

WEDNESDAY 1 MARCH 2006

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Present

Brown of Eaton-under-Heywood, L (Chairman)  
Clinton-Davis, L  
Goodhart, L  
Lester of Herne Hill, L  
Neill of Bladen, L

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Witnesses: **Baroness Ashton of Upholland**, a Member of the House, Parliamentary Under Secretary of State – Department for Constitutional Affairs, and **Mr Edward Adams**, Head of Human Rights Division - Department for Constitutional Affairs, examined.

**Q126 Chairman:** Minister, as ever, we are extremely grateful to you for coming.

**Baroness Ashton of Upholland:** My pleasure.

**Q127 Chairman:** You were very helpful to us last time you were here. I am sure you will be again today. You do not need any explanation as to the transcript and that sort of thing. Perhaps we can proceed at once with the questions. You, I know, have had a copy of the 15 questions or areas of questioning on which we would like your assistance. Since then, we have had the benefit of your helpful letter of 15 February in response to Lord Grenfell's letter of 1 December. I think you also have had, as we have, a copy of the draft memorandum of understanding as between the Council of Europe and the European Union which was touched on by our witnesses last week from the Commission and which itself makes a brief mention of the Fundamental Rights Agency.

**Baroness Ashton of Upholland:** I have to say, I do not have that document.

**Q128 Chairman:** A small point may arise at a later stage with regard to that. Could we perhaps start with the first question, which raises the matter in a fairly general fashion. We all

know there is a large and, dare one say, growing number of bodies which concern themselves with human rights issues, but do the Government think there remains a gap to be filled by some body such as this proposed new Fundamental Rights Agency? Assuming you do think there is a gap, what precisely is the gap and how would it be filled by the proposed new Agency?

**Baroness Ashton of Upholland:** We think there is a gap. The current position demonstrates that there is not any body that enables the European institutions to get the benefit of advice or assistance when it comes to fundamental rights. I am sure we will debate the type of organisation and the remit of the Agency as we go through our discussions, but in principle it would be right to say there is a gap and potentially it is for this Agency to be able to offer that expertise.

**Q129 Chairman:** Is it a gap in the way, so to speak, of fact finding or a gap in the way of advising? What is the real gap, bearing in mind there already has existed since 2002 the Union Network of Independent Experts?

**Baroness Ashton of Upholland:** I think the particular issue would be the ability to look across the European Union and to provide information that is comparable – something which is not available at the moment and which could be of use to Member States, could be of use to Community institutions. I know we will come on later in the questions to the role as regards legislation and whether there is an opportunity through the Agency to be able to consider issues that the Commission is proposing at an early stage.

**Q130 Chairman:** Pre-legislative scrutiny.

**Baroness Ashton of Upholland:** A kind of pre-legislative scrutiny. I do not want to pre-empt the later questions as to how I would regard that. I think there is the potential to offer advice to institutions when thinking about areas of fundamental rights. Whatever view

members of the Committee might take, I think it is right to say that, in those particular areas, at present there is not one body where advice, assistance, support, monitoring would be available, and this Agency, in our view, could offer that.

**Chairman:** In a way that takes you straight to question 2. Are we talking here, therefore, of a monitoring role or an advisory role.

**Lord Lester of Herne Hill:** Before we go to question 2, could I follow up on question 1?

**Chairman:** By all means.

**Q131 Lord Lester of Herne Hill:** I have to say that I have deep scepticism about the gap. I wonder if I could summarise in a couple of sentences why and then ask you for your comment if that is convenient. The European Court of Human Rights has a backlog of 70,000 cases.

*Baroness Ashton of Upholland:* Indeed.

**Q132 Lord Lester of Herne Hill:** By 2010 it will be 250,000 cases. The institution is therefore in crisis. In the old days there was a European Human Rights Commission which would have done this opinion-giving and fact-finding. That was abolished. We now have a Human Rights Commissioner, who does not have that much resource or power but he is there, and we have candidate countries in the Council of Europe who are not yet in the EU. It seems to me that the last thing we need at the moment is new institutions that are managerially top-heavy with the usual “every country wanting their people on it” to create yet further balkanisation on the subject of human rights. It is particularly undesirable when the United Nations, as we know, has just decided to rationalise the treaty bodies of human rights into a single body – and here we are not with just one but two new bodies. We can, of course, develop the ideas of gaps, I agree, but should we not be putting our brains behind rationalising, simplifying, avoiding waste of duplication, streamlining, rather than

proliferating yet further institutions – and I speak as someone who, I hope you know, is pro-Europe and pro human rights, but I am dismayed by this and broadly agree with the Dutch Senate. I would be grateful for your comments although I realise you are a prisoner of previous decisions.

**Baroness Ashton of Upholland:** I am not much of a prisoner on things, as you know, Lord Lester. To go back to what you said at the beginning, it is always convenient to answer your questions. I was not sure, though, in what you were saying whether you were inviting me to suggest that resources spent on the Agency might better be spent on dealing with some of the concerns you raised about the backlog in the European court or whether you were suggesting that a rationalisation would enable the work that this body was undertaking to be undertaken elsewhere – which, in a sense, is the Dutch Senate position at present. There are different views, of course, about how best we might address this. The proposition that lies in front of us is that one way of dealing with some of the questions that are being raised, providing – and again we will come on to this – the relations with, for example, the Council of Europe are dealt with effectively, is to offer this particular support to Member States and Community institutions. In everything you have said, Lord Lester, you did not, I feel, suggest that any of these bodies would be able, for example, to support the Commission in looking at legislation before it becomes legislation. That does not exist at present. Equally, I am not convinced, from what I have seen, that any of the bodies currently operating across Europe have the capacity or the ability to bring together information, to make it comparable across Member States, which increasingly could – and I say could because I do not know if it would – be of value in looking at issues in fundamental rights and human rights between nation states. While I accept that for the Dutch Senate, and obviously for you, there is a genuine “Should we be doing this at all?” my answer to that is that if we accept that the things I have identified

which need to be done are valuable in themselves, then I wait to see a proposition that gives me an alternative way of doing that.

**Q133 Lord Lester of Herne Hill:** That seems to me, if I may say so, a very important answer. Could I add to the panoply of existing machinery one which has not been mentioned, which is that the Secretary General of the Council of Europe of course has special power under the European Human Rights Convention which he has started to use of writing to each Member State or some of them to say, “How are you complying with so and so?” The Council of Europe institutions can and do give advice to Member States on their better compliance with human rights, so, speaking for myself, I am not persuaded that it is better to do this within the narrower European Union context than the Council of Europe but I realise that reasonable people can disagree about the institutional architecture. But I think it is right, is it not, that there is that capacity still, not much used within the Council of Europe, to perform some of these functions and maybe because human rights organisations are a poorer vacuum they are creating a new one to do something which the European Council could have done itself?

**Baroness Ashton of Upholland:** I think you have raised, Lord Lester, a fundamental point, which again we will come on to in the questions, which is about the relationship between the Council of Europe and the Agency. Certainly, in the discussions I have been involved in with the LIBE Committee – and I know Lord Norton of Louth was there last week and I had a discussion with him yesterday about the Committee itself – there are genuine concerns about ensuring that that relationship works effectively. There probably is a question about whether the Council of Europe could exercise its powers differently, that would mean the Agency would not need perhaps to take on different functions, but that has never been raised at the Committee meetings I have been to as an issue. It has been much more about: How do we make sure there is not an overlap in function? – and in a sense the focus has been around the

management structures on that. I think there is a debate to be had, and it needs to be had, which in a sense the Dutch Senate intervention will enable to happen, which is about making sure that everyone is using the best of the resources they have in terms of the powers they have to address some of the issues that have been raised.

**Q134 Lord Neill of Bladen:** As regards the scrutiny of forthcoming pending legislation made by Member States, our last witness was from the Commission, when we last took evidence, and I had the distinct impression – although I do not have the transcript here – that that was not a role that they were thinking very hard would come their way. Could we leave that part of it on one side, looking at legislation. On the basis of what is happening in the Member States – and I am now looking at a report by the Network of Independent Experts – they claim they monitor the situation in each of the 25/26 Member States and they produce reports on each country and on the basis of that they produce a synthesis report which identifies the main areas of concern and makes recommendations. In that survey of what is happening, is there a gap? Is there any fault between what they do which needs to be filled with the FRA?

**Baroness Ashton of Upholland:** I do not think there is a gap in what they do, but I think the description of what the Agency can do is a different one. The Commission, as you will know, Lord Neill, spends a huge amount of its time looking at the way in which it wishes to bring forward legislation and to look at Directives and so on. At the moment, of course, there will be internal scrutiny by the Commission but there could be an opportunity for the Agency to provide advice and support in that area. I would say, by way of a caveat, which I think probably fits with where the Commission would have been in their evidence to you, that there is no question they could do it on every piece of legislation – that would be impossible to do – but, nonetheless, there will be within the Commission's work areas that are particularly relevant to what the Agency is doing, where early advice could enable the legislation to be

drawn up more effectively, with a due regard for fundamental rights. That is a role that I think I identify as being a genuine gap that could be fulfilled by the Agency: it does not cut across what the independent experts are doing but rather is a function that as yet is unfulfilled.

**Q135 Chairman:** It may be that it is not very useful to try to categorise the precise nature of the role, as question 2 invites, but does one describe what you envisage for it as a monitoring role, an advisory role or what?

**Baroness Ashton of Upholland:** I think it is monitoring and advisory, but in the question I saw you asked me the question, My Lord Chairman, quite rightly, as to whether we saw it as an enforcement role, which we do not, so I would say it certainly is monitoring and advisory only.

**Q136 Chairman:** It is certainly not enforcement.

**Baroness Ashton of Upholland:** No.

**Q137 Chairman:** How does the answer you gave to Lord Neill tie in with question 3, the concept of pre-legislative scrutiny? I certainly understood from your recent letter, when you addressed that (second page, bold type) that it is the Commission which is ultimately responsible for monitoring compliance with fundamental rights by EU institutions, and essentially you do not think it is a good idea to entrust that task to the Agency. Or have I misunderstood your response?

**Baroness Ashton of Upholland:** No, you have understood it completely.

**Q138 Chairman:** So no to pre-legislative scrutiny.

**Baroness Ashton of Upholland:** I was trying to identify, as I said to Lord Neill, that if you simply took it on the basis of volume and nothing else, it would be quite impossible for the Agency to do a pre-legislative scrutiny of all legislation. Having said that, I think there are

opportunities with particular pieces of legislation that are coming forward or particular areas where the Agency could and should play a role in helping the Commission to work out that the ----

**Q139 Chairman:** It would be a bespoke role, bespoke by the Commission, is that it?

**Baroness Ashton of Upholland:** It would be a bespoke role by how we design the Agency. We will come on to management structures, I know, my Lord Chairman, later, but there is, I think, a genuine question that this could be something that the Agency could take on, providing it is absolutely clear that we are not suggesting it be every piece of legislation, and, indeed, that it is narrowed in a way that makes it possible for the Agency to be used to best effect.

**Q140 Lord Lester of Herne Hill:** I wonder whether one might go a little further. Of course it cannot give comprehensive scrutiny – that would be impossible – but the disadvantage of the Commission doing the scrutiny is that it proposes the legislation in the first place. Therefore is there not a role, rather like the Joint Committee on Human Rights in our national system for government as an independent scrutineer? Provided it is bespoke, is it not very important that there be some role for this independent body, if they are to do any good at all, to be able to take some important pre-legislative issues and scrutinise them and publish the results of the scrutiny so that there is transparency for the citizens of Europe?

**Baroness Ashton of Upholland:** I agree with that. The only question I would put, Lord Lester, is that the Commission, like the Government here, looks to legal advice and support when examining the legislation it is putting forward, so I would not want to suggest – as I do not think you were anyway – that because they create the legislation they do not do that role properly, because I think they do – just as I hope you would accept the Government seeks to do that here. But I do accept there is a sort of similarity, potentially, in the work of the Joint



Committee on Human Rights, although as you, Lord Lester, will know yourself, the danger is always being overwhelmed with the amount of work that needs to be done. If we can identify properly a function that says, in areas where the Commission is considering legislation that is particularly relevant to the work of the Agency, that the Agency could look at and publish advice on this, I think we could probably find a useful role that might even make you, Lord Lester, warm slightly to the possibility of the Agency.

**Lord Lester of Herne Hill:** It would. It would make me much warmed!

**Q141 Lord Goodhart:** Where would the initiative for this quasi-scrutiny procedure come from? Do you envisage that the Commission would invite the Agency to comment on draft legislation or would the Agency have the power to sift through what the Commission is proposing to do and to decide which items of that it would like to have a look at, or is it a mixture of the two?

**Baroness Ashton of Upholland:** It could be either or neither, in the sense that one of the areas that we have yet to look at precisely is the question of to whom the Agency will be responsible in terms of its work plan. As you will know, Lord Goodhart, there is a question mark at the moment, because, from the Council's perspective, we think it is right and proper for the Agency to have a strong relationship with the Council and the Commission will have a different view potentially of how that ought to work, and the Agency itself may well, as it comes into being, wish to identify that properly. It seems to me, though, in developing its work programme, that it is a good example of where the kind of collaboration between the Agency and the Commission could produce a useful proposal to go through the Management Board of the Agency and to the Council which said – because the Commission often knows what legislation it is going to be dealing with for quite a long time ahead; particularly, for example, in my area where the Hague programme in a sense dictates what programme will look like – “For this year's programme, these are the five” – six, ten, whatever – “areas where

the Agency plans with the Commission to work on pre-legislative of that kind.” That would be my personal view of how it would work best because that would make most sense and everybody would see the very transparent way that had been worked through between the organisation itself and the Commission. So perhaps I would identify it as a process of negotiation.

**Q142 Chairman:** For these comparative studies that the Agency would be carrying out for the benefit of the various EU institutions, would they be looking essentially at ECHR rights or would they be steering clear of those and looking instead at the other rights that are in the Charter?

**Baroness Ashton of Upholland:** I would describe the Charter – and this is my word and nobody else’s – as a sort of backdrop that enables issues that are broader than perhaps we would see in the bases of human rights to be considered. The basis of calling it the Fundamental Rights Agency is to enable it to look at that broader spectrum. However, I think any Agency being set up will have to make decisions about its priorities, simply because it is not going to have huge amounts of resources – of that I can be fairly certain – and it will have to be quite clear about what is of most importance to it. This, in a sense, also goes back to its relationship to the Council of Europe, and making sure that there is not an overlap, which is something I think we are all concerned to address, so that the work they do is complementary to the Council and not in conflict or overlapping with it.

**Q143 Chairman:** We will be coming in a very short time to the possible overlap, but, just before that, question 4, as you know, raises the spectre of a possible problem about independence, given the provision of Article 5(1)(c) that the Agency’s Multiannual Framework will “be in line with the Union priorities as defined in the Commission’s strategic

objectives". Might that compromise the complete independence which Article 15 assures the Agency?

**Baroness Ashton of Upholland:** As you know, My Lord Chairman, at the present time we are still in great discussion about quite how it is going to work. The Commission's proposal at the moment is that there is a much clearer role for the Commission throughout the administrative processes to sort out the way in which the Agency would work. The position we hold and the Council's position, just as I was indicating to Lord Goodhart, is that we have an annual plan and the work plan is agreed by the Council of Ministers. That, in our view, does two things. One is that it is absolutely clear that the Agency has a strong relationship to the Council which is separate to that of the Commission, and, secondly, in a way it binds the Council in to the work of the Agency, because, after all, if the Council approves the work of the Agency then in a sense it is accepting that the Agency will be looking at particular areas. I think it is also quite important that the Council sees the Agency as a resource that goes beyond simply the relationship it has with the Commission, important though that would be, and that I think would be a more appropriate way of ensuring the Agency has a life that is valuable rather than just – as I think is feared amongst members of your Committee, my Lord Chairman, and certainly outside – as yet another bit of bureaucracy being set up somewhere in the world.

**Q144 Lord Lester of Herne Hill:** On this word "independence" which we have in the context of the Equality Bill and our own new Commission – and you and I have had to puzzle over this in the course of the passage of the Bill – presumably we would agree that, whatever independence means, it would mean no unnecessary interference either by the Council or the Commission with the judgments taken by the Agency (merit appointment and all the rest of it as well) in order to ensure practical independence whatever one feels about formal independence. Would that be right?

**Baroness Ashton of Upholland:** I think that is right. Certainly, as you know, Lord Lester, we did puzzle over this in terms of the Commission and reached I think a very happy solution to it. But I think we have to be clear too that the ability of the Agency to look at issues has to be part of a plan that has been approved. Beyond that, I think that if the Council, as we would wish, has agreed the areas where the Agency is going to look at and agreed the way in which it is going to take this forward, it is then for the Council to recognise that it must accept that the Agency will reach conclusions and those conclusions will be in the public domain and will be coming back to the Council. I hope we will have the right kind of independence, in the sense that the Agency is working directly on behalf of the Council but able, within that remit, to reach, as you rightly indicate, independent decisions.

**Q145 Lord Clinton-Davis:** If there is a dichotomy between the Commission and the FRA as far as the strategic objections are concerned, how can that be resolved?

**Baroness Ashton of Upholland:** In what sense, Lord Clinton-Davis?

**Q146 Lord Clinton-Davis:** The FRA and the Commission find themselves facing a situation where there is no possibility of agreement.

**Baroness Ashton of Upholland:** Again, that goes back as to whom the Agency is ultimately responsible. Under the proposals that we support, the Agency will be responsible to the Council, so the Council will be working with the Agency to determine its work programme. Of course the Commission is a huge part of how that would be put into effect, but in a sense the Council would be the arbiter of saying, "This is the work programme and this is what will be done." It would be not surprising that the Agency, in reaching conclusions, may not make everybody on the Council, never mind the Commission, entirely happy with the conclusions that are reached – that may be true in legislation, it may be true in other areas as well – but, nonetheless, if we are very clear about the responsibilities of the Agency and we are very

clear about its role and its independence, I think we can avoid some of those dilemmas straight away.

**Q147 Chairman:** As an introduction to the next group of questions about any possible overlap with the Council of Europe, if I could just have drawn to your attention – and I gather it was sent to your office on Monday, but hiccups occur – this draft memorandum of understanding. It will not take you a moment to assimilate. It is headed Draft Memorandum of Understanding on the Strengthening of Co-operation between the Council of Europe and the European Union. If you go to page 5, the last page, under the heading 3, Human Rights and Fundamental Freedoms of Democracy and the Rule of Law, it says, “The Council of Europe and the European Union will continue to exchange information, examine policies and initiatives ...” etc “in particular in the fields of human rights, fundamental freedoms ...” and then it says, “In the field of democracy and governance collaboration should be enhanced through .... (d) once established” – and this is its reference to the Agency with which we are principally concerned – “the future of the European Agency of Fundamental Rights will strengthen the European Union’s efforts to ensure respect for fundamental rights. The Agency will constitute an opportunity to further increase co-operation and synergy with the Council of Europe and its various organs and contribute to greater coherence and enhanced complementarity in the field of human rights ...” etc. I must say I start worrying when people talk about “enhanced complementarity” but put that aside. This synergy, where are we going to find it? Who is going to secure it and how?

**Baroness Ashton of Upholland:** Having looked at it, I think they are saying that if you take the role of the Agency and you take the role of the Council of Europe then being able to bring together the way in which they are seeking to address questions which are similar may provide an opportunity to deal more effectively with issues across the European Union. I have not, as you have, my Lord Chairman, studied this – and I tend to agree about enhanced

complementarity: it is a great expression – but I think within this they are seeking to try to begin what is actually going to be quite a long conversation with the Council of Europe about precisely how they work together. I take their use of the word “synergy” to recognise that they have to make sure you do not have the Council of Europe and the Agency working in a sense in conflict with each other, or indeed attempting to do the same job and attempting to try to find ways of working on the same issues. The synergy for me is absolutely working closer together. That has implications for the management structure, implications for the collaboration and co-operation, and implications for the work programme as well.

**Q148 Lord Lester of Herne Hill:** I think the awful phrase “enhanced complementarity” is now, like “stakeholders”, a jargon term which is accepted unfortunately. We now have two European Parliaments: a parliament which has to go back and forth by plane and train between two European cities because different countries want it; we have two European courts; we have now two European human rights systems needing enhanced complementarity. It is not really so much a question as a protest, but I do want to say, looking at this draft memorandum, that it is patching over something which is fundamentally very hard to achieve, which is the avoidance of wasteful duplication and added value. I have just come back from Azerbaijan, which is a member of the Council of Europe, thinking to myself: “How is this going to help human rights in Azerbaijan who are outside the European Union? Only if the Council of Europe mimics what is happening within the European Union and applies it in some way.” This is going to require lots of resources and you have said there are not going to be many resources, and therefore I wonder, doing the best you can, how you can be optimistic that this is going to add real value as between these two European systems, instead of rationalising them, slimming them down and making the thing more efficient overall. Because, looking at this, I find I do not think it is going to work very well.

**Baroness Ashton of Upholland:** I fear, Lord Lester, you have cooled down again in your warmth for this Agency, which I thought I had achieved something with. Obviously you have had the benefit of looking at the document and I have not, but I would refer you to an answer I gave some time ago, which is that the way I view the Agency is that it has to have a very specific and clear brief around, for example, the legislative programme of the Commission, and, for example too, around the provision of information across the European Union. Those could be done in a way that would be entirely complementary to the work of the Council of Europe. I do not think I would subscribe at all – which I do not interpret (d) to mean, although the lawyers will crawl all over it – to trying to develop two organisations doing the same tasks. There are opportunities within the work of the Agency and the work of the Council of Europe for both organisations to benefit from the knowledge and expertise of the other – certainly already from the Council of Europe, and over time from the Agency. It is not going to be a hugely resourced organisation, of that I am sure – I do not know what the figure will be, but it will not be by any means huge – but there are particular functions that are not currently being undertaken that could be undertaken which, done properly, would not get in the way of the work of the Council of Europe but could be additional to it. I think that is the premise on which the Government is willing to support the proposition that is coming out around the Agency, but it is on that premise.

**Q149 Lord Goodhart:** This is following up from Lord Lester's question to some extent. I think when the Charter was first being introduced what was seen as the main risk of conflict was between decisions of the ECJ and decisions of the European Court of Human Rights. Now the Agency is not a body which enforces or which will make the law. Is there any comparable body, therefore, in the Council of Europe with which it might find itself coming into conflict on human rights?

**Baroness Ashton of Upholland:** I suspect I do not have the proper expertise to give you a proper answer to that question. Certainly in all the discussions that I have had around the difficulties for the Fundamental Rights Agency, certainly within the Presidency, that was not an issue that was ever raised. There were many difficulties raised, but that was not one of them, so I do not believe there is a comparable question for the Agency. I think of particular concern around conflict has always been around the Council of Europe and the potential for there to be overlap and duplication.

**Q150 Lord Lester of Herne Hill:** We do have the comments from the President of the Parliamentary Assembly of the Council of Europe essentially being extremely cautious, and I would have thought the European Human Rights Commissioner, the new one, Thomas Hammarberg, will be very concerned that there should not be undermining of his role by the Agency. On Lord Goodhart's question as to whether there is someone on the Council of Europe, I suppose he would be the person most likely to be involved.

**Baroness Ashton of Upholland:** Indeed. I took Lord Goodhart's question to be institutional rather than individual.

**Q151 Lord Lester of Herne Hill:** He is an institution.

**Baroness Ashton of Upholland:** Yes, I completely see that. However, in my mind he was an individual at that point. I certainly think it would be deeply damaging if the Agency at any point were in that position of undermining the Commissioner's role, however, that is exactly the reason why these discussions about ensuring that the relationship is done properly are so crucial to the success of the Agency in the future.

**Q152 Chairman:** We did hear evidence at an earlier session from Mr Gil-Robles, who is the present Commissioner, coming to the end of office shortly and no doubt to be replaced by the



gentleman to whom Lord Lester referred, and he gave a cautious welcome to this proposal but was very concerned to stress the need that there should not be any duplication and that nothing should be done to question the pre-eminence of the Council of Europe in the entire field of human rights. We have people in Strasbourg as well as Brussels. What do our people there think about this proposal? Do they feel concerned, sensitive to the fears of overlap, duplication, weakening of the Strasbourg pre-eminence in the human rights field?

**Baroness Ashton of Upholland:** My Lord Chairman, could you define our people in this context?

**Q153 Chairman:** Members of the Parliament there, people on the Council of Europe and the Parliament there.

**Baroness Ashton of Upholland:** I think those involved in the Council of Europe are quite rightly concerned about these issues. In terms of the Parliament, the main body, as you know, my Lord Chairman, which has dealt with this has been the LIBE Committee, where we have quite a wide spectrum of views. Kinga Gál who is the *rapporteur* on this issue has done a rather splendid job of trying to bring it together, and to try to get the Committee to have a proposal that will find support within the Parliament that avoids two extremes. One is creating something that would be in direct conflict with the Council of Europe but would be wide-ranging and would find no support in Member States; and on the other hand something that would be considered to be so pointless that it would be rejected by the Council as being a waste of money. I know Kinga – in that I have discussed this with her on several occasions – has sought to achieve that and I think has managed it with some success. I think the LIBE Committee under Jean-Marie Cavada's chairmanship has also taken this quite seriously and recognises that there is still quite a lot of work to do, because, certainly the last time I appeared before the Committee with Commissioner Frattini, the question of how the Council would operate was perhaps the most substantial issue that the LIBE Committee was facing.

**Q154 Chairman:** I also was concerned more with those in the Council of Europe than those in the European Parliament.

**Baroness Ashton of Upholland:** Indeed.

**Q155 Chairman:** Have we addressed every aspect of what is encompassed in question 6? I am not sure we have crystallised our thinking, in terms of how on a practical level can there be this co-operation, co-ordination, to ensure that there is not this overlap and that we get complementarity/synergy rather than, on the contrary, duplication and weakening.

**Baroness Ashton of Upholland:** I think there are two or three areas where we have the potential to resolve this. First of all, there is the question of representation on the Management Board by the Council of Europe and what role that will be and whether they will have what one might call voting rights in the context of the Agency. That is the first way in which we can make sure there is a direct link. I think, secondly, there needs to be a clear understanding in the Council of Ministers and also in the Commission of the differences in the roles and where they complement each other and what we are seeking to do. Thirdly, in the work plan and work programme of the Agency I would expect there to have been dialogue with the Council – which would become obvious and apparent when the work plan is put before the Council of Ministers if that is where we end up – such that in a sense the Council is able to support the work plan and the Council of Ministers is clear that that is a part and parcel of what is happening. If we get that kind of clarity of programme, if we get clarity about the relationship between the Council of Europe and the Agency and we get the right management structure, including the Council of Europe representation, we should, with a fair wind, my Lord Chairman, be able to resolve any issues that arise – which there may be as operational questions come forward – one way or other, through one of those three different routes.

**Q156 Lord Lester of Herne Hill:** Do you think the European Parliament should have any role at all in reviewing the composition, for example, of the Management Board without, as it were, selecting or anything, in order to give some kind of broader legitimacy to the operation?

**Baroness Ashton of Upholland:** As you know, there was a big discussion quite early on in the deliberations about the relationship between the European Parliament and the Agency about whether, indeed, the Agency should be established under a different article of the Treaty establishing the European Community. That was to move it away from Article 308, where it currently is, to Article 13. You may also remember, Lord Lester – I think I may have raised this at the Committee previously on this issue – that there was quite a lot of desire on behalf of the Parliament to see themselves in a co-decision-making relationship upon the Agency, but that under Article 13 we could not have set up the Agency that we have currently planned to do. So there is an agreement between the Commission and the Parliament through the LIBE Committee of giving them a consultative role that is addressed by the appearance of the President of the time, in terms of the European Presidency, and also the role of Commissioner Frattini. Hence, when I went to the Committee, it was with the Commissioner, and, although it was not a formal trilogue, it was nonetheless an opportunity to talk in greater detail than you would expect on a particular subject. From the Parliament's point of view, there will be many members of the Parliament who feel that this should be pushed further and that they should have a stronger role. We are quite clear, though, that the competence for setting up this rests within Article 308 and therefore the role of the Parliament should be consultative only.

**Q157 Lord Neill of Bladen:** I think part of your answer included the point that there would be somebody on the Management Board from the Council of Europe. As a matter of arithmetic, it is one in 30, is it not? You have every Member State, you have an independent person for the Parliament, one for the Council of Europe and two for the Commission, which

is a total of roughly 30. One voice is going to be in a pretty weak position from which to argue the merits or whatever.

**Baroness Ashton of Upholland:** I think that would be right if we saw this as just being another member of the Management Board. The role could, indeed, be designed to see the Council of Europe role in a different light, and I would envisage that one of the areas for discussion that needs to take place is in terms of the relationship of that one individual to the representation on the board more generally. For example, Lord Neill – and I have no basis to say this other than it is an example from my point of view – it could be that the Council of Europe representative has a particular consultative role on the Management Board, therefore they would, in a sense, be able to speak on behalf of the entire Council of Europe and their views would be weighted accordingly – not in voting rights terms, necessarily, but weighted accordingly. That does happen, as you would know Lord Neill, on other organisations, where particular bodies may be represented numerically by small numbers but nonetheless what they say really does carry more substantial weight. If we get the relationship right, that sort of relationship would for me resolve the problem of the numbers on the Management Board, but I think there is quite a long way to go – and I am certainly not the one negotiating this – to determine how best to make sure that that happens appropriately.

**Q158 Chairman:** I think you would accept that involves further work but I do not think we find that in Article 11 – unless I have missed something – a special voice or role, and you have the same problem with the European Parliament independent representative.

**Baroness Ashton of Upholland:** Indeed. The reason it is not there is because that is not the position at the moment, but, because we are quite clear that one of the key remaining questions for the Agency that will have to be resolved, is its relationship to the Council of Europe, it is an opportunity perhaps to look at how the individual who serves on the

Management Board might have what I would describe as an enhanced role. That could also be pertinent to the Parliament but it is certainly true for the Council of Europe.

**Q159 Chairman:** In a way, it is the point just covered. Under Article 11, one vote for the representative of the Council of Europe and one vote for the independent person appointed by the European Parliament, you think this could be a strong vote or a more potent vote than the rest, but I have two questions. One, you could make it more potent by increasing the number of representatives or you possibly could write into the provisions something to guarantee that “particular attention must be paid to” or something of that character. Is that something that could come out in negotiation?

**Baroness Ashton of Upholland:** It might come out in negotiations but I suppose I hesitate about the word “voting”. My impression would be that if we get this right it is the Management Board which is overseeing a programme that has been determined by the Council and that the need to vote on anything may be reduced if not completely taken away. I know that in setting up bodies it is quite important for people to know they do have voting rights. I would hesitate to increase the numbers too, simply because the size is already in my view quite large and I am not sure that increasing the numbers would enhance the opportunity. It really is about how does that individual represent the Council of Europe and how does the Management Board view the weight of that representation. That, for me, is much more important than whether it equals three votes, four votes, or it is five people. I think that is yet to be determined. In terms of the Council of Europe’s approach to this, I would imagine that they are considering this simply because, if I have thought of it, I am sure they are way ahead of where I am on this.

**Q160 Chairman:** Is this a convenient moment to discuss one matter that you raise in your recent letter which is that there is a French proposal currently under examination for an

alternative management structure for the Agency. You say that it is not yet fully analysed, but “... a dual structure based on a Management Board and a Scientific Committee might prove a better means of ensuring the independence of the Agency from the Commission, the Agency’s accountability to the Council and effective advice and expertise on human rights issues.” It is the last matter you deal with in your helpful recent letter. Do we know enough about this French proposal to know whether it may involve a very substantial alteration to the proposal under Article 11 to the existing Management Board?

**Baroness Ashton of Upholland:** I do not know enough about the proposal yet. Certainly it is an intent, I think, from French colleagues to try to look at alternative possibilities. I am not sure that I have seen yet anything which suggests to me that it has gained substantial support, nor indeed that it will perhaps resolve the issues that are currently on the table. In a way, my Lord Chairman, I think we have to go back to first principles and say that we have to determine precisely what the Agency is going to do and then work out the management structure that flows from that, rather than the other way round, and I think we still have some way to go, not least, as I have indicated, in discussions about its relationship to the Commission, to institutions, to a work programme and to the functional role it will perform, and then perhaps to look at how best that is put forward in the management structure. Certainly Member States need to play a substantial role in that, and, as we have already indicated, there are also other parties, such as the Council and Parliament, who have to have the right kind of voice, and it also may be that we need a management structure that over time can evolve as the Agency beds down and people perhaps become more able to deal with it in different ways. We may find its relationship with the Council, for example, changes over time.

**Q161 Lord Neill of Bladen:** Minister, perhaps you do not really like us to be talking in terms of voting, because it suggests a clash around the table as to exactly how you see this

operating. But, so far as this representative of the Council of Europe being given an enhanced role, hand-written at the moment, that representative is given a reduced role if you look at paragraph 6 of Article 11. You probably know this: that representative can only vote on points (a) and (b).

**Baroness Ashton of Upholland:** That is right, and, as I hope you appreciate, Lord Neill, that is something on which we have views and which is under discussion at the current time. Our view is that they need to have voting rights. Within the context that I have set, I think what is really critical is the weight given to the individual and the responsibilities they hold rather than how many times they end up pressing a button or putting their hand in the air. In a sense I think it would be a pity if that were the way the Management Board were to run – on any organisation, I hasten to add, not just this.

**Q162 Lord Lester of Herne Hill:** Please do not think that I am hot or cold in this area, I am just puzzled. This body is going to have very limited resources and a very clearly defined role, yet it is going to have a very large Management Board and, on the French proposal, in addition, a Scientific Committee (whatever that means).

**Baroness Ashton of Upholland:** Indeed.

**Q163 Lord Lester of Herne Hill:** So the whole thing is going to be hugely top-heavy for performing an important but very limited function. Is there any way in which the Government could come up with something a bit leaner and slimmer and more efficient and less bureaucratic?

**Baroness Ashton of Upholland:** I am always in favour, Lord Lester, of having something that is leaner and less bureaucratic. The reality, however, is that if you set up a new institution you have to recognise, as I am sure you do, that you need a management board that addresses the concerns of the parties setting up the institution. It is very difficult to envisage

at this stage creating a management board perhaps with fewer representatives because I am not convinced that people have yet, as it is brand new, the confidence to do that. The point I was trying to allude to in my previous response that that will change, is that I do believe as organisations settle down and become more comfortable it is possible to address the way in which the management board operates – and that is true in any organisation in any country. That, I think, will be something that the Council and the Commission and the Agency itself will need to consider in the future. At the present time, we recognise that when you are trying to get an agency set up between 25 Member States and the Commission and the Council of Europe and the independent advisor, there are lots of interests that need to be addressed, and that I think leads us to the point where the kind of large management board which you would not normally expect to see needs to happen if we are going to get the Agency into existence. But I absolutely take the point, and my hope would be that if the Agency is successful and if the Management Board needs to be smaller that there will be ways found to do that. It really comes back again though to the function of the Management Board. If this is going to be a group of 30 people who spend their time voting on different issues, then that is one type of management board where it would be very difficult to decrease the numbers because people want their voting rights. If, however, it becomes a management board where strategically it takes the work programme and makes sure that the work that is going on fits in with that and has the kind of debate and discussion that some of the best boards in organisations currently have, then it could well be smaller. But I think we are not at that point yet and I think we just have to accept that the Management Board in a sense has to reflect the needs of the partner organisations trying to set it up.

**Q164 Lord Lester of Herne Hill:** One could think of the body that Lord Goodhart and I belong to, which is the Governing Council of Justice. One could imagine that there would be a council, with all the interest groups meeting four times a year maximum, who would



delegate to a management board the meetings every month perhaps and be accountable to the broader structure. But the idea of a management board of 30 with a Scientific Committee (whatever that means) under it as well does not seem to me very sensible. Is there any scope for any change in this structure at this stage or do we have to wait and hope it develops in the course of time?

**Baroness Ashton of Upholland:** We could spend some considerable time arguing about the structure of the Management Board. I think the truth is that in the limited time – if this is going to come into fruition under the Austrian Presidency, which is their ambition – there are issues that we would see as having a greater chance of success; in terms of, for example, the relationship with the Council of Europe. So, realistically, if I were to ask my officials, led by Edward Adams here, to go and do that, I think they would probably slightly baulk at the idea that this was the most fundamental thing on their agenda. I think, however, Lord Lester, you raise an important point about the opportunity that the Management Board has to find ways itself of managing this. I am very keen, once we have got this established and we have sorted out its remit, we have sorted out its work programme, we have sorted out its relationships, we ought to let it get on with it, and, if it chooses to set up within its Management Board a sub-committee or a different way of doing a particular piece of work, I think that is for it to do – rather like we talked about with the Commission for Equality and Human Rights – not for nation states to dictate.

**Q165 Chairman:** The Agency, as I understand it, is intended to become operational on 1 January next year. If I understand what you are saying, for that to be achieved, the structures would have to become crystallised during the Austrian Presidency; that is, by the end of June. Is that what you are saying?

**Baroness Ashton of Upholland:** The position is exactly that. The Austrians are very, very keen for this to be something that is dealt with under their Presidency, so they want to get to

political agreement on it all by the end of their Presidency in order for it to come into being on 1 January next year – which is the plan at the moment. Therefore we are in a sense constrained because of that laudable ambition: it is a proposal that has been on the table for some considerable time. The focus I think for us is to make sure that we have the right remit, and in a sense I would let it worry itself about how to make sure its management structure works.

**Q166 Chairman:** Part of the Austrian enthusiasm may flow from the fact that it is to be established in Vienna.

**Baroness Ashton of Upholland:** Of course. I take nothing away from the Austrian Presidency for that. That is an ambition they have had for some considerable time. No time like being under your Presidency to establish it. That is completely reasonable.

**Q167 Chairman:** As we turn the page I am conscious that we have thus far addressed specifically the first seven questions. You have obviously covered some of the ground encompassed in the later series. Could I ask: Are you under any appalling time constraints tonight? You do not have any plane to catch, as I think you had on one occasion.

**Baroness Ashton of Upholland:** I did, though I seem to recall I was here for two and a half hours on that particular occasion. My Lord Chairman, I am in your hands entirely.

**Q168 Chairman:** That is very helpful. Could we turn to a group of questions which concerns the relationship between the Charter and the ECHR Convention. How does Government see this? Do Government see the main point of reference for the Agency as the Charter with all the wider rights that are encompassed in that or the narrower convention?

**Baroness Ashton of Upholland:** I think it is the Charter and I described it earlier as a backdrop because a lot of what is in the Charter is incorporated elsewhere, but the reason that

we describe the Fundamental Human Rights Agency in the way we do is because we do see the Charter as being that. Having said that, as I have already indicated it will be important for the Agency to consider the areas that it wants to cover more generally in its work and specifically in its annual work plan.

**Q169 Chairman:** Do all Member States have the enthusiasm for the wider rights encompassed in the Charter?

**Baroness Ashton of Upholland:** There is a difference of view between Member States. We have not, of course, had any serious discussion of this on the Council yet, so I think some of that will evolve from the politicians rather than from the officials, who of course are working on the technicalities at the present time, and there are a wide variety of views about the Agency itself and the role and function it could perform. I would expect nothing less with 25 nation states taking an interest. But I think if we are very straightforward about it, then the obvious approach in my view is to have the Charter as the backdrop, as I have described it, and then to enable the Agency to put forward to Member States the work that it seeks to do and the appropriate weighting it would give to particular aspects of the Charter.

**Q170 Chairman:** The fact that the Charter includes those rights like freedom of the arts and sciences, the freedom to conduct a business, the rights of the elderly, right of access to documents and a host of non-ECHR rights, does not give any cause for concern to the Government here?

**Baroness Ashton of Upholland:** It does not give cause for concern in the sense that the basis on which the Charter is founded does not give us cause for concern. It may well be that for the Agency it will look across these different rights and it will decide that it wishes to focus on particular rights which are more akin to or more relevant in terms of human rights. On the other hand it may decide that actually it would like to do something slightly different and look

at, for instance, the example that you gave, Chairman, how that works across the whole of the European Union. It will be for it to come forward with propositions and for the Council to see the relevance of them and approve the work plan, if that proposal is the one that is accepted.

**Q171 Lord Lester of Herne Hill:** The Charter itself, as I understand it, is gathering together the economic, social, political and civil treaties by which all the Member States are bound anyway, and therefore it does not have to be entirely court-based or civil and political rights-based in its view, any more than our own Joint Committee on Human Rights can look at any of those as it thinks fit. What about those rights that are economic rights of the European Union, freedom of movement and so on? Is it not sensible at least to exclude those from the scope of its work because those are mainstream EU rights that are different in character from the human rights we are talking about, or does one leave the whole thing entirely at large for them to decide upon as they think fit, because that goes beyond the Charter, does it not? Things like freedom of movement and freedom for the right of establishment and so on, are not human rights in the sense they are talking about. They are fundamental rights springing originally from the Treaty of Rome. Am I making myself clear? I am not sure I am.

**Baroness Ashton of Upholland:** Lord Lester, you are always clear, but what I was trying to argue was that we see the Charter as being the backdrop against which the Agency is established, that if one looks across the incorporation of different “rights” there will be some issues where it could be argued that there is a fundamental human rights question where the Agency may well wish to focus attention because these are areas where, either through its pre-legislative scrutiny kind of role these are areas of deep importance, or in offering advice and support, or indeed perhaps during the kind of information gathering I have described, it enables you to contextualise across the European Union and to compare. Those will be higher on the agenda than others. It will be for the Agency though, in this sense of being

independent, to look across and say, “We think these are particularly important and we must put this as part of our work programme”, and for the Council to say in a sense yes or no to that. I am conscious that, though I want the Agency to be very clear about its function, we have to give it some flexibility in looking at what it considers to be relevant, and it may be that areas that perhaps neither you, Lord Lester, nor I would consider to be of legal importance may be of great importance in particular states and of great importance if one is looking across the whole of the European Union, or indeed trying to support the Commission in its legislative scrutiny.

**Q172 Chairman:** It would help me if somebody would bring to life the purpose of all this by giving us a paradigm example of just what this Agency would in fact go out and do. What particular inquiry would it go and conduct, and would it inquire across the entirety of the states of the Union and compare and contrast and then come up with something? How does it actually work? You perhaps have a very clear notion of how it works but for my part I confess I do not.

**Baroness Ashton of Upholland:** No, and, Chairman, you get to the nub and the heart of the problem in the sense that I can envisage areas where perhaps it would be interesting to have a European perspective on particular aspects of human rights that may or may not be relevant and appropriate for the other 24 nation states or indeed be a priority for the Agency. One of the deep questions that is currently being examined in the working group process is trying to establish within the broad remit, where I think there is quite a lot of agreement that I have described already about monitoring and so on, precisely what that might look like and what that role might be. I think that what we have to see next is the working groups working towards a position where the Council of Ministers can make some kind of initial decision that it is the right direction that can be translated into what that means in terms of the way in which the organisation needs to be set up, who needs to be employed by it and so on, which is

also part of this whole debate, of course, and then how the Management Board would work in order to deliver that. However, we are not there yet so, although I am a supporter of what the Agency potentially can do and I am pretty clear about the kinds of areas it should look at in terms of, as I have already described, monitoring and pre-legislative scrutiny and so on, I am very mindful that we are not yet at a position (though we hope to be soon) to be able to be as crystal clear as we possibly can, and again that rather goes back to what its relationship with the Council of Europe is, where can it add value in the whole process, how can it offer things to Member States that will be of value, what should it be offering the Commission? I am afraid you have absolutely hit the nail on the head: it is quite difficult to envisage at this stage quite where it might end up.

**Q173 Lord Lester of Herne Hill:** But it could, for example, say there is too much secrecy and lack of access to official information across European institutions, or there is inadequate protection of personal privacy in data processing across Europe. Taking what we would call data protection or freedom of information, they could say that those issues matter very much and they want to monitor those in close collaboration with the Council of Europe, could they not? That sort of link would do, although governments might not like it very much.

**Baroness Ashton of Upholland:** I think you have again hit the nail on the head. I think in looking at that they would have to justify why that was their priority, bearing in mind, of course, all the work that is currently going on in data protection within the European Union and bearing in mind that they may find Member States are not particularly keen that that be a real priority in the first year of its operation. I declare my interest, of course, as the Minister responsible for both freedom of information and data protection, and I knew, Lord Lester, that that might well be why you raised it. If they were able to put up a good case as to why that was something they should focus on and it was relevant in the context of the Charter, relevant in the context of the work programme and hopefully relevant in the context of the

Commission then perhaps they should look at it, but in a sense, because the Commission is looking at data protection in any event, if we had the Agency it might well in the future have already given the benefit of its knowledge and advice to the Commission in looking at that legislation.

**Q174 Chairman:** Can we move to the geographical scope of the proposed Agency? You touch on this again, helpfully, in the recent letter on the second page, and you express the Government's concern about an extension of the Agency's geographical scope with reference to efficiency and effectiveness, and you have already pointed out that you do not want to over-burden it by widening its thematic mandate, and that is a question, I think, of the second pillar. When it comes to candidate countries, as I understood your letter, you say that the Agency should play a role in assisting candidate countries to prepare for membership of the EU but, as I understand it, not otherwise. Is that how it works?

**Baroness Ashton of Upholland:** Indeed, we think that is right. It is Community institutions and candidate countries only.

**Q175 Chairman:** I just wondered how that squared with the existing draft of Article 3(4), "Without prejudice to Article 27, the Agency shall, at the request of the Commission, provide information and analysis on fundamental rights issues identified in the request as regards third countries with which the Community has concluded association agreements or agreements containing provisions in respect of human rights, or has opened or is planning to open negotiations for such agreements ...". Does that square with that or does Article 3(4) concern you as to overload?

**Baroness Ashton of Upholland:** We are very clear, Chairman, that we think the role of the Agency should be within Community institutions and candidate countries only. That is partly a recognition of the role of the Council of Europe and partly in recognition that there is a limit

to what this Agency could and should do, and we do not believe that it will find huge favour amongst the Council to support a role that goes beyond that. Certainly in terms of candidate countries, we are always mindful that in preparing to join the European Union there is support that could be given to candidate countries to get them ready. I mention it particularly because in the world of justice and home affairs we are looking at what we might be able to do, both in a Government sense and a European Union sense, to help countries be ready around issues that can be fundamental to their ability to participate within the European Union, so there is an opportunity for the Agency perhaps to offer assistance there that would be very much welcomed by those candidate countries, but we do not see a remit beyond that.

**Q176 Lord Goodhart:** Since the role of the Charter is supposed to be limited to the EU institutions or the actions of Member States in implementing EU legislation, it seems that there would be no scope therefore for looking at general human rights issues in countries which are not members of the EU.

**Baroness Ashton of Upholland:** That is true, but that is why we want to be quite specific about whether there is a function that it could perform which we would build into the work that the Agency was doing that was of benefit to candidate countries.

**Q177 Lord Goodhart:** I can see there would be a special position of candidate countries that are going to have to join the EU institutions and would need advice on preparatory work. It does seem pretty obvious that there ought not to be a scope for anything beyond candidate countries.

**Baroness Ashton of Upholland:** I agree, Lord Goodhart, completely with that.



**Q178 Chairman:** Does the existing Monitoring Centre for Racism and Xenophobia which, after all, is what the new Agency is going to absorb, itself play any part in scrutinising and monitoring the situation in terms of racism and xenophobia in candidate countries?

**Baroness Ashton of Upholland:** It does not, as I understand it, at the present time.

**Q179 Chairman:** And you would not expect the Agency to do other than follow that same pattern?

**Baroness Ashton of Upholland:** What we are proposing is that there could be a valuable role for the Agency in helping those candidate countries, as Lord Goodhart said, as they move towards becoming members of the European Union, to deal with issues of concern that they may have or in making sure that they, if you like, fit into the European Union. It is very much a supportive role that I think would be worth building into the work of the Agency which is different from racism and xenophobia at the moment.

**Q180 Chairman:** But that and no more?

**Baroness Ashton of Upholland:** That and no more.

**Q181 Lord Lester of Herne Hill:** There is a body called the ECRI body in the Council of Europe. That does monitor racism and xenophobia throughout the candidate countries.

**Baroness Ashton of Upholland:** Indeed, and that is why we want to make sure this does not overlap with what that is doing. Again, we are back to that fundamental relationship between the organisations and that is already covered appropriately within the Council and therefore it should be left in that way.

**Q182 Chairman:** Article 27 provides that “The Agency shall be open to the participation of those countries which have concluded an association agreement with the Community and

have been identified ... as candidate countries ... where the relevant Association Council decides on such participation”, but as I understand it the Government would not support that.

**Baroness Ashton of Upholland:** The Government, as I say, is very clear, and again this is partly why all these negotiations are under way, that we want a very clear, restricted relationship that goes outside of the European Union institutions, which we think is appropriate for candidate countries for reasons I think the committee would understand, but absolutely no further than that. I think it would be very difficult to imagine how the Agency could conceivably do more and I think it would bring it straight into conflict with the Council of Europe, which would be a waste of resource, if nothing else.

**Q183 Chairman:** Do you understand that to be basically the thinking of other Member States as matters now stand?

**Baroness Ashton of Upholland:** Certainly there will be other Member States which would agree with that. There are possibly other Member States which would take a different view. We have not yet had the political conversation at the Council of Ministers level. When we had the Presidency I did talk about the Fundamental Rights Agency to a number of other states but, of course, as you know, Chairman, it was not the Presidency priority of the UK, so that limited for me the way in which I approached it.

**Q184 Chairman:** I follow. Can we then move to the final chapter, which is on the Gender Equality Institute? As we address it can we perhaps remind ourselves that a number of Member States are bringing the various strands of fundamental rights together and envisaging their protection by a central body, and indeed, as I understand it, our own proposal here is for a single body to consolidate the EOC, the CRE and the Disability Rights Commission. On the face of it, it might be thought it would be counter-intuitive to be at one and the same time

bringing different agencies into being to deal with different strands of fundamental rights.

Why do you think the decision has been taken to bring them separately into being?

**Baroness Ashton of Upholland:** I support the decision to bring them separately into being at this stage but I never rule out the opportunity that might be available in the future to bring things together. If you contrast it with what has happened in terms of our new Commission here, we have a number of bodies with varying track records in terms of length of time and to a degree varying responsibilities who now need to come together with a very clear work programme and a very clear legal base whereby none of them loses anything in terms of the capacity of the work they were doing before in terms of the law. As I see it, what we have with the Gender Institute is a body that will have a very clear remit to look at a particular issue right across the European Union. It is formed under Article 13(2) so it is a co-decision making legal base in any event, and what we have on the other hand is a body that is inevitably going to take some time to find its feet but is seeking to do something that is of a different order. The Gender Institute will be focusing, I would imagine, for example, on issues of pay, issues of child care, issues that affect the relationships of gender in economic, social and other terms in relation to the European Union. I think that is a very clear-cut remit and the legal base under which it is set up is very clear too, that Parliament has a very particular role for its work, and I think it would be a mistake at this stage to say that, on top of trying to set up this Agency, on top of trying to get it to think strategically across the European Union (and to a degree in the candidate countries) about what it can offer against the backdrop of the Charter, we will add in something that has a completely different legal base and in a sense a very clear piece of work to do and open it out for the future. However, I think we will be doing neither organisation any favours and probably lose momentum, certainly on the gender issues at this point, because there is a potential – I say no more than

that – for us not to take those issues forward with the speed and momentum that we can get both from the co-decision making process and also because they are much clearer.

**Q185 Lord Clinton-Davis:** Is it not much more difficult though to adopt the policy which you outline after the organisation has been established? Is there not then a great temptation to justify how valuable that organisation is?

**Baroness Ashton of Upholland:** Of course, and I would expect organisations to justify their own value but, exactly as we did with the new Commission on Equality and Human Rights within this country, we had a long process of negotiation between the different organisations that sought to demonstrate how important it was to bring them together and the value that it would offer not to the organisations but to the people they are seeking to serve. If it becomes clear that the Gender Institute and the Fundamental Rights Agency ought to be in the same place it will be on the basis that they will be serving the citizens of Europe more effectively by doing that, and that, they will have to accept, is more important in a sense than whether the organisations survive independently.

**Q186 Lord Lester of Herne Hill:** Minister, I do not think it is reasonable to ask a minister to be consistent; that is probably demanding more than is necessary for good administration, but I must ask you this. If you look at your letter, you say that merging the European Institute for Gender Equality with the Fundamental Rights Agency would marginalise gender equality issues within the wider context of fundamental rights and that establishing two separate but co-operating agencies would raise the profile of these important topics. Is that not exactly the argument that the Government rightly rejected in this country when special interest groups pleaded that we should have still an EOC or a CRE and so on, and is it not rather strange to single out gender as deserving of special separate institutional recognition as distinct from race or all of the other very important strands? The charge of inconsistency could be levelled

at that, and you will no doubt give me a reason for saying it is not at all inconsistent because what is happening in Europe is different from what is happening in this country. I do suggest to you, however, that it makes no sense to be creating a new Gender Institute when sex equality and sex discrimination are part of human rights generally, as are race equality, for example, and they should all be within the same Fundamental Rights Agency.

**Baroness Ashton of Upholland:** Lord Lester, I am always consistent in my view and I think we are in two entirely different places. I do not think it is about Europe being one place and the UK being in a different one. I think you have to look at what the organisations are going to do. When I look at the potential of the Gender Institute, for example, for me – and I speak in a sense not as a minister but as a woman – I would hope that the Gender Institute would look at the question of equal pay across the whole of the European Union. It might also look at the question of child care support across the whole of the European Union. I hope it will have a very clear work programme of particular issues that are important to address. I do not rule out, of course, that there are other issues that are of deep importance to members of minority and ethnic communities and so on, but I simply focus on that because that is the Institute we have. It is quite different from the role that I was describing of the Fundamental Rights Agency, which is monitoring, looking across the European Union to provide advice and assistance and looking at what legislation is coming through, so I think these are bodies that are quite different at this stage in their development and quite different in their potential. When we merged the organisations through the legislation in this country and sought to set up the new Commission we were fundamentally looking at organisations that had a huge overlap in terms of the way in which they worked, and the difficulty we identified was that if you had more than one characteristic of the discrimination that you suffered then you were dealing with more than one organisation and we did not get the potential of bringing them all together even in terms of the economies of scale that that would imply, but also the opportunity to

thematically think differently about issues of discrimination. If we had in Europe a series of organisations or institutions similar to those which we have in the UK I would be arguing on exactly the same basis that they should be brought together, but we are not at all in that position and therefore I argue at the moment that there is a particular piece of work to be done around gender which is different from the role of the Fundamental Rights Agency.

**Q187 Lord Lester of Herne Hill:** Let me just be quite clear. If we label one silo “the Gender Institute” and the other silo “the Fundamental Rights Agency”, and we are looking at the problems of, say, Roma women, insofar as we are looking at them as women it is the Gender Institute, and insofar as it is Roma it is the other one, and insofar as it is Roma women the two silos have got to come together in some way. That is institutionally and architecturally what we will finish up with, is it not?

**Baroness Ashton of Upholland:** No, I do not think it is at all because what you are seeking to do is to say that the Fundamental Rights Agency’s role is the same as the Gender Institute’s role; it is just not dealing with gender, and that is not at all what I see it to be doing. It is a body that is being set up, if it turns out the way we hope it will, that will have a very clear strategic overview. The Gender Institute, I think, is taking very specific issues and trying to see how to address them, but it is different, and I do not think that you could encapsulate, for example, the difficulties that Roma women face, by saying, “If you are Roma you are in one, if you are a woman you are in the other”, because actually they would not be looking at them at all in the same way. It may well be that the Gender Institute will look at particular concerns of Roma women which may be around education, may be around child care, may be around employment and so on. That would be perfectly logical for it to do. If the Fundamental Rights Agency were doing that it would be within an annual work programme designed across 25 nation states that had a much more strategic view, perhaps looking at what is happening on the gender issues that are relevant across the states and perhaps gathering

information that would be of use to the Gender Institute as it did its work. They are fundamentally different organisations in my view and therefore we are not comparing like with like. I therefore believe it would be possible to see that they would complement each other rather than overlap.

**Q188 Chairman:** Minister, I appreciate that it was not you who gave evidence to Sub-Committee G which looked into the proposed Institute for Gender Equality, but I suspect you will have seen the report, and paragraph 46 of that concluded that the case for a separate European Union Institute for Gender Equality had not been demonstrated and they recommended that further consideration should be given to the alternative of incorporating their work in the envisaged Agency.

**Baroness Ashton of Upholland:** Indeed, but they did not have the benefit of my appearance before them though I would have been delighted to talk to them. I do not know which sub-committee letter I am in at any one point but I would be delighted to talk to them. It could be, could it not, Chairman, that if I had described the Fundamental Rights Agency in the way I have described it to this committee this evening they might have taken a different view because my suspicion is that when that was produced, and indeed I do know the document but I cannot say I know it very well, we would have been at an earlier stage of development. As things stand we can envisage two quite distinct organisations at this point, but I am sure that the members of the committee, with their vast experience, would be fully aware that, just as the Government has travelled in the direction in our own Commissions of bringing them together at an appropriate moment, we would be extremely foolish to rule that out as a possibility in the future. I just think we are not there yet.

**Q189 Chairman:** I follow. As to doing that in the future, is it perhaps one thing to bring together three domestic bodies such as we have now done, but another thing to do that in the

context of the European Union where presumably they are going to be sited in different cities and different countries? It might be politically a very great deal more difficult to close down one agency in one country in favour of another.

**Baroness Ashton of Upholland:** One of the questions always around the European Union is the siting of particular agencies and you will know that discussions are currently under way as to where best to site the Gender Institute. I know there is quite a strong move to site it within reasonable distance of where we expect the Fundamental Rights Agency to be sited, so that could be addressed in that way. I think we have to recognise that increasingly the communication between different organisations is not done face to face and it is quite possible for organisations right across the European Union and parts of the European Union to communicate very effectively and work very collaboratively together without having to be in the same city or even in the same building.

**Q190 Lord Goodhart:** In view of the fact that having separate Management Boards, separate geographical locations and so on is going to make it extremely difficult to bring these together if it is thought a good idea to do so in the future, is there a case, given the top-heavy nature of some of these Management Boards, for saying that there should be a single Management Board which would be responsible for both the Fundamental Rights Agency and the Gender Institute?

**Baroness Ashton of Upholland:** It is certainly a proposition you could put. I think I would argue again that I would envisage these organisations being quite different at the present time and therefore to try and load on to a Management Board, that after all has to set up either one of them, a different range of responsibilities I think could be quite difficult. I am more optimistic than I sense you are, Lord Goodhart, about the potential to bring them together in the future. Who would have thought ten years ago we would have brought together the different Commissions as we have successfully done within the new legislation? It was not



an easy challenge but it was a challenge to which they all rose and a challenge that they recognised, geographically apart as they were, as well as in a sense issue-based apart, that they had a responsibility to provide the right kind of support to the people of this country. At the end of the day it is critical that organisations do not just continue because they have always been there, and if it means we have to sort out management functions in order to provide a better service to people, so be it. I am sure that if it becomes crystal clear that these organisations ought to be in the same place as they develop there will be many in the Commission and in the European Parliament and on the Council who will rise to that challenge.

**Q191 Lord Neill of Bladen:** Would a subsequent decision to merge the two bodies involve unanimity in the Council and a vote in favour in the Parliament?

*Baroness Ashton of Upholland:* That is a very interesting question because, of course, the legal base for both is different, so I would imagine what one would have to do would be to have both of those decision-making processes reach the same decision. Under Article 13(2), under which the Gender Institute is being established, we would have to have co-decision and QMV in the Council, while for the Fundamental Rights Agency it would have to be unanimity. That of itself would be an interesting challenge but, as we have already recognised in this country, we would perhaps be able to provide some advice and support, having successfully achieved it in our own commissions.

**Q192 Lord Neill of Bladen:** I could foresee problems.

*Baroness Ashton of Upholland:* There could be.

**Q193 Lord Lester of Herne Hill:** This is the last opportunity we have to cry “stop” before this goes ahead, though I am sure it will go ahead, but is not Lord Clinton-Davis right that

once we set up these institutions, just as we set up CEDAW and CERD and CAT and the Rights of the Child Commission internationally, we create a problem which has never been solved in Europe of reducing the number of institutions instead of proliferating them? Your justification for creating two bodies is that what they do is entirely different, but how is that so? If we are concerned about the rights and welfare of women I do not understand why a Fundamental Rights Agency which had that within its remit would not look at discrimination, promoting equal opportunity, a family welfare policy and all the other matters, but would do so in the broader context of other rights and interests, like race, for example. You seek to suggest that there is some clear dividing line. I have not understood why there should be such a line and even less so why there should be different Management Boards, different premises, all at the European taxpayer's expense. Is it too late for the British Government to say, "No, let us have a single body"?

**Baroness Ashton of Upholland:** I think a single body would not achieve the objectives that we want to see. If you remember, Lord Lester, when I began with the committee I talked about the role of the Fundamental Rights Agency as being advice and monitoring and providing support to the Commission in terms of legislation in the way I described. That seems to me a very clear role that can span across a whole range of issues that are important. I have not ruled out in the end that we would bring those organisations together but I also identified that I thought the Gender Institute would have an opportunity to focus on, for example, issues of employment in a different way, and be able to take up those issues and address them more effectively. It is possible that a proposal might come forward that said they should share a Management Board or that there should be some way in which one could establish a mechanism that they might come together in the future, but you are then also into the tricky problem that they have a completely different legal base. To be honest, it would be very difficult to find a way to do that at this point, when both have been set up and where

there is undoubtedly great interest in the Parliament for the Gender Institute where they do have co-decision making. They would probably be deeply reluctant to give that up in favour of unanimity on the Council, and there is no appetite on the Council to give up unanimity in favour of QMV and co-decision with the Parliament, not least because, if you change the legal base from 308 to 13, you have a different Agency from the one that is being proposed, so it would really be a back-to-the-drawing-board exercise. That may please you in the sense that that might be where you want to be but it is not where the Presidency of the European Union is at the present time. I think we have to pursue this by recognising that there is a real appetite to do something in this area and I believe a gap that could be dealt with. The critical question is, as Lord Clinton-Davis said, how do you persuade organisations to abandon themselves in order to bring them together, not least because, as Lord Neill said, you have the Parliament having to agree one thing and the Council in two different ways having to agree another. That is for another day in a sense. Those are difficult and tricky issues but I do not believe they are impossible to deal with and it may be that in a few years' time that is what we will have to end up doing. I am visiting the Netherlands next Wednesday specifically to talk about the Fundamental Rights Agency and to get the latest information on what the Dutch position is because at the present time, of course, the Dutch are not minded to support this proposal, and it needs unanimity in the Council so there is quite a lot of work to be done to see whether there are ways that they could support it, which I believe, though I have yet to verify this, is partly around the relationship with the Council of Europe.

**Lord Lester of Herne Hill:** Thank you very much. You have now explained something that I had not thought about. The nonsense makes more sense.

**Q194 Chairman:** We were told, I think a fortnight ago, by Mrs Pavan-Woolfe from the Commission in Strasbourg that there was continuing discussion about the Management Board of the proposed new Gender Institute and there was a real possibility that it will not after all

consist of representatives of each of the Member States. Do you know how matters stand on that front?

**Baroness Ashton of Upholland:** Chairman, I do not, and the main reason for that is that the lead body in government is the Department of Trade and Industry on the Gender Institute and I have not had the opportunity at present to discuss this in any detail. What I was going to suggest was that I would write to the committee and perhaps, having discussed it with my ministerial colleagues, set out in more detail what the current state of play is. We have not been able to establish that. I had hoped to try and do that today but I am afraid I failed to be able to do so, for which I apologise.

**Q195 Chairman:** Not at all. But if it were possible with the creation of that new body to slim down or streamline the board to a degree and to have a number of representative members, a council in effect, might there not be some possibility of achieving that similarly, perhaps as a condition of co-operation on the Dutch front and so forth, with regard to the Fundamental Rights Agency?

**Baroness Ashton of Upholland:** As I have already indicated, the difficulty with the Management Board at this stage, I believe, is that there is a very strong desire from all parties to participate in some form and it is always extremely difficult, when one can see the logic of slimming it down, to ask people not to be on it. I fear that if we were to seek to achieve that in what is a relatively short timetable it would be at the expense of trying to get the Agency into the right shape.

**Q196 Chairman:** Can I ask, and I perhaps should know this, with regard to the Management Board of the European Monitoring Centre on Racism and Xenophobia, does that have a Management Board which has a member from each state?

**Baroness Ashton of Upholland:** Yes, it does.

**Q197 Chairman:** So, perhaps, as that will close another one will open, but one cannot but expect the expense of it all to increase notwithstanding.

**Baroness Ashton of Upholland:** I think there is an issue, of course, about the resources that will be made available to it and, as I have indicated, there is a view that says that this is an unnecessary new bureaucracy which is a waste of European taxpayers' money, to take that particular point. The critical thing is that this has gathered momentum and has the potential to do a useful and valuable job. The job that we have is to make sure that that is exactly what it does and that it does it within the resources that are necessary but no more. If it proves itself to have a wider and more interesting remit in that sense, then that can be reviewed and revisited, the same for the Gender Institute too. If I might just say, my first introduction to the whole question of the Fundamental Rights Agency was in a conversation with the then newly appointed Commissioner Frattini who talked about the need to be able to balance on the scales the need for the European Union to take issues of security and terrorism very seriously, and the measures that were being taken on that, and a recognition of the importance of fundamental rights, so from the Commissioner himself on a personal level as much as the Commission level, he felt very passionately that this was the other side of a recognition of the work we had to do on security and co-operation in that way.

**Q198 Lord Lester of Herne Hill:** What troubles me is that on the one hand people like myself are saying, is all this necessary, and you reply that it is in a narrow compass and there will not be much in the way of resources, and then it would be seen as balancing our commitment to the struggle against terrorism. We could finish up with a situation where it really is starved of resources so much that it becomes a lip-service kind of institution. The reason that I mention that is that I remember when Judge Dame Rosalyn Higgins was on the UN Human Rights Committee. She is, as you know, a very responsible person. I remember her saying that they had so little money that they did not even have the money for glasses of

water to be given to the members of the Human Rights Committee and they could not do their job properly, and they are still massively under-resourced and the result is that they are not doing their job properly. If we are setting up the Fundamental Rights Agency and the Gender Institute, even if it has a narrow focus, it is really important that it has enough resources to be able to do the job properly. If it just becomes a sort of lip-service thing that will be the worst of all possible worlds.

**Baroness Ashton of Upholland:** I agree, but personally I did not want to suggest that in the scales that Commissioner Frattini was weighing against all of the measures around security and terrorism and so on he simply put the Fundamental Rights Agency on the other side. It was part of a whole package of issues, not least, for example, data retention. You know, Lord Lester, that I am also looking at data protection within this context, so it was about what do the scales look like and what do we need to be seen to be aware of in the work that we do. Secondly, my belief is that you need absolute clarity of what an organisation is going to do in order to be able to make sure that the resources are available. One of the problems, and I am not suggesting it is an example you gave, that organisations often have is that they are completely unclear about the work they are going to do. They get given a tranche of money and it is quite impossible for them to fulfil the remit, so I am hopeful that what we will get is clarity about what it is going to do and where it is going to be based which will enable it to have the budget set appropriately. The additional advantage of coming back to the Council with the annual work programme will be that, of course, it will have the opportunity to say, “If you approve this work programme it comes with a price tag”, and in a sense the Council will then have to accept that as part and parcel of accepting the programme of work. That may be to its advantage. It may be more to its advantage than indeed the proposed relationship with the Commission would be, so I agree with the sentiment but I think the

solution to it is to be as clear as we possibly can about what it is going to do and to make sure that it itself costs what it is going to do every time it comes forward with a proposal.

**Q199 Chairman:** Minister, if to some extent the new agencies, and particularly the Fundamental Rights Agency, are being, so to speak, brought into being as a counterbalance to the fight against terrorism and therefore the risk of repressive attitudes in that regard, ought the Agency not to have the opportunity to consider third pillar matters, at least judicial co-operation in criminal matters? I ask the question against the background of your letter which says that the position is unclear as to the third pillar, that you foresee the potential risk of overloading the Agency if it has to address third pillar matters.

**Baroness Ashton of Upholland:** I did not want to suggest in what I said that somehow I thought what was happening across the European Union in terms of crime, security and terrorism was anything other than a very sensible set of measures that will enable us to work more effectively to ensure that we keep our citizens safe from harm, which is a fundamental role of governments everywhere, and I do not see any repression within that.

**Q200 Chairman:** I think that was an ill-chosen word on my part. To some extent the counterbalancing is, I think, there.

**Baroness Ashton of Upholland:** I was not even trying to suggest that it was a counterbalancing. What I was trying to suggest was that, just as we have to deal with issues of security in a collaborative way, so it is also important that we are clear about the rights that people have and should enjoy and that those in a sense go hand in hand. They are not opposites; they go together and they go together in the kind of democratic society we want to live in. Therefore, what Commissioner Frattini was keen to do was to see them in that vein. Scales may be the wrong analogy, although it was his analogy, but we did not try to suggest, “We are doing horrible things over here; we should do nice things over here”, which would

have been a more simplistic way of describing it. Rather, he said, “These things fit together and need to fit together appropriately and well”. That, I think, is the core of what is being done. It is our view that we should not add the third pillar to this. There is not an appetite, as you will be unsurprised to hear, across Member States to do that. We think it would be inappropriate at the present time. There is always the opportunity to revisit that but we believe that the way in which the Agency needs to get itself established is appropriate and that we should get on with it now, try and develop a work programme, get its relationships right with the Council of Europe, try and get a Management Board that makes sense, deal with how that should operate, get it into appropriate premises with the right kind of budget to begin with and then move on from there and let us see what it itself does as it becomes independent. This in a sense comes back to our national domestic legislation with the new commission, that you have to allow it, once it has got going, to decide what it wants to come back and tell us it wants to do. That will be an interesting relationship, I think, just for the new commission that we are having here. There comes a point when governments should stop telling organisations what to do and start to enter a dialogue that says, “This is what we think we want to do”.

**Q201 Lord Lester of Herne Hill:** It is not telling them what to do. It is telling them what they cannot do. What you are saying is that the Agency cannot look at fundamental rights issues under the third pillar because it is – whatever word you use – inappropriate, undesirable, but surely one needs to have safeguards, counterweights, counterbalances, checks, just as much on the third pillar as on the other pillars and therefore, by preventing the Agency from looking at it at all, in that area you are weakening what otherwise would be the position of the European citizen.

**Baroness Ashton of Upholland:** I am glad you are warming back up to the Agency and wanting to expand its remit; what an interesting turn of events. What I was trying to say was that you begin with any organisation trying to be clear about a remit that has support, in this



case, across 25 Member States, the Commission, the Council of Europe and the expert advisers. In order for this Agency to thrive at all it has got to come into being with that support available to it. Once it is in existence and it has begun to demonstrate its role, it will be perfectly capable, I believe, of challenging if it believes its role needs to be expanded or extended. I am simply in a sense being a pragmatist about what you begin with and what you seek to achieve. If we simply overload it, if we simply try and give it things that do not have support, it will fail. That would be an even greater waste of resources than anything I can imagine and that we must not do.

**Q202 Chairman:** Minister, thank you very much. We really must draw to a close and I reiterate our great thanks to you for coming along and being so very helpful.

**Baroness Ashton of Upholland:** Thank you very much. I enjoyed that.