

WEDNESDAY 8 FEBRUARY 2006

Present

Borrie, L.
Brown of Eaton-under-Heywood, L. (Chairman)
Clinton-Davis, L.
Goodhart, L.
Lucas, L.
Neill of Bladen, L.

Memorandum submitted by JUSTICE

Examination of Witness

Witness: **Dr Eric Metcalfe**, JUSTICE, examined.

Q23 Chairman: Dr Metcalfe, welcome back to this Committee. You were very helpful with our inquiry last year. I think you then appeared as one of four; today you are on your own and we can concentrate on help from you therefore. You know the situation; we are live and you will get a copy of the transcript and you will have the opportunity to correct and, if appropriate, to add to it. I think you have had a list of the questions about which we want your help. If we can start with the basic question: is there a need for this proposed new Agency, given (and JUSTICE know at least as much about this as anybody else) the large number of bodies of one sort or another, domestic and international, which already concern themselves with human rights issues? Is there still a gap that this proposed new body could valuably fill? Can we perhaps start by asking for your help on that question.

Dr Metcalfe: We certainly believe that there is a gap. In our written evidence we talked about a gap in terms of dedicated monitoring of protection of fundamental rights under European Union law. It is absolutely true that there are a great many international bodies, governmental

bodies and non-governmental bodies, which are concerned with monitoring human rights, and their jurisdiction includes, if you like, Member States of the European Union and includes coverage of European law, but there is no official body which is dedicated to actually monitoring the effectiveness and protection of fundamental rights in relation to European Union law, and we consider that it is important. If you look first and foremost at the overlap between the Council of Europe institutions and the European Union, it is true that all European Union Member States are members also of the Council of Europe and so there is coverage of protection of civil and political rights in those jurisdictions. Certainly there is also coverage in terms of the non-governmental organisations which look at those areas but there is no body that is concerned exclusively with the rights which are guaranteed under European Community law, by which I mean the Charter of Fundamental Rights. If we take that as a template of what fundamental rights are in Europe, then there seems to be a gap because no other body is concerned with looking at those rights guaranteed under the Charter. The one which comes closest is the Network of Independent Experts but that is of course not a formal, official body and I would hesitate to say that it comes close to performing the kind of role that the Fundamental Rights Agency ought to.

Q24 Chairman: Would you envisage that that body, the Network of Independent Experts would, so to speak, become subsumed within the new Fundamental Rights Agency? How would you see it working?

Dr Metcalfe: As I understand it, the proposal is to have independent experts involved in the Fundamental Rights Agency in an advisory or supervisory capacity. It is not entirely clear to me from looking at the current proposal exactly how that would operate, but my understanding is that the Network would at least be subsumed within the Fundamental Rights Agency in some form or another.

Q25 Lord Goodhart: Perhaps before I ask a question I should make a declaration that I am one of the Vice Chairmen of the Council of JUSTICE. Dr Metcalfe, do you agree that the role of the Fundamental Rights Agency should be restricted to monitoring the implementation of EU law by the institutions of the EU or by the Member States when applying EU law and should not extend to a general monitoring of human rights in the Member States themselves, which would seem to be well beyond the competences of the EU institutions?

Dr Metcalfe: Yes, we are certainly reluctant to endorse a broader remit for the Fundamental Rights Agency, but perhaps slightly broader than the remit that you have just stated. We have suggested in our evidence, and this perhaps links on to a later question, that there may be a role for the Fundamental Rights Agency to play before measures have been implemented to even look at measures as they are being devised, so perhaps a form of legislative scrutiny role. At the same time we would not really want to emphasise that. I think perhaps the thrust of your question seems to be should the Fundamental Rights Agency take a much broader view of protection of human rights in EU Member States, and for myself I would be concerned that that might trespass into areas which are properly the provenance of the Council of Europe, particularly in relation to the monitoring of European Convention rights.

Q26 Lord Clinton-Davis: But if the Fundamental Rights Agency takes the view that it is very clear that some action should be taken, and none is taken, what in your view should the FRA do?

Dr Metcalfe: Action precisely in respect of what? You mean failure to properly implement a measure in respect of European Union law ---

Q27 Lord Clinton-Davis: --- Enforcement.

Dr Metcalfe: I would say in terms of the competence of the Agency, it would also have an advisory capacity, I think is probably the answer to that.

Q28 Lord Clinton-Davis: But if the advice which they tender is ignored by the Member States what do you think the FRA should do? Ignore it? Make representations? How would they make representation?

Dr Metcalfe: Under Recital 11, it refers to the “right to formulate opinions to the Union institutions and to the Member States without interference with the legislative and judicial procedures established in the Treaty”. I think that probably sets the terms. If its recommendations are made and ignored that is obviously something that should be taken up by the European Union institutions themselves. For instance, if it is a failure to act by the Commission or by a Member State then it would be for the Council or for the Parliament to take appropriate action having regard to the Agency’s recommendations. Similarly, if it is a failure by a Member State to act then it should be a matter for the Commission to act on the recommendation. One would hope that the recommendations that the Agency makes in these areas would not be overlooked lightly, even if they do not have, if you like, binding force. I would like for the recommendations of an Agency in respect of fundamental rights ideally to have binding force, but I think that is a rather more bolder Agency than ---

Q29 Chairman: --- It will not itself have an enforcement role but it would alert its concerns to the other institutions - the Commission, Parliament and the Council - as may be appropriate?

Dr Metcalfe: That is correct.

Chairman: I think Lord Borrie has a question.

Q30 Lord Borrie: My Lord Chairman, I was a little anxious by Dr Metcalfe’s answer to Lord Goodhart in which he used I think a couple of times the word “broad” as to the role the Agency would have in monitoring. Your organisation has very helpfully in footnote 2, page 2, listed various matters which are within the Charter and therefore within the Charter’s

concept of fundamental rights, but not in the European Convention, and some of them to my mind are rather astonishing, for example, environmental rights, consumer rights, prohibition on reproductive cloning, the freedom of arts and sciences, and I am not quite sure what that means but it means something different from individual human rights. I found the whole of that footnote exceedingly useful, but disconcerting, because of the range of things which, especially if the FRA takes a broad view of its monitoring function, it can engage in, stepping on the toes of numerous other bodies both at the EU level, the Council of Europe level and, for that matter, the level of separate Member States.

Dr Metcalfe: You are entirely correct, the remit is incredibly broad and the coverage of the Charter is incredibly broad. The purpose of our footnote was to indicate that there are areas that the Charter covers which are not covered by other international instruments in respect of which monitoring is available, and it would be coherent, if you have a Charter which protects fundamental rights in the Union, to have a body that is dedicated to monitoring that. At the same time, I would very much hope and indeed expect the Agency to exercise discretion and judgment when considering its monitoring exercise in such broad areas. For instance, freedom of the arts and the sciences or reproductive cloning. I would not expect for them to have a special person dedicated to those areas necessarily and certainly whoever the Agency appoints to monitor in those areas would have to have regard to existing work that is being done by the other competent international institutions or European institutions. We are not proposing that they should add on monitoring in all those areas; rather that is something they should have regard to and, if you like, act in a co-ordinating role - perhaps co-ordinating is too strong - to gather relevant monitoring that has been undertaken by other European institutions and international institutions so that one can identify the relevant issues where they appear under each Article. We are not suggesting that they should be monitoring actively in an intensive way in each of those broad areas.

Q31 Lord Borrie: But part of the justification for the FRA that you and your organisation are putting forward is that other bodies may have human rights as their concern but the FRA (because the Charter has a much wider range of what are called “fundamental” human rights and obviously other organisations will not be monitoring those matters) will be doing something different, and that is a sort of justification, but what you regard there as a justification worries me because it includes under the head of fundamental rights so many matters which are dubiously there and which have been there now for five or six years.

Dr Metcalfe: Well, let us take one right in particular that I mentioned in footnote 2, say, for instance, the rights of the elderly, Article 25. In effect, on monitoring of rights in relation to, say, age discrimination there will be a number of national bodies and European bodies and other Council of Europe bodies which will be gathering information in respect of age discrimination issues throughout the Union, throughout the Member States, but, as yet, there is no European Union document that you can go to and find what is the state of rights under Article 25 of the Charter in the Union at the moment.

Q32 Lord Borrie: You picked a good example there because age discrimination is concerned with human rights, the same as sex discrimination or race discrimination, so you have picked an example of something - the rights of the elderly - that would be quite properly regarded as a fundamental right, but there are so many other areas within the scope of the Charter that would seem not to be suitable, and although perhaps it has not mattered very much in practice that these items have been there since the Charter came in, whenever it was, six years ago, it is going to matter a lot more if you have got a busy active, body - the FRA with staff and researchers and so on - and they look at the Charter and they can see those very broad phrases that are used.

Dr Metcalfe: Just to build slightly on the point that I made before. I am not suggesting that the Fundamental Rights Agency should be commissioning independent, fact-finding missions

in respect of age discrimination throughout the European Union when it is carrying out its role under its remit. If you think of the Annual Report to which Recital 13 refers, one would expect to find the list in Article 25, but that does not mean that they would necessarily be spending a lot of their resources on doing ground-breaking work in relation to age discrimination. It would perhaps be sufficient to discharge their duty to collate the information that is available in one place so you would be able to have at least a profile of the situation on age discrimination as it currently exists throughout Member States. That in itself would be a useful exercise because that would also help to identify gaps. By having the Charter as a framework you would be able to identify the areas in which information is available and you would perhaps be able to identify areas in which not so much information is available. Again, I think discretion and judgment are key elements here. If I can draw an analogy with national human rights institutions. In principle, they tend to have very broad remits, that is to say protection of human rights in, say, for instance Northern Ireland or Canada or New Zealand. In practical terms they tend to devote the lion's share of the resources to very specific issues. They have broad remits but at a practical level they have no difficulty assigning priorities to various areas.

Chairman: I am so sorry, I did not want to interrupt but I am not sure how much longer we should spend on footnote 2. We had better move on. Lord Goodhart?

Q33 Lord Goodhart: Dr Metcalfe, the Charter of Fundamental Rights of course, as I understand it at present, does not have the force of law although it is something that has to be taken into account when considering what are the general principles of human rights recognised by the European Union. Do you think it is right that if it did get the force of law, which it would have done under the Constitution had the Constitution been approved, the enforcement body would have to be the ECJ, so the position then of the Fundamental Rights

Agency would be rather like what the role will be of the Equality and Human Rights Commission in this country when the Equality Bill is enacted and comes into force?

Dr Metcalfe: Yes, I would agree very much with that assessment. I would see that as a good analogy. I do not see that it would be appropriate for the Agency to be the enforcer of its own decisions, but it would also be important for the Court of Justice to have regard to and place a great deal of weight, one would imagine, upon the recommendations that the Agency have made.

Q34 Lord Goodhart: Could I just add one thing which is, as I understand it, the Council of Europe does not now have anything equivalent to the FRA. It has not got any organisation whose responsibility it is to monitor human rights across the Member States. That is dealt with entirely through the Court.

Dr Metcalfe: Yes. You do have of course the Commissioner, in my understanding ---

Chairman: We have already had evidence from Mr Gil-Robles at some length last week. He goes on fact-finding missions.

Lord Goodhart: He is EU.

Q35 Chairman: No, he is Council of Europe.

Dr Metcalfe: Also, particular instruments of the Council of Europe do have their own capacity to monitor rights, for instance the European Committee for the Prevention of Torture, so it is correct, you do not have an analogous body to the Agency but you do have a number of committees set up under specific instruments. Also bear in mind that there is less need for an Agency insofar as you have a binding Convention on Human Rights that is applicable in the domestic law of most of the Member States.

Q36 Lord Neill of Bladen: I noted when you were answering Lord Borrie when you were talking about what the Agency was going to do, you referred to Recital 11 which talks about “formulating opinions for the benefit of EU institutions and also Member States”, and that I found reflected in Article 4(1)(d), producing opinions. Below that you have got “publishing thematic reports” at Article 4(1)(g) , and I noticed in Article 5 that there is a Multiannual Framework which would say what the programme of work was and at 5(1)(b) you have “determine the thematic areas of the Agency’s activities, always including the fight against racism and xenophobia”. I want to get some feel for how you see this Agency in terms of monitoring. Is it a sort of crusading Agency that goes out with a programme of trying to eliminate what it regards as inappropriate, non-human rights type conduct in individual Member States? Is that what it would do, rather like the Commission in seeing that the basic provisions or the Directives are carried out in Member States? Is that its role?

Dr Metcalfe: From my reading of the Articles, the monitoring role is rather a broad one. A very technical meaning of “monitoring” would be the person who stands there and takes notes and keeps track of things. One would imagine with a human rights objective and a protection of fundamental rights remit that it is not just to monitor but that it would be tied to its role of making recommendations as well. So in one sense gathering evidence is one aspect of monitoring the statistical evidence but it would also perhaps involve fact-finding missions in particular areas, and that I think ties more closely with thematic issues because it is a point which has come up in relation to equality and discrimination bodies at the national level. They say that the focus on particular articles is not always the best way to focus on an issue. If you just wanted to focus on Article 10 rights, or something like that, it might not be the best way to examine issues. A better way might be to focus on particular areas like detention centres, and you may find that detention centres run by the state, in effect, raise a package of rights, some of those concerned with inhuman or degrading treatment but also the rights to

privacy and so on. My understanding is that a thematic approach would be to contrast with the Article and rights-based approach and to allow the Agency to focus on areas of human rights compliance and compatibility. There may have been other aspects to your question and I am not quite sure that I answered them all.

Lord Neill of Bladen: I think that is sufficient for the moment.

Q37 Chairman: It is of course going to be taking over the European Monitoring Centre on Racism and Xenophobia. Do you know how that body sets about its work? Taking a theme, does it examine its application and, if so, is it in a context only of Community law or wider than that?

Dr Metcalfe: I am not especially familiar with the European Monitoring Centre. That is in fact something that a colleague of mine deals with.

Q38 Chairman: Do you contemplate the Agency operating in essentially protecting rights under Community law and not straying beyond the areas of Community law? Is that right?

Dr Metcalfe: Yes, I think that is extremely important because of the abundance of other bodies that deal with rights under other instruments.

Q39 Chairman: Is there a danger of duplicating the Convention and the Council of Europe's remit?

Dr Metcalfe: That is a very real concern and I think for this reason the Agency has to be very careful.

Q40 Chairman: I think we have probably dealt with question two, the sort of role - you see it as monitoring, advisory, not enforcement, but I think you also see it as performing a legislative scrutiny role. Is that linked with the matter the Clerk calls the improving of EU

proposals and legislation which has no in-built monitoring system at the moment? Do you see it fulfilling a role in regard to that before legislation in Brussels?

Dr Metcalfe: We would hope so. We think it is an important issue and it is obviously something that might understandably be resisted by those parts of the existing institutions which already have a remit, the Commission perhaps. One would hope that members of the Parliament would support the creation of more scrutiny of human rights as always a good thing. I think a good example is the current move among European Union Member States to agree minimum procedural safeguards for suspects and defendants in criminal proceedings. This is something which is currently under discussion. It is going to be discussed next week in Brussels by the Justice and Home Affairs Council. It seems rather unsatisfactory if you are going to be making measures that have such an important impact on the protection of fundamental rights, and you have a body that is charged with the remit of protecting fundamental rights, that it should not have a voice in some way in the process of making those measures rather than simply commenting on their implementation. One can draw, again, the analogy with national human rights institutions and one has regard to the Paris Principles on national human rights institutions. Those are the UN principles that were agreed in the 1980s. One of the primary roles of national human rights institutions is to contribute not only to the work of the executive but also the work of the legislature and policy-makers in formulating measures, so we would say that this is a useful role.

Q41 Chairman: Yes. How do you see the best way of avoiding duplication with the work being done already by the Council of Europe?

Dr Metcalfe: We thought the suggestion in Recital 16 of having a bilateral co-operation agreement with the Council of Europe would be an extremely good idea, given that it is by far and away the largest organisation doing work in this area, to make sure that it does not duplicate the work. In general, we do not have any specific recommendations but I would say

good lines of communication are extremely important between the bodies to make sure that they are, first and foremost, aware of what the others are doing and to make sure that the Agency does not duplicate the work the existing bodies are already carrying out.

Q42 Chairman: I understand that you refer to the Recital but of course the Recital's interests are supposed to be carried forward into the body of the proposal and some of the Articles touch on this. Article 5(1)(e) includes the provision "with a view to avoiding thematic overlap with the remit of (in that instance) Community bodies, offices and agencies"; Article 9 talks about "co-operation" with the Council of Europe. Are you happy with the way these matters are couched? Do you think they adequately guard against the risk of duplication and overlap?

Dr Metcalfe: I would not say that this is necessarily the only safeguard. I think part of the difficulty is that it is hard to comment until we have seen something more specific as to the set up of the Agency and how it will run. Again, it much depends on the people who are appointed to staff the Agency, in particular those in charge of managing it, to determine its practical role, and really one can only hope that they will have the appropriate regard to avoiding duplication, not reinventing the wheel in this area, but we do not see any specific proposals that could be made at the moment that would help to clarify this area.

Q43 Chairman: Can you bring to life your concern? Really question five invites you to offer a practical example of where the risk of duplication could arise and how best therefore to avoid it. Have you tried to think through the problem that might develop if this Agency is created?

Dr Metcalfe: The examples that we can think of are only the obvious ones, unfortunately. I do not think they are of a great deal of assistance. A straightforward example is torture, the issue I have mentioned before. In practical terms, given that the European Committee on

Prevention of Torture is so active in this area in meeting with national bodies and inspection of detention centres, we would certainly hope that the Agency does not spend any time trying to do its own visits to detention centres in respect of protection of fundamental rights. Rather the appropriate thing for the Agency to do in those kinds of situations would, first of all, to be in touch with the Committee on the Prevention of Torture and read its reports. There might be an opportunity for it to ask questions if it feels there are aspects of its own work that are not sufficiently covered, but the kinds of conflict issues that we have in mind are the ones which are very clear-cut. We have difficulty thinking of more ambiguous areas, but we would have thought there was a presumption in the Agency's work that it should always give priority to an existing institution which already conducts work in a particular area. The presumption should always be that the Agency will let that other institution go first. In a way it will develop its role filling in the gaps because in fact this is why we see this as being an important body in the first place, because there are gaps that need to be filled.

Chairman: Lord Norton?

Q44 Lord Norton of Louth: I really wanted to pick up on the legislative scrutiny point and indeed relate that to the earlier discussion because, clearly, if one goes beyond a monitoring body to one that can make recommendations, it becomes a very different body. What I thought it would be very useful to get some feel for and some clarification of is which bodies are recommendations going to, particularly if you start engaging in legislative monitoring, legislative scrutiny? Who would the recommendations be made to? Are you envisaging they would go to the national level and the national parliaments or, if you like, upwards in terms of the institutions of the EU, or would the recommendations just hang in the ether waiting for someone to pick up on them?

Dr Metcalfe: I suppose one would imagine the recommendations should be targeted to the relevant bodies. The difficulty with Community legislation is that there are so many bodies

which have a potential to be involved with the making of legislation, but we would certainly have no objection to the Agency making recommendations to the national body, where that was relevant, if a national body is making implementing measures in respect of fundamental rights. I should just add a caveat to that: assuming that the Agency has the technical competence to make recommendations in that area. I would be surprised if it perhaps had the degree of expertise necessary to make detailed recommendations in all the areas in which implementation might take place, but the recitals already go to all the relevant Union institutions so we do not see any limitation.

Q45 Lord Norton of Louth: Presumably there would have to be some targeting? If it is a general going through all the institutions, isn't there a danger that none of them will actually pick up on the recommendations?

Dr Metcalfe: My instinct is that, first and foremost, its recommendations should be to the Commission and to the Parliament at a secondary level, but I do not really have any strong views on that.

Q46 Lord Norton of Louth: Arising from the point that was made earlier about the status of the Charter itself, presumably some recommendations would be harder than others in relation to what is embodied in the Charter?

Dr Metcalfe: Yes, I think people would have due regard to the strength of the obligations behind the particular Charter provision.

Q47 Lord Norton of Louth: So that would affect the response of a national parliament to a recommendation if it is not actually EU law?

Dr Metcalfe: No, but that is something that could be said in respect of any obligation. Obviously greater weight is probably going to be paid to a Charter obligation that is backed

by, say for instance, a Convention right than otherwise, particularly a vague obligation such as, say, the freedom of arts and sciences.

Q48 Chairman: But every piece of advice or recommendation given and made by the Agency presumably would be a public document, would it not?

Dr Metcalfe: Yes.

Q49 Chairman: You are not contemplating that they would ever privately advise the Commission or anyone else, or are you?

Dr Metcalfe: No.

Q50 Chairman: So anything they produce would always be available to the Community as a whole. It might be targeted but it is copied to and available to and able to be accessed by any Member State or anybody else?

Dr Metcalfe: Yes, and we would see that as consistent with one of the roles of the Agency, which is to increase the transparency of the Union institutions in respect of the protection of individual rights, because a great deal of the Community's workings while they are public they are also fairly opaque.

Q51 Chairman: Turning to question seven, in a way you have touched on this already, but you are not suggesting that the Agency should have regard solely to the Charter? What I understand you to be saying is that insofar as it alone has any remit in respect of the Charter, while certainly it should have regard to the Charter, but with regard to other human rights instruments, notably the Convention, then it has regard to those but only in the context of protecting rights under Community law. Is that how it works?

Dr Metcalfe: Yes. I would approach it the other way round, if you like, that the framework of the Charter is built into the remit of the Agency, but because the Charter itself draws upon

international instruments and is informed by other international instruments, in particular the Convention on Human Rights, it would almost be incoherent for the Agency to conduct its work in relation to Charter rights without having regard to the relevant jurisprudence of the Council of Europe in relation to the Convention. You do not understand many Charter rights without first knowing what the content is under the European Convention on Human Rights. Similarly, I cannot think of any examples off the top of my head, but several provisions of the Charter are directly informed by the provisions of the International Covenant on Civil and Political Rights. It would obviously be prudent for the Agency to have regard to the jurisprudence of the Human Rights Committee when it considers what the content of a particular right is under Community law, so it would be important for it to have regard to the relevant international human rights instruments, say instruments on human trafficking for instance, but its formal work should be defined by the terms of the Charter.

Q52 Chairman: Just before we move on to the geographical scope of the Agency, are you in a position by reference, say, to Article 4, which sets out the tasks which it is intended the Agency should fulfil, to identify which of these you see perhaps as the more crucial, the more central and where the existing gaps are that would be met?

Dr Metcalfe: It seems to me from looking over Article 4 that gaps exist in many of the categories that are listed there. In particular, I would say reference to the first two: “record, analyse and disseminate relevant information and data”, because one of the most important functions of the European Monitoring Centre was the data that it gathered and collated.

Q53 Chairman: With regard to racism and xenophobia?

Dr Metcalfe: Yes, there was a genuine information gap, if you like, in relation to that.

Q54 Chairman: It performed that function but obviously across a wider field of racism and xenophobia?

Dr Metcalfe: Yes.

Q55 Chairman: Right, so it goes out and collects and collates and all the rest of it?

Dr Metcalfe: To be fair, that would take up a great deal of the Agency's work.

Q56 Chairman: Yes, I do not doubt it would be quite a ---

Dr Metcalfe: So in our written evidence we have suggested that the legislative scrutiny function is important but perhaps this is not a priority. I am not sure if this is its most essential priority but we do not disagree with any of the things set out in Article 4. The issue that we had concerns about was the extraterritorial remit, if you like, outside.

Q57 Chairman: Shall we then move on to that because, as I understand it, JUSTICE is against any form of extraterritoriality, in other words, you wish to confine the Agency's operations entirely within the existing EU States?

Dr Metcalfe: Yes, I should perhaps qualify that. We do see a potential role - and this is raised by one of your other questions - and it would perhaps have to be a very limited advisory role in relation to where the Commission itself seeks information in relation to an accession country, but we certainly do not think that the Agency should be established on those lines.

Q58 Chairman: Sorry, how would that then work? As a candidate country for accession various demands are made of it by whom? The Council, the Commission, by whom?

Dr Metcalfe: My understanding is that it is primarily undertaken by the Commission. The Commission undertakes this work.

Q59 Chairman: And then?

Dr Metcalfe: Should the Commission desire it, we consider the Agency should be able to assist the Commission in any area that the Commission would like assistance on. If it happens that there are particular experts within the Agency who may help in determining whether a particular issue in an accession country or candidate country requires clarification, then we certainly would not oppose the Agency being allowed to work or provide assistance to the Commission in that area, but we think it is extremely important to be clear about the extent of the involvement. The Agency should be able to assist the Commission where the Commission asks for help in that area, but we do not think that the work that is currently undertaken by the Commission should be shifted to the Agency. It is only if the Agency is able to provide assistance.

Q60 Chairman: How do you understand the Commission informs itself presently as to the state of human rights in some candidate accession countries?

Dr Metcalfe: My understanding is that they rely a great deal upon the work that is done by the Council of Europe because of course being a member of the Council of Europe is part of the criteria.

Q61 Chairman: Why is it a good idea then to superimpose upon that this other body, this other possible way of informing itself?

Dr Metcalfe: We are not suggesting that it is. We are suggesting that if the Commission finds that it might be useful to avail itself of assistance from the Agency then that would be fine, but we certainly do not agree that the Agency should be involved.

Q62 Lord Borrie: Just on that point, Dr Metcalfe, are there some risks that - and I will call it but you can disagree if you think it right - a non-political agency, the Fundamental Rights Agency, could be accused, justly or unjustly, of preventing or being part of the way in which

an accession candidate country is prevented from joining the EU or is subject to a number of qualifications on membership because it has done this sort of advisory work before that country is actually a member of the EU and subject to the FRA in the normal way, with of course its own member on the management board (because every member country has got a member on the board)? I am wondering if there are some difficult political questions on the involvement of the FRA in this kind of work with the candidate country that you envisage?

Dr Metcalfe: I have to be honest we had not envisaged that as being a particular issue, no. I would say that were the FRA to be involved in that way it would be no more subject to criticism than perhaps the Council of Europe's human rights work is subject to the same criticism. I am not aware, for instance, that the Council of Europe is subjected to criticism simply because it may make criticisms or hand down judgments in respect of a candidate country or a potential candidate country in relation to their human rights record. To use an example, Turkey gets criticised a great deal for certain of its actions so do other potential candidate countries - Armenia for example. The mere fact that the Council of Europe has been involved in constructively criticising human rights records is not seen as overtly political. I think the independence of those bodies is respected. That said, I do not really envisage the Fundamental Rights Agency having that kind role in relation to accession countries. Our concern was really that it was involving itself in countries outside the Union which is really beyond its remit and, from our own general human rights experience of doing work in other countries, we have a very tightly defined domestic remit. You always have to be extremely careful going into a new country and a new jurisdiction because the circumstances are very different.

Q63 Lord Neill of Bladen: When you speak of the Commission examining, as it were, the track record of the accession country, the Commission presumably is doing that as agent for

and on behalf of the Council? It must be for the Council of Ministers to decide whether to admit to the ranks of its members an accession country? That is right, is it not?

Dr Metcalfe: Yes, that is my understanding. I think it would always be for the Council of Ministers to make the decision on ultimately how much progress a particular country is making towards the relevant criteria. I think ultimately it has to be a political decision rather than a formal, legal one, if you like.

Q64 Chairman: You see a possibility of invoking the whole of the Agency with regard to candidate countries, but the further away you get from the European Union, the less justification for involving them, so that when you get merely to non-EU States that have concluded agreements with human rights provisions, your reservations about candidate countries presumably become more pronounced and in turn more pronounced still with regard to states with which the EU has no agreement whatever?

Dr Metcalfe: Absolutely. If we can just spell out our reservations in relation to getting involved in accession countries and so forth. There is certainly a case to be made that, after all, the Commission is undertaking this work so if you have a dedicated body concerned with fundamental rights, why not give them this job as well, but it is not sufficiently strong. First of all, although the Charter covers more rights than the European Convention, the Charter itself and the protection of fundamental rights is only one part of the relevant criteria, and certainly when we are talking about the *acquis* much, much less. That involves a great deal more material than merely fundamental rights. All the accession countries and prospective candidate countries are members of the Council of Europe or are likely to be. The only exception I can think of is Belarus and I would say that is a long time in the future if ever. They are also members of the Organisation for Security and Co-operation in Europe, which has its own rule of law monitoring its undertakings. When you look further to the idea of the Fundamental Rights Agency being involved in concluding agreements, Cotonou or the

agreement on the European Neighbourhood Policy, to look at the Cotonou Agreement as it relates to 77 countries - African, Pacific, Caribbean countries - short of Asia, we are talking about a global remit. Similarly, when you look at the Neighbourhood Policy many of those countries are members of the Council of Europe. The kind of expertise involved in monitoring fundamental rights in those areas tends to be very different from the fundamental rights issues you find arising within the European Union.

Q65 Chairman: I think that probably answers questions eight and nine. I think we have probably got your answer to ten, too. If you do not bring the FRA into monitoring compliance with regard to candidate countries and indeed human rights clauses in agreements between EU States and non-Member States, who should help the Commission on this? And the answer seems to be the Council of Europe. Is that about it?

Dr Metcalfe: Yes. I am not aware that they have encountered any difficulties in this area previously. It is possible that they have but we are certainly not aware of it as an issue. Were it an issue, we do not have any objection to the Agency providing advice but we think it would be a mistake for the Agency to become a kind of “super” human rights body that is acting both within and without the EU.

Q66 Chairman: Unless anybody has anything on that group of questions, can we pass then to the Gender Equality Institute. I think JUSTICE’s position is really fairly clear here. You say for every reason, conceptual and in practice, it would be unhelpful to create a separate institute just to deal with issues of gender inequality. As I think you point out in your written evidence, Patricia Hewitt in connection with the proposed new English Commission for Equality and Human Rights states: “As individuals, our identities are diverse, complex and multi layered. People don’t see themselves as solely a woman, or black, or gay and neither should our equality organisations”, and you would suggest, as I understand it, the same in this

regard? It would be absurd to have a dedicated, discrete, separate body to deal with gender, leaving all other aspects of fundamental human rights over to the new Agency; is that right?

Dr Metcalfe: We find it very surprising that at the very point at which the proposal was to eliminate a dedicated, single-issue body on racism and create a unified human rights body, there is a suggestion at the same time to create a separate, single-issue body. As we identified in our written evidence, this runs very much counter to the current trend at the national level, which is to assimilate, if you like, the experience of equality and discrimination across various strands into a single body because the experience of people working in the anti-discrimination field is that people do not experience discrimination on a single issue basis. So it is very surprising.

Q67 Chairman: Do you understand any reason whatever for the suggestion that there should be two separate bodies?

Dr Metcalfe: The only reason that perhaps suggests itself is the long-established rights under Community law that relate to gender discrimination. It is fair to say that perhaps the longest track record of Community law in relation to the protection of fundamental rights has been in relation to (in the human rights field at least) equal pay for men and women, and those kinds of discrimination issues. So perhaps it is understandable given they probably have the most developed work and legislation in that area that they felt that there was enough material there that they should dedicate a specific body, but I really do not see that as a sufficient justification for creating a separate institution. At the same time it undercuts the justification for creating the Agency in the first place.

Q68 Chairman: It might very well be the basis for a thematic report?

Dr Metcalfe: Absolutely.

Q69 Chairman: But not a separate Agency?

Dr Metcalfe: Yes, and it would be perfectly proper for the Agency in its working to devote a significant amount of resources if in practice it finds that many of the fundamental rights issues in Community law arise in this particular area. Then there would be no criticism, I am sure, if the Agency were to devote more resources to work on this area than perhaps age discrimination, but I do not see that as being an argument for a separate institution.

Q70 Chairman: They have managed all these years without having any body dedicated to eliminating gender discrimination.

Dr Metcalfe: As I say, I find it very difficult to understand the reasoning.

Q71 Chairman: Finally, the question of resources and managerial efficiency and the numbers that are proposed for these various bodies. Have you got any comments on this? Do they strike you in any particular way as being perhaps top-heavy, excessive?

Dr Metcalfe: A management board of 30 representatives for an organisation of 130 does strike me as somewhat top-heavy. If you had an advisory board of 25 to 30 representatives that would seem to be perfectly reasonable but a management body which is somewhere between 20 to 30 per cent of the organisation itself seems unhelpful. It is also striking in respect of the relative size of the proposed Gender Institution and the Agency itself. It is far more sensible, I think, to take the 30 people that you have for the Gender Institution and add them to the staff of the Agency. We also consider it is contrary to the principle of proportionality that the Commission's proposal refers to. It seems disproportionate to have that amount of management and that separation of resources.

Lord Borrie: Might it be worthwhile to make the point that the size of the management board, which Dr Metcalfe already thinks is rather large in relation to staff and so on, will become even larger as each new candidate member becomes a member?

Chairman: Yes, as I understand it, the figures for the Gender Institute as proposed would be 25 in management, because there are 25 Member States, but actually 15 workers, so many more chiefs than Indians.

Q72 Lord Neill of Bladen: Can I ask a question about the Indians. It seems to me that if you leave out of the count the applicant or accession states and just take the existing members it is 25 Member States. Has this Agency got a remit to look at what happens in each of those countries and whether there are significant abuses of Charter rights? Does it also look at the forthcoming legislation in each of those 25 Member States to see whether they are skewed and contrary to best practice in human rights? Is that a function?

Dr Metcalfe: That really is something that I think would have to be determined by management, and there seems to be enough to make that decision! I think the interesting question is how you set up these organisations. There is a good parallel with the discussions that are currently underway in relation to the UK's own Commission for Equality and Human Rights. There was a great deal of discussion about whether the Commission should have, for instance, powers to undertake judicial review. We initially were cautious about this because we understood that as a policy organisation that also gets involved in individual cases, individual casework can be extremely time-consuming. It can take a great deal of time away from other work that is one is undertaking. In relation to the division of labour between monitoring and legislative scrutiny, it would be perfectly appropriate to make legislative scrutiny part of the remit of the Agency but leave to the management of the Agency the decision as to how to develop that. Another way of saying it is that they will not necessarily do all the tasks that they are able to on day one, and as organisations grow over time they may find that it is better to concentrate on a specific thing, and if it is a matter of priority then we would suggest monitoring first and foremost and then, if they have time and resources left over, to assign time to scrutiny as well.

Q73 Lord Neill of Bladen: I was thinking in terms of the overall burden. 25 countries, 21 languages, we were told by the European Ombudsman the other day, and four workers per country, forget about the management board. It is bound to grow if it is going to perform a worthwhile job.

Dr Metcalfe: It is difficult to make predictions about growth but, yes, I would suspect that it would have to grow beyond that. There tends also to be a division in most human rights organisations that I am familiar with between what is called policy and what is called casework or grassroots work. Most people spend most of their time and the lion's share of resources goes to things like monitoring and gathering evidence. These are the most time-consuming things and you tend to have a small policy department that perhaps deals with the big issues. To do them in a comprehensive way, yes, it is going to take a lot of people.

Q74 Chairman: What is the strength of JUSTICE numerically?

Dr Metcalfe: Numerically, approximately ten, of which five are full time - an average-sized NGO for the United Kingdom. At the upper end, for example, Amnesty International's UK section has around 130 employees, so this would seem to be equivalent in size.

Q75 Lord Neill of Bladen: May I ask one question slightly off what we have done so far. It caught my eye in Article 15 that it stipulates in 15(1) the Agency "shall fulfil its tasks in complete independence", which is fine, and then I look at Article 5(1)(c) which says "the multi-annual framework within which the Agency operates must be in line with the Union priorities as defined in the Commission's strategic objectives." Supposing the Agency thinks the Commission has got it wrong and it has got the wrong objectives? Is it genuine independence or is it really part of the machinery of the Commission with its programme controlled by the Commission?

Dr Metcalfe: That is an excellent point that I had not considered. Yes, I would definitely raise that as an issue as to their independence. If the Agency is to be truly independent, yes, I would say ---

Q76 Lord Neill of Bladen: --- There might be a problem?

Dr Metcalfe: In practice I doubt it would arise but in principle, yes.

Q77 Chairman: Having regard to the detailed provisional proposal, is there anything else that you think we ought to be particularly alert to? In two weeks' time we are seeing a witness from the Commission. If you were in our shoes, what particular aspect of this would you think we should be focusing most intently upon?

Dr Metcalfe: I think the questions which you had asked in relation to the overlap and how it proposes to handle the overlap with the existing Council of Europe bodies and other human rights bodies. That is bound to be the most important issue for the Agency.

Q78 Lord Borrie: I understand that the new body is to be located in Vienna. With modern technology in relation to the passing of information and communication, perhaps it does not matter where it is located, but if you have got to have co-ordination, you have got to have friendly social relationships, so does it matter where it is located, or is Vienna rather inconvenient?

Dr Metcalfe: We had an internal JUSTICE discussion on this issue when we were originally invited to respond to the proposal. I think that it is probably correct that with modern communications it does not make as much difference. However, it would also strike me as very convenient if one is doing work in relation to the European institutions - the Commission and Council and Parliament - to be closer to Brussels.

Q79 Chairman: Are there perhaps some political interests and considerations at play when it comes to deciding on the location of a new European Agency, or is that beyond your remit?

Dr Metcalfe: I suspect it is outside my remit but I have heard --- I do not know, I am not sure I am allowed to pass on gossip to your Committee.

Chairman: I think that is a sufficient response. Unless there are any other questions, then it remains only to thank you again for coming and helping us. You have again proved to be very helpful. Thank you very much indeed, Dr Metcalfe.