



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Finance and Constitution Committee

**Wednesday 20 September 2017**

**Session 5**



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**FINANCE AND CONSTITUTION COMMITTEE**

**21<sup>st</sup> Meeting 2017, Session 5**

**CONVENER**

\*Bruce Crawford (Stirling) (SNP)

**DEPUTY CONVENER**

\*Adam Tomkins (Glasgow) (Con)

**COMMITTEE MEMBERS**

\*Neil Bibby (West Scotland) (Lab)

\*Alexander Burnett (Aberdeenshire West) (Con)

\*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

\*Ash Denham (Edinburgh Eastern) (SNP)

\*Murdo Fraser (Mid Scotland and Fife) (Con)

\*Patrick Harvie (Glasgow) (Green)

\*James Kelly (Glasgow) (Lab)

\*Ivan McKee (Glasgow Provan) (SNP)

\*Maree Todd (Highlands and Islands) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Ian Davidson (Scottish Government)

Caroline Gardner (Auditor General for Scotland)

Dr Angela O'Hagan (Glasgow Caledonian University)

Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe)

**CLERK TO THE COMMITTEE**

James Johnston

**LOCATION**

The David Livingstone Room (CR6)



# Scottish Parliament

## Finance and Constitution Committee

Wednesday 20 September 2017

*[The Convener opened the meeting at 09:30]*

### European Union (Withdrawal) Bill

**The Convener (Bruce Crawford):** Good morning, colleagues, and welcome to the 21st meeting in 2017 of the Finance and Constitution Committee. As usual, please make sure that mobile phones are in a mode in which we cannot hear them and they will not interfere.

The first item on the agenda is to take evidence on the Scottish Government's legislative consent memorandum on the European Union (Withdrawal) Bill, which is currently being considered by the United Kingdom Parliament. For that purpose, we are joined by Michael Russell, who is the Minister for UK Negotiations on Scotland's Place in Europe. Mr Russell is accompanied today by Scottish Government officials Ian Davidson and Gerald Byrne. The minister has written to the committee with a set of draft amendments that would rectify what he sees as deficiencies in the bill, and members have hard copies of those amendments. I also have a copy of the letter that he sent us.

I welcome our guests to the meeting and invite Mr Russell to make an opening statement.

**The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell):** Convener, given the detail that we have sent to you already on the amendments and other issues that we have raised with you and copied you into, it is probably just as appropriate to start with questioning. People have heard a great deal from me in the last few weeks. I am open to questions.

**The Convener:** Okay. That took me a bit by surprise. I want to get into the amendments, obviously, and some of the issues around them in due course. I know that other members want to do the same.

First, attached as an annex to your letter was the UK Government's list of 111 areas of "Powers returning from the EU that intersect with the devolution settlement in Scotland". I know that there has been some media coverage of that. When I looked at the list for the first time in detail last night, there were some surprises, even for me. One example—given that you and I share a constituency boundary—is "Forestry (domestic)" policy. The second example, which I know that

WWF has commented on, is "Onshore hydrocarbons licensing"—or fracking in normal persons' language. That was something that the Smith commission, in its deliberations, was clear should be within the policy framework of the Scottish Parliament and the Scottish Government.

Can you explain what discussions the UK Government has had with you about this list of 111 powers, and in particular the two that I have mentioned, so that we can have an understanding of what is meant by the list of powers? Talking about those two may help us to understand the implications for the rest of them.

**Michael Russell:** Of course. We have had no formal discussions of the details of the list, because the list appeared out of the blue. A similar list was sent to Wales and, I understand, to Northern Ireland. Although I cannot vouch for the Northern Ireland list, because there is presently no Administration there, I know about the Welsh list.

The list came from the Cabinet Office and is, essentially, a list of areas in which EU competence intersects with the competences of this Parliament. It took us somewhat by surprise, I have to say. There is an on-going discussion, as you are aware, between the First Secretary of State and the Secretary of State for Scotland and myself and the Deputy First Minister about frameworks. The letter relates to the frameworks because it appears to be a list of the areas in which frameworks may be established.

You mentioned forestry. I am a former environment minister with responsibility for forestry—it has been devolved since the beginning of the Scottish Parliament. The Forestry Commission has operated as a devolved body in Scotland. There may be European regulation in forestry, but it is limited. Why forestry should become an area where there is a potential for re-reservation, we do not understand.

The inclusion of onshore hydrocarbons licensing, or fracking, is even more puzzling. As you indicated, it was part of discussions in the Smith commission and it is in the Scotland Act 2016. There is an EU directive that sits above onshore oil and gas licensing. The UK regime for that has to lie in line with the EU framework directive. We will require to establish a licensing regime in line with the EU framework directive, and that is on-going work because we expect to do that. We would need to have a commencement order for those powers, but that is in the Scotland Act 2016, so that is going to happen. Now, if this list indicates that there is an intention for that not to happen or for the EU licensing regime to be established by the UK without a Scottish licensing regime or with a Scottish licensing regime that is absolutely the same as the UK licensing regime,

that raises very considerable questions because a very different point of view prevails in Scotland.

Those examples illustrate areas in which we are either baffled about why those items are on the list or areas in which there would be a genuine disagreement.

It is quite important to contextualise the frameworks. The UK discussion of frameworks is about trading and barriers to trade. In "Scotland's Place in Europe", which we published in December last year, we indicated that there are areas in which frameworks will need to be established and that they should be established by the Governments sitting down as equals and putting together frameworks in which we would have co-decision making and, if there are trading issues, resolving those. However, a lot of the issues are nothing to do with trade. There is a very long list of legal matters, for example, and for the life of us we cannot understand why they are included because there is a separate Scottish legal system and we would expect those matters to be operated here.

The list confuses us a bit and concerns us a bit, and we want much more clarification, which we will try to get in our meetings with Damian Green. We cannot agree to frameworks on all these areas established by fiat of the UK Government. That simply would not be possible.

**The Convener:** Does anybody want to ask any questions about what is on the list before I move on to frameworks?

**Adam Tomkins (Glasgow) (Con):** When was this list given to the Scottish Government?

**Michael Russell:** Sometime in July.

**Adam Tomkins:** It is not a list of the areas that the United Kingdom Government intends to re-reserve. It is just a list of matters that fall within EU competence at the moment.

**Michael Russell:** Well, we believe that the nature of the list may indicate the areas that the UK Government may wish to re-reserve, because there is no indication that it does not wish to re-reserve them. We have asked repeatedly for a list of those areas in which it does not wish to have frameworks. If the existing bill were to operate, there would be orders in council that would free those areas up. We have had no such indication. I suppose that you could say, on the one hand, that we have a list of 111 items that raises the possibility of them being re-reserved in frameworks, but we have nothing on the other side of the scale that indicates the areas in which the United Kingdom Government says it is not interested.

**Maree Todd (Highlands and Islands) (SNP):** I have a question specifically on agricultural

support. Any change to the agricultural support that comes from the EU would cause a great deal of concern in my constituency, as you can imagine. We benefit from having more less favoured area support and we have a great number of farmers and crofters in Scotland compared with England. If we were to switch to, for example, a per capita system of funding, that would really disadvantage us.

**Michael Russell:** Yes, NFU Scotland has been very clear about this. The whole point of devolution is that subsidiarity is a key issue, as is the competence of those who understand and know the issues. The less favoured area support scheme is an important part of that. LFAS is not part of the support system in England, but it is utterly vital in the Highlands and in my constituency of Argyll and Bute. There would be no hill farming without LFASS payments.

There are other items on the agricultural side, such as animal welfare, where we would want to establish a co-decision-making structure. It would be sensible to do that, but it has to be done on the basis of equality. When these powers come back, we should sit down and say very quickly, "Let us get that structure going and let us make that structure work." That is exactly the position that Wales has taken, too. We stand absolutely ready to do that, but it has not, as yet, happened.

**The Convener:** Several members are indicating that they have supplementaries on this issue. I call Murdo Fraser and then Ivan McKee.

**Murdo Fraser (Mid Scotland and Fife) (Con):** Thank you, convener. Good morning, minister. I am trying to understand the high-level concern from the Scottish Government. There are obviously powers coming down from the EU to the UK; in some areas, you feel that they should come straight to Scotland, whereas the UK Government feels that, because it wants to create common frameworks, it wants to retain some of them at UK level. However, you seem to be going further than that this morning by suggesting that there are things that we in this Parliament currently have control over that we would not have control over should the bill as drafted go forward. Is it your position that there are competences that would be taken away from this Parliament?

**Michael Russell:** Yes. This Parliament has a clear competence in agriculture. I have heard Mr Fraser's point being made by others, including the UK Government, who say, "You won't lose a single power." There are two ways in which that is not strictly correct. The first is that the power to vary agricultural support will without doubt be lost if a UK-wide framework is imposed rather than negotiated under co-decision making. Co-decision on the European side means that there is a negotiation among 28 members, in which Scotland

influences the decision making—or attempts to do so, although sometimes the UK Government is not helpful about it. That will transfer to a single point of decision within the UK Government. There has been no proposal to do anything else. If there is a proposal to do something else, we would like to hear it; we have not heard it. So there will be a loss there.

However, there is a larger issue here. Three, four or five years down the road, this process would considerably diminish devolution, because the clarity of devolution—that what is not reserved is devolved—will be fragmented and, once that fragmentation starts, it is likely to continue. We believe that there will be losses: a tangible loss and an intangible loss.

**Murdo Fraser:** The solution to this—I am sure that we will come on to this in a minute—would be to have common frameworks that are agreed at UK level, which would allow the Scottish interest to be heard as part of UK decision making.

**Michael Russell:** Where common frameworks are appropriate and necessary, yes, although we would want to discuss whether it is appropriate and necessary to do it 111 times. And, as I keep saying, frameworks must be set up on the basis of co-decision making. The Welsh Government not only holds that position but has gone further in suggesting a way in which this could happen. It published a paper on this some time ago with some very interesting suggestions.

We are trying, I suppose, to avoid a repetition of the failed joint ministerial committee process. The JMC process does not have co-decision making; it is entirely London-centric. There is a way forward on this, and that way forward would not be difficult to find—both the Welsh Government and ourselves are clear about what that way is. We are looking for the UK Government to accept that. Part of that acceptance, which we will come on to, is not to put in place a piece of legislation that in actual fact will take us further away from that resolution.

**Ivan McKee (Glasgow Provan) (SNP):** Thank you, minister, for coming along. As I understand it, if the European Union (Withdrawal) Bill goes through unamended and there is no more clarification on this list and what it means—you have sought that but not had anything back—that means that the UK Government could unilaterally impose frameworks in 111 areas that would effectively limit the devolved powers in those areas. Is that the road that we are on unless something changes? Is that correct?

**Michael Russell:** Yes, that is so. We can go back to the referendum in June last year and look at what was being said at the time. Although I rarely quote him with approval, Michael Gove said

in a Radio Scotland interview during that campaign in June 2016:

“Holyrood would be strengthened if we left the EU. The Scottish Parliament would have new powers over fishing, agriculture, over some social areas and potentially over immigration.”

In reality, this list is saying that there will be no such new powers; all those powers will be taken to the United Kingdom Government and will not go to any of the devolved Administrations. Then, without anything specific—there is nothing in the bill—there was an indication from David Davis in the House of Commons debate last week that there will be some transitional process at the end by which some of the powers may be transferred back to the devolved Administrations by means of orders in council. However, there is no time limitation on that and no indication of how it will happen, and those powers that were not transferred would presumably remain at UK level with no formal Scottish or Welsh involvement in decision making. Those are the problems.

09:45

**The Convener:** Does Neil Bibby have a supplementary on this area as well?

**Neil Bibby (West Scotland) (Lab):** I have a question on the amendments and the general position.

**The Convener:** I was going to come to the amendments and the bigger general picture later. We have had quite a bit of discussion on the framework issue, and I know that Adam Tomkins wanted to open up a discussion on frameworks. Have I got that right?

**Adam Tomkins:** Yes, I do. Thank you, minister, for publishing the amendments and for early sight of them yesterday—I appreciate that. Thank you also for the way in which they have been presented, because grouping them as you have helps us understand the Scottish Government's and Welsh Government's concerns. As the convener indicated, I want to ask a rather technical legal question about how you understand the relationship between common frameworks and legislative competence.

The Scottish Government has said many times, and you have repeated this morning, that you accept the need for common frameworks in some areas. Obviously, you do not accept the need for 111 common frameworks in these 111 areas, but within those 111 powers you accept that there is a need for some common frameworks somewhere. That is welcome, in my view. Do you accept, then, that if there is to be a meaningful common framework, it cannot be within the legislative competence of this Parliament to enact legislation that is contrary to such a common framework, and

that there will therefore have to be limitations on our legislative competence that do not currently exist?

**Michael Russell:** That is a very important point. Let me start with the issue of what the implication of a common framework is and is not. A common framework is not, in my view, axiomatically a framework that says that the power is reserved to Westminster. That should not happen. A common framework is a framework where the partners in whatever structure we have—I go back to that term “co-decision making”, which I have been using a lot and is very important—agree to work together on areas that are within their competence to find a way forward.

The area that would be most interesting here—you are raising a very interesting issue—is that I suppose that the partner disadvantaged in that common framework would be the UK, if it did not have any legislative competence itself in that area. I am running slightly ahead of where your argument is. If we were to agree to a framework—let us, for the sake of argument, say a framework on animal health and welfare, to use that as an example—I would expect the competence for that to be returned to the Scottish Parliament, the Welsh Assembly and, presumably, for English agriculture to the United Kingdom Government. I do not want to include Northern Ireland in this because it does not have an Administration at the moment so it would be unfair to do so. Then we would sit down and find a way in which we could operate those competences that aligned the policies that we were following.

I would want to think carefully about your question about how that would operate within the competences of each of the partners taking part. I think that we would have to have a clear understanding from each of the partners of how they exercised their legislative competence. I would not push this analogy too far, but it would be, I suppose, a little like membership of the EU itself: you would agree to share your so-called sovereignty—that word is wrong here, but you see where I am going—in order to take part.

I wonder whether Ian Davidson wants to add something, because it is an important point, and I think we need to explore it very carefully.

**Ian Davidson (Scottish Government):** I think the minister has covered it very well. There is a fairly broad spectrum of approaches to co-operation, from informal co-operation through formal memorandums through primary and secondary legislation, which imposes some constraints—that is, a Parliament can then make changes only if it subsequently legislates—through to adjustments of competence either to increase the powers of a Parliament or to reduce them. The

existing principles associated with devolution encompass all of those possibilities.

As the minister has said, we are confident that we could enter discussions on frameworks that could give a wide range of certainty to all the partners involved without leaping to a conclusion that it requires an adjustment of competence, but all these things require to be discussed, and we need to understand the positions of the respective Administrations.

**Michael Russell:** Ian Davidson makes an important point. We should not ignore the existing structures that could be brought to bear on this—for example, the co-ordination of policy positions and memorandums of understanding, right through to legislative consent being given in a particular instance to the United Kingdom Government. There are frameworks or structures that could already be used, and we envisage new ones. Adam Tomkins asked me a question in the chamber two weeks ago about changes to the decision-making and power structures within these islands. That question is the one that the Welsh Government has helpfully addressed in its paper, and it is one with which we are happy to engage. I want the United Kingdom Government to engage with it. That would be a route to progress.

**Adam Tomkins:** Thank you. That is helpful. I want to try to distil that and make sure that I have understood it correctly. If there is a common framework between either three or four Administrations in the United Kingdom on animal welfare, for example, presumably that means that all the Administrations that sign up to that common framework or participate in its negotiation and agreement agree to act in a certain way with regard to animal welfare, and not to act in a way that is incompatible with that agreed way forward. Therefore, my question is, will that have to be reflected in the legal framework—in the Scotland Act 1998, as amended—or will it be sufficient for those common frameworks to have the status of what might be called a concordat, to go back to language used in 1998 and 1999?

**Michael Russell:** “Concordat” is a good word. In their paper, the Welsh anticipate a system of qualified majority voting in any such arrangements. That might work on occasion; it might be too complex on others. I will qualify my answer and say that there is variable geometry, according to the subject and the agreement. We can find a number of solutions. Some solutions will cover large areas but I agree with the basic point in the sense that, if such a structure exists, those willingly taking part in it must accept that they will come to a conclusion that will be binding on the parties. That is a normal part of being in a club, to be honest. Therefore, we would enter discussions on those frameworks on that basis.

**Adam Tomkins:** I am trying to understand how you think that the withdrawal bill should be amended to reflect that practical reality.

**Michael Russell:** In the way that we suggested that we amend it, we start with the acceptance that there are no new constraints on the Parliaments. We start with the clear view that those powers coming from Europe come back to the Parliaments, and then we willingly enter discussions on frameworks. I suppose that the question might be extended to ask what happens if the UK Government believes that there should be a framework and the devolved Administrations do not. That should be a matter for negotiation.

One of our problems is that there is presently no trust in the negotiating process. There needs to be an injection of trust into the negotiating process, with which we could then make some progress. In that spirit, I welcome the discussions that Adam Tomkins and Jackson Carlaw will enter into with the Scottish Government, because that might be the next step in trying to establish a dialogue.

**Adam Tomkins:** I have lots more questions, but I should probably leave things there at the moment.

**The Convener:** That is good of you. Two people want to ask questions; Neil Bibby is one—I think that he also has issues with the frameworks. Have I got that right?

**Neil Bibby:** My question relates to the UK single market and the amendments. Obviously, there is a desire to protect the devolution settlement and the UK single market. Minister, can you give an assurance that support for your amendments will not create any impediments to trade across the UK and put barriers in the way of the UK single market?

**Michael Russell:** Yes. There is no intention to create such barriers. We have our reservations about the description “UK single market”—I would be happy to give you some written information from others that has been helpful in that regard. However, there is no intention whatsoever to have barriers to trade. They are not in our interests; indeed, they are not in anybody’s interests. We are trying to keep things clear and simple, and that can be done by observing the existing devolved settlement.

**Neil Bibby:** That is fine.

**The Convener:** Does Ivan McKee still have a question on this specific area?

**Ivan McKee:** On frameworks, yes. I suppose that it is about the complexity. The minister alluded to some of that in terms of there being no time limit on powers going back to UK ministers as a consequence of the bill. There are also powers that would allow UK ministers to change

legislation, so we would then very likely have less and less clarity over what was within the competence of the Scottish Parliament, given that things will evolve over time. Some of the 111 areas in the list that the UK Government has provided are currently in the Scottish Government’s programme for government or are being considered by the Scottish Parliament. Rail franchising and licensing of operators, fracking, which we have talked about, carbon capture, airport noise management, regulation in relation to animals—all those are live issues in the Scottish Parliament’s consideration. Minister, can you explain a wee bit more about how the scenario could evolve and what the consequences could be if we end up with UK ministers tweaking legislation that should be within our devolved competence?

**Michael Russell:** The outcomes could be dramatic and unfortunate. We have a system that works. There may be people who do not like devolution. That is acceptable; there are people who do not like parliamentary democracy. However, we have a system and it operates. It is always legitimate to discuss replacing that system—people are entitled to discuss that and make proposals, but they should do so openly. If people say that they do not like the devolved system or the clarity that comes with the terms “devolved” and “reserved” and so want to put something else in place, that is fine—let us have that debate. However, by doing things in this way in order to achieve something else, collateral damage is being caused to devolution. That is not right and proper, and it will result in a number of dangerous consequences. One such consequence has to do with the knowledge of those who operate the system. For example, there are legal areas on the list. Scotland has a specific legal system; many of the people who work in the Scottish Government are responsible for administering it. If that work is done elsewhere, it will be done by people who do not have knowledge of the system, which could be very damaging. It is not necessary to do things in this way. The amount of time that we are spending on such issues is unfortunate.

As early as January, I raised the subject within the JMC structure. Indeed, I thought that we had an agreement that we would work together to make sure that things were done in the right way. At the JMC (Plenary) in Cardiff at the end of January, I raised the matter with the Prime Minister, as did the First Minister. We made it clear that, as with all legislation that requires legislative consent, the norm would be for our officials to work with officials south of the border to develop the bill in a way that meant that there would be no problems. Nothing happened. It was a bit like the article 50 letter: we saw nothing. Then there was an election and we kept saying that we needed to

see the bill, because its introduction was getting closer and closer.

Eventually, we were shown the bill on 30 June, just after recess started, and we were told that it would be published a fortnight later. I had a conversation with David Davis on the phone. We both said that we had better sit down and talk about it, so I went down to London the following week and we had a long conversation about it with lawyers present. We said that clause 11 was a particular difficulty; we thought it should come out of the bill and that there should be a placeholder while we discussed how things would operate. That did not happen. We made it very clear that we could not live with that, but no changes were made. Now we find ourselves in this position. We did not have to be in this position, and we can get back from it by amending the bill sensibly and quickly working out the areas in which frameworks are required. We will get on and do that and, as Adam Tomkins has indicated, we will have discussions about how those frameworks are put together and how they will work.

**The Convener:** I know that there are a number of areas that the minister still needs to touch on—principles of consent, trade agreements, intergovernmental relationships and the UK position papers—but we have not really got into the detail of the amendments yet. We should probably do that at this stage, given that you have sent us the material and that you have just mentioned clause 11. It is important that we understand the Government's views about its own amendments and what needs to happen for the Scottish Government to recommend consent. Which amendments are the most critical? Around which is there potential for discussion? In the circumstances where not all the amendments are successful, what other routes—legislative or non-legislative—could be used to try to find a way through? I think that from the language and tone this morning, everyone, including you, wants to find a solution and a way through. It would be helpful if you could just map that.

10:00

**Michael Russell:** Forgive me, then, if I just spend a little bit of time breaking this down and saying where we are. First, we are talking about a variety of bits of the bill, but particularly clause 10, schedule 2, clause 11, schedule 3 and some other slightly less important items.

The amendments I have sent you are essentially in five groups. Amendments 1 to 3 prevent the powers in the bill from being used to amend the Scotland Act 1998 by the UK Government alone. Any changes that are required to give effect to EU withdrawal or to implement international obligations can be made only through

the bill itself, which requires legislative consent, or by a section 30 order, which is subject to procedure in the Scottish Parliament. If a change is required to give effect to the withdrawal agreement, that would require Scottish ministers' consent, and that is for expediency. We are, therefore, trying to be helpful.

Amendments 4 to 6 mean that the UK Government can use its powers in devolved areas only with Scottish ministers' consent. That would allow for the convenience of UK-wide orders when appropriate, but only with Scottish ministers' consent when the powers in the bill are being used to make changes that could be made by the Scottish Parliament.

Amendments 7 and 8 remove the new restrictions and competence relating to retained EU law in clause 11. The competence of the Scottish ministers and Scottish Parliament would therefore be maintained on withdrawal from the EU in areas previously regulated by EU law.

Amendments 9 to 19 remove or modify the restrictions on Scottish ministers' powers under the bill. Modifications to directly applicable EU law in devolved areas, such as justice or health, could therefore be made by the Scottish ministers and the Scottish Parliament, rather than exclusively by the UK Government. Requirements for UK Government consent, for example on a modification to do with quota arrangements, are replaced with a requirement to consult the UK Government.

Amendments 20 to 38 are consequential amendments that give full effect to the four major changes in policy that I have just set out.

The note that you have indicates in greater detail what this is about. It breaks down into four particular areas, with the first being UK ministerial powers. I stress that we are not saying that we approve of the UK bill in its entirety; we do not. For example, we think that there needs to be a restriction on UK ministerial powers and we accept a concomitant restriction on and framework for powers in Scotland.

The amendments, which we have agreed with the Welsh Government, cure the bill with regard to major objections from our two Governments. They do not amend the bill in other necessary ways, such as in relation to the charter of fundamental rights. The political parties in the House of Commons are all bringing forward lots of other amendments that deal with those matters. We are dealing with the core issues that the Scottish and Welsh Governments view as difficult—in fact, impossible—to accept.

The bill gives UK ministers a broad and wide-ranging set of powers. We recognise the need for powers, given the extraordinary challenges of

preparing for EU withdrawal, but those powers should not be used to make fundamental changes to important laws such as the devolution statutes or the equality duties, and they must also, because of their breadth, be subject to appropriate higher levels of scrutiny. We recognise the usefulness of certain instruments being made on a UK-wide basis where the same or similar changes need to be made to a scheme that operates UK-wide. However, the fundamental principles of parliamentary accountability mean that when changes relate to devolved matters, there must be some mechanism for the Parliament to hold the Government to account.

The bill limits Scottish ministers' powers in a number of ways. It prevents Scottish ministers from making necessary changes to an entire category of EU laws—directly applicable instruments—and it requires Scottish ministers to seek UK Government consent before certain types of instrument can be made. Those provisions are all inappropriate. The correct way to divide the powers is to do so in accordance with devolution. If a subject matter is not reserved, the decisions on how the corrections should be made are for the Scottish ministers and the Scottish Parliament to make.

Clause 11 is a new limitation on the powers of the Scottish Parliament. It means that while the UK Parliament has lifted from it the requirement to comply with EU law, all the matters covered by EU law on exit day are put beyond the powers of the Scottish Parliament. The bill allows any new limitation to be modified by order in council. That is not acceptable, since it assumes that where there is to be a common approach across the UK, it is necessary for the subject to be reserved—I made that point to Adam Tomkins earlier. Neither the Welsh Government nor the Scottish Government can recommend consent to a bill with clause 11 in it, so it must be removed from the bill. That is the proper constitutional position, and, as I say, it is the position that both we and the Welsh take.

On frameworks, as we set out in “Scotland’s Place in Europe”, the Scottish Government accepts that there may be a need for a common approach across the UK to some matters. Those must be agreed, not imposed. They cannot be negotiated against the background of clause 11, since that assumes that where a common approach is required, the subject must, in effect, be reserved. The UK Government insists that frameworks are needed to protect the UK single market and ensure the shared management of common resources. We insist that frameworks must respect the principles of devolution, but we accept that, in taking that approach, the same end will be achieved.

We do not say that the amendments are the only way forward; if people suggest that there is a different way to achieve the objectives that we have set out, of course we will discuss that with them. We are discussing the matter with all the political parties in the Parliament, and we will continue to do so. The Welsh Government is engaged in the same discussions with others in Wales, and obviously there is active discussion at Westminster about how the amendments should go forward. The two First Ministers sent the amendments to the Prime Minister yesterday as a suggested way forward, and we await a response to that.

You ask what would happen if the amendments were not made. The first consequence is that we would not bring forward a legislative consent motion, and in those circumstances the Parliament would not give legislative consent. We will give the Parliament the chance to vote on the issue at some stage, of course, but we hope that, between now and the last amending stage of the bill, which is when the legislative consent motion has to be passed, a solution will be found. We do not think that it is likely that last amending stage will happen before the turn of the year or even January, given the situation in the House of Lords. Therefore, there is time for a negotiated set of changes, and that is what we are looking for.

Two things will happen if that does not take place. First, if legislative consent is refused, the proper process under the Sewel convention is that the relevant parts of the bill should be withdrawn. If they are not withdrawn, we will be in absolutely uncharted waters. We spent last year in uncharted waters, but the unchartedness is getting worse, if I may put it that way. The Scotland Act 1998 makes it clear that the UK Parliament “will not normally legislate” on such matters,

“without the consent of the Scottish Parliament”.

That is embedded in our practice, so it would be a serious situation.

Secondly—and finally—we have been considering, as has the Welsh Government, a continuity bill. In our view, that is not the best way forward. There are issues that we could not deal with in a continuity bill. We could not repeal the European Communities Act 1972 in a continuity bill, nor would we seek to do so. However, such a bill would put in place the legislative framework that we need to have in place if we are to leave the EU. In those circumstances, we continue to consider that as an option, as does the Welsh Government. We will make a decision on it in due course.

**The Convener:** Patrick Harvie had some questions on the principle of consent. I hope that I

have not pulled out all the information, given the minister's answer—I did not mean to.

**Patrick Harvie (Glasgow) (Green):** I will dive in, convener.

Good morning, minister. The legislative consent memorandum begins by saying:

“The Scottish Government remains of the view that the best option for the UK as a whole, and for Scotland, would be the one Scotland voted for—to remain in the EU”.

The Scottish Government, as far as I understand it, is still clear in its view that leaving the European Union is an unnecessary and entirely destructive process, and clearly we all—the Scottish Government and Parliament—represent people who by a substantial majority voted against that reckless, chaotic, unnecessary and destructive process. Why should there be any circumstances in which you invite this Parliament to grant legislative consent to the bill or in which we give it?

**Michael Russell:** I entirely agree—you and I have no difference on leaving the EU. It is chaotic and unnecessary and means expending a huge amount of resource, time and effort. Here we are, doing that today—time that could be better spent. It is an unedifying spectacle.

You know, because we have had this conversation, that I am a strong believer in the importance of the European project and the peace that it has brought to the continent of Europe. You and I are in absolutely the same position. However, I have to make a distinction between that position and the technicalities that we are going through at present. I make that distinction because it is more than likely that the UK will continue on this course. I hope that it does not, and I am always looking for a change, but if it continues on its course we will have to have in place the legislative structures to cope. I noticed that in a piece last week Brian Taylor described me as the “Minister for Mitigating Brexit”. I suppose that I wear that hat as well.

**Patrick Harvie:** It is a big ask.

**Michael Russell:** It is a very big ask, and I think that it cannot be done. There is no such thing as a good Brexit. I got pelters for saying that on LBC two weeks ago; the *Daily Express*, among others, was on my case. All we can hope for is a least bad Brexit. We need a legal structure in place—we have accepted that essentially from the beginning. Although we have made that distinction, the UK Government has made things much harder, which is why we are having this discussion. Frankly, if the UK Government was being sensible, it would have made the process of getting the legal structure in place as easy as possible and therefore would have been able to concentrate on what one might call the day job of negotiation.

However, it does not appear to have done that. I am trying to juggle those two requirements, and I accept that for some people it is an unacceptable juggling. However, I feel very much that that is my responsibility, and that is what I am trying to do.

**Patrick Harvie:** You say that the best we can hope for is the least bad Brexit. Does that mean that the Scottish Government has given up on any hope of opposing the process in principle?

**Michael Russell:** No, absolutely not. I think that there is still a chance of it not happening, as I said to the committee in June. The chaos that we are presently seeing probably increases that chance; the extraordinary spectacle of the past week—it is continuing—of a Government in open warfare about crucial issues, intensifies the situation. Perhaps more than half of me is idealistic and positive, and I want this to stop; another part of me has to get the practicalities right, which is what I am trying to do.

**Patrick Harvie:** There have not been many weeks when we have not seen extraordinary and unprecedented events in UK politics. However, moving on to the pragmatic argument, I am interested in what you think the implications are of the discussion that happened last week, when you gave your ministerial statement. Jackson Carlaw said that he was ready

“to meet bilaterally ... to understand the various remedies and positions and to work where we can to do all that we feel able to do to secure an LCM that the Scottish Government will have confidence in placing before this Parliament.”—[*Official Report*, 12 September 2017; c 19.]

You welcomed that offer, and you agreed to those meetings. What, out of everything that you have put on the table, would be acceptable in terms of recommending a LCM to Parliament? Surely there is no half-measure here. Surely either the powers that currently reside at European Union level return to Scotland unless they are reserved or there is a fundamental abdication of the devolution settlement.

**Michael Russell:** I do not disagree with the point that you make, but I do not want to pre-empt any discussion that takes place—and I want that discussion to take place. I thought that it was a positive indication from Jackson Carlaw, Adam Tomkins and almost all the Conservatives who spoke—although perhaps there were one or two who had not had the memo. The reality is that we need those discussions; it is better to talk about the situation than not to talk about it. I have set no preconditions, but when I have those conversations I shall be entirely clear about what I think needs to be done. I have indicated to the committee what I think the problems are in the bill, and they need to be resolved. Equally, I am ready to talk to many people. We have had conversations with your colleague Ross Greer,

and with Lewis Macdonald and Tavish Scott. I repeat my earlier offer: I am very open to briefing the convener and the deputy convener of the committee to make sure that they understand what is taking place. We need an open process—we need a process that is as transparent as possible. However, of course there will be discussions that we would all rather have privately while we explore what is possible. I am not ruling anything out. My responsibility is to try to make sure that we get the process concluded in a way that is least bad for Scotland, and that is what I shall try to do.

**Patrick Harvie:** Briefly and finally, I of course accept that discussions will be happening between all the political parties. My party has had a discussion with you, and the Opposition parties will talk to one another. You say that the process must be open and transparent, so I hope that you will commit to ensuring that any process that would lead to the Scottish Government changing its position in order to secure Conservative support and recommend an LCM is as open and transparent as possible, and that any changes in your position are discussed on the record with the committee.

10:15

**Michael Russell:** I am happy to make that commitment. This has to be done openly and above board. We have to have the confidence not just of the Parliament but of the people of Scotland in the actions that we take. I have no difficulty with that at all—but let us not pre-empt discussions by saying what we think will happen in them. Let us have the discussions and see where this goes. It will not be easy: the history of such discussions between parties in this country, and elsewhere, is that they never follow a straight line, but we have to try to build a process if we are to make any progress. I hope to do that with people around this table and others.

**Patrick Harvie:** Thank you.

**The Convener:** Before we go into other areas, there are issues about amendments, as well. Have we exhausted the subject that we started off with, or does Neil Bibby want to pick up on anything?

**Neil Bibby:** I appreciate what the minister said about discussions having to take place in relation to amendments. However, will you confirm that if all the amendments were agreed to, the Scottish Government would support an LCM?

**Michael Russell:** Yes. I have said that openly and I am happy to say it again here: if all the amendments are agreed to, of course that would happen. If alternatives to amendments that have been agreed with Wales were found which could achieve exactly what we are trying to achieve, we would of course consider them. We have laid that

out very clearly. We are trying to find a way through this, and we are trying to do it with other people.

**The Convener:** It will probably be best to hear questions from Ash Denham on intergovernmental relations, because that is all part of this discussion. Then, I shall bring in Maree Todd on trade agreements and Willie Coffey on the position papers. That is what we have left; there are also a couple of things that I want to raise.

**Ash Denham (Edinburgh Eastern) (SNP):** I would like to ask you about the joint ministerial committee on European Union negotiations, which has not met since February. Its remit was to oversee the Brexit negotiations and to get outcomes agreed between the UK Government and the devolved nations. I know that it is due to meet again shortly, in October, but has it already failed on its own terms?

**Michael Russell:** The committee and your adviser have looked at the JMC process inside and out. I share the adviser's published view that the JMC process has not been a glittering success over the past 18 years. Perhaps we put too much weight on trying to find a development of the JMC that would work. I was a member of the JMC in 2009-10; it was a pretty dismal experience then and it has not really changed much.

There should be a robust way of ensuring that the four nations are able to work together in the devolved settlement, but the JMC is a London-centric structure that is entirely controlled by the UK Government. There is no decision-making structure, so it is difficult to have continuity or progress, because decision making is done essentially on a whim.

I think that the UK Government has also taken against consulting the devolved Administrations because doing so has become a little tiresome; the devolved Administrations—I, Mark Drakeford and perhaps some of the Northern Ireland representatives, when they were attending—have been very robust in expressing our views about what is taking place.

The terms of reference for the JMC(EN) were clear and agreed by everyone, including the UK Government, and were signed off at the Downing Street meeting that we had at the end of last October. The aims were broadly twofold; one aim was to seek agreement on the Article 50 letter, but that never happened because the letter was never shared with the members of the JMC. The first that Mark Drakeford and I saw of it was just after it was published. I believe that the UK Government stopped having meetings of the JMC—8 February was the last meeting—because it would have become impossible to hold meetings, as it was

quite clear that that the letter was not going to be tabled.

The second aim was that the JMC(EN) would, as far as possible, have oversight of the negotiations as they relate to devolved competences. Given the monthly nature of the negotiations, both Mark Drakeford and I have suggested fitting a JMC meeting into that monthly cycle so that we could receive an update on what has been happening, look at the coming issues, contribute and, through that, become embedded in what is taking place. That has not happened.

What has happened is that in the three rounds so far, I was briefed on the first occasion about 10 days afterwards by David Davis—although, to be fair, I point out that Tim Barrow in Brussels gave me a briefing immediately afterwards because I happened to be in Brussels. During the second round, David Davis gave me a verbal briefing on where things were, and he gave me a briefing on the third round on the Monday afterwards.

Those were briefings, however. They were not discussions or consultations, so we have not had any meaningful involvement. That is serious and difficult, and when we get on to the published papers, that will show why it is even more serious and difficult. If negotiations are taking place on matters of devolved competence which this Parliament is responsible for, it may not be possible for the UK Government to deliver the commitments that are made if it does not talk to the devolved Administrations.

There are serious issues other than just issues of due process. There is a constitution: it may not be a written constitution, but the law has established the Parliaments. They are part of the structures of these islands, so one cannot pretend that they do not exist. However, that is essentially what is happening, so we need to ensure that we find a way to remind people that the devolved Administrations exist and that they have responsibilities. They need to be integrated into the process.

Mark Drakeford and I have made detailed suggestions about how the JMC should go forward. We have also made it clear that bilateral decisions cannot be made on the future of a multilateral structure, so a meeting of the JMC is needed to take that forward. A meeting of the JMC is now scheduled to take place on Monday 16 October; of course, I will tell the committee after it what has taken place. We hope that that will start the monthly cycle again and that we will get clarity on how it is going to operate. We will find out on the day. If the meeting is like the previous ones, I am afraid that we will be depressed again, but if it is not, and there is a commitment to change things, we will be quite pleased.

**Ash Denham:** I would like clarification. In June, you and Mark Drakeford sent a joint letter, which you mentioned just now, suggesting a reset and making practical suggestions for how things could be improved. Did you get a reply to that letter?

**Michael Russell:** I think that we had a number of replies, but I am not sure that any of them addressed the points that we had made. The new chair of the JMC(EN) is the First Secretary of State and Minister for the Cabinet Office, and he is now thinking about it: he has been reminded of the letter. An important point, which we have not laboured, is that the UK Government is now in breach of the memorandum of understanding. It had four weeks to hold or call a JMC as a result of Mark Drakeford and I asking for one, but obviously that did not happen in that time. We asked for a meeting on 14 June: we are now well beyond four weeks. Even technically the UK Government is now in breach of the memorandum of understanding.

**Ash Denham:** Thank you.

**Maree Todd:** Obviously, there is a real need to strike trade deals for the future after leaving the EU. We need to bring some clarity and focus to agriculture again; it is an important issue in my constituency, and it is one of the items on the list. Agricultural subsidies can be a real bone of contention in striking trade deals. Over the past week there has been a little more clarity in the UK Government's statements, in which it has been indicating that it wants to retain powers over agriculture. Lord Duncan of Springbank has given some signals that he would like to look to a less protectionist future in terms of trade deals, and clearly that causes people in my area a great deal of concern. Could trade deals be struck at UK level without our having any input to them?

**Michael Russell:** It appears that the Secretary of State for International Trade, Liam Fox, does not wish the devolved Administrations to be anywhere near trade deals. I suspect that the collective mind at Westminster is shuddering at what happened over the comprehensive economic and trade agreement and the role of substate Parliaments in that—in particular, the Flemish Parliament, which took exception to certain details but was, of course, required in order that it could be ratified.

We should remember that the European Union (Withdrawal) Bill at Westminster is the first of several bills that will go through, and one of those will be a trade bill. We do not know its content yet, but I would be surprised if it was generous to the devolved Administrations. There is concern about subsidies—rightly so. Michael Gove keeps sending confusing messages about what he thinks, but there is no doubt that the hill farmers of the west of Scotland require support. As we know,

crofting has always been about how people live on the land as much as it has been about produce. These issues are not relevant to agriculture elsewhere, so they need to be addressed.

There is another reason why we need control of agricultural policy. I will use not the chlorinated chicken example, but will mention use of hormones in Brazilian beef. Brazilian beef has not been allowed into the EU. There are many reasons for that, some of which are to do with hormone feeding and some with the environmental features of its production. If there is to be a deal with the Brazilians, I think that beef would be pretty near the top of the list for them. I am absolutely sure that it would not be possible to allow Brazilian beef with the willing consent of the farming community in Scotland, and the Scottish Parliament would also have severe reservations, so the UK Government may well want to be sure that they are nowhere near that deal.

I am publicly very sceptical about the idea of the “glorious Brexit”, as Boris Johnson puts it, producing buccaneering trade deals all over the world. To take the beef analogy a bit further, that is mince. In such a case, the UK Government would have to have control of such things, and we should be very aware of that.

We should also be aware of the reality of some of the rhetoric. Jean-Claude Juncker’s state of the union message talked about the new trading arrangements that the EU is establishing with Australia and New Zealand: the EU is already in there and doing things. On the much-vaunted Indian trade deal, which has not happened, the real barrier to that has always been, in EU terms, the UK and migration. Unless the attitude to migration changes, some deals will be impossible. I am a sceptic in all that, but I am a worried sceptic in terms of what it may mean for some powers.

**Maree Todd:** I agree: we have a real concern about agriculture subsidies and about equality in animal welfare standards, given the impacts that those might have on food.

Another area about which there have been concerns, and about which there is not clarity, is the NHS. The NHS system in England is very different in that there is much more private sector involvement. I see that public sector procurement is on the list. We have protected our NHS in Scotland from private companies coming in and running our hospital wards and maternity services. Is there a possibility that they could be opened up to that?

**Michael Russell:** You are opening a really wide range of areas, in the list. We should certainly consider the matter. Some people resent EU regulation: we can understand that, because regulations are always difficult. If we were to

abandon the regulations, there would need to be a different regulatory structure. The view of what that regulatory structure should be may differ for the NHS in Scotland and in England. However, if the powers are taken only to the UK, Scotland’s view of that structure, even if it does not like the structure and wants a different one, would be decided on by the UK. That is one of the big issues in the transfer of the powers. We may have to deal with a decision made by the 28 member states with which people in Scotland and some sectors may disagree.

We would then have to deal with decisions being made by one state, with which we may well also disagree, so there does not seem to be much benefit in doing that. Public sector procurement in the health service would be one of those issues. People may find some things in the European directives to be unduly onerous or burdensome, but they might find that what the UK Government wants to do is equally unacceptable. Scotland’s ability to influence that decision would be lost.

10:30

**The Convener:** Thank you. I think that Willie Coffey has some questions, and then I would like to come to a conclusion on the Parliament’s role in scrutinising Scottish ministers.

**Willie Coffey (Kilmarnock and Irvine Valley) (SNP):** Minister, may I just open up a conversation about the UK position papers, which appeared in August, I think? Mr Juncker, even, has said that none of them is satisfactory. Was there any involvement by the devolved Administrations in framing the position papers? Roughly, what are they about? Do we have any opportunity to influence them even at this stage?

**Michael Russell:** No—there has been no involvement by the devolved Administrations. I think the committee has been copied in to a letter that I wrote to David Davis about the papers. As of 19 September, we have had 15 papers: seven position papers, seven future partnership papers and a technical note on implementation of the withdrawal agreement. We have looked at all the papers and have provided the committee with an analysis of them up until the date of the letter. We can continue to do that.

We have been becoming increasingly concerned by the papers. The first interesting thing about them is that many of them—in fact, all of them—contain pretty strong and convincing reasons for staying in the EU. I do not like to suggest that the civil service is subversive, but if you were to take a view, you might think there is a hidden message coming through.

Some of the papers deal with areas of devolved competence, and there has been no discussion at

all about them. What has happened is the same as what has been happening with the negotiations. We are told that the papers are coming out—we are told 24 to 48 hours beforehand—a copy is shared and my colleagues are asked what they think of it. They do not have any input and cannot say, “Well, actually, don’t have page 2, paragraph 3, because it won’t work.” The papers are just published. That is impolite, to say the least.

I also think that we could help on some issues. The paper on migration was actually an options paper. We could suggest other options. For example, I took part last night in a very interesting event that was organised by the Institute for Public Policy Research and the Royal Society, and at which Jackson Carlaw, Paul Sweeney and I spoke. There was quite a strong measure of agreement on the need for, and reasons for, a more flexible migration policy for Scotland. We could have injected that into discussion on the papers, but that discussion did not happen.

It gets really serious when areas of devolved competence are being dealt with without our being consulted. If the papers are being read by a negotiating team and others, the assumption must be—no matter what you think of their content—that they are authoritative and that whatever is in them can be delivered. We do not know whether their contents can be delivered, because we have not been consulted and we do not know, as a Parliament, whether we can do those things. We have not been asked. A sort of false prospectus is being put forward here, and people need to know that.

The right way to do it would be to talk to us about the papers and to have a conversation. It would not have to be lengthy: show us a draft of the paper two weeks beforehand and we will say what we think and put some ideas in. We are happy to work like that. We are very flexible—much more flexible than many other similar Administrations—but we do not get the opportunity to be flexible. That, as I said, is not just impolite, but is actually quite dangerous in respect of the assumptions that are being made.

Some of the papers are also thin. Professor Sir David Edward gave evidence last week to the Culture, Tourism, Europe and External Affairs Committee, in which he said of one paper in particular that had it been offered to him as an undergraduate essay, he would have failed it. There would be the opportunity to make them a little better, if we were involved.

**Willie Coffey:** Are our European colleagues aware of Scotland’s view that our voice is not represented in the papers?

**Michael Russell:** We have made that point in conversations and discussions. We have very

effective representation in Brussels—ministers are there meeting people regularly; I will be there next week—and we will continue to make the point.

**Willie Coffey:** In broad terms, where do you think we are on the three key negotiating points for progressing to the next stage of the negotiations: citizens’ rights, the financial bill and financial support, and the Irish border question? Do you think that sufficient progress is being made?

**Michael Russell:** That will be a judgment that the European Commission and European Parliament will have to make in the coming weeks. A great deal will hinge on what the Prime Minister says on Friday. The expressed concern, that there is in some way something unfair about the sequencing of the talks, rather ignores the fact that the UK signed up willingly to the sequencing in June.

I am not going to be dismissive: clearly, the view is that progress is being made in some areas but not in others. There are some areas in which it will be impossible to make progress with current attitudes. I am not sure that it helps greatly to speculate, except to say that there are issues on which we have agreed with the UK Government, and issues on which we have disagreed. We have been clear about our disagreement on migration: we think it important to say that. We have not done that on other issues, including the budget, because we are not sure that to do so would help very much, so we will wait to see what takes place. We accept that there will be a legal obligation to pay moneys—although we do not accept that there is £350 million a week waiting to come back to the national health service.

We want progress to be made, but we do not think that it will be made in how the matter is being dealt with at the moment. We will wait to see what the Prime Minister says on Friday, and the outcome of that. Again, we do not know what she is going to say. We are 48 hours from her speech: as with the Lancaster house speech, we have no idea what is going to be in it. We will not know until she says it. There is a sense in which, one thinks, that is not particularly helpful.

**Willie Coffey:** All 27 members of the European Council have to agree, as I understand it, before progress can be made. Clearly, one of the key questions for the Irish Government is the Irish border issue.

**Michael Russell:** Yes. I heard Simon Coveney speak in Cambridge two weeks ago at a British-Irish Association dinner, and he made it very clear that he thinks that the progress that needs to be made—he was open about this—is a customs union. He does not believe that the border issue can be addressed without a customs union, and he believes that the right position for the UK is

continuing membership of the single market. I think that that is the minimum we should look for—not as a transition, but as a destination. That is what I would want to hear. It will be an issue.

We have been very clear: the Irish situation is not one that anybody should dabble in. We recognise and respect the process that will be taking place, and nothing should put at risk what has taken place with the Good Friday agreement. There is a guarantee on the common travel area, which is extremely important. It is much more difficult than some of the speculation suggests to establish a seamless open border. The only way that that can be done—the only way—is with a customs union.

**The Convener:** Thank you. May I bring the focus back to the Parliament? You made a very welcome commitment in your LCM statement to Parliament last Tuesday that you will work with Parliament and its committees and agree a set of principles and processes around the legislative issues that concern this Parliament. It would be helpful if you could say a bit more about your thinking in that area, because it is obviously very important to the committee that we be able to scrutinise what you do appropriately.

**Michael Russell:** I want to be as open and as helpful as I can, convener. As I have said, I will be very happy to keep you, the deputy convener and the wider committee briefed as the process goes ahead.

If we plan out from where we are, we might understand what could take place. The committee will consider the legislative consent memorandum and will no doubt report on it. I hope that the discussions that take place between the parties will lead to a common position on the amendments that will be required. I do not know whether that can be achieved, but that is my objective.

I make the point that this also applies in Wales; we are working very closely with Wales, and we cannot envisage a situation in which Scotland would be content and Wales would not be, or vice versa. Provided that that takes place, and if we have a guarantee from the UK Government that the amendments will be taken and accepted, we will have moved forward and we can, and will, lodge a legislative consent motion.

If we do not get that progress, we will clearly be involved in a process in which the House of Commons will attempt to amend the bill. We will, of course, support our colleagues in the Commons; we hope that other parties will, too, and that they will work with us. We offer the opportunity to work together on the limited number of amendments that we have agreed with Wales, in order to see whether we can get that amending process under way.

During that process, I will welcome committee scrutiny. If we can get agreement on the amendments, we will then move on to issues including how the powers of Scottish ministers might properly be supervised, through a framework, or whatever. We are open to that discussion.

The committee has written to me about secondary legislation issues. We need an active discussion between officials and the committee's clerks about how we could bring together scrutiny proposals. I am very happy for parties to bring together those proposals. I commit myself to a framework for scrutiny in that way, if we can come to one. We need to look at things including the charter of fundamental rights.

However, if all that does not work, we will perhaps get into the process of a continuity bill. That would be a different process; I would come back to the committee and explain how we would take that forward. Additional work would be required for that bill.

**The Convener:** Thank you. That was a very helpful evidence session for the committee in terms of getting an initial understanding of your thinking. The committee will now take written and oral evidence over the next couple of months, and we expect to publish our interim views on the LCM before the Christmas recess. We will aim to publish a final report, all things being equal, before the last amending stage in the House of Lords sometime in the new year. That ends our session with the minister this morning. I thank the minister and his officials.

I suspend the meeting to allow a change of witnesses.

10:41

*Meeting suspended.*

10:47

*On resuming—*

## **Budget Process Review Group (Final Report)**

**The Convener:** Item 2 is to discuss the budget process review group's final report. We are joined by two external members of the group: Caroline Gardner, the Auditor General for Scotland; and Dr Angela O'Hagan, from Glasgow Caledonian University. Another external member of the group, Professor James Mitchell, had hoped to join us but, unfortunately, he is unable to be here and has passed his apologies to the committee.

Before we begin, I put on record the committee's gratitude to all members of the group for their incredible efforts in producing such a wide-ranging and high-quality report within the very challenging timescale that they were presented with. I know that some elements, such as the change in the autumn budget date, came into your thinking halfway through, and I am grateful for your dealing with all that turbulence. I know that the external members of the group in particular played a key role in formulating the recommendations that are aimed at improving our budget scrutiny process, particularly in light of those changing circumstances. I thank all the members for their contributions. The group has provided a positive example of the Parliament, the Government and civic society working together. That should be applauded, and I hope that it might serve as a model for similar initiatives in future for trying to find successful ways forward.

Just so that the committee is absolutely clear, although I am sure that everyone will know this from reading the report, I point out that the proposals will take some time to be implemented and some elements will stretch over a number of years, especially in relation to the fiscal framework issues and the block grant adjustment process. That will in no way be able to be implemented for the scrutiny of the budget process for 2018-19. I just want to set the context of where we are.

To begin the discussion today—*[Interruption.]* Sorry, but the clerk has rightly reminded me that, before I go to the first question from James Kelly, our witnesses will each make an opening statement. Forgive me for being premature. I do not know who wants to go first, but I think that you both want to make a short opening statement.

**Caroline Gardner (Auditor General for Scotland):** Thank you, convener. I will be brief, but we thought that, in the light of the shift between your first agenda item this morning and this agenda item, it would be helpful to set a bit of context.

On behalf of the members of the budget process review group, thank you for inviting us to provide evidence on our final report. As you know, we were established to review the budget process in the light of the new tax-raising and spending powers that are being devolved to the Parliament. In March, we published our interim report, which highlighted what we saw as the key issues for a revised process, and we included questions for consultation. The final report reflects the breadth of contributions from members of the group and from the external stakeholders who we engaged with during our work and those who responded to the consultation.

In agreeing our findings, we reflected both on the existing budget and the implications of financial devolution, which is fundamentally changing Scotland's public finances. We would like to take this opportunity to thank everyone who contributed their views. The range and quality of the contributions that we got reflect the growing level of interest in Scotland's budget as we move into this new phase.

Based on the detailed work that we have done over the past year, there are four key things that we think the revised process should do. It should enable Parliament to have greater influence on the formulation of the budget. It should increase transparency and raise public understanding of the budget and the way the new powers are being used to make important choices. It should respond effectively to the new fiscal arrangements and the wider policy challenges that the Parliament and Government face. Most importantly, it should lead to better outcomes for the Scottish people.

To achieve that, we consider that significant changes to the existing budget process are needed, and we have made a package of recommendations to that effect. We recommend a framework for a revised process that includes a continuous cycle of scrutiny throughout the year so that committees can explore the impact of budgetary decisions and look to influence the formulation of the budget before the Government sets out its firm spending proposals.

We think that parliamentary scrutiny should be evaluative, with an emphasis on what budgets have achieved and aim to achieve over the longer term, looking at where money has actually been spent and raised, and the outputs and outcomes that are being achieved. It needs a long-term outlook, building up evidence over time and focusing more explicitly on prioritisation within the fiscal constraints that we will always experience, and making sustainability a key consideration.

Scrutiny needs to recognise the interdependent nature of many of the policies that the budget seeks to deliver, and our recommendations look to enable that. They build on the principles that were

identified when the Scottish Parliament was established and reflect an ambition for a world-class approach to managing the public finances to meet the challenges of today and the future. We recognise that that will mean cultural change as well as changes to processes and procedures, and that, as you say, convener, it will take time to work through.

Given the complexity of the issues, some of the recommendations will need to be phased in over time. We expect that there will be an opportunity to introduce most of the changes that are proposed as we look toward the 2019-20 budget cycle, with the publication of a medium-term financial strategy for the first time before the 2018 summer recess. We also expect some aspects of the budget process to continue to evolve during the current parliamentary session, as the new approaches bed in.

Angela O'Hagan wants to add to that from her perspective before we move on to your questions.

**Dr Angela O'Hagan (Glasgow Caledonian University):** I thank the committee for its invitation and, on behalf of the group, I thank you, convener, for your gracious comments on the process and the report. The budget review process was a positive exercise, with a shared commitment on behalf of the group's members and significantly, as you said, on the part of Parliament and Government to meet challenges and to come up with and advance a practical, responsive and progressive budget process.

Core to that is the commitment to embed equality analysis throughout the process. Through the recommendations to increase parliamentary scrutiny, there are greater opportunities to embed equality analysis. The expanded budget process gives a greater emphasis on evidence on outcomes and impacts. The proposals that we have put forward create more access and entry points for equalities scrutiny. On equality analysis, the Scottish budget process is already well ahead of the processes anywhere else in the UK and most of Europe; at least, there is a process to allow for greater equality analysis. There is an opportunity to build on that pioneering work with the equality budget statement and increased committee scrutiny and, as Caroline Gardner says, to create a world-class approach to equality analysis in the budget process.

I just wanted to emphasise that significant and distinguishing feature of the Scottish budget process and the budget review process and report.

**James Kelly (Glasgow) (Lab):** Thank you for coming and for the detailed work that you have put into your report. I realise that it has been

challenging, but you have carried out the review assiduously.

In recent times, the budget process has been curtailed to an extent because of external factors beyond the control of the Parliament. There has been frustration about the amount of time that we have had to consider the budget properly. You have recommended an approach that involves an all-year-round budget process and a longer-term view so that, rather than simply look at the budget in the coming year, politicians and interest groups will take a much longer-term look at the factors that affect the budget, and we will therefore have a much more robust and qualitative process. One of the key factors in that is data being available to people so that they can make proper assessments. On the issue of all-year-round budgeting and a longer-term approach, what data do you envisage being available to parliamentarians and stakeholders in the year running up to the budget and in the longer term?

**Caroline Gardner:** That is a really good question. We absolutely recognise the challenge that Parliament has had over the past few years in trying to scrutinise the Scottish Government's draft budget in a very short time that is also around the Christmas holiday, so time is squeezed in all sorts of ways. The focus on the budget tends to be over a fairly short time period. The group's view was that that has tended to focus attention on the numbers that are changing at the margins rather than on the overall bulk of the £33 billion or so that is being spent and what it is achieving. We therefore spent a lot of time looking first at timing—I am sure that you will want to talk a bit more about that—and at suggestions that would help Parliament and its committees to pull back and look at the budget as a whole, rather than being squeezed into looking at the numbers that are catching the headlines in one year for particular reasons.

One benefit that we think there will be of a longer-term approach is that committees will be able, over a session of Parliament, to agree the areas that they are most interested in—because of demographic pressures and policy challenges, or because there are signs that the money is not keeping up with demand in various ways or that there are better ways of spending it—and build up their evidence from there. Some of that evidence will come from simply having more time to look at trends, looking back at what has been spent and how that has changed, and looking forward to such things as how demographic changes will affect demand in the future. Health and social care is an obvious example. It is also a chance to draw in evidence from a wider range of stakeholders, including audit reports from Audit Scotland, academic research and, importantly, the views of people who rely on and use the particular public

service to drill down and build up that understanding in ways that can help to improve scrutiny of the budget and, as we say in our recommendations, influence how the Government formulates its budget and the proposals that it brings forward every year.

The sort of data available will be different in each of the policy areas that is looked at. This committee is taking a close look at economic statistics and indicators, which will obviously be key for some of the tax proposals coming through. However, in areas such as education and health and social care, the information that is needed will be quite different and drawn from different sources. We think that the longer-term cycle will give you the chance to identify what data you need, to start to pull it together and to see what it means for you.

**Dr O'Hagan:** In the report, we talk about the basket of evidence that needs to be brought into play to assist in year-round scrutiny. That would include everything that Caroline Gardner mentioned. We have given a graphic depiction of the range of background documentation. As Caroline said, that includes audit reports, but it also includes the reports and data that are generated by the agencies that are responsible for disbursing public finance. Included in that are the data and reporting mechanisms for the public sector equality duty—that is, the mainstreaming and outcome reports that are produced. Those give an indication of the impacts in changes in resource allocation and changes as a result of public service reform or service reconfiguration. So we can look at a wider range in that expanded timeframe.

The report also puts an emphasis on greater hook-up between assessing and evaluating outcomes from publicly funded activities, as assessed through the national performance framework, and the data that goes behind that. That is about interrogating and drilling down into what is behind the national performance framework and making closer links between budgetary proposals and subsequent evaluation through the performance framework.

11:00

**James Kelly:** You have both mentioned a lot of information sources that can be used to identify trends and help with policy choices. Private sector and public organisations outwith the Parliament take a longer-term view. They produce a business plan and five-year forecast showing what the overall numbers will look like year by year, at least at a very high level, but the Scottish Government currently does not have that. Do you think that producing such a medium-term financial strategy is achievable? Although all the information

sources that you have identified are helpful, ultimately, the overall numbers and data will be critical to the political decisions that are taken.

**Caroline Gardner:** The group felt that the medium-term financial strategy is a key element of the package of measures that we are proposing, and it is one of the things that helps to compensate for the continuing shorter period for focusing on the detailed budget proposals each year. The medium-term strategy will set the context for the budget each year, and it will look at the economic and demographic forecasts and the other things that are expected to change alongside current policies and the ways in which they will affect demands on the public finances. The strategy will also look at the level of taxes that are expected to be raised from each of the devolved taxes and at demand-led spending, particularly through the new social security powers. It will also set out clear policies and principles for the way that new powers such as the borrowing and reserve powers will be used within the overall framework.

There is no doubt that it will be challenging for Government to produce that for the first time; it will be a new element of our fiscal arrangements here in Scotland. However, we think that it is possible for it to be done next summer before the summer recess in 2018 to inform the 2019-20 budget cycle and, more importantly, that it is critical to do it if the longer-term and more strategic scrutiny of the public finances is to be effective. It is what lets you move away from a focus on the individual numbers that are changing to the bigger context and the things that the budget is trying to achieve.

**The Convener:** The way that you describe it in paragraph 81 of your report, which sets out four elements, is useful. Just for the record, and so that those who are tuning in can clearly understand what the medium-term financial strategy will contain, I point out that the four elements are:

• Forecast revenue and demand-led expenditure estimates from SFC and their effect on Scotland's public finances;

• Broad financial plans for the next five years;

• Clear policies and principles for using, managing and controlling the new financial powers; and

• Scenario plans, based on economic forecasts and financial information in order to assess the potential impact of different scenarios on the budget."

That is powerful, and it follows up on some of the things that the committee asked for as part of the discussion on last year's budget. I am sorry for reading that out, but it sets the context for the wider audience who are listening.

**James Kelly:** That is helpful. Finally, this requires a change in culture, from that of recent years when the timescale for looking at the budget

has been very short, to looking at it all year round and to taking a longer-term view. What is required to make that successful, so that politicians and stakeholders can understand the new process and engage with it effectively?

**Dr O'Hagan:** It is difficult and challenging to use the term "culture change" in a way that does not make it look as though you are being critical. However, our view in the group was that it has to be seen in the context of the recommendations for a more expansive and extended process in which the focus is on outcomes, which we focus very strongly on in the report. What difference is public funding making in the key areas of government? If, as we say from an equalities budgeting perspective, the budget is the principal expression of a Government's priorities, how are those priorities being met through public spending? That is what we want to encourage: the scrutiny not of the immediacy of the politics of budgeting but of the longer-term impacts and outcomes that are achieved through the consensus that ultimately is the agreement of a budget and will be the agreement of the medium-term financial strategy and the multiannual budgets.

That, again, allows the setting of that consensus, that strategic direction for public spending and the outcomes that we collectively, through improved public engagement, want to see achieved as a consequence of the dedication and allocation of Scotland's resources. It is about looking at the changes that are being made to advance the wellbeing and equality of people in Scotland, so shifting some of the budget scrutiny from the immediacy of political point scoring on indicators and targets to a more long-term and in-depth look at the changes that are happening and where adjustments might be made more effectively.

**Caroline Gardner:** I will add a couple of brief points. First, all of us who are involved in this have to accept that the new fiscal framework and new devolved tax and spending powers will inevitably mean that there is more uncertainty in the budget than there has been in the past. Forecasts are never going to be right, in the narrow sense, and the fact that more or less tax has been raised in a year than was forecast is not necessarily an indication of failure. It is about how we manage the uncertainty and volatility as a whole.

The second point is a strong theme in our report. It is about having greater transparency of information across the whole of public finances, looking at how these things join up, and doing things to make sure that that transparency is useful to people in Parliament and people across Scotland. In the budget documentation, we recommend separating the presentation of the numbers from their political presentation. I know

that there was concern in some committees last year about how some elements of the budget were presented. If we can strip away the confusion between the numbers and their presentation politically, it will help people to focus on the numbers and what they are intended to achieve, as Angela O'Hagan has said, rather than on whether some number should be £50 million higher or lower, depending on which definition you use. That does not help anyone, and it tends to get caught up in the very narrow political street-fighting rather than the bigger decisions that are needed around the budget.

**The Convener:** I think that Murdo Fraser probably wants to talk about revisions in the area that we have just been hearing about. Do you want to pick up on that?

**Murdo Fraser:** Just as a precursor to my question, I echo what the convener said about the report. It is excellent, and the emphasis on evaluation of outcomes and outputs is exactly where we want to be going. It has been very valuable.

I have a specific question about budget revisions, which you touch on in paragraphs 184 to 186. A specific scenario came up during our budget scrutiny for the current year. It may be helpful to put that into context by way of illustration. The budget was presented to Parliament on 15 December last year, if I remember rightly. At that point, the finance secretary told us that every pound was accounted for in the budget. The Opposition parties were challenged to propose alternatives to the budget and they would have to say where the extra money was coming from. That draft budget was then put out to the various subject committees for scrutiny.

It was only six weeks later—a period that of course included the Christmas and new year break—when the finance secretary came back to Parliament for stage 1, at which point he had done a deal with Mr Harvie's party and had found an extra £220 million in order to agree that deal. There were a lot of jokes at the time about the finance secretary's sofa and how he had found that money wedged down the back. However, there are two more serious points. First, if the Opposition parties had been aware that the budget was understated on 15 December, that would have put a different complexion on any negotiations that took place. Secondly, the committees that were scrutinising the budget were scrutinising a budget that was £220 million smaller than it was in reality.

Did you consider that issue when looking at the question of budget revisions? Did you come to any view about how in future we might improve the

scrutiny process and provide greater transparency?

**Caroline Gardner:** You will not be surprised to hear that we spent some time considering that issue as well as the broader question of whether Parliament should have amendment powers over the budget as presented by the Government. There are arguments on both sides. We heard examples of legislatures elsewhere that have various sorts of amendment power, either general or within the overall cap of the resources available, or none at all, which is where Scotland is at the moment. We thought quite hard about the pros and cons of that. It did not take us long to rule out the idea of unrestricted amendment powers; they are generally not a good thing, as you risk ending up with pork-barrel politics and fiscal sustainability tends to go out of the window. However, we thought long and hard about whether it should be possible for Opposition parties to propose amendments within the overall cap that had come forward.

Actually, the more we thought about it, the more we thought that that throws up the same question that you are raising. What is important is that everyone is clear about what the overall envelope of resources is in ways that are complete and transparent. I had a patch earlier this year of making small bets with colleagues to test whether they could tell me where the extra £200 million-odd came from or not. Very few people understood, because, first of all, the budget as it is currently presented does not tell you the whole picture and, secondly, the current process does not require explanation of where the movements are happening. For example, the non-domestic rates pot is outside the budget as presented, and that presents opportunities because of the way it is managed on a rolling basis either to take money out or to put money in. From this year, we have the new borrowing and reserve powers, which bring in for different purposes different streams of money that are not shown directly in the revenue budget that is presented to Parliament.

As a group, we decided that the best thing to do was to stick with the current arrangements whereby only the Government amends the budget but instead to focus heavily on the transparency and the accessibility of the information and on the importance of that covering the whole of the budget, not just individual elements. We need to see how all the new moving parts—borrowing and reserves, the block grant adjustments and the interaction between forecasts and later reconciliations—operate in terms of the amount of money that is available and the choices that are made about tax raising in future. One of the recommendations in the report is for a fiscal framework outturn report, which puts all that into the public domain and gives everybody the same

basis for understanding where there might be levers that could be used to raise more money for investment, spending or indeed for tax cuts in the future, if that is the decision that Parliament comes to. We considered it carefully, but that is the basis of the recommendations were made.

**Murdo Fraser:** Thank you. That is very helpful. I suppose the lesson is that in future, when the budget is presented, the first question that will be asked of the finance secretary is, “Is this the complete picture? What else is there that has not been presented?”

**Caroline Gardner:** And the medium-term financial statement and the fiscal framework outturn report will give you, as parliamentarians, information on which to ask those questions in an informed way.

**Murdo Fraser:** Thank you.

**Patrick Harvie:** Following on from that, I suppose that there is a need to recognise that, as well as the objective that you set out at the beginning of allowing Parliament greater opportunity to influence the budget, presumably before its publication, there is also a political process that comes after publication. Whatever view we take—and I am sure that there are different views—about the merits of any particular outcome in any one year, the question about transparency and the finance secretary not holding back further information is very important.

We are all now being forced to accept that the budget process after publication is much shorter than it used to be, and that does not look likely to change. That increases the argument in favour of giving Opposition parties some ability to make amendments. Given that you have reached the view that that is not what you want to propose, how did you strike the balance between coherence of a budget and political accountability to Parliament? The current period of minority administration is particularly relevant to this, but the years of coalition were relevant as well, as are some of the same criticisms of a political deal between parties resulting in a lack of coherence in budgets. Some of those arguments were made at that time as well. We need a process that will be able to work in periods of potential majority, minority and coalition administration in the future. Just give me a sense of how you think your recommendations reflect the importance of parliamentary process and the reality that there will be a political process after publication, perhaps on a breakneck timescale that has not always worked well in the past.

11:15

**Dr O'Hagan:** I will start with the point about post-publication and trying to create space that

does not exist in the calendar at that point. That is why we emphasise pre-budget scrutiny, the opportunity—indeed, the necessity—for greater committee involvement and scrutiny over the year, and pre-budget influence and formulation and setting out proposals from the committee processes. That, we felt, increases the involvement of Parliament more in the round and engages Parliament much more in the propositions and proposals that should inform and structure the proposals in the budget. There is also the recommendation that the spring budget revision should be accompanied by a mid-year report on revenue and spending up to the end of December, and that the mid-year report should be scrutinised.

When you take the basket of measures across the report, there is public engagement and parliamentary engagement and scrutiny, proactive involvement from the committees—not just in a scrutiny role but in pre-budget proposals and the kind of data that James Kelly was asking us about—and increased monitoring of finances over the year. We have tried to present a series of proposals that have to be taken as a whole because of their interlinking nature, all of which are intended to give greater accountability and transparency.

**The Convener:** Reflecting on Patrick Harvie's point, I notice that paragraph 167 deals with some of the nitty-gritty of this. Could you expand on some of that? Again for the wider listener who is not as close to all this as we are, I think that that would be helpful in response to Patrick Harvie's point.

**Caroline Gardner:** Absolutely. The first thing to say is that we were very conscious that, although we are all working in a particular composition of Parliament at the moment, what we design must be able to cope with every possible permutation that can come out of our electoral system. It is not about a minority or majority Government or anything else; it is about what Parliament needs to work.

As I said, one of the key things that we were trying to balance was proper parliamentary influence with the ability to manage a budget and keep fiscal sustainability as a key consideration to avoid the risk of the sort of pork-barrel politics that we have all seen elsewhere. That can lead to decisions that are politically palatable this year but which lead to long-term problems after that. We felt that our package of recommendations, which would put more information in the public domain for the longer term, with the medium-term financial strategy and the fiscal framework outturn report, was a good starting point. The longer-term evaluative phase that Angela O'Hagan has talked about will influence committees' pre-budget

reports in ways that should drive some of the shift in the proposals that the Government publishes in the budget bill. The budget bill itself should give a much more complete a picture of the public finances, rather than just one angle on it with other moving parts elsewhere that are not included. That all limits the risk of misunderstood or not-understood changes coming through at a later stage.

Equally, we recognise that this will always be a political process. This is a Parliament and that is the way in which Parliament operates. Increasing transparency all the way through was a key part of what we were looking to do. We felt that the Government's ability to bring in amendments at stage 2 was a key part of the ability to reflect on the negotiations that are happening and will always happen.

The influence that comes from committees is a part of their scrutiny and the scrutiny by this committee of the big picture of what is happening on borrowing reserves, with forecasts of revenue and spending for the future, is the best overall balance that we have. There is no right answer, but we feel that it respects the fact that this is a political process and will shine more light on the ways in which it is working and provide Parliament in general with more information about the impact of the changes that it is making than it is doing currently. That is the right place to land.

**Patrick Harvie:** The fact is that the political discussion that led to stage 2 amendments last time round was unusual. Are you suggesting that that should become the norm and that it should be an expectation that, if the Government reaches agreement with other political parties, that should be expressed through a formal process of stage 2 amendments going through on the record?

**Caroline Gardner:** We felt that the mechanism was already there and that it is better than any political party being able to bring forward amendments, for the reasons that we have discussed already.

**Patrick Harvie:** It is already there, but mostly it has not been used; it has been rare.

**Caroline Gardner:** Precisely. I was going to move on to say that the thing that makes it both a more managed part of the process and one that is better understood is the greater transparency of the overall picture within which decisions and amendments are being made, the ways in which they will be funded, and their long-term impact in the context of the medium-term financial strategy. If I stick with the experience that we had last year, you are right to say that it has only rarely been used. The amounts involved were not huge in the context of the overall £34 billion or so that we are talking about but, equally, we know that some of

that money came from different assumptions about the balance on the non-domestic rates account. Parliament should have been able to see that impact and what it meant in terms of trends when voting for or against the budget as it went through. We think that it makes their use more effective and more likely to lead to good fiscal decision making.

**The Convener:** Just so that I can finish that off, you said specifically in recommendations 48 and 49 that there are some changes to the existing process. In particular, recommendation 49 states:

“The Group also recommends that any changes to the Scottish Government’s published spending proposals during the budget process must be dealt with through amendments to the Budget Bill at Stage 2 and Stage 3”.

That takes it a stage further than currently, where it is within the Government’s will. I think that you are suggesting that that process should become a norm.

**Caroline Gardner:** That is absolutely right. As I say, for us this is about making the process more transparent and better understood in terms of the decisions that are being made and their longer-term consequences. I think that it gives Parliament greater control.

**The Convener:** I am sorry, Patrick.

**Patrick Harvie:** The other aspect of parliamentary scrutiny that I am interested in talking about is on the tax side. A large part of the purpose of the budget review process has been to understand how we evolve from scrutinising a spending budget—or what has been almost entirely a spending budget—to scrutinising one that is much more balanced between taxation and spending.

I understand entirely why, within the process of the review, you did not feel able to make a clear recommendation on the idea of a finance bill; you said that it should be examined further. In the interim, have you discussed how we might achieve a higher or more regularised standard of scrutiny of tax instruments before we get to the point of making a longer-term decision on a finance bill? We have a negative instrument on non-domestic rates, which is a major tax power. We have a much more high-profile and tightly time-constrained process on income tax rates—a rate resolution needs to be passed in a very tight timescale to get to the budget. For legislative reasons, we have had a much higher level of scrutiny of the land and buildings transaction tax. Council tax is still in theory a local tax, but the constraints around it are bound up with a national budget process.

Have you had any discussion about how we might achieve in the interim—before we get to the point of making decisions about a finance bill,

which might be several years down the line—a common standard of scrutiny of relevant tax powers?

**Caroline Gardner:** In some ways, that was one of the most difficult areas that we looked at because of how technical it is and because the legislative provisions have been built up piecemeal over time for reasons that we all understand.

We heard some quite strong views from different stakeholders about the need to review the process and streamline it a bit. You will recall that, when I was here with Don Peebles and Jim Mitchell earlier in the year to discuss our draft report, you asked us about the possibility of a finance bill. We considered that and ruled it out on the basis that we were very keen to make recommendations that were in the power of the Scottish Parliament and the Scottish Government to implement rather than ones that would require changes to UK legislation.

We have made some recommendations for streamlining and improving the quality of tax legislation and the way that it is reviewed for minor housekeeping changes as they come through to avoid some of the difficulties and teething problems that we saw when the devolved taxes first came in. To be frank, we feel that that is an area that needs more time and more consideration than we were able to give it as part of the report, and that it could appropriately sit alongside the implementation of the recommendations. Those would improve things in any case, but I am sure that more fine tuning could be done on the tax legislative provisions.

**Dr O’Hagan:** There is not much more that I would add other than, when it comes to the common standard of scrutiny of the principles of taxation—the so-called Scottish approach to taxation—we should ensure that, whatever the proposals are for tax instruments, which are political choices, the scrutiny that is applied is applied from the perspective of equality implementation, take-up and so on.

**Patrick Harvie:** I, too, want to ask about equalities. I do not know whether you want to bring others in on that point, convener.

**The Convener:** We have covered a fair bit of ground already. The key components of the process have already been discussed, so I think that it is appropriate for you to finish off your questioning, Patrick.

**Patrick Harvie:** Thank you.

I will come to Dr O’Hagan first. In your opening remarks, I think that you said that the Scottish approach to equalities analysis is better than elsewhere in the UK. Do you agree that that is setting a bit of a low bar, and that what we have

should not be seen as a model but as a starting point to build on much more substantively? I would suggest—and I would like to know whether you agree—that the equalities statement that accompanies the budget places a lot of emphasis on the value of positive things that the Government thinks that it is doing, but it does very little to analyse the impacts of cuts, for example.

Let us look at the number of jobs that have been lost in local government in the past few years as a result of the constraints on local government spending. The Scottish Government has made no real attempt to produce an equalities impact assessment or an analysis of the equalities impact of such decisions. The Government claims that it is unable and lacks a suitable evidence base to conduct an intersectional analysis—the kind of distributional analysis that your recommendations call for—yet you will be well aware that the Scottish women's budget group has done a fair amount of that kind of work with existing data that is already available. Is it the case that the Scottish Government has been unwilling to go further and do what is already possible? If so, why would we assume that, if it had more data available, it would do what is needed when it has not been doing what is needed with the data that it already has?

**Dr O'Hagan:** Okay. There was quite a lot in there.

I will start by saying that, although the Scottish approach and the equality budget statement should perhaps not be used as “a model”, to use your phrase, the work in Scotland is the very best of what is going on in the UK, where there is very limited equality analysis. There is no equality impact assessment and no similar documentation on the UK budget, for example. I have consistently said in the equality budget advisory group, in successive consultations, in evidence to Parliament and elsewhere that although, as it stands, the equality budget statement is a very important development in our budget process, it is a narrative accompaniment to the budget decisions and not an equality impact assessment.

What we have recommended in the budget process review group report is that we should move more towards the typology and approach that are advocated by the Organisation for Economic Co-operation and Development, which involve ensuring that we have an ex-ante, a concurrent and an ex-post equalities analysis of the budget. By encouraging the creation of that year-round scrutiny of parliamentary involvement, we would create many more access and entry points for equality analysis. We need to prompt that from and require it of Government and within parliamentary scrutiny. The committees themselves could be much more robust in some of the equalities analysis, which should be

concentrated not just in the Equalities and Human Rights Committee but across all the subject committees. That would begin to address some of the issues that you have raised, such as the impact on local government employment. Let us not forget, either, the impact on local government of public service reform, which usually falls on low-paid, precariously employed women.

11:30

The kind of approach that we are advocating is to make more of the public sector equality duty requirement to ensure that proposals that are put forward in the budget—whether from committees or spending departments—are subject to an equality impact assessment and that a wider range of equality analysis tools are used, including beneficiary analysis, to work out what the impact will be. There has been significant improvement in the equalities data that is available in Scotland, which can be brought into much more effective use in the analysis. Indeed, the Scottish Government has recently said with regard to the relationship between the budget and the national performance framework that there is better data there and that more should be used.

The kind of analysis that we are talking about is not what is currently in the equality budget statement, which is why the report has made its recommendations to strengthen and improve the equality budget statement and to reconsider its timing, its purpose and the use to which it can be applied in Parliament. The recommendations on distributional analysis are there for a reason—we know that the data has improved and that improving distributional analysis will improve parliamentary and public understanding of the impact of and outcomes from public spending. There is an increased availability of data—although we undoubtedly still have data gaps—but there needs to be the political will in Government and in Parliament to bring that data into better use and to commit to the kind of intersectional analysis, whereby we look at the lived experiences of women and men in all their diversity in Scotland and at how public services and public finances in Scotland are advancing equality.

That is the basic question that must come before every committee: to what extent any proposal that comes before it advances equality and seeks to eliminate inequalities. If a proposal is not going to do that, it is necessary to go away and think again. That is where we can look to other jurisdictions at sub-national level with similar budget levels and considerably more advanced equality analysis, such as the Andalusian region in the south of Spain, or at national level, where Austria was one of the examples in the international report for the group.

**Patrick Harvie:** So, without suggesting that perfection is achievable immediately, your view would be that the Scottish Government already has available to it the data and tools that are necessary to produce a much higher level of information for Parliament, when it publishes its budget, on the impact of its budgetary decisions in terms of gender, disability, ethnicity, age and income decile. Are you saying that it should be our expectation that Government publishes such information alongside its budget?

**Dr O'Hagan:** We know that there has been a big improvement in data, but in some areas there are still deficiencies; they are historical and are to do with the kind of data sets that we have available, the population size for data sampling in Scotland within UK samples and so on. There are a whole lot of technical reasons. However, the point is about not just producing the data alongside the budget, but using it in the pre-formulation of budget options, in the ex-post and concurrent evaluations, and in the ex-ante formulation of budget proposals.

**Patrick Harvie:** Sure, but if the Government is using the data in that way to shape its budget, the way for it to show that it has done so is to show its working when it publishes the budget.

**Dr O'Hagan:** "Showing its workings in the margins" is a phrase that I have used very often in relation to equality analysis, but the emphasis here is also on the public authorities and public bodies that are implementing the services that are funded through public finance. That is why, in the budget documentation that we talk about in the report, we want committees to take a much wider view and to look at the public sector equality duty and the associated publications that are required for compliance with that duty. Consideration needs to be given to what bodies such as the NHS, Skills Development Scotland and the successor to Scottish Enterprise are saying in their mainstreaming reports and in their audits about equalities and how they are advancing them, and about how those proposals will meet the overarching objectives of Government and of the policies that are proposed by parliamentary committees.

**Patrick Harvie:** That is helpful. Thank you very much.

**The Convener:** We have already had a good discussion about year-round budget processes, longer-term planning, timing, revisions and mid-term financial strategy, which I think is hugely important. Ivan McKee has a very quick question.

**Ivan McKee:** I want to focus on outcomes, and I am glad to see that you have given that some attention in the national performance framework, which we do not talk about often enough in this

committee or in subject committees. It is clear that there are difficulties—I know that the subject committee that I am on struggles to establish the relationship between the input funding, the outcomes that are delivered and how those line up, and you talk about that. You talk about potentially moving from portfolio-based budgeting to programme-based budgeting, which would be interesting.

Could you talk about the discussions that you had about that and the difficulties that you foresee in enabling this committee and subject committees to move more firmly in that direction, so that we can look back on what has happened and not just have a political bun fight about how to line up input funding and outcomes in the future?

**Caroline Gardner:** I think that it was common ground in the group and among all the external stakeholders that we heard from that the outcomes approach is a good thing. We absolutely should be looking at the outcomes that we are trying to achieve rather than at how many nurses, doctors or teachers we have; we should be taking that longer-term view. More can be done to link those outcomes to the money that we spend, which is the key way that any Government or organisation aims to achieve its aims. Alongside that, as the outcomes are agreed and set, Government and public bodies can do more to set out their plans for how they want to shift those outcomes.

At the moment, there is a gap in many areas between the outcomes in the national performance framework and the way in which they cascade down, and the plans that the Government and all the people who are involved in trying to shift those outcomes have for how they will actually go about it. That is a complex thing; for most of the outcomes that are in the framework and that we care about, it is not just a case of cranking a handle to see what is changing. Equally, there is much more room—for example, if one of the outcomes is about keeping people safer by reducing reoffending—to be clear about what the interventions are that the evidence says reduce reoffending; which ones we intend to try here in Scotland or in different parts of Scotland; what money we will put behind that; and how we will know over time whether things are moving in the right direction and we can therefore do more of those interventions, or in the wrong direction, with the result that we must think again.

We have a section in the report about planning for outcomes and the way in which that would be done in the Scottish budget overall, but also within the budgets of the public bodies that Angela O'Hagan referred to. That information itself would give the subject committees much more to work with in testing and challenging whether that

thinking stood up to scrutiny and whether the evidence available was changing over time and whether policy and the direction of money should also change. We felt that that was all a positive direction of travel that would build on the good things that are already in place with the national performance framework and the outcomes approach that we have embedded in legislation now in Scotland.

**Ivan McKee:** Thank you.

**The Convener:** Thank you very much.

As I said at the beginning, the budget process review group's report is an excellent report and this morning's session has been extremely valuable. Obviously, lots of processes and procedures are in there, but I heard the phrase "culture change" a couple of times. It will take a significant culture shift in the Parliament if we are to make sure that some of the proposed processes and procedures are embedded in what we do in a meaningful way.

Obviously, the financial issues advisory group set the foundation stones for the parliamentary budget process and did a rigorous and robust job on it. We now have an opportunity to take it forward to a completely different level and produce a world-class budgeting process within the constraints that we all work under. If we can achieve that on an all-party basis, we will have done the Parliament and Scotland proud. I hope that we can get to that end, and I thank you for helping to push us along that road.

The clerks will produce a paper for a future meeting, which will set out our suggested approach to the implementation of the review group's final report.

*Meeting closed at 11:39.*



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