The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 6 December 2011

Session 4

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JUSTICE COMMITTEE
17th Meeting 2011, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*James Kelly (Rutherglen) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (SNP)
*Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
*David McLetchie (Lothian) (Con)
*Graeme Pearson (South Scotland) (Lab)
*Humza Yousaf (Glasgow) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Carole Ewart (Human Rights Consortium Scotland)
Professor Chris Himsworth (University of Edinburgh)
Patrick Layden QC TD
Lord McCluskey
Professor Alan Miller (Scottish Human Rights Commission)
Shabnum Mustapha (Amnesty International)
Euan Page (Equality and Human Rights Commission)
Lynn Welsh (Equality and Human Rights Commission)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 6 December 2011

[The Convener *opened the meeting at 10:01*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the 17th meeting of the Justice Committee in the fourth session of Parliament. I ask everyone to turn off mobile phones and other electronic devices as, even when switched to silent, they interfere with the broadcasting system. No apologies have been received, although I know that James Kelly has been delayed by the road conditions and the weather.

Item 1 is a decision on taking business in private. Does the committee agree to consider its work programme in private later in the meeting?

Members *indicated agreement.*

Commission on a Bill of Rights

10:01

The Convener: The main item on today's agenda is an evidence session to inform our future response to the consultation by the Commission on a Bill of Rights for the United Kingdom on whether there should be such a bill of rights. I add that later today some of the committee members will meet some of the commissioners here in the Parliament.

I am grateful to our witnesses for agreeing to appear before the committee at quite short notice, and I thank them for their submissions. I believe that, before we start the questioning, certain members wish to declare an interest.

John Finnie (Highlands and Islands) (SNP): As we will be taking evidence from Amnesty International, I should make it clear that, as my entry in the register of members' interests indicates, I am a member of that organisation.

Roderick Campbell (North East Fife) (SNP): I, too, am a member of Amnesty International.

The Convener: Thank you.

I welcome our first panel of witnesses: Professor Chris Himsworth, professor emeritus of administrative law at the University of Edinburgh; Patrick Layden QC; Lord McCluskey, former Solicitor General and senator of the College of Justice; and Professor Alan Miller, chair of the Scottish Human Rights Commission. As we have a lot to get through, we will go straight to questions. Obviously, we want to hear from all of you but if you think that one of your fellow panellists has said what you wanted to say, you should not feel any need to repeat it. You can just nod—actually, it might be better to say, "I agree", because nodding does not get reported. I say that for the benefit of Professor Alan Miller who I see is happily nodding away.

Before I invite questions from members, I thank the witnesses for their very full and useful submissions.

Lord McCluskey: Convener, I should point out an error in my submission, which refers to Kyrgyzstan. Although a member of various European bodies, that country is not a member of the Council of Europe and I would not want anyone to think so. Of course, it borders China.

The Convener: Thank you very much.

Roderick Campbell: I will kick off with a very general question. Do any of our panellists wish to comment on the use of the phrases "incorporates" and "builds on" in the commission's terms of reference?

Professor Alan Miller (Scottish Human Rights Commission): That is a very good and searching opening question. I will cut to the chase. Although the terms of reference refer to enshrining the European convention on human rights in UK law and building on them, they do not confirm whether it is intended that the existing mechanisms under the Human Rights Act 1998, which give effect to the ECHR, will remain in any UK bill of rights. That is why so many individuals and organisations—certainly the Scottish Human Rights Commission—are clear that the 1998 act should be retained; it is an effective way of incorporating the European convention and it has worked largely in that way.

There should be no retreat from the existing mechanisms in the 1998 act that give effect to the European convention. Those mechanisms mean that the courts must take into account the case law of the European Court of Human Rights; that legislation should be interpreted as far as possible in a way that is compatible with the convention; that the courts can issue a declaration of incompatibility if Westminster legislation runs foul of the convention; and, most important, that public authorities are required to comply with the convention. Those are the teeth, and if the teeth were removed, we would not be left with very much.

The Convener: Does anyone else want to comment on that question?

Lord McCluskey: I am afraid that I do not have the terms of reference in front of me.

Roderick Campbell: The commission's terms of reference state:

"The Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties."

Lord McCluskey: I believe that we have to start from the position that the existing system is not working well. First, "human rights" rank alongside "health and safety" as being dirty words in the mind of the public, largely because of conceptions and misconceptions about what is happening in the human rights field.

Secondly, there are the points that I have sought to make in my submission.

Thirdly, under the existing system, cases that go to the court in Strasbourg join a queue of roughly 150,000 cases. There is something seriously wrong with a court that has a backlog of that many cases going back six or seven years. The result is that the countries that choose to ignore the obligations that the convention seeks to impose can do so largely because they know that it will be almost a generation before a case is decided against them. The possible exception is Turkey, which is pretty good in that regard.

Therefore, in my view, we need to start from the position that there is something seriously wrong with the existing system.

Patrick Layden QC TD: I agree that the present system is not working properly, but I doubt very much whether adding a further convention to the existing set-up would improve matters. Also, a new British bill of rights would not cure the major defects in the way in which the Strasbourg court works. It might do something for us in this country—although I have doubts about that—but it would not fix what is or is not going on in Strasbourg. That would require action at Council of Europe level. As I said in my note, we in this country have the European convention on human rights and the charter of fundamental rights. Adding another convention to that would complicate matters even further, and the remedies for the individuals affected would take even longer to produce.

Professor Chris Himsworth (University of Edinburgh): The question that has been posed seems to beg another question. Further incorporation and building on are being considered in the context of a UK bill of rights, but that begs the question whether anything further should be done at the UK level or whether, if there is to be a further building on of rights in whatever form under the present constitutional conditions, that might be done on a different basis. I would have thought that the primary concern of those in this building would be whether any further incorporation or building on of anything should be done at the UK level, rather than at the Scottish level. There would have to be a debate about that.

There is a question about incorporation and building on, and I think that we know where it comes from. Coalition politics insisted that we had to retain the adherence to the ECHR, and that therefore abolition of our adherence to that convention would not be considered lightly. However, nothing has been said by the coalition about the manner in which one might incorporate or build on the convention with further rights, which begs the question whether that would be done by judicially enforceable rights, or by some sort of declaration of further rights or declaration of adherence to those rights.

The snag in these starting stages is that the debate has provoked initiatives from all those in many different quarters who have different views on bills of rights generally. It has also provoked all sorts of debates, whether technical or political, as to the future—even as to the future of Europe and adherence to Europe and the future of the Union. All these thoughts are triggered by that form of words.

The Convener: Does Roderick Campbell want to come back in?

Roderick Campbell: I think that that was a very useful starting point.

I found the comments in Mr Layden's submission on the effects on the Scotland Act 1998 quite interesting; I also found particularly interesting his reference to the "margin of appreciation". I ask him to expand on his view that a British bill of rights would have to be within the margin of appreciation afforded to individual member states, if one accepts the premise that the European convention is going to remain.

Patrick Layden: There are a number of Strasbourg court decisions that recognise that the court should not be trying to lay down general rules to be followed slavishly by all members of the Council of Europe. Provided that the end result—normally a fair trial—is secured, it is for the individual states to decide how they achieve that. The court's better decisions look at the end result and say, "This was a fair trial. That is the way they do it in Scotland; it may not be the way they do it in the Netherlands or in Turkey, but it is, in essence, a fair trial and we are not going to get into the detail of how each country achieves that result."

That is one tendency, but there is an increasing tendency, of which the Salduz case is a good example, where the court has said that there are certain things that happen, or which have happened, that are simply incompatible with the right to a fair trial. The court builds on the unfortunate experience of Mr Salduz, a very young man who was kept incommunicado for 48 hours until he allegedly confessed to a crime. In extrapolating from that, it says that the interviews—videoed and recorded—that take place in Scottish police stations of people suspected of crimes, or any contact or questioning of a suspect outwith the presence of a lawyer, are incompatible with the right to a fair trial. By doing that, the court is effectively legislating. It is taking away the margin of appreciation—the right of the Scottish system, the Netherlands system and the French system to say, "If somebody is concerned, or thought to be concerned, with a criminal act, it is reasonable for the authorities to ask him or her for his or her explanation", which is effectively what happened in the Netherlands and here. By saying that that is completely out of the window, the court has a major effect on the internal workings of our system, the Dutch system and the French system.

Professor Miller: I will add to what I said earlier and pick up some of my colleagues' comments.

We can do better. The Human Rights Act 1998 is as good a way as has been established to give effect to the European convention on human rights, but the act is not in itself sufficient to guarantee the people of Scotland their entitlements under international human rights law.

On Lord McCluskey's comment about the problems of the European Court of Human Rights in Strasbourg and what that has to do with our discussion, we have to be quite clear. We all know the present climate in the UK. We have UK ministers making the most misleading and distorting statements about the Human Rights Act 1998 and calling for its repeal. That is the climate that has been created.

The Scottish Human Rights Commission is the chair of the European group of national human rights institutions—there are 35 of us around Europe. We are actively engaged in the process of trying to improve the efficiency of the European Court of Human Rights. It is clear to people around Europe and within the UK and Scotland that the UK Government is on the retreat from its human rights obligations domestically and internationally. There is a pattern in what it is doing within the UK and around Europe. We can do better than that.

10:15

To pick up Patrick Layden's point about Salduz, Scotland can do better. We should not try to shut ourselves off from outside influences that reflect the way in which the world is evolving. Salduz was a case that was waiting to happen for 10, 15 or 20 years. It came belatedly. It is clear that in that case all our judges got it wrong. We have to move on and accept that Scotland has to take its place in the broader environment, contribute a lot of the good from our system and learn from outside in order constantly to improve our system and enable our people to enjoy the rights to which they are entitled.

In Scotland, we can do better by giving effect to the rest of the international human rights legal obligations relating economic, social and cultural rights. That is what the people are entitled to. We should also develop in a very practical way with the Parliament, the Government and the public a national action plan that sets out what steps we have to take in Scotland to bring the life experience of people, particularly the most vulnerable, up to the standards that the UK has accepted internationally. That is where we should be: having progressive realisation of rights.

Lord McCluskey: I want to comment on some of the points that have been made. Patrick Layden talked about adding an extra convention. I can see the possibility not of adding an extra convention but of substituting our own UK, home-made bill of rights for the Human Rights Act 1998. That is what

the Conservative Party proposed in the lead-up to the election. The proposal was well thought out. I will not say whether it is right or wrong, but substitution, rather than addition, is a possibility.

We keep talking about Salduz, which, as members will know, was the Turkish case that gave rise to the Cadder judgment. In my view, the combination of Salduz and Cadder was a clear example of the human rights system working extremely badly. The court in Europe and indeed the court in London pay lip service to the notion that they will accord responsibility to the apex criminal courts—the domestic criminal courts from the point of view of Europe—but in fact they do not do that.

In Salduz—Patrick Layden has outlined the circumstances—this fellow was detained by security police incommunicado for 48 hours. In that context, the court pronounced a general rule to the effect that everyone has to have a lawyer from the moment of his arrest. That flies totally in the face of the British systems, especially the Scottish system, which was well devised by Parliament after a commission that sat under Lord Thomson and many other distinguished criminal lawyers evolved a system that would ensure a fair trial. That is why I say that the Cadder decision was wrong. It chose to ignore the fact that the Salduz court took no account whatever of Scotland or indeed of common-law systems.

The Convener: Does anyone else want to enter the debate?

Professor Himsworth: I am sorry, but I cannot comment because I have not seen what Patrick Layden said about the margin of appreciation. It would be impossible for me to comment.

The Convener: I will let Roderick Campbell back in after the witnesses. Does Professor Miller want to respond?

Professor Miller: I just want to comment briefly on Lord McCluskey's comments about Salduz. That was not some foreign mystical court out in Strasbourg unduly interfering with our comfortable little legal system—it does not work like that. Lord Hope, a Scottish judge, sat in the Supreme Court and applied what the rest of Europe was applying. As a result of the Salduz decision, Belgium, the Netherlands and Ireland, like Scotland, woke up, smelled the coffee and changed their legal systems to bring them into line with the rest of the European system.

We should just be big enough to accept that we made a mistake. It has been pointed out to us since the mid-1980s, through the 1990s and the early part of this century that there was an anomaly in our otherwise quite impressive criminal justice system. The case was going to happen and we should just be big enough to accept that, think that we have improved the system finally and move on.

Roderick Campbell: I want to press the witnesses a bit further. In your view, as long as the UK adheres to the convention, the British bill of rights must operate within the margin of appreciation. You have identified the problems with, for example, the Salduz judgment. How could that work in practice?

Patrick Layden: As I said in my note, I have some difficulty with it. In this country, we now have a body of jurisprudence that interprets convention rights and gives them a UK meaning. Quite a lot of the trouble with these things in the media has been related to the right to privacy. The media do not like the right to privacy, as it gets in the way of their right to free speech. The convention does not state what the right balance is between those two rights; it simply states that there is a right to privacy and a right to free speech. Both can be diminished in the public interest, and those propositions are just left hanging. It would be technically possible for a UK bill of rights to tease out precisely where the balance should lie and say that certain matters are going to be covered by a right to privacy and that other matters are not. That judgment could be reflected in a statute. However, that statute would itself be subject to scrutiny not only in our courts, but in Strasbourg. There would then be a whole series of decisions about whether particular invasions of privacy were compatible with, first, the British bill of rights as enacted by Parliament and, secondly, the convention rights, which, as you say, we are unlikely to depart from.

We spend a lot of time agonising about the finer points of human rights. As Lord McCluskey says, the major effect of replacing our Human Rights Act 1998 with a new British bill of rights would be the addition of a further layer of law to what is already a complex area. We would simply create more opportunities for lawyers to make long arguments about things, and I do not think that that is the direction in which we should be going at the moment.

Professor Himsworth: I now get the general drift of the argument. The general answer must be that, whether there is further legislation at the level of a bill of rights or at the level of individual pieces of legislation, provided that we adhere to the convention at whatever level, it must be within the margin of appreciation that would be acknowledged by the Strasbourg court.

The Convener: Let us move on.

Humza Yousaf (Glasgow) (SNP): I was going to ask a follow-up question on that subject. Before I do, I will ask another general question, seeing as the previous one provoked such great debate.

The commission's terms of reference talk about building on the current legislation and current rights. However, as has been suggested, the innuendo about catflaps, the misinformation about immigrants and foreign national criminals and any repeal of the Human Rights Act 1998 suggest that quite the opposite situation exists. With such confusion at its core inherent at its inception, would it not be better for the commission to come back in another political climate? Is there something urgent that requires to be done, or is it political posturing? You probably cannot answer the second part of my question, but I would be interested in your answer to the first part.

Professor Miller: I am not aware of any other developed country that has embarked on drawing up a bill of rights that is based on repeal of its existing human rights legislation. The present climate could hardly be more unfavourable to the undertaking of such a project. When other developed and developing countries embark on a constitutional process to construct a bill of rights, it is a long process involving the public and all kinds of different actors in society. Such a process considers international experience and it usually comes out of some transition process that the country has been going through.

When we look at the commission on a bill of rights, we see that the members are all highly accomplished and distinguished individuals, but it is clear that they reflect the composition of the coalition Government: some are Liberal Democrats and some are Conservatives. That is absolutely fine—it is a compromise in the political agenda of a coalition Government in an atmosphere that has been created by one part of the Government being anti-human rights and wanting to roll back its accountability, while the other part, we understand, wants to defend the Human Rights Act 1998.

To put it mildly, that is a bit of an inappropriate way to embark on tackling such a serious issue that has such implications for people up and down the land, who are much more concerned about access to public services, housing, social care and health. For them, human rights are real—they include economic and social rights; to be frank, they are not interested in the Westminster bubble, in which the Government wants to distance itself from being accountable to the courts, to Parliament and to its international obligations. A Westminster debate is being imposed on the rest of the country when the rest of the country wants to move on and do something that is much more practical and effective, and which is relevant to people's actual needs rather than to a politicised debate at Westminster.

Lord McCluskey: I do not think that the word "urgent" is all that relevant here. The democratic dimension has been mentioned. One thing is clear beyond peradventure: there was no democratic discussion at all about the creation of the European convention on human rights, and there was almost none on the creation of the Human Rights Act 1998.

Before the election, John Smith—who, of course, died in 1994—decided that he advocated a British bill of rights, but when Labour came into power, it changed its mind, to the extent that Derry Irvine adopted Lord Scarman's earlier position and decided to introduce a bill of rights that was lifted straight from the convention. If you look at the explanatory memorandum to that bill, as I did, you will find that the estimated cost of the whole exercise was going to be £12 million. That must be an underestimate by thousands of per cent—the real cost of the thing was massively greater.

The other point that I want to make, which is extremely important, is that when the Human Rights Bill was in the House of Lords, where it was fully debated, the Conservative Opposition put down amendments to say that any decision by the court in Strasbourg would be binding on the British courts. The Conservatives did not want that to be the case; they wanted to test whether that was what the Government meant. The Government rejected those amendments on the basis that such a decision would not be binding.

Section 2 of the Human Rights Act 1998 says that a court determining such a question "must take into account" any judgment of the European Court of Human Rights. That has been interpreted by the judges in London, especially Lord Rodger, who was the principal interlocutor on the matter, to mean that it had to be binding on the rest of us. Hope adopted that position, which is why, in Cadder, the court felt bound by what had happened in the Salduz case. To my mind, that was an error that was made in London.

Professor Himsworth: On that precise point, there has been a response to that, but I do not want to go near the general debate about the status of the UK Supreme Court and its relationship to the courts in Scotland. The fact that there has been a response is evident in at least one or two notable cases at Supreme Court level. It is not the case that what Strasbourg says is simply written down and incorporated. A response and a rethinking have been invited in some areas.

Humza Yousaf: Picking up on Professor Miller's comments, I would find a bill of rights wrapped in any national flag a dangerous concept, whether it was a Scottish bill of rights or, as in this case, a UK bill of rights. To me, that seems a parochial, inward-looking and possibly navel-gazing exercise.

This has been touched on slightly, but could it not confuse matters further if the Human Rights Act 1998 were repealed, because the convention rights would still be legally binding on the UK? Would not another piece of legislation just cause further confusion rather than clarify definitions and so on, as Lord McCluskey suggested in his submission?

10:30

Lord McCluskey: On a point of information, most countries have their own bill of rights; for example, Australia, the United States, Canada and many other countries have a bill of rights. There is nothing parochial about it. It is just that you take notions such as morals or necessity and apply them as they are built into, or flow from, your own culture in your legislation. So, your bill of rights reflects the nature of the society that you are in. Morality in Azerbaijan does not mean the same thing as morality in Sweden or Finland.

Humza Yousaf: You see a bill of rights as a moral compass.

Lord McCluskey: Moral rights are written into the convention. I quote the relevant part in my submission.

Patrick Layden: The notion is quite an old one. The English produced their bill of rights in 1688, and even that was several hundred years after Magna Carta. People have always struggled for some sort of general framework within which ordinary laws should be made and ordinary citizens could operate. The rights that are given to individual citizens are more important, because they are recognised by whatever your legislative body is in Scotland. We had the Claim of Right Act in Scotland because various things happened during the later years of the Stewarts' reign that made people think, "We need to do better than this."

Humza Yousaf: You do not see any potential confusion arising from the repeal of the 1998 act, with the ECHR still being legally binding, and having a bill of rights as a substitute. Would that not confuse judges and courts?

Patrick Layden: No. As I have said, given where we are at the moment, a new British bill of rights is liable to confuse things, because we are still subject to the convention and the Charter of Fundamental Rights of the European Union, which is the new kid on the block and is just developing itself. The European Court of Justice will be telling us what that means in due course; it may or may not be the same as the convention.

To add a further British bill of rights to that package could confuse matters. The bill of rights might be very clear in itself, but lawyers will immediately start wondering, if it is expressed in different terms from the convention, whether it is compatible with the convention. If the bill of rights is expressed in the same terms as the convention, what is the point? From an objective point of view, all that we would do by adding a bill of rights would be to clutter up the legal landscape with more hurdles to cross, which would be expensive.

Professor Miller: Humza Yousaf is absolutely right with his question. Leading members of the judiciary, such as Lord Woolf, Lord Hope, and Sir Nicolas Bratza, who is the British president of the European Court of Human Rights, have questioned the purpose of a UK bill of rights in terms of the confusion that it would cause in the legal landscape and the message that it would send out to the rest of Europe, because it would undermine the existing protections of the ECHR. That is not to say that, at a given stage in a country's history and development, there is no case for having a constitution and a bill of rights as part of that.

If we consider the recent example of South Africa, it was an inspiration to the people of South Africa and to the world how rights were enshrined in their bill of rights and in their constitution. In the United Kingdom, or in Scotland, we have not reached such a point in the development of our country; we may do at some point, but we have not. The current climate is clearly a politicised one that is quite backward and inward looking, which is not the most fertile time to have a debate of this kind. We can do better in Scotland by considering our existing international human rights legal obligations and identifying where the gaps are in real life, then having a national action plan to fill those gaps and bringing the living experience of people to where it should be. That is the most practical way ahead, given where the country is at.

Professor Himsworth: Along those lines—and without complicating matters by looking at the British or the UK level—there is certainly at least a Northern Ireland dimension to all this, which is parochial only in the sense that it is confined to Northern Ireland. The notion of a bill of rights for Northern Ireland, which would, if you like, be built into the settlement in Northern Ireland, is certainly a dimension that has developed without anyone damning that as parochial within the present devolution context.

Humza Yousaf: Are you suggesting that the circumstances in Northern Ireland are such that it makes sense to have this discussion there but that, because of that, it makes sense for the rest of the UK to have that discussion as well?

Professor Himsworth: It certainly does not lead to any insistence on a particular solution for Scotland. One cannot simply read off what is happening in Northern Ireland, because the

circumstances that have brought about the proposal are clearly special to that country. On the other hand, if that proposal were to proceed and we had a bill of rights operating at a subnational level within the present UK, it would certainly make it clear that such a move cannot be wholly incompatible with the UK constitution and that, if the case were made and thought given to its contents, status and all the other consequential questions, having a Scottish bill of rights on a similar basis would not be unthinkable.

Professor Miller: Although I very much agree with Chris Himsworth that the Northern Ireland dimension is very important, I think that we need to look at that particular process. The proposal came out of the Belfast agreement, after which there was a decade of constitutional analysis and very real grass-roots public participation. Our sister body, the Northern Ireland Human Rights Commission, was mandated by the Belfast agreement to provide advice on what a bill of rights for Northern Ireland would contain; there were widespread consultations across the communities; and then the document in question was produced. It represents a particular stage in the development of Northern Ireland and fits with the needs of the communities there. However, that is totally different from what is going on at Westminster. I believe that there should be a bill of rights for Northern Ireland and that the integrity of the process should be respected.

Patrick Layden: With regard to timings at Westminster, it is worth remembering that the Human Rights Bill became the Human Rights Act in November 1998—or 16 months after the Labour Government came to power. I can tell the committee—because I was there—that the Government came at this from a standing start. There was not an immense amount of consultation on or consideration of the matter; the Government simply scheduled the provisions of the ECHR to the 1998 act and set out a number of provisions for getting into it and, in some cases, getting out of it. However, for a number of excellent reasons, which I will not go into unless the committee wants me to, the issue did not receive the long-term consideration that it might have received.

The Convener: If you wish to go into those reasons, please do so.

Patrick Layden: That is a matter for the committee.

The Convener: It would be interesting to hear what those excellent reasons are—I see from members' nods that the committee feels the same way.

Patrick Layden: The reasons are largely to do with the enormous difficulty of defining a British bill of rights against the background of the convention. As soon as the process started, there was an immense amount of pressure from the media to preserve their position with regard to free speech. That is the reason for the inclusion of section 12 in the 1998 act; it has no real weight with regard to the ECHR but was simply a means of pacifying media interests, which at that time were probably more influential than they are now. Likewise, section 13, which relates to

"Freedom of thought, conscience and religion"

was included to pacify various religious interests, which were worried about their position.

Apart from including those two sections, the Government did not want to get into those arguments or try to strike a balance between freedom of speech and privacy and, as a result, the courts have had to develop provisions in that respect. Unlike with Northern Ireland, there has simply been no detailed consideration of how a bill of rights might reflect the UK's constitutional arrangements. The Government wanted rights and it got rights simply by taking the human rights in the convention off the shelf and putting them into British legislation. Considering the way in which that was done, that legislation has worked remarkably well.

David McLetchie (Lothian) (Con): I put on record my dissent from the proposition that the commission's composition is somehow rigged or partisan in order to produce a particular conclusion. I am looking at its membership now; I see that one member is Baroness Kennedy of The Shaws, who is a Labour peer, and another is Sir David Edward, who is a very distinguished jurist and professor. Is it seriously being suggested that those people are stooges who have simply been put on a commission to achieve a predetermined result?

Professor Miller: I take it that you are addressing that question to me, so I will answer it.

David McLetchie: You suggested that the composition of the commission is biased, so it would be appropriate if you answered the question.

Professor Miller: Yes. I will answer it straightforwardly.

I know pretty well the process by which the commission's composition was determined. There was an agreement between the coalition partners. I have said that all the members of the commission are extremely accomplished professionals and distinguished individuals in their own fields, but if such a major potential constitutional process is being embarked on, we should not have a commission that has been drawn politically from a Government without account having been taken of the wider sections of

society, culture, occupation, gender and ethnicity. There should be a much wider selection process for any body that is to be charged with such a mandate and a longer period of public engagement. It is a bigger deal than a Government just putting together a body to produce a report by the end of next year.

The general expectation is that each of the political parties will take things from whatever comes out of the commission of inquiry and put them into their election manifestos for the next election. One will potentially call for the repeal of the Human Rights Act 1998 and another will potentially call for its defence.

David McLetchie: Yes, but if there is to be a report by the end of next year, as we have just heard, that will mean a longer period of reflection than the United Kingdom Government in 1997 provided for people to determine the enactment of the Human Rights Bill in the first place. Therefore, is it not fair comment that a longer period has been given for reflection on and debate of those matters than was given for the enactment of the principal legislation in the first place?

Professor Miller: No. I would not agree with that.

David McLetchie: Is it not a calendar matter? You have talked about from now until the end of next year, and I think that Mr Layden and Lord McCluskey alluded to the short period of time for the enactment of the original human rights legislation. It seems to me that one period is longer than the other. Is that not a fact?

Professor Miller: That is simplistic.

David McLetchie: Oh, I see.

The Convener: Let Professor Miller give an answer, simplistic or otherwise.

Professor Miller: I am sorry, but it is not as simple as a calendar matter. A great deal of serious academic constitutional thinking, for example, went into the Human Rights Act 1998. Professor Francesca Klug of the London School of Economics and others who had no party-political connections had a great deal of input into it, and a lot of consideration was given to getting the balance right between Westminster sovereignty, having an international obligation and where the act would fit.

Most legal commentators around the world would say that, given its context within the UK, that act was a very sophisticated piece of legal machinery. Why there was not more public consultation and engagement and why the Government did not promote the act more and set up national human rights commissions way back then and not many years afterwards to carry out public education and awareness raising, for example, are other questions—I agree with that. Like Patrick Layden, I was there at the time. I was down in the Home Office for a year to represent Scottish non-governmental organisations when the act was being created. The mood music at the time was rampant Euroscepticism. A section of the media, including the press, was very hostile to the 1998 act for the reasons that Patrick Layden has given. It thought that it might encroach on freedom of expression through introducing privacy. There was a sort of bunker mentality in the Home Office towards going out and having public engagement on the whole idea of a human rights act. I agree that mistakes were made then, but the process was a lot bigger and more sophisticated than the process that we have now.

David McLetchie: It does not sound to me as though the bunker in the Home Office was vastly superior to the open and public commission that we now have, but perhaps we should move on.

On improvement, I was struck by Lord McCluskey's evidence on the lack of precision in the definitions of key words in the convention on human rights. That ties in with the issue of margins of appreciation. Would one service that a bill of rights could perform, while retaining the incorporation of the convention, be to do a better job in fleshing out the meaning of the key principles so far as the United Kingdom is concerned? Perhaps Mr Layden or Lord McCluskey might like to start the responses, as it links in with what Mr Layden said about why sections 12 and 13 are in the Human Rights Act 1998.

10:45

Lord McCluskey: The lack of definition goes to the heart of the matter. I have tried to explain it in my brief submission paper in fairly clear terms.

A word such as "family" has no particular meaning. It might mean a man married to a woman, with a boy and a girl and a cat and a parrot, living in a semi-detached house. That might pass for a family, but there could also be a family consisting of two gay men, with a child from the deceased wife of one of them when he did not know he was gay, living apart. Is that a family? Who defines a family?

At the end of the day, judges have had to define a family, and the nature of the convention is that, once the European court has given a particular definition or included someone or something in a definition, it is very difficult to change that. As with the American constitution, it requires extremely elaborate mechanisms to make any change. There has been no change in the basic wording of the convention since 1950, although there have

been changes in the protocols with the addition of extra rights.

There is another point: as I point out in my submission, one basic problem is that the convention was created to prevent the Nazis from doing it again. That was its purpose, so the villains of the piece are the public authorities. As I recently said to Mr McLetchie in a different context, if I kill him, we might say that he and his family are the victims—

The Convener: I would love to know the context of that discussion.

David McLetchie: We will return to that.

The Convener: Sorry. Carry on, Lord McCluskey.

Lord McCluskey: If I kill him, he and his family are surely the victims, but they have no remedy against me under the Human Rights Act 1998 because I am not a public authority. However, if I were to go to court to be tried for the murder, I would suddenly become the victim or the potential victim of the acts of the Lord Advocate who is prosecuting me, because he is a public authority. The whole thing is skewed in a way that derives from the nature of the Nazi regime and the consequences of the Holocaust.

That is one basis for the convention, and it was certainly not a basis that led to any democratic discussion. Incidentally, everybody is claiming to have been there at the time of the Human Rights Act 1998; I was there, too—[*Laughter*.] I do not know whether that confers any validity, because my views were formed in the early 1980s.

When the Government was considering many years ago whether we should confer on individual citizens the right of individual petition, who was against the idea? The judges. It so happens that judges have now changed their minds. The general public were not involved except as a result of one case—the case in which *The Sunday Times* went to the European court in the 1970s to overturn the thalidomide judgment of the House of Lords. The House of Lords had banned the publication of information about the thalidomide case because it might be a contempt of court. The European court overruled that judgment, and the press, to a man, jumped on the bandwagon and said, "This is the finest thing since the invention of sliced bread." Of course, the press has changed its mind over the years, so people do change their minds in the light of discussion.

What I like about the present process is the fact that, here and elsewhere, we are beginning to have the discussion that we never had in the proper democratic sense. I accept that plenty people contributed to the debate—Alan Miller and myself among them—but we were academics and lawyers. The great mass of the British public did not get involved in the debate. The democratic legitimacy of where we are now is very suspect.

Professor Himsworth: It has been the case—certainly since the Human Rights Act 1998 and all that—that the UK's compliance with the convention has been sought in very large measure by normal legislation. Ordinary legislation is what keeps the law in the different parts of the United Kingdom compliant or not with the convention—supplemented by the intervention of the 1998 act, since that time.

I am sure that that position will be maintained into the future. We now have systems at UK level and at the devolved levels for ensuring that legislation that is enacted at the different levels is not just convention compliant but in pursuit of the convention's objects, in some measure. Everything happened—I was there, too—at the same time, in 1998, 1999 and so on; the 1998 act was running alongside devolution, and as far as Scotland is concerned, further compliance with the convention has largely been achieved across the devolved areas by ordinary legislation in the Scottish Parliament.

We may still ask how much more might be contributed by a new bill of rights—whether at UK or Scotland level. There will continue to be a mix, in some measure, and I think that the balance will be heavily in favour of ordinary legislation—and indeed the common law in the different jurisdictions—that is broadly compliant with the convention.

Professor Miller: I want to respond to David McLetchie. There is no contradiction between the European convention on human rights and British values. I will try to explain how human rights works and the role that it plays in society, in the UK and beyond. Lord McCluskey talked about the first half of the 20th century and the experiences of the Holocaust and world wars. As a result of human experience, certain values and principles are identified that are fundamental to civilised society, and a framework is constructed on the basis of those universal values, giving legal effect to them.

The European convention on human rights is admired around the world because of the mature way in which it has developed in the past 60 and more years. We heard reference to the margin of appreciation, and Lord McCluskey talked about the definition of "family". Let us consider the current situation in Scotland, where a consultation on same-sex marriage is going on. The European Court of Human Rights has not said that there must or must not be same-sex marriage throughout Europe, let alone at UK level or in Scotland. The court considered a case from Austria and said that same-sex marriage is an emerging area, which needs public discussion and

public policy, and that each country must talk its way through the matter in relation to its traditions, culture, philosophical and religious views and come to a solution that works for that country, within the broad framework of the European convention on human rights.

Therefore, in Scotland there is democratic discussion on the matter. A debate is also taking place elsewhere in the UK, in England and Wales. The debates in Scotland and in the rest of the UK might end up in different places, but those places will all be within the European convention on human rights, under the margin of appreciation. The process is more mature than might be thought if people simply absorb the distorted images of human rights and how it works that are unfortunately imposed on us.

David McLetchie: I do not think that I suggested that ECHR rights are inconsistent with British values; I suggested that in our context we need a better definition of some of the key terminology.

The breadth of the margin of appreciation that you described in relation to what is meant by a marriage is not the same as was applied in Salduz and Cadder, where it appears that very precise definitions were applied of the right to a fair trial in the context of legal representation.

On the one hand, there is what might be described as judicial activism at a relatively detailed level in the context of the right to a fair trial and its component parts. On the other hand, as you have fairly described, there is an approach that basically says that a right to marry could mean whatever we want it to mean in the context of the people who may or may not be entitled to enjoy that right. Does that not suggest that we should define for ourselves what those terms mean and say to the European Court of Human Rights that, after democratic debate, this is what our society and our Parliament mean by X, Y and Z, and that that is a margin of appreciation that the court should respect because it fits within the overall framework? Is that not a reasonable approach?

Professor Miller: Absolutely. The commission has been encouraging the Scottish Government to engage more at the European Court of Human Rights just to have that dialogue at the court. It could and should have been there when the Salduz case was decided. Do I think that that would have made a difference and that the European Court of Human Rights would have agreed with Scotland? No, I do not, but it should have been at the table and part of the presentations to ensure that the court was familiar with the implications of the Salduz judgment for Scotland.

Professor Himsworth: The Cadder judgment has already resulted in legislation in this Parliament. More legislation is probably foreseen, as a wider review of criminal procedure is undertaken. It is through that process, and not through a Scottish bill of rights, that the law of Scotland will change. One thing that we have not exactly dealt with is the division between what is devolved and what is not.

What a UK bill of rights would do to deal more specifically with what we want with regard to criminal procedure in Scotland can only be guessed at. Indeed, a lot of thought would have to be given to any formal competence that was given—at least in Sewel convention terms—to a UK bill of rights to intrude further with regard to criminal procedure in Scotland.

David McLetchie: I have had enough, thanks. Other members can have a shot.

The Convener: That is rather an uncouth way of putting it, but I will let it pass.

John Finnie: My question picks up on something that Lord McCluskey said. I have found the discussion fascinating and the submissions extremely interesting. However, Mr and Mrs Bloggs out in the street would probably be turned off by the whole affair, which is extremely disappointing, especially given that the level of engagement was crucial in the experience in Northern Ireland.

Although Salduz and Cadder are interesting, the UK Border Agency seems keen to "rebalance" what it thinks is the right to family and private life—to use a term from one of the submissions. The Scottish Human Rights Commission's submission says that it

"does not consider that the status quo presents sufficient guarantees".

There are also issues to do with economic and social rights and what could be done in respect of the incorporation of the United Nations conventions on the rights of the child and the rights of persons with disabilities. The phrase that Professor Miller used—which I hope I noted correctly—was that there are gaps in real life. How can we make this discussion relevant to people? If it is not relevant—if it is seen as academic—it will be filed away. Do you agree that it has to be relevant?

Professor Miller: Absolutely. That is why we are saying that Scotland has the opportunity and potential to do better than the UK bill of rights process. For the past 18 months, the Scottish Human Rights Commission has been mapping the realisation of human rights in Scotland, starting with the UK's international human rights obligations, to understand the extent to which they

are realised in Scotland in everyday life, particularly by the most vulnerable. In late spring, we will share the outcome of that mapping exercise with the committee, the Parliament, the Government and the public. We then want to engage in a process of shaping Scotland's national action plan on human rights, so that we can fill the gaps in people's lives and give them the quality of life to which they are entitled. We need to determine who is responsible for doing that and find a practical road map to enable us progressively to realise those rights over the next several years.

11:00

To us, that is a measured, doable way of ensuring that people have the security in their everyday lives to which they are entitled under human rights, rather than having a Westminster-centric, politicised process that will not have a progressive impact. Indeed, such a process could have a regressive impact on people's rights. People now want more security in regard to healthcare, social care and housing, for example, and the Human Rights Act 1998 provides, in a limited but real way, some mechanisms of protection. It makes the Government accountable to the courts, for example. The danger is that those mechanisms could be removed and people would have even less of the protection to which they are entitled than they have now.

Lord McCluskey: On the point about the man in the street, I entirely agree with what was said in the question. However, the man in the street comes to understand the Human Rights Act 1998 by what happens. Cadder was such an instance; a great many people now know about that judgment because it meant that we had to drop prosecutions in 1,000 cases. Everyone also knows what happened in the slopping-out case, which was a human rights case, because the Government has had to meet a bill of tens of millions of pounds as a result of it. Years ago, there was public outrage when it was decided that a dozen Afghanis who had hijacked an aeroplane and flown into Stansted could not be sent back to Afghanistan for fear of persecution there. A fourth case involved the shooting of the Irish Republican Army men in Gibraltar.

Those cases all led to results that the public could not begin to understand. There is public awareness of what is happening, and we need to discuss those cases and find out what has gone wrong. I believe that a lot went wrong in those cases, especially the slopping-out case. That was an outrageous decision that we should never have arrived at. Indeed, we would never have arrived at it, were it not for the peculiar workings of the Human Rights Act 1998.

Professor Miller: The incidents that Lord McCluskey has presented have been familiar to us all for many years, unfortunately, but the question is why they happened. Did they happen because the Human Rights Act 1998 created something that had not been a problem? No; the act was part of solving a problem that should have been solved many years ago. Why was it not solved? Not because of the act, but because of a lack of leadership among those in positions of responsibility. They refused to take responsibility, and it has been easy to blame the Human Rights Act 1998 for the problems.

Let us be big enough to accept that no country in the world gets it right all the time. We all have things that can be improved, but the Human Rights Act 1998 has shone a light on some of the practices that needed to be improved. It was difficult to meet many prison officers 10 or 15 years ago who were proud of the practice of slopping out or who liked to work in those conditions, which affected them as well as the prisoners. Regarding the right of access to a lawyer, when someone is being questioned by the police, people thought that what they saw on every American TV cop show was what went on in Scotland. It did not go on in Scotland, although it went on in most of the rest of Europe. Those were things that we did not get right. That can be uncomfortable for those who should have got them right and who ignored advice, but we cannae blame the Human Rights Act 1998 for that; we should thank it.

Professor Himsworth: On that latter exchange, I am on Alan Miller's side. On his earlier remarks about improving the lot of the people, that is of course a continuing question for the Government and the Parliament. At this point, however, I will perhaps divide from Alan Miller, in that there is still a question to be raised down the track as to how far improving the lower-case rights of the Scottish population, which must of course be human rights-compliant, has to be turned into upper-case Human Rights questions. However, how much more is to be achieved by having an improved bill of rights—a bill of Human Rights with a capital H and a capital R—rather than just normal rights-compliant legislation remains an issue for us, for the Parliament and for the people. I do not think that the response must always be the creation of a new bill of rights or even a rights culture to solve the lot of the Scottish people.

Professor Miller: I agree. The commission's advice is that we do not need a UK bill of rights. In fact, we should just put into practice the existing international human rights legal obligations. Maybe in time that will lead to a bill of rights for Scotland, the UK or whatever the constitutional framework is.

I will give a couple of examples, one of which came from the cross-party group on dementia in considering the development of a charter of rights for people with dementia and their carers. The Scottish Human Rights Commission was asked by the cross-party group to assist in the process of shaping that charter. We brought in the framework of international human rights, including the right to the highest attainable standard of physical and mental health, and looked at how to realise that progressively. We fed that into the process, working with the cross-party group and others, and out of that came a charter of rights for people with dementia and their carers that has become influential in shaping Government strategy in the area and which has been adopted by local authorities. That was done without the need for a bill of rights or any changes; it was done just by recognising that there is untapped value in international human rights, which there are practical ways of implementing.

Although much of the legislation that has been passed by the Scottish Parliament over the years in the area of mental healthcare and the protection of vulnerable adults has not been headlined as human rights legislation, it has been informed by human rights principles and underpinned by the European convention on human rights and it is recognised internationally as being the best in class. We just have to implement those rights practically, building on the good things that we have been doing. Many of the good things that the Parliament has done have been informed and influenced by human rights, although that aspect may not have grabbed the headlines. We should carry on that process and scale it up in a way—to take Mr Finnie's point—that makes a difference to people's lives.

Another example concerns the rights of older people and the quality of care that they receive. A human rights approach ensures that they get a personalised service, not blanket policies in which they are made to fit into the system because it works well for the managers. Scotland has been doing a lot of good things in the care of older people because it has taken a human rights approach. We do not need a bill of rights or any new laws; we just need to use the existing values and take a human rights approach to improve people's lives.

Patrick Layden: It is necessary that Scottish legislation is informed by what is in the European convention on human rights not least because, if legislation is incompatible with the convention, it is outside the power of the Scottish Parliament. Legislation for Scotland has always been examined against the background of the convention. Even before the Human Rights Act 1998 was enacted, it was routine for British Governments to consider whether the provisions in criminal legislation or any other legislation were compatible with their international obligations under the ECHR. If those provisions were found to be incompatible, the decision, 99 times out of 100, was to leave them out and to do something that was compatible. This is not a new idea. The European convention on human rights was not designed as a new standard; it put into an international convention the standards that were applicable in ordinary life in the United Kingdom, both in Scotland and in England, at that time.

Another example of that happening is the United States Bill of Rights. When the Americans had drafted their constitution, they asked what freedoms and protections individuals had under the English common law. They could not carry on running English common law once they were independent, so they put them all into a bill of rights. One can clearly trace the links between English common law and what is in the US Bill of Rights. Likewise, we were not doing anything new in 1950 and 1953; we were simply putting into an international convention what happened here anyway.

Lord McCluskey: On the slopping-out case, which I mentioned because it attracted a lot of public interest, Alan Miller said that the problem was a lack of leadership in relation to the scandal of the lack of en suite facilities in cells. That is not my recollection. As those of you who were members of the Parliament at the time will recall, the Minister for Justice, Jim Wallace, had a limited budget, as all ministers do, and he had a choice between providing en suite facilities and providing money for the rehabilitation of offenders. He made a democratic and legitimate choice. It was nothing to do with a lack of leadership. He did his duty as a leader and made a choice. It so happens that some of us think that he made the right choice and some think that he made the wrong choice, but the end result of what happened was that money that should have gone to the rehabilitation of offenders went into the pockets of those who endured the kind of privations that I endured for the first 25 years of my life, when I sometimes had to go out to a shed in the garden to visit the loo. Perhaps my view is tainted by the fact that, as a poor young person, I had privations that were remarkably greater than those endured by offenders in Saughton or Barlinnie.

The Convener: I have a feeling that that might make the news. However, I was in the Parliament at the time and I think that some £12 million to £13 million was cut from the justice budget at that time. There were also warnings from some members that we might find slopping out coming back to bite us on certain parts of our anatomy. I did not want to go down that track, but that seemed to be the way in which we were drifting. I put that on the record because I was there at the time and I recall

that the issue arose then, unlike the rest of the stuff that we are discussing in relation to human rights.

I know that Rod Campbell is itching to come back in and the discussion is warming up, but I want to move on.

Colin Keir (Edinburgh Western) (SNP): Good morning. A sentence in Professor Himsworth's supplementary submission of 5 December got me thinking. It states:

"It seems unimaginable that 'rights' could be imposed in Scotland".

UK Governments have put through legislation that has been contrary to what we thought were the best interests up here. Why is it unimaginable that rights could be imposed?

Professor Himsworth: Some aspects might be unimaginable. Can I put the remark in context? It is in a sentence that speaks of the probable need for the consent of the Scottish Parliament, and I expressed that in two ways. One is the important question whether the Scottish Parliament's formal consent, according to the Sewel procedure, would be required were a bill of rights for the UK to be enacted at the UK level.

I do not want to go into the detail of that, but it seems to me that, as human rights are not reserved, the capacity exists for any aspect of human rights to be gone into in devolved areas. The possibility would exist for a UK bill of rights to expand the territory into other areas, such as not just criminal justice, which we have mentioned, but health and education. If that sort of thing was undertaken, it would inevitably be within the legislative competence of this Parliament. It is certainly unimaginable that the Sewel convention would not be triggered in those circumstances. That is an important point for the committee and the Parliament to consider. It sounds a bit formal, but it is terribly important.

11:15

When I hear it read back to me, the other part of the quotation is perhaps slightly overstated. However, it is all about the notion that, Sewel apart, the UK Parliament would under anything like the present circumstances wish to legislate for the rights of the people of the UK, including those of the people of Scotland, against the wishes of the Scottish people. I am not a politician but, if I were, I would not like to be in charge of a bill that sought to impose rights on any part of the UK. That is what I meant by "unimaginable". There is a relatively narrowly cast and constitutional dimension—the Sewel dimension, if you like—for dealing with encroachments on specifically devolved areas, but the proposal of some form of imposed bill of rights seems to me to be so utterly fraught as to be, as I said, "unimaginable". It might be the case that it is yet to be imagined and that we will have to broaden our imaginations—I do not know.

The Convener: I should inform members that I want to wrap this up in 10 minutes. Mr Campbell, please do not look so anxious—I am letting you come in now.

Roderick Campbell: As it happens, I wanted to ask the question that Colin Keir asked. Nevertheless, I can broaden things out a bit. What do the witnesses think of the Law Society's suggestion that a UK bill of rights might make it possible for devolved jurisdictions to have derogations, or is it inevitable that the Scotland Act 1998 will, in any event, have to be amended?

Professor Miller: The current provisions in the Scotland Act 1998 would have to be amended. Although I completely agree with Chris Himsworth's point about the very big risks that any UK Government would take in passing legislation of this nature against the Scottish Parliament's will, I should perhaps turn the argument on its head and suggest that it would be within the Scottish Parliament's competence to have a human rights act—the Scottish human rights act or whatever—that continued the way in which the ECHR is currently applied in Scotland. The UK Government would then face a situation in which someone living in Gateshead would have less protection under the ECHR than someone living in Glasgow and it might find it difficult to sell that to the rest of the UK.

Whatever view we take on it, the Human Rights Act 1998, with its minimal thresholds, levels of protection and interpretation through the Supreme Court of the way in which the convention is applied throughout the country, provides a constitutional underpinning for the whole of the UK. The current process might well have the unintended consequence of unravelling all of that by putting in place a two-tiered system and different levels of protection and interpretation. I would not have thought that the UK Government would want that, but it might be the unintended consequence of continuing down this road.

Patrick Layden: The fact that, as my brief submission points out, the Scotland Act 1998 essentially works through the Human Rights Act 1998 and the rights contained in it, which have been taken directly from the ECHR, provides a certain coherence. The same applies to the other law areas in the UK. Although I see entirely the political difficulty in changing that structure, I see even more difficulty in having an imbalance or what might be termed a limping alteration of the situation, as a result of which in one or other of the law areas you would be referred straight to convention rights while in England, say, you would

be referred to the British bill of rights, putting the European convention at one remove. A large number of UK institutions work in each law area and to impose on them a different standard of human rights depending on which bit of the UK they were operating in for the time being would cause even more confusion.

I have grave reservations about the practicability of inserting a new code of human rights—whether a Scottish one, an English one or a UK one—between the convention and the UK courts, as we are where we are in terms of interpreting things. I foresee that it will cause immense legal problems, which will be enormous fun for lawyers to work out but will have little impact on what happens to people going about their daily lives.

Lord McCluskey: I make the point that every right has a corresponding obligation. If you confer a right on one person, that gives everybody else an obligation not to violate that right—you cannot have one without the other. That necessarily leads to the view that you cannot create positive rights without at the same time creating obligations. That dimension must be taken into account when you consider the devolution of some legislative powers and the possible conflict between United Kingdom legislation and Scottish legislation.

Professor Himsworth: I agree with what has been said on this. As a gloss on what both Alan Miller and I were saying, I add that one thing that the Scottish Parliament may not do under the Scotland Act 1998 regime is to amend or repeal the Human Rights Act 1998. A free-standing human rights act for Scotland must not do that.

As to the question asked, I am afraid that I am at something of a disadvantage here, as I have not seen the Law Society's evidence. I would need to know more about what the Law Society meant by derogation and what it would be derogation from. One has to know what the bill of rights would contain, how it would be expressed and so on before one could properly understand what would be meant by derogation to this jurisdiction.

The Convener: If you have not had the opportunity to read the Law Society's evidence—I understand why you might not have—it is on our website and if you wanted to comment on it, that would be very welcome.

Humza Yousaf: Lord McCluskey, could you clarify something that you said during your exchange with Mr McLetchie? It may just be that I am misunderstanding you, because you spoke with perfect clarity in most of your answers. You said that Strasbourg's decision on the right to family life will be interpreted differently according to what the European and the British ideal is. Mr McLetchie suggested that the bill of rights might help to give definition and you seemed to agree with that. Is that how you see the British bill of rights—do you envisage it clarifying definitions of such things as the family? For me, the concept of a family differs not just within the United Kingdom but within households—these things are up to discourse and societal norms, not necessarily legislation. If the bill of rights is going to be a list of definitions of those societal norms, I suggest that it is flawed from the outset. Is that what you think will constitute a UK bill of rights?

Lord McCluskey: In principle, my position is that one of the fundamental pillars of the rule of law is that the law is ascertainable beforehand and not afterwards. That is why crimes such as breach of the peace or conduct contrary to good order and discipline are very difficult to maintain under any sensible rule of law system, because nobody knows precisely what is meant. It follows from that general principle that you have to be able to define people's rights. To give someone a right to family life without defining what is meant by a family seems to be doing something that is contrary to the rule of law.

The idea of a family gives rise to many differences, as you have acknowledged, but Alan Miller pointed out that there may be different solutions in relation to gay people. A gay couple bringing up children—with a dog, a cat and a parrot—may be regarded as a family in the United Kingdom but not in Azerbaijan or Turkey, where there are Muslim majorities. There are considerable differences and it seems to me that, for us, the rule of law demands that we define more precisely what our rights and obligations are.

Humza Yousaf: I still have difficulty seeing how it would practically do that. It would still be very much up to the interpretation of judges, unless I am misunderstanding.

Lord McCluskey: With respect, no. That is why I mentioned the definition of a child. Look at the legislation, such as the Social Work (Scotland) Act 1968 and so on, to see what a child is. Look at the road traffic acts to see what a motor vehicle is, what a road is or what a public place is. Those matters are given very careful definition, sometimes for the purposes of the act, sometimes for the purposes of part of the act and sometimes for the purposes of a section only. Definition is fundamental to administering the law. Judges ought to be able to read the law like a railway timetable, not as a kind of general declaration of intent, which is what the European convention is.

The Convener: If I am following you, you are saying that we can never have an absolutely rock-solid definition but we should want to reduce or minimise judicial discretion. Is that a fair way to look at it?

Lord McCluskey: I want the judges to be confined to the task of filling in the gaps where there is some obscurity in the legislation. The judges cannot just say, "We won't decide this case because we don't know"; they have to fill in the gaps. That has been well understood in this country for hundreds of years. When it comes to basic things such as family life, necessity, freedom of expression and so on, we need to have a debate that informs the legislation and then end up with definitions that people can go to to discover what their rights and obligations are.

Professor Miller: Lord McCluskey might not appreciate my saying this, but when he is giving those views, he is supporting the European convention on human rights and the Human Rights Act 1998, because that is what the human rights contribution is—it ensures that laws are accessible and foreseeable. Every submission that the Scottish Human Rights Commission makes to the Parliament when it is passing legislation asks, "Is this law accessible and is it foreseeable to the man or woman on the street?" I completely agree. Human rights guarantee what Lord McCluskey is calling for.

The Convener: I am going to finish on you completely agreeing with each other. I do not know whether you agree, but I am going to finish there. Do you want to add something, Patrick?

Patrick Layden: I was just going to say that the lack of predictability about the result of the Salduz case was one of the troubles. There is a definition of a fair trial in the convention. It was because the courts have gone far beyond that in their interpretation and development of it that legislators in Scotland were taken aback and taken by surprise by the Salduz case and the Cadder case. That is why we lost 1,000 prosecutions.

The Convener: We shall end on that. Thank you very much for your evidence. It was an extremely interesting discussion. I hope that law students will read all this if they are studying human rights.

11:27

Meeting suspended.

11:39

On resuming—

The Convener: I welcome the second panel of witnesses. I know that you were present for the evidence from the first panel. I hope that you found it as interesting as we did and are ready to comment.

I welcome Shabnum Mustapha, programme director for Scotland from Amnesty International; Euan Page, parliamentary and government affairs manager, and Lynn Welsh, head of legal, from the Equality and Human Rights Commission; and Carole Ewart, from the human rights consortium Scotland. As before, we will go straight to questions.

Humza Yousaf: Shabnum, I heard you speak eloquently on the radio this morning about the First Minister's trip to China. You welcomed the fact that he had mentioned human rights and you urged Scotland to continue doing that. I agree that it is important that we do that.

In the current climate of discussions about a UK bill of rights and scrapping the Human Rights Act 1998 and, as was mentioned earlier, innuendo about cats and the immigration of foreign nationals, are we not undermining our country as a beacon of human rights, as we have previously been seen across the world?

Shabnum Mustapha (Amnesty International): Thank you for that question. It is good to know that you listen to "Good Morning Scotland" like me.

It is very important that, when our First Minister and other representatives of the Scottish Government go abroad, they raise human rights issues. They have done that in the past and I am confident that they will continue to do so. The First Minister has talked about human rights in relation to climate justice while he has been in China, and that is very important.

I think that you are right about the domestic context. We need to show leadership on human rights in the UK and Scotland before we start going overseas and telling other people how to protect human rights.

In the debate about scrapping the Human Rights Act 1998 and replacing it with a bill of rights, Amnesty's position is that we are not opposed to a bill of rights. If it builds on the Human Rights Act 1998, extends it and takes human rights further, we will support it. As an organisation that has worked in countries all over the world, we have supported bills of rights, particularly in societies that are coming out of conflict and that have been divided, or in which there has been secession or even grave human rights abuses. A bill of rights is often put in place to protect people's human rights, so that a country can move on. We therefore support the concept of a bill of rights; we do not support a bill of rights that regresses from the current human rights threshold that we have in the UK.

If we do not get our house in order in the UK, but instead roll back our human rights threshold, how can we go overseas and demonstrate leadership in international situations? We would tell people in China that their human rights record is poor and they would turn around and point out

that we are rolling back our human rights record. It is a question of leadership, and we should show that leadership by having a stronger human rights threshold in the UK.

The Convener: Before we move on, I will ask panel members to indicate to me if they wish to comment, although they should not feel obliged to speak if they agree with what has been said.

Humza Yousaf: I will follow on from that point—I will be quiet after this, as I have probably hogged most of the proceedings.

The Convener: Is that a promise?

Humza Yousaf: No, actually, as I might want to come back.

It would be useful to hear a general view from each of the panel members on Shabnum's point. Where does your balance of probability lie in terms of the UK bill of rights? Do you see it building on current rights and conventions, or are you fearful that it will be a retrograde step? I want to hear where you think that, in all probability, it will go—or where you fear that it will go. Or are you quite hopeful? I have given you a range of options. [*Laughter*.]

The Convener: If you want the alternative vote system, you can rank them.

Humza Yousaf: I would like to hear from each of the panel members, if possible.

The Convener: Excuse me. Just a little minute—chairing is my job. You are a wonderful person, Humza, but occasionally you slightly overstep the mark.

James Kelly (Rutherglen) (Lab): Yes, slap him down!

The Convener: I will push him down a little. Right, who wants to answer the question?

Lynn Welsh (Equality and Human Rights Commission): The Equality and Human Rights Commission is calling for a retention and extension of the Human Rights Act 1998. Any derogation from that act would not be acceptable to our commission. We have to have the same rights as we have now. If anything, we can better those rights, but we should certainly not draw back from the rights that we have or the ability to take them forward in our own country.

Humza Yousaf: I understand that point—

The Convener: Just a minute, Humza. Before we go on, does anyone else want to comment?

Carole Ewart (Human Rights Consortium Scotland): Our view is that we must focus on the outcome of the process. The outcome should be that people enjoy human rights in their daily lives—we do not believe that that is happening at the moment; there is not a lot of evidence for it—and we agree that the existing set of rights, which are hugely focused on civil and political rights, should be extended to cultural, social and economic rights. We are talking about enjoying more rights. We have ratified a number of United Nations treaties, which cover economic, social, cultural, civil and political rights. We want people to enjoy those rights.

11:45

The Convener: Humza Yousaf can now come in.

Humza Yousaf: Sorry, convener. All that I was going to say was that it is clear from the witnesses' submissions that every organisation represented on the panel wants our rights to be built upon and extended. Are you hopeful that that will happen? Or do you fear that, in the current climate, that will be difficult? Mr Page can perhaps comment on that.

Euan Page (Equality and Human Rights Commission): To half answer your question, I wonder whether, as Alan Miller suggested, the debate is about not only changes to the law but how we move from abstract legal discussions to making a difference to people's lives.

The EHRC, like the partner organisations present, does not want any derogation from the current rights and freedoms enjoyed under the Human Rights Act 1998. A further enhancement of rights would be a positive development, but I argue that it will not be sufficient to achieve what we want, which are the outcomes that Carole Ewart talked about.

What does it mean when we take rights from the legal sphere into policy and into the delivery and design of public services by public authorities? I respectfully take issue with Lord McCluskey's argument that the Human Rights Act 1998 is in some way weighted towards public authorities. Public authorities determine huge swathes of people's lives and their relationship to the state and to each other. If we want to make human rights principles real in the design and delivery of public services and ensure that public authorities better balance competing rights, challenges will remain even if there are changes at the legal level. Beyond the legal argument, we are in danger of missing a much more pressing policy argument about how we make human rights real and embed them in the day-to-day practice of service design and delivery.

Shabnum Mustapha: I will come back to Humza Yousaf's question about fearing where the debate is going. What is missing from the debate is proper engagement with the public and civil society about what we want in a bill of rights or

about whether we are happy with the Human Rights Act 1998. The current debate is therefore not properly informed. Sadly, the backdrop to the debate seems to be the issue about cats, which relates to criminal cases that the Government has concerns about because it has lost. That should not be the backdrop to a discussion of what human rights are about. Human rights are about the issues that Carole Ewart and Euan Page discussed. They are about issues that matter in our everyday lives and the services that we get from health, social care and education, but we are not having that debate. We have not taken the public with us on what human rights mean to us, so they are largely being left out of the debate.

It is a substantial piece of work to look at a bill of rights and it is important that the public and civil society are taken along so that they can inform the debate.

The Convener: The academics could not address the impact of the recession on human rights, but perhaps you could. People may be entitled to human rights, but the money might not be there to provide those rights. Duties are being placed on public bodies that they will not be able to deliver in practice.

Carole Ewart: That is important. We had expected there to be more evidence of human rights being considered when public sector bodies decide on funding and on the design and delivery of services. We are looking for evidence of a process whereby human rights are considered, because if they are considered, it is necessary to prioritise. There is little evidence in the public sector that human rights considerations define what services are funded and their prioritisation. A lot of services are about respect for older people and preserving human dignity. At a time of public cutbacks and scarce resources it is pretty important that money is spent on such services.

Evidence of the process is important. One of our recommendations to the committee is that we use the bill of rights process to have a wider discussion in Scotland about how far human rights influence the design and delivery of services.

Lynn Welsh: The EHRC and its Scottish sister organisation are looking at providing guidance and assistance to public bodies about how to assess the human rights as well as the equalities impacts when making such decisions, because it is important in the long term that human rights impacts are considered for every decision.

Shabnum Mustapha: It is important to remember that human rights do not have to cost money all the time. It is about thinking about how to do things differently. Carole Ewart talked about process. For example, in a care setting it might be about thinking differently about how a male carer supports a female resident.

The Convener: I accept that. We can all take that as read. I was talking about areas where money counts—for example, when money is needed to pay for carers and their time.

Carole Ewart: The issue is important in the context of scarce public resources, because we want to avoid hefty compensation payments. Scotland unfortunately has a track record in paying out compensation. The issue fits perfectly with the public policy priority of preventative spend. If we prevent human rights abuses we can save money, which can be invested in public services.

The Convener: That is nice, if we are not having to deal with huge cuts throughout the UK and in the Scottish Government's budget and therefore in local authority and other budgets. There are tough choices for local authorities, health boards and so on to make as they prioritise. Sometimes it is Hobson's choice.

Carole Ewart: I completely agree, but if we had evidence that human rights were considered as part of the process of prioritising services and spend, we would feel more comfortable about the decisions that were reached.

The Convener: Does that mean that as decisions are being made about facilities or resources some human rights should be ranked as much more important than others?

Carole Ewart: The human rights principles of fairness, respect, equality, dignity and autonomy are values that I think that most folk in Scotland subscribe to. Those values influence how we understand and interpret each right. If we polled people, I suggest that they would say that caring for the elderly is a huge issue, which is about dignity and respect, so some other spending in the public sector should have less priority during an economic downturn. We can take the public with us if we have the discussion about human rights and can justify the prioritising of spend on particular services, such as care of the elderly and vulnerable.

The Convener: I will bring in other members. I just wanted to mention resources.

James Kelly: The witnesses all said that they support the Human Rights Act 1998 and the obligations under the ECHR and regard the bill of rights process as an opportunity to build on, rather than retreat from, the position that we are in.

Alan Miller talked about the rights of dementia sufferers and said that the Scottish Human Rights Commission used its influence to have an input into the dementia strategy. In what other areas in

the remit of the Scottish Parliament could human rights be built on?

Euan Page: A good example is the protection of adults who are at risk of harm. Excellent work is going on in that regard. In September, the Equality and Human Rights Commission published its report of an inquiry into the targeted harassment of disabled people. The inquiry had run for almost two years and covered Scotland, England and Wales.

One of the strengths of taking a multijurisdiction approach is that we are able to consider the differences in law, policy and practice in the different countries. It is fair to say that the legislation covering the protection of vulnerable adults, incapacity and mental health that has been passed in Scotland in the first decade of devolution is significantly ahead of the game in terms of the way in which it gives legal form to the principle of human rights and a practical spur to the enactment of human rights. The Parliament should be proud of that.

From the evidence that we took during the inquiry, we know that practitioners at the sharp end of the process, who often work in difficult situations in which adult protection committees are having to make decisions about when and how to place restrictions on somebody's liberty or to make orders to safeguard their property, which are inherently human rights problems, find that the fact that there is a set of human rights principles in the governing legislation is of immense practical value to them—they do not find it to be an airy-fairy list of broad aspirations. We can build on our legislation to further develop public authorities' human rights thinking in the areas around adult protection.

We have touched on the continuing challenge that public authorities face in relation to the need to make difficult spending decisions due to the year-on-year budget reductions, which are only going to get worse. The area that we are talking about is a clear example of one in which we should not make rights compete with each other in an either/or situation. Rather, we should balance rights and make better and more finely judged decisions. That is where human rights principles, as much as human rights law, can make an enormous difference.

Lynn Welsh: We have just produced a large inquiry report into human trafficking in Scotland. We are calling for some of the recommendations of that report to be implemented and for the Government to create a human trafficking strategy for Scotland, which would take us forward as a UK leader in this area. We would like the Government to consider having further legislation around human trafficking, which would promote the human rights of women who are caught in that hideous system.

Shabnum Mustapha: A couple of years ago, Amnesty produced a groundbreaking report on human trafficking in Scotland, which was called, "Scotland's Slaves". I was delighted that the EHRC's inquiry and the report that was launched last week led to the Advocate General making a commitment to go further in terms of protecting people who are victims of human trafficking. Amnesty has also done work across local authorities with Scottish Women's Aid on violence against women and improving access to services for women seeking refuge. Human rights principles have informed that work.

Equally, human rights values and principles have started to be applied much more strongly in our engagement overseas. China is one example and Malawi is another. Last year, two gay men in Malawi were imprisoned with forced labour purely because they were homosexuals. Because of the strong partnership with Malawi that has been developed by the Scottish Government over a number of years, the Cabinet Secretary for Culture and External Affairs was able to engage with the Malawi Government and encourage it to revisit the conviction. Civil society in Scotland also exerted pressure to support the rights of the men, who were eventually released.

Scotland is starting to harness human rights in order to improve things domestically and internationally.

The Convener: I would like to return everyone's attention to the proposed bill of rights and whether it is a good thing or a bad thing, whether it makes things better or more complicated, whether it conflicts with other things, whether it is a lawyer's charter and so on. I am pleased that people have made other points—I asked about the impact of the recession—but I would like to focus more on the proposal for a UK bill, which is what we will have to reply to. Will you find it useful? I take it that we do not have a human rights lawyer in front of us who is saying, "Yes, it's a great idea."

12:00

Carole Ewart: The consortium's view is that a bill of rights is a distraction. There is a lot of talk about building on the ECHR and the Human Rights Act 1998 but the foundations are not strong enough to support any further building. Instead, we need to focus on the fact that the public need more information on human rights and how to use them; access to justice where they perceive human rights to have been abused; and many more tools to be able to use human rights on a daily basis. Indeed, the public sector needs those tools as well. The EHRC has produced a very

good toolkit on the use of human rights by housing associations, which in fact ties in with the previous question on how human rights can make a difference. Article 8 of the ECHR refers to the

"right to respect for ... private and family life, ... home and ... correspondence."

That relates not to the physical structure of the house but to the home and the family environment, and we need to bear in mind the big concerns about fuel poverty and overcrowding in Scotland. Many of the policies that politicians are debating are about human rights, but the fact is that the issues are not being examined through a human rights lens.

In May, the consortium asked the Scottish Parliament to set up a specific human rights committee to exercise leadership and send a clear message to our 10,000-plus public sector bodies to take on board human rights issues more explicitly. When that did not achieve the result that we wanted, we asked that each of the Parliament's subject committees appoint a human rights rapporteur to provide a focus for human rights dialogue.

Euan Page: Carole Ewart's comment that a bill of rights is a distraction is very important. We, our partner national human rights institution, the SHRC, and human rights non-governmental organisations are focused partly on trying to shift public authorities' perceptions of what the Human Rights Act 1998 is there to do and shifting the organisational and cultural thinking of big public sector organisations to ensure that human rights are seen not simply as compliance matters, which they are, but as a set of principles to inform best practice and, as I said before, as a way of helping to make difficult decisions better. If we end up in a significant, protracted legal wrangle, it will simply reinforce current attitudes and undo all the good work that has been done to shift the emphasis away from simple compliance to best practice.

John Finnie: Despite the cross-party support for the enactment of the Human Rights Act 1998, the UK Prime Minister has said:

"we've said we'll scrap the Human Rights Act".

However, the Deputy Prime Minister gave an assurance at his party conference that it will be retained. What does that say about the lobbying on human rights that organisations such as yours have been carrying out?

Shabnum Mustapha: I am not sure what it says about the law but it shows the clear divisions within our political leadership on this matter and that both parties are coming at it from very different angles. I do not believe that the Conservative wing of the coalition is inherently against human rights—I think that it just wants to frame things differently.

The Convener: You have just woken up David McLetchie. I saw his eyebrows rise.

Shabnum Mustapha: As I said, I do not think that the Conservatives are inherently against human rights—they just want to reframe where the legislation is going.

Our organisation wants the Human Rights Act 1998 to be built on. We do not think that it is perfect; indeed, some of the ECHR protocols have not been incorporated into domestic law. As a result, we would go further than the Liberal Democrats, who want to retain the human rights legislation, by suggesting that we build a debate within civil society and the public and encourage politicians to think more broadly about human rights and how they matter in our day-to-day lives.

Carole Ewart: The evidence suggests that the motivation for the Commission on a Bill of Rights is different for each of the political parties in the coalition. Our motivation for getting involved is that we welcome a dialogue and debate on the effectiveness of human rights law in Scotland and on what Scotland can do to promote and protect human rights much more effectively. We are quite happy to participate in the process because we feel that there is a better understanding and more rigorous application of human rights law in Scotland.

John Finnie: I would be particularly keen to hear from—

The Convener: No one else has nominated themselves, Mr Finnie. You must not pounce on people. If a witness does not want to say anything, you should leave be.

John Finnie: I thank the Equality and Human Rights Commission for its submission but I was surprised to read the comment that

"our human rights laws date back to the Magna Carta".

I am not much of an historian but I did not understand that to be the position in Scotland.

Is it difficult for you to answer my previous question because of the EHRC's constitutional position? To date, has your lobbying role included lobbying for the incorporation into Scots law of the United Nations conventions on the rights of the child, disabled persons and other matters?

Lynn Welsh: We do not have a lobbying role. Our statutory duty is to advise on and assist in the understanding of human rights, rather than to lobby for any particular extension.

John Finnie: Have you ever advised that those conventions be incorporated into Scottish law?

Lynn Welsh: We would welcome the incorporation in Scotland of the Convention on the

Rights of the Child, as we would welcome the incorporation of all or any of the UN treaties.

The Convener: Do members have any more questions? I have no one on my list at the moment.

David McLetchie: I have one.

Humza Yousaf: I have a question.

The Convener: The thing to do is to say that we have no more questions. I had Humza Yousaf in reserve.

David McLetchie: He can go ahead.

The Convener: Excuse me.

David McLetchie: Oh, sorry.

The Convener: You are chairing and Humza Yousaf is chairing. This is not a democratic process—it is a dictatorship. Therefore, Mr McLetchie will now ask his question.

David McLetchie: I am happy to accept your arbitrary decision.

The Convener: Arbitrary? Even in accepting it, there is a sting in the tail.

David McLetchie: I am interested in Amnesty's submission, which takes a positive view and suggests numerous rights that might be considered for inclusion in a bill of rights. I ask Shabnum Mustapha to expand on those and say where they fit in the current context. We have had a discussion about the right to dignity, but the submission makes other interesting suggestions, such as that on a right of access to information. It also talks about enlarging or modifying the right to privacy, which gets to the heart of the current debate surrounding the Leveson inquiry about the right to freedom of expression and the role of the media. I ask Shabnum Mustapha and the other witnesses to comment on those issues of reconciling and building on what we already have.

Shabnum Mustapha: As I said, Amnesty has a history of supporting bills of rights internationally, so we do not come to the debate inherently opposed to the bill; we want to build on the current provision and strengthen it, and we have offered suggestions about where we believe it can be strengthened. For example, we believe that children's rights can be strengthened by incorporating the UN Convention on the Rights of the Child. In the Scottish Government's consultation on children and young people's rights, which has just closed, the proposal is to bring that convention into Scots law by requiring ministers to have "due regard" to it. However, we argue that the Government needs to go further. Our submission mentions various other issues, such as those to do with seeking asylum and those of victims' and women's rights, on which we believe the current human rights threshold needs to go further.

On your final point, we all have rights, but we need to balance our individual rights against the rights of other people, which is why we have legal systems. The aim is to balance everyone's rights and to determine who is right and wrong and who deserves X, Y or Z. It might be my right to say what I want in public, but what if exercising my right to freedom of expression could result in harm to someone else? That is why rights must be balanced against one another. Amnesty's view is that it is good to have rights and to extend the current provision by having more and stronger rights, but they must be balanced.

Equally, we do not want things constantly going through the court system. We want an environment in which advocacy and mediation are encouraged earlier on, when conflict arises and before things ratchet up to a legal process. We must have a balance.

Carole Ewart: I like the idea of extending rights, which is appealing. When the UK attends hearings at the United Nations, the committee there usually begins by asking why the ratified treaty has not yet been incorporated into UK law.

There are seven other treaties that provide excellent rights that could easily be added to the list of rights enjoyed in Scotland—for example, the right to enjoy the highest attainable standards of physical and mental health. Arguably, we already have that because we have a national health service, but it is good to have it articulated.

David McLetchie is right about the issue around press and media freedom. If we examine that issue through a human rights lens, it allows us to balance rights. We highlight in our submission that the United Nations has been quite critical of the behaviour of the press and media, because they do not have unlimited freedom; their freedom must be exercised with respect and they must accord people dignity.

We need better public education about human rights. People need to see them as something that is positive and not a threat, but we have a huge way to go in that regard. The evidence this morning from the Scottish Human Rights Commission was welcome, but it is a small body with a comparatively small budget. If we want a national action plan on human rights that will make a difference to people's lives, the public sector must get behind it. One of the big asks for this committee is to use this process as a way of engaging more with the public sector to find out what it can do to promote and respect human rights, rather than just be distracted by the bill of rights debate—it is about what can be done just now.

The Convener: I am afraid that our remit is quite narrow at the moment, but your remarks are noted.

David McLetchie: It has just struck me that the issue of competing rights, such as the right to privacy versus press freedom or freedom of expression, has been thrown into sharp focus recently because of suggestions that people have been driven to take their own lives because of the fear of publication of articles that some people would say intrude into matters in their private life that have nothing to do with their occupation or their public life. Have we got that balance right? Is the right of privacy in that sense a higher right than a right of freedom of expression? Is there a right to be titillated such that we should enforce the law so that people can write stories about other people's personal lives, habits or whatever?

Carole Ewart: Those are exactly the kind of arguments that I would welcome taking place in Scotland, because they highlight the crucial point about human rights: it is about balancing rights. The press and media say that they only print stories that the public want to read, which raises issues about people's rights as well as their responsibilities. Yes, you have the right to privacy, but you have a responsibility to respect someone else's right to privacy. However, we are never going to get there just by preaching. We have to engage the public and have a genuine and informed debate, but we are not there yet. The public often see human rights as marginal and enjoyed only by some, and not as something that will help them in their lives.

Euan Page: It would be wonderfully refreshing to see the Leveson inquiry trying to couch some of these difficult debates in human rights terms, for precisely the reasons that Carole Ewart suggests; that would make it real and help to drive home the point that human rights affect everyone. Some consideration of the better balancing of the right to privacy and the right to freedom of expression, with a clear and more rigorous understanding of what constitutes the public interest, would be an enormously refreshing development from the Leveson inquiry.

As Carole Ewart said, one of the frustrations about the current debate is that it is about concerns over changes to the law, the UK constitution, the intricacies of consequential amendments to the devolution settlements and so forth. Those are all enormously important issues, but we are missing the bigger picture of whether there is an opportunity to make human rights real to every man, woman and child in Scotland and, indeed, the UK so that they do not become the preserve of Bolivian cats and prisoners.

The Convener: Politicians have mixed views on the press, if I may leave it like that.

12:15

Colin Keir: Good afternoon. My question is based on the submission from the Equality and Human Rights Commission. First, to add to John Finnie's comment about Magna Carta, I point out that the Law Society, in its written submission—

The Convener: Excuse me a minute. Is Colin Keir's microphone on? It does not appear to be. Oh, it is that one.

Colin Keir: I have a Queen's counsel sitting next to me and he tends to expand—

The Convener: You actually have two microphones—you could speak into that one as well.

Colin Keir: I apologise. As I say, I blame my colleague to my left for his expansion of territory.

The Convener: Colin Keir has been longing to put that on the record. I have allowed him to do it because of the papers that Roderick Campbell spreads out before him. He is used to a lot of space.

Graeme Pearson (South Scotland) (Lab): In the galaxy, they call that a black hole.

Colin Keir: It is not just Magna Carta that does not apply in Scotland, because neither does the Petition of Right 1628 or the Bill of Rights 1689. There is corresponding legislation as well. That is in the Law Society document.

The Convener: Can I just rescue you? In a submission to the UK Parliament, there is leeway to mention Magna Carta, but not to hang it round the necks of the Scottish.

Colin Keir: Okay. My question is similar to one that I asked previously. Page 3 of the submission from the Equality and Human Rights Commission, under the heading "Implications for Scotland, Wales and Northern Ireland", states:

> "There are also questions as to whether consent from the devolved administrations would be required for any such changes."

I do not know whether you heard the comments from Professor Himsworth, who stated in his submission that it would be "unimaginable" for a process to be forced on the devolved Administration of Scotland, in this case. What are your comments on that?

Lynn Welsh: First, I apologise for our mention of Magna Carta. As has been pointed out, our submission is a British response and therefore should cover legislation from both nations. We do our best to squeeze Scotland in.

The Convener: Some people are sensitive, you will understand.

Lynn Welsh: I share your aggravation—I have to be honest.

Colin Keir: I am not sure that "to squeeze Scotland in" is the phrase that I would have used here.

Lynn Welsh: No, indeed.

We completely agree with what Chris Himsworth said earlier. There are serious issues that would have to be considered at some length as to how a British bill of rights would be introduced and how it would fit with the Scotland Act 1998 and the Sewel convention. The Commission on a Bill of Rights will find some of those issues difficult to grapple with. We certainly have.

Euan Page: Levity aside, the point about Magna Carta perhaps illustrates another dimension. The proposal is to introduce a bill of rights that covers the multinational state of the United Kingdom, in which there are often divergent constitutional traditions and starting points. Perhaps the overemphasis on Magna Carta in the Great Britain Equality and Human Rights Commission's submission to the Commission on a Bill of Rights illustrates some of the pitfalls that it would be as well to be alive to.

Shabnum Mustapha: I agree with what Euan Page and Lynn Welsh have said. Under the Scotland Act 1998, any law that is passed in Scotland has to comply with the ECHR, so we already have a slightly asymmetric system. If we have a UK bill of rights and we regress because rights are rolled back from the position under the Human Rights Act 1998, it will mean that citizens in different parts of the UK have different levels of rights. We do not believe that that is the way forward, which is why consulting the devolved institutions is crucial in order to get this right. Whether we repeal the Human Rights Act or extend it, that dialogue needs to happen so that someone in Newcastle does not have less protection than someone in Glasgow.

Carole Ewart: I echo the point that was made earlier about the situation in Northern Ireland, because it should have had a bill of rights. It was promised more than 10 years ago. Unlike in Scotland, there is a huge degree of understanding in Northern Ireland of what the impact of a bill of rights would be. It would be a broad bill of rights that would include economic and social as well as cultural, civil and political rights.

However, those views have fallen on deaf ears and it has not happened. Despite public support for a bill of rights and the fact that we are part of a national debate on human rights, there has been no promise that the model bill of rights will be delivered. When the UN looked at that bill of rights way back in 2009, it expected it to be delivered without delay.

Graeme Pearson: I might be taking advantage of the panel, but I have to say that I have enjoyed this morning's debate. Having visited Stranraer academy earlier in the week, I can tell the witnesses that one of the rights that the pupils at that school are worried about is the right to work. Given your involvement in the area, what do you think of the idea of having such a right in a society such as Scotland? Has it been the subject of debate or has it been marginalised as being of no interest? No one has mentioned the issue this morning.

Carole Ewart: Are you talking about the right to paid work?

Graeme Pearson: Yes.

Carole Ewart: That follows from other rights, such as the right to education, which is contained in the ECHR. It can be argued that a person needs education in order to have a free choice about the work that they pursue. There are other international human rights standards on the right to an adequate standard of living, which themselves presuppose the right to work. Talking about the issue in such legal or human rights terms changes the dynamic of the discussion because the right becomes a kind of entitlement and, as we heard earlier, the state is responsible for providing those opportunities. We think that they should be enjoyed equally.

The Convener: That might be pertinent to my question about the recession and the ranking of and making choices about rights.

Graeme Pearson: It comes back to the question of making the discussion about rights relevant to people in the street and Euan Page's comment about Bolivian cats. This is the one right that the Stranraer academy pupils who are looking to leave school soon are talking about, and I wonder how we respond to that requirement.

Carole Ewart: We can certainly have a broad discussion about it. After all, the Scottish Parliament hosted the global conference on business and human rights, at which representatives from 80 countries around the world discussed how the private sector could respect and protect human rights and provide a remedy for human rights abuses. The state is creating employment opportunities, but the private sector has the same obligation and all sorts of efforts are being made at the UK level to encourage the private sector to create jobs.

In Scotland, there are historical examples of the state's creating training and employment opportunities to give people the skills base to allow them to access employment on an equal basis. There is no single solution, but the discussion will be helpful in a human rights context. Business and human rights form a critical agenda and, indeed,

companies such as Aberdeen Asset Management and the Royal Bank of Scotland have human rights policies. The Parliament and politicians need to have a discussion with such companies on the creation of employment opportunities for the generation who, as you said, are about to leave school.

Graeme Pearson: Should the right to work be a stated right in future?

Carole Ewart: A lot of human rights are aspirational; after all, not everyone enjoys the highest attainable standard of physical and mental health. I think that the right to paid employment is one of those aspirational human rights. Nevertheless, it is still a human right, because work creates a feeling of self-worth, gives you an income and allows you to provide for your family. In all, it is pretty critical to family life.

The Convener: As a previous convener of the Health and Sport Committee, I know that it is also one of the best prescriptions for keeping people healthy.

Euan Page: I would like to flag up something that could be developed over the next six months or so. As Carole Ewart has pointed out, Scotland, as part of the UK, is not only subject to domestic law but a signatory to seven international human rights instruments. Next May, in Geneva, the UK will come up for consideration in the universal periodic review of human rights issues, for which the Scottish Government is preparing its submission as part of the UK submission. That review will consider not only justiciable rights under the Human Rights Act 1998, but progress on the range of more aspirational, non-justiciable rights including economic and social rights such as the right to labour and the highest attainable standard of health.

Our partners in the SHRC have come up with the good suggestion that, once Scottish Government officials have returned from the review process in Geneva, we use the learning from that to develop a national human rights action plan for Scotland. That seems to be an obvious opportunity to get some political clarity about what the more aspirational, non-justiciable rights might look like in a policy context in Scotland. One suggestion is to look at how such an action plan would fit with the Scottish Government's national outcomes and priorities, so that we human rights proof the outcomes that we all want. That is just one way in which we could take the slightly more tricky, ill-defined rights and make them concrete in Scotland.

The Convener: I will allow two more questions, but I want to keep to time.

Humza Yousaf: I realise that I have broken my promise by asking another question.

The Convener: Somehow I am not surprised.

Humza Yousaf: Let us return to the bill of rights. Amnesty International touches on this point in its written submission. The legislation would be framed as a UK or British bill of rights, but if it were a Scottish bill of rights I would have exactly the same fear: that it would be very focused on citizenship. Is there a worry that a bill might discriminate against foreign nationals who do not have the right to stay because they have not been confirmed as British citizens? Is there a fear that when human rights are compromised it is usually tested out on foreign nationals, immigrants and those from deprived backgrounds? Does anyone on the panel share that fear?

Shabnum Mustapha: You raise an important point about citizens' rights. Sadly, the discussion of the bill of rights in the UK has focused on immigration, asylum and refugee cases that have gone to court and that people feel uncomfortable about. That is sad because we need to move beyond that.

A clear illustration of how fluid the concept of being a citizen is concerns our freedom—our right—to vote in fair elections. A European or Commonwealth citizen is allowed to vote in Scotland or the UK in certain elections. Where is the threshold of what makes someone a citizen of Scotland or the UK? When we discuss or investigate the possibility of a bill of rights for the UK, we need to have a properly informed debate that includes all the arguments so that we do not end up—as Humza Yousaf fears—excluding people from participating in society. Some people may not be able to access every right, depending on their status, but they will still have rights, such as the right to life and the right not to be tortured. The way in which the debate is framed is one of the issues.

Carole Ewart: That is a really important question in the context of the need to generate a better understanding of human rights so that they are seen to be owned by everyone. It is about a mixture of the message and the process. We are where we are, and where we are is that the Scottish Parliament voted to prohibit the Scottish Human Rights Commission from undertaking any cases, so the commission is unable to advise and assist. That is a huge disadvantage. The commission could be demonstrating, through its cases, the equal value of human rights in Scotland. In Scotland, there is a history of voluntary organisations and individuals not really taking forward human rights cases—that tends to be done by groups that have access to a lawyer on another matter, who then identifies a human rights angle. For me, there is a fundamental problem about access to justice in Scotland, which

perpetuates the myth that human rights are enjoyed by only a few.

We also need to point out to folk that they could go to court if they wanted to, although none of us wants this to turn into a legal discussion; we want to prevent problems from arising in the first place. That is why we need more publicity about how human rights can make a difference to people in their experience of using public services and as they go about their daily business. People must see human rights as an opportunity to fix something, instead of using a lawyer to fix it, through discussion with the public sector and as an opportunity for public sector organisations to gain an understanding of their obligations that perhaps gets them to change their behaviour.

The Convener: You said in passing that the Scottish Parliament voted against something.

Carole Ewart: The Justice 1 Committee considered the Scottish Commissioner for Human Rights Bill. Although a majority of submissions were in favour of the commission having the capacity to take cases, that committee decided that that was unacceptable.

The Convener: When was that? I think that I was on that committee.

Carole Ewart: That happened in 2006.

The Convener: I might not have been on that committee then—you are absolving me.

12:30

Carole Ewart: Absolutely.

The context is interesting to go back to. When the debate took place, the Justice 1 Committee asked whether, in a country such as Scotland, where human rights abuses are rare, we needed to establish a Scottish Human Rights Commission. That was just a couple of years after the Napier case. At that time, Audit Scotland was talking about the Scottish Prison Service having to set aside £85 million to settle human rights cases.

From a preventative spend point of view, apart from a principled point of view, it is really important that the Scottish Human Rights Commission should have the power to advise and assist and to take cases. I am not talking about a huge number of cases or obliging the commission to take cases, but it would serve a useful purpose to take test cases on key issues that resonate with the public and fit with the commission's priority of looking at human rights that are not being protected or are of interest to marginal groups.

The Convener: That is interesting information to put on the record. We are having useful lessons on near history and far history today. Witnesses are taking us back and providing a context.

Lynn Welsh: For the record, the Equality and Human Rights Commission has the power to take human rights cases in Scotland, as long as they have an equality edge, too. We can also take enforcement action in our own right in relation to human rights, so Scotland is not completely bereft. However, I agree that the Scottish commission should have a direct right, too, since such matters are in its purview. I also agree that people should not have to go to court, as that is not usually the best way to move forward on human rights issues.

The Convener: Thank you for that clarification. I thought that it would be useful for the committee to have the information on the record.

I ask John Finnie for a short question, as I want to finish the session soon.

John Finnie: I beg your indulgence to ask two questions.

The Convener: Begging my indulgence—hmm. Let us see—let us hear the first question.

John Finnie: The second question will be very short.

The Convener: I cannot win—I do not know why I try.

David McLetchie: This is freedom of expression.

The Convener: Freedom of expression? I have a Conservative taking the side of freedom of expression.

John Finnie: It might help if I just read the reference—

The Convener: Every right has an obligation attached to it, so I ask for brevity.

John Finnie: I am trying to discharge that obligation.

Amnesty International's submission says:

"Amnesty International would be concerned about any attempts to introduce 'responsibilities' or 'duties' into a Bill of Rights. A Bill of Rights sets out the expectations that the individual can have from the state, in terms of the respect, protection and fulfilment of their fundamental rights, whereas the majority of the law of the land sets out the duties and responsibilities of individuals."

I support that, but I ask Shabnum Mustapha for an explanation. A lot of people might be surprised by the suggestion of not considering responsibilities or duties on individuals.

Shabnum Mustapha: I put it on the record that Amnesty does not believe that people do not have responsibilities. We are saying that, when we discuss rights, we should stick to talking about what those rights are in their entirety. We all have inalienable rights. If you have broken the law and you are in prison, your right to liberty is suspended

temporarily, but you do not lose that right. When you come out of prison, you get that right back.

In a human rights framework, it is important to stick to what we are talking about—human rights. The responsibility aspect comes under the criminal law and various statutes that govern how we exercise rights and how we behave towards each other. It is important to deal with the aspects separately.

If we have a bill of rights that outlines people's rights and responsibilities, the situation will not be clear-cut. I will take freedom of expression as an example. Was the release by WikiLeaks of all the cables the right thing to do? Amnesty has argued that when cables—particularly those from the US Government—flushed out cases of human rights abuses in Iraq and Afghanistan, they gave us information about human rights abuses, some of which we did not know about. That meant that we could challenge authorities to investigate those cases or campaign on behalf of prisoners. However, we did not agree with releasing cables that named informants, which put those people at risk.

If a bill of rights has definitions that are a bit tighter, how do we protect rights? That question relates to why we would prefer rights to be looked at in slightly different ways. However, we believe that we all have obligations.

John Finnie: My next question is also about Amnesty International's submission. It is about the potential to enhance an existing right. The submission says:

"The right to life (Article 2) should be strengthened to its strongest possible formulation that would take into account developments in international standards and specifically provide for investigations into deaths in custody and in disputed circumstances".

Is any retrospection envisaged in that proposal?

Shabnum Mustapha: I will be honest with you, John. I am not a legal expert.

The Convener: I hope that you have been honest throughout your evidence rather than only just now.

Shabnum Mustapha: I am not a legal expert, so I hope that you will not mind if I put in a written submission on that. I am not entirely clear about the matter, and would rather give you an accurate response.

The Convener: That is fine.

John Finnie: I am grateful for that. Thank you.

The Convener: That concludes the evidence session. I thank you all very much for another stimulating session and suspend the meeting for a minute to let the witnesses away. Members will stay put.

12:36

Meeting suspended.

12:36

On resuming—

Subordinate Legislation

Act of Sederunt (Fees of Solicitors and Witnesses in the Sheriff Court) (Amendment) 2011 (SSI 2011/403)

The Convener: The Subordinate Legislation Committee has not drawn the Parliament's attention to any matter relating to the negative instrument. As there are no comments from members, is the committee content to make no recommendation on the instrument?

Members *indicated agreement.*

Act of Sederunt (Lands Valuation Appeal Court) 2011 (SSI 2011/400)

Act of Sederunt (Rules of the Court of Session Amendment No 7) (Taxation of Accounts and Fees of Solicitors) 2011 (SSI 2011/402)

Act of Sederunt (Sanction for the Employment of Counsel in the Sheriff Court) 2011 (SSI 2011/404)

The Convener: Next, there are three instruments for consideration that are not subject to parliamentary procedure. The Subordinate Legislation Committee has not drawn the Parliament's attention to any matters relating to the instruments. As there are no comments from members, is the committee content simply to note the instruments?

Members *indicated agreement.*

The Convener: As agreed earlier, we will move into private session to discuss our work programme.

12:37

Meeting continued in private until 12:57.

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