The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 3 September 2013

Session 4

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JUSTICE COMMITTEE
22nd Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

Jenny Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
*Graeme Pearson (South Scotland) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Heather Baillie (Mental Health Tribunal for Scotland)
Alastair Beattie (Scottish Valuation Appeal Committees Forum)
David Dickson (Crown Office and Procurator Fiscal Service)
May Dunsmuir (Additional Support Needs Tribunal for Scotland)
Katie James (Advocard)
John Lamont (Ettrick, Roxburgh and Berwickshire) (Con) (Committee Substitute)
Kenny MacAskill (Cabinet Secretary for Justice)
Elaine Murray (Dumfriesshire) (Lab)
Iain Nisbet (Govan Law Centre)
Kevin Philpott (Scottish Government)
Jon Shaw (Child Poverty Action Group in Scotland)
Lauren Wood (Citizens Advice Scotland)
John Wright QC (Lands Tribunal for Scotland)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 3 September 2013

[The Convener *opened the meeting at 10:00*]

The Convener (Christine Grahame): I welcome everyone to the Justice Committee's 22nd meeting in 2013. I ask everyone to switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting system, even when switched to silent. We have received apologies from Jenny Marra.

I take this opportunity to welcome to the committee Elaine Murray. I also welcome John Pentland, who will perhaps be along later. Subject to the Parliament's approval, they will become members of the committee this evening at decision time—that is, if they like what they see. They will replace Jenny Marra and Graeme Pearson, who have been excellent on the committee and whom we will miss.

With the committee's leave, I will say a few words about David McLetchie. I pass on the committee's condolences to his wife, his son, James, and the rest of the family. The committee will agree that we will miss his robust interrogations, his humour and his mischief. Personally, I will miss his impromptu duets, although unfortunately—or perhaps fortunately—they did not occur during meetings of the Justice Committee. I hope that all members will want to pass on our condolences to his wife and family.

European Union Legislative Proposals

10:01

The Convener: Agenda item 1 is consideration of whether two European Union legislative proposals comply with the subsidiarity principle. Those are the proposal for a regulation of the European Parliament and of the Council on the establishment of a European public prosecutor's office, which is document 12558/13, and a proposal for a regulation of the European Parliament and of the Council on the European Union agency for criminal justice co-operation—or Eurojust—which is document 12566/13.

We have only one opportunity to consider the proposals, which is why the EU reporter—Roderick Campbell—and I agreed that it would be helpful to hear from the Cabinet Secretary for Justice today. I welcome to the meeting Kenny MacAskill, the Cabinet Secretary for Justice; Kevin Philpott, senior policy officer with the Scottish Government's criminal procedure policy unit; and David Dickson, of the international co-operation unit at the Crown Office and Procurator Fiscal Service. I thank our witnesses for agreeing to come at short notice. I also thank the cabinet secretary for the additional letter regarding the Government's position on the proposals.

I ask the cabinet secretary to make a brief opening statement on both proposals before I open up the meeting to members' questions.

The Cabinet Secretary for Justice (Kenny MacAskill): On behalf of the Government, I echo your comments, convener, regarding David McLetchie in particular, but also regarding Graeme Pearson and Jenny Marra.

As members are aware, the Scottish Government has brought an issue of subsidiarity to the committee's attention. I hope to give you some indications of the Government's thinking on that, but I would also like to give you some information about aspects of policy and proportionality. You have received a letter from me outlining the Government's thinking on the issues. I appreciate that the timing has not been altogether conducive to an examination of the issues, so I hope that the letter, along with what I have to say this morning, will help.

The two proposals are closely linked. The proposed European public prosecutor's office would work out of the reformed Eurojust, and the reforms to Eurojust are in considerable measure about providing the framework to allow that to happen.

As I say in my letter, subsidiarity is defined in article 5 of the Treaty on European Union, which states:

> "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

I will begin with the EPPO proposal. The Commission believes that there is a major issue of fraud against the EU budget and that the need to tackle it is given added impetus by the current financial crisis. Members will have seen from the United Kingdom Government's explanatory memorandum that it considers that the identified fraud of about £425 million in each of the last three years is actually the tip of a £2.55 billion iceberg.

It is incontestable that something needs to be done about EU fraud. However, the proposed action raises serious subsidiarity concerns. Members will have seen those concerns in the UK Government's explanatory memorandum, but it is worth repeating the core of the concerns, which is that the Commission has moved directly to

creating a new supranational EPPO with extensive and harmonised powers. There has been no consideration of whether less abrupt changes, such as prevention or deterrence at source, might be as effective—they would certainly be a great deal cheaper.

Even if we take the Commission's view that a high prosecution rate is the way to deal with fraud, it is clear that the move to an EPPO is premature. In 2011, the Commission suggested that national prosecution authorities had conviction rates of between 14 and 80 per cent for cases that the European Anti-fraud Office—OLAF—transferred. It is therefore clear from the Commission's figures that some member states are achieving high prosecution rates. The correct course of action, in line with the principle of subsidiarity, would be to recognise that some member states are effective, so what is needed is not a new EPPO but an effort to help all member states to reach the high levels that some have already achieved.

To turn to the Eurojust proposal, we acknowledge that Eurojust is already a feature of the landscape. We believe that it is successful; that is certainly the tenor of its recent annual report—its 11th—in which the organisation is said to have "reached 'cruising speed'". That being the case, one might wonder why now is the time to jump out of that vehicle and into a rebuilt one.

The specific subsidiarity concern with the Eurojust proposal relates to the powers that are given to national members. As currently constituted, the powers allow national members to initiate investigations

"in agreement with the competent national authority".

The reforms would allow national members throughout the Union to initiate investigations themselves in undefined urgent circumstances. No effort has been made to establish whether the objectives could be better achieved by continuing with the existing arrangements, which respect national and local jurisdictions more. Members will have seen that any kind of bespoke impact assessment is missing. In those circumstances, we do not see how the subsidiarity case for the departure from the existing model is made.

Of course, when there are subsidiarity concerns, there are also likely to be proportionality concerns. According to article 5.4 of the treaty,

"Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

Relevant considerations are whether the Union measure has left as much scope as possible for national decision making and whether the proposals respect well-established national arrangements and the workings of member states' legal systems. It is clear that there are difficulties with each of those considerations.

At the heart of our policy position is our prosecution system and in particular the position of the Lord Advocate at its head. Decisions by the Lord Advocate are to be taken independently of any other person. The proposals for an EPPO and for the reform of Eurojust trespass directly on that position by granting prosecutorial powers in member states to the EPPO and by allowing national members of Eurojust to direct investigations.

These are proposals. Ahead of them lies a period of negotiation, so it is too early to say what the final position will be. In particular, the UK Government has made it very clear that it does not intend to take part in the EPPO. That is stated at several points throughout its memorandum.

However, the proposals give considerable cause for concern. I believe that members will understand our policy position and the difficulties that the Commission's proposals raise. The UK Government's explanatory memoranda set out issues in respect of which both proposals fall short of satisfying subsidiarity concerns. We agree with that assessment. I hope that I have helped the committee with the background to why we have taken that view.

The Convener: That was certainly robust in comparison with what I expected from reading the letters—that is just a comment.

I call Roddy Campbell first, as he is the committee's EU reporter.

Roderick Campbell (North East Fife) (SNP): Good morning, cabinet secretary. Will you expand on the comment on the EPPO in your initial letter that

"there is little or no evidence that consideration has been given to possibilities short of the creation of a new supra-national agency"?

What evidence of the Commission's investigations has been seen by you or your team?

Kevin Philpott (Scottish Government): The point is that we have seen no evidence of any intermediate step between the current position and the all-singing, all-dancing EPPO. There has been no examination of anything less than the full measure that is in the proposal.

Roderick Campbell: So, in terms of the Commission trying to persuade you—let alone this committee—that it has considered alternatives, you would say that that position has not been proven.

Kevin Philpott: That is very much our position. There is no evidence of an intermediate step. There is no evidence that the Commission has

acknowledged that there might be a subsidiarity problem by asking, "Is there something less than this that would achieve the objectives and would be in keeping with national and local measures?" and saying, "Let's examine something less than the entire EPPO proposal." There is no such examination.

Roderick Campbell: The UK Government has not reached a final view on the Eurojust proposal.

The Convener: Can we come back to that afterwards? Let us deal with the EPPO proposal first. I will come back to you.

Graeme Pearson (South Scotland) (Lab): The cabinet secretary made mention of the success rates for prosecution of fraud across Europe. I do not see any reference to the number of cases transferred to the UK as a member state or to the number of cases within Scotland. Do we have any knowledge of the number of cases transferred and our own success rate with regard to prosecution?

David Dickson (Crown Office and Procurator Fiscal Service): The impact assessment indicated that there were something in the region of 25 cases in the UK. There have been very few cases in Scotland. Currently, there is one case.

Graeme Pearson: I think that I am rehearsing the facts, but I do so for the record. It appears that we have not identified where the nub of the fraud difficulty lies in member states. Given that there is only one case in Scotland, we seek to crack a very small nut by making these arrangements.

David Dickson: The evidence seems to indicate that the European public prosecutor's office is being established to tackle fraud as regards the European budget—the budget of the institutions. Fraud represents 0.5 per cent of the budget, so it is not a huge figure. Fraud of any type has to be tackled, but although the figure itself is significant, it is not a significant percentage of the European Union's budget.

The Convener: How do you know that it is 0.5 per cent?

David Dickson: The figure is in the impact assessment.

The Convener: But how do people know that if they have not uncovered all the fraud?

David Dickson: That is the figure for recorded fraud. It is between £400 million and £600 million, depending on what you read.

The Convener: So they know about 0.5 per cent, but the percentage could be a lot bigger.

David Dickson: It is suggested that the figure could be as high as £2.5 billion.

John Finnie (Highlands and Islands) (Ind): Paragraph 7 of the explanatory memorandum relating to the EPPO proposal states:

> "The Commission believes that Member States are not able satisfactorily to identify, investigate and prosecute EU fraud."

Were any representations about the ability to "identify, investigate or prosecute" made to the Scottish criminal justice system in advance of what seems to be an over-the-top, draconian proposal?

Kenny MacAskill: I will ask David Dickson to answer that from a prosecutorial point of view.

David Dickson: I am not aware of whether there has been any direct contact in that regard. The history of the proposal goes back to the 1990s. It has been resurrected, given the current economic situation. A University of Luxembourg study that looked at all member states' approaches to tackling fraud in the European budget identified what is said to be a wide discrepancy. Some member states will investigate and prosecute every case that is referred to them. Conviction is never guaranteed—that is a different issue, but there are diverging conviction rates, too.

What underlies the issue is the fact that we are dealing with 30 different legal systems. Each member state has different rules of evidence and different ways of establishing guilt and so forth. The Commission's position is that the only way that we can deal with that is to have a supranational body with rules of evidence that apply across the board in all member states. Model rules have been drafted, which deal with criminal procedure and evidence. The proposal is effectively an attempt to overcome all that, but it is also a severe criticism of member states' national systems. As Kevin Philpott said, despite the study, there has not been much evidence that those systems are so defective that a supranational body is required.

10:15

Kenny MacAskill: I should say that we have not had any communication from the Commission. Certainly, the Government believes that the prosecutorial system in this country works well in relation to such cases when they happen here.

The Convener: So you are saying that the proposal goes far beyond just the administrative and policing aspects and that we are talking about changing the rules of evidence or applying different rules of evidence to jurisdictions that have their own systems, complete with different ways of determining guilt and of considering balance, juries and whatnot.

Kenny MacAskill: Yes.

Sandra White (Glasgow Kelvin) (SNP): Good morning, cabinet secretary and gentlemen. Following on from John Finnie's question, I am concerned about the powers that may be transferred if the proposals go ahead. The cabinet secretary said that some member states have been very effective in relation to fraud. He also said that fraud is just a small issue in Scotland and that some member states should be given help to be as effective as others on the issue. Has the Scottish Government or the UK Government put forward the idea of helping other member states, rather than having this proposed huge body? The issue is difficult to tackle if some member states are effective but others are not. Has there been any communication from the Scottish Government to the UK Government or from the UK Government to the EU with regard to helping individual member states to be as effective as others on the issue?

Kenny MacAskill: We should put it on the record that, as far as we are concerned, Eurojust works well, as does Europol. Whether through the offices of the law officers, ourselves as the Government, the United Kingdom permanent representation to the European Union or whatever, we believe that it is important that we co-operate at that level. We believe that we are contributing and that any issues that there may be need to be tackled elsewhere.

It is not simply in this area that there are issues; we know that, in terms of information relating to previous victims, some European states are much better. We have had difficulties occasionally in Scotland because that information is not necessarily available to us or able to be accessed by us. However, the Government fully supports co-operating to address fraud, which is unacceptable. We believe that our justice resources—the Government, the independent law officers and the Crown Office and Procurator Fiscal Service—are capable of providing that co-operation. They will continue to co-operate fully, but we share the UK Government's concern about the proposals, which would cut across the office of the independent Lord Advocate and perhaps result in difficulties if a different jurisdictional view is taken in a system where we have our own legal views.

Sandra White: I have a final question. The cabinet secretary has explained that we have concerns. Would we write to the EU or the UK Government with those concerns to ask whether it would be possible for other—

The Convener: No. That is for the committee.

Sandra White: Sorry.

The Convener: That is for us to decide.

Sandra White: Sorry. I have overstepped the mark there.

The Convener: What the cabinet secretary does is his business, although sometimes we like to know it as well.

Sandra White: I would have liked an answer.

The Convener: We will make up our minds about what we want to do on the issue.

I want to move on to the next bit. I cut off Roderick Campbell's question about Eurojust and the second proposal.

Roderick Campbell: The UK Government has yet to reach a final view on the proposal. Are the witnesses able to tell the committee whether the Scottish Government has had any recent discussions with the UK Government in relation to the Eurojust proposal? Are there any indications of its thinking?

Kevin Philpott: I have had some recent discussions with colleagues in the UK Government, but they have not indicated any final thinking on what they intend to do about the issue. However, we are in regular touch about that. Indeed, a conference call has been arranged for tomorrow.

Roderick Campbell: Do we really have no idea about the proposed investigations into undefined urgent areas and what is to be covered?

Kevin Philpott: No, we do not; hence, the term remains undefined.

Roderick Campbell: How does that satisfy the subsidiarity principle?

Kevin Philpott: That is exactly the question. We have no way of assessing how the subsidiarity principle would be addressed as long as the undefined urgent matters remain undefined. "Urgent" could mean quite a lot of things. That is possibly more of a proportionality question than a subsidiarity one but, as you know, they are closely linked.

Graeme Pearson: Reading the papers over the weekend, I struggled to understand the extent to which one proposal relates to the other and how much they rely on each other. If one proposal were to fall because of subsidiarity, how much impact would that have on the other? Are they so closely interlinked that it would have an impact, or are they completely separate?

David Dickson: There is clearly a link between the two. For example, the papers on the proposed directives say that Eurojust's fraud cases—that in itself is a significant phrase, in comparison with the phrase "fraud cases reported to Eurojust by member states"—will be transferred to the European public prosecutor's office. There is a link.

As far as the law officers are concerned, Eurojust plays a valuable role. The Council is evaluating the current structure of Eurojust with visits to all member states to see how they engage with Eurojust under the most recent decision. It has been suggested in various places that the Eurojust proposal is, perhaps, a little premature, as the current situation is still being evaluated.

There is a mechanism within Eurojust that can deal with all those issues. Ideally, it would be stand-alone because it has direct, substantial benefits to us as prosecutors.

Graeme Pearson: Reading the papers on the two separate proposals, it seemed to me that if one were to engage in some kind of transnational investigation of fraud, Eurojust would necessarily need to change its method of governance to oversee that new capacity. I was trying to unpack that in my mind. If we decide that there are subsidiarity concerns—and concerns in relation to proportionality, in terms of fraud—that means that an awful lot more time is needed to re-evaluate the Eurojust element on its own, but they are presented as two separate issues. The spaghetti is there; the issue is separating it out, which is quite difficult when it comes to making decisions.

David Dickson: That issue will concern many jurisdictions, because the proposal can be implemented only if there is unanimity, failing which there could be enhanced co-operation if at least nine member states agreed to the proposal. If that were to happen, there would clearly be different levels at which the organisations would interact.

I am not trying to avoid the question. It is extremely difficult to see how an organisation that is valuable and works would interact with an organisation to which perhaps only half the member states had signed up. Eurojust would have to find a mechanism of operating within that situation, as would the member states' national desks, but it is clear that Eurojust, the national desks and a gateway that we prosecutors could approach to gain assistance across borders would still exist.

Graeme Pearson: I am grateful for that. Thank you.

The Convener: I am going to say the fatal words that I see no member who wants to ask more questions—when I say that, somebody usually comes in. However, there are no further questions, so I thank the cabinet secretary and his officials for attending.

We will move straight on to decisions on each separate proposal. The first is the EPPO proposal. Please excuse me for just battering on, but we have a lot to do this morning. That is because of you, cabinet secretary, and all the bills that you give us. We have a lot of witnesses coming.

Three options are provided on page 3 of paper 2. The first is to agree that the EPPO proposal complies with the subsidiarity principle; the second is to agree that it does not comply, which would trigger a motion in the Parliament; and the third is to agree that there are concerns that the proposal may breach the subsidiarity principle and to write to the relevant Westminster committees highlighting those concerns.

Roderick Campbell: In light of all that has been said, and in light of the UK Government's position, I agree with the Scottish Government and take the view that the proposal does not comply with the principle of subsidiarity.

The Convener: As everyone seems to agree with that, I think that we can move on. A motion to Parliament will be triggered. It does not necessarily mean that there will be a debate but we will lodge a motion to be taken this week.

The second proposal is to reform Eurojust. Again, can I take Roderick Campbell's views on that proposal?

Roderick Campbell: This one is a bit more difficult to assess. I note that the Government official said that the proposal is premature, and I think that it is, too. It is quite difficult to separate subsidiarity from proportionality. Because we do not know what undefined urgent cases are, the proposal is borderline.

I am not sure that I take quite so strong a view of the Eurojust proposal as I do of the EPPO proposal. Perhaps there is a halfway house: we could voice concerns about the Eurojust proposal, rather than take a specific view.

The Convener: Does anyone take a different view? I think that we are all pretty well with Roderick Campbell on that. We could say that the proposal might breach the principle of subsidiarity, and we could write to the relevant Westminster committees to highlight our concerns. We should also thread in the concern that there is insufficient evidence. It all seems to be a bit hurried, opportunistic and not thought through. We will write to the relevant committees.

Roderick Campbell: Mr Philpott said that he is to have a conversation with the UK Government tomorrow, so perhaps we could be advised of the outcome of that.

The Convener: Would members be happy for the letter to be drafted in my name and for Roderick Campbell to give it the once over?

Members *indicated agreement.*

The Convener: Thank you. We will have a brief suspension of a couple of minutes to allow the

next panel of witnesses to sit down, so members should stay in their seats.

10:26

Meeting suspended.

10:27

On resuming—

Tribunals (Scotland) Bill: Stage 1

The Convener: The next item is our first evidence session on the Tribunals (Scotland) Bill. Today we will hear from two panels of witnesses. On our first panel I welcome May Dunsmuir, who is the convener of the Additional Support Needs Tribunal for Scotland; Heather Baillie, who is the in-house convener of the Mental Health Tribunal for Scotland; John Wright QC, who is a member of the Lands Tribunal for Scotland; and Alastair Beattie, who is the convener of the Scottish valuation appeal committees forum. I thank you all for your written submissions; we have done our homework and we have them all here.

If a member asks a question to which you want to respond, indicate that to me. Your microphone will come on automatically. That is the plan anyway, although we are all a bit rusty, having been off for a few weeks.

Members should do the usual; indicate to me when you wish to ask a question and I will put you on the list. For the sake of Elaine Murray, I say that I have two lists. One is for primary questions and one is for supplementaries, so let me know if your question is a supplementary. The first question is from John Lamont.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): Thank you convener, and good morning panel. The bill is about establishing a framework for reform. Do you share my concern that although there is talk of reform in the bill, it contains no detail, which has been left for another time?

John Wright QC (Lands Tribunal for Scotland): Yes. One can appreciate that quite a lot of delegated powers will be necessary for a bill of this sort. However, it would be preferable for the Parliament to use the bill to make decisions on central matters such as whether particular tribunals are in or out. So, yes—in relation to the Lands Tribunal for Scotland, with which I am involved—I share that concern.

10:30

Heather Baillie (Mental Health Tribunal for Scotland): For the Mental Health Tribunal for Scotland, a great deal of comfort has been taken from various undertakings in the policy memorandum, particularly on the chamber structure. Our concern has been addressed to a certain extent, albeit that the memorandum refers to mental health issues going into a separate chamber “initially”, so there is a concern about the

future. We hope that there would at the very least be consultation if that should change.

Alastair Beattie (Scottish Valuation Appeal Committees Forum): I share the views of the other witnesses. As well as the points that they have highlighted, there is also a concern about the onward appeal arrangements. The default is that appeals on points of law against decisions of first-tier tribunals would be to the upper tribunal, but it has already been said as a matter of policy intent that appeals on certain matters—for example, from the Mental Health Tribunal—would still go to the Court of Session, and I think that that is right.

In our case and in the case of the Lands Tribunal for Scotland, it would also be right, as the Lord President has suggested, that appeals continue to go to the lands valuation appeal court. All of those are fairly significant matters that ought to be established from the start in the primary legislation. Parliament ought to have the opportunity to consider those issues in its first look at the issue.

The Convener: I see that John Finnie has a question. Is it along the same lines?

John Finnie: I have a general question to give the witnesses an opportunity to expand on what they have said.

The Convener: Before you ask that, I want to ask about the Lands Tribunal for Scotland's submission, which is really tough. In the fourth paragraph, under issue 2, you state:

"So the new system is not fatally flawed, simply an unnecessary attempt to demonstrate modernisation."

That is the Lands Tribunal for Scotland's submission, is it not?

John Wright: Yes. That response was submitted by Lord McGhie on behalf of the Lands Tribunal for Scotland.

The Convener: It does not sound as though you think that any of this is a good idea. Such comments are threaded through the submission. As far as the Lands Tribunal for Scotland is concerned, it sees itself as being special.

John Wright: I endeavoured to encapsulate certain matters in my individual submission. Certainly, matters of overall policy are not for us, but we have concerns in relation to the Lands Tribunal for Scotland because we think that, although it is entirely appropriate to consider reforming, changing and rationalising a system of tribunals that has developed piecemeal, we are not at all sure that we fit into the scheme, which is a point that others have made.

The slight difficulty with the scheme of the bill is that a body is either in or completely out. There are lots of good things in the bill for lots of tribunals—I deal only with the Lands Tribunal for Scotland, of course—but they will get the benefits of the bill only if they are taken into the unified tribunals scheme that is at the heart of the proposals. It may be that there are some bodies—including, I suggest, the Lands Tribunal for Scotland—which, as you will see when you take a careful look at the issue, do not really fit in with the scheme. To that extent, the bill appears to us to be difficult.

The Convener: Let me just press you on that. At paragraph 11 of the submission, you go further:

"We think that to aim for common standards and procedures, including review and appeal, as a significant plank of policy risks creation of a serious impediment to identifying the most efficient way of serving the different needs of individual users."

You go beyond saying that the proposals do not suit just the Lands Tribunal for Scotland to say that about the bill in general.

John Wright: That is in Lord McGhie's submission on the Lands Tribunal for Scotland's behalf. It is not for me to—

The Convener: Oh, right. I am sorry. I thought that you would speak to that submission. I will leave you to think about it.

John Wright: I do not think that it is right for me as an individual member of a tribunal to criticise the bill's overall policy.

The Convener: I beg your pardon.

John Wright: However, I appreciate that a response has been made on the Land Tribunal for Scotland's behalf by its president. I tried to focus matters in a paper that more particularly relates to the Lands Tribunal for Scotland itself.

The Convener: It is because the submission says "We think" and was submitted on the Land's Tribunal for Scotland's behalf that I thought I could ask you about it.

John Wright: I appreciate that. There are views about the bill concerning not so much the detail as the idea of an overarching unified tribunal; there is the view that that is problematic. However, as I said, I would rather deal with the matter that is properly in my field, which is the Lands Tribunal for Scotland.

The Convener: I will need to ask Lord McGhie what was meant, because his submission seems to have the biggest go at the policy. I appreciate that there is a range of views and that all the submissions described pluses and minuses, but the Lands Tribunal for Scotland's submission seems to be the tough cookie. It is the good one—I am not saying that the other submissions are not good, but submissions such as that really test proposals.

John Finnie: Convener, you have obviously been peeking at my notes, because you used exactly the phrases that I was going to use. I will pass and come in again later.

The Convener: Okey-dokey. I am sorry about that. I just thought that we had missed something.

Roderick Campbell: Good morning, panel. I declare my registered interest as a member of the Faculty of Advocates.

Notwithstanding what Mr Wright said, I direct him to paragraph 13 of Lord McGhie's submission. It would help the committee if you were to expand on the differences between what has happened to the Lands Tribunal south of the border and to the Lands Tribunal for Scotland.

John Wright: The Lands Tribunal of England and Wales was, substantially, an appeals body; it dealt—not entirely, but largely—with appeals and in particular with valuation appeals, with which Mr Beattie is also concerned. It was therefore seen to have a position in an upper tribunal scheme, although it was made a completely separate chamber. I appreciate that such a policy for the Lands Tribunal for Scotland is indicated in the policy memorandum to the bill.

Another point relates to the volume of cases in England and Wales. In a system with a large volume of appeals over the whole field, as in England and Wales, it is easy to imagine splitting the upper tribunal into a number of chambers. However, as I think the Lord President said in his submission, we do not think that splitting up into divisions and chambers the upper tribunal in Scotland, which will deal with a tiny number of appeals—although I know that a particular situation relates to the Mental Health Tribunal—is a particularly sensible way of proceeding.

Roderick Campbell: In a previous committee investigation, we touched on expenses orders at the Lands Tribunal for Scotland. Do you have any views that you would care to share with us about the uniqueness of the Lands Tribunal for Scotland's approach to expenses, as opposed to what is proposed in the bill?

John Wright: That is quite a good matter to illustrate one of the general points, which is the extent to which you will have to change the general provisions in the bill in order for it to fit the situation within particular tribunals. As far as the Lands Tribunal for Scotland is concerned, I am well aware that the committee was looking at one of our jurisdictions in particular, which was title conditions, in respect of which there is specific provision in the Title Conditions (Scotland) Act 2003 that has been causing a problem. However, we actually have several different jurisdictions, and we have a rule on expenses for compulsory purchase compensation and another position in relation to expenses for valuation for rating cases.

If you are going to bring the Lands Tribunal for Scotland into a general scheme with a general rule about expenses, you must take account of all those different things. I am not saying that it is impossible; you can make all the changes that would need to be made to bring in the Lands Tribunal for Scotland, but it seems to be somewhat inappropriate to do so. If you take our general position on expenses and then consider the three specific examples, there are about four different rules on expenses within our various jurisdictions, so it is difficult to see how all those matters could be dealt with appropriately in the context of a general overall reform. However, I stress, with respect, that I am speaking particularly about the Lands Tribunal for Scotland. Other tribunals will be in different positions.

The Convener: We will leave you alone in a little while. I know that it is odd to be on the receiving end of questions when you usually do the questioning. I have been there myself.

Are we going to ask about another issue? We can come back to the Lands Tribunal for Scotland.

Sandra White: My question is not about the Lands Tribunal, per se.

The Convener: Excellent.

Sandra White: Mine is a general question for all the witnesses to answer, if they want to. In the eyes of your organisations, are the proposals an improvement on the structure that you have at the moment?

Heather Baillie: As far as the Mental Health Tribunal for Scotland is concerned, the current structure works well, but we accept that we can work within a different structure and we can see benefits in terms of savings from having a general administration. Our anxiety is to maintain our particular ethos, our patient-centred approach and the special parts of the Mental Health Tribunal that make it a success. Given that the bill does not change the legislation for the Mental Health Tribunal, and given that there appears to be an undertaking that there will be a separate chamber, which would allow for separate training, we are comfortable that the savings that can be achieved in relation to administration could be a good thing.

May Dunsmuir (Additional Support Needs Tribunal for Scotland): It is a similar position for the Additional Support Needs Tribunal for Scotland, which works effectively in its current shape, although we recognise that there are benefits from the Tribunals (Scotland) Bill. However, those benefits will be achieved only if all the listed tribunals in the bill are transferred in. Otherwise, the haphazard and fragmented system

that we currently have, and which the bill seeks to address, will remain. In fact, we could end up with a far more diverse and haphazard system if the listed tribunals are not all transferred in as planned.

The Convener: Before we move on, I would like to ask whether there are conflicts of interests for people who hear cases for support for children with additional needs and who are part of the system.

May Dunsmuir: There are provisions for a member—usually a general member—who has a conflict of interests not to sit, and members of the Additional Support Needs Tribunal for Scotland do not ordinarily sit in the education authorities in which they serve or have served.

10:45

Occasionally during a hearing the question of a conflict of interests may arise because a member's background is relevant to the matter to which the claim refers. That is usually easily addressed by reminding parties of the scope and capacity in which the member sits, which is as a judicial officer who impartially and objectively reaches decisions based on facts and circumstances.

The Convener: Thank you. Conflict of interests is sometimes mentioned.

Alastair Beattie: There are certainly benefits to come for our sector from what is proposed, but as Mr Wright highlighted, it is unfortunate that they will be available only when everybody is brought into the unified system. For some of us, that may be many years in the future, so the benefits of unified training across the sector, for example, will not be speedily accessed.

The extent of the benefit depends on precisely how the structure is fleshed out, which comes back to the earlier point about the detail not being in the bill. I welcome the Lord President's suggestion in his written evidence that the valuation appeal committees and the Lands Tribunal for Scotland might be brought within the unified tribunal structure, but as separate pillars, with appeals against decisions of either tribunal in our major rating jurisdictions continuing to be by stated case to the lands valuation appeal court. If I understand correctly, that would improve the perceived independence of valuation appeal committees by transferring responsibility for our funding and training from local authority to central sources. It would give our sector the benefit of judicial leadership and oversight by the president of the Scottish tribunals.

The continuing involvement of the lands valuation appeal court should ensure that the rating jurisdiction remains coherent, notwithstanding the fact that it is shared between the two tribunals in the first instance. The valuation appeal committees could retain their present regional structure in order to ensure that their members are people with local experience, which is very important in this jurisdiction.

Difficulties would still be created in our sector by the introduction of an age limit for membership, as we set out in our written evidence.

Graeme Pearson: Mr Beattie has partially answered my question. You have each indicated that the current system works well. However, it seems to me, having read the paperwork, that, when we begin to get into some of the commentary, this is a pretty dense and complex area.

From your perspective, what will be the benefits from going through all this pain? We have heard about unified training and the transfer of finance from local authorities, and the possibility of judicial leadership. Is that the extent of the recognised benefits across the various tribunals, or are there other benefits that you would point out?

May Dunsmuir: I reiterate what I have said. The Additional Support Needs Tribunal for Scotland works very well within its existing structure, so perhaps some benefits will come from sharing the expertise that has been gained from the tribunals.

I am aware that other tribunals do not have the same resources available for the delivery of training, for example, but our concern must be the tribunal user, to whom the primary benefit must apply and who must be at the heart of the system. The user ought to be able to approach any of the listed tribunals and know with some certainty what level of service they can expect to receive. As things stand, tribunal users have different experiences, depending on the particular tribunal that they approach. The bill must remain focused on delivering a clear and good quality service for the tribunal service user, as the end user.

Heather Baillie: A benefit of having overarching leadership from the Lord President and a president of Scottish tribunals is that it will improve overall consistency of delivery of service across tribunals. There will be an opportunity for generic training, but there is also a need for specific training, given the diverse users that the tribunals serve.

John Wright: Even in the case of the Lands Tribunal for Scotland, which I suggest is in a somewhat different area and is outside the area of administrative justice with which the bill is primarily involved, there is benefit in expanding a system of purely administrative support, which has already started under the Scottish tribunals service. In addition to training, which has been mentioned, I

can think of one or two other areas in which the expansion of the system will assist, such as in the recruitment process, dealing with questions about the conduct of tribunal judges and so on.

Those are undoubtedly benefits, but I would like to distinguish them from the idea of standardising case handling and that sort of thing. Case handling—not just the hearing of cases but the handling of cases by our specialist staff—is a very important part of our work. I worry about increasing standardisation of case handling, but I suggest that in terms of purely administrative support the bill will bring real benefits.

Alastair Beattie: The benefits that I highlighted, which Graeme Pearson has picked up on, largely arise because—I think, uniquely among the listed tribunals—my tribunal is not structured on a national basis. The others currently have single national organisations, but we exist as 13 separate regional panels, which are funded locally, although they are appointed by the sheriffs principal. The guarantees of consistent operation and so on therefore exist only within each panel area. In statutory terms, I am responsible only for what happens in the Highlands and Western Isles area. My position in relation to the other panels is as a member of the forum, which is a purely voluntary organisation that pulls all our panels together so that we can come to speak to this committee and to the Scottish Government with one voice.

A benefit of creating a national organisation is that it would bring consistency of standards across the sector, regardless of whether we are brought into the unified tribunal. In a way, I think that it is a step that would have to be taken before we could be brought in, which is why we suggest in our written evidence that, before we are brought into the system, there ought to be a more radical and independent expert review of the sector to determine the needs of the users in the sector who are served by ourselves and, jointly, by the Lands Tribunal for Scotland, before a future framework is determined.

The Convener: I have a supplementary question. I have been digging around trying to find a comment that I knew I had seen somewhere in my papers. It is in the Law Society of Scotland's submission, which refers to the distinctive character of tribunals and which says:

"The Society believes that, in the context of the proposed merger of the Scottish Tribunals Service and the Scottish Courts Service, these characteristics are important and worth preserving and that they should be entrenched in the bill."

I know that the characteristics are not uniform across all tribunals, but they include informality, the fact that a tribunal is not a court and that generally, the cases do not involve people for and against who are fighting each other, although that might be the case in the Lands Tribunal, where the practice is much closer to normal court practice.

The Law Society of Scotland's submission suggests that a provision should be included in the bill about the nature of a tribunal being distinct from that of a court. Is that silly or pointless?

The Law Society's submission also quotes a comment from the Leggatt report:

"tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases ... tribunals should do all they can to render themselves understandable, unthreatening, and useful to users".

I exempt the Lands Tribunal from this for the moment, but do the witnesses feel that there should be some attempt to have a culture that embraces flexibility?

Heather Baillie: Yes. It is important to recognise that, as a forum for decision making, tribunals have a flexibility that is quite different and distinct from the courts. In the case of the Mental Health Tribunal, decisions about the detention of the mentally disordered have moved from the court to a tribunal setting and it is very important to recognise that that flexible, informal and patient-centred approach will continue to be taken.

May Dunsmuir: I am conscious that the Law Society's submission reflects the Administrative Justice and Tribunal Council's response on the matter. It would go some way towards reassuring service users, stakeholders and service user groups if the bill contained a definition of the function and distinctive nature of a tribunal.

Alastair Beattie: Bringing out that distinction would be a very desirable move but, given the breadth of the issues that we as a group deal with and the existing procedures, it is very difficult to see how that could be achieved. For example, valuation appeal committees in our council tax jurisdiction are almost always faced with lay appellants, whom we have to approach and handle as individuals. However, although some lay appellants come before us in our rating jurisdiction, the vast majority of cases are handled by professional agents, which makes things much more adversarial; indeed, we frequently have senior counsel addressing us on both sides. Things are veering much more towards a court situation—that is just from putting one tribunal in different jurisdictions. In short, I am not sure how such a principle could be enshrined in law, although it would be worth while.

John Wright: My submission draws attention to the "overriding objective" approach, which is used in England and Wales and of which I have some experience in the UK tribunal system. That

approach, which is put into tribunal rules, could also be put into the bill; as in the practice rules of the upper tribunal under the UK system, such a provision would state that the overriding objective is to enable tribunals

"to deal with cases fairly and justly"

and then would set out a number of principles in relation to that, including

"ensuring, so far as practicable, that the parties are able to participate fully in the proceedings".

That is a useful device—indeed, it could also apply in court—and I note that Citizens Advice Scotland's submission focuses on it as a way of focusing on users' needs.

Of course, the upper tribunal practice rules set out other principles of dealing with a case "fairly and justly", including

"avoiding delay, so far as compatible with proper consideration of the issues."

That sort of general principle could go into the bill; for that matter, I would also accept it for the Lands Tribunal.

The Convener: Given that the Law Society, among others, has raised the issue, we could always ask it to draft an amendment and submit it to members for consideration.

John Finnie: I note that Ms Dunsmuir's submission expresses concern about "any dilution" of specialisms or "the culture and ethos" of the Additional Support Needs Tribunal or

"any unintended drift towards generalised arrangements",

which follows on from earlier comments about standardisation. Was that a pre-emptive comment about what could happen, or has anything specific in the legislation led you to believe that that could be the case?

11:00

The Convener: Ms Dunsmuir?

May Dunsmuir: Sorry—I did not realise that I was being addressed.

The Convener: But you were listening.

May Dunsmuir: I was. The word "drift" caught my attention.

The bill can work effectively and deal with the range of concerns that already exist only if we ensure that the listed tribunals are placed carefully into the appropriate chamber system. That in itself will work against any drift towards a generic tribunal, which everyone is so concerned about. There are a range of safeguards over and above that, which include the provision that the chamber president will be expert in the subject of the chamber over which they preside. Not only the Additional Support Needs Tribunal but the Mental Health Tribunal for Scotland and a range of other bodies, including the Scottish Children's Reporter Administration, stress the importance of maintaining and preventing the dilution of specialisms. Carefully placing tribunals in the appropriate chamber and ensuring that the chamber president remains an expert in that subject will be absolutely crucial to ensuring success and preventing drift.

Heather Baillie: The existing membership and the amount of investment that has gone into training and the development of the different cultures in different tribunals should be recognised. The transfer in of existing members will be important in avoiding the development of a generic tribunal.

Alison McInnes (North East Scotland) (LD): The bill provides for a common system of appointments to tribunals. Do the panel members think that that will increase the independence of tribunal members?

Alastair Beattie: Although that is an interesting development, it is hard to see that it would increase independence. We are appointed by the sheriffs principal, which I think is as good a guarantee of independence as we could have. It is difficult to see that the bill would necessarily increase independence.

The greater risk is that, by straddling the paid appointments that exist in many tribunals and the unpaid appointments that exist in others—such as my own—the common approach might end up not being entirely appropriate to both. I am thinking in particular of the proposal for a retirement age or an age beyond which no appointment could be made. That might have considerable relevance to paid appointments, where those appointed require up-to-date professional qualifications and experience, but it would have less relevance in our case, where members are lay persons with local knowledge, which people of any age can have. Given that we do not have an age limit at present—the previous one having been set aside as it was considered to be inconsistent with EU legislation—if an age limit were imposed before the next revaluation, we would lose 60 per cent of our membership and therefore we would lose the very experience that it would be useful to take into the new system. Where you would find the successors, I do not know.

The Convener: I am glad that it is a matter of capacity, not age, and that there is no age limit on politicians.

Heather Baillie: It is welcome that these are to be judicial appointments. Having one appointments body can ensure that the tribunal

skills that are specific to a flexible and user-centred approach are recognised as part of the appointment process. From that point of view, we welcome the arrangements for appointments.

May Dunsmuir: I agree with my colleagues' comments. The Judicial Appointments Board for Scotland made a comment in its submission that there is no clarification of whether it would be involved in the reappointment process. That is perhaps something that the bill ought to address, because the initial appointment is only one part of the scheme.

Alison McInnes: The bill lays down the criteria for legal members, but it does not do so for lay members—for ordinary members, as they are called. That will come through in secondary legislation or guidance from the minister. Is that an appropriate way to separate out the appointments?

May Dunsmuir: At the moment, provision through regulations specifies the experience that is required before someone can be appointed as a general member of the Additional Support Needs Tribunal. One would hope that, whatever provision is made in relation to each of the listed tribunals, the arrangements will recognise the distinctive qualities that are necessary for each individual tribunal. It would be disastrous if that approach were to be lost—that would go very much to the heart of the specialism of the tribunal. The bill has to address that much more clearly.

The Convener: I call Elaine Murray. Welcome, Elaine.

Elaine Murray (Dumfriesshire) (Lab): Thank you.

Perhaps I should have intervened on this issue a little earlier, as it is a fairly general point. The approach to the bill is a generalist one, and the system is set up such that it will cover certain lists of tribunals, with others joining over a period of time. The evidence suggests that some of the benefits will not accrue until the system is completely set up. Is the gradual approach the best one? Should all the tribunals be part of the system and defined from the outset?

John Wright: Mr Beattie has already referred to the effect of the gradual approach being that some tribunals might be left out of the system for a long time. Certain bodies—obviously, the Lands Tribunal is the body that I am talking about, and I know that one or two other organisations such as the children's hearings have suggested that they should not be in the system—would never get the benefits.

I understand the gradual approach, but it means that provisions that are useful do not apply for a long time—and possibly never, in the case of some bodies.

The Convener: I invite others to comment on the gradualist approach as opposed to a big-bang approach.

Given that many of the provisions will come through subordinate legislation, I will check that that will be subject to the affirmative procedure. Panel members may be concerned about that. If I may use a cliché, we all know that the devil is in the detail, and the committee will return to the matter to consider how the subordinate legislation will interact with the primary legislation.

Are there any further questions?

Roderick Campbell: Yes.

The Convener: I knew as soon as I said that—

Graeme Pearson: There are two of us.

The Convener: I will let Roderick Campbell in first. Graeme Pearson has been in already.

Graeme Pearson: Just with a supplementary.

The Convener: It still counts.

Roderick Campbell: I want to quiz Ms Dunsmuir about comments in the Additional Support Needs Tribunal's written submission in relation to appeals. You suggest that appeals to the Court of Session have "worked well in practice". Under the proposals, appeals will go to the upper tribunal, and you say that you are

"content with the Bill's provisions"

in that regard. Perhaps you could expand on what you mean by "content".

May Dunsmuir: The process of taking an appeal to the Court of Session is undoubtedly expensive and can be fairly time consuming. There can be delays in the appeal process. The bill provides that an appeal can go to the upper tribunal, which will remove those impacts. In that respect, the president of the Additional Support Needs Tribunal is satisfied that the bill makes adequate provision and that there will be no loss to the tribunal by virtue of the different appeals route.

Roderick Campbell: Do you hope that the new route will also be cheaper and speedier?

May Dunsmuir: Yes.

John Wright: I appreciate the usefulness of a tribunal—as opposed to a court—hearing administrative justice appeals but, again, that does not apply in relation to the Lands Tribunal. I am not aware of any dissatisfaction in relation to the Lands Tribunal about appeals to the Court of Session. Indeed, a particularly positive area—the

lands valuation appeal court—has already been referred to.

The Convener: I will let Graeme Pearson in now, lest he think that I am ignoring him.

Graeme Pearson: I cannot find the reference, but I thought that I read in the evidence about the prospect that the Scottish tribunals service will have a growing relationship with the Scottish Court Service in the coming years. Do you welcome that, does it cause you any concern, or is it of no import to you?

Heather Baillie: In relation to the route that cases that involve mentally disordered patients take to get to tribunals, I reiterate that the concern would be that we maintain within a courts and tribunal service our specialism and a recognition of our ethos. That extends to administration, because those who deal with the administration of cases that involve the mentally disordered have built up considerable expertise in communication and in the structure of the Mental Health (Care and Treatment) (Scotland) Act 2003.

The other issue is that of venue. We would consider it a retrospective step for the patient to have to come to the tribunal—at the moment, the tribunal goes to the patient.

Graeme Pearson: So you hope that, as the relationship with the Scottish Court Service grows, the environment in which you work will be acknowledged and serviced, rather than your having to fit in with the SCS's administrative requirements.

Heather Baillie: Absolutely.

The Convener: But there is no proposal for that to happen.

Heather Baillie: No.

The Convener: It is just that you have a concern about that.

May Dunsmuir: A consultation process on the proposed merger is under way, and I know that each of the jurisdictions that are represented here will have responded to it.

The Additional Support Needs Tribunal is an incredibly complex jurisdiction, and the level of specialism that the caseworkers have developed over the years would have to be maintained. I know that Mr Wright has already commented on the level of specialism in the administrative support that is provided to the Lands Tribunal. In the upcoming annual report, the president of our tribunal will report on the efficiencies that have been gained through the development of the casework process. I certainly hope that, in any proposed merger, the special knowledge of the caseworker will not be lost.

I know that the consultation asks questions about how the board can be adapted to recognise the two different jurisdictions, and comments will undoubtedly be made on that.

Alastair Beattie: For our sector, it is very difficult to see what the position will be, largely because, as yet, we have received no indication of the implications for our secretarial and administrative arrangements of being brought into the new system. I am not sure, but I think that we are pretty well unique in the tribunal sector in having an arrangement whereby we have lay chairmen and legal secretaries—rather than the other way round—and a totally different administrative structure. There have been no proposals on how that will be merged into the new system; we do not know how that will be done. Therefore, the implications of further merger are anyone's guess.

Graeme Pearson: That might be an interesting question for the Scottish Court Service.

The Convener: Are you coming back to ask that interesting question?

Graeme Pearson: I hope that I will be able to encourage someone else to ask it for me.

The Convener: I am teasing—Graeme is leaving the committee and we will miss him.

I thank all the witnesses very much for their evidence, which has been extremely helpful.

I suspend the meeting for six minutes.

11:14

Meeting suspended.

11:22

On resuming—

The Convener: I welcome our second panel of witnesses, who were all sitting listening to the first panel's evidence. We have Katie James, manager of Advocard's individual advocacy service at the Royal Edinburgh hospital; Jon Shaw, welfare rights worker with the Child Poverty Action Group in Scotland; Lauren Wood, policy officer for Citizens Advice Scotland; and Iain Nisbet, head of education law at Govan Law Centre. I thank you all for your written evidence. I invite questions from members.

John Lamont: I will start with the same question that I asked the previous panel. The bill is about establishing a framework for reforming tribunals. Do you share my concern that there is not so much detail in the bill?

Iain Nisbet (Govan Law Centre): As has been said, the devil will be in the detail. It would be

useful for members to have at least some indication of the likely content of the subordinate legislation and guidance that is to follow. Having said that, there is something to be said for having the flexibility to make quicker changes when change is needed. For example, rules and questions about appointments and so on are often contained in regulations, and there is nothing particularly objectionable about that. It can be useful, because the legislative timetable is such that it is not always possible to get primary legislative slots when change is needed. As a new system beds in, there might well be a requirement for changes to tribunal rules. For example, the Additional Support Needs Tribunal issued a second set of rules within a year of the first set of rules being published, because some minor amendments needed to be made. That would not have been possible if everything was in the bill.

The Convener: The committee appreciates that the process for secondary legislation is much simpler and more accelerated than that for primary legislation.

Lauren Wood (Citizens Advice Scotland): We are definitely concerned about some of the lack of detail in the bill, but there are ways in which that lack of detail could be mitigated. For example, the bill could include principles to help to guide tribunals, as there are in the Tribunals, Courts and Enforcement Act 2007 in England.

Another way to mitigate would be to use independent review, which is missing from the bill. That would give the Scottish Civil Justice Council the function of overseeing the process and procedures, although not the whole of administrative justice. I know that the Scottish Government and the UK Government are moving to mitigate the impact of the abolition of the Administrative Justice and Tribunals Council, but if the bill does not give someone the power to oversee administrative justice, there will be a risk that all the current good intentions will be missing later on. In five years, will there still be an intention to have a Scottish Government body as an independent advisory committee?

Another aspect is about allowing for the development of new tribunals. The potential new housing tribunal is a good example to use when considering the bill. There is no way for the bill to contain detail about a housing tribunal that does not exist yet, but including the principles in the bill and giving someone the ability to oversee administrative justice would mitigate any negative impact on current tribunals and potential new ones.

Jon Shaw (Child Poverty Action Group in Scotland): I definitely echo most of what Ms Wood says.

To return to the overriding objective, which I was really pleased to hear Mr Wright talk about in the previous evidence session, there is a provision in the Tribunals, Courts and Enforcement Act 2007 that places a duty to put the user at the centre of the tribunal system. Although there is a similar provision in the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, it is a concern that the council has said that it will not draft procedural rules until, I think, 2017-18, which is mentioned in the financial memorandum for the bill. The policy memorandum says that there is no intention to significantly rewrite the rules. So the placing of an overriding objective at the heart of the tribunal system, which has been so helpful in our area of expertise—reserved social security tribunals—is a real area of concern. Placing a principle in the bill to secure that would be a real improvement.

Katie James (Advocard): From a service user's point of view, accessibility comes from having detail that people can look at, cross-examine and utilise effectively. People want to know the detail so that they can use the bill in the most effective way.

John Lamont: I have a follow-on question for Ms Wood and Citizens Advice Scotland. Your organisation supports users of devolved and reserved tribunals, and extensive reforms have been made south of the border. Are there any lessons that could or should be learned from the experiences of the reforms of reserved tribunals? Will the reforms in Scotland achieve efficiencies, make a better system and meet the same standards as have been achieved south of the border?

Lauren Wood: There are still a few questions to be answered about how efficiently the reserved tribunals are working. To have an echoed system is probably a good thing for users, because we have found that, when somebody comes through the door, it does not matter to them whether an issue is reserved or devolved.

The Convener: We have the same experience as MSPs.

11:30

Lauren Wood: It does not matter where the issue sits. Somebody has a problem and they want it dealt with, and that is the focus. On those terms, it is essential that there is somebody who can carry out an independent review of the whole of administrative justice, including tribunal users. To restrict the functions that are given to the Scottish Civil Justice Council to just the process and procedures could restrict what it looks at in relation to how people access the systems.

There are still questions to be answered. We should strive for the best standard possible, because that is what somebody will experience. People do not care, even once the process is finished, whether the matter is reserved or devolved. Having a body to oversee the whole of administrative justice is the way to ensure that things are good for people at the end of the process.

John Finnie: My question is on a number of stark comments in the opening section of Ms Wood's written evidence about openness, fairness and impartiality. You say:

"There is therefore no guarantee ... as characterised by Franks."

You also say:

"Without prescription of the Tribunal Rules, fairness, openness and impartiality cannot be said to be guaranteed."

Can you expand on that, please?

Lauren Wood: Those things are guaranteed mostly through the detail of procedure and process, and the bill does not contain any detail about procedure, so we cannot say that the bill can guarantee that procedure will be open, fair and impartial. If there is no detail about the procedure and no safeguards such as overarching principles to guide the development of procedure in an impartial way, we cannot, on a strict reading, say that the bill will guarantee fairness, openness and impartiality, because the detail is missing that would allow those guarantees to be offered.

John Finnie: How do you suggest remedying that?

Lauren Wood: One way would be by providing principles in the bill as a way of setting out the focus of what we want tribunals to achieve, so as to be user focused. On pages 3 and 4 of our submission, I point out the principles that are in the 2007 act in England. The way to mitigate the impact and to help guarantee openness, fairness and impartiality is by guiding the development of tribunals with principles.

The Convener: That is on page 4 of the submission, by the way, for the benefit of other members.

John Finnie: Thank you. It is helpful to have that on the record.

The Convener: Yes, it is very helpful.

Roderick Campbell: My question is addressed to Mr Shaw. I take on board your point about the importance of the overriding objective but, just for the record, the Government's policy memorandum states:

"There are no plans to comprehensively rewrite the rules of procedure".

You make a number of comments in your written submission, such as:

"The Tribunal Rules for the UK system are indeed simple and clear",

but you point out that, for understandable reasons, you have no experience of the devolved tribunals in Scotland. I wonder whether you were being a bit sweeping in taking such a view on the rules of procedure in Scottish tribunals if you do not actually have experience of those rules. I take on board your other points, but I wonder whether you are going a little too far.

Jon Shaw: It is clear from our evidence that we are commenting on what we see as the positives in the reforms that were introduced under the 2007 act, and I struggle to remember a point in the written evidence where it makes any sort of explicit criticism.

We do not see ourselves as being expert in any way on the devolved tribunals. The points that we were hoping to get across are that there are real positives from having an overriding objective underpinning the rules, that there is flexibility between the different specialisms and that there are differences within the rules. I am sure that, over time, any system will develop and that it will be possible to learn from the other tribunals.

As regards how the tribunal rules are drafted—if they are drafted—there is no suggestion that there should not be specialisms, particularly with regard to membership, time limits, training and venues, as has been highlighted by the other tribunals. There will always be an opportunity to involve stakeholders and users of tribunals and to get the best out of each without compromising those specialisms.

I did not intend to criticise the rules of any individual tribunal; I wanted to highlight the fact that there is perhaps an opportunity to see where improvements can be made.

Roderick Campbell: I agree with your comment that

"the culture of the system"

is

"as important"

as the rules. Your experience is with the UK tribunal system. Where could improvements be made to that system and what can we learn from the experience there?

Jon Shaw: A big issue in the UK system, particularly in social security, is that of delay, which we will always find at a time of large-scale welfare reform. There is the potential that the direct lodgement of appeals will eventually improve things and reduce delays in the system. One big improvement that was made when the

procedural rules were drafted was in preventing the automatic strike-out of cases where people did not return an inquiry form that had been sent by the tribunals service. Judge Martin estimated that that improvement led to 1,200 appeals being won that would otherwise have been struck out simply because people had not returned a piece of paper. Come October, an extra stage in the process will be removed, as appeals are lodged directly with the tribunals service. That is one area where an improvement will be made.

Reserved tribunals work well. There is a clear distinction between a tribunal and a court. Tribunals facilitate user access, particularly lay representation, as far as the upper tribunal. The one criticism is that some judges do not necessarily have the soft skills. There might be further opportunities to make appellants part of the process, rather than their feeling that there is an adversarial jurisdiction. That is perhaps a function of the fact that the Department for Work and Pensions rarely sends a presenting officer, which leaves the tribunal judge to fulfil the role of cross-examining the appellant—that is what it will sometimes feel like, depending on their particular interpersonal skills.

Sandra White: Like John Lamont, I will pose the same question as I did to the previous panel, which I might then follow up with further questions. My first question is whether the proposals are an improvement on what we have now. Ms Wood says that they are an improvement, but I note the criticisms that the witnesses have advanced—although perhaps "criticisms" is too strong a word. In general, do you think that the proposals are an improvement? I might follow that up with further questions.

Iain Nisbet: From a user's point of view, the primary improvement that I see in the proposals is in accessibility. At present, one of the primary benefits of the tribunals system over the alternatives that involve going to court is that it is more accessible. It is also generally cheaper and it is possible to make use of specialist lay representation.

The primary benefit that I see in the new system from a user's point of view is that those advantages will be extended to the first tier of appeals. At present, when people disagree with a tribunal decision, and where there is a point of law to argue, the appeal, if the appeal right exists, is very often to court, which often means the Court of Session. However, for most users who do not qualify for legal aid, that will be outwith their means. The ability to take a case to the upper tribunal without those concerns and the access to specialist lay representation will be good for users and for the tribunals system, as many of the smaller jurisdictions do not have that flow of appellate decisions, which can be useful for clarifying the law and the process that the tribunals use. I see that as the primary benefit from a user's perspective.

Katie James: I concur with that, primarily because I think that people sometimes want the opportunity for mediation and negotiation. The upper tier will give people more of a sense of opportunity to negotiate and mediate effectively.

The Convener: I think that I am correct in saying that an appeal from the first tier will involve a sifting process in any event. It is hard for some people to accept a decision even when it might be blindingly obvious that the decision is the correct one, but there is a sifting process. I take it that you are content with that, too.

Iain Nisbet: I have some concerns about the level of sift. I note that the Faculty of Advocates is concerned about the sift with regard to the second appeal. That will need to be monitored. I have no objection to a sift that is applied to cases that are obviously without merit—that addresses the concerns that you have—but there are not a huge number of appellate cases being brought, and it is good for a tribunal system to have a reasonable flow of those. Parliament will wish to monitor that to ensure that the sifting is not being applied too rigorously, which could lead to a lack of appellate decisions.

Lauren Wood: I agree with all the comments that Mr Nisbet has made.

To pick up on an earlier comment, the new structure will mean a guaranteed baseline standard among all the tribunals, which I think is important for users. The ad hoc way in which tribunals have been allowed to develop has been a good and a bad thing. It has meant that each area has developed into something that really suits the users of each specialism. It is an improvement to have a baseline standard, but each area should be allowed to retain its individual characteristics as far as possible. If a new tribunal is developed within the new structure, having the principles in the bill would give a degree of certainty that it should develop in line with those principles that put users at the core, but not necessarily in a rigid way. That would be important, particularly for a housing tribunal.

Sandra White: I want to pick up on some of the issues. Everyone who made a submission has said that the bill is an improvement but, as we have gone on with the evidence, people have voiced concerns to some extent.

Ms Wood, when you answered Mr Finnie's question about guarantees and so on, you could not guarantee anything. If we look at some of the figures that CAS has presented, there is not exactly a guarantee there either. There is a wee

bit of an issue with words in this respect. You mention the

"650,000 applications made to tribunals across the UK"

and you go on to say:

"this number continues to rise."

You state:

"In 2015-16, applications to the first tier of the Social Entitlement Chamber alone"—

that is another UK body—

"are expected to reach"

a certain figure. That is not a guarantee—they are "expected". I am making the point that, while you are asking for a guarantee on the principles in the bill, the evidence that CAS has presented is not necessarily guaranteed either, with phrases such as "reasonable to expect." I wanted to clarify that point.

You also mentioned the other body, the SCJC. We have had—I probably should not say this—guarantees. As you state,

"The Minister for Community Safety and Justice in Scotland has expressed her commitment"—

which I would say was practically a guarantee—

"to 'an expert independent advisory committee ...'".

Would you be content with that expert advisory committee, or would you be looking to another tier again?

11:45

Lauren Wood: The independent advisory committee is a fantastic move. I have been talking to the civil servants who are involved and they have been excellent in their communication and their openness about it. My concern is that the current independent committee will be an interim advisory committee—that is the way in which it is being discussed. My concern is always to do with the five-years-down-the-line test. If there is nothing in the bill that guarantees that administrative justice will be reviewed overall, what will happen when the matter is further down the agenda in five years' time?

In the last paragraph of my submission, I suggest that that function could possibly be given to the civil justice council. From my understanding of how the civil justice council will work, however—and it is still very early days—that would not necessarily mean that the council should be the body that has to carry out the review, although the council would have to ensure that it is done. In another part of my evidence, I mention that the relationship between the interim advisory committee and the Scottish Civil Justice Council is unclear. I think that it should be a strong relationship.

On a strict reading of the amendments to the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013, to insert the power to overview process and procedure but not to insert the power to overview administrative justice will mean—reading between the lines—that, because the Scottish Civil Justice Council has the power to oversee civil justice, somebody else should do that, and not the SCJC. There is a concern that, if the power is not legislated for and given to someone, although the intentions are good and the interim advisory committee will be a positive thing, a question arises as to how long that will last and how high on the agenda the matter will be for the next five or 10 years.

Sandra White: I take on board what you say. Things are moving along. Next year, we will have the referendum for independence. You are talking about five years; I am talking about a year down the line. You say that the current proposals are a good move, but the issue seems to depend on one thing that makes it not a good proposal. I am a bit concerned that it is hung up on that one thing while there are so many other things to consider regarding tribunals, including education—somebody else might pick up on that with Mr Nisbet.

The Convener: We will have representatives of the AJTC with us next week, so we will be able to marry your concerns about the interim period and about what the functions will be should the other body take over. We can raise all those issues next time.

Alison McInnes: I am interested in the panel's experience of education appeal panels. Would there be benefit in their being incorporated into a tribunals system? Perhaps Mr Nisbet is well placed to deal with that question.

Iain Nisbet: Thank you for asking. This is the aspect of the bill that I am most excited about—the prospect of moving the education appeal committees into an independent structure. You asked about our experience. I have appeared before numerous education appeal committees, and I have advised parents appearing in front of many more. That is possibly one of the largest jurisdictions in the list in terms of the volumes of cases, and important decisions are made about children's educational futures.

The deficiencies are well known and they were officially recorded by the predecessor to the AJTC, the Council on Tribunals, for well over a decade. The Scottish Executive issued a consultation on proposed reforms, which did not really progress matters. The deficiencies that were marked in the original paper are still evident. It is not an

independent system, and it shows. The tendency of the committees is to confirm authorities' decisions, although it varies between authorities. There are 32 different iterations and some authorities are better than others, but by and large there is a tendency to confirm decisions, in some cases without serious scrutiny of the case. The prospect of that jurisdiction being brought within an independent tribunal service is therefore one of the most exciting and beneficial aspects of the bill.

Alison McInnes: That is helpful. Will there be an opportunity to have a shared chamber with the Additional Support Needs Tribunal? Would that bring further benefits?

Iain Nisbet: Yes. I have no reason to object to that; it would be a good move. A learning chamber or something of that sort would be beneficial. The members of the education appeal committee are not specialist members but councillors and parents. There is an element of choosing, but when it comes to more complex issues such as exclusion or placements for children with additional support needs in mainstream or special schools, the expertise is not there. The proposed approach presents an opportunity to develop that.

Alison McInnes: Glasgow City Council points out in its submission that most of its appeals happen at a particular time. Do you anticipate problems in that regard?

Iain Nisbet: It is true that there is a large seasonal element because most placing requests in Scotland are decided on the last day in April, so the appeal process kicks in after that. Local authorities are aware of that and have to set themselves up to deal with the appeals—they do that well.

The Additional Support Needs Tribunal can experience the same issue, to a lesser extent. We do not want a situation in which parents do not know which school their child will be going to, sometimes until into the new term. We have had cases that have gone to the appeal committee and then the sheriff court, and by the time we are through the process we can be into August. Particular attention will need to be given to the issue.

However, as I said, the appeal committees do a good job in getting throughput, and if a number of cases relate to the same school there are provisions in legislation to allow cases to be at least partly heard together so that the committee does not have to hear the evidence on how many classrooms and teachers the school has more than once.

Graeme Pearson: We heard from a witness on the previous panel that an age limit of 70 would have a substantial impact on his sector's capacity to continue in the years ahead. From your experience of different administrative appeals and tribunals, do you think that an age limit would have an effect? Do you have an opinion to share with us on the age limit that might be applied in relation to appointments to serve in a particular judicial capacity?

The Convener: That question was met by a stunned silence.

Iain Nisbet: I can comment on the jurisdictions in which we appear. The education appeal committees and the Additional Support Needs Tribunal seem to rely heavily on retired professionals, so an age limit could well cut off the potential supply of members.

Jon Shaw: I echo that in relation to the social entitlement chamber. The specialist medical members are often retired general practitioners, so an age limit could have the impact that Iain Nisbet described.

Graeme Pearson: Do the witnesses have a view on what retired people bring or fail to bring to the process—or would you prefer to remain silent on that?

Iain Nisbet: There is no need for me to remain silent. The fact that someone is no longer in the system, working for a local authority and so on, enhances their credibility as a member and increases parents' confidence in the process. It can be a benefit.

The Convener: It is about quality of years, not quantity of years.

Graeme Pearson: Indeed.

The Convener: I knew that we would agree on age.

As there are no further questions, I thank the witnesses for their attendance, which has been useful. If you think of something that you want to add or you want to comment on evidence that we subsequently receive, please write to the committee. We will take evidence next week that you might want to say something about. Thank you.

European Union Issues

11:54

The Convener: I move straight on to agenda item 3. Paper 7 provides an update on the committee's EU priorities, which we agreed at the beginning of the year. I ask Roddy Campbell to lead on that.

Roderick Campbell: I will kick off by saying a few words about whether the UK Government will finally opt out of the 130 pre-Treaty of Lisbon measures. The paper is reasonably self-explanatory. We have known since October last year that the coalition Government is minded to opt out. In April, a House of Lords committee prepared a report that criticised the Government's decision on that. Since then, the most significant development has been the announcement on 9 July by Theresa May, the Home Secretary, of a list of 35 measures that the UK Government would seek to rejoin should the opt-out be exercised.

There is still some way to go and I have no doubt that the relevant House of Lords sub-committee will look at the matter further. The subject is highly controversial. This committee would benefit from looking at and taking some evidence on it in due course, without duplicating the valuable work that is going on at Westminster.

The question is what the committee wants to do and when. We would need to act in time to have an impact on the final decision. If we could find a slot to do something towards the end of the year or in January, that would take account of developments by then.

I do not want to pre-empt things, but I do not think that the 35 measures contain specific items that are overly relevant to Scotland. Quite a lot of them—five—are Schengen measures, and the rest are non-Schengen measures. There will be some clarity.

The main issue is that the committee has a heavy workload, so we want to avoid doing things just for the sake of it. However, we need to have input in some form into the issue.

John Finnie: I thank Roderick Campbell for that update. One of the cabinet secretary's letters refers to a seminar on 5 June. Rod talked about a House of Lords committee meeting in July. Do we have more information on the specifics? I am pleased that the Lord Advocate, the Faculty of Advocates, the Association of Chief Police Officers in Scotland and others gave evidence, but they voiced strong concerns about the implications for international co-operation on criminal inquiries. It would help to know where we are with the measures that the UK Government is prepared to go along with.

Roderick Campbell: Those organisations did give evidence. There is a clear difference of opinion; the UK Independence Party and various Tory back benchers have strong views about the issue.

John Finnie: I am delighted to hear of that difference.

The Convener: That is not fair—John Lamont is not here to defend the troops.

Roderick Campbell: The background to European issues is that the European elections will take place next year. The issue is on-going and the question is when the most appropriate time is for us to stick our oar in.

The Convener: We could discuss the proposals in January—probably round about 14 January. Members have a copy of the work programme.

Do we agree to note the developments in relation to the UK Government's 2014 opt-out decision—we will continue to monitor the developments, including the House of Lords inquiry; to note the developments in relation to the proposal to establish a European public prosecutor's office—we have stated what we think about that and we have moved on, because we have lodged a motion; and to return to the final two priorities that we identified once full details of the proposals become available, which makes sense? We can come back to that in January, when a lot will still be going on. Is that agreed?

Members *indicated agreement.*

John Finnie: That approach is helpful, convener. I ask for us to be kept apprised of any developments that occur in the interim.

The Convener: Okey-dokey.

Our next meeting is on 10 September, when we will hear evidence from the Cabinet Secretary for Justice on the legislative consent memorandum on the Anti-social Behaviour, Crime and Policing Bill. We will also hear from a further panel of witnesses on the Tribunals (Scotland) Bill.

Members have in front of them a list of what lies ahead—perhaps that will be too much for Elaine Murray and she will not bother coming back. I have also suggested to the clerks that it would be useful to all members to have a note of when amendments must be lodged for stages 2 and 3 of bills. That concludes the meeting.

Meeting closed at 12:00.

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