JUSTICE 2 COMMITTEE

Tuesday 16 March 2004
(*Afternoon*)

Session 2

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JUSTICE 2 COMMITTEE
†11th Meeting 2004, Session 2

CONVENER

*Miss Annabel Goldie (West of Scotland) (Con)

DEPUTY CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
Colin Fox (Lothians) (SSP)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Mike Pringle (Edinburgh South) (LD)
Nicola Sturgeon (Glasgow) (SNP)

COMMITTEE SUBSTITUTES

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Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Michael Matheson (Central Scotland) (SNP)
Margaret Mitchell (Central Scotland) (Con)
Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Gerry Brown (Law Society of Scotland)
Colin Campbell (Faculty of Advocates)
Michael Clancy (Law Society of Scotland)
Professor Hector MacQueen (University of Edinburgh)
Roy Martin (Faculty of Advocates)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 1

† 10th Meeting 2004, Session 2—joint meeting with Justice 1 Committee

Scottish Parliament

Justice 2 Committee

Tuesday 16 March 2004

(*Afternoon*)

[THE CONVENER *opened the meeting at 15:00*]

Constitutional Reform Bill

The Convener (Miss Annabel Goldie): I welcome members to the Justice 2 Committee's 11th meeting this year. We have apologies from Colin Fox and Nicola Sturgeon.

Agenda item 1 is the Constitutional Reform Bill, for which I welcome on the committee's behalf two familiar faces from the Law Society of Scotland: Michael Clancy, who is the law reform department's director, and Gerard—or Gerry—Brown, who is the criminal law committee's convener. Members should have a copy of the correspondence from the Law Society.

Gentlemen, I thank you for attending the meeting. I do not know whether you want to make an initial comment. As we have your paper, do you want to let us proceed with general questions?

Gerry Brown (Law Society of Scotland): We can just fire ahead.

The Convener: I appreciate that; that is helpful. I will ask a general question. I notice from the letter that you sent for the legislative process down south that it seems to be accepted that the present position is not all that bad, but that the new proposals add something. Has a demonstrable case been made for the change? As a professional society, would the Law Society have otherwise called for change, or is it simply commenting on a proposal?

Michael Clancy (Law Society of Scotland): It is fair to say that we are commenting on a proposal. When the Government made the announcement last June, we took the view that a supreme court would be created. When the Department for Constitutional Affairs published the consultation paper, we took the view that Whitehall had decided that there should be a supreme court, so we are not really in a position to comment on the principle.

That said, when the Scotland Bill was considered in 1997, we said that there might be room to establish a constitutional court to deal with matters such as devolution issues. Of course, that suggestion was not taken up. Instead, the Judicial Committee of the Privy Council was the preferred option.

We did not call for the supreme court, but now that it has been proposed in a bill and is something that the Government has set its sights on and has made a commitment to establish in the Queen's speech—it reinforced that commitment at the second reading debate in the House of Lords last week—we must live in the real world.

The Convener: At the risk of treading on the toes of one of my colleagues—I realise with apprehension that they might be Jackie Baillie's toes—I point Mr Clancy to a sentence in his letter of 2 March, which says in relation to clause 17:

"The creation of the court will reinforce the doctrine of the separation of powers."

Are you satisfied that the bill's provisions on the appointment of judges, for which final responsibility will rest with a minister, achieve that desired separation of powers?

Michael Clancy: When considering the current situation, many theorists could reflect upon constitutional writers stretching back to Montesquieu who, in book 11, chapter 6 of his "De l'esprit des lois"—I see a shocked look on the convener's face—explained:

"Il n'y a point encore de liberté, si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice."

The Convener: I think that I can safely say that none of the committee will be intimately acquainted with the document, so please feel free to enlighten us.

Gerry Brown: Neither was I until half an hour ago.

Michael Clancy: You could hardly believe that we had almost the same education.

Jackie Baillie (Dumbarton) (Lab): We are impressed.

Michael Clancy: Montesquieu was saying that there is no liberty if the power to judge is not separated from legislative and executive powers. If the power to judge is joined with the legislative power, the power over the life and liberty of the citizen will be arbitrary.

There has been a long and extensive flow of philosophical and constitutional thought—stemming from 18th century writers and going right down to Lord Justice Bingham, the campaign organisation Justice and the constitution unit—that says that the separation of powers is one of the best ways of maintaining and supporting the liberty of the citizen. It is a long and well-respected constitutional track, and that is the context in which we approached the subject.

You might ask why all that has resonance now and why, if there has been no separation of powers, we are not all in bondage. One of the reasons for the change in attitude is that the situation in our country has changed. We have devolution under the Scotland Act 1998 and the Government of Wales Act 1998, and the Human Rights Act 1998 has changed the way in which legislators and judges deal with legislation. Issues arise from the implementation of the European convention on human rights that place judges in quite a different position from before. The lords of appeal in ordinary acknowledged that when, in June 2000, they established a self-denying ordinance that they would not speak in debates in the House of Lords on matters of controversy or on matters on which they were likely to end up making judgments. That is part of the issue; things are changing and have changed. That is why we think that the separation of powers might be more appropriately enforced.

The Convener: Are you entirely content with the mechanism for the final appointment of a judge under the bill's proposals?

Michael Clancy: The bill needs to have a lot of clear scrutiny.

Gerry Brown: The issue is the selection procedure. As I understand it, the ad hoc commission for senior appointments will refer between two and five candidates, and the minister will make a recommendation to the Queen. That is not the normal constitutional convention. We do not have a procedure where commissions of appointment across our constitution recommend directly to the Queen. That could be a subject for debate in another forum.

Michael Clancy: In our response to the Department for Constitutional Affairs consultation, we recommended that the recommendations of the ad hoc commission should be made directly to Her Majesty and not through a minister.

The Convener: Appointments should be made by the Queen.

Michael Clancy: Yes, directly.

Karen Whitefield (Airdrie and Shotts) (Lab): At present, the House of Lords is the final court of appeal in civil cases. What are the main advantages of that system? Are there any advantages that should be protected if a supreme court is established?

Gerry Brown: The number of civil appeals to the House of Lords is not substantial—I am sure that you already have information on that. If the member is referring to the protection of Scots law, I advise her that custom has it that, in civil appeals, prime judgments are normally made by Scottish judges. Prior to introduction of the bill, following a consultation process, there was not perceived to be any major clamour for change. The whole issue was hotly debated—if that is not a contrary comment—in the working party, and contrary views were put on whether the proposal could change and on bringing matters back to Scotland, extending them to England and Wales, extending them to London, and so on. We came down in favour of the status quo because we felt that the system was working and provided Scotland with the appropriate decisions in important case law.

Michael Clancy: It is important to note that, if an issue is of such importance that someone would consider taking it to the House of Lords, fundamental questions of law are involved. One can point to many cases in which the House of Lords has provided a decision that creates a just view of the law. For example, in the famous case of Donoghue v Stevenson—the so-called snail in the ginger beer bottle case, which most, if not all, people who have ever been to Paisley will know about—the Court of Session denied Mrs Donoghue the opportunity to have recourse against the manufacturer of the polluted ginger beer. It was the House of Lords that gave her that opportunity and that gave the opportunity for the law to develop so that manufacturers' liability could be extended, enabling us all to live in an environment in which manufacturers are held liable for their misdeeds or for failures in their systems. The duty of care that underpins all that was clearly enunciated by Lord Atkin. Therefore, there is clearly a value in having a superior court to hear cases of such great importance and to give definitive and authoritative decisions.

The important fact is that when the Appellate Committee of the House of Lords makes decisions on matters of Scots law, it acts as a Scottish court. That is not a proposition without controversy—some people have maintained that it is really an imperial court making imperial decisions. Nevertheless, the general thrust of opinion would accord that it is a Scottish court making Scottish decisions that are binding on Scottish courts lower down the track. That is an important fact to acknowledge, and we would expect the supreme court, in deciding cases that emanate from Scotland, to be viewed in the same way. Likewise, in deciding cases that emanate from England and Wales or Northern Ireland, it will have a different character, particularly in relation to the effect that such decisions have—whether they are binding or merely persuasive. We think that decisions in cases relating to England and Wales or Northern Ireland should be only persuasive in Scotland.

Karen Whitefield: The famous Paisley case obviously had a resonance in the whole of the United Kingdom. What is your view on the suggestion by some who practise the law that civil

cases should be taken to appeal in the House of Lords or the new supreme court only when the issues that they raise relate to the whole of the United Kingdom rather than to the implementation of Scots law or Scots jurisdiction?

15:15

Gerry Brown: That is a very interesting point. We used to refer to *Scots Law Times* cases or Session cases, but now cases from all over Europe and the Commonwealth are referred to. That helps in decision making. I wonder whether the point that Karen Whitefield raises would result in decision making being too restrictive.

The Lord President gave the example of a decision on a UK tax law statute. If it originated from a Scottish source, it would be considered binding in Scotland but not in England—although it would be considered highly persuasive in England. Obviously, that is because guidance would be required from the other jurisdiction. There are differences in the common law; and, even when there is a statutory interpretation, there can be elements of consideration of the purely Scottish common law.

Michael Clancy: Let us say that we have two separate litigants—Gerry Brown and Michael Clancy—before the Court of Session. My case relates to the fact that my limited company—Clancy Enterprises Ltd—has a clause in its memorandum and articles of association that does not allow me to give evidence at the Scottish Parliament's committees. Nevertheless, I give evidence and end up in the Court of Session. I then have a right of appeal to the House of Lords because company law is reserved to the UK Parliament. Gerry Brown's case relates to a contractual dispute with the Scottish Parliament. He had an agreement with the committee convener that he would be able to come along but she has breached that agreement by saying, "No. You can't." Because that is a devolved issue, he will not have a right of appeal. Therefore, the two of us, as litigants before the one court, will find that one has a right of appeal but the other does not. Such a situation should not be a policy objective. One would want litigants to be equal before the court. Therefore, rights of appeal should be open to each of them.

If my limited company were making a contract that was purely devolved, we would get into a whole mess of entanglement. With no disrespect to the current senators of the College of Justice, it would be beyond the powers of Solomon to judge that.

The Convener: May I remind members and our witnesses that we have an eye on the clock. We have a lot of business to get through, so we should birl this along as best we can.

Karen Whitefield: Lord Falconer's proposes that, as at present, civil cases will have a final right of appeal to the supreme court. However, in criminal cases, there will be no such right. Is that correct and will it safeguard Scots law?

Gerry Brown: Yes.

Karen Whitefield: Thank you. [*Laughter.*]

Gerry Brown: I am not going to argue with the convener. It is one-word answers from now on.

The Convener: There is nothing better than a compliant lawyer.

Maureen Macmillan (Highlands and Islands) (Lab): Everybody has been having great fun with the act of union, the claim of right and so on. In your written evidence, you mention the need to

"comply with Article XIX of the Treaty of Union",

but you do not mention the claim of right, as others have done. When we took evidence from Lord Cullen last week, he said that the bill as it stands will not protect the separate nature of Scots law. Do you think that it will? If not, do you agree with Lord Cullen that an amendment—although not a large one—would be required to make absolutely sure that there is a separation? Without that, Lord Cullen thought that the supreme court would be a UK court and could not sit as a Scottish court or an English court.

Michael Clancy: You are quite correct that we did not mention the claim of right. There has been a lot of controversy about the claim of right. I do not know whether you have had the pleasure of reading it, but it is an interesting document. I am not quite sure what its constitutional status is. In any event, the treaty of union is the key document in this regard. It acknowledges that the Court of Session and the High Court of Justiciary should remain for all time as they were constituted in 1707. To discover why we ended up with a system that allowed an appeal to the House of Lords, we have to look way back into the mists of time. The first such appeal, in the Earl of Rosebery's case, came in 1708 and was swiftly followed by cases relating to the court of exchequer and the High Court of Justiciary. There has been a trail of appeals from the earliest days of our present constitutional arrangement.

We did not think that the claim of right added much to that. In fact, the process of remede of law under the claim of right was one that, while it might have operated in civil cases, might not have operated in criminal cases. One of the reasons why we do not have a criminal appeal is because, during the 19th century, it was acknowledged that there was never a criminal appeal from the High Court to Parliament. That is one reason for not including the claim of right.

The issue of whether the bill should be amended is taxing. Many aspects of it should be amended. Off the top of my head, I note that the guarantee of judicial independence in part 1, clause 1 of the bill is limited to England and Wales. I am not entirely sure why that should be and why it should not be expected to apply to Scotland and Northern Ireland. In part 2, further amendments are needed in relation to the supreme court and the matter of consultation with the First Minister and the Scottish Executive about certain aspects of appointments and rules that are made. Similarly, aspects of schedule 1 relating to the disengagement of the Lord Chancellor should be examined.

It is clear that, in that package of amendments, some of which we have already drawn up and are in the process of sending to peers, we would also seek to include some words that would flag up the need for the supreme court to be considered to be a Scottish court when sitting in relation to Scottish matters. That might not be a terribly difficult amendment to construct, but I have not yet written it down and the working party has not yet approved any ideas in that regard. However, that is the sort of thing that we would consider.

Maureen Macmillan: Do you think that it would be necessary to include those proposals in the bill or would including them in guidance be sufficient?

Michael Clancy: It is always good to have something in the bill.

Mike Pringle (Edinburgh South) (LD): I want to explore what you think about the cases that go to the House of Lords at present. In the absence of a requirement to seek leave to appeal, do you think that the cases that are currently going before the House of Lords are appropriate or do you think that some sort of change should be made?

Michael Clancy: You are right that there is no need to have leave to appeal. As I understand it, the process in Scotland is that you obtain counsel's opinion that the case is of merit for the House of Lords. I am given to understand—although I have not been involved in it—that that procedure works well. There are not a great number of cases that go to the House of Lords.

In 1997, only 11 appeals that related to Scotland were disposed of; in 1998, seven; in 1999, five; in 2000, six; and in 2001, four. We are talking about only a small number of cases, but the fact that they have reached that point indicates their general importance to the law. Small though the numbers might be, that alone might be sufficient rationale for people to argue the point.

Gerry Brown: As the committee is probably aware, the new supreme court will also deal with devolution cases. Such cases have increased substantially since the passing of the Scotland Act 1998 and have fulfilled a very important purpose in developing our law.

Maureen Macmillan: Mr Brown, you mentioned the important purpose that might be fulfilled by transferring the consideration of devolution issues from the Judicial Committee of the Privy Council to the supreme court. Do you have any concerns about such a move?

Gerry Brown: As far as that transfer is concerned, we have a view that the supreme court should have 15 justices. Michael Clancy will correct me if I am wrong, but I think that we have sought to lodge an amendment to the bill to ensure that at least three of the judges are Scottish.

Michael Clancy: That is the formulation.

Gerry Brown: We expect that, if the supreme court deals with a Scottish case of some importance, the selection procedure will accommodate it. Nothing in the historical case law contradicts that; after all, at the end of the day, one has to consider the purity of what the supreme court is supposed to produce. It is supposed to produce fundamentally good and permanent law for the present climate.

Maureen Macmillan: Lord Bonomy recommended that devolution issues should not include acts of the Lord Advocate as the prosecutor and that as a result such cases should not be referred.

Gerry Brown: I am well acquainted with Lord Bonomy's consultation. At the moment, the Parliament is considering a bill that has been introduced as a result of Lord Bonomy's recommendations. He will quickly correct me if I am wrong, but I think that he made that proposal to address potential delays in cases as a result of people raising devolution issues that would have to be considered by the Judicial Committee of the Privy Council. My reading of the Criminal Procedure (Amendment) (Scotland) Bill, which is currently wending its way through Parliament, is that it will make provision for dealing with these particular issues by focusing on and addressing matters at preliminary diets.

The Convener: So you feel that such a clarification would be sensible.

Gerry Brown: No. I am not saying that I want to change the situation radically just now. Instead, I want to see how the Bonomy proposals come into effect, because I believe that many of these issues, which were usually dealt with later on, can be addressed more effectively at an early stage. In short, I think that there might be fewer devolution issues because of the provisions in the Criminal Procedure (Amendment) (Scotland) Bill.

Maureen Macmillan: So in the end that might not be an issue.

Gerry Brown: It might not be an issue, but we have to reserve judgment at this stage.

Jackie Baillie: I want to get down to the question of the number of judges that there should be and how they should be appointed. How many judges do you think there should be in the proposed supreme court? We have heard varying figures between 12 and 15 and I wondered whether you had a particular view on the matter.

15:30

Gerry Brown: Our view is that there should be 15 judges. I think that I have already commented on our reasons for that. A bench comprises five judges. Cases are not simple, but require a lot of consideration and it is preferable that they should be addressed as soon as possible. There must be a proper quorum of judges to deal with that work. We also propose that there should be at least three Scottish judges.

Jackie Baillie: How many of the 15 judges would be from Scotland?

Gerry Brown: We think that there should be no limit to the number of judges from Scotland. At present, there are two, but there should be at least three.

Jackie Baillie: I entirely understand that benches normally comprise five judges. However, I understand that there is no legislation that sets out that there must always be five judges on the bench. In that context, is it your position that there should be an overall majority of judges from Scotland when the bench is sitting in individual cases that arise in Scotland?

Gerry Brown: I think that the bill makes provision, not only for a set bench, but for reserves and substitutes. To move away from the Scottish angle for a moment, in a case that involved admiralty law, one might want to bring in from the substitutes' bench—so to speak—judges who had great experience in that area, who could assist in the decision making.

Jackie Baillie: There are clearly advantages to having a wider panel beyond the permanent membership of 12, 15 or however many there were.

Gerry Brown: Yes.

Jackie Baillie: A principle has been established in relation to cases that arise from the consideration of admiralty law, but the committee's interest is very much in Scots law. Do you think that, to avoid a dilution of Scots law, a majority of judges from Scotland should sit in cases that arise in Scotland?

Michael Clancy: That has not happened in the past and I am not sure that there has been a dilution of Scots law as a result. It is possible to find an example of a case in which five judges from England and Wales dealt with a matter of Scots law in an appeal from the Court of Session. Equally, one might find a case that came from the English Court of Appeal in which a majority of the judges were from Scotland. Indeed, the latter situation arose in the quite recent past, in 1975, and the former slightly earlier, in 1949. I do not know whether there has been a visible dilution of Scots law, simply because of the composition of an Appellate Committee bench.

Jackie Baillie: Thank you, that is helpful. Finally, I know that the convener was treading gently when she raised issues about the appointments process. Your response was that the ad hoc commission should perhaps report directly to the Queen. Others have suggested that there should be an across-the-board ad hoc commission. Do you think that that should be a Scottish commission? Should the First Minister be the person who makes the decision, rather than a consultee?

Michael Clancy: I think that we would hold to our suggested composition of the appointments commission, which was that it should comprise members of the supreme court bench and also representatives of the judicial appointments bodies from each of the jurisdictions concerned. The Judicial Appointments Board for Scotland system works and we repose faith in it in relation to the membership of our own, localised courts, which operate in this jurisdiction. I see no reason to depart from that system.

The Convener: There is a convention at the moment that non-Scottish judges will not speak in Scottish appeals. Would you wish that convention to be observed in any new proposal?

Gerry Brown: I think that we would wish that to be preserved in any new proposal. One anticipates that, when a case arrives in the House of Lords, a decision will be made on how it is to be allocated. Many issues have to be determined; not only timetabling and availability, but conflict of interest and prior involvement. I presume that the presiding justice will consult on that, so that any decision that is made is above criticism. There have been recent cases in which judges have had to decline jurisdiction because they suddenly realised that such issues had arisen. I think that they would want to avoid that.

The Convener: On the whole question of administration, location and funding, do you have any apprehension that all of that may constitute the new court being seen as an English court?

Gerry Brown: My impression was that there was consideration that it could be peripatetic and could come to Edinburgh or go to Cardiff or to Belfast. I do not think that there are any rules against that.

Michael Clancy: At the moment, there is no limitation on the Appellate Committee of the House of Lords as to its location. A House of Lords committee could sit wherever it wanted. I am sure that I have no recollection of the Judicial Committee of the Privy Council either consulting or sitting in Edinburgh. I do not think that that is a restrictive matter.

The Convener: There are no other questions from members. Are there any concluding remarks that either of you would like to make?

Gerry Brown: This is a purely discursive point about the funding of the court. A view is expressed in the explanatory notes about how the court is to be funded—by court dues for civil litigants. Our understanding is that that would appear to result in court dues being increased for civil litigants across the board, even for those litigants who have no right of appeal to a supreme court.

The figures refer to an increase from 0.8 per cent to 1 per cent per civil case in each jurisdiction. In some respects, that could mean a court fee increase of about 50p, but that is obviously not set in tablets of stone. The litigants who were paying that would be litigants who do not have access to the supreme court. There is an issue as to whether the funding of the supreme court should be dealt with by funding from the consolidated fund and general taxation. That would assist the independence and transparency of the funding, rather than its being linked to some other source. I have a slight concern about funding being laid at the door of the litigant when we are all trying to encourage access to justice, particularly with regard to those who will not have access to that supreme court.

If that is an issue that you think is worth considering, we can certainly write to you about that rather than delay the committee's consideration.

The Convener: Would members find that helpful?

Members *indicated agreement*.

The Convener: Could that be done, Mr Brown?

Gerry Brown: Yes, that could be done, and it is something that we think is important.

The Convener: We are listening with considerable interest to the point that you are making about access to justice. That is helpful.

Mr Clancy, do you have any concluding remarks?

Michael Clancy: I have nothing further to say, convener.

The Convener: Either in English or in French.

Jackie Baillie: Latin will do.

Gerry Brown: When he starts German it is bad.

Michael Clancy: Ex facie that would be correct.

The Convener: On behalf of the committee, I thank both of you very much indeed for attending the meeting. We have found your comments extremely helpful and we are grateful to you for circulating to us a copy of your letter.

I think that our next witness, Professor MacQueen, has arrived, but I am conscious that we have been sitting here since 2 o'clock. With Professor MacQueen's indulgence, I propose that we have a short break of five minutes, which should let him have a cup of tea or coffee and allow others of us to attend to other critical needs. We shall adjourn for five minutes.

15:39

Meeting suspended.

15:45

On resuming—

The Convener: I welcome to the meeting Professor Hector MacQueen of the University of Edinburgh.

Your written submission has been very helpful to the committee. Members will want to ask some questions on your submission, very much in the same format that we used with the witnesses from the Law Society of Scotland. You have produced a very full paper. Would you like to make any introductory comments or are you content that we proceed with questioning?

Professor Hector MacQueen (University of Edinburgh): I do not wish to make an introductory comment, but I hope that there will be an opportunity to say something more about funding and the separation of powers, as I have had an interesting exchange with an American colleague, who is visiting the University of Edinburgh at the moment, in connection with that subject.

The Convener: I know that those issues will be raised by the committee in its questioning, so we could perhaps leave it to individual members.

Professor MacQueen: I am happy to leave things that way.

The Convener: You have made extensive comment in your paper on the proposals that have been made. I put this question to the Law Society witnesses, too. I am interested in ascertaining

whether you have found a demonstrable case for change. In other words, if the current proposals had not been made, would you have been moving for change?

Professor MacQueen: I would certainly not have been moving for change, because I do not think that there is anything that is demonstrably very far wrong with the present set-up. There is certainly nothing causing major problems in this regard, least of all the issues of the separation of powers and human rights.

However, since the Scotland Bill was being considered, I had thought that the question of a constitutional court would become an issue. I had thought that it was almost inevitable that, over time, the Privy Council would evolve into a constitutional court. Given devolution, human rights legislation and lots of difficulty with European Community constitutional arrangements, there was, I thought, a clear need in this country, as in other countries, for a specialised constitutional court to deal with constitutional issues. That would be different from the proposals that are before us. That is what I would have anticipated being spoken about whenever reform was to be discussed. I did not think that there was a major problem with the House of Lords. There was perhaps a theoretical issue, but I thought that the lords had done nearly everything that they needed to do on that, with various self-denying ordinances and so on.

The Convener: I am very struck by those comments. One of the underlying components of the proposals is the separation of powers. This is an intangible area, and it can be difficult to get specific comment on it. You refer to self-denying ordinances and to the way in which the appellate lords have conducted themselves. Was it your impression that the political presence did not interfere with the discharge of independent judicial functions?

Professor MacQueen: I would not want to put it in quite that way. The reason why there was not a problem was that there was not really a strong political dimension. The perceived problem is really to do with the legislature and the judiciary. As I say in my paper, the real problem is when the executive is on top of or in control of the judiciary beyond a certain inevitable extent. It is the checks and balances in that relationship on which we ought to be much more focused and concerned.

The Convener: I have a slightly more specific question. Paragraph 9 of your submission refers to the case of Burnett's Trustee v Grainger and another. You are critical of the process that arrived at the decision in that case. To help the committee, could you explain that a little?

Professor MacQueen: I am not critical of the process. I am saying that that case illustrates nicely a situation where the Scots law of property arrived at a particular result, and so did the Court of Session and the sheriff court below it. The English judges, who were in a majority in that case, did not like the results, but they were persuaded by Lord Hope and Lord Rodger that that was Scots law, like it or not. I suspect that this Parliament may find itself looking at that outcome in a few years' time. It was not for the English judiciary to, as it were, change Scots law in a case of that kind, so there was a five-nil result in favour of the Scots law position, but at least two of the English judges were strongly critical of the outcome, and said that had they felt free to do so, they would have arrived at another result.

The Convener: But what is important is that they did not feel free to do so.

Professor MacQueen: That is absolutely correct. There has been considerable interest in the legal world about the outcome of that case. Many people were anxious about the prospects because, on the whole, if law reform is needed in that area, it would be better if it were carried out by this Parliament rather than by English judges.

Maureen Macmillan: I want to go back to the separation of powers. Do you agree that there needs to be a perception that the legislature and the judiciary are not linked? I do not know whether you ever read the *West Highland Free Press*—

Professor MacQueen: I have occasionally read it.

Maureen Macmillan: This week there was an article by Iain Fraser Grigor, which was on an entirely different matter, but in it he mentioned the Freshwater and Salmon Fisheries (Scotland) Act 1976, which was instigated in the House of Lords. He wrote:

"of the 20 peers who spoke, at least 15 had vested interests as the owners of salmon fishings … the landlords had very deep pockets, and their stratagem was not challenged in a civil court in an action which … might have cost huge sums of money and gone all the way to the House of Lords: that same "House" which had so joyously helped bring to perfection the 1976 Salmon Act."

So there is a particular public perception, which is a problem. In fact, there is no link, but the public perception is that there is.

Professor MacQueen: I would not deny for a moment that public perceptions are important. One of the confusions that can arise is the perception that the legislative House of Lords is the same as the judicial House of Lords, but 99 per cent of the time that is not the case. I fully see the point, and I certainly have difficulty explaining the difference to foreign students in the university, as I have frequently had to do over the years. It is confusing and difficult to understand, but I do not think there is a serious problem in reality for legislative or judicial decision making.

Karen Whitefield: In your paper, you suggest that we should be questioning whether we need a second tier of appeal at all, which is a different proposal from the one that is in front of us. Given that you believe that the system is working reasonably well and that there is no need for change, why would you then suppose that we do not need a second tier of appeal at all?

Professor MacQueen: Let me try to explain that. I think that I have a coherent and clear position on this matter, which is as follows. The system as it is works tolerably well. No system is perfect, and there are many things about it that one would change if one had the opportunity, but it works tolerably well. It is a little bit obscure and difficult to explain, as we have just discussed, but it works reasonably fairly. However, when the question of what should happen is thrown into the air, that provides an opportunity to think about the anomalies and the difficulties. My paper is not in any sense committed to a particular view. It simply throws out a number of ideas. I am doing my professorial bit, and offering my students and anyone else who will listen the opportunity to talk about different ideas. I feel strongly that this is an opportunity that, by and large, we have not had before.

Certainly, in the light of the figures that I drew together, one of the possibilities that we could think about is why we want a third level of court in our system. It may be that we decide to have one. If so, that would be fine and I would not stand in the way of it. I am simply drawing attention to the fact that the third level of court is not doing a lot of work specifically for the Scottish system at present. As has been explained, some of the work that it does is very helpful and useful. Right now, it has some outstanding judges, which has also been the case in the recent past, but it is still not clear whether we need it.

The main point that I want to make on the subject is that there is room for more debate on the issue. It so happens that the Constitutional Reform Bill coincides with the Scottish National Party's proposal for a civil appeals bill to get rid of the right of appeal in Scottish civil cases to the House of Lords. I think that it is still worth considering whether that is a sensible option—perhaps it could be aligned with the constitutional court idea.

Although I see the obvious and symbolic importance of having a UK-level court, does it have to be accessed through the present system? I tend to think that that question should at least be debated. The possibilities of a constitutional court, a "single market" court or no appeal at all should be looked at in a much more thorough and rigorous manner than they have been by the Department for Constitutional Affairs and the Executive.

Karen Whitefield: I have to confess that, when I read your submission, I jumped to the wrong conclusion. I believed that you thought that there was no case for us to have or even to consider having a third tier of appeal. I understand now that your submission is suggesting that we should have a wider debate about whether there is a need for a third tier. There might well be a need for it and there might be times when Scots law could benefit from having the input of other jurisdictions, particularly on issues of human rights and European legislation.

Professor MacQueen: I would not dissent from any of that. I repeat the point that I made in my submission that it is slightly curious and unusual for a legal system to build in the opportunity for others to have a look at what it does. In many ways, it is a good thing to do that, but there are many ways in which that could be achieved other than by having people who are not qualified in the system sitting in judgment on it.

That is the situation that we have in the UK. The real problem and oversight from a Scots law point of view is that we never have a majority in our superior court of the House of Lords. We are always at risk of someone who really does not like the result taking the view that they do not like the judgment, that they think English law—or some other law, for that matter—is better and that they will apply that. I do not know what would happen in that situation.

The Convener: I want to return to a slightly more practical proposition. In the United Kingdom, we have law that is applicable to all parts of the United Kingdom—I am thinking of employment law or taxation law. If the appellate function for civil cases stopped in Scotland, how would we avoid inconsistencies?

Professor MacQueen: That is another reason for the possibility that I ventilated in my submission. If one says that the court is to look only at UK legislation, it creates the problem of having lower courts that are able to deal with everything but a superior court that is able to deal only with what I called the "single market" matters that are put up above. It would be slightly odd and also quite difficult to do that.

I do not think that we have encountered many problems in looking at, for example, what matters are reserved in the Scotland Act 1998 and how they interact with devolved matters. A number of potential legal pitfalls are involved that will one day trip all of us up fundamentally. I am not sure that the situation will necessarily be resolved by having an appellate court that a litigant could get to only after going through two tiers of appeal at considerable expense.

The Convener: But you accept that for as long as we remain part of the United Kingdom there will always be a framework of law that is universally applicable throughout the United Kingdom. If that law had different applications in the different parts of the United Kingdom, the result could be unsatisfactory.

16:00

Professor MacQueen: Absolutely—I accept that. I am trying to say that we will have great difficulty in defining the scope of the jurisdiction of the supreme court—I will use that name—in terms of UK-wide law.

The Convener: I apologise to Karen Whitefield for butting in on her line of questioning. Forgive me.

Karen Whitefield: My questions are finished.

Maureen Macmillan: Perhaps we could narrow our focus. We have had the debate, but we are back with the bill as it stands. Concern has been expressed that the bill does not protect the separateness of Scots law. What provisions does the bill need to protect that separate identity?

Professor MacQueen: One measure is having enough Scottish judges to form the majority, not necessarily in the body but on the panels that sit on cases from Scotland. That is certainly important.

The judicial appointments system deserves closer scrutiny. I do not have a magic formula for that either; the matter is not easy. However, the judicial appointments boards that are developing in this jurisdiction and in England and Wales are good and sensible. They bring what was previously a shadowy process out into the open.

The big problem is with the difficulty that some may feel in applying for posts that people were previously slipped into. As my paper says, I was recently in South Africa, where I saw judicial appointments board applications, which are public and very tricky. Some people do not apply for the posts. We are putting ourselves in some difficulty with that. I accept judicial appointments boards and think that they are good. However, the supreme court will have difficulties if the Scottish legal system is inadequately represented. The bill proposals amount to inadequate representation.

Maureen Macmillan: You think that the act of union and the claim of right are relevant to consideration of the bill.

Professor MacQueen: They are relevant background, but I do not see major problems in them for the proposals, other than the fact that the system will be under the wing of a department—the Department for Constitutional Affairs—that has essentially an England and Wales remit, rather than a UK remit but even that is not strictly covered by the act of union.

Maureen Macmillan: Is having enough Scottish judges the answer?

Professor MacQueen: Yes—that and an appointments system with proper scope for the Scottish system to supply its best candidates to fill the posts.

Mike Pringle: In the absence of a requirement to seek leave to appeal, do appropriate cases go to the House of Lords at the moment, or should any changes be made?

Professor MacQueen: There is some evidence that some cases have reached the House of Lords when they should not have. If anyone wants to follow up the reference, that is discussed in an article by a colleague of mine from the University of Aberdeen, James Chalmers, which was published in the *Edinburgh Law Review* of January 2004. James cites several cases in which law lords said that the cases should never have reached the House of Lords. In his submission to the consultation by the Department for Constitutional Affairs, Lord Jauncey, who was one of the Scottish law lords, said that the system could be tightened. Certification by two counsel has not always proved completely satisfactory.

An interesting figure in the table of statistics that I have prepared for the committee is the large number of cases that do not go to judgment. Some appeals to the House of Lords are disposed of other than by judgment—in other words, those cases are settled somewhere along the line. There are more of those cases than cases in almost any other category. One suspects that sometimes an appeal to the House of Lords is a litigation tactic to bring pressure to bear on the other side's resources. If there is an issue about access to justice, greater control is needed of the cases that get to the top level. That is what I said in my submission to the DCA.

Mike Pringle: How would you put that control in place?

Professor MacQueen: The only system I know in this regard is the English system, in which the Court of Appeal certifies whether there is a point of sufficient interest for the case to continue to the House of Lords. Of course, there is a right of appeal against that to the House of Lords, which usually considers such appeals fairly briefly. I cannot give you any figures as to how often it overturns the view of the Court of Appeal.

The Convener: On a point of practice, at the moment, by convention, non-Scottish judges do not make speeches in Scottish cases. Do you want that practice to continue in any supreme court?

Professor MacQueen: Again, that is not totally satisfactory. After all, if the justification is that we will be getting some sort of external perspective, but English judges do not speak, we get the benefit of an external perspective only as it is filtered through whatever the Scottish judges end up saying. If there are five judges on a case, they should all be entitled to speak. They should not have to speak, but they should all be entitled to do so, and if they have critical things to say, let us hear them. The Burnett's Trustee case gives good examples of that. There is plenty of raw material there for us to think about, however satisfied we might be that the Scots law of property is in good shape.

The Convener: Paradoxically, maybe that absence of a right to speak introduces the critical facility for judges from another jurisdiction to comment on the law and how it might be applied without having the authority or legal power to determine the appeal. Scots law would therefore be protected, but appellate Scottish judges would have the benefit of hearing what other judges think without that affecting Scots law.

Professor MacQueen: I am not necessarily to be seen as someone who believes that Scots law should be protected. That seems to suggest that it is like some rare bird or animal, which it is not; it is a legal system and it is law.

The Convener: When I say protected, I mean that it should be free from contamination from other sources.

Professor MacQueen: I am trying to say that if there are five judges on a case, they should all have the right to speak. There certainly should not be a statutory rule that says that of the five judges, two or three shall not speak. That would be quite absurd because then there would be no point in having them there.

The Convener: Just to be clear, you said that you thought that the present system worked quite well, and that is how it works.

Professor MacQueen: Yes; it works well with that convention, which can be broken—the Burnett's Trustee case shows it being broken. No one gets very upset about that. The upset would have come if the three English judges had overturned the view of their two Scottish counterparts. That is acceptable to me and I find little of benefit in a rule that says that some judges sitting in a case shall speak and others shall not. That seems to me to be completely mad.

Maureen Macmillan: I want to look at devolution issues and the proposal that they be transferred to the proposed supreme court from the Judicial Committee of the Privy Council. What do you think of that? Is that idea moving towards your constitutional court idea?

Professor MacQueen: I would prefer to see things go that way, but with caution and hesitation. It should be open to discussion.

South Africa has a Constitutional Court and what it calls a Supreme Court of Appeal, which deals with all the other ordinary, non-constitutional appeals. I went along thinking, "What a good idea," but the first thing that I heard at the conference at which I was speaking was a proposal to merge the two courts. So, 10 years in, the South Africans are at least debating the issue. I strongly suspect that there is no clear, right answer to the question. Nonetheless, I believe that we should be looking first at a UK-level court being a constitutional court and only then considering whether to add other functions to it. That is how I would deal with the matter.

Maureen Macmillan: So you would support having two separate courts.

Professor MacQueen: Yes.

Maureen Macmillan: But perhaps merging them eventually, as in the South African example.

Professor MacQueen: That might be a possibility, although it has not happened yet in South Africa.

Maureen Macmillan: Why not just leapfrog the whole process and merge the courts now?

Professor MacQueen: Again, it is about having the sense that the constitution is distinct from and above ordinary law and that the law in general must comply with the constitution. We are not there yet because we do not have a full, written constitution. However, we may be heading in that direction, because so many of our difficulties flow from the lack of such a constitution. We are inching towards something like that and, as part of that development, I would personally like the Privy Council jurisdiction to be the platform for considering issues at a constitutional level. We should accept that we have changed and are no longer the country of the unwritten constitution and that we should be developing in the way that other countries with such constitutions do.

Maureen Macmillan: I suspect that that might take a long time.

Professor MacQueen: It would.

Maureen Macmillan: What do you think of Lord Bonomy's recommendation that devolution issues should not include acts of the Lord Advocate as prosecutor.

Professor MacQueen: I do not have a view on that. The fact that those are devolution issues under the present system has thrown up instances of clear anomalies, of which temporary sheriffs were one. That was another instance of the question of the separation of powers, in which the

executive had too much control over the judiciary. Many people had said that since temporary sheriffs began to develop, but there was no mechanism for doing anything about it until the Human Rights Act 1998 came along and it was held that the acts of the Lord Advocate should be treated as devolution issues. Without having strong and developed views about the matter, I would say that the current system has not been a bad thing so far and I would interfere with it only with great caution.

Jackie Baillie: Several of my questions have been covered, but I will home in on a couple of points about the number of judges in the supreme court and how they would be appointed. Your written submission is silent on the issue of the overall number of judges and what proportion of them should come from Scotland. It would be interesting to hear your view on that.

Professor MacQueen: The previous witnesses from the Law Society of Scotland said that there should be 15 judges in the supreme court. I do not see any difficulty with that. However, the House of Lords has difficulty in dealing with all its business with its present complement of 12 judges, so from time to time it brings in retired judges and so on to help. That suggests that there is a manpower shortage—perhaps I should say person power, but the Appellate Committee did not include any women until recently. Therefore, the evidence is that there are not enough judges for the existing work. Members will note from the statistics in my written submission that the amount of casework is increasing substantially, so there is a case for having more judges to deal with that. Having 15 judges may be the answer, but I do not know.

For cases coming from Scotland, I would like there to be at least a majority of three Scottish judges sitting on the five-judge panel. How we get there and whether all three would have to be full-time is a matter for debate, given the statistics about the number of judges. Perhaps we can make use of the idea of acting justices. Harping back to South Africa, I note that it has what are called acting justices of appeal, who serve what is almost an apprenticeship before they eventually graduate to become full-blown justices. That system enables the court to get its work done. That might be the way to enable the supreme court to do its Scottish work. That would be my suggestion.

Jackie Baillie: I do not want to put words in your mouth, but I want to be clear about the matter. Irrespective of the size of the bench—which does not always have five judges—you would want it to have a majority of Scots judges who could be a combination of permanent members and those from the wider legal system.

Professor MacQueen: That is a pretty accurate summation.

Jackie Baillie: That is helpful.

Finally, on the appointments process, you express a different view in your paper from the view that I heard from the Law Society. Why have you taken that view?

16:15

Professor MacQueen: I cannot recall precisely what the Law Society's view is, but the view that I want to express is that there should be a more substantial Scottish input in the appointments process than what appears in the bill. It seems that the Judicial Appointments Board for Scotland will be represented on the group that makes the initial recommendations and thereafter there will be consultation with the Lord President and the First Minister. One cannot help but think that that is inadequate, especially when a candidate for any vacancy will be one of two to five Scots lords. Who would the two to five be? I do not know whether we have as many as five who could do the job at any particular time. The Secretary of State for Constitutional Affairs will make the final decision and will make a recommendation to the Prime Minister and on to the Queen. In reality, one can assume that the decision will be made by the Secretary of State for Constitutional Affairs, who will know very little about the quality or otherwise of potential Scottish judges.

Jackie Baillie: Surely it would be up to the consultees to make them aware of the policy.

Professor MacQueen: Absolutely, but there is no obligation whatever to do anything other than take their views into account—I think that that is the phrase.

The Convener: I want to clarify a point that arises from the previous question. What would you like to be strengthened? Would you like the composition of the commission to be strengthened?

Professor MacQueen: I would like the Judicial Appointments Board for Scotland to have a much more active role in identifying the candidates to go forward—

The Convener: To the minister?

Professor MacQueen: If I had my way, the board would have a much more active role in identifying candidates to go forward to the Prime Minister and to the Queen, assuming that the Queen would ultimately make the appointment.

The Convener: What about the current rather elastic nature of the consultation provision? We will not know two things—we will not necessarily know what the consultation process will have produced, unless the consulters put that into the public domain, or why the minister will have

disregarded what he is told if he has disregarded it. Do those elements concern you?

Professor MacQueen: Yes. As I said earlier, the attraction of the judicial appointments system as it has developed is that the process is open and transparent. We can see what is going on. If we think that the Executive is exerting too much influence, we can criticise it. There is public debate, which is entirely healthy and appropriate on such matters.

The Convener: I notice that you did not come up with a specific answer in your paper relating to the general proposals on funding administration of the court—it was probably brave of you not to do so. Do you think that there is a danger that the current arrangements that are proposed for administration funding and location could give rise to a perception that the court is an English rather than a United Kingdom court?

Professor MacQueen: Yes, in as much as the Department for Constitutional Affairs will, in effect, determine what goes on. I will take the opportunity to make the point that I said earlier that I would like to make. I am concerned about the separation of powers, which has not been properly discussed. Members may recall that I have been concerned about the executive having too much control over the judiciary. Other jurisdictions could be considered. I have discussed the matter with a colleague from the United States, who has given me useful information that I would be happy to pass on to the committee, if it would like to consider it. That information is about how the United States runs its federal judicial structure, its supreme court and the federal courts that operate underneath that. Basically, the executive has nothing to do with it. Congress determines the budget, essentially by a formula that has been worked out over time. Thereafter, the management of the budget is entirely in the hands of the judiciary itself. There is a body that is roughly akin to our Scottish Court Service. It is completely detached from the executive because the greatest anxiety in the separation of powers lies in the executive controlling the judiciary too strongly. Therefore, Congress has the status, if you like.

One could argue quite forcefully that there is much more reason to be concerned about the executive's control of funding, which is apparent, regardless of which bit of the executive we mean—English, Scottish or whatever—and that we should be carefully considering a completely separate system that would in essence be under the control of and monitored by the Parliament, either at Westminster or here. That is the best way of fulfilling the requirements of the separation of powers.

Mike Pringle: I think that you implied earlier that you do not like the name "supreme court". Others have been asked for alternative suggestions; do you have one?

Professor MacQueen: The best suggestion that I have been able to come up with is "court of final appeal", but it is a pity that that is not a very attractive name. "Supreme court" is attractive on one level, as is "House of Lords". "Court of final appeal" is rather limp by comparison.

Mike Pringle: Do you have a view on where the court might sit?

Professor MacQueen: Again, I agree that it could sit anywhere and should try to do so. The real problem is that the resources that back up a court, notably a library, are not necessarily portable, although perhaps now that we have computers, the internet and all the rest of it, that is less of a problem than it might have been in the past. Lord Hope made something of that in his evidence to—I think—the House of Commons committee that considered the matter and I accept his view. We would have to think about what the court's support systems would do while the court was in transit. In principle, however, the court should be on the move.

The Convener: I gather that no other members want to ask questions, so thank you very much, Professor MacQueen, for being with us this afternoon and for the very full paper that you provided, which was extremely thought provoking.

Professor MacQueen: Would the committee like to see the short e-mail from my colleague that quotes from the federal court book of the United States? I can send a copy to Mr Hough.

The Convener: Yes. That would be welcome; please send it to our clerks. Thank you.

Our next two witnesses will be the dean and the vice-dean of the Faculty of Advocates, who cannot be with us until 4.30 pm. Do members agree to proceed to the next item on the agenda, to try to make some progress on that?

Members *indicated agreement*.

Tenements (Scotland) Bill

16:22

The Convener: We proceed to agenda item 2. Members should have received copies of all the written submissions that have come in and a helpful note that the clerk and the Scottish Parliament information centre have prepared. We must decide whom to invite to give oral evidence on the Tenements (Scotland) Bill at stage 1, so I invite members' suggestions.

Mike Pringle: An invitation to the Association of British Insurers would flow from some of the discussions that we have had. I was also interested in the City of Edinburgh Council's submission, because I was somewhat surprised to learn that the council does things differently as far as common repairs in tenements are concerned. I had thought that everybody treated common repairs in the same way, but perhaps that was because I used to be a councillor in the City of Edinburgh Council and have no experience of what happens elsewhere in Scotland. The council's submission says that the tenement management scheme takes precedence over the existing deeds; that would be an interesting issue to explore with the council. I thought that it might be interesting to hear from those two bodies.

The Convener: I was interested to note that the City of Edinburgh Council submitted a detailed response and is certainly not in favour of free variation of the title deeds.

It has been suggested to me that it might be useful to hear from the Society of Local Authority Lawyers and Administrators in Scotland, which has an all-encompassing technical knowledge of the matter, but is not accountable to any individual local authority. Would committee members find that helpful? We should try to test the City of Edinburgh Council's view.

Jackie Baillie: I am happy to do that. It would be useful to hear from local authorities other than the City of Edinburgh Council, which clearly has a track record in dealing with the matter differently from other local authorities.

The Convener: The Society of Local Authority Lawyers and Administrators in Scotland would offer us a technical understanding of the background to the legislation, which might be valuable.

Karen Whitefield: A number of local authorities have sent us written submissions. It will be difficult to choose which ones should give oral evidence and which ones should not, but we need a panel of local authorities so that we can reflect the interest across Scotland. I would like North Lanarkshire Council to be part of that panel; we have experience of a lot of multistorey blocks, not in my constituency, but in my colleague Cathie Craigie's constituency of Cumbernauld, which has high levels of home ownership and the problems that arise from that. North Lanarkshire Council would have a specific perspective on the issue and on the bill. We should reflect the geographic spread of local authorities that have expressed an interest.

We do not have a written submission from the Chartered Institute of Housing in Scotland, which I would have thought would have something to say about the bill. We should consider asking it to give oral evidence.

Perhaps we need to hear from individuals. I notice that a number of tenants groups have raised their concerns—

The Convener: May I intervene for a moment? Page 7 of the clerk's paper has a list of suggested witnesses for oral evidence, which includes the Chartered Institute of Housing. Members might want to look at that list as a starting point. I am happy to listen to other suggestions over and above what is in the paper. So far, Karen Whitefield has suggested that apart from the Chartered Institute of Housing, we should take evidence from a representative panel of local authorities.

Jackie Baillie: I am happy with that suggestion. I note simply that while it has been suggested that the Chartered Institute of Housing should provide oral evidence, we have received nothing in writing from it, so to comment on what we think the institute might say might be slightly premature in the absence of any paper from it.

To back up Karen Whitefield's final point about ensuring that residents and tenants are involved, it might be useful to invite the Scottish Consumer Council, which will have the interests of residents and tenants at heart. The SCC participated in the housing improvement task force, so it may have a slightly different view to offer us.

A leader in the field, and the only academic so far to respond, is Dr Douglas Robertson from the University of Stirling. I wonder whether we should hear his perspective.

Mike Pringle: I was going to suggest that as well.

The Convener: I am grateful to you for mentioning that, because it lets me raise a technical point about paragraph 28 of the summary of written evidence, in which Dr Douglas Robertson becomes Dr Douglas Paterson. I alert the committee to that little clerical oversight. I have noted the suggestions so far.

Mike Pringle: The only other organisation that I have highlighted is the Scottish Federation of Housing Associations. As I am not an expert on housing, perhaps somebody could tell me whether its evidence would be covered by the Chartered Institute of Housing.

Karen Whitefield: My preference would be to hear from the Chartered Institute of Housing, but Jackie Baillie might have a slightly different view. That is my preference simply because the CIH looks at housing as a whole, not solely from the point of view of the registered social landlord. The SFHA will have things to say about the bill, but it would come at it from the perspective of an RSL, rather than look at it in the round; having said that, I may have condemned the SFHA unduly, which I would not want to do.

The Convener: We have set aside two meetings to take evidence; our third meeting will be with the Minister for Communities. We must be sensible about getting the best responses from our evidence sessions. That means that we should be focused on selecting the witnesses for oral evidence—if we are not, we will use up all three meetings. We will do that if we have to, but I think that the committee is not overly enthusiastic about doing so. I am happy to be guided by members.

Can we identify the key witnesses? I direct members to the list of suggested witnesses for oral evidence that appears on page 7. I think that everyone acknowledges that we need to get a standpoint from the legal professions, so do we accept that the organisations that are mentioned in the first item on that list should be conjoined in a single session?

Members *indicated agreement*.

16:30

The Convener: Leaving aside the Chartered Institute of Housing in Scotland for a moment, I move to the Royal Institution of Chartered Surveyors in Scotland and the Property Managers Association Scotland. Again, I think that they could be conjoined in a single session. Is that acceptable?

Members *indicated agreement*.

The Convener: That takes us pretty close to the usual capacity of our meetings. We then have the Chartered Institute of Housing in Scotland, the Council of Mortgage Lenders, a local authority and the two other suggestions that were made. Members might think that the City of Edinburgh Council's response is very full—we are in no doubt about its views or its reasons for holding them—and that it is therefore not necessary for the council to give oral evidence. Perhaps it is important to test the council's views against other sources, and that might bring us towards the grouping that Mike Pringle suggested, perhaps coupled with an umbrella organisation. I throw in that suggestion—it is not absolute, but that grouping would represent all local authorities' lawyers and administrators. We will get into slightly pressurised territory at the second evidence-taking meeting. Are members with me?

Jackie Baillie: I am absolutely with you, but I do not think that the Society of Local Authority Lawyers and Administrators in Scotland, good though it is, will necessarily add anything. We have agreed to have a substantive evidence-taking session with the legal profession, and if we are to invite the society, we should invite it in that category. There are some things that we want to hear about from local authorities, from either the City of Edinburgh Council or a small panel of local authorities. Perhaps we should ask the Convention of Scottish Local Authorities to bring along a couple of authorities.

The Convener: I might be happier with that. Although I have a great deal of sympathy with the point that Karen Whitefield made, I am conscious that it is difficult for us to select some local authorities without inevitably causing irritation to others who have views to offer on the situation in their areas. However, I am perfectly happy to deal with the matter under the umbrella of COSLA, if we ask it to be our witness and to bring such representatives as it deems appropriate. Is that all right?

Members *indicated agreement*.

The Convener: The Council of Mortgage Lenders is important for one reason: whatever happens, we must be clear that we understand the effect of any legislative proposals. If the CML has concerns about what it would find acceptable in the future as lending security for tenement or other subdivided properties in Scotland, we need to know about that. Do members agree that we should invite the CML?

Members *indicated agreement*.

The Convener: Are we content with the City of Edinburgh Council's written submission or do we want to—

Members: Leave that to COSLA.

The Convener: I am happy with that. That leaves us with the Chartered Institute of Housing in Scotland, which is a perfectly reputable body that has, no doubt, a valuable opinion to offer; I am just sorry that there is no written submission from it to help us. If members want to take evidence from the Chartered Institute of Housing, we can probably build that into the second evidence-taking session. Is that agreed?

Members *indicated agreement*.

The Convener: We have a final decision to make, although I think that we have dealt with it. Is the body that Mike Pringle suggested taken care of under the umbrella presence of COSLA?

Mike Pringle: Yes.

The Convener: So you do not want to press that suggestion?

Mike Pringle: No.

Jackie Baillie: My suggestion was to take evidence from the Scottish Consumer Council, rather than from individual tenants associations.

The Convener: That is sensible. Are members happy with that suggestion?

Members *indicated agreement*.

The Convener: The clerks tell me that that gives us six groups of witnesses, which we can fit into the two available evidence-taking sessions. I presume that the third session will be for the minister, after which we will identify the bones of our draft report.

Mike Pringle: Should we fit in Douglas Paterson?

Jackie Baillie: It is Douglas Robertson.

Mike Pringle: Somebody said that it is Paterson.

The Convener: No; it is Robertson.

The suggestion raises a problem with scheduling.

Mike Pringle: It might be interesting to get Dr Robertson's perspective given that he is an individual, rather than a representative of an organisation. His submission was reasonably good, so it might be useful to hear from him.

The Convener: Do members support the inclusion of Dr Robertson?

Karen Whitefield: If we can hear from him, we should do so.

The Convener: We might be able to build in space in the session with the Council of Mortgage Lenders, given that its points will be fairly focused. Do members agree to include Dr Douglas Robertson?

Members *indicated agreement*.

The Convener: I am grateful to members for their suggestions.

Constitutional Reform Bill

16:37

The Convener: We return to agenda item 1. I am pleased to say that the witnesses from the Faculty of Advocates have now joined us: I welcome Colin Campbell QC, who is the dean of the faculty and Roy Martin QC, who is the vice-dean. On behalf of the committee, I say how pleased we are to have you with us. We appreciate your making time to join us. Members have various questions, but would you like to make an introductory comment, Mr Campbell?

Colin Campbell (Faculty of Advocates): Thank you for the welcome and for the invitation to give evidence. I thank the committee for accommodating us—Roy Martin and I have both been in court today and I am conscious that the committee has made particular arrangements, for which we are grateful.

Members of the committee may have seen our response to the consultation by the Department for Constitutional Affairs, but perhaps I can take a minute—no more than that—to say something else. The main driving force behind the proposals for a supreme court is the desirability of separating the highest court in the land from the legislature. Many have argued for that for a long time, even though it is widely accepted that the current Appellate Committee is not in fact compromised by the present arrangements. However, those who have put forward those arguments have done so for perfectly understandable reasons that are based on sound constitutional principles. The faculty accepts those arguments and thus supports the principles and the underlying thinking behind the Government's proposals for a supreme court.

Clearly, the Government has accepted and decided to proceed upon the basis that the separation of powers is of sufficient importance to justify the changes. I suggest that it is perhaps a little odd that the same does not appear to apply to the new court's independence from the executive arm of Government. The bill, as it is presently framed, fails to respect that aspect of the separation of powers in at least two important respects. The first is the discretion given to Government in the matter of selection for appointment to the new court. The second is that the court will be under the administrative umbrella of the Department for Constitutional Affairs, which runs the court service for England and Wales but not that of Scotland.

It is my personal view that the independence of the court from Government is more important than separating its members from the upper house. The

arguments that are given in the consultation paper against an independent supreme court service seem to be based principally upon economic considerations and civil service career structures, and they are, I suggest, not convincing.

Those aspects of the proposals are of particular concern from a Scottish viewpoint. It is vitally important that there is no risk that, over time, the new court will in effect come to be, or be seen to be, part of the hierarchy of the courts of England and Wales, and part of the court service of England and Wales. Not only would that be constitutionally improper, but it would damage the identity and standing of the separate Scottish legal system, which is an important part of our national identity. The failure to place in the bill any safeguards for the Scottish legal system in a new United Kingdom court simply adds to our alarm.

Madam, that is all that I wish to say by way of introduction, although I note that last week, you asked some questions about the meaning of the phrase "a superior court of record". If that is still a matter of uncertainty, I hope that I might be able to help you with that in the course of the discussion.

The Convener: I will take advantage of that, Mr Campbell. I asked the question because, as far as I can recall, the phrase never featured in my law degree. If you can explain to the committee what that phrase means, that would be appreciated.

Colin Campbell: In a sense, it is all of a piece with what I have just said about the bill. The concept of a superior court of record is a purely, and very traditional, English legal term. A traditional classification of English courts is their division into superior and inferior courts. The critical nature of superior courts is that their jurisdiction is limited neither by the value of the subject matter of the case, nor geographically. That does not apply to an inferior court.

Examples of superior courts are the House of Lords, the Court of Appeal, the High Court, the Crown Court and the Judicial Committee of the Privy Council. I have read that there is an ancient division of courts into courts of record and courts that are not courts of record. The basic historical distinction depended upon whether the court in question maintained a record of its proceedings. In more recent times, the essential characteristic of a court of record is one that has the power to punish for contempt.

It is not surprising that none of us has heard of a superior court of record, and the inclusion of the phrase suggests that we have to keep a close watch on the bill from the Scottish viewpoint.

The Convener: I am grateful for that clarification.

At the start of your remarks, you said, diplomatically, that in so far as these were the proposals, here were your comments and observations on them. Would the Faculty of Advocates have been calling for change to the current structure of appeals to the House of Lords had the proposals not come forward?

16:45

Colin Campbell: The answer to that is probably no.

The Convener: Are there aspects of the current system that do not work satisfactorily?

Colin Campbell: I can answer that from my personal point of view, but I should say that Mr Martin has been closely involved in preparing our response to the consultation. I hope that it will be acceptable if he contributes from time to time.

The Convener: He must feel free to contribute.

Colin Campbell: I am struggling to think of any aspects of the current system that do not operate satisfactorily.

Roy Martin (Faculty of Advocates): Likewise, I am not aware of any difficulties in the current arrangements. I endorse Mr Campbell's view: I cannot conceive of the faculty having sought a supreme court if the initiative had not been proposed. The concept has been debated for some time, but the faculty has not been actively engaged. It is certainly not one of the priorities for the legal system.

The House of Lords jurisdiction—which, of course, is the civil jurisdiction—has not caused any particular difficulty. When devolution took place, the jurisdiction of the Judicial Committee of the Privy Council came into being for devolution issues. There was perhaps some uncertainty about how that would sit alongside the House of Lords and alongside the High Court of Justiciary as the highest jurisdiction of the criminal court in Scotland—notwithstanding the fact that devolution issues could go to the Judicial Committee of the Privy Council. It is fair to say that the process was evolutionary and has worked itself out. The system does not now give rise to any immediate concern, whatever anxieties there may have been at the time. It was perhaps one of the consequences of devolution that simply had to settle—and it has settled.

The Convener: Mr Campbell, you mentioned separating the role of the legislature from that of the judiciary, but you expressed concern that that independence had not been achieved in relation to the executive arm of Government. Was your concern specifically in connection with the proposals on the appointment of judges?

Colin Campbell: I mentioned two specific points in that context, and selection for appointment was

certainly one of them. The other related to the proposals for the administrative, funding and staffing arrangements at the Department for Constitutional Affairs. One benefit of the current system is that—both in fact and in perception—the Appellate Committee of the House of Lords is completely independent, in all senses, of Government. I am concerned that that may no longer be the case.

Karen Whitefield: In response to my colleague Annabel Goldie, you said that you were satisfied with the current system and saw no disadvantages in it. You mentioned the importance of the independence of the judiciary. What are the other main advantages of the current system and how would you want to protect them in any new supreme court?

Colin Campbell: Before I answer that, I will elaborate on my earlier answer to the convener. There is a powerful argument—which the faculty accepts in principle—for the change, but that argument does not relate to the practical workings of the House of Lords sitting as the Appellate Committee. If I said that it was a question of theory, it would sound as if the question were unimportant. However, the question is not unimportant—it is a matter of perception and of respecting the independence of the court by separating it from one of the other arms of our constitutional set-up; namely, the legislature.

Many people, not least Lord Bingham and Lord Steyn, have argued persuasively and cogently that in a modern liberal society the supreme court or the highest court in the land—indeed, any court—should not have direct links to, overlap with or duplicate the work of any other arm of the constitution. Not everyone takes that view; however, there is a perfectly respectable argument for that position.

Everyone hopes that we will benefit from the new arrangements by an increase or improvement in the independence of the judiciary in the proposed supreme court or the highest court in the land. However, we also hope that no corresponding disadvantage will emerge in some other realm. To answer Karen Whitefield's question directly, the Appellate Committee of the House of Lords must be one of the world's most widely respected judicial bodies. It contains judges of the very highest quality and its decisions are read all over the world. I am sure that the vice-dean Mr Martin and any practitioner would agree with me that visiting the House of Lords is like a trip to Hampden Park or to the centre court at Wimbledon—it is the pinnacle of one's career and a wonderful experience. Although I am sure that that would still hold true for the supreme court, one knows that with the Appellate Committee of the House of Lords one is dealing with something very special. We hope that none of that will change.

The Convener: That was a very colourful analogy.

Karen Whitefield: I hope that you have more success at the House of Lords than we have at Hampden.

Colin Campbell: I was at the Holland game at Hampden. We had some success there, but we were not so good in Holland.

Karen Whitefield: At the moment, the House of Lords is the final court of appeal only for civil cases. The UK Government is not proposing any change in that respect and, indeed, maintains that it is entirely appropriate that, as far as Scots law is concerned, the final court of appeal should relate only to civil cases and not to criminal cases. Do you think that such a position is right? If so, why?

Colin Campbell: I will make a brief comment and then Mr Martin will say something. I know that he has thoughts on that matter.

The Faculty of Advocates felt that the issue in question was among the most controversial or contentious. With regard to the arguments in favour of retaining the appeal on civil matters from the inner house of the Court of Session to London, the consultation paper points out quite persuasively that for really important and appropriate cases there is real benefit in having the extra breadth of experience of that further court of appeal with judges from another closely related jurisdiction. Our civil law has really benefited from that appeal mechanism.

That said, exactly the same point could be made for the criminal jurisdiction of the High Court of Justiciary and the Court of Criminal Appeal. There is a perfectly respectable argument that the benefits for civil law could apply equally to criminal law. However, I should point out one important difference that persuaded the faculty in its response to support the status quo with regard to criminal jurisdiction: there has never been an appeal to the House of Lords in criminal matters. History shows that there was a right of appeal, from the old lords of council and session, to the King and Parliament only in civil matters and, after a case in the 1870s—almost two centuries ago—the absence of an appeal on criminal matters was enshrined in statute. It would be a major innovation to introduce a criminal appeal to London. On balance, the Faculty of Advocates is not persuaded that that is necessary.

Roy Martin: I endorse what Colin Campbell has said. The matter was the subject of considerable debate in the committee that prepared the response. It is fair to say that there were two views; the prevailing view was that which the dean has just set out.

The content of the question underlies another anxiety about the proposal, which has come about

because the British Government has sought to drive it. If there is a need and justification for a supreme court, the opportunity could be taken to reconsider issues such as the difference between criminal and civil jurisdiction and whether there should be an appeal to a final court—a supreme court or the House of Lords. At the moment, both the consultation paper and the legislation would simply preserve the status quo, except that they would turn the House of Lords and the Judicial Committee of the Privy Council into a supreme court. It might have been interesting to have had a much more substantial debate: first, about whether there ought to be a supreme court and secondly—in this context and more importantly—about the radical changes in the jurisdiction of such a court that might be justified in modern circumstances. One criticism of the legislation might be that although it takes the first step—the radical innovation of creating a supreme court—there appears to be no willingness to take the second step, which is to engage in a debate about exactly what that court might do.

Colin Campbell: I do not want to prolong the discussion, but some would say that there is in the current situation a degree of illogicality that would be preserved under the proposals. At the moment, under the Scotland Act 1998, criminal issues can be referred to the Judicial Committee of the Privy Council in the form of devolution issues. In particular, actions of the prosecutor as a public authority can be raised in London. Under the proposals, that jurisdiction would be transferred to the proposed supreme court. Some criminal issues could be referred to London, but most could not. Some people would see that as an unbalanced and awkward situation.

Karen Whitefield: My last question relates to a submission to the consultation on the proposed supreme court from John Chalmers, who suggested that civil appeals that are made to the House of Lords from Scotland should relate to matters that have an obvious relationship with the whole United Kingdom and that would influence civil law across all jurisdictions in the UK. The Law Society of Scotland said that it would be difficult to make such a judgment. It asked how litigants would be able to determine whether their case was suitable for consideration by the House of Lords and suggested that the proposal would cause inequity of access to justice. What are your views on Mr Chalmers's proposal? Is it a good idea for civil appeals to be made to the House of Lords or to the new supreme court—should it be created—when we think that the matters that are raised affect the whole United Kingdom, rather than Scotland exclusively?

Colin Campbell: I can give only a personal view. I do not favour Mr Chalmers's proposal. I think that the intention behind the proposals and the provisions of the bill is not fundamentally to change the current arrangements. If that is the case, the provisions of the bill might be improved.

When the House of Lords sits in a Scottish appeal, it sits as a Scottish court, it is the final court of appeal in the Scottish legal system, it is hearing a Scottish appeal and its decision is binding only in Scotland. Similarly, a decision of the House of Lords sitting in a case coming from Northern Ireland is not binding in the Scottish legal system. Likewise, a Scottish decision is not binding in England. The system respects the separate identities of the legal systems.

I understand the thinking behind Mr Chalmers's proposal and the point that he is making, but I am anxious in that it would seem that, over time, some kind of UK jurisdiction or legal system would be created. There are some who might ask what is wrong with that, but the Faculty of Advocates would always wish to stand up for the Scottish legal system and for Scots law.

17:00

Roy Martin: I agree with what the dean has said. The matter comes back to the absence of critical examination of the various relationships. At the moment, in a Scottish civil case there is a right of appeal without leave to the House of Lords against a final decision. That is a remnant of the right to appeal formally to the King and Parliament.

In an English civil case, one has to have leave or permission to appeal either from the Court of Appeal or from the House of Lords. That gate-keeping arrangement tends to mean that the court has control over the character of the cases that come before the House of Lords. In Scotland that does not happen, although a case requires certification by two counsels, as appropriate, for the appeal jurisdiction of the House of Lords.

An arrangement such as Mr Chalmers suggested could be facilitated by introducing into Scotland a requirement for leave to appeal. However, that goes against what some might say is the fundamental constitutional entitlement in Scotland to go to the court beyond the lords of council and session. Although it is a suggestion that one can understand, it might limit access to the House of Lords, which might be a good thing or a bad thing. More important, raising the issue identifies the absence of debate on the jurisdiction of the House of Lords, all the various relationships and how they might work in a new court in comparison to how they work at the moment.

The Convener: For clarification, is signature by two counsels a convention or a practice? Would a case not proceed to appeal to the House of Lords without those signatures?

Roy Martin: It would not. As I understand it, the practice directions of the House of Lords state that it is necessary for there to be signatures of two counsels in support of an appeal from Scotland. There is authority on the view that that is to ensure that the case is appropriate for the House of Lords and not simply a further appeal.

The Convener: So that is a de facto leave to appeal.

Roy Martin: Yes. It is usually, but not exclusively, exercised by the counsel who have represented the unsuccessful party. It is a form of safeguard against uncontrolled access to the House of Lords, but it is not under the control of the court either at junior or senior level, as would happen in an English case in which there would be a requirement for leave or permission to appeal.

Maureen Macmillan: What you are referring to is the claim of right when someone can appeal to the House of Lords over the heads of judges. It was originally an appeal to politicians rather than to judges in the House of Lords, but it is now an appeal to judges.

Clause 19 in the act of union also allows for the separation of the two legal systems. The dean raised those points in his statement about there being no safeguards in the bill to preserve the separation of the two jurisdictions. What safeguards and protections do you think need to be added to the bill? Is it possible to amend the bill to add a clause that would make it clear that the jurisdictions were to be kept separate?

Colin Campbell: I have no doubt that various formulations could be put forward, but I see no reason why a draftsman could not come up with something that simply reflects what underlies the act of union. I am sure that that could be achieved.

Another important safeguard that I hope will be introduced is the stipulation of a minimum number of Scottish judges. At the moment, the convention is that, of the 12 law lords, at least two will be Scottish. I see no reflection of that convention in the bill. One can debate how many members should sit in the new court and how many should be Scottish, how many should be English and how many should be from Northern Ireland, but I am concerned to see that there is no built-in preservation of the entitlement of this jurisdiction to a minimum number of justices who are experienced in our legal system.

Maureen Macmillan: Do you think that the number of judges is the most important safeguard?

Colin Campbell: It is a very important safeguard. I think that it is probably implied in the current provisions, but I see no reason why one could not also have some provision in the bill that would seek simply to transfer the current status quo of the jurisdictions to the supreme court. There would be a powerful argument that that is implied in the provisions of the bill, but why not express something to the effect that the new court is obliged to respect the separate identities of the various jurisdictions?

Maureen Macmillan: Would that need to go into the bill itself, or would it suffice to have it in guidance alongside the bill?

Colin Campbell: No—that provision should be in the bill. That is a fundamental point that should not be left to convention, to regulations or to anything else.

The Convener: Neither should it be left to speculation.

Jackie Baillie: I am quite clear about your view that the number of judges should be specified in the bill, but do you have a magic number?

Colin Campbell: We suggested a minimum of three in our response, which would be an increase of one on the current convention. The reason why we made that suggestion is that it would enable there to be a majority of Scottish judges sitting in Scottish appeals—assuming that the new court continues to sit in panels of five, which I understand is the suggestion.

Jackie Baillie: You are quite right that normal benches would indeed be of five judges, but although it is a convention, there is nothing to indicate that that number could not be increased. Should the principle be that we should have a majority of judges from Scotland sitting in cases that are entirely about Scots law?

Colin Campbell: I struggle to find any cogent argument against that.

Jackie Baillie: So does the committee, it has to be said.

One of the arguments that has been presented to us is that, even with three judges, there is a lot of work on. Do you see an advantage in having a wider panel of membership beyond that of the permanent membership of the three Scottish judges?

Colin Campbell: I shall ask Mr Martin to add his thoughts on that question: it is a difficult question. In principle, I have a difficulty with extensive use of temporary or ad hoc judges in any court system, all the more so in the proposed UK supreme court or the House of Lords. There will, I think, always be a place for them and one could debate about the pool from which temporary or ad hoc appointments should come.

The guiding principle should be that the permanent establishment, which is subject to all the selection procedures of full-time permanent

appointments to that court, should be sufficient to deal with the anticipated work load of the court. However, there may be occasions when people are ill, when there is an unexpected increase in the work load or when there are other particular circumstances in which it makes sense to ask a retired justice, a sitting Lord President or someone else to sit.

Roy Martin: I certainly agree with that. A distinction should be made between part-time or temporary appointments for genuine emergencies—whatever they may be—and the use of temporary or ad hoc appointments for the anticipated establishment. If one anticipates that a committee will normally consist of five and one believes that there should be a majority in a Scots case, it seems to me that it is immediately inappropriate to assume that one will make up that majority by means of one or more part-time or temporary appointments. Issues of independence and freedom from perceived pressure—which have given rise to difficulties in other matters of which I am sure the committee is aware—arise in such circumstances.

I would like to add to the comments that have been made in response to questions. It is well recognised that the system that is in place at the moment operates by convention; there are conventions relating to the type of court, the constitution of the court, the number of members who sit in a committee and the number of Scots or Northern Irish members. One cannot in principle rely on such conventions if one creates a new institution, such as the proposed supreme court, even if one wants it to be exactly the same as what existed before. People will question whether such conventions should apply. I endorse the view that these matters are so fundamental that they should be in the act when it comes into being.

Jackie Baillie: Colin Campbell said that he is concerned about the appointments process, but we did not receive much elaboration on the nature of his concerns. Rather than elaborate on the concerns, can Mr Campbell tell me how he would structure the appointments process?

Colin Campbell: As a member of the Judicial Appointments Board for Scotland, I should make it plain that the comments that I am about to make are purely personal and are not made on behalf of the board.

The second half of the bill deals with the establishment of a judicial appointments commission for other judicial appointments in England and Wales. A separate provision in the first part of the bill establishes a judicial appointments commission to select justices for the new supreme court. It is interesting to compare the differences between the two.

My concern about the new supreme court centres around the proposed power of the commission to suggest at least two, but no more than five, names to the Government, which will then choose one of the names that have been put forward. Much less discretion is given to the Government in the part of the bill that deals with other judicial appointments. If a name is suggested to the Government under the appropriate part of the bill, the Government has the right to ask the commission to reconsider. I do not doubt that on occasions, facts will come to light that might make it entirely sensible for the commission to think again. As I understand the proposal, if the commission does not wish to change its view, nothing can be done and the name will go forward on its recommendation.

I struggle to understand the logic or rationale behind the proposed system of establishing a judicial appointments commission to select appropriate candidates for the new supreme court. What is the point of going through the process I have outlined and then asking for a list of names—from a pool that will inevitably be rather small—only to leave it to the Government to choose? Why is that being suggested? The logical answer is that the Government wants to retain control: it wants to have a say in deciding who will sit in the supreme court of this jurisdiction and the English jurisdiction.

Of course, the Government has that at the moment, so it might say that it is simply preserving the status quo, which is true. I will pick up the vice-dean's point. We have an opportunity to reflect on whether that arrangement is appropriate and my view is that it is wholly inappropriate for the Government to choose judges for judicial posts of such importance and in general.

17:15

Mike Pringle: Do you have thoughts about where the court should sit? Should it rotate and sit in different locations? Do you have thoughts about what we should call the court? I have a slight problem with the name "supreme court", which smacks of Americanism.

Roy Martin: I will answer the questions in reverse order. The name "supreme court" suggests an American-type court or a constitutional court. The proposed alteration to the constitutional arrangements will not change the constitutional jurisdiction of the House of Lords. Whether one would advocate such a change is another matter, but a supreme court could be created with the power to strike down United Kingdom legislation, just as courts have the power to strike down Scottish Parliament legislation. That would make the supreme court more like a constitutional supreme court in the United States and other countries.

To use the name "supreme court" may give a slightly misleading impression because, in general, it will simply be the final court of appeal, although some cases will have constitutional implications. What one calls the court may make a difference to perception. The name "Supreme Court of Judicature" is a term of art that refers to the highest courts in England and Wales. In Scotland, the phrase "supreme court" has no technical significance, but we tend generally to refer to the Court of Session and the High Court of Justiciary as the supreme courts, because they are supreme in Scotland. The faculty does not propose and has not considered an alternative name and I will not suggest what the court might be called.

The faculty made representations about the court's location. If a radical alteration to the status quo is being considered, why not think about the location? If the court is to be separate from the legislature and the executive, why does it have to sit in London or England? Why should it not sit in Scotland, Northern Ireland, Wales or a part of England that is away from London? I will say no more about that. The faculty has made various suggestions.

One measure that might be worth considering is having the court sitting on circuit, even if its base is in London. There is no reason why, for a Scottish case, the court should not sit in Edinburgh or Glasgow. A similar arrangement could be made for cases from Northern Ireland, Wales or London. The opportunity to debate those matters is available, but it has not been taken. The assumption seems to be that the court will sit in London.

Mike Pringle: That is the assumption. Evidence has been given that sitting on circuit might be a good idea, but that back-up for having the court in four places might be difficult. Do you agree?

Roy Martin: That is a matter of administration. Courts sit on circuit all the time—the High Court of Justiciary and English courts sit on circuit. Resources would be required for that to happen, but the new supreme court is intended to serve all parts of the United Kingdom. The question is whether the additional cost of the court sitting on circuit—which I suspect would not be great, as the court would not need permanent establishments in any of the places where it might sit away from its base—would be justified by the advantage of the court being seen to be placed at times in other parts of the country. That issue could be debated.

Colin Campbell: The equivalent court in Australia—the High Court of Australia—sits in Melbourne, Brisbane, Sydney and Perth. I grant that it travels around an area that is much larger than the UK, but if that court can move around, I see no reason why our new court should not be able to do so.

Mike Pringle: We are about to vacate the building that we are in today, which is very handy for the High Court. What better use for this building could there be?

Colin Campbell: This is a lovely room.

The Convener: I have a couple of rather technical points. We briefly discussed the current system, whereby there is no formal leave to appeal to the House of Lords, but the signatures of two counsel are required in respect of cases that are appealed. Has that system meant that inappropriate cases have been appealed, or are you satisfied that the cases that go to appeal genuinely merit determination by the House of Lords?

Colin Campbell: The current system places a heavy responsibility on counsel to exercise their discretion responsibly. I cannot say that there have not been odd occasions in the past—indeed, there has been one fairly recently—when their lordships have expressed anxiety about a case. There was a period about 10 or 15 years ago when similar sentiments were expressed in relation to a couple of appeals that were taken to London. However, those are very much the exception and would not in themselves justify any major change to the system. There is a heavy responsibility on counsel to ensure that they certify a case as suitable for appeal only when it is genuinely appropriate—for example, because it raises a major point of principle or is of great importance to the law or, sometimes, to the parties concerned. There is often room for debate. In some cases, there is no automatically right or wrong answer; that applies in questions of granting leave to appeal, too. I am not aware of sufficient cause, of the nature that you mentioned, to justify any change.

The Convener: Has it been known for counsel to refuse to exercise their discretion in such a way?

Colin Campbell: Yes, absolutely. I am sure that I have done so myself.

The Convener: You are saying that that is not just in isolated cases.

Colin Campbell: By definition, unless one is directly involved in the decision, one does not know about the exercising of discretion, but I would be very surprised if what you suggest did not happen fairly regularly.

Roy Martin: I am sure that that is right. Obviously, a litigant who loses a case in the inner house of the Court of Session and who is unrepresented does not have a counsel who has been in the case and who can consider whether he might appeal to the House of Lords. On two occasions I have considered, along with another

counsel, whether I would be prepared to sign and certify that an unrepresented litigant's appeal was appropriate for the House of Lords—I considered the case not because I anticipated that I would be involved in it, but simply so that an unrepresented litigant would not lose at least the opportunity for that consideration to be given. On both occasions, I was not prepared to certify that the appeal was appropriate.

The Convener: There is a current convention that non-Scottish judges do not make speeches in Scottish appeal cases. Should that convention be continued in the proposed supreme court?

Colin Campbell: I noticed that that matter was raised earlier. I must confess that I was not aware of that convention. Such a convention does not seem to be honoured these days and I see no reason why it should be. I can think of many recent Scottish appeals in which English law lords—many of whom are in fact South African, for whatever reason, although they have practised as barristers and then judges in the English courts—regard themselves as being under no self-denying ordinance to refrain from delivering speeches in Scottish appeals. I, for one, would not want to gag them.

The Convener: I think that you have already partially covered the subject matter of my final question. You talked about your slight reservations about the proposal to make the Department for Constitutional Affairs the supremo that would administer the proposed new court. I infer from what you said that you have no specific solutions about how the supreme court should be administered or, indeed, funded. In fact, concerns have already been expressed about the intended system of funding, which will involve divvying up charges among the litigants. Would you be concerned by such a system?

Colin Campbell: Before I deal with that question, I will make an observation about something that you said a moment ago. The faculty suggested in its response that there should be a one-line budget. Of course, we must have some form of democratic accountability and a minister who is ultimately answerable for the budget in Parliament. However, we have proposed a one-line budget for a supreme court service, which would effectively be under the control of the senior judge of the supreme court. As a result, procedures, personnel matters, administrative arrangements and the day-to-day organisation of the courts would be under the justices' control.

The Convener: And not under the control of the Executive.

Colin Campbell: It would not be under the control of the Secretary of State for Constitutional Affairs. Of course, the money will have to come from the Government, which means that there will have to be some form of accountability. However, I understand that the High Court of Australia operates on the basis that I outlined. Indeed, I would like the same system to be introduced for the court system in Scotland. If it is good enough for the UK supreme court, I see no reason why it would not be good enough for the Court of Session. That said, the committee should probably not get into that very different matter, because it raises all sorts of issues.

On the specific question of funding, I should have mentioned earlier that one of the big advantages of the Appellate Committee of the House of Lords is that it is incredibly good value for money. On any view, the proposed supreme court will be a much costlier exercise, certainly in the short term, because a new and appropriate building will have to be built. I do not have any easy answers to the question, but there are concerns about spreading the cost among all litigants. Access to justice is a major issue—indeed, that is another subject that the committee should not get into today—and anything that increases the barriers to access would be a serious matter. I hope that the cost will not be spread among litigants—after all, most of them will never see the inside of the supreme court.

Maureen Macmillan: You touched earlier on the transfer of devolution issues from the Judicial Committee of the Privy Council to the supreme court and highlighted the anomaly of transferring criminal cases that have a devolution connection. Moreover, Lord Bonomy recommended that devolution issues should not include acts of the Lord Advocate as prosecutor. The Law Society of Scotland thought that he had made that recommendation because of the potential for cases to be delayed and claimed that the Criminal Procedure (Amendment) (Scotland) Bill would address the matter. Do you have any comments on that issue?

Colin Campbell: I am hoping that the vice-dean will have some bright ideas.

Roy Martin: I am not aware of the details of the Law Society of Scotland's consideration, but I am aware of Lord Bonomy's proposals. That specific recommendation raises a number of other issues about the proper status of the Lord Advocate as an independent prosecutor of crime in Scotland and a member of the Scottish Executive, which itself brings the acts of the Lord Advocate within the remit of a devolution issue.

If I understand the Law Society correctly, its comments raise a big question, which might depend on whether the Lord Advocate ought to remain a member of the Scottish Executive or ought to be reconstituted as an entirely separate and independent prosecutor whose acts would not

be the Executive's acts. I have to say that I am not advocating the latter course of action, which, although it might bring those acts outside the ambit of devolution issues, would raise the question of what right of appeal there might be against an act of the Lord Advocate as far as purely criminal law is concerned. I am sorry if that does not help you. As I indicated, I was not aware of what the Law Society had said.

17:30

Maureen Macmillan: The Law Society, which gave evidence to us earlier this afternoon, seems to believe that Lord Bonomy was anxious about potential delays in the system but that the Criminal Procedure (Amendment) (Scotland) Bill will ensure that such matters are addressed at a preliminary diet. However, you are obviously talking about something that is much more constitutional.

Roy Martin: Yes, in so far as the Bonomy proposals for the operation of the High Court of Justiciary are concerned. Delays in court operations are intended to be addressed by a system involving preliminary diets. I believe that the faculty gave evidence to the Justice 1 Committee on those matters. I am not sure that the issue of delays in court operations is directly related to a delay that might occur if there were a devolution issue in a particular case. I do not believe that Lord Bonomy's proposals for a preliminary diet would result in direct control over the time that it would take to resolve a devolution issue.

Maureen Macmillan: But you feel that the issue goes deeper than that.

Roy Martin: Yes. It goes back to what we said earlier. If one were looking at the issue in depth, one would have to examine the relationship between the Lord Advocate and the Scottish Executive, the independence of criminal prosecution and the relationship between devolution issues in criminal cases and a criminal appeal jurisdiction. I believe that several issues would arise that might ultimately lead to changes in the supreme court approach, which basically continues with the arrangements that we have now, albeit with a different court.

Colin Campbell: I do not know whether this is helpful, but I believe that there was a flurry of devolution issues while Lord Bonomy was considering his proposals. I am not conscious that as many matters are now being taken to the Judicial Committee of the Privy Council as one might expect. When a new jurisdiction is introduced, there will inevitably be a bit of pushing at its frontiers and a proper testing of it. Even if a devolution issue were raised, I suspect that, in an urgent case, the Judicial Committee of the Privy Council would be remarkably good at dealing with it quickly.

Maureen Macmillan: What are your views on the proposal that the Judicial Committee of the Privy Council should become part of the supreme court? Would you be content with that?

Roy Martin: Yes, if I may speak for myself. That proposal seems logical and I do not believe that it raises any particular issue. Of course, it leaves aside all the questions that we have talked about regarding overall consequences. However, I have no difficulty in principle with the proposal, which seems logical.

The Convener: As members have no further questions, I ask the two witnesses whether they want to make any concluding remarks.

Colin Campbell: I do not, other than to say thank you for what has been an enjoyable session. I wish you well in your deliberations.

Roy Martin: I endorse that.

The Convener: On behalf of the committee, I thank you both. We appreciate your coming here after a day's work in court. We particularly appreciate your presence, because the nature of the supreme court proposal is such that it is vital that the committee receives the best and most informed evidence that it can get. Your contribution to the meeting has been extremely helpful in that respect.

Antisocial Behaviour etc (Scotland) Bill (Leak Inquiry)

The Convener: Item 3 relates to the Antisocial Behaviour etc (Scotland) Bill and in particular to our committee's draft stage 1 report on the bill. Members may recall that, as we met to finalise matters on the report, we were aware of an article in a Sunday newspaper that at first sight seemed to be indicative of a leak by a committee member. I remember stating at the time that I take a very dim view of such leaks. The committee resolved to refer the matter to the Standards Committee. In the interim, I received a letter from one of our members—Mike Pringle. I ask the clerks to distribute copies of the letter to members. With the agreement of Mr Pringle, I propose to read the letter aloud, so that it can be incorporated into the *Official Report*. The letter is dated 2 March 2004 and is addressed to me as convener. The letter states:

"Dear Annabel

I would firstly like to apologise to you as the Convener of the Justice 2 Committee and to the rest of the Committee if as a result of my conversation with a journalist of Scotland on Sunday I caused any concern or embarrassment.

When the supposed link was first suggested I took the opportunity to go on record saying that I did speak to someone from Scotland on Sunday when I discussed my opinions and some of my concerns with regard to the Anti Social Behaviour bill. I reiterate what I said then that I did not discuss directly or indeed give the journalist sight of the confidential draft report.

However I accept that having that discussion at that particular time was perhaps imprudent and that I might have exercised more discretion at what was a very sensitive time in the process. We can all learn by our mistakes.

Again, I am sorry that the Committee's and clerks' time has been wasted as a result of my actions.

I can assure you I will be more careful in future.

Yours sincerely

Mike Pringle MSP."

I thank Mike Pringle for writing to me in those terms. He was under no obligation to do so. I recall that, at the meeting to which the letter alludes, he was entirely candid and stated publicly that he had had a conversation with the journalist concerned. His letter effectively explains the nature of that conversation. I thought that it would be appropriate to make members aware of its contents at this meeting, so that they could decide how they wished to deal with the matter. Does any member wish to comment?

Karen Whitefield: Mike Pringle's letter has clarified what happened, so I do not believe that it is necessary for the committee to take any further action. We initially thought that we might need to refer the matter to the Standards Committee, but I do not believe that that is necessary now. We should consider the matter closed.

Maureen Macmillan: I agree.

The Convener: I share that view. The experience has probably been instructive for everybody. In the circumstances, I propose that the committee formally resolves that the letter terminates the matter and that we take no further action.

Members *indicated agreement*.

The Convener: Thank you.

My final point is to say that we are, of course, looking forward to an enjoyable occasion next Tuesday at our youth justice seminar in Glasgow, which Dr Lesley McAra will facilitate. I understand that members will get a conference pack later this week. I hope to see all members next Tuesday.

Meeting closed at 17:38.

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