The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 10 September 2013

Session 4

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JUSTICE COMMITTEE
23rd Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (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)
*John Pentland (Motherwell and Wishaw) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Alan Gamble (Upper Tribunal, Administrative Appeals Chamber)
Richard Henderson (Law Society of Scotland)
Kenny MacAskill (Cabinet Secretary for Justice)
Jonathan Mitchell QC (Faculty of Advocates)
Adrian Ward (Law Society of Scotland)
Jim Wilson (Scottish Government)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 10 September 2013

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

Interests

The Convener (Christine Grahame): I welcome everyone to the Justice Committee's 23rd meeting in 2013. I ask everyone to switch off mobile phones and other electronic devices completely because they interfere with the broadcasting system, even when switched to silent.

Our first agenda item is to invite Elaine Murray and John Pentland to declare any interests that are relevant to the committee's remit.

Elaine Murray (Dumfriesshire) (Lab): The only thing that I can think of is that I am a member of Unite the union. I feel it necessary to tell people that, although I am not sure that it is all that relevant.

The Convener: Perhaps you are in the wrong place today and you should be somewhere else.

John Pentland, do you have anything to declare?

John Pentland (Motherwell and Wishaw) (Lab): I have no relevant interests to declare.

Deputy Convener

10:01

The Convener: Agenda item 2 is to choose a new deputy convener. The Parliament has resolved that the deputy convener of the committee should come from the Scottish Labour Party. I invite nominations for the position.

Sandra White (Glasgow Kelvin) (SNP): I nominate Elaine Murray.

The Convener: As there are no other nominations, do members agree that Elaine Murray be chosen as deputy convener?

Members *indicated agreement.*

The Convener: Try to look pleased—make her feel at home.

Elaine Murray was chosen as deputy convener.

Anti-social Behaviour, Crime and Policing Bill

10:01

The Convener: Agenda item 3 is consideration of a legislative consent memorandum on the Anti-social Behaviour, Crime and Policing Bill, which is United Kingdom Parliament legislation. I welcome Kenny MacAskill, the Cabinet Secretary for Justice, who is accompanied by the Scottish Government officials Jim Wilson, policy officer with the criminal law and licensing division, and Peter Jamieson, policy manager with the police division. I invite the cabinet secretary to make a brief opening statement before I open up to questions from members. Get your pencils ready, members.

The Cabinet Secretary for Justice (Kenny MacAskill): The draft legislative consent motion seeks approval for the United Kingdom Parliament to apply the relevant provisions of the Anti-social Behaviour, Crime and Policing Bill. Most of the bill does not extend to Scotland. The parts of the bill that extend to devolved areas relate to the abolition of the Police Negotiating Board, to dangerous dogs and to witness protection law.

We have agreed to the abolition of the PNB and intend to establish a separate police negotiating board for Scotland through the Criminal Justice (Scotland) Bill, which was introduced prior to the summer recess. The PNB provides a forum in which representatives of police officers and those who manage and fund police forces can consider questions relating to police hours of duty, leave, pay and allowances, pensions and clothing and equipment. It operates on a UK basis, and the Home Secretary, the Scottish ministers and the Department of Justice in Northern Ireland are required to consult it before making regulations on relevant matters.

Following the recommendations of the Winsor review of police remuneration and conditions in England and Wales, the Home Office intends to replace the UK PNB with a police remuneration review body for England and Wales. In July, the Scottish Government published a consultation paper that seeks views on the detailed arrangements for the functions, membership and procedures of the proposed PNBS. The consultation closes on Friday 27 September 2013. I reassure members that we will carefully consider all responses to our consultation and will consider the implementation and commencement of both bills as we move forward.

At present the offer of protected status—that is, witness protection—can be made only to people such as are listed in the Serious Organised Crime and Police Act 2005, which includes witnesses and informants, and judges, jurors and other people who work in the criminal justice system. Although that covers the majority of those who are at risk—they tend to be witnesses—we are aware that concerns have been raised about protection of vulnerable individuals whose lives may be at risk but who do not fall within the scope of the 2005 act. For example, they might be potential victims of forced marriage or other honour-based violence, who may be identified before any crime is committed. The purpose of the proposed amendment is not to alter the list that is set out in the 2005 act but to give the chief constable the discretion, on a case-by-case basis, to make protection arrangements for individuals whose lives are at risk but who are not currently covered.

Finally, on dangerous dogs, the bill contains provisions that will explicitly include attacks on assistance dogs as an aggravated offence under the Dangerous Dogs Act 1991. The bill will also ensure that the courts assess the character of the owner in determining whether a dog poses a danger to public safety. We think that that is a sensible response to the 2012 court judgment that called into question the existing powers of the courts in this area.

We believe that the extension of the relevant provisions to Scotland can be justified on the basis that it is a sensible and appropriate step to ensure effective and consistent implementation of various policy changes that affect England, Wales and Scotland. I hope that the committee will share our view that it is helpful that those changes be made through the UK bill and regard it as an effective and efficient use of the LCM procedure. I therefore ask the committee to support the legislative consent memorandum.

I will be happy to take any questions.

The Convener: I intend to let members ask questions on the three categories—the Police Negotiating Board, dangerous dogs and witness protection—if that would be helpful.

Who wants to ask about the Police Negotiating Board?

John Finnie (Highlands and Islands) (Ind): Thank you, convener. Good morning, cabinet secretary.

I commend the Scottish Government's approach of having a PNB for Scotland—it is something that I proposed many years ago. Will the chief officer ranks be included in that?

Kenny MacAskill: We are discussing that with the Scottish Chief Police Officers Staff Association. Our preference is that they be included. The chief officers are currently mulling that over.

John Finnie: Has any indication been given of what their position will be? It would be preferable if all Scottish police officers were covered by one body.

Kenny MacAskill: I think that they would be. The chief officers have matters to sign off. They must answer for themselves, but we are very hopeful that they will come on board. I share your view that it would be better if all ranks were covered.

John Pentland: Good morning, cabinet secretary. Did the Scottish Government ever consider following the UK's review of the PNB?

Kenny MacAskill: We did not agree with the Winsor review. We have always taken on board the views of those who are involved with the police service, whether on the management side or on the side of those who represent staff, who uniformly wish to have a police negotiating board for Scotland. It is for that reason that we are establishing one. That is the desire of all sides who are represented at the table, and we are delighted to go down that route.

John Pentland: Can you provide some reassurance that, if the process goes ahead, the transition from the old PNB to the new Scottish PNB will be smooth?

Kenny MacAskill: Yes. That is fundamental. We have already established a standing committee—it is up and running, although it is not yet formally constituted on a statutory basis. We hope that there will be a legislative dovetailing, but there is a fall-back position of continuing with the existing PNB powers, so I can give you an assurance that matters can be dealt with.

John Pentland: On the financial implications, you say that it is likely that the establishment of a PNB for Scotland will be cost neutral. Are you quite sure that that will be the case? Might the costs rise?

Kenny MacAskill: I think that its establishment will be cost neutral. Although there will be matters that will have to be addressed on a distinctive basis—the Scottish Police Federation has raised that with us, as I am sure Mr Finnie knows—most of that is about access to information, which can be provided through other bodies. We believe that the establishment of a PNB for Scotland will be cost neutral; any costs would be fairly minor.

Given that management and the workforce representatives are clear that that is the structure that they want, unless there is a glaring issue, we would not wish to go in the direction of the UK Government. No one in Scotland—regardless of which side of the table they are on—wishes to follow the UK Government's proposal.

Roderick Campbell (North East Fife) (SNP): I have a brief follow-up on the financial issue. At the moment, we contribute about 10 per cent, or £50,000 annually, to the cost of the PNB. Are you confident that the cost of the replacement body will be of that level?

Kenny MacAskill: Yes. I think that it would be fair to say that the body down south is pretty substantial. The number of people who have to sit around the table would struggle to fit in this room. I think that the number of people involved will decrease proportionately, because of the size of Scotland, and that the amount of money that we have set aside will be sufficient.

The relatively minor concerns that the SPF has raised with us, of which Mr Finnie will probably be aware, are about more access to information, such as statistical information and how a judgment can be made about what parity is, but such information can be provided through the Office for National Statistics and other bodies.

We are confident that the cost of a lighter, smaller body that is still able to ensure that all parties are represented around the table can be met within the current envelope. Any additional resources can be provided by us or by other bodies.

The Convener: Thank you. Let us move on to the amendments to the Dangerous Dogs Act 1991.

Elaine Murray: I have a couple of questions on the Dangerous Dogs Act 1991.

The Convener: You do not need to put a marker down—just ask your questions.

Elaine Murray: My first question is on the issue that was raised by Guide Dogs Scotland, which is that the definition of an "assistance dog" in the Equality Act 2010 is a bit broad. The suggestion is that it should be based on the definition in European Commission regulations. The issue is particularly about the fact that the dog should be trained by accredited member organisations of the International Guide Dog Federation or Assistance Dogs International. Do you have a view on that definition?

Kenny MacAskill: We are aware of the concerns that have been raised by Guide Dogs Scotland. We are in touch with the Department of Environment, Food and Rural Affairs officials who are leading on the issue, and our understanding is that guidance on what is and is not to be considered an assistance dog will be provided. We are confident that the amendment will provide sufficient clarity, and we will get advice from those who are currently negotiating with Guide Dogs Scotland. We are conscious of the issue and we

are—"negotiating" is not the word—liaising with DEFRA.

Elaine Murray: My other question is on the Scottish Society for the Prevention of Cruelty to Animals' view. As you know, the SSPCA is not at all keen on the legislation, but it is in favour of there being the ability to assess the character of the owner as well as the character of the dog in cases of exempted dogs or banned breeds. Do you favour the SSPCA's suggestion that the scheme be redrawn so that an exempted dog could, instead of being destroyed, be rehomed with somebody who could care for it more appropriately?

Kenny MacAskill: We think that the change is necessary because of a court case south of the border. Although the ruling in that case would not be binding on a court in Scotland, it would doubtless be considered. We believe that the character of the owner should be taken into account, which seems to follow the point that has been made and, if the issue is the nature of the owner and not the dog, hopefully the new provisions will provide the desired flexibility.

This is about the inflexibility of the current legislation, which we drafted and which was appropriate at the time but which looks only at the dog. The court case to which I referred makes it clear that the nature of the owner and their activities should be considered. That seems to be the direction in which we should go. I believe that the new provisions will address the SSPCA's concerns and provide appropriate flexibility for the courts.

The Convener: Scotland is ahead of the game with the Control of Dogs (Scotland) Act 2010, which addresses the deed, not the breed, and considers responsible ownership. Perhaps the courts down south could pay a little bit of attention to that legislation. It was introduced by Alex Neil and pursued by me, but the bulk of the work on it was done by Alex Neil and I commend him for that.

Roderick Campbell: Has any research been done in Scotland or the rest of the UK on the likely number of additional dogs that will be destroyed through taking into account the character of the owner?

Kenny MacAskill: Very little such research has been done. Jim Wilson may be able to talk about that.

Jim Wilson (Scottish Government): The Scottish Government does not hold any statistics on the destruction of dogs. However, in the past 10 years, there have been nine applications relating to banned breeds of dog. Those related to section 1 banned dogs, but the courts decided that the dogs did not present a risk to public safety and the dog owners were, as long as the owner or keeper ensured that certain strict conditions were met, allowed to retain the dogs.

I presume that you are picking up on the SSPCA's comments on destruction. It will be important to measure the impact of the provisions, going forward. We plan to liaise with Police Scotland and the National Dog Warden Association, and I intend to speak to Mike Flynn at the next meeting of the cross-party group on animal welfare, which will be held two weeks today. Although we do not have statistics on the destruction of dogs, the benefit of the Control of Dogs (Scotland) Act 2010 is that it is all about preventing dog attacks from happening in the first place. The legislation was introduced because there had been a 160 per cent increase in attacks over eight years and something had to be done.

We have conducted some high-level research to determine the number of dog control notices that have been served in Scotland in the first two years following the passage of the 2010 act. The figures that councils have supplied suggest that 235 notices have been served, and we are aware of a prosecution that occurred in Shetland. Although it is relatively early to look at the impact, the act has got off to a steady start.

10:15

Sandra White: Have you considered the concerns that have been voiced by Guide Dogs Scotland—on which we have information before us—about interpretation of the Equality Act 2010? It has stated that attacks on guide dogs are at an all-time high, and that from 2011 to 2013 there were approximately two such attacks a month. Was that issue considered when you spoke to Guide Dogs Scotland?

Jim Wilson: It is my understanding that Guide Dogs Scotland is asking for an amendment that would require the secretary of state to designate dog training organisations. We do not think that that is necessary, but—as the cabinet secretary has advised—we plan to ensure that guidance will be published.

As you will know, the issue of dangerous dogs is devolved. However, given that the Dangerous Dogs Act 1991 is UK Parliament legislation, we will ensure that, if there is a need for UK-wide guidance on amendments, Scottish viewpoints are taken into account in the formulation of that guidance.

The Convener: While you are liaising with Westminster on that, perhaps you can ask—as a postscript—whether it is considering introducing legislation that is similar to the Control of Dogs (Scotland) Act, which, as you rightly say, intervenes early and covers attacks across the

board. As we know, there are huge issues with regard to how prohibited breeds are defined.

Jim Wilson: I recently attended a dangerous dogs seminar in London at which the chair of the Environment, Food and Rural Affairs Committee made opening remarks. She likes the model that has been introduced in Scotland, under which we now have a dog control notice regime, and she had suggested to UK ministers that a similar model should be adopted for England.

So far, I have not seen any indications that a similar scheme will be introduced. The approach that has been taken appears to wrap up dog control issues as part of the legislation on antisocial behaviour. I have no strong views on that, but it appears that there are no signs of any movement to follow or to replicate the provisions that you introduced, convener.

The Convener: That is rather a pity, but there we are.

We move on to witness protection, which is the third subject.

John Finnie: Police Scotland has voiced a concern regarding the possibility that the provisions will give protection to people who are involved in criminal feuds. I commend the cross-jurisdiction application of the provisions, which is desirable and positive. Is there any way to address the issue of giving to someone who is involved in a criminal feud protected-person status, which would require them to be maintained at the lifestyle level to which they are used? We want people to be protected.

Kenny MacAskill: That would have to be signed off by the chief constable. I doubt that the chief constable would, if they felt that somebody was under threat but that their lifestyle was not likely to change and therefore was not conducive to the scheme, be prepared to sign that off.

We have, as you know, Osman warnings and other instruments that are dealt with by the police. The changes to the current system will ensure that, ultimately, the police will have a say and will not require to give any support or assistance beyond what should be given to any citizen in terms of provision for public safety. We do not have any concerns in that regard, and I trust the chief constable's common sense.

The Convener: Does Colin Keir want to come in?

Colin Keir (Edinburgh Western) (SNP): That was my question.

The Convener: Right—I will let you in first next time. John Finnie did not know that he was pinching your question.

Alison McInnes (North East Scotland) (LD): The extension is to be welcomed, in particular the provisions on forced marriages and honour-based violence. That is a good thing.

The Scottish Government's note on the LCM, which discusses the financial implications, states that witness protection is "a demand led area" and that the cost is therefore difficult to ascertain. However, it notes that the new powers "are discretionary". Will some cases be on a different footing from other people who are eligible to be covered by the witness protection scheme.

Kenny MacAskill: No. It is all one.

Alison McInnes: Thank you very much.

Sandra White: I, too, welcome the extension of the provisions to forced marriages and honour-based violence. It is a very good step forward that has been welcomed by Women's Aid and others.

I recall that Victim Support Scotland said that the bill could be strengthened if there were a more robust framework with more information and support. Is the bill adequate, or could it be developed in the way that Victim Support Scotland has suggested?

Kenny MacAskill: The legislative basis and the appropriate guidance are there. I think that many of VSS's concerns relate to the practical handling of matters, which I think requires not legislation but appropriate implementation.

It also seems to me that although we are not dealing with a large number of cases, the cases can be very varied. We could be talking about, for example, relocating a person who has a past record of criminality—albeit that it might be unrelated to the matter that has caused the understandable concern that was highlighted by Mr Finnie—or entirely innocent people. Moreover, people could be relocated within Scotland, within the United Kingdom or outwith the UK, on the basis of relationships that we have signed off with other countries. As a result, such things must be dealt with individually, and case by case.

Things might develop and matters might arise, but the fact is that the situation in Scotland is very limited. I do not think that the devil is in the legislation; instead, the difficulty is in the implementation. VSS's points are well made and we must ensure that the people who look after witnesses' interests consult those who look after their safety and relocation. I certainly assure the committee that we will be feeding such matters back to the chief constable because, ultimately, this will be dealt with as a police matter.

The Convener: Here come the fatal last words—I do not think that members have any more questions. That usually causes a final little flurry—but not this time.

I thank the cabinet secretary for attending the meeting. At our next meeting on 17 September, we will hear from the Lord President and the Minister for Community Safety and Legal Affairs on the Tribunals (Scotland) Bill. We will also consider this LCM again and sign off our report at that meeting.

I suspend for a couple of minutes for a change of witnesses.

10:22

Meeting suspended.

10:24

On resuming—

Tribunals (Scotland) Bill: Stage 1

The Convener: The next item on the agenda is our second evidence-taking session on the Tribunals (Scotland) Bill. I welcome to the meeting Adrian Ward, convener of the Law Society of Scotland's mental health and disability sub-committee; Richard Henderson, convener of the Law Society's administrative justice working party; Jonathan Mitchell QC from the Faculty of Advocates; and Alan Gamble, who is a judge in the administrative appeals chamber of the upper tribunal sitting in Scotland.

I thank the witnesses for their written submissions. I understand that Mr Henderson will be able to speak to the submissions from the Law Society and the Scottish committee of the Administrative Justice and Tribunals Council.

Richard Henderson (Law Society of Scotland): That is right, convener.

The Convener: Good. I made a mistake last week with Mr Wright and would not want to repeat it.

I do not know whether you have all appeared before the committee before, but I should point out that members will indicate that they wish to ask a question and you should indicate to me whether you wish to respond. Your microphone will come on automatically when I call you.

I seek questions from members.

Elaine Murray: The Law Society is concerned that the bill should identify the characteristics that distinguish tribunals from courts; indeed, last week, Citizens Advice Scotland expressed a similar concern and has in its evidence proposed amendments based on the Tribunals, Courts and Enforcement Act 2007 to entrench some of those characteristics in the bill. Do you agree that such an amendment should be lodged?

Richard Henderson: I will lead off on this question.

The question whether a tribunal should be defined is related to the relationship between courts and tribunals, whether this country actually has a civil justice system and what its components are. The civil courts and tribunal reform processes are both in train and, as I recollect it, the civil courts reform process involved proposals for a third tier of judiciary that might leach across—"leach across" is the wrong phrase; perhaps "wash across" is better—into a tribunals structure. There is, as a result, a linkage between those two components of a civil justice system.

The current tribunals system is fragmented and comprises subject-related bodies that are nearly all different with regard to their founding legislation and the substantive law that they administer. There are of course common characteristics to what makes a tribunal but whether those characteristics stretch across to what makes a court is another matter. Tribunals were originally established to be less formal than courts, to be user-friendly and to be a place where justice could be determined without the necessity for lawyers to make an appearance. As a result, the nature of the proceedings in tribunals will be quite different to what is generally the case in courts. If you are seeking to create a new tribunal—and we know that in other parts of the forest people are asking whether housing, for example, will go to a tribunal or a court—you will need to think about the characteristics that you are looking for in the adjudication process. Until you have worked out what you can buy, as it were, or what the different components are, you will to some extent be dealing with things in a slightly anarchic fashion.

You could not have had a civil justice review five years ago because, at that stage, we were not talking about the kinds of reform processes that we are talking about now. It is only when you get some way down the road of reforming courts or tribunals that you can begin to think about the other components of a civil justice system, notably ombudsmen and complaints systems, all of which make up what you would call a civil justice system. If you are going to make reforms in those different areas, you are sooner or later going to have ask yourself about the linkage between them—and if you are going to ask that question, you will sooner or later have to ask yourself, "What is a tribunal?" That is when you will need to define the term.

The Convener: Does anyone else wish to comment?

Jonathan Mitchell QC (Faculty of Advocates): I wish to make two points. First, we have constantly to bear it in mind that the bill is not, in truth, about Scottish tribunals as a whole; instead, it applies to something like 2 per cent of Scottish tribunals and the elephant in the room is that the bill itself puts out of mind the fact that the vast bulk of tribunals will remain in the reserved tribunals system. About 4,000 cases a year—more or less—will go into the proposed system; however, something like 60,000 cases a year go through the social entitlement chamber, about 20,000 a year go through Scottish employment tribunals, 10,000 go through immigration and asylum and so on. When one considers the complexity and length of such cases, one sees the percentage in the system shifting.

10:30

When we are discussing characteristics that might emphasise or reduce distinctions between tribunals and courts, we must bear it in mind that we are dealing with a very small fringe of the system in the short term. It is therefore important for the bill to go further in the direction of creating a structure that is capable of taking over at least some parts of the remaining 98 per cent.

The bill emphasises that people, who the ordinary citizen would call judges, sitting in a Mental Health Tribunal for Scotland and who are called judges in the UK system, are not to be called that. That is apparently to emphasise some sort of sheep-and-goats distinction between true judges, who sit in Scottish courts, and the hoi polloi, who sit in tribunals and who are really not up to scratch. One problem that I see—

The Convener: I think you are a member of the hoi polloi, Mr Gamble.

Jonathan Mitchell: The UK system has not fallen into that trap. At some points, there has been a failure to learn. Alan Gamble might speak a bit more about this, but it seems to me from outside that one of the great merits of the UK system has been the extent to which it is recognised that one can transfer lessons in both directions. It is often said that a distinction of tribunals is that they are user friendly, and that they have overriding objectives. If that is true, it is a very depressing verdict on the Scottish courts—that we need tribunals to be user friendly.

An absence in the bill is any recognition that the new tribunal system ought to be capable of sending messages through to the rest of the judicial system. The system in the bill very much seems to us to be one of old-fashioned democratic centralism. The system goes up to the Lord President and he nominates a judge of his choice, who runs the tribunal.

One of the most striking, extraordinary provisions in the bill, which a number of people have commented on, is the power of the president of the tribunals to lay down, completely on his or her own decision, what the law is; to tell tribunals, for instance, that there is an issue of statutory interpretation as to section X of act Y and to say, "I am telling you that this is the right interpretation and if you hear submissions that convince you to the contrary, that is tough and you should ignore them."

As far as the bill is concerned, you must get back to something that does not so much emphasise distinctions between tribunals and courts but recognises the modern status of the tribunal system as it has developed, as shown by Mr Gamble's tribunal perhaps more than any other.

Alan Gamble (Upper Tribunal, Administrative Appeals Chamber): I broadly support what Mr Mitchell has said. I will deal with a technical point first: as I think the Lord President agrees, we are really concerned about section 68(5), to which Mr Mitchell was alluding, which confers on the senior president or equivalent in Scotland the power to include points of law in a practice direction. We feel that that is quite inappropriate, for the reasons that we have given in our written evidence. I endorse all that Mr Mitchell has said about that. The directions may include matters relating to

"the application or interpretation of the law".

Mr Mitchell has vividly put the potential effect of that. A point of law might conceivably arise when submissions are made to a tribunal judge and, even though the judge may feel that the law is X, if the senior president has, by invocation of the power in that subsection declared it to be Y, that judge must say that it is Y. The interpretation of the law should be for a tribunal or a court, not for a senior judge acting administratively rather than judicially. I strongly endorse what Mr Mitchell has said in that regard.

Adrian Ward (Law Society of Scotland): On that last point, being just a coalface solicitor, I can tell you that, yesterday, I received a written decision from a sheriff making a finding in one direction in law, and part of my submissions were to point out to him that one of his colleagues in the same court had come to precisely the opposite conclusion. I do not complain about that. What do I do if I do not like it? I go to the sheriff principal, and he will determine the matter. That is probably the right way to go.

On the original question, tribunals are different from courts—we only have to go into one to get a feel for the difference. There are differences among tribunals, and there are differences in the way in which sheriffs may conduct their courts. If we have a bill about tribunal reform, it would be helpful to say what a tribunal is.

Elaine Murray: Are you advising that section 68(5) should be removed from the bill entirely, or should it be replaced?

Richard Henderson: My position on that is that, in both the Scottish committee and the Law Society, judicial independence is a precious commodity. We do not want to undermine that at any stage of the process. If there is scope, in section 68(5), for the independence of the judiciary to be undermined by other sections of the judiciary, that is a bad thing.

Jonathan Mitchell: I see no good point in section 68(5). It says:

"Directions may include ... instruction ... on the interpretation of the law".

If that means guidance as to application or interpretation, I am not sure that that takes things much further than what judges constantly do, and I would not have thought that section 68(5) had any content. I am open to correction, but I am not aware of anything equivalent to that provision anywhere else in the Scottish or English legal systems.

Alan Gamble: It certainly does not apply in the 2007 act, which is the legislation that applies to the Great Britain and, in some cases, United Kingdom tribunals, including the reserved tribunals operating in Scotland, to which Mr Mitchell referred. There is no equivalent power for the senior president of the Great Britain system of tribunals to invoke the proposed provision, and I would strongly agree with Mr Mitchell and submit that subsection (5) should not be part of the bill.

Adrian Ward: I may have misheard the question, but the concern is about section 68(5), not the rest of section 68.

The Convener: We understand that. You have all made your points clear on the matter.

Roderick Campbell: I wish to deal with the appointment of the president. I put on record my entry in the register of interests as a member of the Faculty of Advocates.

I direct this point to Mr Mitchell in particular. In your comments, you make reservations about the suggestion that the new structure should have as its president a senator. In his submission, the Lord President has indicated that he would propose to nominate Lady Smith to the role. Do you have any comment about that?

Jonathan Mitchell: I do not want to get into a personalised debate. It is possibly unfortunate, for the purposes of this debate, that a question as to whether the person should be a senator is a question as to whether a particular person should be president.

I will generalise the matter. There are two problems, which, in a sense, are contradictory of each other. The first problem is to ask what we want for a system that is as minuscule as what is offered in the short term by the bill. It is tiny: it is the Mental Health Tribunal, the Additional Support Needs Tribunal and the education appeal committee—it is a few bits and bobs with no particular relationship to one another. If that is what we are left with five or 10 years along the line, the Parliament will have failed in attempting to rationalise the tribunals system. In that context, I can see the purpose—albeit this is rather anomalous, and we have said that this is like having a Rolls-Royce for the job—of bringing in somebody from the top who can attempt to impose an overall direction on the system, and to have a

senator. It is a bit strange, however. It is a very small system, and it does not really call for one.

You have noticed the economics of the matter, which were put to the Finance Committee, and they are very strange, as they relate to how having a senator doing the job on a package of over £200,000 a year, with pension, magically only costs the same as bringing in a part-time sheriff, because of a series of actings-up. That is an expensive approach.

There is a very different problem in the longer term. In 10 years' time, I very much hope that we will have a system that all the tribunals in Scotland operate as a part of, including the employment tribunals, which already have a Scottish jurisdiction independent of the English, and the Scottish parts of the UK unified system—Alan Gamble might differ on that. Once we have that, which will require many other changes in the bill, it will seem strange if some of the very senior people in that system are barred from applying for the job of being president.

I commend to the committee the comments of the employment judges in Scotland in their submission. The signatories to that are running a Scottish tribunal system that has approximately five times as many cases as the system in the bill will have. The amount of judicial time that is put into those tribunals must be between 20 and 50 times the amount that the bill contemplates. It would be a bit strange to tell them that they were not big enough to run this tiny system. There is no particular long-term purpose to saying that the president must be a senator.

Roderick Campbell: Mr Gamble, you say in your submission that you

"are strongly of the view that the best interests of users in Scotland is that the reserved tribunals should remain intact and there should be no devolution of their functions ... As they are concerned with the application of British Statutes applying throughout the United Kingdom ... it is better to have the coherence that is created by a unified judicial structure than by splitting it."

Scottish courts deal with British statutes, so what distinction do you make between courts and tribunals?

Alan Gamble: I am expressing a personal view and I will try not to get involved in a party-political issue. Our position is a little different from Jonathan Mitchell's. First, our view is that, as long as the present devolution settlement or something like it remains in force, there is some logic to having a reserved administrative structure for subjects that are substantively reserved under the Scotland Act 1998. For example, immigration, taxation, social security, child support and employment law are all by and large reserved.

Our second—and perhaps more telling—argument is that we operate in a cross-border way. For example, I can sit in London if asked to do so. My colleagues from London can sit in Edinburgh and do so occasionally. That would not happen if a point of Scots or English common law arose but, in the common statutory system, it is important to have cross-border fertilisation. Even in the proposals—which are no longer live—for devolving the reserved tribunals, provision was intended to be made for maintaining the cross-border link.

The easier way to maintain the cross-border link is to retain essentially the present system, but that is just a personal view. I respect the view that Mr Mitchell expressed and I respect Mr Campbell's argument that the Scottish courts deal with reserved as well as devolved business. That is why we make our second argument. Given that, in practice, relatively few social security cases go beyond the upper tribunal, there is an argument for the coherence of common interpretation at upper tribunal level that cross-border working requires.

Roderick Campbell: If the system pans out in the way that Mr Mitchell described, we will be left with a small number of cases being covered by the bill. If the situation did not move on, would it be worth going to such effort for the 2 per cent that he identified?

Alan Gamble: To be frank, that is a political point—it is not necessarily party political, but it is a Westminster/Holyrood issue. The Lord Chancellor announced that the UK Government's position is that the reserved tribunals will not be devolved in Scotland in the immediate future. You might well disagree with that, but that is a statement of fact.

The Convener: I do not think that we can just deem the issue political. It is fair to ask whether we need a hammer to crack a walnut, as it were. Roderick Campbell was just asking you whether the bill is necessary.

Alan Gamble: The bill is necessary for the reasons that Mr Mitchell advanced. First, it will give coherence to what already exists. Secondly, if at some point a change is decided on and the reserved tribunals are to be devolved to Scotland at least to a degree, there will be a ready-made system into which to slot them. We do not object to that. Our personal position is that we would prefer that not to happen—at least immediately—but there is a structure in the bill to fit the reserved tribunals into if ministers in London and Edinburgh decide to make a change.

10:45

Richard Henderson: If your question is whether the proposals are necessary for dealing

with perhaps only 3 per cent of the tribunal work, on the economic level plainly the answer is no. If, asking the question differently, you ask whether we want a Scottish civil justice system—which, after all, we have in part—and the answer to that question is yes, you cannot leave in place the currently fragmented and chaotic structure of tribunals. In the bad old days—pre-Franks or pre-Leggatt anyway—departments perhaps thought that they had ownership of a tribunal, as I think is still the case in Whitehall. The only way to emphasise that the tribunals are part of a justice system is to put them in the hands of a justice body. If you ask what that justice body is, you have one in the bill.

On the question of what to do about the reserved areas, we have a strange arrangement at present, given that an undertaking was made in 2010 that there would be a consultation by the end of 2010 on the devolution of responsibility for not the substantive areas of the law, but the administration of justice aspects, and three years later we are still waiting. It is easily explicable why we are still waiting. However, if we consider the matter in the context of what a justice system is, it would be a nonsense for there to be a long-term position in Scotland in which some of the justice system was not the responsibility of those who have the majority of the justice system within their control.

That is not, I emphasise, a political argument.

The Convener: No, we are talking about administration here.

Richard Henderson: Yes.

Jonathan Mitchell: On pages 65 to 66 of the most recent "Senior President of Tribunals' Annual Report", it is pointed out that we have been waiting for years for a consultation document on what is to happen with the reserved tribunals in Scotland. I do not want to read it out at length, but the report comments:

"the governance arrangements for reserved tribunals operating in Scotland might be described as less than ideal"—

which is language that we can all, I think, read. The report continues:

"at some point in the not too distant future it will become necessary to review whether the arrangements ... remain appropriate".

The problem has been shelved, but it has not been put aside. In reality, whatever the outcome of next year's vote, we will come back to the question in 2016. Therefore, it is critical that the bill provides a system that is capable of being presented to members of UK tribunals and their users as one that they can come into. People such as Mr Gamble should not be told, "If you shift over, you will lose your job and be put on a short-term contract."

The Convener: Sorry, what do you mean by "shift over"?

Jonathan Mitchell: The system in the bill makes no provision for permanent judges. They will not be judges at all but people who are brought in on contract for short periods.

Alan Gamble: May I elaborate on that? I have expressed a personal view, but I think that my stronger point would probably be that, if there is devolution of the reserved tribunals, steps should be taken within that to maintain—I think that this would be possible—all the cross-border benefits that we currently have. That is our major point. I do not think that it is beyond the wit of man to devise a system under which that could take place.

I endorse the crucial point that Mr Mitchell has made. The bill makes no provision for the appointment of a full-time salaried judge in any of the tribunals that the bill envisages. We will have these fee-paid judges—I have no problem with that whatever—but even the upper tribunal is to be a totally ad hoc tribunal consisting of nominated sheriffs and nominated senators. For obvious personal reasons, I welcome the provision whereby judges of the UK tribunal could be nominated on occasion to sit in the Scottish upper tribunal. We strongly endorse that and we are very thankful that the draftsman has included that in the bill. However, on the more basic point that Mr Mitchell has made, we think that it is unfortunate that there is no provision for any full-time salaried appointment anywhere in the bill.

The Convener: Does anyone else wish to comment?

Richard Henderson: I agree with that entirely if you are trying to set the template for the future. My understanding is that the bill was prepared in the context of saying, "If we are not going to get something going from Whitehall, we have to start here some time," and this is it.

Adrian Ward: Simply for the record, I, too, agree. I have not joined in the discussion, as I have nothing useful to add.

The Convener: However, nodding heads do not show up in the *Official Report*, so it is good if people say, "I agree."

Adrian Ward: That is why I told you that I agree.

Alan Gamble: I will add a practical point from personal experience. Mr Mitchell and my colleagues from the Law Society would probably agree that the standard and quality of justice have been vastly enhanced by the policy of offering full-

time salaried judges in employment, social entitlement and immigration tribunals. Like Mr Mitchell, I have worked in the tribunals field since I was a very young man and I think that everyone who works in those fields would say that the quality of justice has been greatly enhanced. We strongly submit that that practice should be maintained in any Scottish system.

Jonathan Mitchell: I agree. As an outsider—somebody who just goes into the tribunals rather than sits on them and also goes into the courts—I know that the truth is that the quality of the tribunal judiciary in Scotland across the board is as high as the quality of the courts judiciary.

The Convener: Mr Henderson and Mr Ward nodded. I put that on the record so that they do not need to say that they agree.

Alan Gamble: I think that that has partly been caused by the increase in the number of full-time salaried judges in the system.

Jonathan Mitchell: It has.

Roderick Campbell: I want to broaden out the discussion.

The Convener: If the question is about salaries and permanent judges, you can go on, but Sandra White has another question. You can come in again with a different question, but Sandra has been very patient.

Sandra White: Thank you very much. I have been very patient in listening to the evidence that has been given, which seems to be entirely different from what is in your submissions. Mr Henderson in particular welcomed the bill; the Law Society said that the bill

"will provide a coherent and more consistent structure",

and that has been said throughout the evidence sessions. We have also heard, quite rightly, the concerns that exist, but, before hearing the evidence that has been given today, I and perhaps members of the public were always under the impression that the bill was meant to give the best service to people who use tribunals, not necessarily for judges, the Faculty of Advocates or whoever.

I know that you have mentioned salaried judges, courts and so on. You welcome the bill, but why are you so critical of the different movements towards changing? I may be wrong, and I am sure that you will correct me if I am. You have welcomed the bill and said that it is a better way and that the structure has to be looked at and has to be more coherent. I have been at immigration cases supporting asylum seekers, for example, and know that how we perceive asylum seekers in Scotland is entirely different from how they are perceived in England. Therefore, I would like to see the power brought to Scotland. That is a personal opinion. I think that Mr Gamble was a judge at one of the tribunals.

Alan Gamble: I have never sat at an immigration case in my life.

Sandra White: It must have been someone who looks a wee bit like you.

Alan Gamble: It must have been someone else. My jurisdiction is social entitlement or appeals from social entitlement. I also sit as a Mental Health Tribunal convener, but I have never had any experience of immigration.

Sandra White: I apologise.

Alan Gamble: No problem.

Sandra White: The tribunal was very interesting to sit through and listen to.

I would like a wee bit of clarification. I know that you have talked about section 68(5) and various other issues, but do you think that, on the whole, the bill is a good one to go forward? You seemed to imply that we need to look at the matter in a United Kingdom context as well, depending on the result in 2014, obviously.

Jonathan Mitchell: It is a curate's egg of a bill. The basic idea is good and the way forward is correct, but a number of the details are wrong and some of them are very damagingly wrong, such as section 68(5) and the restriction on the right of appeal in so-called second appeals, which we flagged up, although nobody else did. As always, there is what one might think of as a rather unholy alliance involving the judiciary, the civil service and the Administration to cut down on citizens' rights of appeal, However, the bill is fundamentally the right way to go.

In a way, our problem with the bill is that it does not go far enough: it is not radical enough. For example, it does not attempt to provide for a full-time judiciary in the tribunals, as it takes a very tepid attitude to what we currently have in saying that all that we currently have is people who drop in and out for a day here and a week there, so that is all that it should provide for. We could do things better.

If there were a straightforward choice to be made between having the bill as it stands on the statute book or not having it, that would be a difficult question, because the bill has a series of flaws. However, in principle, the faculty has no doubt that it is the right way to go.

The Convener: And, of course, this version of the bill is not the one that we will debate at the end of the legislative process, as there will be another two stages. It is therefore helpful for the committee to hear about suggested improvements to the bill—you have listed some—by deletion,

amendment or substitution. Such suggestions are useful when we write our stage 1 report, so feel free to make them.

Jonathan Mitchell: All the problems are curable. None of the problems in the bill is fundamental; it is a fundamentally good bill that has a series of significant flaws.

The Convener: You have mentioned some of those. Are there too many to mention on the spot?

Jonathan Mitchell: One that I will mention, because no one else has mentioned it in their evidence, is the restriction on rights of appeal to the courts.

Section 43(4) provides for the general right of appeal to the Court of Session. Correctly, that is done with a sift. Leave has to be given for the appeal and it can be given only if the court or tribunal is satisfied that it is an arguable appeal. That is the traditional test in Scotland for allowing leave to appeal. During the 100 years or so for which it has been operating, nobody has really had any problems with it in Scotland. There has been a problem in England because, for whatever reason, since world war two the English courts have been flooded with hopeless appeals, commonly run by party litigants and by lawyers of a class that we do not have so much in Scotland. One sees, for example, that the ratio of appeals against—

The Convener: I will not pursue the line about there being lawyers of a class that we do not have in Scotland.

Jonathan Mitchell: There have been continual problems with the English system being flooded with hopeless cases in which clients are told to take it all the way or tell themselves, "I will take this all the way."

There is not an equivalent problem in Scotland and there never has been. In that context, it is strange that section 45(4) imposes language that is lifted from a provision that in England has been a useful protective measure against what I have described. To be clear, although section 45 refers to a "second appeal", the provision means that if I win my case at the first tier and it goes to the upper tribunal and that tribunal says, "The first tier got it wrong," I cannot appeal to the Court of Session unless there is a point of principle. From my point of view it is my first appeal, as I have held the judgment until that stage, but I am told that there is no important issue of principle and that it is just one of those things. We view that as wrong.

It is striking that the only reason for the provision being in the bill is that there has been a recognised need in England to hold the line against vexatious and frivolous appeals. The provision has been lifted, without thinking about it, into our system.

The Convener: Are there any other points?

Adrian Ward: Yes, convener. If you are widening the discussion to cover general concerns about the bill, we have not yet touched on a point that is of considerable concern to the Law Society. We make it clear in our submission that we believe that the Mental Health Tribunal should, by statute, be in a chamber of its own. The issue has been debated. The bill provides that there is an intention for the Mental Health Tribunal to be in a chamber of its own and that an affirmative resolution would be required to alter that. Nevertheless, for constitutional and human rights reasons, and in terms of the perceptions of those who use the jurisdiction, we still adhere to the view that the fact that the Mental Health Tribunal should be in a chamber of its own should be enshrined in statute and thus alterable by the Parliament by primary legislation and not by any other route.

The minister has courteously consulted on the issue. She has explained her position and met with me and the vice-convener of the committee that I convene. However, we must remember that the Mental Health Tribunal was created by primary legislation of the Parliament following a massive amount of consultation. The tribunal had a few uncertain stages, but it has now bedded in and is working well. Although it might be tiny in terms of the number of cases with which it deals, it is major in its impact and in its jurisdiction, which includes depriving people of their liberty, imposing treatments on them that they do not want to accept and imposing conditions as to how they may live if they are not deprived of their liberty completely. There are major issues.

11:00

The constitutional point is that, as the Parliament created this jurisdiction by primary legislation, it is right that any change should be made by the Parliament. The human rights issue is that, usually, the parties before the Mental Health Tribunal are in essence the state and the patient. In relation to the separation of powers, it is one thing for you as a legislature to set up the tribunal and have the power to change it, which of course you have, and quite different—in fact and in perception—if we have secondary legislation that is proposed by ministers and simply laid before the Parliament.

On perception, there was great concern when, just under five years ago, a significant change in the status of the Mental Welfare Commission for Scotland almost slipped through in the context of the Public Services Reform (Scotland) Bill. That was an issue for the users of services. It would be

a positive message if the Parliament said that it will keep hold of any change in the tribunal that it has created, and it would be a negative message if there was any erosion of that.

For all those reasons, we adhere to the view that the bill when enacted should state that the Mental Health Tribunal should be in a chamber of its own and that any change should therefore be a matter for the Parliament. To my mind, no persuasive reason for not taking that approach has been put to us. If a new jurisdiction were to be created that could possibly be paired with the Mental Health Tribunal or if some existing jurisdiction were to be shifted from elsewhere, that would almost certainly require primary legislation anyway. Therefore, we do not see a great disadvantage, other than perhaps a perception of untidiness, in enshrining that approach in the bill. We remain firmly of that view.

I stress that we bring that point to your attention as the legislature and that we are not having an argument with the Executive. We suggest that you as the legislature should keep control of the tribunal.

The Convener: That is fine. That is what the committee is for. We take views and ponder them when we draft our report. As you know, we then bring to the attention of the Government and the Parliament any concerns that we have with specific aspects of the bill. At the end of the day, we recommend whether the bill should proceed to stage 2. Our job just now is to tease out the problems that might arise.

Does any of the other witnesses dispute what Mr Ward has said? Do the other panel members feel the same way about the Mental Health Tribunal?

Alan Gamble: I entirely agree with Mr Ward—speaking as a convener of the Mental Health Tribunal, I think that the points that he has made are telling.

To respond briefly to Mrs White, I endorse entirely her point that the user should be at the heart of the system. Although we have got into quite a lot of technical matters, you can take it that we are all really concerned about the user. In particular, the point that I think we all made about having full-time salaried judges is important, because that will enhance the quality of justice for the user. That is the reason why we have emphasised that point. It is not to get jobs for the boys for the legal profession—I am being honest and sincere in saying that. The interests of the user are the reason why we have stressed the need for full-time judges.

The Convener: Yes, I understood that your position was to do with quality, experience and expertise.

Alan Gamble: I just wanted to amplify that point.

Richard Henderson: I want to back up that point. In this, I am talking for the Law Society and for the now defunct Scottish committee of the AJTC, which was established in the wake of the Leggatt report, which set the user and the user's interests at the centre. The act that founded the AJTC did not say that, but that was the approach that the AJTC took. Absolutely, the user has to be at the centre of considerations.

Your original question was about whether we really welcome the bill.

The Convener: I had forgotten what the original question was—thank you for reminding me.

Richard Henderson: I made a wee note of it. Yes, we really welcome the bill. However, to think that you are going to get it right first time—I am not using that phrase just because it is the title of an AJTC report—is probably the wrong approach. The bill is a first step. I referred earlier to the other components that do not relate directly to the bill except in that you must see the bill in the context of what else is going to be happening.

The Convener: The committee is aware of the range of radical bills that are going to come before us, including the Criminal Justice (Scotland) Bill and the Victims and Witnesses (Scotland) Bill, which will all be interlocking although it is difficult, at times, to put them all together.

Roderick Campbell has already asked questions, so I will take Alison McInnes next.

Alison McInnes: I wanted to explore concerns about the Mental Health Tribunal, but Mr Ward has eloquently pre-empted my question and I have heard enough on that issue, thank you.

Adrian Ward: I would just like to make another point on that issue, if I may. Do we welcome the tribunal? Yes, but there is a "but". Somebody used the word "fragmentation". We are addressing the consequences of fragmentation, but we must balance that against the fact that—certainly, in the case of the Mental Health Tribunal—a great deal of advantage is derived from the specialisation. We need to balance the two factors. Both the Mental Health Tribunal and the staff supporting it have built up specialist knowledge that means that somebody in distress can pick up the phone and get a sensible answer. Again, that is hugely valuable and important for the user. The answer is that, yes, we welcome the tribunal, but we must safeguard what is valuable in what we have already.

The Convener: The committee acknowledges the specialisation across the various tribunals as well as the fragmentation argument about why some cohesive legislation is required. It is not

perfect at this stage, but we hope that it will be better at stage 3 when we get there.

Roderick Campbell: I have a couple of questions, the first of which relates to procedural rules. Last week, we heard concerns from witnesses about the fact that there will be no early movement to create a body of rules. We know that the Scottish Civil Justice Council will give priority to rules for the courts. The Faculty of Advocates has said that it is constitutionally not terribly helpful or desirable to have the Scottish Government interfering in making rules for the tribunals. However, given the probably limited number of tribunals that will be affected and leaving the constitutional issue aside, in practical terms, if we are largely working on the basis of the existing procedural rules, how much difficulty is that likely to cause until the Scottish Civil Justice Council addresses the matter properly?

Jonathan Mitchell: The difficulty is the upper tribunal. At the moment, the Mental Health Tribunal has sets of rules that you could translate to the chamber and for the ASNTS, but some of them do not, such as education committees. However, the gaping hole is in the upper tribunal, for which rules need to be written. It is a more politically sensitive issue, as the upper tribunal tends to deal with cases that are of more general significance.

It may be unavoidable that the issue cannot be dealt with at the head of the queue by the Scottish Civil Justice Council, so there may be nobody who can make rules but the Government. Nevertheless, that is a bit too much of a theme, and I do not think that it is just a constitutional frolic of the Faculty of Advocates to say that it matters. It is undesirable that Government should be in a position to run so much. Take fees, for example. Section 70 permits the Scottish Government, if the Lord President agrees that it will be a good revenue-raising measure, to say to anyone in Carstairs who is looking to bring an appeal that they must come up with £100. It allows for fees across the board without new primary legislation, and that seems to be too much power to give a Government without parliamentary control.

Roderick Campbell: Is there anything that the profession can do to help the Government with this little difficulty that it is having, in the short term?

Jonathan Mitchell: In what sense?

Roderick Campbell: You talk about ad hoc committees of tribunal judges. There is a problem. How do we get around it?

Jonathan Mitchell: One thing that is missing in the bill is provision for user groups, which typically come about without statutory formation. They work well in some courts and tribunals and less well in others. For example, I do not think that they work at all in Scotland in relation to immigration and asylum—well, perhaps they work after a fashion—but they work well in relation to employment and in relation to the Court of Session. It depends on the body.

One thing that would help in that regard is if more attention were given to the concept of user groups that could be driven by users—when I say "users", I am talking about citizens and legal representatives, which is to say, people who use the body—and could put forward proposals for rules.

Alan Gamble: We have no answer to the question but, obviously, the main problem is going to be that the Scottish upper tribunal will be starting from scratch and will have to have new rules, whatever happens to the rules for the tribunals that are transferred over. There is a genuine problem. Priority should be given to the drafting of those rules.

Roderick Campbell: I will move on to deal with the review provisions. The submission from the Faculty of Advocates says:

"The proposed provisions for Review at section 38 are welcome, but they seem to be incomplete".

How would you extend those provisions?

Alan Gamble: If I may answer that first, we have a concern in the opposite direction. We are unhappy with the proposals in section 39(2)(b)—sorry to be so precise—which is the rather odd provision that enables the first-tier tribunal to refer a case. That would mean that it would not be an appeal on a point of law to the upper tribunal but a referral of the whole case—facts and law.

It is our submission that that power exists in the 2007 act. It has not been used in Scotland in the five years since that act has been in operation. Our point of principle is that the upper tribunal is not set up to hear from and examine witnesses and make findings of fact. Our role is to determine what the law is and, if need be, remit the case to the first tier to enable it to have another go at finding the facts. We do not think that the provision is necessary. The power in the 2007 act has not been very much used, and we feel that vesting in the first-tier tribunal the power to refer the whole case—facts and law—to the upper tribunal is an unnecessary complication, and we would prefer it not to be there.

Jonathan Mitchell: Section 38 does not articulate at all the circumstances in which there might be a review. If I am a first-tier tribunal judge, I might make a decision and tell the parties what it is, and they would go away and think that they had got that under their belts. However, I might sleep

on it and come back the following week and say, "I'm reviewing that decision because I think I got it wrong." You have to articulate what it is that leads to a review.

There is a clear need in practice for what is sometimes called a slip rule—situations in which I have issued a decision that contains a typographic or arithmetical error. Courts do that. Beyond that, however, the situation becomes quite difficult. There is no doubt that there are policy arguments for saying that, if I think about a matter and come back a week later, my second thoughts might be better than my first, but I doubt it. At the moment, however, the situation is just open-ended.

Richard Henderson: If you are looking at tribunals as being different from courts, you are looking at something that is more flexible and more responsive and, therefore, might very well be portrayed differently. The idea that you can review a decision might be novel and unwelcome, but it allows for the mistake to be rectified, which is probably quite a valuable thing. From the user's point of view, it is true that some certainty might be sacrificed, but if we are talking about disputes in the state/citizen context, a mistake against a citizen, in favour of the state, is slightly different from a mistake in a citizen/citizen context.

11:15

The Convener: Is the problem the use of the word "matter" in section 39(2)(b)? I do not know whether it is—I am asking what you think.

Alan Gamble: We have no objection to the review provision as such, although I agree with Mr Mitchell that the grounds for review should be spelled out more clearly. Our concern, which I referred to in my answer to Mr Campbell, is more specific; it is to do with one of the remedies that follow after review, which is to refer the whole thing holus-bolus to the upper tribunal. We feel that that is unlikely to be used and is unnecessary, and that retaining the simple right of appeal to the upper tribunal is a better remedy.

We have no objection to the idea of a review, provided that the grounds for it are spelt out. Our concern is to do with one of the specific remedies—I am sorry to have to descend into this technicality, but I guess that that is what we are here for.

The Convener: Well, the law is all technicalities.

Alan Gamble: It is, yes.

The Convener: Are you saying, then, that 39(2)(b) should just be deleted?

Alan Gamble: And the relevant parts of 39(3) that follow on from that. For example, 39(3)(a) says

"may re-decide the matter concerned".

That is more or less a lift from the 2007 act for the UK tribunals. The remedy has not been used very much and I do not think that it is very suitable.

Richard Henderson: The key may be that it is not used very much, if at all. If it is not going to be used, why not leave it? If it is going to be used, it is probably going to be used in circumstances that are relevant. If they are not relevant, I should think that the tribunal would see it off. I would leave it.

The Convener: I thought so. You say it has not been used very much but it has been used.

Alan Gamble: With respect to Mr Henderson, the situation that Mr Mitchell—

The Convener: I love the phrase "with respect"—that is what happens when you get lawyers involved. Just go for it.

Alan Gamble: A situation similar to Mr Mitchell's example has actually happened in the first year, although we did not consider that the application was competent. A tribunal judge completely rewrote her decision, then reviewed it, set it aside and tried to send it all up to us to start afresh, so such situations can happen. However, as it happened, for technical reasons we dealt with it another way, but that danger was there. Having made a decision, two or three days later the judge rewrote it and purported to refer the case.

Jonathan Mitchell: I have seen that, too. I differ from Mr Gamble on that point, although I agree with him on everything else there. Personally, I think that there is merit in allowing a first-tier tribunal to refer something up to the upper tribunal for a definitive judgment.

A very recent topical example is that of the decisions in Fife last week of the first-tier tribunal on what a bedroom is for the purposes of bedroom tax, which have been quite widely circulated. Without in any way criticising what is in those decisions, those are matters of general importance, and things such as whether a cupboard can be a bedroom really ought to be decided authoritatively. There are difficulties in restricting matters to appeals that can only be on points of law; ultimately, you may end up with a spread of very different first instance facts and decisions when it would have been helpful to everybody to get a general definitive view from above.

The Convener: That is fine; I think that we have teased out that point. The committee will consider the matter.

Elaine Murray: I think that the Lands Tribunal for Scotland and the Law Society argued that the Lands Tribunal should be in a separate chamber too and that it would work fairly well as it is. Should that be on the face of the bill?

Richard Henderson: That is certainly the view that the Lands Tribunal expressed—pretty forcefully, I think—last week. The Law Society would certainly not dissent from that view. Again, the problem that the committee and the Parliament will grapple with is that if you are setting up something and everybody says, "I want out," it is—

The Convener: They are all special.

Richard Henderson: It is potentially a wee bit chaotic, so yes, the nature of that jurisdiction is such that it probably should be on its own. Whether it comes out completely—which may be the Lord President's view—and just deals with things as they are is one option. I think that that would probably be going too far. The job is to try to create a structure into which you can accommodate the existing structures and processes that have similarities; you want to emphasise the similarities and develop them, and try to cluster them together.

Internally, the question whether we should use this chamber or that chamber becomes, I think—I am sorry, we are arguing among ourselves—a secondary issue, although given where we are just now, the nature of mental health issues takes us into a completely different realm. Earlier, we talked about the judicial title. Clearly different considerations come into play when you are talking about the mental health jurisdiction as opposed to other jurisdictions. We must try to create a structure that will be able to accommodate that vast spectrum of differences.

I probably did not answer your question.

The Convener: I think that you did—sort of. You seem to be saying that when we are talking about mental health issues and loss of liberty, we are talking about a far bigger dynamic than the court-based process of the Lands Tribunal. There is a huge amount of flexibility in all the processes across all different tribunals. Did I summarise what you said correctly?

Richard Henderson: Yes, that is fine.

The Convener: I will let you come back in after we have heard from Mr Gamble.

Alan Gamble: I have no views on this at all. The 2007 act put the Lands Tribunal in England and Wales into the upper tribunal. The jurisdiction of that tribunal is therefore part of the upper tribunal. That is a sort of compromise, I guess, between keeping it out altogether and making it part of the general tribunals structure. For what it is worth, that is what the 2007 act does.

Adrian Ward: There might have been some debate about whether the Lands Tribunal should be included in this exercise at all. I make it clear that the Law Society's position is that the Mental Health Tribunal for Scotland should be included but the question is how it should stand within the system. I just want to re-emphasise that point.

The Convener: We understand that.

I was just about to say that there were no further questions, but John Pentland is sneaking up on me with a question.

John Pentland: The panel today has mostly raised technical and academic issues, whereas the committee is concerned about the end result for the general public. Do you believe that there will be significant benefits to the public when the bill is passed, or are we moving from improving the service to creating further confusion?

Jonathan Mitchell: Well, the bill as it stands contains no major advantages for the public. There are some minor advantages—little bits and pieces—but, to be honest, it is not really going to matter very much. It will not justify the effort that is being spent on it.

There would be benefits to the public in a radical rethink of the whole set-up. We have had that—we can see how that has happened in the UK system.

Richard Henderson: I suppose that the major benefit of the bill is that Cinderella will at last go to the ball. Tribunals will become part of—

The Convener: You have to explain that, because I got quite lost. I am all mixed up with mental health tribunals and Cinderella, and I am not good at metaphors at this time of the day.

Richard Henderson: Cinderella is what administrative justice is traditionally called.

The Convener: Is it? We learn something every day.

Richard Henderson: Absolutely. I know that the bill could go way beyond administrative justice into party-party stuff, but this is the first time that anyone has looked at creating a coherent and integrated structure for civil justice in Scotland. That will not be a big deal for most individuals in the street but they will see the benefits of it as the tribunals develop over the coming 10 years.

Adrian Ward: My comments on the Mental Health Tribunal were mainly designed to avoid users and the public seeing things not working so well. On the more general point, it is relevant to consider whether, when Parliament, for some reason, at some time in the future, creates a new jurisdiction, it will know where to put it and how to create it. Do you have a ready-made berth for a new jurisdiction that will work from day one? Will it be clear to you from the original definition that we

are discussing that you are creating something that ought to go to a tribunal? There are advantages there for the future.

The Convener: The point is that more of the public will be involved with some kind of tribunal or appeals committee at some time in their lives than will be involved with any civil court. It is terribly important to recognise that.

Adrian Ward: Also, people who, because of their circumstances, get themselves before tribunals find themselves before several tribunals of different sorts in quick succession. If the rules of the game are different every time they go along to a tribunal, that is not helpful.

Alan Gamble: I will make a point in answer to Mr Pentland. Broadly speaking, I agree with what Mr Mitchell said. Although the changes are perhaps important, they are not going to make an awful lot of difference to the man in the street. However, I highlight that, on the whole, it is better that appeals from first-tier tribunals go to the upper tribunal and not to the courts. One effect of the bill is exactly that—that appeals from the first-tier tribunal, as with the Great Britain tribunals, will go to the upper tribunal and not to the courts.

The upper tribunal is a bit more formal than the first-tier tribunal, but it is considerably less formal than, particularly, the Court of Session. English experience suggests that the effect will be that the number of cases that are taken on appeal from the first-tier tribunal will increase because it is a less expensive, more flexible, more informal appeal process. I hope that you do not think that it is special pleading, but I argue that that change will benefit the user.

Richard Henderson: Yes.

The Convener: John Finnie has a question. Is it a short one?

John Finnie: Yes.

The Convener: Excellent.

John Finnie: My question is for Mr Mitchell and is about the comments in the Faculty of Advocates submission in relation to section 30, on assignment policy, and particularly the term "cross-ticketing". You seek the preservation of the right of tribunal members to be appointed between tribunals and chambers, and you comment on the cost of training associated with that. Will you comment on that?

Jonathan Mitchell: On cross-ticketing, one needs to bear it in mind that these are all expert bodies. Each of the chambers will be specialist and expert in a manner in which, traditionally, Scottish courts have not been. A sheriff court is, in effect, a court of almost universal jurisdiction. There is always a tension between, on the one hand, the user's requirement and, indeed, the judicial requirement to have proper specialists hearing mental health cases, for example, and, on the other, the administrative pressure, particularly on cost grounds, to say that it is so much cheaper if we can just cross-ticket.

Here, for example, there is provision for, in effect, open-ended cross-ticketing of people coming in as sheriffs. That is strange in a number of ways, but what it means in practice is that, if a tribunal is to take place next week and the so-called legal member—the judge—has chicken pox, a phone call can be made to find out whether a full-time sheriff can come in part time and be parachuted into the tribunal on the basis that, simply by virtue of being a sheriff, they have that expertise.

None of us has any objection in principle to cross-ticketing, as somebody can have more than one expertise, but it has to be kept under control.

John Finnie: Do you accept that there is a difference between expertise and training? Everyone has to start somewhere, and all the people who have gained expertise had their first day sitting.

Jonathan Mitchell: Oh, yes. Absolutely. Even Court of Session judges are now trained on the job, in effect, for the first six months.

The Convener: Is there anything that we have not asked about that the witnesses would like to comment on? We have discussed various sections and you have mentioned issues including the general policies and the mental health issue. Is there anything that we should have asked about but did not?

Alan Gamble: I do not think so. Thank you for all your questions and your obvious research into the contents of the bill.

The Convener: Mr Mitchell, is there anything that you want to add? Is there any section that you want us to look at or any issue that has not been touched on?

Jonathan Mitchell: No—none of substance. I stress that this is fundamentally a good bill. It is going the right way. We have addressed the problems and complaints, and that is really because we all take for granted that it is the right way forward.

Richard Henderson: The bill is welcome. Yes, there are glitches in it here and there, but in general terms it is to be welcomed.

Adrian Ward: I hope that you have realised that we are not nit-picking because we do not like the bill. We are trying hard to help you to get it right because it should happen.

The Convener: That is all right. We do not mind nit-picking. That is what we want to hear.

Adrian Ward: I was talking about the motive. People can try to destroy something because they do not want it to happen. Certainly from the Law Society's point of view, we want it to happen, but we want to help you to get it right.

The Convener: That is what we want to hear. Thank you very much.

That ends this evidence session. As I have already said, our next meeting will be on 17 September, when we will hear from the Lord President and the Minister for Community Safety and Legal Affairs on the bill.

Meeting closed at 11:30.

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