

JUSTICE 2 COMMITTEE

Tuesday 9 January 2007

Session 2

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JUSTICE 2 COMMITTEE

1st Meeting 2007, Session 2

CONVENER

*Mr David Davidson (North East Scotland) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)

Colin Fox (Lothians) (SSP)

*Maureen Macmillan (Highlands and Islands) (Lab)

*Michael Matheson (Central Scotland) (SNP)

*Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

COMMITTEE SUBSTITUTES

Cathie Craigie (Cumbernauld and Kilsyth) (Lab)

Mr Kenny MacAskill (Lothians) (SNP)

Margaret Mitchell (Central Scotland) (Con)

Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Paul Cackette (Scottish Executive Justice Department)

Beth Elliot (Scottish Executive Legal and Parliamentary Services)

William Fox (Scottish Executive Education Department)

Johann Lamont (Deputy Minister for Justice)

Alistair MacLeary (Scottish Committee of the Council on Tribunals)

CLERK TO THE COMMITTEE

Tracey Haw e

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Steven Tallach

LOCATION

Committee Room 4

Scottish Parliament

Justice 2 Committee

Tuesday 9 January 2007

[THE CONVENER *opened the meeting at 14:05*]

Decision on Taking Items in Private

The Convener (Mr David Davidson): Good afternoon, ladies and gentlemen, and welcome to the first meeting in 2007 of the Justice 2 Committee. I wish the clerks and members of the committee a happy and successful new year.

We have received apologies from Colin Fox, who cannot make it to the meeting, and from Jeremy Purvis, who has a transport difficulty. Jeremy hopes to join us soon, however.

I remind everybody to switch off their mobile phones, pagers and BlackBerrys.

Agenda item 1 is to decide whether to take in private item 4, under which the committee will consider the evidence that it has taken on the Tribunals, Courts and Enforcement Bill. Do members agree to take item 4 in private?

Members *indicated agreement.*

Tribunals, Courts and Enforcement Bill

14:05

The Convener: Under agenda item 2, the committee will take evidence on the legislative consent memorandum to the Tribunals, Courts and Enforcement Bill, which is a United Kingdom bill. Members have copies of the Scottish Parliament information centre briefing on the bill and the written submissions that have been received.

I welcome our first witness, Professor Alistair MacLeary, who is chairman of the Scottish Committee of the Council on Tribunals. Thank you for coming to the meeting.

We understand that the provisions on tribunals in the bill seek to build on changes that have already been made to the way in which administrative support is provided for tribunals, through the creation of the Tribunals Service. What changes have already been made in that area? How do the proposed legislative provisions fit in with those changes?

Alistair MacLeary (Scottish Committee of the Council on Tribunals): The Tribunals Service did not require primary legislation, but its creation anticipated the bill and built on the thinking in the Leggatt report, which considered tribunal systems. Members may have heard of that report. The 2004 white paper said that the Tribunals Service would be accorded in the bill its own administration and senior president.

The UK Tribunals Service was set up last year and has had great success; indeed, I think that it already deals with 10 of the main tribunals. If the bill is passed, more tribunals will accrete into the system. The aim is to create a unified system with unified administration. There are two tiers, which allows for an appellate level and great efficiency. The service's mission is to ensure that the user is better served. That mission, rather than resource efficiency, drives the system, although I understand that the system has proved to be efficient. The success that has been achieved has been a main feature of what lies behind the bill.

The Convener: That is helpful. Which tribunals in Scotland could be added to the 10 tribunals that you mentioned?

Alistair MacLeary: I would not like to say. The Tribunals Service is a United Kingdom institution, and UK tribunals rather than devolved tribunals are involved. Tribunals can benefit from the Tribunals Service, but candidates for involvement cannot be named at the moment.

The Convener: The bill provides for the Council on Tribunals to be replaced by a new body, to be known as the administrative justice and tribunals council. How will the work of that new body differ from that of the Council on Tribunals? Why are changes necessary?

Alistair MacLeary: I return to the Leggatt report and the white paper. It was generally agreed that the administrative justice system was the Cinderella of the justice system. The criminal justice and civil justice systems may have their warts, but they have been analysed well and consistently improved. Administrative justice has been very ad hoc, as tribunals tend to pop up in bits of legislation here, there and everywhere. Leggatt found the system to be incoherent and inefficient, and his report and the white paper suggested that the powers of the Council on Tribunals, which has a fairly narrow remit to oversee listed tribunals, should be expanded so that the administrative justice system as a whole and all its component parts would be considered.

The advantage of including in the council's obligations the role of reporting to Government, advising it and recommending means of making the administrative justice system better is that the council would become what is called in the Leggatt report and the white paper the "hub of the wheel". We would have a body that had a duty and a responsibility to oversee the system as a whole and to make recommendations on its improvement. That would be a step function upwards for the council, which would involve our having a number of new responsibilities.

The Convener: It sounds as if you welcome the proposed changes. Is that a fair reflection of the view of you and your colleagues on the council?

Alistair MacLeary: The nice thing about the bill is that everyone welcomes the measures that it contains. It is abundant with common sense. It has not been difficult to follow the thinking that has flowed through from way back. Since the Franks report on tribunals of 50 years ago, it has consistently been the view that rationalisation is necessary and that there must be better ways of doing things. The fact that thinking has sharpened in recent years is particularly encouraging. The new administrative justice and tribunals council will be obliged to consider the system from the user's point of view and to look upwards at it, rather than to look down at it and to consider how to impose dispute resolution procedures, which has been the traditional approach. We will look up at the system and ask how we can improve access, especially for people who are disadvantaged. The bill is so worth while that it is difficult to argue against.

Bill Butler (Glasgow Anniesland) (Lab): Good afternoon, Professor MacLeary. You have struck a highly positive note.

In response to the convener's second question, you said that the proposed administrative justice and tribunals council would have expanded powers, which you welcomed. What additional resources will that body need to carry out its additional functions?

Alistair MacLeary: The white paper declares that no new resources will be needed and that the membership and staffing of the United Kingdom Council on Tribunals and its Scottish committee will remain at the present levels. However, the bill raises questions about resources because we will have additional work to do within the same timeframe. It is fair to say that some of the work that the council and the committee do, such as their visits to tribunals, may have to be sacrificed, but that is not something that can be given up altogether because if we are to make recommendations on administrative justice systems and, in particular, on tribunals, we must find out for ourselves how they work. How can we make recommendations without knowing how bodies are performing on the ground? I think that there will be strains and that we will be stretched; it will be interesting to find out how things pan out.

Bill Butler: It certainly will be. You mentioned that the white paper said that no new resources would be needed, but then you seemed to go on to say that you felt that that was a fairly optimistic assessment. Have I deduced correctly what you were saying?

Alistair MacLeary: That is a fair reflection. It would be extremely foolish of me to say that we will be able to guarantee to meet all the objectives that are set for us with our present resources, but that is not to say that that cannot happen. I will not prejudge that.

Bill Butler: Do you think that the argument of the authors of the white paper is that economies of scale will come into play and that, as a result, no new resources will be required? If that is the case, do you think that that argument holds water?

14:15

Alistair MacLeary: That argument holds water for the Tribunals Service, in relation to which there will be major economies of scale, but it does not come into play in relation to our small set-up. However, it would not be proper of me to be too gloomy because not enough information is available yet. What has been laid down has been laid down and we will try to live with it.

One of our new powers and responsibilities is that of promoting and making recommendations on research. There do not appear to be new resources for us to do research but we will be able to make recommendations to the Department for Constitutional Affairs and, in our case, to the

Scottish Executive for research that they might find it acceptable to fund. That would, of course, be of considerable aid to us. If we are looking at the administrative justice system as a whole, we first have to find out what is there. The Scottish Committee of the Council on Tribunals has a pretty good idea of that but not a complete picture. It is only when we have surveyed the ground that we can analyse it, see what is needed and make progress, and research might come into play forcefully in that work.

The Scottish Executive has indicated that it is prepared to support primary research at our suggestion and that of the Scottish public services ombudsman, so I suggest that we do a mapping exercise on administrative justice. No one quite knows what are the boundaries of administrative justice. Not just tribunals, but complaints handling and other kinds of dispute resolution procedure are involved. There are already signs that the Scottish Executive is at least prepared to fund—modestly, I would say—some research in that area.

Bill Butler: So it is a work in progress.

In relation to the current arrangements, how does the role of the Council on Tribunals in relation to tribunals in Scotland differ from its role in relation to tribunals in England and Wales? Would the position change under the proposed arrangements for a new council?

Alistair MacLeary: I see that the Executive recommendation to the committee is not to change that role, and I would go along with that. The current arrangement is that the Scottish Committee of the Council on Tribunals oversees UK-wide tribunals on behalf of the Council on Tribunals; we are simply a committee of the council. However, we have direct responsibility for the devolved tribunals and the council has none.

Bill Butler: Thank you for that clarification.

Maureen Macmillan (Highlands and Islands) (Lab): Would it be possible and sensible to restrict the functions in Scotland of the proposed administrative justice and tribunals council to tribunals that work within reserved areas and to exclude those that work in devolved areas?

Alistair MacLeary: Anything is possible.

Maureen Macmillan: But would that be sensible?

Alistair MacLeary: We would have to put a lot of thought into that rather than just jump to any particular solution. It would be most sensible to carry on as we are at present.

Maureen Macmillan: We should wait and see.

Alistair MacLeary: We should work at it and find out how the whole administrative justice

system works, not just physically and geographically but institutionally, and then see what is best. Again, that should be done from the correct and intelligent point of view, which is that of the user.

Maureen Macmillan: Thank you.

The Convener: On several occasions, you have repeated that we need to take a closer look at some of the issues. Will there be time to do all those mapping exercises, if you like, before the proposed new tribunal is likely to be created?

Alistair MacLeary: No. I understand that, in the House of Lords, Baroness Ashton expressed the hope that, if they are acceptable, the provisions in the bill will be implemented in June, which is quite a good timetable.

I referred to some research that I hope will start in about one month. That would provide a preliminary view in June and then a final report would come out a bit later. However, I do not think that there will be anything substantive to help decision making before the bill is enacted.

Jackie Baillie (Dumbarton) (Lab): We understand that members of the Council on Tribunals will somehow seamlessly transfer to the new body. Is that the case, and will it apply to members of the Scottish committee as well?

Alistair MacLeary: Yes. I am told that there are what are called grandfather rights, which I thought were something to do with British Airways and Heathrow, but apparently they apply to us. It is a very sensible thing to do. Technically, we should be sold off and others brought in, but who could do it better than those who were already there? It is not that things will carry on as they did before, but the people who are already in place are undoubtedly the best people to pick up the ball and run with it.

Jackie Baillie: Such continuity will be helpful. Are there likely to be changes to the appointments process for new members?

Alistair MacLeary: The process will not change, but the criteria for membership will be heightened, given the nature of the job specification. The calibre of members, particularly Scottish members, is high—I am not just saying that—and I have absolute confidence that we can take on the duties that will be imposed on us. As we recruit, we will seek people who can take a strategic rather than a parochial view.

Jackie Baillie: You will be aware that the bill provides an order-making power to bring the appeals jurisdiction of the Criminal Injuries Compensation Appeals Panel within the remit of the new Tribunals Service as a first-tier tribunal. What practical difference will that make?

Alistair MacLeary: It will be good for the Criminal Injuries Compensation Appeals Panel, which will be much more efficient and transparent—and all the other nice labels that we can stick on it. We support the approach, which makes abundant sense.

Jackie Baillie: Do you have concerns about the approach?

Alistair MacLeary: We have no concerns at all.

Michael Matheson (Central Scotland) (SNP): You might already have covered this issue to some degree. It was brought to the committee's attention that Andrew Leggatt's review of the delivery of justice through tribunals, which was carried out in 2000 and 2001, mainly considered United Kingdom tribunals and did not consider the tribunals in Scotland that operate in devolved areas. The annual report of the Scottish Committee of the Council on Tribunals flagged up concern that the devolved tribunals might potentially be left behind. Will the mapping and research exercise that you mentioned be sufficient to address your concerns?

Alistair MacLeary: No, it will not be, although it might expose problems and make us aware of opportunities.

The advent of the Tribunals Service is a very good thing and the proposed approach will bring with it a much more efficient internal appeals procedure, training for lay members, much better administration and a service that is set up in chambers—all kinds of mechanisms will make the service better for users. However, what happens to tribunals that are outside the system and do not enjoy those mechanisms? That applies to the devolved tribunals, but we should remember that the issue relates to England, too, to a degree. For example, local authority tribunals are outside the current system. The problem is not unique to the devolved tribunals.

I do not suggest that tribunals that are outside the system are somehow second class. I have heard the term "second-tier tribunal", which I reject, because many specialist devolved tribunals in Scotland are doing very well indeed. They do not need repairing; they are fine. However, some tribunals might be disadvantaged and some might need improvement, even without the advent of a new, better-run, Tribunals Service hanging over them like Big Brother. We have concerns, but we hope to survey and analyse the situation before we make proposals.

Michael Matheson: It is reasonable that you should make proposals after you have received the results of the research.

Do you have concerns about other provisions in the bill? Do you want to bring any matters to the

committee's attention before it discusses the bill with the Deputy Minister for Justice?

Alistair MacLeary: No, we have no concerns. It is nice to be able to say that.

The Convener: Thank you for your succinct and to-the-point answers, which were encouraging. The clarity and experience that you brought to the matter were helpful. Thank you for coming.

Alistair MacLeary: It was my pleasure. I wish the committee well in its deliberations.

The Convener: I suspend the committee until the minister can take her seat.

14:24

Meeting suspended.

14:31

On resuming—

The Convener: We now welcome our second panel of witnesses on the Tribunals, Courts and Enforcement Bill. I apologise for the croak in my voice. Most people in the north-east of Scotland seem to have had such a croak recently.

We welcome Johann Lamont, who is the Deputy Minister for Justice; Paul Cackette from the Scottish Executive Justice Department; William Fox from the Scottish Executive Education Department; and Jane McLeod and Beth Elliot from the office of the solicitor to the Scottish Executive.

Happy new year, minister, and welcome to the committee. The legislative consent memorandum notes that some of the provisions in the bill to do with tribunals fall—[*Interruption.*] Oh, minister, would you like to make some opening remarks before we move to questions?

The Deputy Minister for Justice (Johann Lamont): If I may.

Thank you very much for your welcome, convener. I extend the same happy new year wishes to the committee. I look forward to working positively with you over the coming period.

I am grateful for the opportunity to speak in support of the draft motion in the legislative consent memorandum on the Tribunals, Courts and Enforcement Bill. The letter from the Minister for Justice to the convener on 14 August, and the subsequent Executive memorandum, set out fully the parts of the bill to which the draft motion relates. I intend to summarise only the main points.

Two parts of the bill fall within devolved competences: the first is in relation to tribunal reform and the second is in relation to immunity

from seizure of works of art. I will speak first about the provisions on immunity from seizure.

The provisions were not covered in the minister's letter as they were not in the bill as published by the Department for Constitutional Affairs. However, from the memorandum, members will see that we feel that Scotland will be disadvantaged if the provisions are not applied here.

The provisions will protect the United Kingdom's ability to attract loans of cultural objects and works of art from overseas for exhibition to the public. Major cultural exhibitions increasingly rely heavily on loans from abroad to give the public and tourists a significantly enhanced opportunity to appreciate culture and art. However, there have been instances of works of art being seized while on international loan because of disputes over ownership or debt, for example. Overseas museums and galleries, and private owners, are increasingly concerned about that risk. Legislation protecting cultural loans is therefore becoming the international norm. The UK is now out of step with the United States of America, Canada and European countries. Consequently, the UK finds it more difficult to attract loans from overseas.

Although the provisions are new additions to the bill, the Department for Culture, Media and Sport has consulted on the need for legislation. The National Museums of Scotland and the National Galleries of Scotland support Scotland's having the same legal protection as the rest of the UK, with that protection commencing from the same date. We agree.

We acknowledge that a balance has to be struck between the benefits of giving immunity and the rights of people, such as victims of the Holocaust, who may legitimately claim ownership of the works of art concerned. The proposed legislation will not affect any claims on objects in UK national collections or in other museums in this country, including Holocaust claims.

I turn now to the tribunal reforms, which are the culmination of work that followed the Leggatt report on the review of tribunals in 2001. Sir Andrew Leggatt said that the current systems in reserved tribunals were inefficient and he made a number of recommendations for improvement. The UK Government's reform programme has two phases. The first was the establishment last April of the Tribunals Service, which is a new executive agency of the Department for Constitutional Affairs that brings together the administration of central Government tribunals, including some which operate in Scotland in reserved areas. The second phase of the reform programme is to create a unified tribunal structure within the new Tribunals Service. The new service will create a simpler and more coherent tribunals system that is flexible

enough to meet the needs of different users and jurisdictions. The unification of the tribunal judiciary will give clear leadership and a single voice and will allow more consistency in decision making and training. The new system will be more transparent and will increase public confidence by taking appeals against decision making away from the Government department that made the decision that is under challenge.

Two of the provisions on tribunal reform include areas that are within the competence of the Scottish Parliament. The more important is the creation of the new administrative justice and tribunals council, which will have a remit of keeping the administrative justice system under review and reporting on it. The committee heard earlier from Professor MacLeary on the work of the Scottish Committee of the Council on Tribunals, which currently carries out similar tasks. Given the supervisory functions of the new council, it would have been possible for the UK Government to legislate on reserved tribunals only, but it was felt that that would significantly disadvantage users of devolved tribunals and result in an unsatisfactory imbalance of tribunal scrutiny across the reserved-devolved divide. The Executive does not believe that exclusion of devolved tribunals from the independent scrutiny would be in the best interests of tribunal users in Scotland. We therefore support the reforms to set up the new reserved Tribunals Service.

Tribunals are a vital part of our system of justice and we are keen to see further progress in the modernisation of the civil justice system. Although that will be for the incoming Administration after the forthcoming election, we have announced a review of the civil courts system, which has received wide cross-party support. I expect that to be the main priority, but no decision has been made as to whether the DCA model is the way forward for Scottish devolved tribunals. We welcome views on that from stakeholders such as Professor MacLeary and from committee members.

I hope that those opening remarks are of value in setting the general context for both parts of the draft motion in the memorandum. As ever, I am happy to deal with any questions that members have.

The Convener: The committee intends to ask questions in two areas. We will start off with questions on tribunals and then ask questions on the protection of cultural objects that are on loan. The minister touched on both those issues, and we are grateful for her comments.

You highlighted one issue that is within the competence of the Scottish Parliament. What difference will the measures make and how will

the Parliament be able to get involved in the matters that you described to us?

Johann Lamont: It is generally accepted that the proposals for the tribunals system make sense and will result in a more transparent system from which people throughout Scotland will benefit. The sense that some bodies are judge and jury in their own cases will be shifted, because appeals will not be determined by the Government body that made the original decision. That is the critical matter.

A separate issue is the way in which the bodies will be scrutinised by the new administrative justice and tribunals council, with its Scottish committee. That is a means of enhancing the process. The Scottish Parliament and its committees will relate to that issue in the same way as they relate to other justice matters.

Paul Cackette (Scottish Executive Justice Department): That is right. I will add to what the minister said about the functions of the new council, which will be similar to the functions of the Council on Tribunals, although they will be enhanced. The intention of schedule 7 is to ensure that the remit of the new council in supervising tribunals in devolved areas is, in effect, the same as its remit in relation to reserved tribunals and the UK Government. It will have powers to send reports to the Scottish ministers, which will then be laid before the Parliament. It will also send an annual report to ministers, who will lay it before the Parliament. The new council will have a role in ensuring consistency in standards, tribunal training and user-friendliness of the tribunals. The benefit of the council doing so across the reserved-devolved divide relates to the fact that the majority of tribunals operate in reserved areas, such as social security and taxation, and that a relatively small number, taking the system as a whole, operate in devolved areas.

The expertise that the current Council on Tribunals has acquired will be built on by the new system, and the new administrative justice and tribunals council will allow that expertise to be brought to bear to scrutinise reserved and devolved tribunals. As I said, that will include the ability to make recommendations to this Parliament on devolved tribunals to the same extent as it can do to the UK Government on reserved matters.

The Convener: Thank you for giving us those details. From the evidence that we took from Professor MacLeary, it is obvious that he has great confidence that the current occupants of the council have the skill base, but he suggested that there may be grey areas around resources and the ability to take on new research work and so on. That is for him and his committee to argue about with your good self, minister, but does the Executive believe that the current resources will

be sufficient for them to do the additional work that appears to be coming their way?

Johann Lamont: It is fair to say that, if we are challenging people with responsibilities, we need to ensure that they are resourced appropriately. I cannot comment just now on the negotiations on what those resources should be, but everything that I have learned about the process has shown that people have confidence in the Scottish committee and its work and that they are looking to enhance it in the future. We are happy to continue the dialogue to ensure that there is appropriate resourcing so that the work is real as opposed to being a function that cannot be delivered. The detail is obviously a matter for discussion.

Bill Butler: In your opening statement, you said that the exclusion of devolved tribunals would not be in the interests of the Scottish justice system. When I asked Professor MacLeary whether it would have been possible or sensible to restrict the proposed functions of the AJTC to tribunals working within reserved areas, he said that what is proposed is sensible as it stands. That comment perhaps speaks for itself, but will you expand on why any exclusion of devolved tribunals would not be in the interest of the Scottish justice system?

Johann Lamont: We are talking about independent scrutiny, and we want it to be open and transparent. It will enhance what has worked in the past, so why would we not also attach it to the devolved tribunals? The new system will not work for ever and a day. As I said earlier, it does not preclude a future Administration from going further and setting up a separate body. Whether that would be rational is a separate matter.

I accept what you report as being said by Professor MacLeary, and it is also the Executive's view. It is logical to enhance the role of the tribunal system in ensuring appropriate scrutiny.

Bill Butler: Thank you for putting that on the record.

It is proposed that the order-making powers in the bill will be used to bring the appeals jurisdiction of the Criminal Injuries Compensation Appeals Panel within the new Tribunals Service. Will you outline what practical difference, if any, that will make for claimants in Scotland?

Johann Lamont: Perhaps I can explain the proposals in relation to the CICAP. The committee will be aware that the CICAP is a cross-border public authority and is designated as such under the Scotland Act 1998. It was so designated because the panel operates in both England and Scotland, and its functions in relation to Scotland are devolved.

Due to the importance of the decision-making process of the panel, which is one of the largest tribunals, it was decided to bring it within the new tribunal structure. The bill creates powers to do that, allowing changes to the constitution of the panel to achieve a merger. That will require the consent of the Scottish Parliament. The panel currently operates administratively as part of the Tribunals Service and will continue to do so. There is no plan to merge. We took the view that the change would strengthen its work and that there would not be any difficulty.

Bill Butler: Do you agree with Professor MacLeary that a much more transparent process is being proposed?

Johann Lamont: I will, of course, study closely what Professor MacLeary has said. Indeed, we will reflect on everything that has been said in evidence. As I have said already, the whole thrust of the proposals is to increase transparency and give people confidence in the process.

14:45

Jackie Baillie: Could you give us some further detail on the proposal for first-tier and upper tribunals? What will the practical effects be of the proposal?

Johann Lamont: I will try to find the best place to start on that question. The first and second tiers are to do with raising a complaint and then having an appeal. I would expect the appeal to the second or upper tier to be used far more rarely. It is a matter of giving people confidence in the process.

Paul Cackette: The principal aim of creating the first and upper tiers is to have a more transparent system of determining tribunal decisions. It is a movement away from the way in which tribunals traditionally developed, under which, if someone did not like their income support assessment, it was the Department of Social Security—now the Department for Work and Pensions—to which they appealed. If people did not like their asylum or immigration status, they appealed to the Home Office. There was concern that that did not provide adequate levels of transparency and independence.

The Tribunals Service seeks to create a system whereby the current decision-making process is effectively taken out of the parent department and put into a separate decision-making process to form a unitary system of first-tier appeals, in which tribunal experts will take decisions in a way that can give appellants confidence that they are being dealt with fairly and transparently.

It is intended that the decision makers—for example the social security commissioners and

child support commissioners—will enter the new first-tier process and effectively be divided into what have been described as chambers, where they will decide cases within their own area of expertise. That means avoiding somebody having to make a decision in an area that they know nothing about. That division can allow greater transparency in decision making.

There is to be a right of appeal from the first tier to the upper tribunal on points of law, with the leave of the first tier. That will allow for a review of any concerns that arise should the first tier decision-making process not lead to the correct decision. Beyond that, there will still be recourse to the courts—above the upper tribunal. For the purposes of Scotland, that means the Court of Session.

Jackie Baillie: I am assuming that, because any such appeals will be on a point of law, with a requirement for leave to appeal, you do not envisage many people going to the upper tribunals.

Paul Cackette: I anticipate that a relatively small percentage of cases will go to the upper tribunals.

Jackie Baillie: My next question is about timing and impact. I am conscious that, if the bill has not already entered report stage in the House of Lords, it might be about to. When do you envisage the changes to criminal injuries appeals taking place? On the matter of the bill's impact, what will happen to those people who currently work for the Criminal Injuries Compensation Appeals Panel in Scotland?

Johann Lamont: Report stage in the House of Lords is provisionally scheduled for 23 January. The remainder of the timetable, including the bill's introduction into and passage through the House of Commons, will be decided by parliamentary business managers in due course. I invite Paul Cackette to deal with some of the specifics.

Paul Cackette: In administrative terms, when the Tribunals Service was set up on 3 April 2006, criminal injuries appeals were already included. In practical terms, that is all part of the wider process. My understanding is that there will be no impact on the position with respect to the number of people employed by the Criminal Injuries Compensation Appeals Panel. I have no information either way, but my understanding is that there is no intention of having an impact on the people concerned.

Maureen Macmillan: The LCM notes that the review that was carried out by Sir Andrew Leggatt into the delivery of justice through tribunals did not cover tribunals in Scotland that operated within devolved areas. The minister spoke about that earlier. How has the Executive ensured the

adequate representation of Scottish interests in the development of the administrative and legislative changes affecting tribunals?

Johann Lamont: My understanding is that there has been active consultation and liaison, but Paul Cackette might be able to be more specific about that activity.

Paul Cackette: At official level, we have been closely involved with the Department for Constitutional Affairs in a lengthy series of developments. The Leggatt report goes back to 2001, and we were closely involved in the development of the white paper and then the bill.

In conjunction with the work that was done among officials, a Scottish tribunals forum was established in September 2005 under the chairmanship of Lord Hamilton—who later became Lord President—and latterly Lord Abernethy. It met quarterly to review the bill's progress and brought together the tribunal chairs from all of the reserved tribunals and some of the devolved ones, so there was a process to ensure that the tribunals concerned were consulted.

The DCA has commissioned separate research on the tribunals sector in general. Professor Hazel Genn, who is a law professor at University College London, has carried out research into the tribunal system's impact on users. One of the key priorities for the new system is to make it as user friendly as possible.

Maureen Macmillan: Thank you. That is helpful.

Michael Matheson: It has been brought to our attention that, in its annual report, the Scottish Committee of the Council on Tribunals notes its support for the establishment of the Tribunals Service but also expresses concern that Scotland-only tribunals should not be left behind in the process of establishment. Will you expand on how you intend to ensure that the tribunals that work on devolved matters only are not left behind?

Johann Lamont: An administrative justice steering group under Lord Philip has been established to continue the work and pursue the recommendations on tribunals. We are keen to work with people who have an interest in tribunals to build on what has already been done to ensure that the Scottish expression of the recommendations is satisfactory to all involved. The steering group is examining closely how the recommendations can be pursued.

The Convener: We now turn to the protection of cultural objects on loan, which is addressed in part 6 of the bill. In your opening comments, you answered some of the questions that the committee was minded to ask. You also talked about the need for Scotland not to be left behind. Will you detail for the committee what practical

problems have arisen due to the absence of the provisions that are proposed in the bill? Is there evidence that exhibitions in Scotland have been unable to borrow objects?

Johann Lamont: We may be able to give details of specific examples, but there is no doubt from the department's consultation that the National Museums of Scotland and other groups feel that the provisions are necessary, would provide them with a safeguard and would support them in holding exhibitions. Therefore, consultation has uncovered a need for the provisions, which must come from an understanding of the challenges that those organisations face in doing their jobs. Perhaps we can give you more detail on whether that need arises out of specific incidents or an anxiety that such incidents might occur in future, but the consultation demonstrates the organisations' wish to be part of a UK-wide approach that provides the safeguard of the provisions to museums in Scotland as well as elsewhere.

William Fox (Scottish Executive Education Department): Before items could be loaned for the Royal Museum of Scotland's recent exhibition of items from the State Hermitage Museum in Russia, the Hermitage required what is known as a letter of comfort to say that the Scottish Government would do what it could to protect the items while they were on loan in Scotland. Of course, the Scottish Government cannot really do anything, so it is merely a form of words to give some comfort to the lenders. Those letters of comfort are now not considered to be enough to provide satisfactory assurance for lenders; in particular, Russia and Germany will not accept letters of comfort.

The Convener: Could you expand on other difficulties? You mentioned one exhibition that was coming from the Hermitage in St Petersburg. Is this something that has been going on for a while?

William Fox: Letters of comfort have been used for a number of years. Another instance that I know of was a loan from the Hermitage to the National Library of Scotland. A letter of comfort was required before the items could be loaned.

Bill Butler: Can the minister state, for the record, how the Executive ensured that Scottish interests were adequately represented in the development of the proposals in part 6 of the bill?

Johann Lamont: The Department for Culture, Media and Sport consulted throughout the United Kingdom in 2006 on the need for legislation to provide protection from seizure for cultural objects on temporary loan in the UK. Obviously, the Scottish Executive was actively involved in that consultation. As I indicated, there was further

consultation with our own stakeholders on the specific issue of seizure.

Bill Butler: We have received some evidence and an extract from a speech by Lord Janner highlighting concern that the bill might, for example, deny the rightful owners of works of art stolen by the Nazis the opportunity to recover them. How would the system that is proposed in the bill prevent such unintended consequences from occurring?

Johann Lamont: I think that everybody is aware of the seriousness of the issue, its sensitivity and the anxiety that people have rightly expressed about it. That was reflected in the debate. As I indicated in my opening comments, we must get the balance right because we want to get a range of exhibitions into Scotland but do not want to end up in a position whereby people who were victims of the Nazi Holocaust feel that they are not able to reclaim what is rightfully theirs.

The museums have to follow guidance on combating illicit trade. The committee may want to get details of the document, which clearly lays out the procedure that should be followed by anybody who brings exhibits from abroad. It states:

"museums, libraries and archives must take precautions to ensure that they acquire, or borrow, only ethically acceptable items and reject items that might have been looted or illegally exported."

That test would have to be applied before the items were brought in. There would have to be evidence that the test had been applied and that the guidance was being followed. Of course, we expect that the bodies for which the immunity would be sought and agreed would be on a list of bodies that would have to comply with the guidance. We believe that that gives reassurance that responsible borrowers who are holding exhibitions and are seeking loans of items from abroad must be signed up to the guidance. That should give people confidence that items that are ethically inappropriate will not be displayed in this country. That deals with the matters that have been raised by those who are most concerned about issues relating to the Nazi Holocaust and spoliation.

Bill Butler: In essence, the provenance of the items would have to be watertight and it would be up to the museums that were borrowing the items to ensure that that was the case because otherwise they would be liable.

Johann Lamont: The guidance, which you might want to examine in more detail, makes it clear that not only must museums think that it is okay, they must show that they can establish provenance, that they have considered the matter and that they have evidence that the items can be brought into the country for exhibition. The

statement of principles from the national museum directors

"recognises and deplores the wrongful taking of works of art that constituted one of the many horrors of the Holocaust and World War II."

Therefore, at the outset, there is an understanding of the significance of the issue. I believe that the guidance will set out the clear procedures that museum and gallery directors will be expected to follow. If they want permission, they will have to produce evidence that they have followed the guidance. If they do that, they will be covered by the terms of the legislation.

15:00

Jackie Baillie: Clause 128 provides that protection from seizure will apply only to museums and galleries that have been approved for this purpose by the secretary of state. I understand that an amendment will be lodged at the report stage in the House of Lords to give Scottish ministers a role in terms of the Scottish institutions. Is that correct?

Johann Lamont: That is correct.

Jackie Baillie: Excellent.

Maureen Macmillan: Given the contentious nature of the issue, I want to explore how things will happen in practice. Let us say that the State Hermitage Museum was anxious to send an exhibition to the National Galleries of Scotland and that, having gone through the rigorous checking procedures, the National Galleries decided that some of the items that the Hermitage was offering were of dubious provenance. Would the National Galleries have to say to the Hermitage, "We will take X number of your French impressionist paintings, but we do not want to take painting Y or painting Z"? The Hermitage might then say, "It is all or nothing." What would happen in practice?

Johann Lamont: I will not attempt to capture in a few words all the guidance, all the serious work that has been done on the issue and all the consideration that has been given to it. However, it is worth reflecting on what the guidance says to those who are faced with that kind of decision. My understanding is that it is the responsibility of the receiving body to ensure that it does not receive items for which it cannot establish provenance. If a lending body were to say, "If you do not take all that we are offering, you cannot get any of it," a gallery would be unable to take the works for exhibition. The onus is on the receiving body to establish provenance.

Maureen Macmillan: Yes but, even with the new provisions in place, the Hermitage would still not want to send us exhibitions because the

provenance of some of the works on loan may be challenged.

Johann Lamont: That is an entirely separate matter. The issue for the bill is enabling works of art to be seen in this country. We want people to enjoy and engage with work from other countries. The perceived anxiety among those who loan from abroad is that their exhibition items may not be secure. The provision is aimed at giving them confidence and not in providing a get-out clause to those who want to loan ethically unsound objects for which provenance cannot be guaranteed. The matter that you raise is much broader than the issue under debate.

Others are anxious that, under the bill, they will be unable to rightfully claim what is theirs, but that is not what the bill is about. It does not prevent that from happening; it ensures that anyone who wants to bring objects into the country for display is faced with the challenge of establishing the provenance of those items—that responsibility lies with the receiving body.

Maureen Macmillan: Will the galleries get any support in making those checks, which I assume will be rigorous, time consuming and possibly costly? Will they be given extra support to do that?

Johann Lamont: The question is a detailed one. I will ask my officials to address it.

William Fox: Museums and galleries do that already. Under the due diligence guidelines, they are duty bound to ensure that they check carefully the provenance of anything that they loan or acquire.

Michael Matheson: Clause 127 sets out that the provisions protecting objects from seizure would not affect any liability for an offence relating to the importing or exporting of such objects. Could you expand on the type of offence that would be committed in those circumstances?

Johann Lamont: That is a question for officials.

William Fox: I am sorry; will you please repeat the question?

Michael Matheson: Clause 127 sets out the provisions protecting objects from seizure, but it says that that protection does not affect liability for an offence relating to the importing or exporting of objects. What type of offence would be committed if a museum here imported or exported something that had not gone through the due processes to determine its provenance?

Beth Elliot (Scottish Executive Legal and Parliamentary Services): There might be offences that are unrelated to the provenance of the item. Such offences might include a breach of a prohibition in a customs act. Offences that are committed by virtue of the pornographic nature of

the material would be unrelated to the provenance of items that might be subject to a Nazi-spoliation claim.

Michael Matheson: In such circumstances, who would be liable to be charged? Would it be the director of the gallery involved?

Beth Elliot: I imagine that they would not want such items in the country in any case, but a normal criminal process would be followed; there would not be immunity in such a situation.

Michael Matheson: I am just trying to establish who would be liable.

Beth Elliot: The person who would be liable would not change. The normal, existing criminal provisions would apply.

The Convener: I thank the minister and her four officials for coming along this afternoon. You referred to a particular document. If the clerks are in doubt about what it was, they will contact your officials.

Are members prepared to receive a draft report on the bill in private at our next meeting?

Members indicated agreement.

Custodial Sentences and Weapons (Scotland) Bill: Stage 1

15:08

The Convener: Item 3 is to allow the committee to consider further an interim response from the Minister for Justice to the committee's stage 1 report on the Custodial Sentences and Weapons (Scotland) Bill, which members have had circulated to them. The clerks assure me that we will get a detailed response from the minister before the end of January. Are members content with that?

Members *indicated agreement.*

The Convener: As members know, we have a stage 1 debate on the bill on Thursday afternoon. The first day of stage 2 consideration is now expected to be 6 February.

15:09

Meeting continued in private until 15:17.

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