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Pàrlamaid na h-Alba

Official Report

DEVOLUTION (FURTHER POWERS) COMMITTEE

Thursday 10 September 2015

Session 4

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DEVOLUTION (FURTHER POWERS) COMMITTEE
21st Meeting 2015, Session 4

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

Duncan McNeil (Greenock and Inverclyde) (Lab)

COMMITTEE MEMBERS

*Malcolm Chisholm (Edinburgh Northern and Leith) (Lab)
*Linda Fabiani (East Kilbride) (SNP)
*Rob Gibson (Caithness, Sutherland and Ross) (SNP)
*Alex Johnstone (North East Scotland) (Con)
*Alison Johnstone (Lothian) (Green)
Stewart Maxwell (West Scotland) (SNP)
*Mark McDonald (Aberdeen Donside) (SNP)
*Stuart McMillan (West Scotland) (SNP)
*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Aileen McHarg (University of Strathclyde)
Professor Iain McLean (University of Oxford)
Andrew Tickell (Glasgow Caledonian University)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Devolution (Further Powers) Committee

Thursday 10 September 2015

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

The Convener (Bruce Crawford): I welcome everyone to the 21st meeting in 2015 of the Devolution (Further Powers) Committee. I remind all members present to switch off their phones.

I welcome our panel of witnesses and any other witnesses to today's proceedings. We have received apologies from two of our members: Stewart Maxwell and Duncan McNeil. There are no substitutions on this occasion.

Agenda item 1 is a decision on whether to take in private item 3, which is consideration of evidence heard; item 4, which is the summary note of our away day; and item 5, which is our citizens guide to Scottish devolution. Do members agree to take those items in private?

Members *indicated agreement.*

Scotland Bill

10:01

The Convener: Item 2 is an evidence session on the Scotland Bill prior to its consideration in the House of Commons at the report stage. We have with us a panel of academic witnesses: Professor Aileen McHarg, who is professor of public law in the department of law at the University of Strathclyde; Professor Iain McLean, who is professor of politics at Nuffield college at the University of Oxford; and Andrew Tickell, who is a lecturer in the department of law at Glasgow Caledonian University.

I thank you for coming along; we are grateful to you for giving us some of your time as we continue to deliberate on the Scotland Bill before the report stage.

I will start with a question specifically for Professor McLean, because I think that it will set up the discussion nicely. I see the other two witnesses giving a sigh of relief—sorry, Iain. I was very interested to read in your submission the views that you expressed about the balance between the taxes that are being devolved and those that are remaining reserved, and the ability of a future Scottish Parliament to pay for a different set of economic and social policies in Scotland from those in other parts of the United Kingdom if that is what we want to do—for example, abolishing tuition fees or the bedroom tax.

Is the balance in the bill between the risk and the rewards right, given the risks that are being transferred—for example, being responsible in part for the provision of the Scottish welfare system? Are we getting the right rewards in terms of extra financial powers or policy flexibility? In that light, how important does the fiscal framework become?

Professor Iain McLean (University of Oxford): Thank you, convener. Neither the UK Parliament nor the Scottish Parliament seems to me to be an entirely free agent in the matter, because we have before us a bill to implement the recommendations of the Smith commission. The commission proposed a certain balance of tax and spending powers, and that is more or less what the bill proposes.

As members will have seen in my written evidence, there are some things that I think are good. One example is the extent to which the bill reduces vertical fiscal imbalance, which I define in my submission; I am happy to talk about that further. However, other aspects are rather confused—because of the political process of Smith, I think. For example, there is a rather

random set of welfare powers in the bill and also powers to top up other welfare spending.

You asked about the balance of risk and reward. The issue in that respect is that the bill contains powers on the up side but not on the down side. With any further tax devolution, the risk is that tax receipts in Scotland will go up by less than tax receipts in the rest of the UK. The bill contains powers to top up spending, but it does not contain powers to reduce spending, so in my view that risk translates into a risk that the Scottish Parliament might face a funding crunch somewhere towards the end of the spending review period that is about to start.

I would prefer it if risk and reward were more balanced in the way that I suggest in my submission. In my view, when welfare powers are devolved, some welfare tax powers should also be devolved. That way, the risk and the reward would both sit with the Scottish Parliament. At present, some of the risk is in one place and some of it is in another.

The Convener: I want to widen the discussion so that others can take part in it. I will give a specific example in the area of welfare, which I know that Linda Fabiani wants to ask about.

The Welfare Reform Committee received a submission from Professor David Bell, who pointed out a possible flaw in the risk-reward balance if we do not get the agreements between the two Governments right. That is why I asked my initial question. When the powers for disability living allowance, carers allowance and so on transfer, we will receive about £2.5 billion to pay for those benefits, but unless we uprate that figure each year at the correct rate, the fact that our population is ageing more quickly than that in the rest of the UK means that demand might outstrip the revenues that are provided. Unless we get things right and have a greater ability to boost tax revenues from elsewhere by having a deeper basket of taxes devolved or by ensuring that we have a suitable balancing agreement in the fiscal framework, we could be looking at a poisoned chalice, for want of a better description. I seek your thoughts on that. Perhaps my description of the situation is a bit too strong, but you can see where I am going.

Professor McLean: Is “poisoned chalice” David Bell’s language or yours?

The Convener: It is mine. I take a bit of licence.

Professor McLean: David Bell knows what he is talking about. Although I have not seen his evidence, it seems to me that that is very likely to be right. I think that “poisoned chalice” is a perfectly appropriate phrase, because of the general point that I made earlier. If Scottish tax receipts do not go up in proportion to spending liabilities, it will indeed be a poisoned chalice.

The Convener: Before I come to Aileen McHarg and Andrew Tickell, I invite you to reflect on how we might use the fiscal framework to allow a balancing process that could create the environment in which that situation would not develop. Is that possible?

Professor McLean: I am sure that it is possible. Ministers talk about using tax powers to grow the economy; I think that they might be a wee bit optimistic in that regard. However, the area in which the Scottish Parliament has already shown some initiative and stepped away from the Westminster framework, and in which there is the most potential, is land and property taxation. I have separately given evidence to the tax reform commission on that, to which I could refer members. In my view, there is scope in that area.

Professor Aileen McHarg (University of Strathclyde): I do not know a huge amount about tax, so I do not have a lot to add. The general view, which seems to be borne out by experience, is that income tax is a difficult tax to raise; other taxes are easier to raise. The wider the basket of taxes you have, the greater the flexibility you have.

The issue goes wider than welfare. We must understand tax as not merely a revenue-raising instrument but a regulatory instrument that is designed to alter behaviour. Therefore, the fewer tax powers you have, the less flexibility you have in other areas. The failure to devolve taxes can alter the balance of risk and reward in substantive policy areas.

In his submission, Iain McLean mentioned onshore oil and gas taxation. There is an interesting issue there to do with the political incentives that that creates in relation to allowing fracking, for instance. If the Scottish Government is not going to get any of the rewards from allowing fracking, and given that fracking, as we know, is highly controversial, that tips the balance a bit on the substantive policy decision on whether the Parliament allows fracking. We have to understand tax in that broader policy sense and not merely as a revenue-raising instrument.

Andrew Tickell (Glasgow Caledonian University): I am not a tax lawyer either, or particularly good with numbers in general.

One of the challenges that the committee faces is that we have a dual process here. There is a process for framing the Scotland Bill, which sets out what powers the Parliament will or will not have, and then there is, as the convener described, a parallel set of negotiations between the Governments about the fiscal relationships and how the Smith commission principle of no detriment might be realised.

Just looking at the bill does not tell us how the negotiations between the UK Government and the Scottish Government are going and whether they are hitting the right balance in distributing resources across the country. That is one of the big challenges: it is hard to analyse the bill in isolation.

The Convener: Does it not also constrain us in terms of policy flexibility? You described some of that in your paper and might want to expand on it.

Andrew Tickell: In terms of tax?

The Convener: In terms of welfare, in particular.

Andrew Tickell: My criticisms of the bill were largely premised on how the powers are drafted, rather than on the interaction between taxation and welfare. My basic principle is to ask whether the restrictions that are placed on powers are intelligible, sensible and necessary. If they are not necessary, they should not be there.

The Scottish Parliament is a constrained legislature; it is not like Westminster. We are not transferring welfare powers from Westminster to Holyrood, because Holyrood is subject to judicial review in ways that Westminster is not. Westminster is a sovereign Parliament in relation to welfare; policy made by Westminster, generally speaking, cannot be challenged in the way that acts of the Scottish Parliament can be.

I am particularly concerned about some of the definitions around welfare in the Scotland Bill. They are very likely to give rise to litigation and to limit the Parliament's ability to make policy on matters such as disability and carers. That is unnecessary.

The Convener: That leads into Linda Fabiani's questions.

Linda Fabiani (East Kilbride) (SNP): I have picked up two issues from Andrew Tickell's paper that are relevant to what the convener has been saying. The first of those issues is the lack of cohesion among all the different elements in the Scotland Bill. That is particularly stark in relation to welfare issues. I have a concern that, when we move from talking about the theory and the disagreements, we will have people who may well find that their lives are even more messed up over welfare issues than they had been over the last while.

I was interested in what Andrew Tickell said about the difference between the Smith commission view that Holyrood should have complete autonomy in determining the structure and value of benefits for certain things and the restrictive way in which that recommendation is being applied. I am particularly concerned about the definitions that specify who should be classed as disabled or as a carer, and the potential long-term argument between institutions that ends up with the people in the middle having a really hard time.

As an academic, have you been able to work out a logic for the way in which the recommendation is being applied and why it is so different from what was clearly the intent of the Smith commission?

Andrew Tickell: My understanding is that the first draft of the bill was written by the Treasury, and that begins to explain quite a lot about how it is drafted and the control freakery of it.

Take the example of how we define a carer. What interest does the Westminster Government have in defining carers benefits as being payable only to people over the age of 16 who are not in work and not in education? Is it to be accepted universally, for all time, that this Parliament would not want to give extra support to 14-year-olds who care for their relatives? I do not understand what the Westminster Parliament's prevailing interest is in specifying that, and what is to be gained in constraining the policy autonomy of this Parliament.

As was said, if in future a Government or party wants to challenge the limitation and, say, give payments to 14-year-old carers, will we have another section 30 order under the Scotland Act 1998 and another set of reforms? This is meant to be a stable settlement, but I do not think that Westminster realises that.

10:15

Linda Fabiani: That leads me on to one of the things that Aileen McHarg said regarding devolved areas and the new welfare benefits. Andrew Tickell said that, in his opinion, that discussion would quite clearly have been started by the Treasury. There is a Smith commission recommendation about the power to create new benefits within areas of devolved responsibility; that was quite clear. However, we now have a Secretary of State for Scotland who is saying, "That's just silly—you already have that." The Treasury sat there all the way through the Smith commission negotiations, and without giving too much away, I think that the negotiations were rather constrained at times by some of the Treasury opinions. Does Tavish Scott agree?

Tavish Scott (Shetland Islands) (LD): I will come to that in a minute. [*Laughter*.]

Linda Fabiani: I find this whole area confusing. That is fine when we are sitting here discussing it in committee and there are different panels of witnesses. However, at the end of the day people will be very much affected by what is in the

legislation. What is your view on the arrangements for welfare? What is your view on the potential for simplifying and making the system more cohesive overall, at the current stage in the legislative process?

Professor McHarg: There is probably not much potential for that. My strong sense from talking to officials in the UK Government is that they are not going to change anything. Somebody said to me that they are too far down the process to tear it up and start again. Amendments are possible, but if there is an issue about the entire approach that has been adopted I think that we are probably stuck with it, which is very unsatisfactory. I agree with you.

As I said in my written evidence, the way in which we are approaching the matter and the authority that has been given to the Smith commission agreement—no offence to members of the committee who were on the commission—is highly problematic, given the nature of the Smith process. It was very rushed, a political bargain and had very little public involvement. The agreement is now being used as the measure of what can be done in the parliamentary stages—this far and no further. That is really problematic, because we are now supposed to be scrutinising the bill and working out whether it works. We are allowing an earlier, flawed process to hamper a later part of the process.

On the specific issue of benefits in devolved areas, I am not an expert in that but I have looked at it over the past few days. My view is that there is scope for disagreement, so why not make it clearer? What is the objection to putting something beyond doubt? That should prevent disputes in the future. I do not understand why that would not be done if there is the opportunity to do it.

Linda Fabiani: I have one final wee thing that I would like to get on the record. I presume that the Scotland Office is spending a lot of money on the adverts that say that the terms of the Smith agreement are being met. Is it your view that the terms are being met?

Andrew Tickell: In some areas, clearly yes; in some areas, clearly no. In other areas, your guess is as good as mine. I made the point in my written submission that the Smith commission is rather vague on those points. To sound a bit lawyerly, an arguable case might be that a number of different areas are met. I agree entirely with what Aileen McHarg said about the critical question being not just whether the terms are being met. We need to shift to a question about whether it makes sense—particularly on welfare powers, for example.

It is quite probable that a legal challenge will emerge. This Parliament has seen a number of its acts being challenged in the courts, on grounds relating not only to the European convention on human rights and European Union law but to the way in which the legislation relates to reserved matters. If there is a convoluted scheme of welfare in schedule 5, with exceptions on exceptions, you can bet your bottom dollar that somebody will bring a case to court.

Linda Fabiani: Yes. I think that that goes back to spirit and intent, convener.

Tavish Scott: I remember that a lot of academics said that Calman was too slow, and now you are saying that Smith was too rushed. Maybe we should just get you guys to write all this and politicians should give up altogether.

Andrew Tickell: That is an excellent idea.

Tavish Scott: I have two questions. The first is on Andrew Tickell's remark that the welfare clauses would give rise to litigation. Do you want to explain that? Governments do not go into court against each other, do they?

Andrew Tickell: No. However, they could do so, so it is not to be ruled out.

Tavish Scott: But back in the real world—

Andrew Tickell: By the way, my father would insist on the correct pronunciation of my surname, with the emphasis on the second syllable.

Tavish Scott: I apologise.

Andrew Tickell: The wrong pronunciation sounds absurd, and I am absurd enough already.

We have to think about the fact that the standing in Scots law on actions to review acts of the Scottish Parliament has been expanded significantly by the AXA General Insurance Ltd case, which members will know as the pleural plaques case. We are not necessarily talking about one Government challenging another. Imagine, for example, that the Parliament passed an act—

Tavish Scott: Sorry, but I want to be clear about the evidence that you gave earlier, when you said that the welfare clauses as drafted could lead to litigation. I suggest that the intergovernmental machinery, which the committee has taken a lot of evidence on, is designed to make sure that that does not happen. Governments do not go to court, and in practice they will not go to court on the welfare clauses either, will they?

Andrew Tickell: Sorry—perhaps I did not make myself clear. My point is that an ordinary member of the public, a pressure group, a campaigning group, the Christian Institute, AXA or any other organisation can review acts of the Scottish Parliament in the Scottish courts. For example, the disability clauses as they stand state that a

disability benefit created by the Scottish Parliament has to be in connection with a "significant" disability. "Significant" is a vague word, so if the Parliament introduces a disability bill and somebody out there disagrees with it, the legislation can be reviewed in the Court of Session. I am not suggesting that Governments will go to court, but a member of the public may well avail themselves of that right.

Tavish Scott: That is helpful. Thank you.

I want to ask Professor McLean about his submission—some of which I understood and some of which I did not, if I may say so. The bit that got me was about horizontal fiscal equalisation. In paragraph 11 of your submission, you say:

"HFE means the transfer of resources from relatively rich people to relatively poor ones, and hence from relatively rich parts of a country to relatively poor ones."

Can you explain what you mean by that in the context of what we are discussing?

Professor McLean: Yes, I will do my best. Suppose that we consider the case not of Scotland but of Wales and Northern Ireland, because it is quite clear that those are both relatively poor regions of the UK.

Tavish Scott: But with great respect, we are considering Scotland.

Professor McLean: For the purposes of answering your—

Tavish Scott: Forgive me, but you are giving evidence to a committee of the Scottish Parliament. We are not discussing Wales or Northern Ireland; we are discussing Scotland and the Smith commission, so I would like the answer to relate to us, please.

Professor McLean: Very well. Scottish gross domestic product per head is about 96 per cent of the UK average, and Scottish public spending per head is about 115 per cent of the UK average. There may be some anomalies, but if we maintain a social union and Scotland remains part of the United Kingdom, that figure of 96 per cent suggests that, on average, there are somewhat more poor people, or people in difficult circumstances, per 1,000 of population in Scotland than there are in the rest of the UK. On average, there are also fewer higher rate taxpayers in Scotland than in the rest of the UK. Therefore, within a social union, there will have to be some transfers, so it can never be the case that the Scottish Parliament can be expected to raise all that it spends; it will raise less per head in tax, and it will have a greater requirement to spend on welfare benefits.

The only reason why I proposed to bring Wales and Northern Ireland into the discussion is that the issues are much more clear cut in those cases, because their GDP per head is in the order of 80 per cent of the UK average.

Tavish Scott: The convener asked about the fiscal framework. Do you agree that that is the nub of the issue?

Professor McLean: For me it is, but that is not to disregard the legal points that other colleagues are here to address.

Tavish Scott: Do you have a view about how the fiscal framework needs to work or how it can best be constructed?

Professor McLean: That is not in the bill; it relates to the intergovernmental negotiations, about which I know very little.

Tavish Scott: That is the stuff that really matters in all this.

Professor McLean: There is a lot of stuff that really matters. It is sort of clear what the no-detriment principles mean on day 1 of the transfer of a tax power, but it is not at all clear to me what they mean in year 2. In that respect, if I were answering Linda Fabiani's question about whether Smith is being implemented, I would have to say that I do not know, because I do not know how, or even whether, the no-detriment principles are to be implemented.

Tavish Scott: That is helpful. Do you think that the no-detriment principle should apply over a parliamentary session or over a spending review period? Do you think that such definitions matter? Have you done any work on assessing how the system might operate?

Professor McLean: They matter a great deal. If the system were locked into a spending review period, the downside risks and the upside rewards would be less than if it were applied annually, because if the GDP per head in one part of the country were to grow less than that in another, that might be protected for a whole spending review period, but presumably not if it were to be done annually.

Tavish Scott: Do you think that it would be more fiscally responsible to take the longer-term view than to take the year-to-year, short-term view in terms of how that is constructed?

Professor McLean: I am not sure what I would favour because I am not sure whose interests I would be expected to be looking at.

Tavish Scott: In this context, let us say that you would be looking at the taxpayer's interests.

Professor McLean: Yes, but am I looking at the position of the Scottish taxpayer or the position of

the taxpayer in the rest of the UK? In some unfortunate circumstances, their interests might be opposite, so I do not think that I can answer that question.

The Convener: We will come back to the deeper issues to do with the fiscal framework later, but I know that Alison Johnstone has time pressures so I want to ensure that she gets the opportunity to raise the issues that she wants to raise.

Alison Johnstone (Lothian) (Green): Thank you, convener. I would like to ask Andrew Tickell about a couple of interesting blog posts that he has written recently regarding the UK Government's plans to repeal the Human Rights Act 1998 and the impact that that might have on ECHR requirements on the devolved nations. I have two or three questions that might allow you to elaborate on those subjects.

Mr Tickell, is it your view that repeal of the Human Rights Act 1998 does not require Sewel consent, and that, although we should lament and campaign against that repeal, we might perhaps be better to push forward with our own version of the act? I would also be interested to learn your views on whether a British bill of rights would require consent from this Parliament.

Andrew Tickell: There is plenty there. I imagine that Aileen McHarg will also want to speak to those points, although we may disagree on one or two things.

Your first question was whether the repeal of the Human Rights Act 1998 requires Sewel consent from this Parliament, and there is quite a strong argument from quite a few points of view that it does. Iain Jamieson, who is a former Scottish Government lawyer, has made the point that the Human Rights Act 1998 is the dictionary of the Scotland Act 1998. As you know, the ECHR provisions in the Scotland Act 1998 are different from those in the Human Rights Act 1998; they will apply whether or not the Human Rights Act 1998 is repealed across the UK. There is therefore a strong argument that the consent of this Parliament would be necessary for repeal, full stop, because repeal would alter the competences of this Parliament and impact on what you can and cannot legislate for, and that engages the Sewel convention as it is presently understood.

On your third point, I think that a British bill of rights would clearly require the consent of this Parliament. Human rights are not reserved under schedule 5 to the Scotland Act 1998. The UK Government has been profoundly confusing in its public statements about whether it regards either repeal or replacement as requiring the consent of this Parliament. Michael Gove seemed to suggest that it does not; I think that he is probably mistaken in that judgment. To be honest, the UK Government shows very little evidence of having thought at all about the devolved aspect of the proposal. It dominated the abortive Liberal Democrat-Tory commission on a bill of rights, but it has been missing from the Government's analysis since then.

Your second point was about whether we should replace the Human Rights Act 1998 with a Scottish bill of rights. That might be an interesting idea. We could replace it with different sets of rights—children's rights, for example—but that would have limits, in the sense that it would not apply to every single public authority in this country, as the Human Rights Act 1998 currently does. The act applies to every school, every hospital, every local authority.

Professor McHarg: I do not disagree with Andrew Tickell as much as he thinks I do. My initial view on Alison Johnstone's first question, which was whether repeal of the Human Rights Act 1998 requires Sewel, is that it does not, because the Human Rights Act 1998 is specifically a reserved statute under schedule 4 to the Scotland Act 1998. However, I have been persuaded by what other people have said subsequently, particularly by Iain Jamieson's view that it is more intertwined in the Scotland Act 1998. There is certainly an argument that Sewel is required.

10:30

I certainly agree with Andrew Tickell that Sewel would definitely be engaged for a British bill of rights. On whether it would be better to push forward with our own version, I see no problem with that in principle. There is a view that human rights are part of the UK constitution and that they should be the same throughout the UK, but the truth is that they are not the same at the moment. The level of protection of convention rights varies from country to country. Of course, rights are protected not just by the ECHR but in legislation, so the practical protection of rights varies quite substantially from jurisdiction to jurisdiction.

I see no problem with the idea in principle but, as a little bit of a rights sceptic, I have some concerns about the attitude that that would be a great opportunity to entrench everything and have lots of socioeconomic rights. I am a little bit concerned about that.

Andrew Tickell made a point about reserved public authorities and whether we would be able to include them in a Scottish bill of rights. There is a little bit of an argument that we possibly could. We might regard that as an alteration of Scots private law, which is defined in the Scotland Act 1998 rather problematically as including judicial review,

which is not private law. We could frame it as an alteration to the grounds for judicial review. It might be arguable that we could include reserved public authorities in that way, but I would not be confident about it.

There is a risk in a bespoke Scottish system: it might be much stronger and better in its content but much narrower in its scope, which would be a loss. Many of the human rights challenges involve issues such as immigration, which are outwith the Scottish Parliament's competence. There would therefore be a huge narrowing of the scope for human rights challenges in this country.

Alison Johnstone: Thank you. Could I ask one more quick question, convener?

The Convener: As long as it is not quite as tangential as that particular exchange was. [*Laughter*.]

Alison Johnstone: I think that it is a very important question. It seems to me to be such a hugely important issue. Do the witnesses have a view on the political implications of Westminster going ahead without the consent of the Parliament, which would be massively contentious?

Andrew Tickell: Of course it would be contentious. I think that many people would regard it as outrageous, frankly, in the sense that the Sewel convention is a constitutional principle. Some people would say that it would be an unconstitutional act by the Westminster Government—if I am correct and if Aileen McHarg is correct on the points that have been mentioned.

The Convener: Do you agree with that, Professor McHarg?

Professor McHarg: Yes. It is Northern Ireland that you need to be really concerned about, not here.

The Convener: We will move on to a slightly different area, although it is probably linked.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): I will come on to Sewel more generally. Although the convener might regard this as tangential, I ask him to allow me just a few minutes. I am really intrigued by a quotation from an earlier blog post by Andrew Tickell. He said:

"If Westminster abolishes the Human Rights Act, Holyrood and the Scottish Government will remain bound over to observe Convention rights, but Glasgow City Council and the police will be liberated from their obligations to respect freedom of religion and conscience and the privacy and home life of everybody they encounter."

I was not quite sure why that should be the case, given that, legislatively, we are responsible for local government and the police.

Andrew Tickell: I am being quoted—I hope that all my record is as pure as that. The point is that there is a distinction between the two human rights regimes that apply in Scotland. Under the Scotland Act 1998, this Parliament cannot do anything in legislation that is contrary to the European convention, and the Scottish Government must observe convention rights. However, the Human Rights Act 1998 casts its net much more widely to incorporate the bodies that you have just described—the hospitals, schools and police officers.

If the Human Rights Act 1998 was abolished—it is worth remembering that Westminster could do that; that might be a constitutional abomination, but it could do it—it would mean that this Parliament would still be bound by the ECHR but Glasgow City Council would not be.

Malcolm Chisholm: It is a striking quotation, so I think that the convener has forgiven me for briefly pursuing that point.

I am interested in Sewel issues more generally. Obviously, the intention of Smith is to give us more powers, but it appears from how Sewel is being dealt with that we may get fewer powers.

Towards the end your paper, you quote from the Scottish Parliament's standing orders, the key phrase being about something

"which alters that legislative competence or the executive competence of the Scottish Ministers."

I was not particularly aware of the change to executive competence. Can you explain the ways in which you think we will have fewer powers than we currently have if those aspects of Sewel are overlooked?

Andrew Tickell: It is quite odd. Clause 2 of the Scotland Bill sets out to recognise—in inverted commas—what has been called the Sewel convention, although I dare say that we might want to call it something else because of recent events. It sets out the principle that Westminster

"will not normally legislate with regard to devolved matters".

"Devolved matters" is not a term that we use in the Scotland Bill in general; we talk about reserved matters, and all that is not reserved is devolved.

The Sewel convention has developed over time to extend not just to Westminster legislating with regard to devolved powers but to Westminster changing your powers. That is what we are here to discuss. In my interpretation, if the Scotland Bill was in force today, we would not be discussing this because the Scotland Bill itself is not a devolved matter; it is a reserved matter. I think that I described that as "chimerical". It is a much more limited understanding of what the constitution

expects than the Scottish Parliament's standing orders express.

Malcolm Chisholm: Could you say something about executive competence? Are you suggesting that that could change in relation to energy?

Andrew Tickell: Those are two different questions. The executive competence clauses in the bill will make the Scottish Government responsible for making decisions in certain areas. It will extend powers from the UK Government to the Scottish Government.

Generally speaking, with Sewel, we are talking about changes to the Scottish Government's powers. Let us say that, down the line, an act of the Westminster Government proposes to strip the Scottish Government of certain executive powers. The question then will be whether that will require Parliament's consent. Under the definition of Sewel in the Scottish Parliament's standing orders, it will, but under the definition in the Scotland Bill, arguably it will not—then again, we do not know what the magic phrase "devolved matters" means, because it is not defined anywhere in the bill.

Professor McHarg: I agree with Andrew Tickell. I will give an example of the Scottish Parliament's consent being required to change an executive competence. The Energy Act 2013 took away the Scottish Government's powers to set the renewables obligation in Scotland when that was replaced with contracts for difference. That is an example of where that wider sense of what Sewel requires has been implemented. In terms of legislative powers, the Scotland Act 2012 was subject to two legislative consent motions in the Scottish Parliament. If we understand conventions as constituted by practice rather than words, practice tells us that Sewel goes wider than what is in the Scotland Bill.

However, if clause 2 is merely a declaratory clause that does not have any legal effect—and I argue that, as currently drafted, it does not—that does not necessarily mean that the other bit of Sewel does not still apply. The problem is that the statutory statement is likely to become the more authoritative understanding. There is a risk of the other bit of Sewel atrophying.

Malcolm Chisholm: On legislative competence, can you give examples of where that would apply and where it would not?

Professor McHarg: As Andrew Tickell said, you would not be asked for consent to the Scotland Bill, because changing the boundary between reserved and devolved matters is not a devolved matter.

Malcolm Chisholm: Are there any examples of when we have been asked for such consent?

Professor McHarg: The Scotland Act 2012.

The Convener: I know that Stuart McMillan is interested in this area. Have your questions been answered?

Stuart McMillan (West Scotland) (SNP): I have just a wee area to ask about, if that is all right.

When I came in this morning, I did not think that we would be discussing a bill of rights, whether a UK or Scottish one. However, hearing from the witnesses got me to thinking. The Scotland Bill includes proposals on the devolution of some welfare powers. If there were to be a discussion about a bill of rights, how would that affect the Scottish Parliament's ability to take decisions over welfare powers and how would it affect an LCM if, at some point in the future, the UK Government wanted to change or abolish the Human Rights Act 1998?

Andrew Tickell: That question feels extremely hypothetical—hypothetical on hypotheticals. If you could narrow it down to something more specific, I might be able to be more helpful.

Stuart McMillan: Certainly. We have had a bit of a discussion regarding some elements of the Scotland Bill and the devolution of welfare powers. The committee has also widely discussed the welfare powers in terms of some of the potential confusion or the restriction that could be placed on the Scottish Parliament. If a UK Government in the future wanted to make any major amendments to welfare powers—perhaps through a different means, not a direct change—how would the Scottish Parliament be affected? If the Scotland Bill proposal regarding the Sewel convention was enacted, how would the Scottish Parliament be affected?

Professor McHarg: Right. Are you talking about the UK Government taking back the devolved competences, extending them or recasting them in some way?

Stuart McMillan: I do not know.

Professor McHarg: That sort of thing is covered by the second bit of the Sewel convention.

The bit of the convention that is in the Scotland Bill would cover a situation in which Westminster, notwithstanding the devolution of welfare powers to the Parliament, decided to go ahead anyway and legislate. For instance, only last week, it was threatened that, if the Northern Ireland Executive could not agree on a social security settlement, Westminster would step in and impose one. That is unproblematic.

However, if you are talking about adjusting the boundaries of devolution, that comes under the

second bit of the Sewel convention, and that is the bit that is not clearly catered for in clause 2 of the bill.

The Convener: I will cut to the chase on the Sewel stuff. How important is it that all three strands of the Sewel convention that are defined in devolution guidance note 10 are clearly reflected in clause 2?

Professor McHarg: At the moment, the only situation that clause 2 covers clearly is one in which Westminster exercises its right to legislate in an area that has been devolved to the Scottish Parliament.

The Convener: So the other bits are missing.

Professor McHarg: I think so.

The Convener: Andrew, do you feel the same?

Andrew Tickell: Yes.

The Convener: That is on the record. We know where we are.

Mark McDonald (Aberdeen Donside) (SNP): I will ask about the fiscal framework and some of the financial elements of the bill.

The Secretary of State for Scotland was before us on 25 June and, in answer to a question that I posed about the flexibility that will be allowed within the fiscal framework, he said:

"it is not the intention that the fiscal framework should constrain the powers that are being devolved in the bill."—[*Official Report*, *Devolution (Further Powers) Committee*, 25 June 2015; c 33.]

However, if I look at paragraph 2.2.5 of the command paper, I find the sentence:

"In the context of Scottish devolution, the fiscal framework must ensure that Scotland contributes proportionally to the overall fiscal consolidation pursued by the UK Government."

Professor McLean, do those two statements sit side by side? They seem contradictory.

Professor McLean: I agree that they seem contradictory. That takes us back to the set of questions that the convener asked at the start of this evidence-taking session.

You cannot square the circle. In the worst case from Scotland's point of view—in which Scottish GDP and, therefore, Scottish tax revenue grows more slowly than rest-of-the-UK GDP—and if the Smith no-detriment principle operates both ways, in both Parliaments, while we remain in the United Kingdom the UK Parliament has to be able to say that Scotland cannot, for instance, increase its deficit by more than the UK does.

My reading of the sentence in the command paper is that it is a consequence of a remaining United Kingdom, which the majority voted for last September. As for contradictions between that and what the Secretary of State for Scotland said, I cannot speak for the secretary of state.

10:45

Mark McDonald: That is possibly a wise approach to take. Does Professor McHarg or Mr Tickell wish to add anything on that?

Professor McHarg: I will just make the technical point that something in legislation will, as a matter of law, always trump something that is not in legislation. However, we need to be aware that what the legislation says is not always what actually matters in practice. There are other ways of enforcing things that may be included in non-statutory frameworks.

Andrew Tickell: I have nothing to add.

Mark McDonald: That relates to a point that I think Andrew Tickell made: that, while we have the legislation, there are also the negotiations that are taking place around the fiscal framework.

I wish to look more broadly at the financial powers that will come to Scotland, and this ties into the point about coherence that my colleague Linda Fabiani made. Professor McLean, you have expressed a view that the suite of taxation powers that are coming to Scotland perhaps do not sit well with—rather, they do not seem to match—the aspirations that could be achieved via some of the policy instruments. For example, compared with other taxation powers, there are limitations to how many things one can do with income tax in order to derive the revenues to make policy decisions. I do not know whether you want to put some thoughts about that on record.

Professor McLean: That was not exactly my point. My point was that the tax powers in total are still less than the spending powers in total. Therefore, there is still an imbalance. I was not expressing an opinion on which tax powers were best used for which policy purposes except, to a limited extent, in paragraph 20 of my paper, regarding sin taxes—fuel taxes and excise. Those taxes can clearly be used as policy instruments, although they give rise to the classic problem that the more successful you are at stopping the behaviour that you want to stop, the less you raise in the tax.

Mark McDonald: In fairness, you discuss in your submission taxes that you describe as "candidates for further devolution".

Professor McLean: Yes.

Mark McDonald: In particular, you have highlighted the full assignment of VAT, as opposed to its partial assignment, and the devolution of national insurance contributions. I

am a member of the Finance Committee, which has discussed the completeness that that would provide for the income tax provisions. Do you wish to comment on either or both those points?

Professor McLean: I mentioned them simply because they bring tax and spending more into balance. VAT is an example, as I say in my paper, where we could assign—not devolve—the whole of VAT receipts in Scotland to the Scottish Government, but it would make not a blind bit of difference to the policy levers that the Parliament can pull, because it is an assignment not a devolution.

In a sense, I think the same about the big ones, including national insurance contributions, for either employers or employees. The ones where devolution of tax gives you policy levers are excises and fuel duties, as I have already mentioned, and I will also mention—as it came up earlier in the discussion—both offshore and onshore mineral taxation. You would be given policy levers if those taxes were devolved.

Mark McDonald: Does Professor McHarg or Mr Tickell wish to contribute anything on the broader point about the coherence and relationship between the levers available and the powers available? No—I see shakes of the head.

The Convener: I know that Alex Johnstone has an interest in this area. Do you want to pick up on anything at this stage, Alex?

Alex Johnstone (North East Scotland) (Con): Just a couple of things—a bit of a mopping-up operation.

I have always taken the view that, in its simplest form, devolution of powers to Scotland should mean, "In the devolved areas, as long as you can pay for it yourself, you can do what you like." Are you telling us that, within the proposed new legislation, the profiles do not match with what is required to achieve that outcome?

Professor McLean: I assume that that is a question for me. That is correct—the profiles do not match. However, they are closer to matching than they were under the Scotland Act 1998 or the Scotland Act 2012.

Alex Johnstone: One thing that we do regularly is assume that every stab that we have at devolution will be the final chapter in the book. However, it never is, and each attempt produces hostages to fortune. Are we in a position in which we need to take action in order to avoid hostages to fortune when the next round of devolution comes along and the next final chapter is written?

Professor McLean: That is almost a political question, convener. I will take refuge in the wise statement of the former Secretary of State for Wales, Ron Davies:

"Devolution is a process, not an event."

Alex Johnstone: Indeed. Earlier, we touched on the issue of devolution being a process, and I have a final question on that issue.

With regard to the nature of the legislation, particularly with regard to the fiscal framework, which we have little or no control over, do you think that we can achieve something that can be an on-going process, or will the effect, particularly in relation to the no-detriment provision, be that we have a snapshot on day 1 that might be clearly definable as functional, but which will be inflexible, and therefore unworkable, thereafter?

Professor McLean: That is really tricky, because none of us around this table knows what "no detriment" means. I refer you to the earlier discussion between Tavish Scott and myself. Over what time period are the no-detriment principles to be set and reset? We do not know. With respect, I find your question is impossible to answer. I apologise for that.

Alex Johnstone: My final question relates to a specific comment that you made in your opening remarks. When you were talking about the relationship between powers and taxation, you said that it was relatively simple to work out what a welfare power was. However, you mentioned something that you described as a "welfare tax". Could you explain what you meant by that?

Professor McLean: Nominally, since 1911, national insurance contributions have been a welfare tax. They are nominally linked to a national insurance fund. You might say that that was a fraud from day 1. There is a famous book called "Lloyd George's Ambulance Wagon" that shows that Lloyd George knew very well what he was doing—he was creating a pay-as-you-go system.

If I gave the impression that I thought that the link was anything more than nominal, I probably should not have done. However, nominally, there is a link between national insurance contributions and welfare benefits.

Alex Johnstone: So you were talking in a fairly general sense rather than suggesting anything to do with the hypothecation of taxation.

Professor McLean: Everyone around this room knows that the UK Treasury has a panic fear of hypothecation of taxation. To the best of my knowledge, I do not think that that is really coming up as much of an issue in this bill or in the fiscal framework discussions.

Alex Johnstone: It would appear that you are concerned that, if we achieve all that we want to achieve with regard to the ability to create new benefits in devolved areas, the necessary tax powers in order to achieve that are not contained in the bill.

Professor McLean: My concern was expressed at a more general level. Apart from what is needed to be distributed within the social union, I would prefer it if the power to tax amounted to the same proportion of public expenditure as the power to spend. That is the neutral position; it is not saying anything about any particular tax.

The Convener: From what we are hearing this morning, it seems that the fiscal framework is the central piece of documentation that will determine whether the arrangements work or not. Do you agree with this committee that, as it is developed, there should be more transparency about the process so that both Parliaments can understand what the fiscal framework means, that we should have the chance to scrutinise elements of the draft fiscal framework before they are set in stone and that both Parliaments should agree the fiscal framework before it is signed off?

Professor McLean: At the end of the process, this Parliament will have to decide whether to give legislative consent to the bill, but I find it difficult to see how this Parliament can decide either way unless it knows something about the fiscal framework. I therefore agree with what you say, convener.

Professor McHarg: I agree, too.

Andrew Tickell: Yes: you cannot calculate what the bill will do until you know that.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): Good morning. Let us turn to the devolution of the Crown Estate, which both Aileen McHarg and Iain McLean have commented on. From the point of view of both the process and the use of assets, Aileen McHarg has said that there is

"even greater complexity of the devolution arrangements in the Bill as compared to the draft clauses"

and that

"it is not entirely clear how the Scottish Parliament's powers to alter the management of the transferred assets contained in clauses 31(2) and 31(6) will be affected by any restrictions in the transfer scheme itself",

particularly regarding clause 31(10). Would you like to explore how you think clause 31(10) constrains those previous provisions or how it might be altered?

Professor McHarg: Clause 31(10) is the bit that says that the Crown Estate must be maintained as "an estate in land". My first reaction is to ask, "What on earth is 'an estate in land'?" The term appears in the Crown Estate Act 1961, but it is not a term of art in Scots law, and that is a problem. It is an English term of art. Australian property law is based on English law, and a few weeks ago I asked an Australian colleague who is a property lawyer what the term means. She said, "Ah, yes. That's a very good question," and I was none the wiser, unfortunately.

The idea seems to be that something must be maintained in Crown ownership. That does not have to be what is currently in the Crown Estate—assets can be sold or added, but there has to be something that is the Crown Estate. I find that a really odd idea, and I do not think that the justification that is given for it makes sense historically. The argument seems to be that the Crown is indivisible, and therefore Crown property is indivisible, and that it is the historical property of the sovereign and must be maintained in trust for the sovereign. However, that seems to me to be a lot of nonsense.

Crown Estate property is Government property and the things that are included or are not included in the Crown Estate are, to some extent, random. For instance, offshore energy rights and the right to grant leases for offshore gas storage and offshore renewables have been added to the Crown Estate recently by statute. Oil and gas pipelines have also been added to the Crown Estate by statute. However, offshore oil and gas drilling never had anything to do with the Crown Estate—it is still a Crown right, but it is not in the Crown Estate.

Historically, the Crown Estate has nothing to do with the sovereign; it is just Government property, and the Crown Estate is a device by which we manage Government property. There may be a case for maintaining Government property, but there may be a case for doing something else with it. I do not see any argument for imposing that restriction on the Scottish Parliament. I think that, if you want to give away Crown property, you should be free to do so.

Rob Gibson: Indeed, the transfer of Stirling castle grounds was an interesting recent example of the Crown Estate making an agreement with the Scottish Government and Parliament.

Professor McHarg: Some Crown property is already devolved. Not all Crown property in Scotland is Crown Estate; it is completely haphazard.

Rob Gibson: You are suggesting that clause 31(10) should probably be scrapped.

Professor McHarg: I would say so, yes.

Rob Gibson: I wonder whether Iain McLean would like to comment at this point. In your written submission, you talk about the consequences not being specified of the Scottish ministers deciding to treat Crown assets in different ways. Do you think that the restrictions in clause 31(10) should be abolished?

11:00

Professor McLean: As I am not a lawyer, I would rather not attempt to second-guess what Aileen McHarg has just said about clause 31(10). I was simply taking at face value the statement in the explanatory notes to the bill that I quote in paragraph 7 of my submission.

I am making a different point to Aileen McHarg's; it is that if the Scottish ministers use the freedom that it is said the bill grants them—I am not qualified to say whether it actually grants them that freedom, but let us assume that it does—that is a policy change and therefore, under the Smith no-detriment principles, the rest of the UK could play hardball and say, "You have reduced the revenue that comes to you from the Crown Estate, so you must bear the risk of that." I am simply pointing out that that is a risk to the Parliament of using the powers in that way. That is not to say that it is the wrong thing to do; it is just a risk.

Rob Gibson: Yes, but that is only an example of using a less commercial approach and increasing the role of social enterprise. The Scottish Government could act differently and add to the revenue through various taxes on offshore renewables or oil and gas. The example that has been given suggests that the Scottish Government would take less from the Crown Estate. Why does it not suggest that the Scottish Government could take more?

Professor McLean: I was just going with the example that has been given.

Rob Gibson: But that is only one example.

Professor McLean: The consequence of the example that is given in the explanatory note is that the Scottish Government would take less. I was simply saying that that could give rise to a claim from the rest of the UK, although the figure might be trivial in proportion to the total of public expenditure.

I should say that, with one of my hats on, I speak as a trustee of a body—the British Academy—that is a tenant of the Crown Estate, and I am well aware that the Crown Estate is as hardnosed as any landlord you will get. Speaking as a private citizen, I would be delighted if the Scottish Government were to take the approach that the explanatory note suggests that it could take, but I make the point that there would be fiscal consequences.

The Convener: I have a feeling that Aileen McHarg wants to contribute.

Professor McHarg: There is an irony in that, in the transfer scheme, one of the restrictions that is to be imposed is to ensure that we cannot fleece UK energy consumers by upping rents for offshore renewables or pipelines, but there is no such restriction on the powers of the Crown Estate in England. As Iain McLean has just said, it acts in a wholly commercial manner.

There is a real inconsistency. I do not understand why the Scottish ministers are to be trusted any less to control the assets than the Crown Estate is. If there is a problem, it is already a problem.

Rob Gibson: The Crown Estate assets include the revenues from offshore wind and things like that. The UK Government has changed the potential income from those by constraining the possible number of offshore wind developments. Therefore, the Crown Estate, in investing its income in further income-gathering projects, is actually perhaps already detrimental to Scotland's ability to gain income from the offshore estate. Would the no-detriment principles have to take that into account? The principle that there is to be no detriment as a result of decisions to devolve further power does not apply, but there is also the principle that there is to be no detriment as a result of UK Government or Scottish Government policy decisions post devolution, and we are already talking about things that have been constrained before we get to that stage.

Professor McLean: This is an "I am not a lawyer but" answer, and there are two lawyers sitting to my left, but if the Crown Estate in Scotland controls, among other things, facilities to do with offshore wind on the foreshore, it seems to me that the Scottish ministers will, under the bill, have the power to direct the Crown Estate to do the opposite of what the explanatory note says and to act in a more commercial manner to allow more offshore wind to be developed off the Scottish coast. In that case, the no-detriment principle still works, but it will mean that the policy will change in Scotland and, if there are more tax receipts as a result of a directive to the Crown Estate in Scotland, this Parliament will get to keep them.

Rob Gibson: Indeed. Do you therefore think that the restrictions in clause 31(10) should be scrapped?

Professor McLean: I must defer to the lawyers on that.

The Convener: That has already been covered.

Rob Gibson: Yes, it has, but—

The Convener: The lawyers have already said yes to that question.

Rob Gibson: Yes, I know that.

The Convener: I thank the witnesses very much for what has been a useful and informative session for the committee. I am grateful to you for coming along to give evidence.

We will now go into private session.

11:05

Meeting continued in private until 11:18.

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