioner should have the right to intervene in a court decision? As the bill is drafted, they would have to seek leave of the court to intervene.

Valerie Stacey: On balance, the faculty's view is that it would be correct for the commissioner to seek leave to intervene rather than to have the right to intervene.

The Convener: Is that the view of the Law Society?

Christine O'Neill: It is, although, as we said in our written submission, we would wish to see expanded the scope of the right to apply for leave to intervene. We have pointed to the fact that the bill does not allow the commissioner to apply for leave to intervene in appellate proceedings in the House of Lords.

The Convener: We will come to that later.

Margaret Mitchell (Central Scotland) (Con): I was interested in what you said about the Faculty of Advocates having training courses and keeping human rights at the forefront of what it is doing. We heard from the committee at Westminster that is considering the establishment of a commission in England that keeping human rights at the forefront was what it wanted to achieve by creating the commission. Will the creation of a commissioner in Scotland achieve that? Is there not an argument that each group, with its expertise, can keep human rights at the forefront? Is that not a far more meaningful way of promoting human rights, rather than having a top-down approach?

Voluntary bodies, with their expertise, could be funded to consider potential breaches. Is creating a commissioner the best way to keep human rights at the forefront? We had a long chat about that with the Westminster committee. For particularly English reasons, it thought that creating a commission was the best way to do that. Human rights legislation is incorporated directly into Scots law, which makes a difference.

Valerie Stacey: The faculty's response to you is that the policy is a political question. We do not have a policy view, but we have tried to help by saying, "If you do this, this is what may happen."

If a commissioner were appointed, one of his or her duties would be to conduct consciousness raising through training and so on. I have no doubt that the Faculty of Advocates could benefit from that, but so could others who would not normally run training courses on such matters. I have read some of the responses to the committee from various industry figures, who said that they might find it useful if somebody had a duty to provide training. I think that that is right. The more knowledge one has about such matters, the better.

Lord McCluskey, to whom the convener referred, said in his submission that some voluntary organisations lack the funds to obtain good knowledge and training on such matters. You referred to funding in your question. Voluntary organisations would require funding to obtain training. The commissioner might provide a way to supply more knowledge generally in the community for voluntary organisations, industry and anybody else about what human rights mean and the difference that they make to people's lives.

Margaret Mitchell: That is interesting, because Lord Judd said yesterday that Oxfam, for example, does not have the resources to do what it wants to do. The voluntary sector appears almost to have thrown in the towel on arguing for resources to use its expertise to promote human rights. It thinks that it will not achieve that, but that a commission could make grants to voluntary organisations. A commission seems to be seen in England not as the ideal but as a second-best approach that has been considered because it has more chance of success and of being implemented. It is interesting that Lord Judd backed that view.

Mike Pringle (Edinburgh South) (LD): Intervention in courts has been mentioned. I will ask both organisations how they feel about another point that Lord McCluskey made. I do not

know whether you have a copy of the bill in front of you. Section 3, which is about the duty to monitor law, policy and practice, says:

"For the purposes of the Commissioner's general duty, the Commissioner—

(a) must keep under review—

(i) the law of Scotland".

However, section 6(1) says:

"The Commissioner may not, in the course of an inquiry (including the report of the inquiry), question the findings of any court or tribunal."

Does that not create a serious conflict? If the commissioner is to keep under review the law of Scotland, which will involve a not inconsiderable body of evidence, will he have time for anything else?

Michael Clancy: I will take the second question first. Christine O'Neill and I discussed what "the law of Scotland" means. It might be a philosophical exegesis that is not appropriate for this place, but we will give it a shot.

Section 126 of the Scotland Act 1998 talks about Scots private law and Scots criminal law. That gives us a basis for considering what the phrase might mean. The section says that Scots private law includes

"the general principles of private law (including private international law),"

the law of persons, the law of obligations, the law of property and the law of actions. That formulation mirrors the arrangement of the institutes of Justinian in almost every respect. The section also says that references to Scots private law include references to judicial review and that

"References … to Scots criminal law include criminal offences, jurisdiction, evidence, procedure and penalties".

That is a starting point for asking what the law of Scotland is. However, the law of Scotland also includes law that is reserved to the UK Parliament and which applies here. Schedule 5 to the 1998 act provides for that. If we had another hour and a half, I could read you that schedule.

10:45

However, that is not the end of it, because we are talking in the context of a bill about an organisation that is to be based on an international convention. There is a whole host of international conventions and I include in that the treaties that make up the European Union.

Appointing a human rights commissioner would be a mammoth undertaking for anyone. One of the biggest tests for the commissioner will be how to manage compliance with the duty to keep under review the law of Scotland. I am tempted to say that one of the commissioner's first recommendations should be that everybody in Brussels and Westminster, and indeed maybe even here, should stop making law for a minute, whether acts or subordinate legislation. Even if that were the case, we have common law, which is formulated and reiterated by the courts all the time.

One has to look carefully at the duty, what it means and how it can be complied with. As I said, even the law reform committee of the Law Society of Scotland has 10 people working in it—six qualified people and four support staff. We cannot look at everything. Even with the assistance of the office in Brussels, it is an impossible task to cover every aspect of change that is being made to the fabric of our law on a daily basis, whether by legislative institutions or by the courts.

I am not sure whether if one were to fulfil that duty properly one would have no time to do anything else. An agreement might have to be reached on prioritisation between the commissioner and the Parliament, but it will certainly be an awesome responsibility to undertake.

Valerie Stacey: I agree with Michael Clancy that the law of Scotland is a large question and that, if created by the bill, the commissioner would have a great deal to do.

Section 3 concerns the duty to monitor law, policy and practice. It requires the commissioner to keep under review the law of Scotland and allows him to recommend changes. That is a duty to look at the law, which, as Michael Clancy says, is found in all sorts of places. It means legislation, but what is decided in courts also counts as law. So the commissioner would look at that and he might recommend changes—as, indeed, can anybody. However, one would expect the commissioner's recommendations to have some weight.

Section 5 has a new heading of "Inquiries" and confers power on the commissioner to conduct inquiries into the practices of:

"(a) a particular Scottish public authority,

(b) Scottish public authorities generally, or

(c) Scottish public authorities of a particular description".

That is quite wide. The rest of the section sets out what the commissioner can do.

Section 6 is headed "Restrictions as to scope of inquiry". It says that the commissioner

"may not, in the course of an inquiry (including the report of the inquiry), question the findings of any court or tribunal."

I suppose that what that means—this goes back to something the convener raised—is that it is not proposed that the commissioner should be able to

change decisions at his own hand, but he can look at things, conduct an inquiry and make a report to Parliament. No doubt that report would be of interest and it might be influential, but the commissioner could not the change the outcome of a court case.

Under section 11, the commissioner would have the power to intervene by making submissions in court. Once again, his submissions would no doubt be of interest to the court. The way in which the section is drafted means that he may seek that power only if he thinks it will be of assistance, and the court is to grant it only if it thinks it will be of assistance—so it is not to happen in every case. The court would no doubt listen and then make up its mind having taken the commissioner's submission into account but, once again, it is the court that would decide. The provision is not advisory; it is a matter of making a submission that would be of use to the court.

Mike Pringle: In view of what you have both just said, is £1 million enough?

Valerie Stacey: In our response, we said—

Mike Pringle: I know what you said: I want it on the record.

Valerie Stacey: We have described the budget as being a little low.

Mike Pringle: Michael?

Michael Clancy: I do not think we made any comment on funding, but if you want to give me £1 million I will review the law of Scotland. [*Laughter.*]

Mike Pringle: There are six or nine people in your department who are already doing that.

Michael Clancy: And we do not cost £1 million or review the whole law. It would be a matter for the commissioner to work within whatever budget is set and to formulate a way of complying with the duties that are set in the statute in accordance with the budget.

Mike Pringle: That is very diplomatic.

I have a question for the Law Society. Can you expand on the points you raise in your written evidence about the restrictions in the bill that allow intervention only in courts lower than the House of Lords, the Privy Council or appellate courts?

Christine O'Neill: We have some concerns about the way in which the bill is drafted in relation to the power to intervene. We have said that, as a matter of general principle, a power of intervention would be advantageous. If we are to have a commissioner, we would support the concept of a commissioner with the power to intervene, with the leave of the court, in a way that would be of assistance to the court.

The comments that we have made about the scope of that power arise out of a concern to ensure consistency across the board and to ensure that the power of intervention is logical in its application. We are not persuaded that any clear justification has been given for excluding the commissioner from appellate proceedings. It might be that you have that information and we do not.

We suggest that appellate proceedings are sometimes the most important stage of a court case, at which this sort of intervention might be most useful. Often, it is only at the appellate stage that issues are fully focused and it might be the human rights issue that is fully focused only at that stage.

Further, as we said in our submission, the commissioner might not become aware of the issue that has arisen—and therefore be in a position to take steps to intervene—until appellate proceedings take place because, obviously, they are more likely to attract press coverage and be reported in the law reports at that point. There is no duty in this bill that corresponds to that which is in the Scotland Act 1998: to require human rights issues to be intimated to the commissioner as devolution issues are to be intimated to the law officers.

We would not for a moment suggest that there ought to be an obligation to intimate to the commissioner that human rights issues were being raised by a court case—that would not be practical or desirable—but given that there is no such obligation, we think that it would be appropriate to allow the commissioner to intervene at the appellate stage.

Mike Pringle: The Faculty of Advocates has suggested that

"the Commissioner might usefully seek to intervene in appellate criminal cases raising matters of principle."

Can you expand on that?

Valerie Stacey: Since the Human Rights Act 1998 came into force, the majority of devolution issues that have gone to the Privy Council have been to do with criminal cases. They are called devolution issues but they are human rights matters. The Faculty of Advocates takes the view that if the point of a commissioner intervening in a court case is to make submissions from a peculiarly human rights-related angle, it would be useful if that could be done in those high-level criminal appeals.

I can give some examples of cases that have gone to Lord Advocate's references. I will explain what that means. If, in a criminal case, a person is acquitted, put broadly, the Crown—the Lord Advocate—cannot appeal that acquittal. That is an end of it as far as the accused person is

concerned. However, the Crown can seek the court's opinion, essentially, by a Lord Advocate's reference.

The court will consider the particular case—it will not consider a hypothetical question—and make a ruling. Its ruling will not affect the acquittal of the particular accused—it is technically not an appeal, although it feels like one. It is the stage at which the important issues of principle are considered. That is why the faculty is of the view that, if there is to be a commissioner who can intervene in cases, that would be a good point at which to intervene in appropriate cases. Intervention will not be appropriate in every case.

Mike Pringle: Do you have a specific example or examples?

Valerie Stacey: The proper definition of the law of rape was taken to Lord Advocate's references fairly recently. An example from some little time ago is whether killing someone by injecting them with drugs is murder, culpable homicide or not a crime at all.

Devolution issues that have been to the Privy Council include the obligation to tell the police who was driving when they ask, which arose in the context of driving while under the influence of drink. In that situation there is a statutory obligation to answer a question from the police, which people are not normally obliged to do because they normally have a right of silence.

Mike Pringle: The examples that you give are clearly ones in which human rights might be involved, so we should think seriously about your proposal.

Margaret Mitchell: I ask you to consider some of the implications of the references in the Equality Bill to the Scottish Commissioner for Human Rights Bill. The Scottish Commissioner for Human Rights Bill proposes to create a commissioner, but it has not yet been passed and it might be that no such commissioner is created. Clause 7(4) of Westminster's Equality Bill says that certain consents would need to be sought and granted by

"a person … established by Act of the Scottish Parliament"

whose principal duties would be human rights duties similar to those of the commission for equality and human rights that the Equality Bill would establish. If we decided not to have a commissioner, could the powers proposed for the commissioner be given to the Scottish public services ombudsman? Would the ombudsman satisfy the criteria in clause 7(4) of the Equality Bill?

Michael Clancy: I would have to write to you about that, because I do not have the Scottish Public Services Ombudsman Act 2002 to hand. I reserve my opinion on that, if you do not mind.

Margaret Mitchell: It would be an extension to the ombudsman's role. She already deals with human rights issues, but not to the extent that the proposed commissioner would. Giving her the commissioner's powers would change the focus of her work a little bit. Hypothetically, would that be possible?

Michael Clancy: Well, the ombudsman is certainly

"a person … established by Act of the Scottish Parliament",

so it is a question of whether

"the person's principal duties relate to human rights and are similar to any of the Commission's"

European convention on human rights duties under section 9 of the Equality Bill. One would have to consider carefully how such a remodulation of the public services ombudsman's duties would result in human rights issues becoming principal duties. One could obviously work that out on a piece of paper.

Margaret Mitchell: My next question is on clause 31(4)(b) of the Equality Bill, which concerns judicial review. Before I consider the lack of such provision in the Scottish Commissioner for Human Rights Bill, I ask for a bit of background on the historical thinking against giving organisations the power to initiate a judicial review. In Scotland, it has been hard for organisations to satisfy the title and interest test.

11:00

Christine O'Neill: All I can say about the historical background is that a line of cases that were decided by the Scottish courts has led to a situation in which it is difficult for organisations and representative bodies, rather than individuals, to take judicial review proceedings. A recent example that members may remember was the Glasgow rape crisis centre's attempt to take judicial review proceedings when the boxer Mike Tyson was given leave to enter the country. One reason why the rape crisis centre failed in its attempt to achieve judicial review of the decision was because of the law on title and interest, which relates to the right to take such cases and which is simply a result of decisions of the Scottish courts. The rationale that the courts have given for restricting title and interest is that someone who raises such an action ought to have a direct and personal interest in the proceedings that they raise and that the courts ought not to entertain challenges that are made by busybodies and political organisations who want to use up court time to make political points through the legal process.

By contrast, the English courts have been a little more accommodating to representative

organisations and have been more willing to allow them to take such cases. That is simply a difference in approach and in the culture of the courts, although I am sure that the English courts would also say that they are not a forum for busybodies and political point making. However, those courts have been more willing to say that, in certain limited circumstances, it might be appropriate for a representative body or lobbying group to take such cases.

Margaret Mitchell: Is there any difference in how judicial review is interpreted? In Scotland, judicial review relates only to the way in which public authorities have made decisions, but clause 31(3)(a) of the Equality Bill mentions an "unlawful act". Are we talking about the same thing?

Christine O'Neill: I am in an extremely difficult position, given that the man who taught me about judicial review is in the room.

Margaret Mitchell: Do not be intimidated.

Christine O'Neill: There are several differences between the law of judicial review in Scotland and that in England. To be fair, they are mainly procedural differences, for example, in the time limits within which judicial review proceedings can be brought. On the type of bodies that can be challenged by way of judicial review, the Scottish courts have in fact been more expansive than the English courts have been. So while in Scotland the type of people who can take cases is more restricted, a broader number of bodies might be attacked by way of judicial review. In England, many problems have arisen over the concept of a public law decision, which tends to govern whether judicial review proceedings can be taken in England. However, in Scotland, the test is slightly wider. Historically, we have been well able to challenge proceedings of sports disciplinary bodies—that has never been a problem in Scotland, but it has in England. We have greater scope for challenging decisions in Scotland.

Margaret Mitchell: It is interesting that the definition is wider here, given that it is harder for organisations to get title to pursue judicial review. Does Valerie Stacey have any comment on the issue?

Valerie Stacey: Christine O'Neill is quite right in what she says. There may be something of a paradox, in that although, traditionally, the Scottish interpretation of title and interest has been more restrictive than the English interpretation—I understand that that continues to be the case—the definition of what one can take to judicial review is wider in Scotland. I do not know whether it helps to think of the term "judicial review" as being shorthand for judicial review of administrative action. That is what we are talking about. The phrase "judicial review" means a court's review of some administrative action by an organisation such as a housing association or a licensing board. All sorts of things can be judicially reviewed. The Court of Session has always had a supervisory jurisdiction. The technicalities of how one goes through the court rules for a judicial review have developed significantly in the past 20 years, but there has always been such jurisdiction in Scotland.

Margaret Mitchell: That brings us to the two pieces of proposed legislation under discussion. Under the Equality Bill, the commission for equality and human rights will be given title. It is implicit that the commission will have title and interest to sue, but the Scottish commissioner for human rights will not. If the commission took up an issue that was not wholly reserved but contained a devolved element, would that break new ground in Scots law? Will the commission be allowed to do something in the courts in Scotland that would not be allowed at present? The DCA said yesterday that that was certainly not its intention. It did not want the Equality Bill to usurp the procedure on what is allowable in a Scottish court.

Christine O'Neill: I am not entirely sure that I am clear about the question, but I will try to answer it. I want to clarify the differences between English and Scottish judicial reviews. We have said that there is greater restriction on the types of bodies that can take judicial review proceedings in Scotland than there is in England, but that in Scotland a wider range of bodies can be attacked through judicial review. The grounds for judicial review in Scotland are similar to those in England and I can see nothing in the proposed legislation that would change that situation.

The committee should be aware that at present there are rules of court that allow parties to intervene in judicial review proceedings in Scotland, if that is in the public interest. That is a fairly recent change to the Court of Session rules and I am not aware of those rules ever having been used. Given that a power to intervene in judicial review proceedings already exists, aside from anything that the bill says, any of us could apply to intervene and make submissions in a human rights judicial review case if we thought that there was a public interest in doing so and if the court wanted to hear from us.

What the Equality Bill will do that the Scottish Commissioner for Human Rights Bill will not do is specifically empower the commission to act in that way. Perhaps we can turn things around and think of the issue as being less to do with what the courts will allow and more to do with what the statutory powers of the respective bodies will be. If the Scottish commissioner sought to use the existing rules of court to intervene in judicial review proceedings, his or her action might well be

ultra vires because the bill will not empower him or her to do that.

Margaret Mitchell: So obviously the solution—

The Convener: I draw the witnesses' attention to clause 31(4)(b) of the Equality Bill, which relates to the issue that Margaret Mitchell raises, which I have already mentioned and which we asked the DCA about. The issue that the DCA is considering is whether the commissioner that we might create could be granted consent to use the power that is in the Equality Bill.

The second issue that Margaret Mitchell raises is that in the Equality Bill, Westminster is legislating to allow all commission bodies—including any Scottish CEHR commissioner who is appointed—to use clause 31(4)(b), which represents a departure from the normal court practice. Clause 31(4)(b) states:

"subject to any limitation or restriction imposed by virtue of an enactment (including an enactment in or under an Act of the Scottish Parliament) or in accordance with the practice of a court."

We now wonder whether that is legally competent.

There are two issues. The first is whether it is legally competent for a UK act to depart from the practice of the Scottish courts by giving the CEHR, including any Scottish CEHR commissioner, the power to act as a victim, if you like, where previously we have not allowed that. The second issue is that the commissioner that the Scottish Commissioner for Human Rights Bill will create will not have that power. The question is whether the Scottish commissioner could intervene anyway or whether, as we are advised, the UK Parliament would have to legislate for that. Do not worry; we are not really expecting an answer.

Michael Clancy: That is comforting. If we go back to certain first principles, the UK Parliament is a sovereign Parliament and can legislate for whatever it wants. Therefore, is there a question about the competence of the UK Parliament in allowing such action? Even if the legislation that the UK Parliament enacted were subsequently challenged under the Human Rights Act 1998, it would still be valid. If it were found to be contrary to the convention, it would be subject only to a declaration of incompatibility. Going on that first principle, it is certainly possible for the UK Parliament to bestow on its creation such powers as it sees fit. Until a court corrects that or issues a declaration of incompatibility, Whitehall ministers might not be moved to change the position. I am not sure whether the Scottish commissioner could use the commission for equality and human rights almost as a surrogate or secret agent to deal with things that go on in Scotland by saying, "I cannot do anything about this, but you might want to take a look at it". It would be a word to the wise, as they say. Nothing in the Scottish Human Rights Commissioner Bill would prevent a Scottish commissioner from indicating to another body that it might want to look at something that is awry. There is no such limitation in the bill.

Mr McFee: Surely including a requirement to co-operate positively encourages such action.

Michael Clancy: Yes, but it is about who initiates an inquiry. The Scottish commissioner must co-operate with the CEHR if a letter comes in saying, "Will you give the CEHR consent to raise judicial review proceedings in Scotland?"

Christine O'Neill: Clause 31(2) of the Equality Bill clearly gives the UK commission title and interest in proceedings in Scotland. I do not think that that subsection can be read in any other way. I am not sure that the rules on title and interest as developed by the Scottish courts fall within the concept of the practice of the courts. I am open to other views, but practice is more about procedural rules and how one conducts a case rather than one's legal entitlement to be involved in a case. I am not persuaded that clause 31(4)(b) detracts in any way from the general empowerment provision in clause 31(2), which, on the face of it, gives the CEHR the power to do in Scotland something that would normally be outside the rules on title and interest.

11:15

The Convener: Yes. I think that the DCA conceded yesterday that this is another instance of English wording. If we were drafting such a provision in Scotland, the wording

"in accordance with the practice of a court"

would not have been used. I think that the DCA accepts that it may have to look again at the wording.

For the purposes of debate—to go back to first principles, as Michael Clancy suggested—I wonder whether the question for us should be who has the competence to determine whether the rules on title and interest are a matter for the Scottish Parliament under the devolution settlement or one for the UK Parliament. Given that we are talking about a development in Scottish common law, I am not wholly clear why the power to determine that question is a UK one. Is there an argument that says that we have the power to determine who has title and interest?

Christine O'Neill: Of course, in terms of first principles, the UK Parliament retains the power to legislate on anything, even if the matter falls within a devolved area. It is entirely open to the UK Parliament to make rules that vary Scots common law in relation to title and interest. That in itself is not particularly controversial. If the UK Parliament

has any doubt about whether a newly created body should have that right, it can provide for that. However, the Scottish Parliament also has power to determine whether the Scottish commissioner should have title and interest to intervene or raise proceedings in their own right.

The Convener: Right. That is helpful. The committee will have to give further consideration to the matter. Obviously, as the minister will be at next week's committee meeting, we can debate the matter with him. One of the questions that we will put to him is whether, in parallel with the UK interest in taking title to sue for the UK commission, it may be legally competent for the Scottish Parliament to look at the question in respect of devolved issues.

Michael Clancy: The Equality Bill has already been the subject of a Sewel motion.

The Convener: Yes, but only in relation to the powers on which we have agreed to give consent to the UK Parliament to legislate for the time being, which are the promotional duties—nothing else. Even if we agree to a Sewel motion, that does not prevent us from taking a different decision later—it does not hold for ever.

Michael Clancy: I will be advised by you, convener.

Margaret Mitchell: If we create a commissioner and give them the power to raise judicial review proceedings, would that open up a Pandora's box? Would other organisations take it as a precedent to seek title and interest? Would it strengthen their case?

Valerie Stacey: I expect that it might encourage others to seek to say that they should have title and interest. I imagine that they might like to do that. Whether it would strengthen their case is another matter. As Christine O'Neill outlined, the law has looked at title and interest over many years. Title and interest is given by statute; it is a political decision. I am not sure whether such a provision would strengthen anyone's argument in law, but it might lead to organisations seeking to say that they too should have title and interest.

Margaret Mitchell: We are talking about a third-party right, not the direct right of the victim.

Valerie Stacey: Yes, that is correct. Although the commissioner has no direct interest in the case—they are not the victim of anything—they can say that they have a general interest in the matters that are being raised.

Christine O'Neill: The situation is possibly ameliorated by the fact that we now have rules of court that allow intervention by such organisations. For example, although the Glasgow rape crisis centre is unable to raise proceedings on its own behalf, it can intervene in proceedings that are raised by an individual. Developments have taken place that make it easier for the voices of such organisations to be heard, so there may be less of problem.

Margaret Mitchell: Okay. Thank you.

Mrs Mary Mulligan (Linlithgow) (Lab): I have a question for the vice-dean. In your submission, you talk about the commissioner being able to litigate. I am not sure whether the examples you gave earlier might apply. In what circumstances would it be desirable for the commissioner to be able to litigate in his or her own name?

Valerie Stacey: Our answers to question 2, which were certainly quite brief, would indicate what we think about that. There may be situations in which an individual is not empowered to take a case due to lack of funding. It might be useful in such cases for the commissioner to be able to be a party.

Mrs Mulligan: Is that the only example?

Valerie Stacey: No. I imagine that there could be many others; that is the example that we have given in our submission. The difficulty with litigation is that, for some people at least, it is a voluntary activity. One does not have to litigate, although an accused person has no choice. There must be individuals out there with interesting questions that are not being resolved because they do not wish to litigate. There may be occasions on which the sort of body that is envisaged in the bill would, in the public interest, consider a matter and take it further if an individual, for their own reasons, does not wish to litigate.

Mrs Mulligan: That is helpful. Thank you.

Mr McFee: In your reading of the bill, is there anything to prevent the commissioner from providing funding to an individual who wished to litigate, as opposed to the commissioner taking the case on directly?

Valerie Stacey: There is no direct power to do that; however, you have asked me the obverse—whether there is anything to prevent his or her doing that. My reading of the bill is that it is not the intention that the commissioner would do that—

Mr McFee: Other than financial, perhaps.

Valerie Stacey: Yes. Are you thinking of the commissioner making a grant available for such things?

Mr McFee: Yes. Something of that nature, when there is a public interest.

Valerie Stacey: I do not think that the bill says that the commissioner cannot provide funding to an individual, but neither do I think that he or she is empowered to do so. The commissioner will be

a statutory creation; the role will not exist unless it is created by statute, and the statute will set out what the commissioner is empowered to do. I would have thought that they would not have the power to provide such funding.

The Convener: My question is for the Law Society. You say in your submission that you are not clear why the power to intervene does not cover cases in the children's hearings system. You are not the only witnesses to have said that. If that power were granted, how do you envisage that it might work?

Christine O'Neill: It would work simply in the same way as it would work in other legal proceedings. That is not a trite response, but I anticipate that, in cases in which a matter that arises in children's proceedings comes to the attention of the commissioner, the issue will be that of how such matters are brought to the attention of the commissioner. If the commissioner felt that there was some public interest in intervening, he or she might seek to do so, but in principle, that is no different from the type of intervention that might take place in other proceedings. I do not think that any of us anticipates that the commissioner would intervene every week of the year. It would happen infrequently and in exceptional cases.

The Convener: That is what I wondered. How would the commissioner know when to intervene, given that there are so many children's hearings, and that they are local and informal? If it was a big, systemic issue, the children's commissioner might have picked it up anyway. People often know about the big civil cases, but obviously there are fewer such cases, so it is easier for the commissioner to think about whether he or she might want to intervene in the process.

Christine O'Neill: The volume of cases is not just a problem for children's hearings; we could say similar things about immigration decisions or what might be described as common-or-garden criminal proceedings. That takes us back to the point that we made about intervention at the appellate stage. It is often only at that stage that a case comes to public attention, and it may be only at that stage that the commissioner becomes involved. Moreover, if the commissioner's general duty is to promote awareness, it ought to be part of the exercise of that duty to make aware people who represent children in children's hearings or people appealing immigration decisions that the commissioner may be interested in becoming involved in the process.

The Convener: If the power to intervene applied to appeal cases, do you envisage that the human rights commissioner's involvement would depend on whether the court thought that the commissioner would have something useful to add?

Christine O'Neill: Yes.

The Convener: This has been a useful exchange. The debate about the constitutional issue has been helpful, although it was not conclusive. It might never be conclusive—who knows? We would be happy to keep you in touch with our discussions with the Department for Constitutional Affairs on that point, if you are interested. I thank the Law Society of Scotland and the Faculty of Advocates for their invaluable contribution to our consideration of the bill at stage 1.

We agreed previously to take the next item in private in order to discuss the issues that have arisen so far and to consider what we might put in our stage 1 report.

11:26

Meeting continued in private until 13:05.

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