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Pàrlamaid na h-Alba

Official Report

SCOTLAND BILL COMMITTEE

Tuesday 8 February 2011

Session 3

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SCOTLAND BILL COMMITTEE
6th Meeting 2011, Session 3

CONVENER

*Ms Wendy Alexander (Paisley North) (Lab)

DEPUTY CONVENER

*Brian Adam (Aberdeen North) (SNP)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Tricia Marwick (Central Fife) (SNP)
*David McLetchie (Edinburgh Pentlands) (Con)
*Peter Peacock (Highlands and Islands) (Lab)

COMMITTEE SUBSTITUTES

Michael Matheson (Falkirk West) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Elish Angiolini QC (Lord Advocate)
Dr Gary Gillespie (Scottish Government Directorate for Strategy and Performance)
Dr Andrew Goudie (Scottish Government Director General Economy and Chief Economic Adviser)
Fiona Hyslop (Minister for Culture and External Affairs)
Dave Moxham (Scottish Trades Union Congress)
Lucy Parsons (Orkney Islands Council)
Martin Sime (Scottish Council for Voluntary Organisations)
John Swinney (Cabinet Secretary for Finance and Sustainable Growth)
Alan Trench (University College London)
Andy Wightman

CLERK TO THE COMMITTEE

Stephen Imrie (Clerk)

LOCATION

Committee Room 6

Scottish Parliament

Scotland Bill Committee

Tuesday 8 February 2011

[The Convener *opened the meeting at 14:15*]

Decisions on Taking Business in Private

The Convener (Ms Wendy Alexander): Good afternoon. Welcome to the sixth meeting in 2011 of the Scotland Bill Committee, which is due to be our last oral evidence-taking session. Before we start, I invite all members and everyone who is joining us today to turn off BlackBerrys, pagers and other electronic devices. We have received no apologies from committee members. As far as I know, no additional MSPs will join us.

Does the committee agree to take item 3, which is consideration of our report, in private?

Members *indicated agreement.*

The Convener: The clerk is urging me to ask the committee to agree that all future consideration of the draft report be taken in private, as is standard practice. Is that agreed?

Members *indicated agreement.*

Scotland Bill

14:16

The Convener: The next item is further consideration of the Scotland Bill and relevant legislative consent memoranda. I am delighted to welcome to the committee the Cabinet Secretary for Finance and Sustainable Growth and the Minister for Culture and External Affairs. We have an enormous amount of evidence and a wide range of issues to get through with the first panel. I alert the committee and others to the additional evidence that has become available. I invite the clerk to comment on that.

Stephen Imrie (Clerk): I apologise if members have not had the opportunity to look through the material that has just been provided to them. I received it at about 20 past 1 today. There are nearly 40 letters, running to about 140 pages. We provided members with copies of the material in advance of the meeting.

The Convener: It may be helpful for the minister or the cabinet secretary to comment on the issue. Given that the committee met for a pre-meeting at a quarter to 2, it was rather difficult for members to read 140 pages that were received—not electronically—at 1.20.

The Minister for Culture and External Affairs (Fiona Hyslop): I am more than happy to comment. When we appeared before the committee in December, I indicated that we had had extensive discussion and dialogue with the United Kingdom Government on a range of issues, both financial and non-financial. Unfortunately, when the Secretary of State for Scotland appeared before you, he indicated that we had not exchanged any substantial arguments, either financial or non-financial, on the clauses.

Over the past few weeks, I have provided the committee with the information that we gave to the UK Government about our positioning on the range of areas on single sheets that, helpfully, are in the same format and set out the content of the arguments. It is clear that, in this area and a number of others, the secretary of state may have misled the Parliament on the extent of the engagement that took place. The content of the letters that you have is evidence of that. It is similar to the content of the material that we gave to you previously, which set out the position of the Scottish Government on a range of issues.

It is quite evident from the substance of this range of correspondence that, far from being limited to technical detail, correspondence has been extensive. The timeline that was given to the committee yesterday lists the communication that took place in both meetings and correspondence.

We have provided you with evidence of the volume of the engagement that took place. Over previous weeks, we communicated with you about its substance.

The Convener: We will try to give the material due scrutiny later.

I move to the substance of today's meeting. There are both financial and non-financial matters to cover. The financial matters have attracted the greatest attention. To reflect that, we hope to start with the cabinet secretary. As has been discussed, we will allocate about an hour to financial issues before turning to non-financial matters. Without further ado, I invite the witnesses to make some short opening remarks.

The Cabinet Secretary for Finance and Sustainable Growth (John Swinney): I put on record that I will need to be at this afternoon's meeting of the Cabinet, as it comes at a rather critical point in Parliament's decision-making processes.

The Convener: That is understood.

John Swinney: Thank you, convener—that is appreciated.

I will reiterate two questions that the Government believes are crucial to consideration of the bill. First, do the propositions in the bill offer any meaningful transfer of fiscal and economic levers to Scotland? Secondly, what are the likely impacts and risks of the changes that will arise from the bill for the Scottish budget and—more important—for households and businesses across our country?

The Government has consistently outlined its concern that the bill in its current form fails on both those questions. Our evidence has highlighted the potential risks from a deflationary bias; the lack of meaningful economic powers; the inadequate borrowing provisions to manage budgetary volatility; the economic inefficiency of the income tax proposals; the modest capital borrowing powers; the lack of detail on the block grant adjustment, the no-detriment rule and the costs of set-up and continuing administration; and concern about the transparency and long-term sustainability of a system that depends on an on-going series of ad hoc technical fixes and adjustments.

Since taking office in 2007, the Government has made delivering increasing and sustainable economic growth our core purpose. The bill is not about improving economic growth or providing an opportunity to make a fundamental difference to the lives of the people of Scotland. Without real access to the levers of growth or to social policy, we will simply be changing the accountability arrangements for Scotland's budget from Whitehall. Under the bill, Westminster will continue to collect and control 85 per cent of Scottish tax revenue. Scotland will remain a part of one of the most centralised systems in the developed world and will have limited power over taxation. We can contrast that with the spectrum of devolution that is offered in other countries and which others, such as the Steel commission, have recommended as a possible solution for Scotland.

As is well known, the Scottish Government believes that Scotland's future will be best secured by independence. However, we recognise that others in the Scottish Parliament do not share that view. That is why we have also proposed an alternative framework—full financial responsibility—that would provide the maximum policy autonomy in a United Kingdom macroeconomic framework.

As the paper that I have shared with the committee outlines, a framework of full financial responsibility would devolve to Scotland all tax revenues except VAT; allow the co-ordination of benefit and employment policy in Scotland; provide control over the levers that are crucial to business; and allow us to control the key policy instruments in Scotland. It would also transfer the levers that are required to manage that fiscal transfer by providing proper saving and borrowing powers.

The consensus seems to be that raising more of Scotland's revenues directly will increase the Scottish Parliament's financial responsibility. That is a key objective of the bill that the committee is scrutinising. I agree with that objective, but it cannot be achieved by assigning a small proportion of income tax revenues, as the bill proposes.

The bill's proposals will create a significant risk to Scotland's budget and economy. We have highlighted the prospect of a deflationary bias, the inadequate revenue borrowing powers, the modest capital borrowing powers and the lack of clarity on key issues such as administration costs, the block grant adjustment and the no-detriment rule.

I turn to the economic benefits of greater financial responsibility. "The Government Economic Strategy" sets out our view on the drivers of economic growth, population, participation and productivity and the importance of economic levers to improve economic performance. Financial responsibility would increase the economic levers for revenue and expenditure that are available to the Scottish Government and would provide the opportunity to enhance the Scottish economy's productivity and economic performance. That could be manifested in several ways in relation to tax powers and tax changes.

Such performance-enhancing levers are not part of the bill's proposals, which is why it is straightforward to consider the financial impact of the changes relative to the status quo. The committee has been asked to consider a bill that simply replaces one part of the block with an assigned income tax revenue. That is the key difference between our proposals and the bill. The UK Government proposes a revised funding mechanism, whereas full financial responsibility would provide new opportunities to enhance Scotland's economic performance and increase the Parliament's accountability and responsibility.

Brian Adam (Aberdeen North) (SNP): The committee has heard that Organisation for Economic Co-operation and Development figures show that growth in public spending has been higher than growth in income tax revenue in every decade since 1965. We have also heard that the period that the Scottish Government chose for its analysis was untypical. Even the UK Government has admitted that, over the past 10 years, the Scotland Bill would have reduced the Scottish budget by £700 million. The figure that Scottish Government has suggested is £8 billion. How do you explain the differences in the figures? Do you agree that, although we can argue over the figures, there is no doubt that the Scotland Bill contains a deflationary bias?

John Swinney: Essentially, my point—and this is the point that we make in the analysis with which we have provided the committee—is that, over the period that the Government examined from 1999-2000 onwards, public spending rose at a faster rate than income tax revenues did. That is not atypical. The atypical period is the one that we are just about to enter, in which income tax revenues may well rise at a faster rate than public spending levels. That is for the clear reason that public spending is reducing in what I think it is fair to describe as an unprecedented fashion—it may not be unprecedented, but the precedents in the past century are very limited.

The decline in public expenditure in the period going forward will be significant. Clearly, I am wrestling with those challenges as we speak in relation to the Government budget. The period that lies ahead will be very much out of kilter with the period that the Scottish Government analysed in the information that we provided the committee with on what is inherent in the Scotland Bill financial proposals: that they contain a deflationary bias. That position is borne out by the evidence and information that has been put in the public domain on the question.

Brian Adam: How long will the period that we are about to enter last? When will we return to the previous position of spending outstripping tax receipts?

John Swinney: I expect that we will be back into that period before the Scotland Bill is implemented. It is not for me to tell the committee when the bill will be implemented. From what I can deduce, it is unlikely under these financial provisions that the bill will be enacted until something like 2018 or 2019. By that time, I would be fairly confident that what I would call the norm of public spending rising faster than income tax revenues would have returned. In looking at the dynamics of that period, we have to ensure that, whatever provisions are enacted as a consequence of the bill, a set of legislative arrangements is not enacted that deal with the exception; we should enact a set of arrangements that guides us through the rule. That is a safer way to proceed.

Brian Adam: You are suggesting that income tax will rise more slowly than all taxes in general. What evidence do you have that income tax will rise more slowly in the long term than tax revenues in general and spending? You suggest that that is where one element of deflationary bias comes from.

John Swinney: The historical patterns tell us what we need to know in this respect. It is pretty clear that that is the pattern that it would be realistic to expect in the period that lies ahead.

Brian Adam: Can you point us to detailed evidence on that, either now or in writing?

John Swinney: With the greatest respect, Mr Adam, I can point only to the historical trends. I suspect that, if I were able to point to future trends, the Chancellor of the Exchequer would be inviting me to gaze into my crystal ball. I certainly think that looking at the historical trends is a very robust way to proceed.

14:30

Brian Adam: From your engagement with the business community, can you tell us anything about its feelings about the devolution of corporation tax?

John Swinney: To be fair, I think that the business community will have mixed views on the matter. Some members will be very comfortable with and positive about such a move, whereas others will be concerned about having different corporation tax regimes north and south of the border. However, some of that concern would probably be disarmed if the business community had some comfort that corporation tax rates were going to be lower in Scotland than in the rest of the United Kingdom.

Frankly, I also think that certain members of the business community will just not be comfortable about operating their businesses in a two-tax

regime. That gets to the nub of arguments about the distinctive fiscal jurisdiction that would be Scotland, some of which, of course, are just as valid with regard to the business community's views and perspectives on income tax. I do not think that this question is exceptional to corporation tax.

The Convener: In response to Brian Adam, you appeared to indicate that income tax's share of the tax take was declining. However, figures from the Scottish Parliament information centre on the budget indicate that income tax as a percentage of all UK taxes was 26 per cent in 1998-99; that it rose to 29 per cent in 2008-09; and that it is forecast to remain at that level in 2015-16. I do not expect you to comment on the detail of that, although Andrew Goudie might want to say something about whether income tax's share of the total tax take is destined always to decline.

John Swinney: I do not think that that was my point. I apologise if I did not make it clear enough but what I said was that public spending was rising at a faster rate than income tax. That is my point about the deflationary bias of the proposals in the Scotland Bill.

It might help the committee if I point out that, in its September 2010 report "Long-Term Trends in Public Finances in the G-7 Economies", the International Monetary Fund indicated that, since 1965, total taxation as a share of UK gross domestic product has grown by 6.2 per cent while income tax has grown by only 0.9 per cent. To go back to Mr Adam's question and the need to take a longer-term perspective in looking at these issues, I think that that information shows where the growth in tax is coming from. Moreover, the growth in income tax is from the higher bands, from which, under the proposals that the committee is considering, the Scottish budget would receive a lower share than it would receive from other tax bands.

David McLetchie (Edinburgh Pentlands) (Con): I want to follow on from Mr Adam's questions and nail down some of the numbers. I am looking at the income tax proposals additional information summary, with which you helpfully provided us, and specifically at the four-year spending review period from 2011-12 through to 2014-15. If we look at the Scottish Government's projections, we see that, comparing the present funding regime with the proposed funding regime in the Scotland Bill, you estimate that there would have been a deficiency and that we would have been worse off by £331 million in 2011-12 and by £61 million in 2012-13, but in 2013-14, £318 million—

John Swinney: So that I can follow carefully what Mr McLetchie is saying, could he just—

David McLetchie: I am referring to table 1.

John Swinney: Is this in "Scotland Bill Income Tax Proposals—Additional Information"?

David McLetchie: Yes. I think that that is what I said at the start.

John Swinney: Sure.

David McLetchie: If we look at table 1 and at the four years of the spending review period from 2011-12 onwards, I think that, in 2011-12, we see a deficiency between the Scotland Bill proposals and the current funding regime of £331 million, on your figures. If we look at 2012-13, we see that we would still be in deficit by £61 million but, when we come to 2013-14, we see that the Scotland Bill proposals would favour our budget positively to the tune of £318 million, on your figures. In 2014-15, there would be another positive outcome for the Scottish budget of £681 million, on your figures. Is it fair to say that, over the four-year period of the spending review—if we analyse what is happening going forward, not looking at the past—we find that the Scottish budget would be the net sum of £607 million better off under the Scotland Bill proposals, on your figures? Is that what those figures tell us?

John Swinney: This really gets to the nub of the issue. It goes back to what I said in answer to Mr Adam's point about the historical trends. I said that, to me, the forthcoming spending review period is the exception. If we look back at the periods that Mr Adam suggested, we find that public spending is rising at a faster rate than income tax. We are all aware of what is happening during the course of this spending review period. We are having a period of significant fiscal consolidation. We are agreed on that factual point.

We have not had such a period of sustained fiscal consolidation since, I would think, the post-war period. Certainly the fiscal consolidation that we are facing in this spending review period is more acute than we faced in the early 1990s or in the 1980s. This is the exception.

My point is that, by the time the bill is in force and these mechanisms are in place, we will not be dealing with this particular spending review period of 2011-12 to 2014-15; we will be dealing with the next spending review. My judgment is that, in that spending review period, we will be going back to the normal conditions that Mr Adam raised with me, whereby public expenditure is rising at a faster rate than income tax.

David McLetchie: There is—

John Swinney: Let me complete this. There is of course a choice to be made here. One can opt for the mechanism set out currently in the Scotland Bill, but we should do it with our eyes open. That relates to my point about the conditions

that we are looking at in this spending review period being fundamentally different from those that generally apply and permeate. I do not see why that is a beneficial arrangement for the Scottish economy.

David McLetchie: Of course we have a fundamentally different level of debts and deficits in Britain than we have ever had before, even after two world wars. I suggest that a lot of things fundamentally change—

John Swinney: Actually, I agree with Mr McLetchie there: we are in a unique situation. He has marshalled the argument for me in a way that demonstrates that the current spending review period is a completely different situation from the one in which we would normally find ourselves, because of the debt challenge to which he refers.

David McLetchie: Exactly, but the issue is whether we accept your analysis, which is that everything will be sorted out and rosy and bright in four years, and we will get back to what you say is the norm for the relationship between tax receipts and public spending, or whether it will take longer. On the subject of whether it will take longer, did the Scottish Government not estimate—perhaps Dr Goudie can help us here, because he was the author—that the period of fiscal consolidation would endure to 2025 and that, in real terms, we would not be back to where we were until then? Was that not an official projection from the Scottish Government?

John Swinney: I will answer the first part of your question, and then invite Dr Goudie to make some remarks.

Dr Goudie can correct me if I am wrong but, in the analysis that was undertaken, we assumed that public finances would recover after a period in which—I think we are all familiar with the demonstration of this point—public expenditure fell for a number of years to reach its lowest point. We applied levels of public expenditure increases in that trend analysis to demonstrate the length of time that it would take to return to the peak of public expenditure, which was in 2009-10. We demonstrated from that the cumulative amount of resource that would be lost from public expenditure in a comparative sense.

If we assume that public expenditure will rise at a slower rate than was assumed in the trend analysis, the period of fiscal consolidation—or rather, the fiscal lost opportunity—will become much longer than the period that Dr Goudie demonstrated in the analysis. Perhaps Dr Goudie would like to say a bit more on that.

Dr Andrew Goudie (Scottish Government Director General Economy and Chief Economic Adviser): I will offer a couple of comments. First, the reference to 2025-26 relates to when, under the set of assumptions that we deployed in that analysis, we might anticipate that we will be back to the levels of expenditure in real terms that existed in 2009-10.

David McLetchie: Expenditure will be flat, or lower, until we get to that point, but no higher.

Dr Goudie: On the basis of the assumptions that we have made in that analysis.

David McLetchie: Right, so there will be no real growth for 15 years.

Dr Goudie: In comparison with 2009-10.

David McLetchie: Well, yes—the most recent year. Your statement was that, virtually from now, there will be no real growth in public spending for 15 years. Is that correct?

Dr Goudie: That is right, but the key point is that public spending will reach a trough—probably; these statements are made on the basis of the assumptions that we put into the analysis—in 2015-16. From 2015-16, we do not know the rate at which UK expenditure will grow, but we make the assumption that Scottish expenditure is moving broadly in line with UK expenditure, which in turn is moving broadly in line with GDP at the UK level.

In fact, we will have expenditure growth during that period of time from the trough, even though we do not get back to the peak level of 2009-10. You should not view it as a period of flat real expenditure; it will be one of quite rapidly—or relatively rapidly—rising expenditure, given that we will have reached a trough.

David McLetchie: What is the real percentage fall from the peak in your trough?

Dr Goudie: In expenditure?

David McLetchie: In real terms. How many percentage points lower are we at the bottom of your trough?

Dr Goudie: I think, off the top of my head, that the level is 6.3 per cent below the 2009-10 peak.

David McLetchie: And that is in a trough that occurs in 2015-16.

Dr Goudie: That is on the basis of six years of real decline from 2009-10 to 2015-16.

David McLetchie: If we are recovering from a 6 per cent trough in 2015-16 in the period to 2025, our real growth is less than 1 per cent per annum, is it not? It is two thirds of a per cent, by my humble arithmetic.

Dr Goudie: I must admit that I do not know the exact number, but the key thing is that, over that period of time, it is, broadly speaking, locked into the GDP growth rate for that period.

14:45

David McLetchie: Right. Is it the case—as you are an economist, I think that you can help us here—that the reason why we have a structural deficit in the UK economy is that public spending has been rising faster than tax receipts, including income tax receipts?

Dr Goudie: That is true.

David McLetchie: What reason is there to suppose that a future United Kingdom Government will make exactly the mistakes that got us into the present mess?

John Swinney: I—

David McLetchie: Please, Mr Swinney. I think that Dr Goudie is just drawing breath to answer.

John Swinney: Okay.

Dr Goudie: It is important to go back to the two fundamental reasons why there may be a deflationary bias. The key point to make is that, in the coming period, almost by definition we do not know with certainty what the trend path for expenditure will be, what the trend path for total revenues will be or, most important, what the trend path for income tax revenues will be. There are considerable risks around those trends, and the technical point is that, under the terms of the bill, you will be relying on one tax to handle that risk.

For the first eight years of the 2000-10, there is clear evidence that expenditure outgrew tax and income tax considerably. There can be no doubt that the period of time is critical, but the IMF data to which the cabinet secretary referred suggest that, over a much longer period—40 to 45 years—instead of growing at perhaps 2.1 or 2.2 percentage points per year, income tax as a proportion of total revenue in the UK grew by only about 0.8 or 0.9 of a percentage point per year. The important point is that seems that over the long term—when related to GDP, admittedly—there have been changes in the tax system: the phenomenon that we have seen is that changes in the tax system have moved us towards personal tax as opposed to indirect taxes.

However, in the absence of knowledge about the future—which, of course, none of us has—the key point is that you hope to manage the risk with one tax instrument rather than an array of tax instruments.

David McLetchie: I accept that, but I am saying that, given the scenario of there being an unprecedented and extended period to 2025 in which there will be no real growth in public expenditure from the peak that we had previously achieved—that is the scenario that the Scottish Government has painted—it must be just as likely that the mechanism in the Scotland Bill will produce a positive outcome for Scotland as it is that it will produce a negative outcome. Is that the case?

Dr Goudie: The key question is always whether the share of income tax and total expenditure that is actually occurring in a particular year is greater or less than the share in the base year, or the year zero, from which you start your calculation.

David McLetchie: Indeed, but we are going to be starting from your trough, are we not?

Dr Goudie: It depends what ratio you apply in that year, and what deduction you make from the block.

David McLetchie: My point is, given your gloomy analysis that public spending will remain flat for that lengthy period, that I find it hard to see how it can be taken almost as a given that there will be an inherent and intrinsic so-called deflationary bias, when the evidence of the four years that you are predicting with some degree of certainty—never mind crystal balls, predictions for 2025 or whatever—is actually quite the opposite. We will actually be better off. Is that not the case?

Dr Goudie: Unfortunately, I do not have the exact numbers in my head about the performance from 2015-16, but what is important is the rate of growth from the trough and the comparison with income tax over that period. We have not forecast income tax over that time. I do not know whether anyone does—

David McLetchie: So, you have not forecast it.

Dr Goudie: Income tax?

David McLetchie: You have not forecast income tax from that time. That is what you said. Is that right?

Dr Goudie: We have no basis for doing that.

David McLetchie: Right. If you have not forecast it, that means that there are no figures on which you can base an assumption. Is that not right? The income tax receipts are one of the components. Is that not correct?

John Swinney: No—that is a misrepresentation of the analysis. Two points need to be made. First, the forecasts that were implicit in the analysis that Dr Goudie undertook were forecasts about tax revenues rather than specifically about income tax. Secondly, the fundamental point, which must be understood, is that public spending will rise from the trough. It will take some time to recover—

David McLetchie: It will rise slowly from the trough. We have heard that it will rise only six percentage points in nine years.

John Swinney: Yes, but it rises from the trough—although, of course it will take time to get

back to 2009-10 levels. The key point that Dr Goudie made, which the committee must bear in mind, is that the Scotland Bill would lock us into a direct relationship with income tax. As the IMF evidence demonstrated, income tax is rising at a much slower rate than wider taxation revenues in general.

The Convener: Dr Goudie was inviting us to say that the relevant comparison is a 45-year trend on income tax. I mentioned figures on income tax as a percentage of all tax in the decade since devolution and during the next five years. Will you clarify the position on income tax as a percentage of all tax?

Dr Goudie: In the nine years since devolution, the Scottish Government budget grew on average each year by 8 per cent. The total tax take rose by 6.4 per cent and total income tax take grew at a rate of 5.2 per cent per annum.

The Convener: That was not my question. My question was this: during the 10 years of devolution, what has been the trend in relation to income tax as a percentage of total tax take?

Dr Goudie: I cannot give you a precise figure. I think that I am right in saying that during that time income tax as a proportion of the Scottish block decreased from 49 per cent to 39 per cent, which gives a flavour of the trend that we are looking at. Gary Gillespie will correct me if I am wrong.

The Convener: The question was about income tax as a percentage of total tax take, not about income tax in relation to Scottish spending. You offered us a 45-year trend, based on IMF data. In the past 10 years, what has happened to income tax as a percentage of all tax and where is that percentage forecast to go in next three years?

Dr Goudie: We do not have those figures, I am afraid.

The Convener: It would be helpful if you could write to us on that.

Robert Brown (Glasgow) (LD): We must analyse the reasons for the trend. I am a lay person and do not necessarily understand all the economics, but it seems to me that the reasons are that we have expanded the use of VAT and national insurance and, in particular, that we have expanded the use of borrowing, against a background of higher house prices and debt levels throughout the country. If those factors remain the same, the cabinet secretary might have a point, but if those policy and factual trends are not consistent—as appears to be the case, given the current situation—does not the stack of cards that has been erected on the 45-year trend collapse around your ears, because the trend is not relevant to the future?

John Swinney: It does not collapse around our ears. You have helpfully provided some of the answers, by talking about VAT and national insurance contributions, which will not be at the disposal or discretion of the Scottish Government or the Scottish Parliament under the bill.

The key point that Dr Goudie was making was that, in essence, we are being invited to sign up to an arrangement in which we will be wedded to the prospects for income tax revenues. The convener asked for further information on income tax patterns: the 45-year analysis demonstrated the slow growth factor in relation to income tax. What Mr Brown said supports my case entirely.

Peter Peacock (Highlands and Islands) (Lab): I want to clarify something from the papers that were circulated earlier this afternoon and to which Fiona Hyslop referred. They are obviously difficult to get to grips with. However, they include a letter of 6 July from the permanent secretary to the UK Cabinet, who is in the home civil service, to which a one-page summary is attached that is headed "Financial Responsibility for Scotland Within the UK." That paper is dated 10 June 2010. I want to clarify whether we have all the documents. The one-page summary is headed "Summary", which rather implies that it is a summary of something else. What is this paper a summary of?

John Swinney: It is essentially an explanation, for ease of reference, of what we would consider to be the model of financial responsibility. I suppose that one could look at some of the detail in the document "Fiscal Autonomy in Scotland: The case for change and options for reform", which the Government published in February 2009 and which introduced a concept that was affectionately referred to as "devo max", but which had acquired the more thoughtful title of financial responsibility by the time that it got to that letter to—

Peter Peacock: So, it is not a summary of a document but a summary of an argument.

John Swinney: That is fair.

Peter Peacock: Does that one page represent the most substantive document that was submitted to the UK Government about financial responsibility?

John Swinney: I think—I do not think; I know—that that prompted discussions with UK ministers about the concept of moving to a wider range of powers and responsibilities than are proposed in the Scotland Bill, and that it prompted the extensive discussions that took place between, principally, Dr Goudie and his team and their counterparts in Her Majesty's Treasury.

Peter Peacock: So, the arguments that would flow about financial responsibility were not

recorded. There is no piece of paper that is more substantial than the one-page summary, setting out the arguments to the UK Government so that it could properly consider them. Those matters were developed in conversations between officials and between ministers.

John Swinney: Dr Goudie can say more about that because, obviously, he was involved in many of the official discussions. However, anybody considering that document alongside the Government publication of the paper on fiscal autonomy in Scotland and the white paper would have got a greater and deeper understanding of the issues; those documents were obviously enhanced by the conversations that took place between officials.

Dr Goudie: That summary would have been the only piece of paper that we passed physically across to the Treasury. However, perhaps it is worth saying that over the summer months we had a series of detailed conversations with Treasury officials about the full fiscal responsibility approach of ministers, as is broadly captured in the paper that the committee has been provided with in the past few days, which is a nine-page document that summarises the position. The key point is that in the course of those meetings we gave on several occasions quite formal presentations of the views of ministers around full fiscal responsibility, talking through PowerPoint presentations and describing the structure of the argument in great detail. So, even though they were provided with only the one piece of paper that Mr Peacock has described, I am confident that they were fully aware of the views of ministers and the arguments that underlay the positions that ministers were taking.

Peter Peacock: How would you characterise those arguments? Was it about high-level principles in the sense of the points that John Swinney set out earlier about the Scottish Government's belief that having more levers would open up options for the Scottish Government and the Scottish economy? Alternatively, in the way that you have done for the questions about the Calman proposals that David McLetchie was pursuing, did you model the financial responsibility model for the Treasury so that it could give it full consideration?

15:00

Dr Goudie: We did two things. One was to address the technical issues surrounding the Calman proposals and where we felt those were difficult. The committee is familiar with those and they are well captured in what the cabinet secretary has said and in the letter that was provided to the convener on 25 January.

The second part was to put forward the Government's view around full fiscal responsibility both in its own right and as a systematic approach to addressing concerns about the Calman work. One of the issues that arose during our discussions on Calman and our concerns was that the Treasury was very much in the territory of talking about ad hoc solutions. That has now evolved into discussions about no detriment, but broadly speaking the approach involved taking problems on a case-by-case basis and trying to find ad hoc solutions to them. The point that we were trying to get across was that the full fiscal responsibility model, as it is described today, is a coherent approach that removes the need for a great deal of ad hocism and gives a model that is quite workable.

There is a clear answer to the specific question about whether we modelled full fiscal responsibility. Modelling of some of the precise implications of full fiscal responsibility would be extremely difficult, as would modelling of the full implications of the Scotland Bill, because the implications lie in the behavioural effects and incentives that they inject into the economy through the system changes and rate changes. If you are asking whether we can produce a sophisticated forecast, the realistic answer is that we cannot do that.

However, as is set out in the fiscal responsibility paper, we can say something about the Government's year zero balance sheet, if I can call it that, within the new system. That shows something about the financial flows in that year, as set out in tables 1 and 2 in the full fiscal responsibility paper that we have done. We talked through with the Government why ministers felt that having the choices and opportunities to use those powers would complement the powers that they are already using in the context of implementing the Government's economic strategy. We went into a lot of detail about the complementarity between the existing devolved powers and the use to which additional powers could be put to complement and increase the effectiveness of what is already being undertaken.

Peter Peacock: Is there no documentation to back that up for us to examine?

Dr Goudie: No. We provided no documentation. We just talked about the matter in great detail with ministers, and we talked through the presentations with them.

Fiona Hyslop: Convener, I point out that a detailed model has yet to be produced for the Scotland Bill. All that we have is an illustration, and the Scotland Office's caveat is that that has not even had Treasury approval, so there is an issue about modelling in relation to the Scotland Bill, and particularly the requirement in year zero

for some kind of balance adjustment, for which there is no technical provision in the bill, for Parliament to approve. I suspect that the Westminster Government will legislate on that within a matter of weeks. That really is a matter for concern about the Scotland Bill.

The Convener: Minister, when you asked us whether the committee would give full scrutiny to alternative proposals to the Scotland Bill, you meant scrutiny of a one-page summary and no modelling.

Fiona Hyslop: I think that you will find that you have been provided with an extensive set of arguments and proposals in the correspondence that has been given to you. I do not think that we could have provided more information to the committee. Compared with what you have got on the Scotland Bill, it is far more extensive.

Tricia Marwick (Central Fife) (SNP): I turn to the subject of financial accountability. If you have been reading the *Official Report* of the Scotland Bill Committee, you will know that I have consistently asked witnesses where the 35 per cent figure—the amount of money that we can raise—comes from. Last week, the UK Government told the committee that its 35 per cent estimate was based on an estimate on page 105 of the Calman commission report. Given that some of the taxes that are proposed in the report have not seen the light of day in the Scotland Bill, surely that 35 per cent figure is an overestimate. Has the UK Government provided the Scottish Government with any calculations that show where its claim of 35 per cent has come from?

John Swinney: It has certainly not provided them to me. Dr Goudie tells me that that information has not been shared in any discussions that he has had with the Treasury.

Tricia Marwick: So, no information on that 35 per cent figure, which the UK Government has suggested will be the amount of fiscal responsibility, has been shown to the Scottish Government or to anyone else.

John Swinney: No.

Tricia Marwick: Reform Scotland told the committee that we would be responsible for raising only 26 per cent of the devolved budget. Of course, there is a big difference between 26 per cent and 35 per cent. Is a Government that raises only a quarter of what it spends financially accountable?

John Swinney: I am not sure about that number, either. According to the numbers that I have in front of me, under the current framework, 7 per cent of Scottish tax revenues are devolved to the Scottish Government and it is envisaged that under the Scotland Bill the figure will be 15 per cent. I am not sure where the other numbers come from.

Tricia Marwick: So, there is about a 20 per cent difference between your figures and the amount that the UK Government has claimed Scotland will be responsible for raising as a result of the Scotland Bill.

John Swinney: It is certainly a big difference.

Tricia Marwick: Will you share your calculations with the committee?

John Swinney: I am happy to do so.

Tricia Marwick: I hope that the committee will also write to the UK Government, asking it to explain exactly where the 35 per cent figure comes from.

At your previous appearance, you said that the UK Government had not provided you with any detail behind its £45 million estimate for the costs of implementing the financial proposals. Have you received any detail on that since then?

John Swinney: No.

Tricia Marwick: Last week, the Secretary of State for Scotland said that that £45 million, which under the proposals would come out of the Scottish block, was highly caveated and he refused to put a ceiling on those costs. The week before that, the Institute of Chartered Accountants of Scotland told the committee that the costs of implementing the tax proposals could be high as £150 million. Has the Scottish Government asked the UK Government to provide a detailed breakdown of how it arrived at that £45 million figure?

John Swinney: I cannot say with hand on heart that we have asked for such a breakdown, although we have, of course, made clear in correspondence to the UK Government our concerns about the assumption that the costs of all this would have to come out of the Scottish Parliament and Scottish Government budget. The eighth point in paragraph 3.2 of the statement of funding policy would lead me in completely the opposite direction.

However, before I say any more about that, I will deal with Tricia Marwick's comment that the £45 million is heavily caveated by saying a little bit about my experience with the Scottish variable rate, which has—as the Parliament and the committee will know—been somewhat uncomfortable. When I came into office, I was faced with three figures that I could pay to ensure that the Scottish variable rate system could be restored to a state of 10-month readiness, which it was not in at the time. Depending on which option I chose, the figures ranged from £1.2 million to £2.9 million to £3.4 million.

When I was eventually given a specific proposition, in July 2010, the figure was £7 million. That was on top of my predecessors having spent in excess of £12 million on establishing the system. In one of his items of correspondence on the Scottish variable rate, the secretary of state—rather glibly, I thought—commented on the fact that we were being asked to pay only £7 million, £10 million or something like that when the upgrading of HMRC systems had cost £330 million. Somehow, I was supposed to be grateful that we were being asked to pay that small sum of money against the colossal cost of updating HMRC systems.

The committee needs to look at the issue very carefully. In my humble opinion, signing up to a proposition without a definitive specification and a guaranteed cost is a place we have been before—we are currently sitting in it. I caution the committee about that question, particularly in dealing with HMRC.

Tricia Marwick: ICAS also said that financial statements from the Treasury normally underestimate the final cost. ICAS was extremely concerned that the more complex it was to put together the database of Scottish taxpayers, the more costly it would be. It suggested that the cost would be in the order of £150 million or possibly more. We all recognise the difficulties that we have had with estimates in the past. Does it concern you that the Secretary of State for Scotland is suggesting not only that the £45 million should come out of the Scottish Government's money, but that we could face a cost of £150 million or more? Will the Scottish ministers, as well as the committee, take that up with the Treasury at the first opportunity?

John Swinney: We have raised our concerns about the assumption that the Scottish block will pay for the costs of implementing the proposals, bearing in mind the fact that the Scottish block has already paid for one tax system that is now about to be abolished by the decisions of the House of Commons and the House of Lords. To me, that activates paragraph 3.2.8 of the statement of funding policy. I say to Tricia Marwick that we cannot be cavalier about the cost of the system, because it is not a simple system to apply; it is a very complex system to put in place. As Scotland's finance minister, I take a keen interest in the question, which is why I have cited paragraph 3.2.8 of the statement of funding policy. However, the committee needs to consider carefully the questions that have been raised.

The Convener: I am aware that Fiona Hyslop wants to come in. We will move on to non-financial matters and return to that issue later.

Fiona Hyslop: This is on a financial issue. For clarity, we wrote to Michael Moore on 26 November, outlining our concerns and indicating that properly supported costings backed up by viability reviews would be a crucial test of the bill. He replied, but not in any detail. Importantly, he said:

"HMRC would want to work closely with the Scottish Government over the coming months and years".

At the end of that correspondence, he said that

"the bill will be based on phased implementation consistent with the commission's recommendations".

Regardless of the committee's views on the merits or demerits of the case for the finances, long after the bill is passed at the House of Commons and the House of Lords, discussions will still be required on a lot of the fundamental tax issues. Currently, in the bill there is a fundamental absence of any mechanism to ensure that those issues come back to the Scottish Parliament, whether by LCM or by another mechanism. The committee might want to consider that. As Michael Moore says, the matter will take some time to resolve, whether or not we agree with the contact basis. There must be a mechanism whereby the Scottish Parliament, in future years, will be able to express views about the implementation of such a measure.

The Convener: The issue is what improvements the Scottish Government seeks to make to the bill. We must move on; there is a lot of ground still to cover. Long questions equal long answers, as it happens.

15:15

Peter Peacock: I have four or five areas to go through, which I will try to do quickly. The areas are: higher rate income tax, grant reduction mechanisms, borrowing and something about Scottish Government proposals to devolve energy, employment and benefits. We have taken a lot of evidence on those things with a view to whether there are ways to improve the bill as it stands.

I turn to income tax, which you mentioned earlier, cabinet secretary. As it stands, the bill provides access to only the basic rate of income tax, not intermediate or higher rates. We have heard that one improvement might be open access—I will put it that way—to higher rates with a cap and a collar applied to set upper and lower limits. Another suggestion is to have access to a fixed percentage of each tax band: basic, intermediate and higher. Do you have specific proposals on those matters to improve the bill as you see it?

John Swinney: I appreciate that Mr Peacock asked me a question—he did not make a statement or set out a commitment on his position—but when we get on to that ground, we

have to accept that the bill proposals are severely constrained and limited. In my opinion, in considering the most appropriate way to proceed, we would do better to open up the whole thing. I refer to the model of full financial responsibility that would enable an orderly set of arrangements to be put in place.

One problem in the Scotland Bill that would arise from any variant, however reconfigured it was in respect of the issues that Mr Peacock raises, is that we would simply come across further variables and factors that would act as obstacles to the deployment of proper flexibility to deal with emerging economic circumstances. The nub of the issue for me is whether we have the flexibilities in the bill that enable us to deal with those difficult situations.

Peter Peacock: I understand where you are coming from. Propositions have been put to us. I am simply trying to establish whether the Scottish Government has a view on how the bill can be improved in a technical way. From what you say, you appear not to have a specific proposal—

John Swinney: No, that is not—

Peter Peacock: Part of the reason for asking the question is the contrast between non-financial issues, on which the Scottish Government is coming up with amendments to the bill, and financial and technical measures, on which it has proposed no amendments.

John Swinney: I gave a pretty specific answer to Mr Peacock. We think that the way to proceed on this matter is to equip Scotland with the ability to make a range of flexible decisions that take account of the prevailing economic circumstances. That is the model we believe in; that is our enhancing proposal.

Peter Peacock: In which case, I suspect that I will get the same answer to my next three questions.

John Swinney: Oh well, let us cut to the chase—

The Convener: I will ask a convener's question before we return to Peter Peacock's questions.

The Government began by asking this committee to give full scrutiny to alternatives. We have established that there is one bit of paper that constitutes the Scottish Government alternative. That is all that has gone to the UK Government in the 20 months since Calman published—there has been no modelling at all. You then said to the committee, "Please improve the bill." To my knowledge, the Scottish Government has suggested no amendment of any kind to the structure of the income tax power, for example. We have had a lot of criticism, but do you have any amendment to that power?

John Swinney: A convener's question is usually designed to penetrate the issue a little further. I have just given Mr Peacock the answer. We fundamentally believe that the right way in which to proceed is the model of financial responsibility. The manner of the convener's question suggests that she is casting doubt on the volume of information that has been made available, but has she made any analysis of the material that the Government has published, including the information that we have exchanged and discussed with the Treasury? That is why we produced the timeline. The Secretary of State for Scotland came to the committee last week and he fundamentally misled the committee on the degree of dialogue that has been going on—he fundamentally misled the committee. He came to committee and said that there had been no dialogue on the substance—

The Convener: Cabinet secretary—

John Swinney: No, no convener. I want to put this on the record.

We have produced a timeline of the dialogue that took place between the Scottish Government and the UK Government on all these questions. My officials, who took part in the discussions with the Treasury, are here to amplify the material that we have provided. I am afraid that the assertion is misplaced.

The Convener: What assertion is misplaced?

John Swinney: The assertion that the detail is not there—all of it is there.

The Convener: The detail is there; we have established the depth of the alternative. I am asking you about improvements to the bill. Are there any amendments that you want the committee to make to the structure of the income tax power that is proposed in the bill? This is our final evidence session. We have been studying the bill—as you have—for a number of months. What amendments would you like to be made to the income tax structure?

John Swinney: The committee could recommend to the UK Government that we move to having a much wider range of financial powers, as envisaged under financial responsibility. It would be helpful if the committee were to agree on that recommendation.

The Convener: Let me ask four precise questions. First, how would you like the income tax structure that is proposed in the bill to be amended?

John Swinney: We may be back on the ground that Mr Peacock was on previously; you may get the same answer to four questions. Fundamentally, the Government's perspective is that we do not believe that the arrangements in

the bill provide the type of financial and economic levers that would enable Scotland to focus on growth.

The Convener: I accept that.

John Swinney: Your acceptance is an illustration of the fact that the bill must move by a considerable margin to align itself with the Scottish Government's aspirations for growth.

The Convener: I absolutely accept that the Scottish Government does not think that the bill is perfect. On our final evidence day, I am asking how you would like the grant reduction mechanism to be improved. The entire resources of the Scottish Government are available to you. What improvements would you like to make to the form of grant reduction?

John Swinney: How the grant reduction mechanism will operate is a mystery tour. Even the United Kingdom Government is not clear about that. Let me quote from the last piece of modelling that we received from it, which was rushed out 20 months after the Calman commission's report. We received this little ditty from the secretary of state, who said:

"It is not possible at this stage to estimate what the impact of the changes on the Scottish budget will be when the system is introduced."

The committee is considering legislation that is in front of the House of Commons, and I am being asked to say how I would improve the grant reduction model, but I do not know what the grant reduction model is. It is a mystery tour.

The Convener: You are being asked what the Scottish Government believes is the optimal approach to grant reduction. What is your view?

John Swinney: My view is that the optimal direction is to move to full financial responsibility. If the committee took that approach, it would be doing Scotland a service.

Fiona Hyslop: The grant adjustment model is a leap into the unknown. It would be an act of faith by the committee to recommend that legislative consent be given in that area when we do not even know what the Treasury's model is. That is a very serious point.

The Convener: You have written to us with a vast array of amendments on the non-financial powers. On the final evidence day, why do we have no amendments at all from the Scottish Government on the financial powers?

Fiona Hyslop: How can you amend something that is not there in the first place? The actual legislative proposal is not in the Scotland Bill, which says only that the Treasury will adjust the grant.

The Convener: The bill amends in law the structure of the income tax power. That is one area. I will give you another example. Which additional tax would you like the committee to include in its report?

John Swinney: You could include corporation tax and a variety of other measures. We have specified that we do not think that VAT should be part of the framework; we accept that that must remain a United Kingdom tax, but a whole range of taxes could be devolved under the concept of full financial responsibility.

Peter Peacock: I will not go back into grant reduction—I got the answer to the question before I asked it and I will settle for that. I understand where you are coming from.

Borrowing, however, might be slightly different, because it features in your proposals for financial responsibility. You talk about access to full borrowing. We have had a lot of evidence on not just short-term borrowing for managing cash flow, but capital borrowing. It is not clear how the limits have been arrived at and you are critical of them, as many other witnesses have been. In your proposals for financial responsibility, you talk about the need for an economic agreement and a Scottish fiscal commission, implying, particularly in relation to the latter, that there must be some limit on borrowing. What is the right limit on borrowing?

John Swinney: There are two distinct areas of borrowing: borrowing for revenue volatility and long-term capital borrowing. On the borrowing for revenue volatility, the cumulative limit of £500 million strikes me as being too low to deal with the volatility within a cycle. What would the number ideally be? I suspect that the number might more safely be between £1 billion and £1.5 billion. In the period—[*Interruption*.] This is not the table that I have in my head—

Peter Peacock: You have a better one. [*Laughter*.]

John Swinney: Here it is, in my helpful Scotland Office document. In the four-year period 2008-09 to 2011-12, the cumulative variance is about £1.2 billion.

Peter Peacock: You are seeking a limit that exceeds the maximum that it has been in recent experience.

John Swinney: I am just saying that £500 million feels to me to be too light. The answer is probably about £1 billion or perhaps slightly higher.

On capital borrowing, the figure in the bill bears a startling resemblance to the estimated costs of a piece of bridge infrastructure that Mr Peacock might drive over in years to come. He will not be driving to Edinburgh—he will still be using the

Forth rail bridge, which I know he uses frequently. Perhaps it is an arbitrary number.

The key question on borrowing is about the ability to service and sustain borrowing in the medium term. That is essentially a prudential judgment that can be applied.

That brings me to my final point, which is about the framework that must be in place. This comes back to one of Mr McLetchie's earlier points. I accept without question that if you are moving to a system in which there is financial responsibility within the United Kingdom, or to the system envisaged here, due account and due respect must be given to the macroeconomic framework of the United Kingdom. You cannot have a borrowing limit in Scotland that pays no regard to that framework—it has to be respected as part of that arrangement and borrowing must be sustainable and prudential.

My comment about the macroeconomic framework is essentially to reassure the United Kingdom Government that a framework could be designed to take that into account.

Peter Peacock: I want to take that a bit further. Whether or not other taxes are added in light of your recommendations, the borrowing powers will maintain, so what the bill says about borrowing is quite important. Do you have specific proposals on how you construct the legislation in a way that allows the flexibility that you are describing?

John Swinney: We can certainly provide the committee with input on that.

Peter Peacock: But there is not one you have ready.

Dr Gary Gillespie (Scottish Government Directorate for Strategy and Performance): The timeline that was referred to shows that at one of the meetings with the UK Government we provided draft clauses on borrowing.

Peter Peacock: It would be helpful to see those.

Fiona Hyslop: They are based on the Calman proposals but we will be able to update them in relation to the bill.

15:30

Peter Peacock: That is fine.

You referred to the paper on financial responsibility that you have circulated in the past couple of days, which says that energy policy, employment policy, benefit policy and all the taxation and measures that accompany them are part of the full financial responsibility package. Am I correct that you are talking about the entire gamut? Do you have amendments to the bill on those matters?

John Swinney: That has been covered in what I said to the committee about the extent of financial responsibility. The point is possibly best illustrated by figure 1 in the document, which demonstrates the contrast in responsibility under the different models.

Peter Peacock: I will follow up Tricia Marwick's earlier questions. Have you provided costs for the Treasury for running your proposed system?

John Swinney: I will make a point for which I had the data a second ago. The United Kingdom Government has high expenditure on tax administration as a percentage of GDP—it spent nearly twice as much as Norway and almost two thirds more than Finland on tax administration in 2007. Efficiencies can undoubtedly be made in the organisation of such systems in small countries.

Peter Peacock: Tricia Marwick quoted a figure from ICAS of up to £150 million for the system under the bill. You have no equivalent figure for the cost of your proposals.

John Swinney: I would not like to credit the figure that the Scotland Office gave the committee as worth making a comparison with—the number is a bit shaky.

Peter Peacock: But you have no number for your proposals.

John Swinney: I am simply saying that we can deliver tax administration in efficient ways in a small country.

Peter Peacock: But you have no number—that is what I am trying to find out.

John Swinney: I am simply saying that we can deliver tax administration in a small country.

Peter Peacock: I think that I have got the answer.

Robert Brown: I will return to growth, which the cabinet secretary was right to mention. Has the new document—the February 2011 paper called "Full Financial Responsibility"—been sent to the UK Government?

John Swinney: The document was sent to the committee.

Robert Brown: Has it been sent to the UK Government? That is what I asked.

John Swinney: Not so far.

Fiona Hyslop: Last week, I had a helpful meeting with David Mundell, when I agreed that we would marshal all the materials that had been given to the committee and give them to him after the committee finishes its deliberations.

Robert Brown: That is helpful.

Page 5 of the document refers to the experience of other small European countries. It says that

"from 1978 to 2008 Scotland's GDP growth averaged 1.9% a year. This compares to ... 2.7% among small EU countries."

I suppose that it is reasonable for you to make the point—although achieving it would be a magic totem—that

"If Scotland was able to replicate the success of these countries, it would significantly boost its average annual growth rate."

Against that background, I have looked at some European countries' GDP figures. Apart from Scotland, 1.9 per cent was the figure for Italy. Germany was on 2 per cent, Switzerland—a federalised and very devolved country—was on 1.9 per cent and Denmark was on 2 per cent. Apart from Ireland, where ups and downs must be taken account of and which went a bit higher, the United States was on 2.9 per cent. My point is that countries with GDP growth that is equivalent to Scotland's—Switzerland, Denmark, Germany and Italy—provide examples of big, small, federalised and unitary countries. Switzerland and Germany are federal; Italy is slightly more centralised and France is a bit more centralised. The United Kingdom's growth was also a bit higher than Scotland's.

What are your thoughts on all that? Those figures do not seem to bear out your general point about a difference between growth rates in small countries and larger countries—the figures do not match. The biggest growth in significant countries was that of the United States, at 2.9 per cent.

John Swinney: The definition of small European Union countries that has been used is of countries with a population of less than 10 million. The countries that have been included in the analysis are Austria, Denmark, Finland, Ireland, Luxembourg, Portugal and Sweden. That is what the analysis is based on.

Robert Brown: So it is an average. There is not really an obvious principle coming out of that against the wider figures of the EU, the UK and the mix of countries at the same level as Scotland, is there?

John Swinney: I think it just demonstrates a level of economic performance that is a worthy aspiration for Scotland—we could deliver economic performance at a higher level than we currently perform. UK trend economic performance over that period will be higher than 1.9 per cent; it will be 2.3 per cent.

Robert Brown: I want to develop that point slightly, because you made the interesting statement on the same page of the paper that

"ultimately, the impact of any increase in financial responsibility on Scotland's economic performance will depend on the policies and priorities of future administrations. If successful, the economy will grow more quickly; if less successful it will grow more slowly."

Presumably if you did it really badly, the economy would not grow at all. Do you stand by that statement that the key point in all this is the policies of Administrations?

John Swinney: I do.

Robert Brown: I am struck by the fact that a different impression is conveyed in the January paper, "Summary of Full Financial Responsibility & Independence", where you put forward the proposition that an increase in Scottish public spending of 1 per cent a year would give us an extra £18 billion of resources in real terms for public service over 10 years. You base that very enticing idea on the analysis by Professor Hughes Hallett and Professor Scott that every 1 per cent increase in fiscal devolution might raise GDP by 1.3 per cent after five years. Do you now accept that that statement in the January paper was very distinctly over-egging the position? We might all have agreed with you that a bit more fiscal efficiency, if you like, was possible, but not that there was this historical inevitability that you seem to have taken from Professor Hughes Hallett and Professor Scott.

John Swinney: There is a really interesting point here. This is why I think the work of Professors Hughes Hallett and Scott is very important and why it is appropriate for us to consider it. I think there are two elements to this growth argument. One is about the point, on which I am completely in agreement with Robert Brown, that a large measure of it depends on what you do and what policies you take forward. I have no issue with that whatever.

There is another question about economic efficiency, which I think is about improving the base performance of the Scottish economy. Let me illustrate that point to the committee; I am very much considering this issue at the moment. The previous United Kingdom Government made an interesting proposal for a future jobs fund, which was to create limited-time employment for people who had been unemployed for a long time, to get them back into the labour market. It was a good, sound idea in terms of creating new economic opportunities. When the Government spent the money on creating posts, it was able to get the benefit of not having to pay benefits. If I, as Scotland's finance minister, consider having a future jobs fund in Scotland, I have to pay the money for the posts, but I do not get the saving in the benefits, because that all goes to the Treasury—the Treasury is quids in.

I use that example to illustrate the fact that when you go through this process of integrating all aspects in full financial responsibility, these opportunities open up to you and they create a one-off improvement in the base position. I accept that you only get it the once. It improves your economic efficiency and then it is up to you. What do you do? Do you take good decisions or bad decisions? Do you deliver growth or do you not deliver growth? That is the choice. That is a very practical example of the difference between the issue that confronts me as Scotland's finance minister within a devolved Scotland—it is the same issue that would confront me under the Scotland Bill proposals—and the issues that I would like to consider with full financial responsibility.

Robert Brown: That is a very good example, and I am prepared to accept what you have said to a degree. However, the fact is that those kinds of decisions can be made at various levels, including by the UK Government and, as you have illustrated, the Scottish Government—

Fiona Hyslop: But it cannot.

Robert Brown: Please let me finish the point. Yes, there is an opportunity to make technical efficiencies in the system, but the committee is also concerned with the fact that any consideration of where would be the best level to put these powers must take account of downsides to the Scottish economy as a result of some of the movement of taxes that the committee has been examining; whether there will be fiscal tax competition, for example, with regard to corporation tax; and a whole series of other issues.

John Swinney: Those questions fall under the "What do you do?" category. Do you take the good or the bad decisions? Robert Brown is absolutely correct to say that all these decisions can be taken at different levels, but I point out that under the current framework I could not introduce, say, a future jobs fund and get any credit for doing so under the Barnett formula. The budget that would be varied at UK level would be that for the Department for Work and Pensions, which has zero comparability for Barnett purposes. That is where we are.

Robert Brown: Has the argument that the devolution of revenue tax-raising powers points in the likely direction of economic growth been overstated? Is it not the case that growth cannot in fact be sustained?

John Swinney: I think that I answered that point when I said that I recognise that there are one-off economic efficiencies, including the one that I have just cited, that can be achieved and then there are certain decisions that have to be made about what you are going to do or to tackle.

The Convener: Is it the Scottish Government's view that a 1 percentage point increase in fiscal devolution might be expected to raise GDP by 1.3 per cent after five years, above what might otherwise be the case?

John Swinney: The Scottish Government continues to accept that analysis, although I think that we have said that there is likely to be a 1 per cent increase in GDP. I know that the study by Professor Hughes Hallett and Professor Scott has stated a 1.3 per cent increase, but I think that from the Scottish Government's perspective the figure will be 1 per cent.

David McLetchie: According to the First Minister at the Scottish National Party conference, Mr Swinney, it was not a one-off increase in performance but 1 per cent per annum growth.

John Swinney: The point that I have just made is the explanation that I would give.

David McLetchie: Which is at variance with the First Minister's explanation.

The Convener: Does the chief economic adviser have any comment to make on that relationship? Might a 1 percentage point increase in fiscal devolution be expected to raise GDP by 1.3 per cent after five years above what would otherwise have been the case?

Dr Goudie: I expect that you will be aware of what my answer is, convener. Our team looks at and analyses the information and offers its best professional judgment on all these matters in confidential private advice to ministers and, as you will no doubt expect, I would not dream of passing that advice on to the committee today.

The Convener: With that intriguing answer, I bring this part of the session to an end. I thank the cabinet secretary, whom we have kept from Cabinet discussions on the budget, and now turn to the Minister for Culture and External Affairs with questions on non-financial matters. Trish Marwick will lead off on elections.

Tricia Marwick: The Secretary of State for Scotland will still retain a number of responsibilities, including voter registration, rules on the Parliament's composition, the procedure for filling regional seat vacancies during the Parliament's life and rules on disqualifications. Is the minister happy with the UK Government's response to the committee last week? Apart from the procedure for filling any regional seat vacancy during the Parliament's life and rules on disqualifications, what other rules relating directly to the Scottish Parliament would the minister like to be devolved?

15:45

Fiona Hyslop: That is an important point in relation to elections, and it also has an impact on other non-financial areas.

Those proposed changes are intended not to empower the Parliament, but to transfer powers to ministers to do certain things, and we are obviously disappointed at the limitations. As I recall, there has been a clear consensus on all sides of the chamber that there should be a movement of powers not only to ministers, but to the Parliament.

The committee might want to reflect more generally on the fact that the proposed changes in non-financial areas involve more of a transfer of powers away from the Parliament to the courts, the UK Government or, in some cases, ministers. The movement of powers to the Parliament is very limited indeed: air-guns are the only area in which legislative powers have been transferred to the Parliament.

With regard to elections, the powers are very limited indeed. We are perfectly capable of carrying out and implementing our own requirements, so we would prefer a greater transfer of powers. In one of the papers that we have provided to the committee on administration of elections, we have listed the amendments that we would like in that regard.

Brian Adam: Can you clarify the Scottish Government's view on whether it would be better to devolve powers on all the relevant matters that relate to drink driving? I am talking about the whole package, including the limits, penalties and regulations on random testing.

Fiona Hyslop: Yes, we think that it would.

In terms of policy implementation, that would be in the interests of the police as it would give them the powers on random breath testing and penalties that they would need to make an impact. There is no reason why it cannot be devolved and members on all sides of the chamber have called for that for a number of years. There is no strong reason for it to be retained; the case for that has still to be argued.

Brian Adam: How do you envisage the system of penalties working? If the limit was set at 50mg per 100ml of blood, for example, would you take the view that for any suspension or withdrawal of a licence, the offence would be lesser at 50mg than at 80mg?

Fiona Hyslop: It would be for the Parliament and ministers to decide what the penalties should be in relation to any limits. My argument is that we should at least have the chance, and the powers, to make those decisions about what the penalties should be.

The case for reducing the limit is strong and has been very well argued; it has gained support from members all round the chamber. However, it is not my place to say to the committee that the penalties should be X, Y and Z.

Brian Adam: We heard from the Road Haulage Association that the speed limits for heavy goods vehicles should be devolved. In particular, the RHA argued on the grounds of safety as well as environmental improvement that raising the speed limit from 40mph to 50mph on single carriageways would help in terms of safety records and fuel consumption. Can that be done under the current regulations, or would it require a change to the proposals?

Fiona Hyslop: It would require a change, which again reflects the limitations of what is proposed in the bill. The RHA submitted evidence to the original commission on devolution, giving precisely the same reasons that you have just set out. A much more watered-down proposal has been put forward in the bill.

I have been told that that is because the UK Government wants to look at transport variations as a whole. Why do we have to wait until the UK Government and the minister there carry out a review of transport and speed limits, when we know from our experience with the A9 that there is a strong case for variations in limits for safety reasons? It is crazy that responsibility for speed limits can be limited to one aspect of road use and not cover another, whether we are talking about caravans or HGVs. We have suggested that the proposal needs to be improved.

Brian Adam: We have heard evidence that casts doubt on the necessity of re-reserving the regulation of the health professions. Joseph McIntyre told the committee that members of the Dental Laboratories Association

"said overwhelmingly that they want things to stay in Scotland",

and the representative of the Health Professions Council told us:

"We are working very well with the system as it is."—[*Official Report*, *Scotland Bill Committee*, 25 January 2011; c 271-2.]

Has the Scottish Government received any representation from health professions that are seeking re-reservation?

Fiona Hyslop: No. There has been no such request. I noted that when the committee received evidence from professions that will be affected by the proposals in the bill, witnesses said that they wanted regulation to remain devolved.

It is not just about who decides on regulation; it is about the ability to negotiate from a position of strength, with a knowledge and understanding of

the content of regulations when they come up. The issue is not just the power to regulate but the fact that our having responsibility for regulation allows meaningful dialogue, rather than one-way traffic from Westminster, in the regular discussions that take place across the UK.

The Department of Health's argument for re-reservation relies on the possibility of fragmentation of regulations. It is quite telling that there has been no such fragmentation during the past 10 years and that co-operation between the four Administrations in the UK has been positive. No problem has been identified and the devolved professions want to remain devolved. The only results of the change would be the removal of the Parliament's role and the weakening of Scotland's negotiating position—I do not know whether it would assist the DOH.

I stress to the committee that we are talking about another example of the bill taking powers away from the Scottish Parliament, never mind the Scottish ministers.

Brian Adam: I presume that the change would bring practical difficulties and weaken the ability of the Scottish Parliament and the Scottish Government to influence decisions, which should be made on a parity-of-esteem basis across the UK. Is that the essence of your argument?

Fiona Hyslop: Yes. Re-reservation would also diminish the ability of devolved health professionals themselves to inform and influence discussions about regulation. It is interesting that one of the professions—I cannot recall which one—opened offices in Scotland, so that it could get closer to the Scottish health system. Given the approach of the new coalition Government in the UK, it is clear that there will be increasing divergence between Scotland and the rest of the UK on health policy, so it is particularly important that our health professionals have the comfort of being close to the Cabinet Secretary for Health and Wellbeing and decision making on regulation in Scotland.

Brian Adam: In written evidence, the Scottish Federation of Housing Associations said:

"The SFHA is opposed in the strongest possible terms to the provision contained within clause 12 of the Scotland Bill which serves to re-reserve to Westminster responsibility for legislation relating to the insolvency of social landlords in Scotland."

Have you had an indication that the UK Government is listening to the sector and will amend the provisions on corporate insolvency, to avoid damage in relation to registered social landlords? The SFHA did not supply a draft amendment in that regard.

Fiona Hyslop: The answer to your question is no, and we are concerned about the issue. Provision for section 30 orders under the Scotland Act 1998 was made to support the Housing (Scotland) Act 2001—the convener is familiar with the legislation—and the Housing (Scotland) Act 2010.

With regard to insolvency of RSLs, we were led to believe that the UK Government had no intention of taking such steps, right up until the day on which the Scotland Bill was published. That means that there has been limited time in which we could engage with the UK Government on the issue—you will see from the correspondence that Alex Neil has set out our concerns, as you will also see from the single sheets that I have regularly supplied to the committee.

The issue is one of the reasons why the bill does not comply with the UK Government's convention on devolution, which is very unusual. Normally, the UK Government would not agree that a legislative proposal could go forward unless it complied with the convention. That did not happen with the Scotland Bill, because so much of it was so late. Obviously, we would still have been in dispute with the UK Government on this area. Usually we get enough sight of a UK bill that we can resolve the issues or at least set out to the UK Government what the issues are under devolution but, highly unusually, the bill did not comply with the UK Government's convention on devolved practices.

This is the one area on which the committee has had strong representations from the organisations concerned. We all know that housing is very much a devolved matter. Although there have not been any insolvencies, we think that the blanket approach that seems to have been taken on insolvency generally will result in a sweeping up of devolved areas and powers being taken away from Scottish ministers. It is another example of power shifting away from Scotland rather than coming to it under the bill.

The Convener: It would be very helpful to have an amendment on the RSLs, because there is widespread acceptance that the issue needs to be looked at. A submission on that in due course would be great. We understand the policy position and have some sympathy with it.

Fiona Hyslop: We will provide something, if you bear with us. It is a fairly complex area.

The Convener: We come to the other really substantive issue, which is the Crown Estate.

Peter Peacock: We have had a lot of evidence—written evidence, mostly—on the Crown Estate, and we will have a session on it just after you have gone. That evidence points overwhelmingly to some change being sought. At one level, the bill makes what could be argued is a fairly token change—the appointment of a Scottish

commissioner. At another level, you have argued for full devolution of the Crown Estate to Scotland.

However, a number of intermediate possibilities have emerged, one of which would involve taking further the appointment of a commissioner for Scotland and vesting the power to make that appointment in the First Minister or in the Scottish ministers. In addition, we have had an interesting paper from Calum MacDonald, the former MP, who has set out the proposition whereby the Secretary of State for Scotland could be required to exercise his powers of direction over the Crown Estate, in consultation with Scottish ministers and a national committee for Scotland. That replicates closely the current arrangements for the Forestry Commission. I do not know whether you have had time to see that paper.

Fiona Hyslop: No, but I am aware of it.

Peter Peacock: Another strand that has emerged is that new forms of accountability between the devolved Administrations and the UK Government—the Crown Estate currently accounts to the Treasury—could be developed. I know that you favour full devolution of the Crown Estate, but do you regard any or indeed all of the other possibilities that are beginning to emerge as a welcome step forward?

Fiona Hyslop: There are many possibilities with the Crown Estate. As you rightly said, what is presented in the bill is, unfortunately, just about the most minimal change that could be made. I indicated that in December. I am a bit disappointed that the secretary of state said that he awaited

"the SNP's detailed proposals on either fiscal autonomy or the Crown Estate, so that they might be debated"

and that the case on the Crown Estate had

"not been put forward in detail either by the Government of Scotland ... or by others."—[*Official Report, House of Commons*, 27 January 2011; c 471-2.]

As the member knows full well, there is a huge amount of evidence, research and reports on the Crown Estate. We put forward our case when the report of the Crown Estate review working group was published, on 21 February 2007, and on 30 November 2009. On 26 November, we produced a consultation paper entitled "Securing the Benefits of Scotland's Next Energy Revolution". On 31 January, we sent the Scotland Bill Committee a note on the Crown Estate commissioners. On 2 February, the Cabinet Secretary for Rural Affairs and the Environment set out more extensive views. In addition, of course, the Treasury Select Committee report of 22 March 2010 set out important recommendations on review and the appropriate level of ministerial involvement, so there is a range of views on the issue.

Quite clearly, we think that full devolution of the Crown Estate is required. I recognise that other proposals have been put to the committee by other people. It is not for me to weaken our position by saying that a pick-and-mix from different areas is required. The Commission on Scottish Devolution made it clear that Scotland had to be consulted, and a number of your points are about ensuring that there is consultation. The idea that the appointment of a Scottish commissioner will somehow improve things when, technically, there is one already is mistaken; it is a tokenistic proposal. Not to recognise all the arguments that we have put forward over many years, given the coastline that we have, is a singular omission. As members know, local authorities in the Highlands and Islands have lobbied extensively on the issue. It is not good enough for the Scotland Bill to contain a feeble proposal on the matter.

16:00

Peter Peacock: I take your point on that, but I am trying to get a hint from you. I understand that you argue for full devolution of the Crown Estate, but if the UK Government was not disposed to do that, other possibilities are emerging, and you would want at the very least to see some movement from the current position. You would prefer to go to a fully devolved situation.

Fiona Hyslop: It is clear that we think that a fully devolved position would be preferable. The issue is not just appointments, which can be made in different ways; it is about policy influence. That is the key. Policy influence is critical, and we think that that can best be achieved by full devolution. However, I appreciate the argument that has been put by others, and I do not want to prejudge what the committee will come forward with.

Peter Peacock: You have taken me to the next point that I was going to probe. A current issue is that the Crown Estate has been developing entirely new expertise in offshore renewables and their licensing. It has been pushing to the next round of development and putting quite a lot of investment into offshore renewables, and it has gathered a considerable amount of staff expertise. It may well be possible to construct ways of influencing policy on that in the short to medium term that could be of great benefit to Scotland without necessarily going to full devolution. That may be the UK Government's preferred position. Are you happy to consider such proposals further in the spirit of moving things on?

Fiona Hyslop: I think that the status quo is unacceptable. I would like us all to agree about that, and to agree that the proposals in the Scotland Bill are feeble and need to be improved. The key issue is influencing policy, which can be

done in different ways. We are setting out our views to members. The committee has received evidence from a number of other areas, and it is up to the committee to decide on the way forward, but I suspect that anything will be better than where we are now. However, let us not limit our ambitions and the horizons of the possible.

Tricia Marwick: Andy Wightman has provided us with a submission, in which he says:

"Clause 18 of the Bill states that Scottish Ministers should be consulted on the person that the Chancellor of the Exchequer proposes to recommend to Her Majesty and that this must be a person 'who knows about conditions in Scotland as they relate to the functions of the Commissioners'."

Given that the bill's intent is to further empower the Scottish Parliament, are you surprised that there will be no requirement whatsoever for the potential commissioner to put forward the interests of the people of Scotland or, indeed, the Scottish Parliament?

Fiona Hyslop: Yes. That accentuates the flaws in the proposal in the Scotland Bill. It does not engage at all with the issue of democratic accountability, which is an issue not only for the Scottish Parliament. We know that the local authorities that have a keen interest in the matter want to have an input as well. Therefore, the proposal is extremely limited.

The current Scottish commissioner was appointed in 2009, and the earliest date at which the Scottish ministers would be expected to be consulted, even under the legislation, is 2013. It is telling that the proposal in the bill is for the Chancellor of the Exchequer to make the appointment; it is not even the Secretary of State for Scotland. If anything, it is starting to remove the controls within Whitehall and the Treasury. Our interest is not just in the revenue aspects, to which I alluded in my answer to Peter Peacock; it is about the policy implications for other aspects of our stewardship of an important marine area.

Tricia Marwick: An issue that I raised with the Crown Estate commissioners last week was the potential revenue from offshore renewable energy in the next decade. The Crown Estate commissioner suggested that the revenue for the UK would be between £12 million and £48 million. Some people dispute that and think that the amount will be much higher. Do you think that, even if nothing else changes, Scotland should get a share of the profits that currently go back to HM Treasury? Should Scotland get a share of the profits coming from the Crown Estate commissioners?

Fiona Hyslop: Definitely. Under the Crown Estate Act 1961, the commissioners' duties are "to maintain and enhance" the value of the Crown Estate

"and the return obtained from it".

The Crown Estate's stated aims are

"to benefit the taxpayer by paying the revenue from our assets ... to the Treasury; and to enhance the value of the estate and the income it generates."

It is about income generation. Of course we want to have a good, fair share of that income in the short term, before we take on wider responsibilities, but it is not just about revenue. Because there is a duty to raise revenue, often decision making in relation to the stewardship and management that is required of these areas, which are of vital importance to us, can be flawed.

The Convener: I thank the minister for her evidence. There are one or two areas that we have not had the chance to cover. I am sure that we will cover them in correspondence. Is there anything else that you would like to put on the record?

Fiona Hyslop: There are a number of issues. I know that the Lord Advocate will give evidence to you later, but I have serious concerns about some proposed provisions and the lateness of their introduction. I understand that you may have seen some draft—possibly secret—clauses. So have we, but there is a real issue as to whether we will be able, in the time that is available, to have a meaningful discussion about provisions that involve huge transfers of constitutional powers.

The lateness of the provisions is understandable, given the Advocate General's consultation, but we need to take our time to ensure that they are accurate. It would help me to make that point in my discussions with the UK Government if the committee were to provide advice on the timeframe for the proposals. There should be an opportunity for the provisions—not least those relating to the role of the UK Supreme Court—to come back to the Parliament once they have been through the Westminster process.

It is important to state that the High Court in Scotland is the supreme court in Scotland. Although all of us recognise the Advocate General's policy intent, his proposals could have severe and dangerous consequences, depending on the technical drafting of the detail of amendments. We have yet to take a collective view on the matter, as the Advocate General set out his views only last Monday. I wish to discuss it with my Cabinet colleagues, but it is one of the issues on which we may need to make a late submission to you, because of the lateness of the proposals.

The Convener: I understand that. For clarity, will you confirm that your concerns relate to

section 57(2) of the 1998 act, which is not inconsequential, and that you have no concerns beyond that?

Fiona Hyslop: No. We have a range of concerns about all the Advocate General's proposals. Some proposals are welcome, but we have serious concerns, especially about the proposals relating to the Supreme Court.

The Convener: You are talking about section 57(2).

Fiona Hyslop: Yes, but we have concerns about the consequences of some other proposals. After I have had time to discuss the matter with my Cabinet colleagues, I would like to have the opportunity to provide you with our view, while you are drafting your report. This is an on-going issue. As you will hear, it is fundamental to not just decades but centuries of practice. For that reason, the Scottish Parliament should be able to reflect on it fully.

It is doubtful that you will be able to come to a definitive view that you can share with other members of the Parliament when we come to discuss the LCM. We need to have space for continued dialogue—Government to Government, and law officers to law officers. I appeal to the committee to recommend that the issue comes back to the Parliament after the dissolution period.

The Convener: Last week we indicated that we would take further evidence on section 57(2) from relevant interested stakeholders. It would be helpful to have submissions on any other issues relating to legal provisions relatively early, but we are happy to take late submissions on section 57(2). It may or may not be possible to reach a definitive view on the issue.

Fiona Hyslop: The information that I have provided to the committee already sets out our view on the proposals of the expert group and on the Advocate General's consultation. You do not have our definitive position on the Advocate General's proposals, now that we have seen them.

The Convener: I understand. Thank you for that clarification. I suspend the meeting for a minute or two to allow the new panel to join us.

16:09

Meeting suspended.

16:12

On resuming—

The Convener: We are joined by a large and distinguished panel. Martin Sime is the chief executive of the Scottish Council for Voluntary Organisations; Dave Moxham is the deputy general secretary of the Scottish Trades Union Congress; Lucy Parsons is the project manager for marine renewable energy in Orkney Islands Council; Andy Wightman is a prolific author on these matters and is someone whom I describe as a land reform campaigner—I do not know whether that is a helpful description, but that is how I think of him and there is no designation beside his name in my papers; and Alan Trench, who is an honorary senior research fellow at the constitution unit of University College London and the author of the blog "Devolution Matters".

As I hope that we have already indicated to our panel members, the only way in which we can fit everything into the hour that we have together is to start with the SCVO; move on to the STUC; then move on to a debate on the Crown Estate, involving Andy Wightman and Lucy Parsons; and then move on to deal with the written submission from Alan Trench.

I invite Martin Sime to say a few words.

Martin Sime (Scottish Council for Voluntary Organisations): I will be brief, because I know that time is tight.

In our written submission, we pointed out that voluntary organisations are likely to have a wide range of views on all aspects of the bill and on matters that are not in the bill but which perhaps ought to have been considered. The SCVO's role is not to second-guess what that diversity might produce, but we want to make two general comments in relation to the bill.

First, we think that the process has been disappointing. It has not been consistent with the way in which policy and regulation have developed in Scotland. We recall the principle of a participative approach to the development of policy and legislation that the Parliament signed up to as one of its founding principles, and we believe that the process from the Calman report up to now has fallen far short of what our members have come to expect in terms of how legislation should be developed, particularly in relation to a more broadly based and inclusive approach that engages people from beyond political circles.

16:15

We reflect that the bill has a number of drivers—as is evident in the speed at which the bill is going through Parliament and the pushing of this committee's considerations—which are not to do with getting it right, building consensus or understanding and appreciating the options that might emerge from a more mature discussion, such as we have around the development of legislation in the Scottish Parliament.

I have listened to this committee for the last hour and a half and I have heard about all the uncertainties and the lack of clarity about different options and costs and processes that are associated with the bill, and about the last-minute amendments that you do not have time to think about, which rather illustrates my point. What is the rush? Why do we have to do this so quickly and risk, of course, getting it wrong? The answer is that an election is looming and the bill has become a political football, which my members and I think is unhelpful and sets a bad precedent for how devolution ought to be improved.

The second point relates to the issues and concerns that voluntary organisations have experienced since devolution began. We tend to be at the sharp end of working across the UK and Scottish Governments on various issues and agendas, and our members have reflected on that. We find that in some areas of public policy there is an ever-moving feast, as the Minister for Culture and External Affairs said. We have divergent policy systems in the health service, for example, and there are the issues that the Cabinet Secretary for Finance and Sustainable Growth raised about possible disincentives for expenditure on a Scottish future jobs fund.

In a number of areas, the devolution settlement does not work and has a significant impact on the lives of people who receive public services and benefits. The bill is utterly silent on such matters. We reflect on the issues that are actually covered in the bill, which is not to demean them—I am sure that there are real benefits to be had from licensing air guns and restricting the speed of motor cars apart from those towing caravans—but fundamental issues around the operation of public services, public life, expenditure and the powers of different Parliaments have emerged since the devolution settlement that require to be addressed. We are rather confused about the fact that the bill simply ignores them.

Tricia Marwick: Your submission states:

"In practical terms, the Scotland Bill fails to address some major public policy and service delivery areas—"

you touched on that in your opening statement—

"where the current devolution settlement creates difficulty, duplication or overlap with reserved responsibilities."

You also refer to:

"Divergence of reserved benefits and devolved care ... Employability services ... and ... Distribution of proceeds from the National Lottery."

I take on board completely your point about the lack of consultation, but can you see any way in which the bill could supply answers on any of the issues to which you have referred? Can you see any possibility of amending the bill to meet your concerns better?

Martin Sime: I am not a technical expert, but I think that that would take the Scotland Bill into completely new territory, which is exceedingly unlikely at this point in the cycle. However, that is more about the track that the bill seems to be set on rather than about whether, in an ideal world, it would be possible to amend the bill to make certain possibilities real for the committee and to give Westminster a choice of whether to go in the existing direction or not. However, my overall view is that I simply would not have started from here. In an ideal world, the whole thing should go back to the drawing board.

Tricia Marwick: I take it that that is the view of the SCVO, but how widespread are the views that you have expressed? Do they reflect the views of the voluntary sector?

Martin Sime: That is a difficult question. I have indicated in my evidence to you—which has been validated by the SCVO policy committee, which is elected by our 1,300 members—our disappointments in the bill but also the expectation that our members will have a diverse and pluralistic set of views relating to what is in the bill and what ought to have been in the bill. I am sure that that is the case. We expect voluntary organisations to make up their own minds rather than have some collective or corporate view.

Tricia Marwick: Do you get the sense that the voluntary sector resents the fact that there has been a lack of consultation with it both on Calman and on the bill?

Martin Sime: I would not say "resents", but we expect a better set of processes in the generation of legislation than this bill has reflected. The fact that it is a Westminster bill means that it rather reflects a traditional way of making legislation in the UK, from which the Scottish Parliament has moved on. Our members have a high expectation of detailed engagement on the development of policy options and widespread consultation around the issues that affect them and that come before the Parliament—even before they come before the Parliament—as the subject of legislation. Those standards have manifestly not been reached in the progress of the bill.

Tricia Marwick: In evidence to the Scottish Affairs Committee, the witnesses from the SCVO suggested that there should be devolution of the power to make secondary legislation in the areas of reserved benefits. Can you expand on what you mean by that and explain why you think that it would be of benefit?

Martin Sime: I am sorry, but I do not have a brief to go into that. That was maybe a response to the specific circumstances and the rather aggressive questioning that the SCVO delegates seemed to receive at that committee.

My members simply reflect that, in the area of care, for example, in which policies on the operation, organisation and funding of services are diverging substantially between Scotland and England, the benefits system is ill-equipped to cope with those changes. We look to the horizon and the Dilnot inquiry into how care should be paid for, and we rather suspect that the direction of travel in England will heavily influence what happens in and create further difficulties for Scotland. That will affect members of the public in Scotland who rely on services. My members work with such people in difficult circumstances, which we suspect are going to get more complicated and more difficult.

Tricia Marwick: The SCVO has also raised concerns about the impact of the bill on charities that receive donations through charitable giving. Can you elaborate on your concerns? Could the bill be changed to address those concerns? Can you also update us on whether your on-going discussions with HMRC have proved fruitful or otherwise?

Martin Sime: There are two aspects to that. The first is the ill-conceived proposals that were inserted at the last minute into the Calman commission's report, for which there was apparently no evidence. The proposals that aspects of the definition of charity law should be re-reserved or harmonised seemed simply to reflect some conversation that had been had over dinner and were not the subject of any consultation or proposition whatever. Fortunately, we managed to persuade the secretary of state that those proposals should not be in the bill. However, we heard recently that they had been raised again by members of the Scottish Affairs Committee with a view to reinserting them into the bill. Those proposals do not reflect the diversity of practice that has emerged across the UK; they are simply a set of solutions looking for an issue, as far as I am concerned.

The issues about gift aid are rather more complex. The bill's proposals for giving the Scottish Parliament power to amend the level of the standard rate of income tax will create a complicated set of situations regarding gift aid. Gift aid practice is also under review at the moment, and it is difficult to predict in which direction that review will go. We have had initial discussions with HMRC about a solution of sorts, under which the composite rate of gift aid recovery that applies to the English situation would be applied in Scotland, so in effect we would be opting out of gift aid recovery reflecting the actual rate of tax in Scotland. That is a bit unfortunate, because the connection between what somebody gives to charity and the tax that they pay is an important one, but for the sake of simplicity, and so as not to spend millions more pounds on some further adjustment to an HMRC system, we would prefer a composite rate to apply.

Robert Brown: I do not want to go too far into the process, because you have made your views on that clear, but for clarity, I wonder what you submitted to the Calman commission on this.

Martin Sime: I think that we gave evidence to the Calman commission.

Robert Brown: Yes, but what did you say to it?

Martin Sime: I cannot recall offhand, but we gave substantial evidence on some of the issues that we felt ought to be covered by a review of devolution and the proposals that we thought would fit the needs of our sector and the people it works with. We presented to Calman head on, as we do with any consultation. Aspects of the way in which the commission was set up were not as inclusive as they might have been, but some of the real difficulties in the process have emerged since Calman.

Robert Brown: You have made considerable points on and there is some substance in what you say about the linkages between benefits, which are reserved, and care, which is largely devolved; about the employability issues; and about the national lottery. Were those points clearly made to Calman?

Martin Sime: Oh, yes.

Robert Brown: Okay, so they were submitted.

On the process that you adopted, I think that you mentioned your policy committee, but have you held any kind of consultation in the many months since the Calman report came out and legislation was proposed? Have you consulted your members on the issues to get a bit more of a mandate, if you like?

Martin Sime: No, we have not consulted widely on the Scotland Bill. In fact, our members are largely disinterested in it. The current preoccupation with economists' views about economic growth is not the kind of thing that gets my members out of bed, nor are all the other propositions in the bill. The substance of the bill does not cover areas that my members are interested in. We have a policy view, which we have expressed to the committee, and it reflects the consensus of our elected policy committee on the matter.

You have to understand that voluntary organisations are asked their views about lots of different things and we have to choose the ones that best reflect our members' experience and interests. I am afraid that the bill rather fails that test.

Robert Brown: As you rightly said, the bill is the sort of thing that voluntary organisations from

different sectors and within sectors will almost inevitably have different experiences of and views on.

Martin Sime: When a particular issue is at stake—for example, you have heard from the Scottish Federation of Housing Associations about the insolvency propositions—it is quite right that organisations make their case in that way.

Robert Brown: Can I ask you more particularly about—

The Convener: We are very pressed for time.

Robert Brown: I just want to ask about this one area, if I may.

The Convener: Sure.

Robert Brown: The substance of what you have said is really about the difficulties that exist, not least in employability and so on. The divide between reserved and devolved functions has to go somewhere, and wherever it goes there will be issues. Is that not best dealt with by tackling the matter on a partnership basis, taking the functions as they are, saying, for example, "Look, there are oddities here and the voluntary sector's activities are made difficult," and trying to arrive at practical solutions by applying the powers at both ends? Is there not quite a lot of—

Martin Sime: Absolutely. That is how it works from day to day, but we are reviewing devolution after 12 years and considering legislation that will change it, and I believe that there is a case for capturing that experience and seeing where substantial legislative change needs to be made. That change needs to reflect the moving ball of public policy in different arenas. Legislation might well be the best way of resolving any long-term problems with the interface between, for example, health and care.

The Convener: Martin, please stay with us, as we might well raise other issues of interest.

I invite Dave Moxham, deputy general secretary of the STUC, to make some opening observations on the bill.

16:30

Dave Moxham (Scottish Trades Union Congress): I will be brief—I promise—in agreeing with Martin Sime about process. Organisations such as ours with a relatively wide membership and democratic process to be observed have found it difficult in the timescales provided to go into the bill in depth and provide the kind of modelling that is required to back up some of the assertions that I am nevertheless going to make. I am probably prepared to go out a bit more on a limb than Martin is able to. It is also an excuse for our not having provided written evidence or comments on specific clauses.

Given that we have not made a written submission, I would like to make a couple of general comments. Notwithstanding certain reservations that I will mention, we have found quite a lot that we can recommend in the command paper. First, in particular, we feel that the transfer of additional fiscal responsibility represents genuine progress. However, as has already been mentioned, we feel that there could have been further movement on benefits. I am happy to give more detail on that—at least to the extent that I am able to—but our concerns relate to council tax, housing benefit and aspects of the welfare system.

Secondly, as far as the tax-raising proposals are concerned, we are generally persuaded that the aggregates tax and air passenger duty should have been included in the bill.

Finally, with regard to borrowing, we are relatively convinced in relation to the limits on revenue expenditure that the cabinet secretary mentioned and the arguments that some have made about the raising of bonds, again notwithstanding certain reservations. The majority of what I want to say today relates to fiscal powers rather than to other aspects of the bill.

The Convener: Thank you. I think that my voice is going to fail me.

As the STUC knows, the bill is attempting to put a process in place. Although there is already a process of sorts for the transfer of powers, there is not really a process for financial aspects, and whether it be the acquisition of borrowing powers, the ability to create new taxes in future or the further devolution of taxes, we feel that although the proposals are not perfect they are a significant step forward.

However, a number of areas that the Calman commission referred to—immigration, for example, and welfare and social security, which Martin Sime has already touched on—have not been included in the bill. What should be the direction of travel in those areas? After all, our report will set out not a series of amendments but a range of issues that should remain on the agenda. We will come shortly to the range of institutional mechanisms and financial and policy processes that Alan Trench wants to be deepened.

Dave Moxham: In its submission to Calman, the STUC recommended that immigration and welfare and social security be included—and, indeed, in perhaps more depth than Calman ended up recommending.

Perhaps I should touch briefly on welfare, in which I include council tax benefit. We have yet to

hear a single good reason why council tax has been devolved but council tax benefit has not. In addition, there have been mechanisms in the history of the Parliament in which changes in council tax were reflected in changes to the block grant, and we certainly feel that in that respect certain wider welfare matters could be examined. The future jobs fund is a good example, because one could quite easily come to the view that a specific responsibility of the DWP has been removed as a result of easily identifiable expenditure from the Scottish skills or health budget. It seems to me to be not beyond the wit of legislation to deal with such a situation progressively. We are looking for that to be included, certainly in the committee's recommendations.

On immigration, we were persuaded by Calman's view that, in relation to permits to work, specific Scottish situations could be recognised. However, we have never been persuaded of the view—few are—that immigration per se should be devolved. We were particularly pleased that Calman included references to defence of the rights of the child or the responsibility to protect those. Interestingly, the only area of employment law that is currently devolved is in relation to children. As I said to the Calman commission, we believe that it is important to be clear that the responsibility of the Parliament in relation to the rights of the child can trump any other form of legislation, particularly immigration and asylum legislation.

The Convener: I want to return to the point that Robert Brown raised about where we draw the line. We have received interesting evidence that, as we have control of council tax, we should perhaps have control of council tax benefit and that, as we have housing policy, we should have housing benefit. We have heard that there are issues on the boundary of social care. If we are going to dig holes in the ground, the landfill tax and the aggregates levy perhaps go together. There has been a lot of thoughtful work on that in the written submissions.

We have also had evidence that, on aspects of the welfare state, whether it be the old age pension, child benefit, tax credits or major disability benefits, there is a desire to preserve a level playing field in the access to benefits. That involves us in drawing the line that Robert Brown talked about. I invite either of you to say where that line might be drawn, not necessarily in the bill, but in how we frame the issue in responding to the bill.

Dave Moxham: We were persuaded by the Calman commission's view that it is important to maintain the basic sense of social solidarity being equal across the UK. However, some changes at national or local level already imply deviation from that to an extent. Issues such as council tax levels and the quality and nature of tenure already impact on the expectation that an individual has for their welfare. In a sense, we said that that social solidarity framework is good, but if we already have policy that has the potential to impact on it and to make things in some way less even, let us at least ensure that that policy is consistent.

Brian Adam: A specific example of that is attendance allowance and how that money was lost in Scotland as a consequence of a decision that we made on free personal care. That is fairly clear evidence that those two things were linked and ought to have been dealt with in that way. There is still a sense of grievance to an extent that the money was lost.

However, I turn to other things in which the STUC has an interest. Martin Sime commented earlier that not too many of his organisations are interested in the academic debate among economists, but I am pretty sure that the STUC will have a view on the economic impact of the bill on growth and, in particular, on jobs. Has the STUC or its member organisations given thought to that?

Dave Moxham: At the risk of delving back into debates that took place earlier and that will be continued in future, it is fair to say that we have looked at the evidence and come to the conclusion that the case is not proven. To proceed on the basis that a more wholesale devolution of taxes would by its nature either grow or shrink an economy would be a mistake.

We are concerned about the suggestion—I realise that it has not come from all quarters—that lowering corporation tax is an important mechanism, because we are concerned about the race to the bottom on corporation tax generally. We tend to favour pan-national and pan-European attitudes to corporation tax, which would prevent such a process from taking hold. To the extent that we have a view, we are not particularly persuaded that devolving further taxes would suit our members' long-term interests, notwithstanding the evidence that a short-term reduction in corporation tax can provide short-term benefits.

Brian Adam: What should the bill's main purpose be? If it is not about stimulating the economy, creating jobs and allowing the creation of more wealth for redistribution—perhaps to support the voluntary sector—what is its point?

Dave Moxham: The bill has several points. One main point is that the Scottish Government's actions in spending what is currently 60 per cent of public moneys in Scotland should be better reflected in the balance of the funds that it receives. Shifting the mix away from a pure block

grant to a system that reflects the tax base somewhat more is important. The Scottish Government already spends 60 per cent of the moneys that are available, and reflecting that is a key aim of the bill.

Tricia Marwick: I will return briefly to corporation tax. You do not want a race to the bottom and you seem to suggest a UK policy on, and a UK level for, corporation tax. However, much of the evidence that we have received makes it clear that the UK Government is at least considering devolving to Northern Ireland the right to set the corporation tax rate. If Northern Ireland had power over corporation tax, would Scotland need to be able to set its own corporation tax rate, to allow us to compete on a level playing field?

Dave Moxham: I understand your question, but you ask me to hypothesise about something that I do not agree should happen. Even if such devolution happened, some grounds would be different, such as the relationship between the south and north of Ireland. My fundamental point is that the mechanism is poor and is certainly poor for maintaining in the medium to long term a sustainable and fair economy.

The Convener: I thank Martin Sime and Dave Moxham for their evidence. They can stay with us if they wish to; if they cannot do so, we will understand.

We move on to the Crown Estate commissioners. I invite Lucy Parsons and Andy Wightman to make opening remarks.

Lucy Parsons (Orkney Islands Council): We made a pretty short submission in which we said that we would like the bill to go further. Happily, our interests are generally aligned with those of the Crown Estate, because the value of its sea bed is enhanced by the success of the industry in which we have a major interest. The question is what happens when our interests are not aligned. We are more interested in the policy and the practicalities, as a previous witness said, than in the revenues that go directly to the Crown Estate.

The key divergence is that the Crown Estate focuses on the long-term value of its sea bed, whereas our interest is in the short and medium-term prospects for developing the industry. Orkney had research and development for two decades before the Crown Estate made its round 1 announcements and we would like to maintain the momentum.

Andy Wightman: It is important that the legislative opportunity is used to progress the debate on the powers and governance of the Crown Estate commissioners, which has run for years and years. As Calman and his adviser, Professor Gallagher, observed the other week in London, the Calman proposals are fairly minimal.

From 1962 until the end of 2009, every chairman of the Crown Estate commissioners has been Scottish, and there has been a Scottish commissioner, although that commissioner and the chairman were the same person in the previous term. The body has had no shortage of Scottish representation in its life, so the idea of having a Scottish commissioner statutorily rather than voluntarily does not take us forward. To take us forward, that commissioner should have statutory powers and responsibilities.

The debate is not about money; it is about governance, effective public administration and accountability. After all, all those Crown property rights are already devolved. We could abolish the Crown Estate tomorrow here in Edinburgh if we wished. Some of the Crown property rights are administered here in the Crown Office. Historically, the Lord Advocate sent the rest of the powers south in the 1830s. It is a question of bringing them together in one place to ensure efficient administration of the rights and to ensure policy alignment. Although Roger Bright said last week that, happily, policy is converging between the Crown Estate commissioners and the Scottish Government just now, that might not always be the case. There are plenty of examples of where that has not been the case in the past and might not be in the future.

16:45

Peter Peacock: You heard it said to Fiona Hyslop that there is the pretty token position of change in the bill and full devolution, which you and the Scottish Government support, but some intermediate positions are also beginning to emerge. You have suggested one: ensuring that, if there is not full devolution, Scottish ministers appoint the commissioner for Scotland. Calum MacDonald has submitted a very interesting paper. There has been some discussion—this perhaps relates to the Orkney interest—about how the devolved Administrations, which have a particular interest in developing renewables and in the current activity of the Crown, can influence those policies more successfully. Will you give us your observations on those intermediate approaches?

Andy Wightman: Anything that improves accountability and the ability of the Scottish Government and Scottish Parliament to make policy over these Crown rights, which, as I say, the Scottish Parliament already owns—these are Scottish public rights—is to be welcomed. I would have no problem if the committee were to recommend some of those intermediate options. Calum MacDonald's paper is extremely interesting. It comes from his direct experience as a minister and a forestry commissioner. The one

big difference between the Forestry Commission and the Crown Estate is that the Forestry Commission commissioners are accountable to Scottish ministers and the Scottish Parliament has all the powers of policy making over forestry, which is not the case with the Crown Estate.

If the Scottish minister were to be the Scottish commissioner, that would take things forward. It would take us back to where we were in 1956 when the Secretary of State for Scotland was one of the commissioners of Crown lands. All those things are possible and would be helpful, but they are all moving towards the inexorable logic that if we have all these public rights already under the control of the Scottish Parliament, why on earth do we not administer them, like we administer all other public rights? That would be a fairly straightforward reform to make. There are consequential issues. If the revenues were to flow to the Scottish Parliament, there would be consequential issues with the block grant and all the rest of it, but those are details. The reform is fairly straightforward. I have come up with a one-liner for amending the Crown Estate Act 1961, which is that it

"does not apply to Scotland".

The Scottish Government has argued for the removal of two of the reservations in the schedule to the Scotland Act 1998. Both would achieve the same end. Such reform is eminently doable and practicable.

Peter Peacock: Given the flow of revenues that might result from the kind of fundamental change that you are talking about and the stage in the development of the Crown's activities in relation to the next big industry, which arguably will have enormous climate change implications, would it be wise to separate Scotland from the access to expertise and a big pot of resources south of the border from which we could benefit disproportionately to our population share? Would it be possible to retain access to those benefits with the changes that you have rehearsed?

Andy Wightman: The two benefits that you have outlined are finance and expertise. Expertise in any topic is there to be bought by any organisation that wants it. If the Crown Estate commissioners were no longer responsible for administering the Crown Estate and it were Marine Scotland or another body in Scotland, that body would buy in the necessary expertise. I do not think that expertise is the problem; there is expertise in Britain. Whoever administers the rights will seek to employ and exploit it to develop the offshore marine renewable industry.

I would not be too concerned about the money side of things, because the Crown Estate commissioners are not investing vast amounts of money in offshore renewables, certainly in comparison with the amounts of capital that we are talking about needing to invest to make it a viable industry in the future. Much of that money will have to come from the private sector. I do not see that as a big downside; the upside is much greater.

There could be a conflict if, for example, the Crown Estate commissioners wanted to slow development to increase the value of the assets that they administer, while the Scottish Government wanted to get things going more quickly—perhaps to speed up on meeting its carbon emissions targets. However, the economic benefits from efficiency in public administration would be much greater than the potential downsides of losing out on the Crown Estate commissioners as they currently operate.

Peter Peacock: Lucy Parsons might want to answer my next question, as it relates to a point that she made earlier.

You said that you wanted improvement in the policies and practicalities. Would that follow from some of the changes that Andy Wightman has described?

Secondly, the investment might be small in a UK and Scotland context, but it could be a huge sum of money for Orkney. Do you have any views on that?

Lucy Parsons: I would say that there is a risk. We have an industry that is at a very early stage of development. There is valuable expertise, and continuity and momentum are also valuable. An amendment might bring everything to a halt while we rearrange things and recruit a team. Yes, you can hire expertise, but it has taken the Crown Estate a couple of years to get to the stage of having a competent team to handle the leases at the speed that we want to move. We have something to lose on that front.

I liked Michael Moore's suggestion of transparency and accountability, which to a large extent answers our concerns in Orkney.

Peter Peacock: I will move on slightly, to ask Andy Wightman a question. You mentioned a few moments ago that Scotland could, in effect, take control of some of these matters—you said that we had the legislative competence to do that. Will you say a word about that? Is that view supported by other legal minds in the system, or is it contentious? How do people regard your view on that?

Andy Wightman: It is not my view—it is just a statement of fact. You should read the Scottish Law Commission's "Report on Law of the Foreshore and Sea Bed". The fact is that Crown property rights are devolved to Scotland under

paragraph 3(1) of schedule 5 to the Scotland Act 1998, and that has been recognised by the Treasury committee; it is not a matter of opinion.

Peter Peacock: Would you say that the Scotland Bill is your preferred route for tackling the set of issues that you have discussed or, notwithstanding what happens with this bill, could they still be handled through the mechanism to which you have alluded?

Andy Wightman: It would be very messy for the Scottish Parliament to try to rearrange Crown property rights—they are of some antiquity, and that would not be the most productive route to go down. The point is how they are administered, who administers them and where the level of accountability is.

The fundamental point is that accountability must lie with the Scottish Parliament and the Scottish ministers. They are responsible for the bulk of regulation and planning, and for environmental controls, particularly over the sea bed, so it makes sense that they administer the rights. That could be done most effectively through the Scotland Bill.

The Convener: Notwithstanding the significant policy and governance issues that have been played out through the committee, one of the challenges for us is to establish not the desirability of governance or policy changes, but what is appropriate in the context of the Scotland Bill.

Although I am very interested, as people know, in the financial aspects of the bill, I am no lawyer, so you must guide me here. We have had contrary evidence that suggests that as a matter of fact the Crown is reserved, and so it is not within the powers of the Scottish Parliament to pass an act relating to those matters.

Can you clarify your view? That would be useful for the record, and for the committee's report.

Andy Wightman: One of the problems in that regard is that the Crown Estate commissioners have muddied the water over the past 10 or 20 years, first by calling themselves the Crown Estate. The Crown Estate is defined in the Crown Estate Act 1961, which states that the

"property, rights and interests ... under the management of the Commissioners shall continue to be known as the Crown Estate."

The Crown Estate is a bundle of property rights. The Crown Estate commissioners are a body corporate under the 1961 act—in fact, under the Crown Estate Act 1956—and they administer the Crown Estate, but they are calling themselves the Crown Estate. We then end up with a situation in which their chief executive sat before you last week and said that they are just the landowners. They are not—they own nothing, apart from some paper clips.

The Convener: That is the most interesting evidence of the day.

Andy Wightman: The Crown Estate commissioners submitted evidence to Calman saying that they owned the sea bed. They do not own the sea bed.

The Convener: Can you make a distinction between the sea bed and the responsibility between 12 and 200 miles? Does that apply to all of the Crown Estate's functions and roles?

Andy Wightman: All of the Crown Estate, as defined by the 1961 act, is administered by the Crown Estate commissioners. The property rights and interests—the nature of them—are devolved because they are part of Scotland's law of property. After all, we abolished the Crown as paramount superior in the feudal system. However, the administration of those rights, which is held under the 1961 act by the Crown Estate commissioners, is reserved. As a body corporate, the Crown Estate commissioners are reserved. The Scottish Parliament cannot interfere with the 1961 act. It cannot interfere with the administration of the act. However, if it wanted to, it could pass a bill tomorrow saying that mussels are no longer a Crown property right.

The Convener: You have created an interesting area of debate for the committee. Is there any other legal authority that you would encourage the committee to look at in order to reflect on the issues that we have discussed in the past few moments?

Andy Wightman: I would read the opening pages of the Scottish Law Commission's "Report on Law of the Foreshore and Sea Bed", which was initiated by Donald Dewar in 1999 to begin to resolve various problems, one of which was the conflict of interest between the Crown Estate commissioners as an administrator of the proprietary interests in the foreshore and their duties as a trustee of the public rights over the foreshore. The SLC identified a host of problems back then that have still not been resolved.

You could just look at paragraph 3(1) in schedule 5 to the Scotland Act 1998.

The Convener: I am grateful. That was very helpful in getting on the record the various issues. As there are no further questions on the Crown Estate, we move to Alan Trench.

Alan, thank you for your helpful evidence to the committee. It dwells in its totality on some of the wider institutional and governance mechanisms that the committee might want to recommend in its report. In your opening remarks, will you give us a flavour of some of the issues of future institutional

arrangements and governance that you highlight in your evidence?

Alan Trench (University College London): Thank you, convener. It is a pleasure to appear before the committee.

The Scotland Bill is a pretty flawed measure, not because the proposals of the Calman commission are innately flawed but as a piece of work to implement and deliver those proposals. In a slightly less formal setting than my memorandum of evidence to you, in a post on my blog "Devolution Matters", I went through the bill's financial provisions and gave them scores. The total score was 44 per cent. I observed that, according to the university marking scale, that equated to a comfortable third.

Scotland deserves better than a third-class bill.

The Convener: Take us to a 2:2 and then a 2:1. We are all ears. The Lord Advocate can wait.

Alan Trench: Before talking about the things that would be necessary to get it to a 2:1, the first key point, which has been left unclear in the bill, in the accompanying command paper and in speeches—particularly ministerial speeches in the Commons second reading debate last week—is whether the Scotland Bill is the end of a process or a step along a path. If it is a step along a path and it can be acknowledged as such, it makes a valuable contribution despite its flaws.

If, however, the bill is treated as being the end of the matter—and there are many, certainly in Westminster, who would see it as the end of the matter—there are serious problems, and it may well collapse under its own weight during the time that it is likely to be in operation if we do not continue to move forward.

The reason why it is particularly valuable is that in contrast to the initial proposal for the implementation of Calman, from the Labour UK Government in November 2009, after a transition period we will see proper figures being used for the amount of tax revenue that accrues to Scotland from income tax.

That is absolutely fundamental. If real figures are not used, there will simply not be real fiscal accountability. That was the decisive flaw among many flaws in the 2009 scheme. The block grant would have been transformed into a virtual block grant or virtual form of fiscal accountability run on an Excel spreadsheet in HM Treasury, which is not good enough. Therefore, there has been one valuable step.

17:00

The two fiscal issues that particularly concern me are the way in which the discount from the block grant is to be calculated and the UK Government's complete failure to spell out how that will take place. I gather that the committee has already had an extensive discussion about that with Gerry Holtham, Bernd Spahn and various colleagues. I have very little to say on the matter, other than to commend the Holtham commission's work, which is by far the most thoughtful discussion of it that I have seen.

The proposals are seriously weak on the institutional side. One of the shortcomings of the Calman proposals generally was that it was assumed that, wherever things did not quite add up or people did not quite know what to do, the matter would be thrown into the intergovernmental arena and there would be a few more meetings of the joint ministerial committee to deal with it. Someone who had been involved with the Calman commission said to me after the report had been published, "Oh, you'll be happy. We've recommended lots more formal intergovernmentalism." Unfortunately, he had missed my point at the time, which was that when things have to be done that involve overlaps of functions or interactions between Governments, they should be done formally rather than informally and in a systematic rather than an unsystematic, ad hoc manner, which is how they have largely been done so far. The bill in particular involves a use of intergovernmentalism to manage some very important practical collaboration issues relating to the administration of taxes and tax collection and fiscal and macroeconomic policy. I am afraid that I find the solutions that are outlined in the command paper on that point quite unsatisfactory.

The Convener: I urge you to expand on that a little. Compared with the status quo, there will be the mechanism through the UK tax committee, and there is the involvement of the Office for Budget Responsibility and the National Audit Office. Where should we take that range of intergovernmentalism to give the robustness that you seek? In 1998, I observed that many people thought that the process was the end of the road: how wrong they were. What institutional underpinnings would strengthen the formal element?

Alan Trench: One thing that the bill and the command paper do is to avoid looking at how the block grant element of Scottish funding works. That element will still account for a substantial amount of the Scottish Government's funding—the money that the Scottish Parliament can spend. I understand that there are reasons not to approach a review of the quantum of the block grant at the present time. The Chancellor of the Exchequer has taken that off the agenda until the United Kingdom's finances are restored to health. As members will know, I also have a good deal to do in Wales, where that is a cause of considerable

displeasure and alarm, as Wales would stand to benefit appreciably from a review of the block grant in a way that Scotland would be unlikely to.

Things can be done about how the block grant works that do not depend on spending an extra penny of public money, other than possibly a small amount on administration. The report of the House of Lords Select Committee on the Barnett Formula, which I advised, contains a recommendation that a UK funding commission should act as the institutional arbiter of the Barnett formula. In the scheme that that committee came up with, that commission would have a general advisory role on quantum, but it would also have a role as an arbiter and a pretty authoritative independent adviser on how money should be allocated—on, for example, whether a consequential is triggered by a change in spending at the UK level, how much that should be, and how it should feed through. We now have some information about that, which we did not have even three years ago, but the information that we have about it, let alone about any body that could act as an intermediary or arbiter, is still poor.

The big dispute, of course, has been over the consequentials from the 2012 Olympics. That dispute has gone on to the newly established disputes panel of the joint ministerial committee.

Appropriate steps with regard to audit and NAO are welcome. Technically, NAO is part of the UK Parliament; it is not something on which the UK Government can confer functions willy-nilly. However, issues relating to audit should not be dealt with simply at the UK level; there ought to be a role for the Scottish public auditors as well. The issues will concern Scotland as well as the UK as a whole. I would not want in any way to question or impugn the impartiality of the NAO, but we would want these matters to be as above board as possible.

The most important part of the institutional architecture is the role of HM Revenue and Customs. A problem with the approach in the bill is that HMRC will remain a UK Government body that is accountable to the UK Government and hands over a bit of dosh to the Scottish Government and the Scottish Parliament. I do not think that that is good enough. If HMRC is to be responsible for collecting taxes on behalf of more than one Government, it will have to have accountability to all the Governments with which it deals, and to all the legislatures of those tiers of Government. In other words, HMRC will have to have a line of accountability to the Scottish Parliament as well as a line of accountability to Westminster. It will have to function in a more impartial way, and not simply as one of the Chancellor's departments at Whitehall.

The Convener: What will be the character of that line of sight? Every tax director whom we have met has spoken about the desirability of having a single collection agency.

Alan Trench: There are plenty of ways of having a single collection agency without necessarily having it just as part of one Government, without the control of others. I am thinking of the arrangements in Canada, where the federal Government collects taxes on behalf of most of the provinces. It collects them for all the provinces bar Quebec—so, for all the English-speaking provinces. All individual taxpayers in Canada fill out a single tax return and pay a single tax; but the money goes directly to provincial Governments as well as to the federal Government. That is all regulated by a detailed document; it is a quasi-legal agreement and it goes into very great detail. That is not the UK way, and I dread to think what such an agreement would look like if it were framed in a UK context. However, it is one possible approach.

My favoured approach, initially at least, would be to have a commissioner appointed to HMRC from Scotland—by the Parliament rather than by the Government. He or she would be a commissioner who represented the Scottish exchequer rather than the UK Exchequer. As part of the process, there would be accountability from HMRC to here in Scotland as well as to Westminster.

The Convener: I note in passing that no amendments on this financial side have been lodged so far. What you have said has been very helpful.

Brian Adam: Could Alan Trench recommend some amendments that might help to improve the bill? In particular, what amendments should we be suggesting to the UK Parliament on the mechanics of borrowing, both revenue and capital and the amounts and the conditions that might be attached? The current suggestion is that there should be an annual limit for revenue borrowing and a total limit that is absolutely tiny—0.6 per cent of the revenue budget. It will be almost impossible for that to work. The same sort of thing will happen on the capital side, where there are restrictions on the amount that can be borrowed in any one year or in any number of years, and restrictions on the total amount of money that can be borrowed.

Alan Trench: The borrowing provisions are something of a poser. One of the first questions to arise is whether the borrowing should be done directly by the Scottish Government on the bond markets, or done through HM Treasury—which is what Calman recommended and what the bill suggests.

Although, in principle, I rather like the idea of the Scottish Government being able to approach the bond markets directly, there are grave problems with that. The dangers of having an implicit UK bailout behind Scotland, were it to have a direct, untrammelled power to approach the bond markets, are significant. Oddly enough, those risks become even greater if the power is trammelled.

It is a very difficult area to get into. Because, under the circumstances, the UK is likely to be seen as implicitly offering to bail out Scotland in the event of a default, that forces you in the direction of the approach that is contained in the bill: borrowing through HM Treasury. I wish it were otherwise, but I do not see how a Government with very limited revenues of its own—that is dependent on the block grant for such a large proportion, at least 65 per cent, of its revenues—can tell the bond markets convincingly that it can pay its own debts.

That is one of the reasons why you will need to consider widening the tax bases of the Parliament—so that the borrowing powers can be expanded. You are heavily reliant on a single source—earned personal income, in effect, not unearned income, because that has been cut out. The land-based taxes will contribute only a very small amount of revenue. You are heavily dependent on personal income tax revenues or the block grant, and that is a very narrow base.

As you rightly say, the limits are very low, and they need to be expanded. How far they should be expanded is something on which I have no clear opinion. I listened with interest to what the Cabinet Secretary for Finance and Sustainable Growth said earlier. I thought that he was perhaps egging his case somewhat too much, but he did make a strong point. The limits are unlikely to be very useful at their present level. We are talking about one or two large infrastructure projects. In effect, one Edinburgh bridge plus one Edinburgh tram scheme would exhaust the capital borrowing limits. What people outwith Edinburgh, the Lothians and Fife think of that I do not know.

Brian Adam: We are left with the challenge of what to recommend to the UK Government. Most folk are suggesting that the present arrangement will not work. We have heard some thoughts from the cabinet secretary, and he was suggesting a figure of a lot less than 5 per cent—probably about 3 per cent of the departmental expenditure limit per annum as a maximum potential buffer, and not all in the one year. We have to come up with an alternative suggestion.

Alan Trench: That is still not an unreasonable figure, except for this fact: although one treats the DEL money as being an allocation as of right and therefore a guaranteed revenue stream that can service borrowing, it is nothing of that sort in law. The legal foundation to the Barnett formula remains very tenuous. It is a statement of funding policy, and it is the unilateral declaration of policy of one Government. I well recall from when I was advising the House of Lords Select Committee on the Barnett Formula that Mr Swinney was keen to point out to that committee that he does not get to sign off the statement of funding policy, even on a technical level, and that agreement to it is signified on behalf of Scotland by the Secretary of State for Scotland, not by a Scottish minister. All the devolved Governments share that concern.

Part of the approach to reconstructing how devolution finance works could be to start putting those arrangements on a statutory basis, so that there is an overarching statute that creates a foundation for the funding, in addition to the role of a UK funding commission.

David McLetchie: I am interested in your comment about there being too narrow a tax base under the proposals. I wish to contrast that with a statement that you make in your written submission. It states that the system that is proposed under the bill

"would create greater autonomy than enjoyed by German *Länder* or the regions and communities in Belgium".

Alan Trench: Yes.

David McLetchie: It strikes me that the Government is proposing a constitutional framework that will create a greater degree of autonomy over expenditure and taxes than applies in a mature federal system such as that of the Federal Republic of Germany. I do not think that anyone in Germany says that there is too narrow a tax base, but maybe I am wrong.

17:15

Alan Trench: You quoted from a short sentence in which I compressed a large number of quite complex ideas. In Germany, practically all taxes are collected by the Länder—

David McLetchie: That is collection, not the setting of the rates or the tax base.

Alan Trench: Indeed. The reason why I said that there is limited spending autonomy is because of the way in which the German equalisation system works—

David McLetchie: I am sorry to interrupt, but I want to be clear, because we have had this debate before. We understand that there is a lot of spending autonomy in the Länder—

Alan Trench: There is very little—

David McLetchie: I am talking about autonomy in relation to spending on what we might call devolved areas, as opposed to tax setting.

Alan Trench: In both cases there are constitutional requirements, which are set out in the basic law, to ensure common living standards across the national territory. Therefore, even if someone lives in a relatively poor part of Germany, such as Mecklenburg-Vorpommern, they will receive a level of public services that is similar to that which is received in a prosperous part of Germany, such as Hessen or Bavaria. That is funded by direct, horizontal transfers from the taxpayers of Hessen and Bavaria, which do not go through the federal Government but are remitted directly—from Wiesbaden or Munich to Schwerin, in the example that I used.

David McLetchie: Notwithstanding that, you are saying that the system that we will have if the Scotland Bill is enacted will create greater autonomy than exists in the Federal Republic of Germany.

Alan Trench: That is because of the way in which the equalisation system works. For further details, I direct you to a very good presentation by a German colleague from the Bertelsmann Foundation, which you will find on my old website at the University of Edinburgh. He explained exactly how the German system works. I still remember being aghast at the level of complexity and at the absolute level of equalisation according to spending needs across the country. I was sitting there thinking that the system would never work in any English-speaking system, because—

David McLetchie: The Canada Health Act does exactly the same thing.

Alan Trench: No, it does not—

David McLetchie: I am afraid that it does.

Alan Trench: No, it does not. The Canada Health Act—

David McLetchie: We will have to disagree. There is a federal Canada Health Act, which lays down the standards of health service provision that must apply universally across Canada.

Alan Trench: Indeed—but it does so in general terms, rather than in precise terms. I mentioned the Canadian system in the paragraph from which you quoted. Canadian provinces raise—if my memory serves me correctly—about 65 to 70 per cent of their spending. Health care in Canada is supported by a per capita transfer from the federal Government to the various provinces, which accounts for about a third of the total cost of health care. Therefore, the transfer funds a basic level of service in relation to health care for individuals, but the bulk of health care is funded out of own-source taxes that are generated by the Canadian provinces.

David McLetchie: Okay.

In your submission you said that

"a share of income tax on savings and dividends has been omitted, for no very good reason".

The Calman recommendation in that regard was not taken up in the bill. As I understood the Calman recommendation, it was that we should estimate what Scottish taxpayers are paying on their shares, dividends, savings and so on, and then assign to the Scottish block the estimated sum. Is that correct?

Alan Trench: Yes. That is my understanding. The committee's learned adviser can put us right if we have misunderstood.

David McLetchie: However, in your submission you said that a virtue of the proposals in the bill is that the Scottish Government would get the actual tax revenues, and you were dismissive of an estimating model. I am not sure why you dismiss an estimating model in relation to taxes on earned incomes while regretting the absence of an estimating model in relation to savings and dividends—which was in Calman. I do not see the logic of your approach.

Alan Trench: I do so for exactly the reasons that are set out in the Calman report, which was absolutely right on that issue. The administrative complexity and the costs involved with going beyond an estimate of the proceeds of savings and dividends income are such that it makes doing that very hard to do. I would much prefer real figures to be used in every case. However, I want there to be as wide a tax base as possible for the Scottish Parliament. If using an estimate is the means by which we can do that, and the alternative is not having that element of the tax base, I would accept that as being the lesser of the two evils.

David McLetchie: We will talk about evils at another point.

You talk about capital gains tax on land and real property, and try to separate that from capital gains tax on the disposal of other assets. Of course, capital gains tax is levied on the total gains that are made by an individual in any given year from the totality of their asset disposals. If we were to have the separation that you propose, someone who made a gain on the sale of a flat or a house would not be able to set that against the loss that they might have made on, for example, flogging their RBS shares—which would represent a considerable loss, even now. By creating that separation, do you not undermine the principle of the system, which is that it is a tax not on land but on the totality of asset disposals?

Alan Trench: That is true, which perhaps suggests that there should be a different approach

to CGT. I threw that suggestion in partly in an attempt to follow the logic of Calman, which is absolutely right—in all of the arguments about fiscal federalism it is agreed that taxes relating to land are the best ones to devolve to lower levels of Government, whether they be subnational units such as Scotland or even local authorities. However, I accept that there are profound flaws.

The proposal is not something that could be achieved through the bill, but it is part of the process of seeking to extend the Parliament's fiscal base. In the short term, a much better set of targets to consider would be the so-called sin taxes, which generate much more revenue and relate much more directly to devolved functions. Although the Calman commission considered that option and rejected it, the arguments in favour of it outweigh the arguments that were balanced against it, which were basically spillover arguments that related to concerns that, for example, the benefits of a higher rate of duty on alcohol or tobacco in Scotland would be undermined by people smuggling those goods in from across the border. It is true that you cannot stop people driving down to Newcastle to save a few pence, but you might make some money on the fuel duty.

The Convener: I am acutely aware of the passage of time, so we will end this part of the meeting. I thank the panel members for their attendance. We will suspend to allow the Lord Advocate to take her place.

17:23

Meeting suspended.

17:27

On resuming—

The Convener: Our final witness today is the Rt Hon Elish Angiolini QC, the Lord Advocate. I am delighted that she has joined us and I apologise for the lateness. We sometimes have long meetings on the committee. I understand that this may be the Lord Advocate's last appearance at a parliamentary committee before she steps down at the coming elections. On behalf of all members of the committee and, I am sure the Parliament, I thank her for her public service and wish her well in the future.

Members: Hear, hear.

The Convener: I ask the Lord Advocate to make any opening remarks, after which we will move to what I hope will be rather brief questions.

The Lord Advocate (Elish Angiolini QC): I do not intend to make opening remarks. I am happy to proceed immediately to questions.

The Convener: The significant issue is section 57(2) of the Scotland Act 1998. When we had the Minister for Culture and External Affairs before us earlier, she expressed understandable anxiety that proposed clauses on the issue are not in the public domain and she spoke about the need for on-going consultation on the issue. Today is very much about taking stock of where we have reached thus far. You will have had the opportunity to see the evidence that we received at last week's meeting.

Robert Brown will kick off the questions.

Robert Brown: I add to those of the convener my good wishes for your future after the election, Lord Advocate.

In your letter of 27 October 2010 to the Advocate General, you indicate that you strongly support any measures that might result in the Lord Advocate's role as a prosecutor being removed from section 57(2) of the 1998 act, but you talked about the High Court being a sort of gatekeeper for the European convention on human rights-type constitutional issues that go to the Supreme Court where appropriate, and said that you were considering that option. Against that background, what do you think of the proposals that have come from the Advocate General's expert group and have subsequently been taken forward by the Advocate General in his recommendations on the process?

The Lord Advocate: I thank members for their good wishes.

I warmly welcomed the position of the expert group and the Advocate General in recognising the problems that emerged during the Calman commission process, but which were not dealt with specifically at that time, probably because the issue is so difficult to deal with. The Advocate General courageously took up the matter and his expert group produced a report. I generally welcome that report because of its recognition of the inept way in which prosecution issues were characterised as being constitutional in the context of the Scotland Act 1998. As a result, that produced an idiosyncratic approach to the vindication of human rights in the context of criminal proceedings. The legislators never intended it to have that effect, but I believe that they underestimated the ingenuity and innovative flair of solicitors in Scotland to find an act of the Lord Advocate in just about any aspect of criminal proceedings. Indeed, at one point, it was suggested that if I live and breathe in a courtroom, that is thereby an act of the Lord Advocate.

17:30

It is important that we recognise the practical problems that have arisen, which are not

insignificant. Although very few cases make their way to the Supreme Court, as has been recognised, a very large number of devolution issues come through the process. Those do not simply have to be minuted and noted, as the Advocate General has to do with 10,000 such issues; they must be analysed by our lawyers, debated in the courts at the lower levels and thereafter in the appeal court. They might thereafter fall off and not get to the Supreme Court, but a large number of cases are dealt with in that manner.

The recognition of the problem is welcome and, to an extent, I welcome the proposal of Sir David Edward's expert group. My comments relate simply to the threshold at which we identify when a matter is considered to be of constitutional importance. As members will be aware, the autonomy of our High Court was recognised as recently as the Criminal Procedure (Scotland) Act 1995, which was introduced when Mr McLetchie's party was in government in the UK. Section 124 of that act recognised that the jurisdiction of our supreme court—the High Court of Justiciary in Scotland is the supreme court of Scotland—was absolutely final and not subject to review by any court whatever. In 1995 and until 1998, lawyers generally acquiesced to that. That included human rights lawyers, although in 1995 there were very few of them around in Scotland. At that stage, it was acknowledged that the ability to recognise a separate legal system with its own features, and to allow it to grow its own jurisprudence was an important feature of our dual legal systems in the United Kingdom.

Where the expert group fell short, as I said in my letter, is that it did not recognise the need for a specific threshold, except in so far as it referred to leave of the court. Leave can be assessed according to a variety of thresholds. I have proposed that, if such leave is to be available to the High Court, it should be identified at a robust threshold to avoid for example cases that relate to international obligations going up to the Supreme Court. A prosecution in the district or sheriff court for not having a tachograph up to date is a matter of European Union law and international treaty, and is therefore a matter of competence. Currently, that could be characterised as a devolution issue and could make its way up to the Supreme Court.

If we wish the Supreme Court to deal with such issues, there is tremendous scope to expand their number, particularly given the forthcoming provisions under title V of the Treaty on the Functioning of the European Union. European approaches to criminal proceedings could widen the scope for proceedings to make their way up to the Supreme Court. The important thing is therefore the threshold and ensuring that we do not inadvertently, because of the absence of such a threshold, increase the number of cases that could go up.

Robert Brown: I want to be clear, because we need to have a sense of the overarching scheme before we try to fiddle about with the details to ensure that they are right. Do you dissent from the general proposition that there should be a constitutional role for the Supreme Court? That is the central issue that takes us beyond the treaty of union and the sole jurisdiction of the Scottish courts.

The Lord Advocate: The Supreme Court's constitutional role is crucial in the context of the Scotland Act 1998, and not simply in relation to criminal proceedings, but because of general issues of competence between and among the various devolved Administrations. It has the role of reconciling issues regarding the competence of ministers as well as the role of assessing the parameters of devolution.

However, in relation to criminal proceedings, the position is uneven across the devolved Administrations. There is an asymmetry for Scotland, in that under section 57(2) of the 1998 act the Lord Advocate is the only prosecutor who is identified for such treatment. My colleagues south of the border in England are not rooted to the Supreme Court via the constitutional mechanism of vires. The same is true in Northern Ireland, where the Director of Public Prosecutions is not subject to the vires issue. However, like me, they are all subject to the Human Rights Act 1998.

Again, to put it beyond doubt, the removal of the Lord Advocate from section 57(2) does not remove the Lord Advocate from her obligation to act compatibly with the convention rights as set out under the Human Rights Act 1998. So, it is not a case of the Lord Advocate somehow removing herself from that form of obligation, but it is an idiosyncratic approach by virtue of the fact that the Lord Advocate is also a Scottish minister.

Robert Brown: In terms of ECHR obligations, is there a cross-cutting level for which we need an element of symmetry across the United Kingdom, whether for criminal matters or other things? Do we not then have an issue about the speed of justice? I am not saying that the Supreme Court is hugely fast, but it is an awful lot faster, if I am not very much mistaken, than going to Strasbourg and it is more convenient for people. Am I right in saying that there are no Scottish judges on the European Court and that it can take three, four or five years to get a determination there? Leaving aside the threshold issue, is there a considerable advantage for access to, and the speed of, justice in having available application, in certain limited circumstances, to the Supreme Court of the United Kingdom?

The Lord Advocate: You will be aware that one of our concerns, which the expert group identified, was the question of delays that are brought about because of the existence of the new tier of appeal, which is what the Supreme Court has brought about for Scotland. There have been instances where the Supreme Court has responded very vigorously. Recently, I referred five cases up to the Supreme Court, which are collateral issues arising from the Cadder case, in order to ensure that those matters may be dealt with and achieve certainty sooner rather than, say, 18 months down the line. I took that factor into account in my decision to refer those cases.

The question is: how do you view human rights? Is it truly a matter that, in terms of international obligations, requires a frequent form of jurisdiction from the Supreme Court? My understanding of Strasbourg jurisprudence is that it recognises strongly the concept of subsidiarity in expert national courts determining their own approach to human rights, and that it does not demand uniformity of results, although it demands consistency of approach in terms of the convention.

Likewise, when John Smith and the Labour Party brought about the repatriation of rights to the United Kingdom, the notion was that by doing so, far from making the human rights convention a foreign or anorak subject for a few human rights lawyers, it would make the convention become the bread and butter of everyday lawyers in Scotland, and of the courts, the judges and the prosecutors, and based on that we would be able to develop within the United Kingdom our own convention of jurisprudence without its having to be slavishly looked at on a Strasbourg basis.

That also recognises that there are two very distinct legal systems within the United Kingdom, in England and Wales and in Scotland—although there is also a distinct Northern Irish system. The Scottish system is one that, again, requires some form of recognition of subsidiarity and the importance of the expertise of the local court in growing its own convention jurisprudence, which does not require an absolute symmetry with that which takes place in England. For instance, you could ask English citizens how much they consider the right to a trial by jury to be a constitutional basic right, and many of them would consider that to be the case. However, that right is not available in Scotland. There is no suggestion that the two approaches need to be reconciled and to be identical. We do not require identical approaches to convention rights; they can be different.

My concern is that because of the Supreme Court's approach, there is a real danger that we will have not just harmonisation of our criminal law on procedure and evidence but, indeed, a complete loss of identity for Scots law, unless the Supreme Court process is genuinely rarely exercised and takes place in the context of a matter that is of substantial constitutional significance across the United Kingdom or where there is a very new piece of jurisprudence that is clearly ambiguous.

Robert Brown: That comes back to the gatekeeper function that you talked about before.

The Lord Advocate: Yes.

Robert Brown: It may be something that is easier put in writing later, but I wonder whether you would like to elaborate a bit on it and say how you think it should operate: what the criteria should be and whether it goes beyond just the discretion of the High Court on the one hand or the Supreme Court on the other, and whether there is a framework of golden rules, if you like, that could be set down to guide and, I suppose, to restrict the flow of the tap that comes through that direction.

The Lord Advocate: It could be left to the courts to develop their own jurisprudence, based on an ordinary provision of leave. The difficulty with that, however, is that it would not give the courts a steer as to what should be considered. Although, as I mentioned, the expert group referred to international obligations, that can be fairly small beer in terms of the nature of the subject matter that is under consideration.

Even the test that has been articulated in the original draft clause, which the Advocate General has kindly given me sight of, is miscarriage of justice. That in itself is not a particularly high threshold, and it could in fact widen the number of cases that go before the Supreme Court, rather than narrowing or focusing them. For instance, the refusal of a judge to adjourn a case, a juror misbehaving or a misdirection by a judge may all be miscarriages of justice. I am not sure that that is what you would—

Robert Brown: Is it not just a breach of human rights that leads to a miscarriage of justice? We are not quite as open as that perhaps suggests.

The Lord Advocate: The suggestion that you have articulated is a very wide proposition, because those things are not mutually exclusive. We have our common law and our law of evidence. Fundamental rights, which have been recognised for centuries in Scotland and which are also characterised as human rights, or convention rights, are not at all mutually exclusive; they are not two separate streams of jurisprudence.

The notion of a fair trial did not come in with the Human Rights Act 1998 in Scotland. It is therefore very easy to characterise almost anything that takes place in a trial as an act of the Lord Advocate, even if the Lord Advocate is passive.

Another example is that there have been attempts in the appeal court—you might find them incredible, but they were heard—to prove that the action of the Lord Advocate in attempting to defend a devolution issue was itself an ultra vires act. There is scope for growth on those particular points.

The Convener: That does seem to speak to the desirability of our making some progress, albeit at this 11th hour of trying to reach agreement. I simply say to the Lord Advocate that for those of us who are non-experts—of which I freely admit I am one—there seemed to be a considerable degree of agreement among the stakeholders around the table that the bill was the right way to resolve the issue.

I am struggling to understand how profound your anxieties are, and the ease with which we may be able to find a way forward.

The Lord Advocate: As I said, the Advocate General has been open to discussion on that, and we intend to meet later. I have offered the assistance of my officials to make observations on what the problem may be. I am not sure whether the people who were here last week had seen the draft clause: they certainly had only a very short period in which to consider it, given that it materialised only the night before.

I have seen the draft clause, of course, as the person who is the centre of attention in the matter. The first thing that struck me was that, if one looks at it superficially, one can see that it will remove the Lord Advocate from section 52 but will reinsert the reference in a new provision in the Criminal Procedure (Scotland) Act 1995. That does not appear to be consistent with the expert group's desire for a self-standing provision that would relate not to the acts of the Lord Advocate but more generally to issues before a criminal trial.

The other objective that the provision does not meet is the idea of consistency. The Advocate General suggested in his notice that we want a consistent approach to convention rights by the route to the Supreme Court, but that is not currently available, nor will it be under the new provision.

Acts that the Lord Advocate prosecutes under the Scottish legislation will be devolution issues, if the vires of the act rather than the Lord Advocate are being struck at. The prosecutor's acts when she is prosecuting under a reserved statute will be protected by section 6 of the Human Rights Act 1998, which means that they are sheltered and protected.

I cite the practical example of a complainer in a rape case. The Scottish Parliament has very recently passed legislation on sexual offences; until that point, most sexual offences legislation came from the UK Parliament and common law. As a result of that legislation being passed, the vulnerability of the legislation to challenge is so much greater and could result in a stay of the prosecution at that stage. For a complainer in a similar situation who is having a prosecution under the umbrella of English legislation, all that will be available will be a declaration of incompatibility, but the proceedings can continue, notwithstanding incompatibility with the ECHR.

There is not yet symmetry in relation to the retrospective position not only of the prosecutor, but of those who may be victims. I venture to suggest that if I was a victim of crime in those circumstances, I might consider that lack of symmetry itself to be an issue in terms of compatibility with the convention and my rights to effective criminal sanctions. In other words, a victim in Carlisle can have her case continued, with a declaration of compatibility allowing the situation to continue until it is remedied, because effect is being given to an act of the UK Parliament, but that is a very different position from that of someone who is having a prosecution under a piece of Scottish legislation. That vulnerability—arising from the fact that there is no symmetry in the way in which we deal with those international obligations—has to be recognised.

17:45

Robert Brown: How many challenges have there been to the legislation as opposed to acts of the Lord Advocate, which have been the centre point of the issue?

The Lord Advocate: There have been challenges to legislation and to the common law. I am happy to write to the committee with details. Mr Gibson, who is the head of the appeals office in the Crown Office advises me that we are aware of at least three cases that would challenge the vires of the legislation in relation to the Lord Advocate.

Robert Brown: "Potentially" is the operative word, I presume.

The Lord Advocate: Absolutely, but it is that security that is relevant when you are talking about consistency of approach. Likewise, if a trial judge breaches article 6 by making an outrageous direction to the jury, in which he misleads the jury about the law, that would be justiciable under the Human Rights Act 1998 and therefore would not go up to the Supreme Court.

There is no symmetry in terms of what is taking place even within the criminal proceedings, based on the proposed clause at the moment. That is the case unless, again, one is creative. The Advocate General has proposed that an omission of the Lord Advocate might be caught by the new provision. "Omission" is a new and ambiguous

term that has not been used before, and it has the potential to cover a wide range of conduct. Would an omission of the Lord Advocate be her failure to jump up and correct that trial judge, simply by not pointing out to him that he is misdirecting the jury? You can just imagine the scope for the number of appeals that could find themselves working their way up to the Supreme Court based on that assessment.

It is, therefore, important to know what it is that you want to put before the Supreme Court, if an appeal is going to go there at all, and the threshold that is going to be applied. It is also important to ensure that that threshold is sufficiently robust to deter vexatious, flippant or less serious matters going before that court, while allowing matters to be heard that are constitutional, in that they have a pan-UK significance.

Robert Brown: I think that we need to sort out some of the details of this matter at a later date, for the sake of clarity.

Before we come to the end of the meeting, could you confirm whether you appear before us today as the Lord Advocate who is a member of the Government or the Lord Advocate who is the head of the Crown Prosecution Service?

The Lord Advocate: I appear before you with two hats on. I am here as a member of the Government and as the Lord Advocate. The constitutional role, which involves the issue of partial referral, is a retained responsibility in that there is no collective responsibility with my colleagues in that regard. The same applies to the prosecutorial role. My other portfolio functions are a matter of collective responsibility with the other ministers. I have no portfolio responsibility as Lord Advocate other than that of giving advice and legal advice to my colleagues, and I am responsible for the advice that they are given. Policy is a matter for ministers rather than for the Lord Advocate.

The Convener: Obviously, a lot of detailed discussion will go on between the Advocate General and yourself. What will interest the committee with regard to where we ultimately alight on the issue of what can or cannot be said in the initial LCM that will come before the Parliament is the question of how much distance exists in terms of principle, so I will ask a couple of questions that will try to probe that.

Is it right that the Lord Advocate's adherence to convention rights should, as is the case with every other public body in the UK, ultimately be decided in the UK by the Supreme Court—the notion being that that is required in order to develop a UK convention jurisprudence of the kind that you have talked about—or does that principle carry inherent risks?

The Lord Advocate: That question is premised on the misapprehension that all public authorities make their way to the Supreme Court, and that there should therefore be consistency in that regard. However, that is not the case in criminal proceedings at the moment. A decision by the court in criminal proceedings would still be for the appeal court in Scotland to deal with. There is not evenness, in that regard.

The Convener: But on convention rights—

The Lord Advocate: Yes, on convention rights as well. The High Court of Justiciary is a public authority in terms of the Human Rights Act 1998, but if it is sitting in a criminal matter, section 124 of the Criminal Procedure (Scotland) Act 1995 would apply, except in so far as the matter is a devolution issue, and the matter only becomes a devolution issue because of the Lord Advocate.

The Convener: So there is, in that sense, an issue of principle as well as the emphasis of—

The Lord Advocate: Yes, I think that your assumption is that the convention applies in all cases. I have to make it absolutely clear that the Lord Advocate is not suggesting that she should somehow have a limited susceptibility to convention rights challenges. Of course, it is absolutely imperative that the Human Rights Act 1998 applies to her in the same way as it applies to other public authorities. What I am talking about is the route by which, and the level at which, all those issues are determined by courts. The expert group and the Advocate General are attempting to limit those two truly constitutional issues. My concern is that the draft provisions—which I suspect will change substantially—do not achieve that, so I believe that substantial work is required in order to ensure that they deliver what the expert group and the Advocate General wish to achieve.

The Convener: In that vein, the committee has said that, although we think that the situation is slightly unfortunate, we understand the reasons why the matter emerged at so late a stage in the process. We should simply allow further evidence to come forward toward the end of the month. At that point, we will see where we are and decide what we feel able to say to the Parliament. You will clearly be working until the last minute, and we wish you well with those discussions. Please write to us at the end of the month, when there is greater clarity around the issues and you might have been able to find common ground on the drafting—or not.

I thank the Lord Advocate and her colleagues for their attendance.

17:52

Meeting continued in private until 18:21.

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