

JUSTICE 1 COMMITTEE

Wednesday 18 January 2006

Session 2

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JUSTICE 1 COMMITTEE

3rd 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:

Robert Brown (Deputy Minister for Education and Young People)

Brian Peddie (Scottish Executive Justice Department)

Nora Radcliffe MSP (Scottish Parliamentary Corporate Body)

John St Clair (Scottish Executive Legal and Parliamentary Services)

Huw Williams (Scottish Parliament Corporate Policy Unit)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 4

Scottish Parliament

Justice 1 Committee

Wednesday 18 January 2006

[THE CONVENER *opened the meeting at 10:00*]

Scottish Commissioner for Human Rights Bill: Stage 1

The Convener (Pauline McNeill): Good morning and welcome to the third meeting in 2006 of the Justice 1 Committee. As usual, I ask members to switch off anything that might interfere with the sound system. All members are present, except Bruce McFee. No apologies have been received, so he may join us at some point. I introduce our adviser on the Scottish Commissioner for Human Rights Bill, Jim Murdoch. We also have with us Sarah Harvie-Clark and Murray Earle, who are from the Scottish Parliament information centre and have been assisting us through the passage of the bill.

Agenda item 1 is stage 1 consideration of the Scottish Commissioner for Human Rights Bill. I welcome Nora Radcliffe and Huw Williams. Nora Radcliffe will be known to all members—she is a member of the Parliament and is here in her capacity as a member of the Scottish Parliamentary Corporate Body. Huw Williams is head of corporate policy in the Parliament. I thank them for coming along. We will proceed straight to questions.

Marlyn Glen (North East Scotland) (Lab): Given that the proposed Scottish commissioner for human rights would be an office holder of the Parliament, is the SPCB content with the Executive's consultation during the preparation of the bill? We have your written submission on that issue, but I ask you to expand on those comments.

Nora Radcliffe MSP (Scottish Parliamentary Corporate Body): It might have been helpful if there had been greater consultation with the SPCB about the financial memorandum. However, we have an opportunity to feed into the consideration of the bill through the committee, for which we are grateful. The minister in charge of the bill, the Deputy Minister for Education and Young People, was recently a member of the SPCB and had the portfolio responsibility for commissioners, so he probably would have been aware of the likely views of the SPCB. However, more consultation with us might have been helpful.

Marlyn Glen: Do your concerns relate only to the bill's financial aspects?

Nora Radcliffe: We would like one or two other aspects of the bill to be amended. First, the bill proposes that the accountable officer should be the chief executive, but we feel that, in line with what happens with other commissioners, the accountable officer should be the commissioner himself or herself.

Secondly, we would like wording to be added to the bill that states the grounds for removal of the office holder from office, similar to the wording in the Commissioner for Children and Young People (Scotland) Act 2003. It would be helpful for the corporate body and the office holder to have a clear understanding of the grounds for removal from office.

Those are the two other main issues on which we would have liked to comment to the Executive.

Stewart Stevenson (Banff and Buchan) (SNP): I hope that Ms Radcliffe is familiar with the Finance Committee report on the bill, because I want to address what it says on the relationship between the corporate body, the commissioner and—the third leg of the stool—the Executive. First, are you satisfied with the way in which the commissioner's budget will be set and with the corporate body's role in that?

Nora Radcliffe: We would like greater clarity in the bill about that relationship. We would like the bill to make it clear that it is for the corporate body, in discussion with the commissioner, to set the budget. With other commissioners, we can only comment on the budget before it goes to the Finance Committee, but it would be better if the bill was clear that the budget is to be set by the corporate body, in discussion with the commissioner.

Stewart Stevenson: Your response appears to suggest that you see the corporate body as being the senior partner in the negotiations. You stated that the corporate body would "set the budget." Are you satisfied that it will not compromise the independence of the commissioner if you play that role, rather than the position being one in which the commissioner proposes and the corporate body disposes, as is the case with other commissioners?

Nora Radcliffe: The lack of clarity in relation to other commissioners is caused by the fact that the corporate body does not dispose; it can only comment on what the commissioner has proposed to the Finance Committee. We found this year that that was not a very satisfactory arrangement. It would have been better if the budgets had been agreed between the commissioners and the corporate body and had then gone to the Finance Committee. The Finance Committee has recommended that it would prefer that mechanism, which we would like to be codified.

Stewart Stevenson: I understand perfectly the tension that you describe, but the important part of my question, which you really need to address, is whether, by making the role of the corporate body more explicit and perhaps greater than it has been, we risk compromising the independence of the commissioner.

Nora Radcliffe: I do not think that that risk would arise, because someone, somewhere must say what the limits are on spending and be accountable for the use of public money. At some stage, someone will have to say whether something is or is not giving value for public money. It seems to me that, in this instance, the corporate body is the appropriate body to do that. I do not see why that should in any way compromise the integrity or the functionality of the commissioner.

Stewart Stevenson: You said in your response to my colleague Marlyn Glen that one of the changes that you wish to see made to the bill is for the commissioner to be made the accountable person in law. In the answer that you have just given, you talk about the SPCB being accountable for expenditure. Can you help me to understand the distinctions that you are making?

Nora Radcliffe: All the other commissioners are the accountable officers—is that the technical term?

Huw Williams (Scottish Parliament Corporate Policy Unit): They are accountable for the money that they spend.

Stewart Stevenson: They have to sign the accounts. They are accountable to Robert Black or his successor.

Nora Radcliffe: They can account for the money that they have been given in their budget, which is different from saying that we think that the amount of money that they need to fulfil their functions and give value for money is X amount. Someone, somewhere must set the budget, but that does not mean that how the commissioner exercises their functions is compromised, unless the budget is set at such a ridiculous level that they are not able to fulfil their duties. We have a statutory responsibility to enable them to fulfil their duties.

Huw Williams: What we are looking for is greater clarity in the process. When we consider commissioner budgets, there are considerable discussions at official level before the matter reaches the corporate body. The corporate body then takes evidence from each of the commissioners about their budgets before putting their budgets forward as part of its overall budget bid to the Finance Committee. We want there to be greater clarity about what the final determining element of the budget process is.

Stewart Stevenson: Colleagues will ask about how much money is needed. I will close this part of my questioning by asking about the SPCB's approach. In determining your approach to the negotiations—that is what we are talking about—with the commissioner, will you be driven by the amount of money that you can make available, telling the commissioner that they must work out what they can deliver for that, or will you simply challenge the commissioner's assertion that they need a particular sum of money to do what they think is necessary? After all, they are responsible for publishing the plan of what they have to do. How does the balance of the negotiations work out? What are the respective roles of the SPCB and the commissioner in driving towards an agreement on the budget?

Nora Radcliffe: With all due respect, that is like asking, "How long is a piece of string?" The rough parameters are set out in the financial memorandum, so we know roughly what ballpark we are operating in. It is then for the commissioner to propose a budget that they can justify and which we accept is justifiable. When we have agreed it, the money will come from the corporate body's budget and then our budget as a whole will go to the Finance Committee, so there are checks and balances in the system.

Stewart Stevenson: But which approach do you think you will take? Will you say, "This is the money that is available," or will you respond to what the commissioner says they need? I have had such arguments too many times to be readily convinced that these things are straightforward. They are not. Things always get difficult when money is involved.

Nora Radcliffe: It depends on the proposal that is made. If the commissioner asked for more than we thought was reasonable, that might evoke one response, but they might ask for less than we thought was reasonable, which might evoke a different response. We cannot—

Stewart Stevenson: So you can envisage circumstances in which you would say to the commissioner, "Please take more and do more."

Nora Radcliffe: I do not think that it would be couched in those terms. It is not for us to say what the commissioner should do, but it may be for us to say, "Your plan is to do such-and-such. Do you think that you have costed it adequately?" It would be couched in that way. We cannot compromise the independence of the commissioner.

Huw Williams: This year, one of the commissioners came forward with a programme that the corporate body thought, in monetary terms, was too ambitious—the corporate body thought that the commissioner probably could not achieve it. All that the corporate body could do

was provide a note of caution to the Finance Committee. The corporate body felt that that was the extent of its powers. If it had greater powers, it could ask the commissioner to reconsider the matter and come back with more formal proposals for debate so that a conclusion could be reached on the project.

Stewart Stevenson: That brings me right back to the beginning. You think that the corporate body needs more powers to control and direct what the commissioner does.

Nora Radcliffe: A commissioner's budget should be agreed at the point of discussion between the corporate body and the commissioner, not at a different point when we have sent our corporate budget to the Finance Committee. We think that it is more helpful to agree the commissioners' budgets before we present our entire budget to the Finance Committee.

The Convener: I ask Huw Williams to clarify the example that he gave. You talked about a commissioner who came forward with a special project. Why was the corporate body asked to sign that off? If a budget had been set for the commissioner, why did they have to come to the—

Huw Williams: A budget had not been set.

Nora Radcliffe: The discussion was about setting the budget.

The Convener: Was it about the overall budget or a budget heading?

Nora Radcliffe: It was about the overall budget. On one aspect of the budget, we thought that a proposed programme was not deliverable within the proposed timeframe. We asked why the commissioner had budgeted for something that they could not deliver and asked for a justification.

The Convener: So there was no overall budget to start with. That was the first attempt. The commissioner came to the corporate body saying, "This is what we want to spend and this is what we want to spent it on."

Nora Radcliffe: Yes.

The Convener: I will ask you the same question that Stewart Stevenson asked, but I will put it differently. The backdrop to the question of independence and accountability is the Paris principles. We are learning about those ourselves, but they are the international standard for human rights commissions. Is the corporate body satisfied that, in broad terms, it has met the Paris principles?

Nora Radcliffe: Well—

The Convener: You do not have to answer that, but we have to make you aware that that is the

context. If the corporate body is taking a view about budget setting, I would like to know whether it is satisfied that that can be done within the Paris principles.

Huw Williams: That was one of the arguments that the commissioner for children and young people made to the Finance Committee. Obviously, we have to take the Paris principles into account, but we must also remember that the Parliament has to approve the use of public money for the commissioner's functions.

10:15

The Convener: But these matters are not mutually exclusive. You are arguing, "Our body will be accountable for expenditure, because someone has to be." I have no difficulty with that, but I suppose that it all comes down to how one interprets the Paris principles. My question is whether, in taking that particular view, the SPCB is satisfied that what it is doing is in the spirit of those principles.

Nora Radcliffe: I wonder whether we could write to the committee on that question, because I do not want to give an unequivocal response right now. I would rather give the committee a written, reasoned response that sets out our position on the matter.

The Convener: That would be helpful.

Mrs Mary Mulligan (Linlithgow) (Lab): I have a more specific question about finance. Is the commissioner's proposed operational budget of £1 million a year realistic?

Nora Radcliffe: We are concerned that, in comparison with the budgets for other commissioners, it might be a bit tight. For example, the Scottish information commissioner's budget is £1.4 million and the commissioner for children and young people's budget is about £1.3 million. I think that £1 million will be adequate in the first year, as it will not have to cover a full year; however, it might prove somewhat restrictive in subsequent years.

We also have a slight difficulty with the budget for recruiting the commissioner. Although the amount that has been allocated might cover one recruitment exercise, the bill's wording appears to suggest that two separate recruitment exercises—one for the commissioner and another for the deputy commissioners—will be carried out. We do not think that the financial memorandum addresses that matter.

Moreover, the costs incurred in seeking external legal advice or consulting other sources, in holding an inquiry and in auditors' fees do not appear to have been budgeted for. We need to set a realistic budget at the outset to ensure that we are all

operating within a realistic time frame and that we do not have to adjust matters later or to cut our coats to fit an inadequate amount of funding.

Huw Williams: In order to make cost savings, the SPCB will certainly try wherever possible to share support services such as information technology. Obviously, we cannot provide any estimates on such matters at the moment, but it will really depend on the location of the office and the number of staff to be employed. However, I should say that we are grateful for the SPCB's powers of determination over such matters.

Mrs Mulligan: It has been suggested to the committee that a £1 million budget is insufficient. For example, the Northern Ireland Human Rights Commission is already seeking additional resources. Should we consider that example in our deliberations?

Nora Radcliffe: It helps to examine the experience of comparable posts elsewhere. For example, when we compared the budget for the proposed Scottish human rights commissioner to those of the other commissioners in Scotland, it seemed a bit restrictive.

Mrs Mulligan: That is helpful.

Mike Pringle (Edinburgh South) (LD): I feel that the budget is lamentably low. The Finance Committee highlights the fact that staff salaries will amount to £175,000, which I presume will include the chief executive's salary. In comparison, the chief executive of the Mental Welfare Commission is paid £106,000; the chief executive of the Scottish Commission for the Regulation of Care is paid almost £100,000; and the chief executive of the Water Industry Commission for Scotland gets more than £80,000. Given that £175,000 is being allocated for staff salaries, it appears that, once the chief executive is paid his or her salary, there will be only about £75,000 left to do everything else. I simply do not think that that is feasible. Moreover, I find it bizarre that the commissioner's salary has been set at £75,000 right at the beginning of the process.

When we were in London, we asked how much commissioners under the Equality Bill were to be paid. We were told that we would have to take that up with the minister because no one had considered or decided it. I understand that the bill went through the Commons on Monday, yet the job specification has not even been decided. We seem to be really sort of cash for this.

Huw Williams: Staff salaries come to about £350,000.

Nora Radcliffe: We thought that it should be a bit more than that. We estimated that it should be closer to £388,000.

We wondered whether the commissioner would need a chief executive, given that there will be a relatively small staff team. Also, if the committee takes on board the proposal that the commissioner should be the accountable officer, there might be no need for a chief executive, or some other post at that level, which would have an impact on salary costs. However, we thought that the final figure was lower than we would have estimated if we had been asked to do so.

Mike Pringle: I do not disagree about the post of chief executive; it would be an unnecessary luxury.

Can we look at the commissioner's salary? As I said, salary levels for equivalent posts have not been decided under the Equality Bill. It depends on who you talk to whether you argue that the commissioner must have a legal background. If so, would they have to be paid a similar salary to someone in a judicial position? Let us look at some examples of judicial salaries in Scotland. A judge in the inner house of the Court of Session earns £175,000; a judge in the outer house earns £155,000; and a sheriff principal earns £125,000. The Scottish information commissioner earns more than £75,000, and the Scottish public services ombudsman earns quite a bit more than £75,000. Will a salary of £75,000 be adequate, given that the post of human rights commissioner will be, in my view, the most important commissioner post in Scotland?

Nora Radcliffe: When we set the salary level, we took into account what we do with our other commissioners. This will be the fifth commissioner that we have appointed.

Huw Williams: With our other commissioners, we commissioned the Review Body on Senior Salaries to consider whether the salary levels that have been set already were appropriate. Based on what it said, the ombudsman's salary was increased, but the others were felt to be within an appropriate range. The SPCB has not yet determined the salary level for the human rights commissioner.

Mike Pringle: Perhaps we can explore that with the minister.

Nora Radcliffe: We have information about the current commissioners' salaries. The Scottish public services ombudsman earns £84,477—that was the salary that the Review Body on Senior Salaries thought should be uprated. The Scottish information commissioner earns £77,722, and the Scottish commissioner for children and young people earns £74,520. Therefore, the salary for the new commissioner will be in the same ballpark.

Margaret Mitchell (Central Scotland) (Con): Was any account taken of the fact that the role is

mostly promotional and awareness raising? The commissioner will not instigate legal proceedings, so additional costs for legal advice for public authorities and the commissioner will not come into the equation.

Nora Radcliffe: The promotional activities will be largely covered by the budget for salaries in the same way as they are for the Scottish commissioner for children and young people, which is an equivalent role.

There will be some occasions when the commissioner might look to take external legal advice, particularly if they do not have a legal background. I am thinking of occasions when they have to intervene in court proceedings, which is an activity that is included in the remit. I can see that that might be a reason for seeking external legal advice.

Margaret Mitchell: That would not happen as a matter of course, because there is no duty to intervene, and that might be reflected in the amount involved.

Nora Radcliffe: That is correct.

Margaret Mitchell: What would the procedure be if, during the financial year, the commissioner were to come along and say that it was clear that the budget was going to be overspent?

Nora Radcliffe: There is a central contingency fund that all commissioners can draw on if they need to, so it would depend on the nature of the overspend. If it was seen as something that could legitimately be met out of the contingency fund, there is money to cover that. If it was something that we thought could be dealt with differently, we would advise accordingly.

Margaret Mitchell: Which budget would that come from? Would it come from the SPCB budget?

Nora Radcliffe: Yes.

Margaret Mitchell: Would you get an increase in funding? Is there a tacit agreement with the Executive about that?

Nora Radcliffe: We were quite attracted to the Finance Committee's recommendation that, if it turned out in practice that the budget was too low, the Executive should meet any shortfall if it could be demonstrated that that had come about because the initial budget was inadequate.

Margaret Mitchell: Would that be done by giving you the money to pass on?

Nora Radcliffe: No. It would be a case of the Executive underwriting any potential overspend as a result of not having estimated the budget accurately at the outset.

Margaret Mitchell: So it would not come out of the SPCB budget.

Nora Radcliffe: It would do at the moment. The way things stand, we would endorse the Finance Committee recommendation that, if there was an overspend because the initial budget had been inaccurate or inadequate, the Executive should meet that shortfall.

Margaret Mitchell: How much attention would be paid to the reasons for the overspend? If the budget is found to have been inadequate, who decides that?

Nora Radcliffe: It is difficult to say.

Huw Williams: We would look first of all to the commissioner contingency fund, which is there for unforeseen events. It is a capped amount; it is not an unlimited amount of money. Should we be unable to meet the shortfall from that contingency fund, we would have to look in the SPCB's overall budget, the purpose of which is to support the Parliament. If we could not meet the shortfall, we would have to put forward a supplementary estimate to the Finance Committee, part of which would have to include a justification as to why there was a shortfall and what the reason for the increase was. That would be a matter for debate with the Finance Committee.

Margaret Mitchell: That is excellent. Thank you.

Mike Pringle: At the end of the SPCB submission are a number of comments that I think we have already covered. For example, we have talked about the chief executive and staff and about the role of the accountable officer.

Do you have a view on where the office should be located? It has been said that the GB commissioner, who will be part of the proposed GB commission for equality and human rights, will be based in Glasgow. There might be a view that everything should be in one place, so that if someone arrives wanting to get a problem sorted out and cannot get it sorted out by our commissioner, he could go to the GB commission.

Finally, I have a mop-up question. I see that the minister has just arrived outside the door. Do you have any other issues that you think it would be worth our while to raise with the minister today?

Nora Radcliffe: We are looking at the pros and cons of co-location and how it could be accomplished. Audit Scotland is conducting a review of SPCB governance and we have asked it to extend its remit to consider options for sharing services or co-location among commissioners. If the GB commission is to have a presence in Glasgow, there are strong arguments for co-location, because the two commissioners will have to liaise closely. Obviously, such things depend on what is available at the time, what looks like being

best value for money and where it is sensible and practical to share resources. Those considerations will all be taken into account when decisions are made. I hope that that answers your question. It is quite an amorphous thing that we are dealing with when it comes to the practicalities, but we are actively looking at sharing services and at co-location, and there would be quite a strong argument for the co-location of our commissioner and the GB commissioner, as they will have to liaise closely.

I think that the other issues that the committee may wish to raise with the minister have been pretty well covered.

Huw Williams: Most of the SPCB-related issues have been covered.

10:30

Nora Radcliffe: The SPCB takes the view that the accountable officer should be the commissioner. However, the bill says:

“The chief executive is the accountable officer”.

If that requirement were to be removed, the Parliament could consider whether a chief executive was needed; the two issues are tied to each other. It is also important to have clarity on budget setting.

As I said earlier, the bill should also include wording such as that which was included in the Commissioner for Children and Young People (Scotland) Act 2003 on the grounds for removal from office. Such wording would provide comfort to the office holder and the SPCB.

Is there anything else that we should mention, Huw?

Huw Williams: No. Those are the SPCB-related items. The SPCB submission also raised questions on areas that are outwith its remit, one of which concerns section 9, on report of inquiry. Our question is, what will happen to an excepted inquiry report? The issue is one for the committee to consider.

The Convener: Thank you. We have no more questions. We thank you for your evidence. The committee would be pleased to receive comments from the SPCB on the Paris principles. One of the debates that we are having is about the balance between accountability—about which Nora Radcliffe rightly spoke—and the independence of the commissioner. We need to ensure that the right balance is struck. Effectively, the SPCB will act on behalf of the Parliament on the matter. We want to know that, broadly speaking, the SCPB is satisfied that its determinations are in line with the Paris principles.

Nora Radcliffe: We will write formally to the committee on the matter. I thank the committee for the opportunity to give evidence today. The SPCB appreciates that.

The Convener: Thank you.

10:32

Meeting suspended.

10:33

On resuming—

The Convener: Our second panel is Robert Brown MSP, the Deputy Minister for Education and Young People, and his team of officials from the bill team, who are Brian Peddie, Ed Thomson and John St Clair. I welcome them and thank them for appearing before the committee this morning. I thank the deputy minister for the detailed letter that he has given the committee. Although we have not had the chance to take it all in, it is a thorough and detailed response, which is very helpful to the committee.

We will move straight to lines of questioning. The key question for the committee is: what is the need for a Scottish commissioner for human rights? If you have read the *Official Report* of our discussions on the bill, you will know that a number of witnesses—the most notable of whom is probably Lord McCluskey—have made the case that prompts that question. They have said that we are taking human rights seriously and have a number of organisations and bodies that are duty bound to promote human rights. In addition, the elected members of the Scottish Parliament have duties in this regard and the Parliament has incorporated human rights into its legislation. Given that the issue is being taken seriously, why, on top of all that, do we need a Scottish commissioner for human rights?

The Deputy Minister for Education and Young People (Robert Brown): If I may, I will take a little bit of time on my response to the question. As the committee rightly says, that is the core question and I have a variety of things to say by way of response.

I was impressed with the evidence that the committee heard from the New Zealand chief human rights commissioner. Among other things, she mentioned that before the New Zealand Human Rights Commission, with its promotional facility, was established, civil servants and local authority officials had little concept of human rights, notwithstanding the fact that New Zealand legislation placed duties on them similar to the ones that you described.

The committee has, rightly, been concerned with whether the Scottish commissioner for human rights will add value. There has perhaps been a reluctance on our part, for which I take some responsibility, to provide too much detail, because every commissioner has to develop their own priorities and must be—and must be seen to be— independent of Parliament. We do not want to suggest that the Executive's priorities for the independent commissioner's remit are this, that or the other.

It is worth answering your question in a number of ways. First, it is worth saying that the bill empowers the commissioner to do a number of things: monitor law, policy and practice; provide information, advice, guidance and education; carry out inquiries; and intervene in civil court proceedings. In my view, a significant part of monitoring law, policy and practice—and indeed providing guidance—will be to issue guidance to Parliament itself in the form of human rights analysis of appropriate legislation.

The argument has been made that both the Executive and Presiding Officer have to certify that bills are human rights compliant, but that takes the form of a yes or no statement and does not get to grips with the reasoning, although some is provided in the policy memorandum. It is helpful in many instances to have a fuller analysis.

When I was a member of the Social Justice Committee considering the Housing (Scotland) Bill in the previous session, there was considerable controversy about the right to buy for council and housing association tenants. The Executive told us at an early stage that whatever was done in the future, we could not interfere with the existing rights of council tenants, because of the European convention on human rights. Politically, that argument might be right—I am not making an issue of that—but I was and continue to be less than sure that it is correct legally, because of the proportionality dimension to the ECHR and the discretion that is given to national legislatures to make appropriate decisions. An independent analysis of those issues by a human rights commissioner might well have cast a different light on the argument.

Another example is in the realm of civil liberties, where all sorts of issues are arising constantly in law and practice about the balance between the individual and the state, such as the retention of DNA samples when people have been acquitted of the charges brought against them; the use of police weapons; prisoners' rights when they are in detention; the right of women to have their babies with them in prison; and slopping out, which I know that the committee has considered in detail. Many of those are extremely tricky issues relating to vital subject matters, where the cost of court

cases is high and the outcome for individuals is important.

I will dwell a little on the commissioner's role; I am sorry to go on about this at length, but I think that it is important. The commissioner does not declare the law—I know that you have had some discussion about that—but his or her opinion is a persuasive power. It will influence the debate powerfully and might help Parliament and other public authorities to consider matters and arrive at the best conclusion. Public authorities might have a duty to comply with the ECHR, but we know from the evidence of the New Zealand commissioner and from many spheres of action that such a duty requires drivers of public policy and administration to bring about the highest standards on the ground.

That brings me to the commissioner's power to provide advice and training. There is an extremely good study relating to Carstairs that shows what can be achieved. In a case like that, the commissioner could hold an inquiry into an individual institution. Until the 1980s, Carstairs had a poor reputation; it was largely custodial and provided little in the way of care, therapy or rehabilitation for the inmates. The medical sub-committee considered the wider implications of the Human Rights Act 1998 and realised that the subtleties and implications were beyond the expertise that it was able to bring. It brought in Professor Allan Miller, who is a consultant and expert on human rights issues, and major changes were made as a consequence. The comment that the committee made afterwards was that the human rights approach provided it with an immensely practical framework within which to consider the difficult decisions that had to be made. Human rights were mainstreamed in that situation in a way that had not been possible before.

I make that point largely in answer to Lord McCluskey, who suggested that human rights in the ECHR sense are not like legal rights and do not provide an enforceable framework. In my view, human rights have a double function. They provide enforceable rights for individuals—they are declared and enforced daily in the courts—but they also provide a basis for qualitative improvement in the performance of public authorities, as in the Carstairs case.

I will give some examples of areas that the commissioner might examine. My examples are drawn from human rights cases. They include, first, the rights of victims of crime or abuse and access to justice in remote areas or in specialist areas. The justice committees examine and discuss those matters from time to time. Further examples are the rights of Gypsies on land and the implications for elderly residents of the closure

of care homes. In the latter example, the commissioner's focus would be not so much the closure as the way in which it is done and the alternatives.

The commissioner might also examine school uniforms in relation to religious requirements; the care and feeding of patients in hospital wards; the rights of sufferers from particular conditions such as HIV/AIDS; debt-recovery procedures; and the use of non-conviction information in child protection—that is topical, given events involving the Secretary of State for Education and Skills. There is a call to have another commissioner to examine the rights of older people more generally, but in my view such matters can be dealt with more than satisfactorily under the banner of the human rights commissioner.

The ECHR requirements will allow the commissioner to take a balanced look at the issues that I mentioned and to consider the human rights of various groups. I contrast that with the position of the commissioner for children and young people. Her remit contains aspects of human rights but, as she said, her role is specifically to advocate the rights of children. The human rights commissioner will be able to assist the Parliament by, for example, analysing the thorny issues that arise when teachers are wrongly accused of physically abusing children, such as the teacher's right to expenses if they sue the child and the teacher's right to anonymity. The commissioner for children and young people would tend to be engaged on one side of that issue and would not have the more dispassionate and impartial view that could be taken by the human rights commissioner.

Many other issues are involved, but I hope that I have given you a general outline of the parliamentary analysis side and an idea of the slot into which the human rights commissioner will fit against the background of the other commissioners, institutions and bodies.

The Convener: That was helpful, but I would like to break it down a bit. You highlighted some useful examples—I have to say that, in evidence, we have been a bit short of examples. We are trying to make the bill real for the people whom we represent, so examples are helpful. The issues that you mentioned are all issues that elected members talk about and members act as advocates on behalf of people who are affected by those issues. One question that arises is whose job it is to advocate on behalf of some of our most vulnerable groups.

You said that one of the commissioner's roles will be to provide an independent analysis, but you highlighted the fact that they will not have a declaratory power. It would be scary if one individual had such authority, but I can see that

there might be a role for the commissioner to provide an independent analysis. How will that be done? Will you talk us through the procedure? The committee sometimes has to wrestle with the rights of the individual, particularly in criminal law legislation. How do you envisage that we will use the assistance of the human rights commissioner?

Robert Brown: The commissioner could become involved at the request of the committee or might regard something as part of their workload. Obviously, in sorting out their workload, the commissioner should know about and keep up to date with the forthcoming legislative programme. Of course, not every bill has significant human rights implications, but many of them do. The primary point at which the matter will come into focus and the human rights commissioner might have some input is when the committee is considering its stage 1 report on a bill, after there has been some consultation. It is important for committees to get some guidance not so much on the decisions that they make on the issues but on the issues that arise. We in the Parliament have our own perspectives on particular bills, but we are not experts on human rights issues and we are not expert lawyers.

It will sometimes be difficult to work out all the conflicts of interest, to tease out the implications for citizens or to strike a balance, but the commissioner would assist the committees and the Parliament in doing so. We do not need to go too much further into the matter, because it can be worked out between committees, the corporate body and the commissioner. I suppose that the issue relates to the commissioner's work programme, which the committee has also discussed. Suggestions could be made to the commissioner about matters that they might want to take on board.

10:45

The Convener: The issue is important. To give an example, the protection of children is a live issue. In considering the creation of risk of sexual harm orders, the committee felt that there were fine balances to be struck. You may not be aware of this, but chief constables will be able to apply to the court for such an order without having conviction information, if certain tests are satisfied. That is a strong power, so we were concerned about the human rights impact on individuals who are subject to such orders. I do not want to be bounced into decisions on such matters as a result of the human rights commissioner declaring that, in their view, a certain decision would be a breach of human rights. I feel strongly that the commissioner should not have that role.

If I, as an elected member, am considering where the balance lies in deciding how to vote on

an issue, an analytical report from or discussion with someone who has expertise in human rights would be useful, but there is a crucial difference between those two possible roles for the commissioner. Do you agree that that is an important difference? Elected members could be bounced into making decisions. Because the word "advocate" has been used so often in relation to the commissioner, I worry about the mechanism.

Robert Brown: We must be careful about what we say on the issue. I do not like the use of the word "declarator" in this context. Nowhere in the bill does it state that the commissioner will have the role of declaring the law. As I tried to make clear earlier, that will certainly not be the commissioner's role. It is absolutely clear that the courts declare the law and Parliament makes it. However, Parliament should not be too worried about authoritative-sounding opinions. We employ experts of all sorts in different ways—we have committee advisers and other people who give views. We also have screaming headlines in the press from time to time. In the overall scheme of things, an authoritative view from the human rights commissioner will not bounce MSPs into decisions that they would not otherwise make.

This is a matter for the commissioner, but I imagine that their analyses or opinions would be expressed in a fairly legalistic form and would lay out the consequences on the one hand and on the other hand. Equally, the commissioner might well want to be reasonably definite about his or her views on certain aspects. That is their role—we do not want analyses that simply lay out both sides of the argument with no end result; we want the commissioner to give guidance.

Human rights are not the only issue. I well remember attending a lecture that Gordon Jackson QC MSP gave at which he said that we could abolish the right to a trial by jury without breaching human rights—the issue is not the be-all and end-all or the only matter to be considered, but it is an important matter. We should not use phrases such as, dare I say it, "rights of declarator". The commissioner's analyses will be one source of information that comes to committees and the Parliament. It will, I hope, be reasonably authoritative, although that will depend on the standing of the person who is appointed. Nevertheless, ultimately, the political and other decisions will be for members to make in accordance with their conscience.

The Convener: I presume that the Scottish Executive is satisfied that the commissioner will have general public support. Some of the issues that you have raised are important to many people, but others are exclusive and only people who operate in certain circles will be interested in them. Have you given any thought to the general

public's reaction to the creation of another commissioner on an issue with which many people already deal, and with a potential cost of more than £1 million a year?

Robert Brown: People will have a range of views, as the MORI poll that was carried out for the committee indicated. No single view emerged from that poll—if I recall correctly, the most common view on what human rights meant was shared by only 17 per cent of respondents. However, the poll showed that there was fairly wide acceptance of the importance of human rights, especially for people at the bottom of the scale, by which I mean people who live in deprived or vulnerable circumstances. Oddly enough, the greatest acceptance of the importance of human rights was among working-class people, as the poll defined them. That seemed to reflect the fact that, more generally, there was considerable understanding of what, broadly, human rights legislation is designed to do.

There are obviously misunderstandings that need to be cleared up and some people are more concerned about some aspects than others. Let us take the thorny question of criminal issues, for example. I guess that there is likely to be less sympathy for people who take part in nasty criminal activities, but it is important to say that the human rights commissioner should have a role to play in relation to the rights of victims. The convener seemed to suggest that the role of the commissioner would be to act as an advocate, but apart from advocating human rights, the commissioner must ensure that high standards of public performance are met and analyse whether that is the case.

The commissioner's ability to examine the rights of different sorts of groups or individuals in different situations will be important. In court cases, we tend to think of the rights of the accused vis-à-vis the majesty of the law that surrounds them, but the issue is wider than that. The commissioner will have a role in considering systemic matters. That takes us into the realm of the rights of groups and away from the rights of individuals in particular cases, which are for the courts' authority and lawyers to deal with.

Mike Pringle: In a previous answer to the convener, I think that you mentioned the standing and authority of the person who is appointed as the commissioner. I want to explore that. To me, the human rights commissioner will probably be the most important commissioner in Scotland, so surely we must make certain that that person, whoever they are, is highly respected and that there is no doubt about their ability, so that people will listen when they make a pronouncement. Bearing that in mind and taking into account what you have said about the legal aspects of the

commissioner's role, can you say whether the person who is appointed will have to have a legal background and be able to demonstrate considerable expertise?

Robert Brown: That is fairly likely, but we have not put in the bill that that is a requirement of the job. People who are qualified and have standing as solicitors, advocates or members of the judiciary would all count as having a legal background, as would certain academics and people who come to the law from a different perspective. We should not necessarily rule out people who have no legal background, but it is reasonably unlikely that that will be the direction of travel. The analytical requirements of the role require such expertise to be brought to bear. I have no doubt that when the corporate body works out the job specification, such matters will be given further consideration.

Mike Pringle: You would agree that we must ensure that, whoever the person is, their opinions cannot be in doubt. They must be someone of serious expertise.

Robert Brown: I would not phrase it in quite that way. They would certainly have to be someone who would be listened to. That is the bottom line. They would have authority not just because of who they are but because of what they say. They would need to build up a track record of being reasonable, sensible and right. That, too, will be important to the quality of the appointment that we make.

Margaret Mitchell: At stage 1, we are determining whether the commissioner might add value, which is fundamental. So far, the evidence on that has been sketchy. You have outlined some definite ways in which you think that having a commissioner would add value. You spoke about the task of analysing whether bills were compliant with human rights legislation. On many occasions, the convener has made the point that the Parliament has not yet passed a bill that has not been HR compliant. A commissioner has not been necessary to achieve that.

You mentioned the Carstairs experience. In that situation, it was clear that the medical sub-committee did not have the necessary competence and it brought in an adviser. You outlined how well that worked. Policy was changed and, again, it was not necessary to bring in a commissioner.

You said that the commissioner would be a driver of policy, but I have a reservation about that. You mentioned, in regard to the children's commissioner specifically, that sometimes there may be no definitive right and wrong answer; that clearly can be the case and a decision may be a matter of proportionality and weighing things up.

Surely it should be for elected politicians to make such a decision with the advice of the relevant commissioners instead of looking to the new commissioner in effect to set policy.

Robert Brown: It is clearly the role of elected politicians to make many of these decisions. However, the Justice 1 Committee and the Parliament are not making decisions on the ground about local authorities, quangos and a whole range of things, although there may be a duty of accountability, through ministers, or to councils on those matters. As a wide range of bodies of that kind is covered by the duty under the ECHR, considerable issues could arise and the ability of the commissioner to be proactive is important.

You make the point—the case could be argued both ways, and I was conscious of that as I was speaking—that the expertise could be provided in other ways. I accept that entirely. However, in Scotland there is a fairly small community of human rights professionals with the necessary level of expertise. It is important that there is a centre of expertise, which the commissioner would provide, to draw people in, to act as a fulcrum and to provide the resource that is needed to back up inquiries like the one that was undertaken at Carstairs. I accept entirely that the expertise could be provided in other ways, but the functions of the commissioner, including the promotional function, must be seen in their totality.

As it happens, the people at Carstairs were far-sighted enough to bring in expertise but, in other instances, the officials or the persons in charge of an institution, local authority, quango or other public body could charge on in the same old way without being particularly apprised of the human rights issues. You heard compelling evidence from the New Zealand chief human rights commissioner on the point that there is a promotional aspect to the commission as well. Joining together the promotional aspect, the analytical aspect for Parliament and the advice and inquiry aspect gives a critical mass that is not got in any way other than through the commissioner proposal.

Margaret Mitchell: Is there not a disadvantage in taking such an holistic approach? You are almost sidelining the very people who have expertise and who have been working on human rights for many years, who could make the situation much clearer. You have provided a list this morning. How many commissioners do we need, if they are going to delve in there, and where is the duplication? Who will have the final decision if another commissioner may challenge totally what the human rights commissioner says? Are we not creating more problems and making the law less clear?

Robert Brown: No, I do not think so.

Margaret Mitchell: Are you not almost sidelining or bypassing the expertise that is already out there by creating a commissioner?

Robert Brown: The point that I was trying to make is that there is perhaps not as much expertise as we would like out there. The commissioner will provide a fulcrum for producing more of it. It may well be that not all the commissioner's activities, such as providing human rights training for public bodies, will be done in-house. Nevertheless, the commissioner will provide a centre of expertise, which is very important. I do not accept your proposition about the sidelining of expertise; in fact, there will be a development of expertise in consequence of the creation of the commissioner.

Duplication is an important issue. Executive ministers have been concerned from the beginning that the commissioner should fit into an appropriate slot and not do the job that other people are doing. That is why there is a specific duty in section 14 to ensure that there is no duplication. We talk about protocols and agreements with other bodies and people, which could be the commission for equality and human rights at the GB level or the commissioner for children and young people. From my previous experience as the convener of the cross-party group on human rights, which related to a number of groups, I know of the close relationship that there already was between the Equal Opportunities Commission, the Disability Rights Commission, the Scottish Human Rights Centre and other bodies of that kind. I think that there will be a reasonably good understanding between the different bodies that are involved in these areas about where the centrality of their individual roles is; where definition needs to be made; and where there will be difficulties with overlap, which will have to be resolved by agreement. There is enough work across the board of the different bodies, as you rightly say, to keep people going in connection with that.

Having said that, I am not suggesting that the commissioner will do all the things that I have mentioned. The examples that I have given you are largely issues that came out of individual human rights cases, which have been decided at various levels, often in England but sometimes in Scotland. Those issues have arisen over a number of years—happily, they have not all arisen at once—and the commissioner will have to programme himself or herself to be able to deal with such issues in a rational way.

11:00

Margaret Mitchell: I want to pick up on your development-of-expertise policy. You said that you would not sideline the existing expertise of the

many non-governmental organisations out there, or of the other commissioners. Rather than spending this £1 million budget on the creation of a centralised commissioner, would it not be more effective to spread that budget over those non-governmental organisations and commissioners to allow them to staff up and get the expertise or the kind of advice that the Parliament's committees would get from people who are steeped in human rights issues from all angles? Would not that be preferable?

Robert Brown: That is the point that Lord McCluskey has made. He is one of only three people involved in the original consultation who were opposed to the concept of the commission. Lord McCluskey seems to come from a rather different strand on human rights with a definite view on the role of the courts in such matters, which I do not think fits with the views that we got from anybody else.

I do not think that it is true to say that the other commissions have that level of expertise. The issue of human rights is, at best, incidental to the operation of the children's commissioner—which is probably the nearest one—or the public services ombudsman, among others. They have particular roles to which human rights are incidental and, in some cases, they have to advocate for particular interest groups. That is different from the position of the human rights commissioner, whose job it will be to develop specific expertise in human rights generally, not to advocate for anybody in particular but to improve standards across the board through his promotional role. The human rights commissioner's remit will go distinctly wider than just the development of expertise; a series of functions are laid out in the bill, which are relevant to that context. That view was shared at an earlier stage by senior luminaries in the Conservative party, such as David McLetchie and Lord James Douglas-Hamilton, in a debate on the issue in 2000. It is not a view that is limited to the coalition parties.

Margaret Mitchell: Right, but I return to the point that, if the expertise is to be developed, should we not fund those people to develop human rights expertise rather than rely on the central point? If the children's commissioner is an advocate for children, should they not be up to date on children's human rights? Should not all the other commissioners be up to date? Should not the non-governmental organisations be funded to bring their case properly rather than through a third party? Should they not have more than a sketchy view of things? That is another way of looking at it. Lord McCluskey had a particular way of arguing it; I am asking you whether that would not be more effective.

Robert Brown: No, I disagree fundamentally on that point. Apart from any other issues, we have tentatively suggested that the human rights commissioner might have a role in providing expert advice to the other commissioners. As I have said—and as you rightly say—it is important that those commissioners have an appreciation of and mainstream human rights in their work as well as they can. However, that is not the central requirement that is placed on the information commissioner, the standards commissioner or the public services ombudsman, for example. Human rights are incidental to their work; therefore, there will be added value in the existence of the human rights commissioner, to whom such matters will be more central and who will be more impartial in handling human rights than some of the other commissioners with their slightly different roles.

Margaret Mitchell: Could not the public services ombudsman's function be increased to fulfil that role? She is already considering some human rights issues.

Robert Brown: Yes, I saw the evidence that the public services ombudsman gave in that regard. She made the point that, in one or two other countries—which perhaps started from a slightly different point—the role of the ombudsman service has been expanded to include human rights. That is not the usual remit, but it leads us into the territory of the ability to support individual cases. The crucial difference between the public services ombudsman and the proposed human rights commissioner is that the public services ombudsman is very much case-driven. Her role is to deal with maladministration in individual cases and to take things forward in that connection; she does not have a sectoral role in the way that the human rights commissioner will have one. Nor, indeed, is she required to consider human rights issues specifically.

The answer to your question is yes, it would be possible to do it in that way. I do not know whether that would necessarily bring about budgetary savings, because we would have to develop a whole new panoply of expertise. Also, it would dilute what we are trying to do with the human rights commissioner. My view, which may not be entirely shared by my colleagues, is that human rights are central to those other matters. The human rights commissioner is the bit in the middle that percolates out to the activities of all the different commissions. I do not think that what you suggest is the best way; it is certainly not what has been proposed by the Executive in the bill.

Margaret Mitchell: Was that possibility considered prior to the bill?

Robert Brown: Consideration was given to a number of options. I was not in post at that point,

so I do not know the content of the earlier discussions.

Brian Peddie (Scottish Executive Justice Department): Some consideration was given to the fundamental question of the role of a commissioner, the need for a commission and whether a role could be given to other bodies. It is probably fair to say that the roles of the other commissioners and the ombudsmen were not all fully formed at the time that the proposals in the bill began to be developed. I would not necessarily claim that there was a full, in-depth analysis of the option of giving the human rights remit to the public services ombudsman; however, some consideration was given to whether, instead of having a free-standing commissioner for human rights, the role might be given to the ombudsman or indeed to some other body.

Robert Brown: Among the questions in the first consultation was something along the lines of whether there were other ways to fulfil the function of a human rights commissioner. That is exactly the point with which you began. One of the main purposes of the consultation was to find out the public response to that question. For what it is worth, from my reading of the evidence, Alice Brown's view—even having an interest in where this goes—was that the preferred method was to create a human rights commissioner.

Margaret Mitchell: She also said that there was some advantage in having a one-stop shop and putting all the functions with her.

Robert Brown: I accept that entirely. To some degree she has come to that conclusion after having amalgamated a number of ombudsmen's roles that were previously dealt with separately. She has experience of that. The point that we have made throughout is that there is a complementarity—if that is the right word—between the roles of different bodies here. I would certainly wish and expect, as I imagine the corporate body said in its evidence, for there to be as much co-operation between the bodies as possible and as much common use of back-office services and so on as it is reasonable to have in the circumstances. That is entirely reasonable. Alice Brown has developed a number of IT activities, in which she is trying to interest other commissioners. That has gone forward in some respects. It is all good stuff.

The Convener: We have dealt quite thoroughly with this question, but I have one point to raise in conclusion. You say in the opening paragraph of your evidence to the committee that

“there is at present no statutory person or body whose express purpose is to promote human rights”.

I am about 90 per cent in agreement with that. We feel strongly, however, in making the case—or

not—for a human rights commissioner, that we have a dimension in Scotland that other countries do not have; devolution has been successful and we have an additional layer of Government. MSPs are legally bound to ensure that we incorporate the ECHR in legislation. It would be helpful if the Executive could reiterate the backdrop to the human rights issue. I have a great deal of respect for the expertise of witnesses in their field of human rights—I trust their judgment—but I have been concerned that none of the witnesses has mentioned the elected legislature and its role. It is important in Scotland to pin down where the gap is—where the need for a commissioner is—because we have devolved Government.

Robert Brown: As you rightly imply, human rights is at the heart of the devolution settlement. The Human Rights Act 1998 is part of the Scotland Act 1998 to all intents and purposes. We therefore have a much higher profile for human rights in Scotland than in the UK or in other countries.

The human rights commissioner is an instrument of the Parliament—I use that word advisedly because the commissioner has an independence that I am not trying to take away. The Parliament is creating the human rights commissioner through this bill. The commissioner will add to our corporate ability, across the board, to ensure that human rights issues, which are extremely important to the Scottish Parliament, are implemented to as high a standard as possible. Ultimately, that is what it is all about. We should remember, of course, that Parliament has the power to hire and fire the commissioner and to direct them in certain circumstances. The commissioner will be conscious of the primacy of the Parliament.

Stewart Stevenson: I start with the modest observation that Scotland has fewer politicians per head of population of any country in Europe—34, which compares to 42 in England.

Robert Brown: I am not convinced that that observation will attract public acclaim.

Stewart Stevenson: It is merely an observation that those who claim that politicians need additional support from a commissioner such as the one that we are discussing might care to consider.

If I may, I will move on to other aspects of what the minister described as “complementarity”. Minister, you will be aware that the committee visited Westminster to talk to officials and the joint parliamentary committee on Westminster’s Equality Bill, which is at a somewhat more advanced stage than our bill. In your letter to the committee convener, you made some observations on the extent of powers. I want to

explore a difference between the view of the Executive, and what you say under the heading “Extent of powers” in your letter. You suggest that the Parliament does not have the power to give the Scottish commissioner the right to raise legal actions in his or her own name. However, I put it to you that the advice that we got in London from officials and politicians on the joint committee, which is made up of members of the House of Commons and the House of Lords, was that we do have that power. Have you considered their opinions on that matter in reaching your view?

Robert Brown: Our officials have had discussions with officials in London. The view that is laid out in my letter follows logically from the scheme of the Scotland Act 1998. Not to beat about the bush, the argument is a bit tortuous. It goes back to the definition in the Human Rights Act 1998 of victims being people who bring actions of one sort or another. The view that has been taken by our officials—in agreement with Westminster officials, I thought, although I might be wrong—is that, because that act is linked with the Scotland Act 1998 in terms of how the Parliament is set up, we cannot give our commissioner the power to raise individual cases.

I know that there is phraseology in the Equality Bill that looks forward to the Scottish commissioner and allows for consent from the Scottish commissioner in certain situations to such actions being brought by the GB commission, but I suggest that the primary concern relates to cases that raise devolved and reserved issues. It would probably be artificial to have a case in which, for artificial reasons, as it were, a bit of the argument could be made with the support of the GB commission but the other bit could not. I think that that is the situation that is looked to by the legislation that is going through Westminster. If you recall, support was originally not going to be given to individual cases in that way. That came in by way of an amendment later on.

I confess that that leads to a difference between the powers of the GB commission and the powers of the Scottish commissioner. Of course, that is not the only difference. The Scottish commissioner has powers to enter premises, which—I think I am right in saying—are not given to the GB commission. We are making our own legislation, quite rightly.

The point is that if we are not empowered by the ECHR arrangements in the Human Rights Act 1998, it is difficult to see how we could be in a position to give powers to our commissioner that would require Westminster legislation to bring them about.

11:15

Stewart Stevenson: That was quite a wide-ranging answer, minister. Later, one of my colleagues will develop issues relating to the power to enter premises.

For interest, I direct you to section 17 of the bill before us. It defines the meaning of "Scottish public authority". Interestingly enough, section 17(a)(ii) includes in the definition authorities that are only partly dealing with Scottish Parliament responsibilities, in other words, those that cross the boundary—

Robert Brown: Are you talking about the Human Rights Act 1998?

Stewart Stevenson: No, I am talking about the Scottish Commissioner for Human Rights Bill. I apologise for my lack of clarity.

Robert Brown: No, I think that I allowed my mind to wander further than I should have from this rather complex argument.

Stewart Stevenson: Perhaps, but perhaps not. The subject is complex and I think that we do not yet want to restrict your wanderings, although we might later.

The boundaries between the responsibilities of the Scottish Parliament and those of another place are addressed in that section, in a sense. The section appears to give this Parliament's commissioner some locus not to be shut out from consideration of such matters. However, the need for our commissioner in effect to ask the GB commission to act in legal matters appears to be a significant gap and to change the responsibilities that this Parliament can exercise over some of the things that happen that are related to Scottish administration. The Westminster commission will act in matters that are wholly to do with the powers of the Scottish Parliament.

That is the background. Will you revisit whether we have the powers to do what we have been talking about? This committee met particular officials who expressed particular views in answer to particular questions that were put to them. I accept that that might not be the same set of officials that you have spoken to. Further, I would not want to make any judgment as to the capability of the officials to whom we spoke to give an absolutely informed answer. However—alternatively—I think that it would be opportune to examine the question of whether a reverse Sewel motion might give us the powers that we are talking about, which it would appear to make sense for us to have.

The bottom line is this: is this situation where you wanted to end up, in policy terms?

Robert Brown: I will start with the policy. The concept that we have proceeded with from the beginning has been that we have not been keen to go in the direction of allowing the commissioner to take action in their name. We did not see that as being the commissioner's primary function. It is perfectly true that, in some other jurisdictions—Northern Ireland, for example—a substantial case-work function has grown up around the human rights commissioner, perhaps for local reasons. However, our decision was made for two reasons. First, an expansion of the remit would have budgetary implications; secondly, there are other bodies that are relevant in this area, including the courts, as Lord McCluskey quite rightly pointed out, whose role it is to be active on these kinds of issues.

At the beginning, the equalities commission approach came from the fact that it had some of the relevant rights because of its anti-discrimination and equality role, rather than its human rights role. There was a unity of concept at the beginning that has gone away a little bit as a result of the slight change that has been made to the Westminster legislation.

One of my Liberal Democrat colleagues in Westminster tabled an amendment to the Equality Bill. I think that it was debated yesterday.

Brian Peddie: It was debated on Monday.

Robert Brown: In response to the amendment, the minister, Meg Munn, said:

"The legal effect of this amendment is highly ambiguous and for that reason alone the Government must oppose it ... If the purpose is to override the victim test in section 7 of the Human Rights Act, we do not think the amendment is clear enough to achieve it. However, it is clear that the amendment is intended to deal with a matter—namely, the powers of a person established by Act of the Scottish Parliament—that falls within the area of devolved competence of the Scottish Parliament."

So, without going into the ins and outs of the side issue of the amendment, this gets into the situation that we are talking about—the limitation that the Westminster Government sees in proceeding in this fashion.

Clause 7(1) of the Equality Bill—the principal clause—provides:

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

That was the starting point of the equalities legislation as well. In the debate in the Commons, Meg Munn went on to say:

"If and when a Scottish commissioner for human rights is established by Act of the Scottish Parliament, it will be possible to consider whether any further provisions need to be made in relation to reserved legislation to give the

commissioner the powers that he or she needs to carry out their duties."

That would be done

"by way of an order under section 104 of the Scotland Act 1998. Such an order would be taken forward by agreement between the Government and the Scottish Executive, and would be subject to scrutiny here in Parliament."—[*Official Report, House of Commons*, 16 January 2006; Vol 441, c 652.]

That is, in the Westminster Parliament.

The Executive's policy position is that we do not need, and should not proceed in the direction of giving the commissioner powers to take cases in their name. If the view of Parliament ultimately differed on that, and if Parliament wanted to proceed in that direction, it would require legislation at Westminster in the form of an order made under section 104 of the Scotland Act 1998 to give us the powers to do that. We should not get too tied up in the technicalities of all this; the central question is whether or not we want to go in that direction. That must be the committee's primary concern.

The Westminster Government has already said that it is not talking about the GB commission operating in devolved areas without the consent of the Scottish commissioner. I accept that that does not entirely square the circle—which is Stewart Stevenson's point—but I cannot conceive of a situation in which the Scottish commissioner, which was set up under devolved legislation to deal with devolved issues, would give consent to the GB commission to make inquiries entirely in a devolved area. I feel that the areas of concentration would be those in which there is some overlap—where both devolved and reserved issues arose out of something that we had done in that particular context.

Stewart Stevenson: Let me give you an example, minister, to test whether I understand this correctly. It is perfectly possible that I do not. In your opening remarks, you referred to some of the cases that the commissioner might take on. One of those was a teacher being falsely accused of improper conduct in relation to a pupil. Under the bill, the Scottish commissioner for human rights could make inquiries about the general framework and could report on whether matters were being conducted in an appropriate manner that was consistent with human rights. However, that would do nothing to move forward any individual's case unless the local authorities were to take action in relation to teachers being allowed to teach, and so on. We are talking about highly sensitive and complicated things in which there would be great variability in instances that might occur.

Is it envisaged that the Scottish commissioner could ask the Westminster commission to take

legal action to change how local authorities work in such cases? The individuals concerned would have the legal capacity to take action in any event, but they would not necessarily have the financial capacity to do so because, as teachers, they would probably be at an earnings level that would largely disbar them from getting support from the Scottish Legal Aid Board. I choose that as an example to illustrate the point. Where, in this maze, would we end up delivering on the human rights of those individuals, who the commissioner has said are not being properly treated, if the authorities are not under the cosh of legal enforcement to make them change how they work? That appears to be the power that the Westminster commission will have—not the Scottish commissioner—in what is a wholly Scottish matter.

Robert Brown: Even in the Westminster context, the likelihood of the GB commission supporting a large number of individual cases is not that great.

Stewart Stevenson: Allow me to clarify, minister. Although I am referring to the delivery of justice to individuals—which is what we have to ensure—I envisage that in the sense of the GB commission taking action on the general issue.

Robert Brown: I accept that entirely; however, we are talking about the support or the institution of individual cases and, frankly, I cannot conceive of a situation in which the GB commission would support the taking of such an individual case in Scotland—which, you will accept, is entirely a matter of devolved Scots law with regard to education and schools—or, indeed, in which the Scottish commissioner would regard it appropriate to consent in that particular context.

Stewart Stevenson: So would it be a matter for Alice Brown to deal with? That brings us back to her assertion that she is involved in human rights and should be given the additional responsibilities to—

Robert Brown: Her issue proceeds from maladministration and her role is slightly different. She might have a role in that matter, as might others; however, I suspect that, in the sort of case that you are talking about, a legal decision by the court would be the end of the matter, failing legislation to put the matter beyond doubt. In relation to legal aid, many trade unions support their members in taking legal action by paying for lawyers. I do not know the position of the teachers unions, but support of that kind might be available. That is a broader issue.

It is not envisaged that the human rights commissioner or any of the other commissioners will be able to solve all the problems of the universe. As the convener said earlier, there is a

role for Parliament in these matters. Parliament might decide to legislate in particular areas of concern, such as that which you mention, and we should not ignore that aspect in the consideration of these things.

Stewart Stevenson: You used that example yourself in your preliminary remarks. It is still unclear to me how the commissioner will achieve justice for the individuals in the situation that you described.

Robert Brown: I was talking about that in the context of, among other things, the commissioner's power to raise awareness and to hold inquiries. It would be perfectly possible for the commissioner, if he or she saw fit, to hold an inquiry not into the practice of a specific council but into the practice of councils generally in matters of that kind and to produce a report with recommendations, which the appropriate bodies would or would not take on board, as they saw fit. That would be a contribution of a powerful kind both to the debate and, perhaps, to parliamentary legislation if that was thought appropriate. It would be one remedy or way of taking things forward. Nobody is suggesting that the human rights commissioner or anybody else could solve all the problems by their very existence or that they would have the power to take action in every conceivable situation. That is certainly not the case.

Stewart Stevenson: You thought that that example was important enough to include it in your preliminary remarks.

Robert Brown: Yes.

Stewart Stevenson: Does it matter whether we have a huge debate if, ultimately, there is no process by which the individuals whose human rights we have identified as being transgressed can get a remedy?

Robert Brown: There are two points to make on that. First, as you have rightly identified, there is redress through the courts, if that is appropriate.

Stewart Stevenson: And if that is available.

Robert Brown: Just a minute. There may be issues about support, the applicability of legal aid, and so on, but there is redress through the courts. That is the primary instrument—it always has been—for the vindication of people's legal and human rights.

Secondly, the commissioner will have the power to hold inquiries into specific sectoral issues, which will allow a view to be taken and recommendations to be made about improvements that might be made in certain areas of the law. The commissioner might well do that in the case that we are discussing if he or she regarded it as a priority.

A number of remedies are available, and we are adding to the panoply of remedies and possible forms of action by creating the commissioner—that is the central point. We have departed a little from the equalities commission point, regarding the technicalities of the issue, which I thought was the central point that you were trying to make.

Stewart Stevenson: Are you ruling out the Scottish commissioner in such circumstances or, in the long list of examples of circumstances that you gave, asking the Westminster-created commission to act?

11:30

Robert Brown: It is inconceivable that the Westminster commission would take such a request on board: doing so would not be part of its functions. I accept that, because of the relationship between the two bodies and the two legislatures, there is a difficulty with squaring the circle. In the situation in question, before action could be taken, the power for the victim's interest to be represented would have to be given. The primary issue for the committee and the Executive is whether we want to go in that direction. The Executive's advice is that we do not, because we think that other remedies are available in such circumstances.

We accept that there is an anomaly in the Westminster legislation, the details of which will have to be worked through. I want to correct something. I said earlier that there might well have been guidance from Westminster on the view that was taken, but a direct view has not been expressed about what the end result of all that might be.

Brian Peddie: Do you mean that a view has not been expressed about devolved competencies?

Robert Brown: Yes.

Brian Peddie: We have had extensive discussions with officials in the UK Government. It has not expressed such a view to us and I was not aware that it had expressed such a view to the committee. I would find that rather surprising, but I do not know what was said to you.

Stewart Stevenson: I want to be cautious and I was careful to say that the capacity in which a view was expressed to us was not necessarily of the same quality as the capacity in which a view was expressed to you. I acknowledge that absolutely. However, committee members were left uncertain about what the position was.

I will move on, which the convener would have encouraged me to do anyway. You are ruling out asking your colleagues at Westminster for a section 104 order, which would clear up the

ambiguity and permit us to create the power if we chose to do so.

Robert Brown: The Executive is subject to the decision of Parliament in these matters. Parliament can take a different view from the Executive on where it wants to go. The policy objective and the advice that the Executive is giving the committee is that we do not want to go in that direction, partly for the reasons that I have set out about overlap and duplication and partly because there would be budgetary implications, which we all have to be cautious about in these flattening-financial-trajectory times, if I can use such a horrible phrase to support my position. If the committee and the Parliament take a different decision, that aspect will have to be revisited.

The Convener: I just want to be clear about this, although I think Stewart Stevenson has clarified the point. Our discussion with officials was purely informal. We are not implying that any status is attached to our discussions. I just wanted to nail that down.

The minister is correct to take a view about whether having a section 104 order is desirable. At the moment, I tend to think that the Executive has it right, because there are other ways of achieving the same thing. The question for the committee remains. We want to be clear about who is competent to legislate. Competence would appear to lie with Westminster, because what we are talking about relates to the Human Rights Act 1998. However, even if we all agree in our report that we want the power to be given to the Scottish commissioner, that will not happen because the discussions on the UK bill will have finished. It is not likely that Westminster will go back and open up discussion of that one issue just for us.

Robert Brown: Leaving aside the phraseology of the Equality Bill, which we know is not finalised, I understand—and I look to Meg Munn's statement to the Commons on this matter—that it would be possible to deliver the objective if it was specified in our bill in terms of section 104 of the Scotland Act 1998. I make no claims to be an expert on the technicalities of that. Whether it is the way forward might need to be the subject of further detailed advice, but that is what the Westminster minister said.

John St Clair (Scottish Executive Legal and Parliamentary Services): Speaking as a lawyer, as far as officials are concerned, the unity of advice that we have received so far is that we cannot change section 7 of the Human Rights Act 1998 by way of an act of the Scottish Parliament. The clear advice that we have also been given is that we cannot be confident that it could otherwise be done by a section 104 order. Section 7 looks like a substantive measure in its own right; it does not contain provisions that are necessary or

expedient in consequence of something that the Scottish Parliament has done. I am not saying that section 104 has not been stretched almost to breaking point up until now, but that we cannot be confident that we can effect the change in that way.

Robert Brown: Certainly, it is no longer possible to get anything into the Equality Bill to cover the issue. I return to the point that—

The Convener: I am sorry, minister, but I want to be clear about what John St Clair said. My understanding is that if we decided to change the Human Rights Act 1998 to give Scotland the equivalent power for its commissioner that the GB commission for equality and human rights will have, the change would have to be done by way of Westminster primary legislation.

John St Clair: That is not the only way in which it could be done. It could also be done by an amendment to schedule 5 to the Scotland Act 1998 through an order in council. That is quite a big constitutional measure to take, however.

The Convener: And it still comes under the primary legislative competence of Westminster.

John St Clair: I agree; it is not within the competence of the Scottish Parliament to do that.

The Convener: Before we come to a view on whether the change is desirable, it is helpful to understand the legal technicalities of the issue.

Robert Brown: The matter is extremely technical; I am learning as we go along—learning on the job, as it were.

Stewart Stevenson: My question appears to be more straightforward; it is perhaps also less controversial. Unlike the Westminster bill, which requires the commission for equality and human rights to prepare a strategic plan and to consult on it in advance, the Scottish commissioner for human rights does not appear to be required to prepare such a plan. Is the minister prepared to look further at the issue? Why did we not take a similar approach to that which was taken at Westminster?

Robert Brown: My understanding is that the requirement emanates not from the human rights perspective but from that of the other areas of discrimination for which the commission for equality and human rights will be responsible. The requirement on the commission follows on from the practices of the current commissions—the Equal Opportunities Commission and so forth—which it is to replace.

Section 12 places on the commissioner the general duty to lay before the Parliament an annual report, which must include

"a summary of the action which the Commissioner proposes to take in the next reporting year in pursuance of that duty".

Section 12(3) goes on to provide that

"In preparing a report under this section, the Commissioner must comply with any directions given by the Parliamentary corporation—

the SPCB—

"as to the form and content of the report."

Consultation is an important angle to all this; it is reasonably clear that all sorts of people will want to raise interests in this regard. We do not want some sort of bidding war to take place. The commissioner will talk to all sorts of relevant interests in the preparation of the annual report.

Obviously, there is also a limit to the resources the commissioner can bring to bear on their work in this respect. If we added a requirement to consult, it would not only produce an undesirable formality but be costly. A requirement to consult would add another burdensome duty to those the commissioner is already required to undertake. Consultation is probably far better done informally; the bill allows the commissioner to decide on the way in which he or she will undertake it.

I do not have a closed mind on the subject, however. If people have other views of which they would like to persuade me, I am more than happy to look further at the matter. Consulting is an important issue. This relates to the point the convener made about the extent to which the commissioner will be subject to parliamentary authority. It is important that the Scottish commissioner for human rights is set up in an independent way and that that is seen to be done. If we included in the bill a form of consultation, the implication would be that the commissioner was being directed on the detail of his or her work. That would raise a number of issues. The committee may want to ponder its approach to the matter.

Stewart Stevenson: The minister referred to section 12(3), which includes the wording, "form and content". If we seek to have a commissioner who is independent of the SPCB, is the use of the word "content" appropriate? I do not envisage the corporate body flexing its muscles unduly in this regard, but if "content" is used, it appears that the commissioner will be pretty much under the thumb of the corporate body.

Robert Brown: When I was on the other side of the fence, as a member of the corporate body, I had responsibility for dealing with the commissioners. That was the sort of concern it had. I am perfectly certain that the corporate body will be restrained: "content" does not mean what goes in; it means the subject matter that goes in, if you see what I mean. It is about the things that

have to be included, rather than things that are left out. It is not about what the report itself says.

Stewart Stevenson: Section 18, on interpretation, does not provide a definition for "content", but I am sure that good faith will prevail.

Robert Brown: What I have said this morning is also relevant, if there is ambiguity. This phraseology is used in other legislation and it has the overall implication that I have described against the overall context of the bill.

Stewart Stevenson: I accept that entirely, but I am sure that you also accept that it is up to committees to work from a zero base and to question previously accepted nostrums for their continuing utility or otherwise.

Robert Brown: I would not expect anything else.

Stewart Stevenson: Lord McCluskey questioned the inclusion of human rights beyond what had been legislated for and the extent to which human rights, as defined in the bill, include things that are not capable of enforcement in law. Might the bill's being almost a blank cheque carry with it the danger of a loss of focus on the key issues that are essentially entrenched in law?

Robert Brown: It is fair to say that we do not have an open-ended bill, but the other conventions that you mention form, to some extent, what might be described as background flavouring in the legislative approach taken by the courts. As I understand it, the courts are entitled to have regard to some of those other conventions in instances of ambiguity and to help them in interpretation or in deciding on the approach to be taken. There are obviously specific issues with regard to visiting international human rights committees of one sort or another, which are entitled to call upon us to assist in their endeavours in that regard. That is a specialist sort of area and is pretty self-explanatory.

Section 2(3) specifically states:

"the Commissioner must have regard, in particular, to the importance of exercising the Commissioner's functions under this Act in relation to the Convention rights."

That gives a reasonably clear priority focus to the ECHR, notwithstanding the ability to look for enlightenment in certain instances to the background flavouring issues, as I have described them, where that is suitable.

Stewart Stevenson: It comes back, presumably, to the plans that the commissioner lays before Parliament. Will those plans take account of what weight those considerations will have in the future work programme?

Robert Brown: That might be the case, although I am not altogether certain that the plans

would go into that level of detail, as opposed to saying, "We're going to do an inquiry into X, rather than Y." However, that may be an aspect that should be considered. I would be surprised, to be quite honest, if the workload of the commissioner were significantly determined by the existence of the right to look to other international instruments of one sort or another.

The Convener: Will you, at some point, give the committee a list of the relevant human rights conventions that would come into play?

Robert Brown: I thought that that had been done, but if it has not we are happy to do that.

The Convener: Primarily, the commissioner will deal with the Human Rights Act 1998. We have been given some examples to do with the convention on torture, but there are other conventions and we need to know exactly what powers we would be giving a commissioner and what areas might be covered.

11:45

Robert Brown: I am happy to do that. I think you will find that the European Court of Human Rights and the Scottish courts probably have some regard to those other conventions when they interpret human rights legislation and the ECHR itself. I am not an expert on that, but I think that that is probably the case.

The Convener: That is accepted but, for our purposes, we need to be clear about the situation.

Brian Peddie: Would it be helpful for you to have a list of the international human rights conventions that the UK has ratified? That is what the bill refers to.

The Convener: Yes, and a broad description of what they are about.

Brian Peddie: We can provide that. Would you like copies of the conventions or would you be satisfied with just a summary to start with? I warn the committee that some of them are lengthy.

Mike Pringle: Let us protect the trees.

The Convener: I think that we are all agreed that a summary of the broad issues would be fine.

Brian Peddie: We will provide that.

Mike Pringle: Section 14(2) says:

"The Commissioner must seek to ensure, so far as practicable, that any activity undertaken by the Commissioner under this Act does not duplicate unnecessarily any activity undertaken by any other person under any other enactment"

but section 3 says that one of the duties of the commissioner is to

"keep under review —

(i) the law of Scotland, and

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

Lord McCluskey said that if the commissioner is going to keep the law of Scotland under review, that will be a full-time job and they will have no time to do anything else. Could you comment on that?

The Law Society of Scotland said that it has five people on its staff who are constantly reviewing the law of Scotland. Do you agree that organisations such as the Law Society, the Scottish Law Commission, the Parliament and the Executive are already reviewing the law of Scotland and that, therefore, there is a danger of a lot of duplication? In what way do you think the commissioner will vary what he is doing in relation to the law of Scotland from what those other bodies are doing?

Robert Brown: I think you missed out the qualifying phrase at the beginning of section 3, which is:

"For the purposes of the Commissioner's general duty".

That means that, in relation to the commissioner's general duty of promoting human rights and so on, he must keep under review the law of Scotland. The duty to do so is subsidiary to the general duty in section 2.

I must confess that, when I first read that section, I had similar issues to those that you raise. However, I was advised that that is the right way in which to phrase the section. It does not require the commissioner to consider everything straightaway or even in the future. As you noted, the Scottish Law Commission has powers to consider generic review of the law in certain areas and has done some useful reports in relation to certain areas. For example, the Family Law (Scotland) Bill that we dealt with recently resulted from a Law Commission report.

The approach of the Law Commission is much wider than that of the human rights commissioner. The human rights commissioner's focus remains on human rights and the law of Scotland in so far as it relates to human rights requirements. The initial words in section 3 and the primacy of section 2 are important in relation to the way in which you should approach this issue.

Margaret Mitchell: With regard to the direct incorporation of the ECHR into Scots law, is that not already being considered? Is that not being automatically taken into account in any review?

Robert Brown: Yes. With regard to the incorporation of the ECHR, it should be noted that its provisions are set at a fairly general level—a prohibition against torture, a right to privacy, a right to security of possessions and so on. The

meaning of all of those elements is capable of indefinite development because of changing social conditions. We are not dealing with a static society. As society changes, views about those issues and about the top standard in terms of human rights change as well.

The issue is therefore not just one of the ECHR requirements but of how they are interpreted in the practical situations that come up every day. The American constitution is a similar document in that it is set out in general terms and is the subject of an enormous number of cases before the courts in America. Similarly, the ECHR has been examined in the European Court of Human Rights and courts in the UK.

The role of the commissioner is to be aware of such issues, to be up to date with relevant legal decisions and to try to ensure that public bodies, in particular, are aware of their responsibilities and conform to human rights standards in their approach to their duties. I do not know whether that answers your question.

Margaret Mitchell: My question was whether bodies such as the Law Society of Scotland, the Scottish Law Commission, the Parliament and the Executive are already examining the role of public bodies where the ECHR comes into the equation.

Robert Brown: You are right to say that a series of bodies are examining the issue, but you would not postulate that we should have the Parliament, the courts and nothing else. A series of public bodies carry out administration: local authorities; in a slightly different context, quangos, and so on. There are individuals to inspect, to monitor and to perform various other tasks in that connection.

I return to where we began the debate. The issue is whether the human rights commissioner adds value to what we are trying to do. Our contention is that they do, for the reason I have given. Although it is true that other people are operating in allied and, to some degree, overlapping fields, by placing a specific duty on the commissioner to enter into arrangements with other bodies to ensure that duplication does not happen, the bill is designed to avoid duplication. There are not so many of those bodies as to make that difficult. It is fairly obvious where the children's commissioner or the Scottish public services ombudsman might be interested, for example. Arrangements can be made to deal with any overlapping issues there. The provision is designed to help make the human rights commissioner's duties more focused than they would otherwise be.

Margaret Mitchell: It comes down to a value judgment.

Robert Brown: Absolutely.

Mrs Mulligan: In reply to questions from both Margaret Mitchell and Stewart Stevenson, we established that you are content that the commissioner will not have an individual inquiry function. Is that correct?

Robert Brown: Yes.

Mrs Mulligan: Some of the witnesses from whom we have heard—for example, representatives of the Disability Rights Commission—have suggested that that is one of the pitfalls. In the wider public arena, there may be an expectation that the commissioner will have an individual inquiry function. How do you respond to that concern?

Robert Brown: There is a comprehension aspect to the issue. As the bill progresses, the commissioner is appointed and so on, we will get a clearer view of the commissioner's role and his or her central duties. Human rights is a term that has a wide connotation. When I was practising as a lawyer, a significant number of the clients who came through the door said that their human rights had been breached. In 99 cases out of 100, it was just a phrase—they really meant that they felt that injustice had been done in their case. Whether there was right or wrong on their side is another matter, but issues relating to the ECHR were rarely raised. There needs to be an educative process in that connection, so that people can understand the position.

It is worth mentioning the existence of the Paris principles, on which I am sure the committee has received evidence. The Paris principles set the international standard for what human rights commissioners should be, how they should be set up and so on. The independence of the commissioner and their accountability to Parliament—we have not stressed that point today, but it is a distinctive feature of the proposed Scottish commissioner—are part of that. However, the Paris principles do not require human rights bodies to handle complaints, especially where, as in Scotland, a number of other bodies are active in that area.

This goes back to the value judgment that needs to be made about what the commissioner should do, whether added value is created by their existence and whether we want to go further by giving the commissioner the power to deal with complaints. Our contention is that that is not necessary, that it does not add value and that it might be a distraction from the commissioner's main role. Even the commissioner for children and young people, who has a slightly different role, said that the lack of such a power in her jurisdiction had not handicapped her to date, although she wanted to keep the matter under review. That was an interesting observation.

Mrs Mulligan: Given that she said that she wanted to keep the matter under review, will the Executive consider doing that?

Robert Brown: The Parliament rather than the Executive will want to keep all such matters under review. The Finance Committee has had concerns about budgetary levels, sharing of services and the location of commissioners' offices, which we have reflected in the bill. It is entirely right for the Parliament to take an overview of those issues as they affect all the bodies, which, after all, are set up under the Parliament's authority. The Executive might have a view to contribute, but we would prefer the Parliament to take the lead role in that process because of the independence of the commissioners.

The proposed commission for equality and human rights in London will be the result of an amalgamation of previous bodies and an expansion of their role, and I suppose that one cannot rule out such a development here. As such developments take place and we gain experience of how they proceed, we might want to consider how the different bodies interrelate and whether some of them should be joined together. I do not think that we are at that stage yet; we are talking about whether the Scottish human rights commissioner will fill the slot in the middle that has been left by the Equality Bill and by the other developments that have taken place here and whether, in doing so, they will add value.

Mrs Mulligan: Do you think that there could be a problem in that someone who thinks that they have had their human rights breached and goes to the commissioner that the Parliament will establish could be told that they should go to their lawyer, whom they should have gone to in the first place?

Robert Brown: Perhaps. The commissioner will have an advice function, so they could support individuals by providing them with advice. However, the point has already been made that limited resources will go into that, so the commissioner's ability to do that sort of thing will be limited. Whether people in remote rural areas can get access to a lawyer with human rights expertise and, if they cannot, how we can go about filling that gap might be more of an issue. In that connection, there might be a number of ways of meeting need, without getting the commissioner involved in the provision of financial or other support to individuals who want to take a case to court. However, in the long term, we rule nothing out; we would naturally wish to keep that issue under review as the system develops.

Mrs Mulligan: That is helpful. We will come back to resource issues later.

The Convener: I want to clarify what you were referring to when you mentioned the commissioner's advice function.

Robert Brown: Under section 4(1), the commissioner may, among other things, "provide advice or guidance". The terms are general. There is an issue about how the commissioner will provide advice or guidance and the extent to which it will be available to individuals. The experience of the Northern Ireland Human Rights Commission has given us some information on what happens when a commission body is given that additional function. I think that I am right in saying that evidence on numbers was available from the Northern Ireland commission, which was helpful in getting a taste of things.

Section 4 states that advice is to be provided

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

which is

"to promote awareness and understanding of, and respect for, human rights".

That points to the commissioner having a general role rather than setting themselves up as an advice agency for individuals, although I do not think that the phraseology that has been used necessarily rules that out. Brian Peddie might be able to help me out on that.

John St Clair: I will answer that. What is envisaged by the text of section 4 is that the commissioner may provide general advice to the public rather than individual case advice because it would be inconsistent for the commissioner to investigate only sectors, but to give advice about individual cases. We do not think that section 4(1)(b) could properly be read as giving the commissioner such a specific role.

Robert Brown: I stand corrected.

The Convener: Mary Mulligan is essentially correct in the sense that if a member of the public goes to the human rights commissioner and says that they think they have a complaint, they will have to be sent away.

Robert Brown: That is right. The commissioner will not have the facility to support such activity. That said, an individual complaint might lead into consideration of an issue that has general application. We would not want to rule that out, so the commissioner would have to be open to receiving information in some way. The commissioner and their chief executive would have to give a bit of thought to the best way of ensuring that that was possible.

There will certainly be a need for openness to knowledge about the issues. Some of that will come from knowledge around the courts and the human rights community. Other issues will come about in the press and in other ways. I guess that there would have to be some way in which people could make their views known to the

commissioner. We do not particularly want to encourage an individual advice function; there would have to be a general duty. There is a distinction between general sectoral investigations and advice to an individual.

12:00

John St Clair: Such a case could be considered to be at the margins, because there is a general understanding that public bodies have a duty to be as open and helpful to the public as possible. An individual would not immediately have the door closed on them, but the commissioner might point them in the right direction. It would go no further than that; the commissioner would not get involved in the detail of an individual case.

Stewart Stevenson: I want to be absolutely clear about what constitutes a Scottish public authority, in relation to inquiries. I realise that that goes back to the Human Rights Act 1998. Would the private company Kilmarnock Prison Services fall within that definition? I choose that company not for any particular reason, but just as an example.

The Convener: Are you opening up a new subject area?

Stewart Stevenson: I am just asking whether inquiries could be conducted into that company. I will take your advice, convener, on whether this is an appropriate point at which to raise that issue.

The Convener: Before we move off the specific point of the advice function, I think that we need to discuss the issue further so that it is clear to us where the dividing line lies. When a commissioner is created, it is inevitable that members of the public will queue up to get advice or assistance. What will be the mechanisms for dealing with that?

Robert Brown: I come back to the general duty

“to promote awareness and understanding of, and respect for, human rights”.

The general duty is developed in section 4, in terms of the specific things that the commissioner can do in that connection. Under section 4(1)(b), I imagine that pamphlets, guidance or things of that sort might be made generally available.

As John St Clair said, we do not envisage there being an individual advice facility. However, the commissioner might point people in the direction of other agencies that do that sort of thing. The ombudsman's role is relevant in that context. Voluntary sector bodies might have a role in connection with that, as well. Reasonably clearly, the commissioner would have to determine the way in which he or she exercised that function. I do not think that the commissioner would be able to set up a general advice-giving facility—that is the central point—although there is an issue about

how they would deal with people who came through the door.

The Convener: Judging from what you have said, however, there could be some back-door ways. We need to be clear about that. We will come to the question of how priorities are determined. The human rights commissioner will, inevitably, get letters from members of the public and will write back saying, “I can't take up your individual complaint because I don't have the power to do that.” However, those individuals may raise issues with a common theme on which, I presume, the commissioner might want to take a view, especially if several hundred people had written to them about it. We need to make clear where the dividing line is. That would be an individual complaint that just happened to be a common issue for many people.

Robert Brown: That is what I was trying to get at, and I was trying not to go too far into all this. The commissioner must be open to getting through the door knowledge about general issues of that kind—some of the issues that I talked about before. At the same time, they could get bogged down in hours of discussion with individuals, trying to find out what on earth the issue was, as people sometimes have difficulty in explaining themselves. The commissioner would have to work out the practicalities, but the direction of travel is very clear. We do not want the commissioner to undertake a direct advice function on individual cases, but we want to be able to bring into the organisation knowledge about general issues that might be the subject of general inquiries.

Margaret Mitchell: Have you not just underlined the case for giving the funds directly to the non-governmental organisations to which the individual would be directed by the commissioner?

Robert Brown: No. We are talking about a subsection of section 4 that relates to only one aspect of the commissioner's general duty. I do not think that our earlier discussion points us in the direction that you suggest.

As I said, nobody has ever suggested that the commissioner will be the answer to all the problems of the universe. The commissioner will work with other people, bodies, voluntary sector organisations and Government bodies to be part of the whole picture of resources that are available to the citizen to deal with their individual and general ails.

Margaret Mitchell: I accept that entirely. We are looking at the best way of doing things. However, you have just said that approaching the commissioner is not the best way of dealing with individual complaints. You outlined a process in which the commissioner would direct the individual

to a non-governmental organisation, which would then look at the general theme of the complaint before referring it back to the commissioner. Why not just let the commissioner run with the complaint in the first place? Going back to the commissioner to explain everything seems to be the duplication that we seek to avoid.

Robert Brown: As I have said, there are concerns about how the process will work and what the facilities will be for referral to other agencies. Nevertheless, it remains the case that it will not be the commissioner's job to take up individual complaints or to give individual advice—that has been made very clear.

We have had a lot of discussion about the Scottish public services ombudsman's role in all this and it might well be that individual cases should be referred to her to avoid duplication. However, it is a matter for the commissioner and the ombudsman to work out the details. I am not an expert on the matter and neither are committee members. Using their expertise, the commissioner and the ombudsman will have to work out the practical implications of some of those dividing-line points, which will arise inevitably in the function not just of the commissioner, but of many other bodies.

The Scottish Law Commission deals not with individual cases, but with generic reform of the law. How does it get its information about areas of the law that need to be attended to? That is the kind of question that we are considering in the case of the proposed commissioner.

Margaret Mitchell: With respect, we are talking about an individual in whom expectation could be created by this commissioner, who will—

Robert Brown: Explaining to the public what they can expect from the commissioner will be part of that office's promotional campaign. In my experience, people are pretty good at finding their way to the relevant bodies in such situations. In some cases they might have to be redirected, but that happens anyway; the advent of the commissioner will not create that problem. With great respect, your viewpoint is not supported.

Margaret Mitchell: You do not accept that the creation of the commissioner could produce confusion.

Robert Brown: No, I do not. Clarity is available. However, nobody disputes for a minute the fact that there will be overlaps in functions. The potential for duplication exists, but the bill contains a specific duty to avoid that. I fail to see what more we can do to avoid such difficulty other than letting the commissioner explain, as part of the promotional activities, exactly what his or her role is. The same applies to almost anything that we do. When my department advertises for

applications to the children's panel, part of our job is to explain what members of the children's panel do—that is endemic to the existence of almost any organisation.

We do not envisage the commissioner having an individual advice role and we would not be in a position to make funds available from the Scottish Commissioner for Human Rights Bill budget to enable the commissioner to operate in that way in any event. That is the central point.

Marlyn Glen: You spoke about the value of the committee's evidence session with the New Zealand chief human rights commissioner. She told us that her commission had conducted an extremely successful inquiry into public transport in rural areas, which had considered the human rights practices of private operators. Would our commissioner be allowed to conduct such an inquiry?

The committee is concerned that confining the Scottish commissioner's inquiry function to Scottish public authorities could be unduly restrictive. What do you understand the term "Scottish public authorities" to mean in practice? You talked about Carstairs, which would obviously fall into that category, but what about Kilmarnock prison? It is not clear whether joint ventures and similar initiatives would count.

Robert Brown: I do not want to give a view on Kilmarnock prison in particular, but my understanding is that private prisons in general would come under the definition of public bodies in the Human Rights Act 1998 because they provide a whole service for the public authority. The same might apply to care homes in certain instances, but not to private care homes, which operate in a different capacity. There will be some grey areas for which a definition will have to be developed.

The New Zealand Human Rights Commission's inquiry into transport is an interesting development, but it arises from the commission's wider role in equality. If I have understood the inquiry correctly, equality was one of the aspects with which the New Zealand Human Rights Commission was concerned, but we might not be able to consider transport from entirely the same point of view. If one is stuck in a house, I do not know whether the right to liberty is quite the issue, but the right to respect for private and family life, home and correspondence might conceivably raise some issues if private life is too constrained, for example. I do not know whether that would be a possibility. It would be a matter for the commissioner to decide whether the convention rights provided hooks on which to hang such an inquiry. I am not entirely sure that I know the answer to that, to be honest.

Marlyn Glen: Are you saying that you would not rule out the possibility of private operators being part of such an inquiry?

Robert Brown: As I said, I would not exclude private operators in so far as they provide services to public authorities. John St Clair will correct me if I am wrong, but I do not think that that would necessarily include private transport operators.

John St Clair: The legal definition of public function is problematic. If a body carries out a public function it will come under the Human Rights Act 1998 and hence be caught by the bill. There is authority that large transport companies that cover almost the whole nation are carrying out a public function, so they could be investigated. The mere fact that the function is being performed by a limited company does not mean that it is off limits for the Human Rights Act 1998 or the bill.

Robert Brown: It is a bit of a grey area, but the grey area arises not from the bill but from the definitions and powers that are given in the Human Rights Act 1998. That is the difficulty. You might be right to say that there are issues with the definition of public authority, but that is a broader issue, which does not affect the bill.

Stewart Stevenson: I apologise for my earlier intervention; I pre-empted my colleague's line of questioning.

I take it that there is little or no ambiguity if the service is provided by a private company whose sole business is to provide that service. Kilmarnock Prison Services Ltd is an example of that, albeit that, as is usual in such cases, that company is a subsidiary of a company with much wider interests.

John St Clair: I think that it is slightly different in that if, as in the case of Kilmarnock prison, the company carries out a function on behalf of an Executive department, it becomes a public function although it is carried out by a private body and is therefore caught by the bill.

Stewart Stevenson: Yes, but the test that removes ambiguity is that the company's core business is to provide that service.

John St Clair: No. We do not have to consider the whole company's core business; we consider the function that is being carried out. The company can count as a public authority even if the public function is only a small part of its business.

Robert Brown: The definition emanates from the provision of public services. We have to consider the matter from that angle, not the company angle.

Stewart Stevenson: So it is the services, which happen to be provided by a private company, that are within the scope of the bill. It is not the case

that, because part of the private company's business is the provision of those public services, its whole enterprise is drawn into the scope of the bill.

John St Clair: We agree with that.

Stewart Stevenson: The issue is the services rather than the organisational structures that deliver them.

12:15

Brian Peddie: That is correct. It might help to mention that the Commons and Lords Joint Committee on Human Rights published a report on the definition of a public authority. It gave the example of a security company that ran a private prison and provided security services at a supermarket. The first service would clearly be public, so the company would fall within the definition of a public authority to that extent. The provision of services to a supermarket would not fall within that definition, even though the same company supplied the services. The question involves the function and what is provided.

Stewart Stevenson: Is it fair to say that it is not envisaged that all services that are acquired by public money will fall within the definition of public services?

John St Clair: We agree that not all services that are acquired by an authority will become public functions. For example, if a hospital has a contract with a private health provider to run the hospital and to deliver almost all the health services, that is almost certainly a public function. However, a contract to do the electric lighting or to dig up drainage, for example, probably does not involve a public function. Determining to what extent something is a public function is a question of the degree and scope of the function.

Stewart Stevenson: Is one of the definitive tests that the service is delivered to an individual real person who has human rights? The electrician who is employed to provide electrical services in a hospital, for example, directly provides services not to a real human being but to an organisation.

John St Clair: The service need not be provided directly to the consumer to be a public function. Quite a lot of functions that are undertaken on the Government's behalf do not impact directly on the consumer, but the citizen has an interest in their being undertaken. Defence is a classic example of that.

Stewart Stevenson: However, in defence, provision of the service—let us say the Army, for the sake of argument—is clearly part of the public service; it is controlled and directed in the public service. On the other hand, the transport of tanks is now fulfilled by a private company. At one point,

that was clearly a public service. I do not want to become overembroiled in one instance, but you gave that example. Is such transport a public service?

John St Clair: That is a difficult question, because the function is on the borderline between public and private. I would not like to give a view on that—the point could be argued both ways.

Stewart Stevenson: The committee is left with a genuine dilemma—perhaps the Executive is in a similar dilemma. How the heck will we resolve what is or is not a public service?

John St Clair: The problem is addressed in different ways in different legislation. All the public functions can be listed, which produces a huge document, or a definition that uses a big word such as “public” can be used. Neither option is perfect and both lead to difficult cases, such as your example of transporting tanks.

Stewart Stevenson: I am genuinely concerned about how the definition issue will be resolved when it arises.

Robert Brown: I make the general important point that the question does not arise from the bill or the commissioner’s role. I understand entirely that the committee needs to comprehend the issues and I have listened to the discussion with interest, but we can do nothing in the bill to clarify or change the position, because it arises from the Human Rights Act 1998. If we talked about the commissioner’s right to conduct an inquiry, I suppose that somebody could interdict the commissioner from becoming involved in a subject because the definition did not cover it. I doubt whether anyone would go down that route, but that could—just—be envisaged as a possibility. That would mean that a definitive decision of the court had been made in one of the grey areas that you have talked about.

Stewart Stevenson: There is, however, a sense in which the commissioner is protected by the definition in section 17(a)(ii), which explicitly permits intervention where there are “mixed functions”.

The Convener: That is true, but the point that Marlyn Glen was pursuing is that there is an on-going debate about the definition of a public authority under the Human Rights Act 1998. That was the central issue that was raised by the New Zealand chief human rights commissioner.

It is important for us to know the scope. Some of the issues that have been suggested to us as human rights issues will still have to pass the test of being covered under the 1998 act with respect to public authorities. The most notable example of that is private care homes. It seems odd in the extreme that we can address the human rights of

anyone in the public sector, but that elderly people who are in care homes, having previously been in hospital, might not be covered by the definition of public authority.

Robert Brown: I take the point, but there are bodies that relate to private care homes, such as the care commission, which could be the subject of human rights investigations. Perhaps that helps. Some of the issues that we are discussing might, incidentally, be taken on board. I do not want to go too far in that direction, but members can see the lie of the land of what I am suggesting. The care commission has rights of inspection of private care homes and other such bodies.

Mrs Mulligan: I take the minister back to the example that was given by the New Zealand commissioner: that of transport, and bus services in particular. From what you have said, my understanding would be that FirstBus, for example, would not be covered by the legislation in providing its service, because it is a private company. What would be the situation if FirstBus were to be assisted by a local authority in running a particular service? Would that service be encompassed?

Robert Brown: There are two points about that. First, it is likely that the railway bodies will be covered, because they provide a service that is commissioned, in effect, by the Scottish Executive. To an extent, that is also the case with bus companies. FirstBus and other companies would, in certain parts of their role, be covered by the definition of public authority, as there are quality bus partnerships and other arrangements of a more technical nature—with which I do not claim to be au fait—as well as subsidy arrangements, under which people run special lines and so on. Organisations are given licences to run bus services, and the role of public authorities can be regarded on that basis.

It is not easy to get this entirely clear, but we are concerned with the policy function of roles rather than with the private status or otherwise of the companies involved. Our tentative view might be that organisations such as FirstBus might, or even would, be covered, at least in part, and possibly in substantial part, in terms of the functions that we have been discussing. Have I misinterpreted that at all?

John St Clair: The definition of public authority is very problematic, but there is no way of getting round it. The minister is right to say that there is an argument that certain types of private company that run transport services for the benefit of a large section of the public could be classed as performing a public function. We cannot define things more tightly than that. We could not definitely say that FirstBus, for example, was performing a public function. The more locked into

the local authority and the more interwoven with its functions that an organisation is, the more it becomes public. It comes back to questions of degree.

Mrs Mulligan: It has been suggested that there could be a further complication, in that there might be a difference between the receiver of the service, the customer and those who deliver it, who are employed by the private sector company. Would you foresee any difficulty in that regard?

Robert Brown: In terms of their human rights?

Mrs Mulligan: Yes.

Robert Brown: Let me think about that. I suspect that the employees' rights are probably not covered by the human rights implications.

John St Clair: No—employee contractual rights—

Robert Brown: It is a different issue, anyway.

John St Clair: Such contractual rights are not covered by the Human Rights Act 1998.

Robert Brown: So that issue would not arise. We are interested in the customer, if you like.

No doubt that has brought clarity to the whole thing.

Mike Pringle: It is as clear as mud.

Mrs Mulligan: We could probably go on forever with examples in which we might foresee difficulties. However, the minister talked about being clear about where the commissioner will be involved and what role they will play, so it is useful for the committee to have heard some of those examples.

John St Clair: As I mentioned earlier, there is an alternative way. I refer the committee to the Freedom of Information (Scotland) Act 2002, in which the public bodies are all scheduled and there are specific powers of adding by schedule.

Mike Pringle: Having discussed that complicated and complex situation for a considerable length of time, let us come to a minor issue and an easy question. Schedule 3 to the bill says that the commissioner has to give 14 days' notice when they visit a public authority or a prison, for example. Everyone whom we asked—although we did not ask everyone—thought that that suggestion was not sensible. Will the minister lodge an amendment to the effect that, if the commissioner wants to enter premises, he will not have to give 14 days' notice but will be able to walk up to the front door, knock on it and say, "I want to inspect"?

Robert Brown: We could view that on several levels. The power is intended to be a back-up; it is not intended that the commissioner would

normally give 14 days' notice. We would expect those organisations that are covered by the powers to give immediate access to the commissioner. However, the 14-day provision sets a basis for further action if access is not granted.

I know that there has been some discussion in the committee about the appropriateness of the provision. It has been said that if torture or something of that nature is going on in prisons, the thumbscrews and other instruments of torture could have been taken away by the time that the commissioner arrived.

Mike Pringle: I am not sure that we expect to hear that torture is going on in our Scottish prisons.

Robert Brown: We can certainly look at the point again. However, there has to be a basis for following through on the procedure and taking enforcement action. There has to be a refusal or implied refusal to give access to the premises. There is nothing particularly magical about the 14 days; we can look at that again if the committee has strong views about it. However, we do not expect that that power will be used at all, because we will expect public bodies to give the commissioner access on demand.

Mike Pringle: What happens when the commissioner turns up and expects to get access on demand, but is told that, under the legislation, he has to give 14 days' notice?

Robert Brown: Section 8 is the key. It says that the commissioner may

"enter any place of detention for the purpose of exercising any power under paragraph (b) or (c)".

There is no qualification in the principal section of the bill. That sets out the power and the entitlement.

Schedule 3 is a subsidiary, to some extent, to the main section. It lays down powers that the commissioner can exercise if he is not given co-operation. As I said, we can look at the issues again. I am conscious that the issue has been raised a number of times during the committee's evidence taking, but there must be some basis for the formal exercise of the enforcement powers. There has to be a reason for enforcement; one does not force an organisation to grant access before one has asked for it in the first place.

Mike Pringle: I am grateful that the minister has outlined how he thinks that the provision will work. I am sure that the committee will discuss that later.

12:30

Stewart Stevenson: I will examine the wording of the bill more closely. Paragraph 1(1) of schedule 3 refers to section 8(1). The schedule

states that in relation to any place of detention, the commissioner may exercise the powers under section 8(1) only after 14 days' notice has been given. In other words, it specifically excludes exercise of the powers in certain circumstances by qualifying the powers under section 8(1) and stating that 14 days' notice is necessary. However, it appears that under section 7, which relates to evidence, and paragraph 1 of schedule 2, on requirements to give evidence, the commissioner can turn up at the gates and say, "I require somebody to give evidence, and to do so now," because the power is unqualified. Is that a fair interpretation, or am I being sufficiently selective as to distort what the bill means?

Robert Brown: I had better pass over to John St Clair to deal with the detail. However, my general comment is that although we are talking about powers, in 99 cases out of a hundred, such things will be done by arrangement, rather than by exercising powers. We are talking about how the process will operate in exceptional situations.

John St Clair: The minister has said that the authority of the commissioner, like that of the inspector of prisons, means that doors will open automatically when he arrives. However, if he meets resistance, he will be able to invoke formal powers. Sometimes the resistance may be justified. A building might be being reconstructed and it might be dangerous to give access—that is why there is a notice period. The Executive is open to argument on whether the period should be shortened.

Stewart Stevenson: So the existence of powers does not preclude the commissioner from entering a place immediately without invoking those powers. Therefore, I am perhaps not being wholly unreasonable in pointing to the interoperation of section 7 and schedule 2, which flesh out that that can happen.

John St Clair: Are you talking about the requirements to give evidence?

Stewart Stevenson: Yes.

John St Clair: Evidence can be produced much quicker than access to a place of detention can be granted. That is why there is not such a long period in relation to evidence.

Stewart Stevenson: Okay. I will leave it there.

The Convener: How does that square with the optional protocol, which states that if an inquiry is being conducted, such a person should get immediate entry to "places of detention"?

Robert Brown: That is under section 8. Sorry; can you repeat your question? I am not sure that I follow your point.

The Convener: Our adviser has raised a point about the optional protocol in relation to section 8, entitled "Places of detention: powers of entry, inspection and interview". Section 8(1) states:

"For the purposes of an inquiry, the Commissioner may—

(a) enter any place of detention for the purpose of exercising any power under paragraph (b) or (c),

(b) inspect the place of detention, and

(c) conduct interviews in private with any person detained there, with that person's consent."

There is no specified time period. It seems to be a general power.

Robert Brown: But section 8(5) states:

"Schedule 3 makes further provision in connection with the exercise of the powers under subsection (1)."

Stewart Stevenson: The issue relates not to subsection (1) but to subsection (2).

Robert Brown: Subsection (2) just defines "place of detention". The principal power is in section 8(1). It is subject to schedule 3 under section 8(5). I may be missing something. I do not fully understand the point.

Stewart Stevenson: I accept that.

The Convener: The difference seems to be that under the Scottish bill, the commissioner will have to be conducting a specific inquiry.

Robert Brown: Do you mean to entitle the commissioner to enter a place of detention?

The Convener: Yes.

Robert Brown: Section 8 specifies that the commissioner may enter a place of detention

"For the purposes of an inquiry".

I am trying to think of other instances.

The Convener: Perhaps you could get back to us on that. Our understanding is that the UK has ratified the optional protocol where it does not require—

Robert Brown: I beg your pardon, but I think that we are talking at cross purposes. Do you mean the optional protocol to the convention?

The Convener: I mean the optional protocol against torture that the UK signed up to. The protocol does not specify that there has to be an inquiry before the commissioner would get immediate entry into a place of detention.

Robert Brown: You are asking about the link between the rights that the commissioner would have to help out—

The Convener: My point is that we have signed up to a protocol that gives more rights to a commissioner than the Scottish Commissioner for Human Rights Bill does.

Robert Brown: We will write to the committee to clarify the issue. In view of our discussion with the committee, we might consider revising our thoughts about the provision in schedule 3(2) on the 14 days' notice. Is that all right?

The Convener: That is great.

Finally, I want to understand the Executive's thinking in relation to the inspector of prisons. When we visited Westminster, we heard from the Joint Committee on Human Rights that there were plans to abolish the inspector's counterpart in England and Wales. I want to check that the Executive has no plans to do something similar here and that the inspector of prisons will still have a role in Scotland. If we are to continue to have an inspector of prisons, I presume that the commissioner for human rights will work with them.

Robert Brown: Neither my officials nor I know of any plans to abolish the office of inspector of prisons in Scotland. I am pretty certain about that. The inspector of prisons will be one of the people whose functions the commissioner will want to avoid duplicating. We are more than happy to engage with the committee on the details of how the budget for the commissioner will operate, his or her relationship with the Scottish Parliamentary Corporate Body and the question of the duplication of functions, if the committee has particular concerns about them. However, those issues do not particularly involve the principles of the bill. Perhaps, in the light of the Finance Committee's report and other reports, the committee has a view on those matters. We will, as I say, be happy to talk to the committee about them. However, the inspectorate of prisons will not be treated any differently from any other inspectorate or commissioner in the field.

The Convener: You have already dealt with some of the issues around the commissioner's relationship with the Scottish courts. However, a few issues were not covered and I would like to go over them now. Essentially, the Scottish commissioner will have the power to intervene in court and the GB commission will have the power to initiate proceedings. There is also the question of the commissioner's role in supporting wider human rights issues as opposed to individual cases.

The bill specifies that the commissioner's power of intervention will be restricted to civil proceedings. Will you amplify the policy intention behind that?

Robert Brown: Behind the general power to intervene was a desire to avoid the uncertainty that surrounded the Northern Ireland Human Rights Commission in that area. As I understand it, powers do not exist for other interventees—if

there is such a word—in criminal cases or in children's hearings cases, which have similar aspects to criminal cases in some regards. There may or may not be a reason for intervention, but if there is, it should be considered generically, not with particular regard to the human rights commissioner. We should consider whether intervention is a good thing and how it would affect the speed of a case, the rights of the accused, and other sideways issues. Intervention in such cases should not be a by-blow of the Scottish Commissioner for Human Rights Bill; it should come about only after proper consultation on the implications that it might have across the board. The question is whether the human rights commissioner's right to intervene in proceedings will lead to other people asking for leave to intervene. Incidentally, the same applies to tribunals. If anything, a stronger case can be made, because tribunals are not criminal proceedings and they do not relate to the children's hearings system in quite the same way.

We do not want to introduce a general right to intervene as a by-blow of the rights in the bill. If we were to introduce such a right, we would do so only after consultation on whether it is a good thing for people to have that right. As I understand it, such rights are rarely used in Scotland in any event and the procedure is nowhere near as developed or as common as it is in England and Wales. To a degree, the issue is academic, but it will be of importance more generally if the law develops.

The Convener: Will the GB commission have the power to intervene in criminal proceedings in England and Wales?

Robert Brown: I think that there may be a right.

Brian Peddie: Our understanding is that the GB commission will not be able to intervene in criminal proceedings. There may be some confusion because the Equality Bill is framed rather differently from our bill. The Equality Bill confers what looks like a general power to intervene, but that power is qualified. It is described as being

"subject to any ... enactment ... or in accordance with the practice of a court."

Our understanding, given the existing procedures and enactments, is that the GB commission will have no power to intervene in criminal cases in England and Wales.

The Convener: At any level.

Brian Peddie: Yes. It will be possible for issues that arise from criminal cases to be raised in another context, but not as part of the criminal justice procedure.

The Convener: The note that we have from our discussion with officials from the Department for

Constitutional Affairs states that the GB commission will have such a power.

Brian Peddie: We can clarify that point in writing, if that would be helpful. It might be that our UK counterparts were making the point that, if the procedures in England and Wales were changed to allow intervention in criminal cases generally, the GB commission would be able to take advantage of that change and intervene. That might be what they were getting at, but we will provide clarification in writing.

The Convener: The power to intervene is subject to the leave of the court. The commissioner must have permission from the court.

Robert Brown: Yes.

The Convener: The Law Society said that it could not see anything in the bill that would prevent the commissioner from providing financial support to enable individuals to bring cases, given that the commission will not have title to take cases in the Scottish courts.

Robert Brown: The answer to that is relatively straightforward. The commissioner will have the powers that are conferred by the bill. They will not have a power of general competence that goes beyond the general duties in the bill. The commissioner's powers have to be exercised for the purpose of the general function in section 2. As the commissioner will not have a power of general competence, our understanding is that it will not be competent for them to use funds in that particular way. If they did so, that would raise issues. There was a discussion early on about what would happen if the commissioner went beyond their remit. The short answer is that there would be questions about their ability to spend their budget, which the Parliament will provide for particular purposes.

The Convener: Finally, I have a question on an issue that we have discussed already but I want to be sure that we have covered it. It is the Scottish commissioner's power to consent to the GB commission acting in relation to a devolved matter. Does the drafting of the UK bill provide a back door for the Scottish commissioner to grant consent for judicial review, given that they will not have the power to initiate proceedings?

Robert Brown: Our understanding is that that is not the case, but I look to my officials for clarity.

John St Clair: There is no agenda to that effect. The bill builds on the provisions in the Equality Bill and there needs to be formal consent from the commissioner, but the provisions are not designed to allow the commissioner to initiate intervention by the back door. That would be improper.

The Convener: I think that we agree that, if we decide that the Scottish commissioner should not have the power to intervene, the drafting of the UK bill should not give them that power by the back door. However, we have raised drafting issues with the Department for Constitutional Affairs. We agree that intervention by the back door would not be desirable, but there is nothing in the UK bill that specifically excludes it. Are you satisfied that the drafting of the bill does not allow such intervention?

12:45

John St Clair: The minister may want to make a statement to that effect during the passage of the Scottish bill, so that it is on record that powers are not to be used in that particular way. I would leave that for the minister to consider.

Robert Brown: The issue would be whether the Equality Bill at Westminster accidentally changed the legislation on devolution. That would be a substantial constitutional issue, unless any change were made expressly. United Kingdom ministers have been careful to make it clear that they have no intention of doing anything of the sort.

John St Clair: There will be a memorandum of understanding between the Scottish Executive and the department that is piloting the Equality Bill on how the powers will operate. We would expect the possible mischief that you envisage to be formally excluded in that agreement.

Robert Brown: Apart from any consideration of what might happen at our end, the GB commission will not operate in the way envisaged. That is the bottom line. That is not the purpose for which the GB commission is being set up. UK ministers have made that clear.

The Convener: That is helpful. We may want to have further discussions at stage 2 on the impact of the consent power and on what it means.

Mrs Mulligan: I want to ask about resources and salaries. I am conscious of the time so I will try to be brief.

The Scottish Parliamentary Corporate Body and the Finance Committee have raised concerns about the ambiguity over whether the SPCB will be responsible for setting the commissioner's budget. Will the SPCB be responsible?

Robert Brown: No. As I said before, I have considered this issue from the other side, as it were. Oddly enough, when I was a member of the SPCB, one of my responsibilities was to deal with the commissioners. The wheel comes full circle.

At the time, the SPCB was rightly concerned not to interfere with the commissioners' independence. However, as Brian Peddie said in

evidence to this committee, giving independence does not mean offering a blank cheque. We think that the bill will give adequate powers to the parliamentary authorities to deal with these matters. I think that there were protocols with the SPCB that took into account how things had been handled before and the powers of the Finance Committee.

What is in the bill is okay, but this is not a matter of principle for us. If the committee has particular concerns about the wording or about evidence that it has heard from the SPCB, we will be more than happy to discuss those concerns with members. However, I do not want to compromise the independence of the commissioner. We must bear in mind the Paris principles, and the commissioner must not be too constrained.

Salary will be an issue for the parliamentary authorities. People wondered whether the salary and budget were right. They appear to be broadly in line with those of similar bodies, both here and elsewhere. If one removes the casework support for the Northern Ireland Human Rights Commission, there is parity with our proposals. Northern Ireland began at £700,000. That has gone up to £1.3 million, but that takes into account the casework support. We are in the right ballpark. One can always argue a little bit either way, but the Executive feels that it has got the levels about right.

There will be a starting budget for the commission but I would guess that not all of it will be spent in the first year of operation, as things are being set up. After that, it will be for the parliamentary authorities to consider whether the commissioner's budget is adequate, appropriate and so on when bids are made to the Finance Committee for parliamentary funding in future years. Arrangements for how all that is done may reasonably be entered into between the Scottish Parliamentary Corporate Body and the commissioner under the ambit of the bill.

As you know, we have tightened things up in certain respects, in that we have a location aspect: the parliamentary authorities may direct the location of the commissioner. That measure arose from particular concerns that the Finance Committee had about the policy of dispersal—whether or not new bodies should be setting up in Edinburgh—and about the savings that might be obtained through co-location with appropriate partners. All the appropriate powers are there; the issue is really how the corporate body exercises them with regard to the commissioner, and the independence issue is somewhere in the middle.

Mrs Mulligan: You have answered a number of questions there, but I want to be clear on this. A number of witnesses have suggested that the £1 million that the commissioner is to start out with is

not sufficient. The Finance Committee has suggested that the issues that you have taken into account to arrive at that figure are perhaps not as robust as they might be. It is important to consider the message that is given out about the budget that is set alongside our establishment of a human rights commissioner.

Robert Brown: Yes.

Mrs Mulligan: Do you think that £1 million will be sufficient? Will you keep that under review?

Robert Brown: Absolutely. At the end of the day, the question is, "How long is a piece of string?" We always encounter issues such as this with budgets. A larger budget means that we can do more things more imaginatively; a smaller budget means that we are a bit more constrained. It is about striking a reasonable balance, paying due regard to the proper use of public funds and considering what will allow the commissioner reasonably to carry out his or her functions.

We think that, broadly speaking, we have arrived at that balance. We have considered the experience of existing Scottish commissioners and, to an extent, that of other commissioners abroad, not least the Northern Ireland Human Rights Commission, which is probably the best example to which we can equate. We think that we are in the same ballpark as the Northern Ireland commission. That is about as far as we can go.

You should remember that the details that were used for the financial memorandum were intended to be illustrative. We did not want to constrain either the corporate body or the commissioner by requiring a certain level of detail or going in a certain direction. There is discretion there. Given the experience of local authorities, with ring fencing and so on, we know the importance of such issues.

Mrs Mulligan: I do not want to question your judgment further but, should there be a shortfall, would it be appropriate for the SPCB to adjust the figures in responding to that shortfall through what the SPCB witnesses described earlier today as a contingency fund, or should the Executive pick it up?

Robert Brown: I think that the question is an artificial one. The commissioner will not be entitled to overspend his or her budget. They are accountable officers as far as the financial arrangements are concerned. I am not an expert on all that but, like any other budget holder—such as the parliamentary authorities and Executive ministers—the commissioner will have a responsibility not to spend money that they do not have. That is the bottom line. They must cut or expand their cloth to meet the requirements of the budget that they are given, and they must take due account of the workload in doing so.

Having said that, I am not saying that consideration could not then be given to future budgets, if the parliamentary authorities thought it right to seek an increase or, indeed, a reduction, should that become appropriate at a later point. That is an issue of future budgets, however, rather than one of budget overspends, which should not happen.

Mrs Mulligan: My understanding of Nora Radcliffe's response on the matter earlier is that, if a particular issue arose that had not been foreseen, but that the commissioner felt it absolutely essential to investigate—although to do so would not be possible within their budget—there would need to be some sort of contingency to pay for that. Are you saying that that is not the case?

Robert Brown: No, I am not saying that. That would be a matter of the budget being expanded by agreement, and would be up to the corporate body. It would have no implications for the Executive or for the rest of the budget. The corporate body will take that action if it feels that it has the contingency funding to do so.

I think that I am right in saying that an issue arose with one of the commissioners about a legal action that they got involved in, and about the possible unexpected contingency. I suppose that that might just happen in the odd instance, although each case would have to be dealt with on its merits. However, that should not happen without people knowing about what is coming down the line, if you follow my point, and without particular permission being sought.

Stewart Stevenson: I am not clear about the permission. Paragraph 13(b) of schedule 1, on finance, refers to

"any expenses incurred by the Commissioner in the exercise of the functions of the Commissioner"

and contains a qualification, which is just about getting money back for services rendered and does not matter to my question. In essence, the bill seems to say that the commissioner decides how much money they need. To an extent, that is the intention behind section 12, which talks about the relationship between the corporate body and the commissioner in developing plans, but schedule 1 makes it unambiguously absolute that as long as the commissioner can show that they are spending their money

"in the exercise of the functions of the Commissioner",

we must pay up.

Robert Brown: That statement is a standard provision that is used for all commissioners. It is within the ambit of the accountable officer role that you talked about, in paragraph 12 of schedule 1, which is the same as that for other commissioners.

That is against the background of the controls that are exercised through audit and in other respects. That is no different from an individual budget—the bottom line is that if you ain't got the money, you cannot spend it.

If an overspend occurred—although I do not envisage one—serious issues would arise about the continuance of the commissioner or their chief executive in their role. However, an overspend should not occur, because the arrangement is surrounded by the same provisions for proper scrutiny and public accountability as apply to the other commissioners and to other bodies, such as the SPCB.

Stewart Stevenson: I understand the fiduciary duty that you describe and that the commissioner would have to give notice if they needed another £23 million to do something, for example. I accept that the bill contains the standard form of words. However, I still comment on them.

I will move on to the following paragraph in schedule 1, which is on accounts and audit. I suspect that this is standard stuff, too. It says that the commissioner has, in accordance with such directions as the Scottish ministers may require, to

"keep proper accounts and accounting records"

and

"prepare annual accounts".

Is it not more proper for the corporate body, rather than ministers, to require the commissioner to do that? Why are the ministers involved?

Robert Brown: I may need guidance on that, but I think that I am right in saying that that relates to the general function not of controlling the commissioner, but of imposing proper standards. I guess that the corporate body acts under such an arrangement, which links to the powers of the auditor.

John St Clair: The Public Finance and Accountability (Scotland) Act 2000 gives the Scottish ministers such powers of direction in relation to accounts. The bill mirrors those provisions.

Stewart Stevenson: I will ask just for clarity. In essence, as I suspected, do exactly the same rules apply to the corporate body?

John St Clair: Yes.

Stewart Stevenson: Right—that is enough.

Mike Pringle: The memorandum from the Finance Committee shows the budget for 2006-07, which I will not look at, and that for subsequent years, which neatly comes out at £996,000. We talked about whether the commissioner would want legal advice. We all acknowledge that going down that road is expensive.

Robert Brown: You are talking about the financial memorandum, not the Finance Committee's report.

Mike Pringle: No—the figures are from the Finance Committee, which laid out what it thought the budget might be after 2007. It has various figures for the commissioners' salaries, the recruitment of staff, rent, acquisition, equipment and running costs. One functional cost is for promotion and awareness raising. All that I am asking is, if the commissioner starts to receive legal advice, as we discussed earlier, and they conduct any inquiries, do we seriously think that £175,000 will be enough? I would expect legal advice to be funded from promotion and awareness raising, which is why I have doubts about the ability to stick to £1 million.

13:00

Robert Brown: The Finance Committee's report lifted those figures from the financial memorandum that the Executive provided. I made the point before that the information is illustrative and represents the kind of costs that might be incurred. The commissioner is entitled to make use of the budget up to the limit that they are given in whatever way they want other than for their own salary. Therefore, more or less could be spent on promotion, legal inquiries or any other function.

The financial memorandum does not include specific provision for the cost of inquiries, but travel costs are described as including travel for the purpose of conducting inquiries. Our view is that it is not possible to make any realistic estimate of the cost of inquiries, as it would be necessary to make some assumption about the number of inquiries and how big or how little they were—they could be big inquiries with lots of expense or little ones with not very much. In any event, in most inquiries, the main cost would be the time of the commissioner and her staff—I mean "his or her staff"; I said "her" because of the children's commissioner, so please forgive me. Such inquiries would not involve quite the same costs as were involved in the Fraser inquiry or some other public inquiry.

Mike Pringle: Convener, can I go back to a question that does not relate to finances?

The Convener: I want to close the discussion, so it must be brief.

Mike Pringle: Minister, I have a question on criminal cases, which arises out of evidence from the Faculty of Advocates. Do you envisage that the human rights commissioner would get involved when the Lord Advocate makes a reference at the end of a criminal trial? I refer to when an accused has won an appeal—the Lord Advocate might refer the case back for a decision of the court.

Robert Brown: Do you mean on a point of principle?

Mike Pringle: Exactly.

John St Clair: All criminal stuff is off limits, but that does not mean that the commissioner could not investigate the way that court services run. You are talking about a case—criminal proceedings.

Mike Pringle: The Faculty of Advocates gave an example. Valerie Stacey said:

"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."—[*Official Report, Justice 1 Committee*, 11 January 2006; c 2609.]

John St Clair: I see. If the matter is not within the proceedings, that would be different. If a general question is being raised about definitions and human rights, the commissioner would be covered by their duty to keep the law of Scotland under review in relation to human rights.

Robert Brown: I want to be content and I am not sure that that is quite right, because we are still talking about the commissioner being involved in the context of a case. Are we talking about a reference forward for bench decision?

Mike Pringle: No. The case is finished.

The Convener: We are talking about the Lord Advocate's specific power to refer any point of law to a panel of judges, which he did in the examples that Mike Pringle gave. To me, the answer is clear cut because, if the Lord Advocate's reference was on a criminal case, the commissioner would have no locus.

Robert Brown: That is my thought. Is that right?

John St Clair: We had better come back to the committee on that. Whether such a reference is still within the proceedings is a very narrow question. If it is not within the proceedings, the commissioner is covered by the general function of keeping the law under review, but we will check that out.

Robert Brown: There are too many amateur lawyers like me involved in the argument.

The Convener: Our adviser has pointed out one other question. Just for the purposes of completeness, would the power of intervention extend to the European Court of Human Rights in Strasbourg? We believe that the Northern Ireland Human Rights Commission has intervened in Strasbourg proceedings, so there may be some precedent for such intervention.

Robert Brown: I think that that would be a matter for the court in Strasbourg, rather than the

Scottish Parliament, to decide. There is a general power in section 11(8) of the bill, which says:

"This section is without prejudice to the Commissioner's capacity to intervene in any proceedings before any court or tribunal under an enactment or in accordance with the practice of the court or tribunal."

That is what I said, although the bill puts it in a slightly more technical way.

The Convener: You will be pleased to know that we have exhausted our lines of questioning. I thank you for being so clear in your answers and for your thorough written evidence, which we will consider now and over the next few weeks as we put together our stage 1 report. I thank you and your officials for coming along.

There is one other matter to deal with while we are still in public. I ask members to agree that, at our next meeting, we meet in private to continue the discussion of our stage 1 report. Is that agreed?

Members *indicated agreement.*

The Convener: We move into private to discuss the contents of our stage 1 report.

13:06

Meeting continued in private until 13:34.

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