JUSTICE 2 COMMITTEE

Wednesday 12 May 2004
(*Afternoon*)

Session 2

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JUSTICE 2 COMMITTEE
† 19th 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

Ms Rosemary Byrne (South of Scotland) (SSP)
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:

Colin Boyd (The Lord Advocate)
Paul Cackette (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Gillian Baxendine
Lynn Tullis

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 4

† 16th, 17th and 18th Meetings 2004, Session 2—joint meetings with Justice 1 Committee.

Scottish Parliament

Justice 2 Committee

Wednesday 12 May 2004

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:02*]

Items in Private

The Convener (Miss Annabel Goldie): I welcome members to the 19th meeting of the Justice 2 Committee in 2004. Item 1 on the agenda is for the committee to decide whether to take items 5 and 6 in private. Is that agreed?

Members *indicated agreement*.

Subordinate Legislation

European Communities (Services of Lawyers) Amendment (Scotland) Order 2004 (SSI 2004/186)

Supervised Attendance Order (Prescribed Courts) (Scotland) Order 2004 (SSI 2004/194)

14:03

The Convener: There are two Scottish statutory instruments to deal with under the negative procedure. As far as I know, nobody has expressed any views about them. The Law Society of Scotland was specifically asked whether it had any views, and it seemed to have no concerns to report. If no one has any questions about the orders, I shall take it that the committee is content to note them.

Members *indicated agreement*.

Petition

Public Bodies (Complainers' Rights) (PE578)

14:03

The Convener: Petition PE578, which is from Mr Donald MacKinnon, concerns the position of young and vulnerable people reporting abuse, and whether the right of absolute privilege that is available to those who complain about the conduct of a range of public bodies should be extended to such young people. When the petition came before us previously, we agreed to seek information from the Executive on the number of defamation actions that have been raised against young and vulnerable people who have reported abuse.

We have a response from Hugh Henry dated 23 April in which he states that he is not aware of any similar cases and that he considers the case of McKellar v MacKinnon to be highly unusual. Apart from saying that the Executive is currently considering

"how best to address the possibility that children and young people may be deterred from making genuine complaints because of the prospect of a subsequent defamation action",

there is no specific further comment.

The committee must decide what should be done with the petition. Members are invited to decide whether a change in the law appears necessary or whether a programme of guidance and information is sufficient. It might be helpful to ascertain views from members on that before we come to any further decision.

Karen Whitefield (Airdrie and Shotts) (Lab): I am undecided about whether we need to change the law—I am not completely convinced that it will not be necessary to make changes. My preference is for the committee not to close the petition completely, but to await the Scottish Executive's deliberations on the matter and to ask the Executive to keep the committee advised of progress. We can consider in future whether the course of action that the Executive decides to take addresses the petitioner's concerns. We should not decide now whether we think legislation is necessary, given that the Executive has stated in the letter that it is considering the matter.

The Convener: If the committee is minded to follow the course that you propose, would that imply that we adjourn our consideration of the petition, perhaps for six months, so that it does not die? We could then revert to it.

Karen Whitefield: Yes.

The Convener: Are there any other suggestions?

Jackie Baillie (Dumbarton) (Lab): I support Karen Whitefield's suggestion. As there is something in the petition, we should keep it open and allow the Executive to consider the matter. I hope that we will reach something akin to a satisfactory position for the petitioner, the Executive and the committee.

Mike Pringle (Edinburgh South) (LD): I agree. I do not want the petition to disappear because I have a lot of sympathy with it. I am no lawyer—although there are lawyers present who might be able to comment—but I am sure that the matter will create a considerable amount of discussion among the legal fraternity in the Scottish Executive. I suspect that the matter is complicated and therefore we should give the Executive time to consider it. We should not dismiss the petition now, but consider it again once the Executive has had a full opportunity to take on board what might be the serious or difficult legal consequences.

The Convener: Karen Whitefield has made a helpful suggestion. Members agree that we should keep the petition on our agenda. For the benefit of Mr MacKinnon—I do not want him to be anxious about what is happening and when—we should decide on a suitable period of continuation. It is now May—the recess is coming up and I do not imagine that the Scottish Executive will respond in detail in the near future. Would a six-month continuation period be suitable?

Members *indicated agreement*.

Mike Pringle: Will we let the Scottish Executive know of that decision?

The Convener: We will continue the petition for six months and we will write to the petitioner to explain that the petition has not died, but remains a viable consideration. I see no reason why we should not copy to Mr MacKinnon the letter that we received from the Scottish Executive—that information should rightfully be made available to him. We shall also intimate our decision to the Scottish Executive and request to be kept informed of proposed developments at the Scottish Executive end.

I am informed that the Lord Advocate, who is to attend for the next agenda item, has not quite made it yet. As there are no other agenda items that we can take in advance—the others will be taken in private—all that I can do is suspend the meeting briefly until the Lord Advocate appears.

14:10

Meeting suspended.

14:14

On resuming—

Constitutional Reform Bill

The Convener: I reconvene the meeting. On behalf of members, I welcome the Lord Advocate. As usual, we appreciate his attendance.

The Lord Advocate is here to be asked questions about the Constitutional Reform Bill, which is currently before the United Kingdom Parliament. However, before he gives evidence, he would like to make a short introductory comment.

The Lord Advocate (Colin Boyd): I do not propose to say anything about the Constitutional Reform Bill or the proposed supreme court by way of introduction. However, with the indulgence of the committee, I think that it would be appropriate for me to say a word or two about the terrible events in Maryhill in Glasgow.

I am sure that all our thoughts are with those who have been affected by yesterday's tragedy at the Stockline Plastics factory in Maryhill in Glasgow and I know that we would all wish to send our condolences to the relatives and families of those who have been killed in the explosion. Our thoughts and prayers are with the families of those who are trapped in the rubble and wreckage of the building and we hope that the enormous rescue effort that is being undertaken at the site will have a successful outcome. Our thoughts are also with those who have been injured and with their relatives and families.

Members will know that the First Minister is visiting the site today—indeed, he is there at the moment. I know that he is speaking to the families and to victims and that he has expressed admiration for, and gratitude to, the emergency services. I have been in close touch with the operation and know from the procurator fiscal at the site about the difficulties that the emergency services have encountered. All reports have said that they have done, and continue to do, a magnificent job in difficult and, at times, dangerous conditions. I am sure that the committee will join me in thanking them for their efforts and in wishing them all the best with the difficult task ahead. The investigation into the cause of the dreadful tragedy has commenced and will be full and thorough.

The Convener: I am sure that members of the committee would want me to thank you for your comments and that we would all wish to be associated with everything that you have said. I am sure that we would all endorse the legitimate praise that you have extended to the emergency and rescue services and the supporting medical

facilities, which seem to have done an extraordinary job in very demanding circumstances. Our thoughts are certainly with the families and friends of those who have tragically died; our thoughts are also on the continuing uncertainty for those who may still be trapped, whom you rightly mentioned. We are grateful to you for making a statement and we share your views.

As well as the Lord Advocate, I welcome his colleagues from the Justice Department—Glynis McKeand and Paul Cackette. I cannot see your name-tags, but I hope that you will show some spark of recognition as your names are mentioned. We also appreciate your being with us.

Lord Advocate, you said that you had no preliminary comments to make on the Constitutional Reform Bill. I know that there are questions that members want to ask, but perhaps it would be appropriate for me to ask the first general question, which is on the overall case for change from the current system to having a supreme court. On the thrust of the evidence that the committee has heard from the Scottish end of the sectors that are likely to be affected by the change, those sectors were all fairly frank in saying that the change was not something that they had strenuously argued for; indeed, many thought that there was nothing particularly wrong with the current system. You now have an opportunity to explain further to the committee what the overall case for change is.

The Lord Advocate: A number of strands come together. First, I believe that in a modern, democratic state, it is right that the judicial process should be separated out from the legislative process. I fully accept that there has not been a problem in any particular circumstance with the judges who currently form the lords of appeal in ordinary—I do not think that anybody has made a case for that—but it is increasingly the case that the proximity of those judges to the legislature poses serious problems and serious questions about continued impartiality. Sometimes we put them in an untenable position. For example, Liberty, which is a pressure group, has cited a particular case in which the House of Lords Appellate Committee was considering a matter. When the committee broke for lunch, one of the judges was lobbied in the corridor for his vote on the very matter that the committee was deciding. That poses serious concerns about the way in which our democracy works.

The bill is part of the modernisation of the British constitution. It is important that we take the opportunity to separate the functions of the House of Lords. That goes with the general reforms that are taking place in the House of Lords, although some would say that those reforms are proceeding at a slow or piecemeal pace.

That is a general case that can be made but there are particular matters that relate to Scotland. The bill gives us the opportunity to rationalise dual appeals; those on devolution issues go to the Judicial Committee of the Privy Council and the others go to the House of Lords. It is sometimes difficult to know in which direction a particular case might go.

More generally, there is a case for modernisation of the legal system. A supreme court is more readily understood. If we talk about access to justice and allowing people to understand what the judicial system is about, trying to describe what the House of Lords and the Judicial Committee of the Privy Council do is difficult enough for lawyers and it becomes more difficult for lay people. Sometimes our procedures look arcane and archaic. I believe that there is a sound case for moving towards a supreme court.

The Convener: I have a more specific point, which was also identified by Lord Cullen, in relation to part 1 of the bill, particularly clause 1, which is entitled

"Guarantee of continued judicial independence"

and is on the responsibility and obligations on ministers of the Crown. Is it not the case that, under the bill as drafted, the guarantee of judicial independence does not extend to Scotland and would have to be extended expressly to Scotland?

The Lord Advocate: That is right; it does not extend to Scotland. Do you want me to comment on what I understand to be the reasoning for that?

The Convener: Yes. From your response, I infer that it is not going to be extended to Scotland.

The Lord Advocate: At present there are no plans to extend it to Scotland.

Clause 1 of the bill is there because it is part and parcel of the abolition of the position of Lord Chancellor, which was peculiar to England and Wales. Until now, the Lord Chancellor has been a senior legal person who was also a politician, and thus a political appointee. Lord Chancellors took a judicial oath, were regarded as judges and, as such, sat in on appeals.

The English judiciary has long held the view that the role of the Lord Chancellor was important in England for securing the independence of the judiciary, and the judiciary was concerned, as were others, that the abolition of the role of Lord Chancellor would undermine the role of the judiciary. It was therefore thought appropriate to put into the bill a particular obligation to respect the independence of the judiciary.

As far as Scotland is concerned, that measure does not apply because we have never had a position similar to that of Lord Chancellor. Some people have suggested that the Lord Advocate had a similar role in the past, but the Lord Advocate is no longer responsible for the appointment of the judiciary and never had that quasi-judicial role in respect of appeals. The question is whether we should have a corresponding provision in Scotland. The view that has been taken so far is that it is a matter for the Scottish Parliament and that we should consider it separately with regard to the Scottish judiciary.

The Convener: I can understand that in relation to Scottish judges presiding over cases in Scotland, but what about the position of the Scottish appellate judges that are proposed for the supreme court? How will they be protected from ministerial interference?

The Lord Advocate: Clause 1 is a declaratory provision. It is not suggested by anybody that there has been interference in the independence of the judiciary—indeed, Lord Bingham, who is the leading law lord and one of the strongest supporters of the supreme court, made that point explicitly in evidence to the House of Lords Select Committee on the Constitutional Reform Bill. As I understand it, Scottish judges will have the same protection in the supreme court as other judges.

Nicola Sturgeon (Glasgow) (SNP): In the evidence that the Law Society gave to the select committee, the view was put forward that, by virtue of the Scotland Act 1998, the term "Ministers of the Crown" includes the Scottish ministers. Therefore, the bill would create an arguably anomalous situation in which the Scottish ministers are obliged to uphold the independence of the English judiciary but not that of the Scottish judiciary. Will you comment on that?

Secondly, if your view is that the matter should be dealt with by the Scottish Parliament—I am sure that you will not be surprised to hear that I agree with that view—do you intend to examine the matter urgently? Can we expect a similar measure to be introduced here?

The Lord Advocate: On the first matter, a correct reading of the bill and the Scotland Act 1998 is that the Scottish ministers would not have a role in protecting the English judges.

Nicola Sturgeon: Will you expand on that? Why would that be the case?

The Lord Advocate: My recollection is that the provision in the bill extends only to England and Wales. The Scottish ministers have jurisdiction only within Scotland; we do not have functions beyond Scotland.

On your second point, you will be aware that there is a commitment in the partnership agreement to put the Judicial Appointments Board for Scotland on a statutory footing. That legislative vehicle could be used to enact a similar provision if it was thought appropriate or necessary to do so.

Colin Fox (Lothians) (SSP): I am intrigued by Lord Bingham's view on the separation of judicial and legislative roles. I am struck by the position of Lord Advocate—you are the head of the judiciary in Scotland to some extent, but you sit among the ministers in the legislature. You said that the proposal is part of a democratic reform of the law and the House of Lords. Do you see it as an early stage in the wider process of modernising the House of Lords? Are we to expect a view from the Lord Advocate on a directly elected chamber and on the use of the words "Lord", "Lady" and "Crown"? Is that something that we can expect as part of such a modern democratic process?

14:30

The Lord Advocate: First, let me correct you on the matter of whether I am head of the judiciary in Scotland—I am not. If you seek a parallel in England and Wales, it would be the Attorney General, who is a political appointment.

I certainly believe in the modernisation of the legal system—much can be done to modernise the system as a whole. I have tried to say that we ought to be more open and accountable. We ought to give people a greater sense of ownership of the legal system, which is one of the reasons why I support the idea of a supreme court. A supreme court might seem symbolic, but symbols are sometimes important, and giving people a sense of ownership is an important way of bringing to them a greater understanding of what the system is about. If one has a greater understanding of the system, one has more chance of influencing it.

The points that you made about the House of Lords, the use of titles and so on are not for me. Tempting as it is to go down the road of—

Colin Fox: Go on—enjoy yourself.

The Lord Advocate: Members know the United Kingdom Government's proposals for the reform of the House of Lords. I believe that the role of hereditary peers in the House of Lords should be abolished. It is appropriate that, if a judge is also a peer, he or she should not sit and speak in the House of Lords while they exercise a judicial function.

Mike Pringle: Do you see any benefits or disadvantages for Scotland in civil appeals transferring to the proposed supreme court? Is there an argument that both civil and criminal

cases should go to the supreme court, or should we keep to the current system whereby criminal cases stay in Scotland? Is there any benefit in the idea of restricting civil appeals to those that raise UK-wide questions of statutory application or interpretation only?

The Lord Advocate: In response to your first question, we have to be clear about what the choice is. The choice is not between remaining with the status quo and having a supreme court, because the status quo is not an option. Barring unforeseen—or perhaps semi-foreseen—circumstances, let us assume for a moment that the bill becomes law. The role of the Appellate Committee of the House of Lords will disappear. Therefore, the choice is between having no right of appeal in civil cases to a higher judicial body and going to the proposed supreme court.

I believe that civil appeals should go to the supreme court, which will come as no surprise to members. That jurisdiction has been exercised for some 300 years by the House of Lords and I would be reluctant to see rights that have existed for a long time now being removed.

The system has brought us distinct benefits. For example, we would not have the jurisdiction of judicial review had it not been for the comments made by the House of Lords in the case of Brown v Hamilton District Council. That has been of distinct benefit to Scotland, to litigants in Scotland and to Scottish jurisprudence.

We have been able to influence legal systems elsewhere. The case that I know of is cited time and time again, but it bears repetition. It is the case of Donoghue v Stevenson, which set the scene for the modern law of delict in Scotland and the law of tort in other common-law countries. Of course I recognise the concerns that some people have expressed, and if I am asked about them, I will explain why I think that they may be overstated. I think that the benefits are there.

As far as criminal and civil cases are concerned, it might be said that not allowing criminal cases to go to the supreme court and allowing only civil cases to go there is an anomaly. If so, it is an anomaly that has existed for 300 years. There are distinct differences between criminal law and civil law. In civil law, there are peculiarly Scottish doctrines; however, on the whole, Scots civil law is much closer to the equivalent in England and Wales than criminal law in Scotland is to criminal law in England and Wales. Nobody has been pressing for change in this area. From my perspective, putting aside my more general law officer hat and putting on a prosecution hat, I would be reluctant to see criminal cases going beyond where they go at the moment, although that will happen in relation to devolution issues, which is another matter that we can, no doubt, come on to.

Your third point related to the restriction of civil cases to ones in which either the common law is the same or there is a UK statute. On occasions, it would be very difficult for us to work out where the common law was the same and where it was not, and there might be disputes just over that. The UK-wide statute is a proper proposition to put. However, Donoghue v Stevenson would never have gone to the House of Lords had that route been restricted to UK-wide statutes, and nor would the case of Brown v Hamilton District Council, so we would not have had the benefits that came from those cases.

Maureen Macmillan (Highlands and Islands) (Lab): You will be aware that, when we took evidence on the bill, anxieties were expressed—for example, by Lord Cullen, the Law Society of Scotland and academics—that the creation of a supreme court would impel us to blur the distinction between Scots law and English law. Your submission states that the Secretary of State for Scotland and the Lord Chancellor are going to lodge an amendment that will, it is hoped, correct that perception. Can you give us any more detail on that amendment?

The Lord Advocate: The short answer is no. At this stage, I have not seen the proposed amendment. All that I can say is that I have seen the evidence that the Lord Chancellor gave the House of Lords select committee in which he stated that that is his intention. Indeed, he has stated that on a number of occasions. Officials in the Scottish Executive Justice Department are in consultation with officials at the Department for Constitutional Affairs about the form that the amendment might take. We have not yet seen the outcome of the deliberations of the House of Lords select committee and the various consultations, therefore I cannot give you that information at this stage; I can only note that it is a firm intention to lodge an amendment. We welcome that and we are working with officials to produce an appropriate amendment.

Maureen Macmillan: Is there a timescale? When might we know?

The Lord Advocate: The bill comes back out of the House of Lords Select Committee on the Constitutional Reform Bill on 24 June—I cannot say whether we will know before then. However, my understanding is that the third reading in the House of Lords will be towards the end of the year. The bill will then go to the House of Commons and go through its process. Therefore, there is plenty of time for the amendment to be tabled. We are not lodging the memorandum for the Sewel motion at present, but we want to be able to give the Justice 2 Committee and, indeed,

Parliament as much information as possible about the final shape of the amendment before we lodge the memorandum.

Maureen Macmillan: We would need to know what the amendment was before the Sewel motion came before us.

I wonder whether I can move on to the business of the acts of union and the Claim of Right Act 1689, which were the subject of a lecture that you gave to the Law Society of Scotland. Perhaps we can get on the record for the committee your views on that. Do you think that the bill's provisions are compatible with the acts of union and the Claim of Right Act 1689?

The Lord Advocate: We must regard the claim of right and the treaty of union as different documents. The Claim of Right Act 1689 was intended to entrench Protestant ascendancy in Scotland. It did so by taking various measures against the Roman Catholic Church and Roman Catholics. We must accordingly view the claim of right as an interesting historical document, but I am not sure that we would wish to hold it up as the fountainhead of Scottish democracy or as a Scottish constitution. Indeed, if it was such a fundamental constitutional document, we would still have the Protestant ascendancy in Scotland.

Article 19 of the treaty of union deals with the continuation of the Scottish legal system—broadly—the Court of Session and the High Court of Justiciary. If I remember it correctly and can paraphrase it, article 19 says that there will be no appeal to a court in Westminster Hall, which was where the English courts sat in the days before they moved up to the Strand. I think that that is right—I hope that I have got the history correct.

Of course, if a United Kingdom supreme court was seen simply as—or was, in fact—an English court, that would run counter to the treaty of union. However, the whole thrust of the secretary of state's proposals is to create a UK supreme court rather than one that is tied to any one territorial jurisdiction within the UK.

Maureen Macmillan: So the proposed amendment, which we discussed earlier, should safeguard us from breaking the act of union.

The Lord Advocate: Yes, it will have an important role in that, but it is also intended that the jurisdictions of the House of Lords and the Judicial Committee of the Privy Council will come together. Given that that jurisdiction will be created from the coming together of jurisdictions that have been exercised in the past by two different bodies and which did not break the act of union, I think that that is a safeguard in itself. However, I recognise and support the idea of further entrenching that safeguard to make it clear for future generations that there is a distinction.

The Convener: I will raise a couple of practical aspects. Currently, to appeal Scottish cases to the House of Lords there is no need to seek leave to appeal, although I think that two Queen's counsels must certify that there is a statable case. Does that mean that cases that are currently on appeal to the House of Lords are appropriate? Are there any concerns about that?

The Lord Advocate: That is something that I have been concerned to find out. I noticed that the committee heard evidence about whether appropriate cases have gone to the House of Lords. It is fair to say informally that one case in recent years might not have been given leave to appeal if there had been a leave process. There has been an issue about whether or not leave should be required for cases from Scotland. Leave is certainly required for cases from England and Wales and possibly for cases from Northern Ireland. It has been suggested that in order to have a level playing field, cases from Scotland should also have leave.

The combination of the fact that in the past few years only one case would not have received leave and the low numbers of cases suggests to everyone that it is more time consuming to go through the cases that are going to the House of Lords from Scotland to ascertain whether they should have leave, than it is simply to get on and hear them. It is practical and appropriate to have a one-stage process instead of a two-stage process.

I acknowledge that if the situation changed one might want to bring in some kind of filter for cases from Scotland, but there is currently no pressing or practical need for that.

14:45

The Convener: There is also currently a convention that non-Scottish judges do not deliver speeches in Scottish cases on appeal. Would that convention continue in the proposed supreme court?

The Lord Advocate: With respect, I have heard that convention spoken of, but I am not clear that it actually exists. It is perhaps more accurate to say that English judges are slow, or slower, to get involved in cases that they think involve matters of Scottish civil law that do not read across to English law.

One of the leading statements in Donoghue v Stevenson, which is almost the fount of the modern law of delict—as I am sure the convener recalls—was made by Lord Atkin, who of course was an English judge. I read what Lord Cullen said to the committee and I agree that it is for the good sense of the judges on the panel to decide whether they can contribute appropriately on an issue and then to do so, as happened in

Donoghue v Stevenson and in other cases. No doubt, when judges feel that they have less to contribute to a case, they will leave it to their Scottish colleagues.

Colin Fox: You suggest that there is no convention, but that non-Scottish judges are reluctant to get involved. What criteria are used to determine whether non-Scottish judges should be involved in Scottish cases in the first place? Does that happen when Scottish judges are not available to hear a case?

The Lord Advocate: There are 12 permanent lords of appeal in ordinary, who usually sit in panels of five. Of those 12, two are Scottish judges. If a panel consists entirely of permanent members, there will be two Scottish judges and three judges from other jurisdictions, who might all be from England and Wales, or—as happened when I presented a case on a devolution issue to the Judicial Committee of the Privy Council—there might be two Scottish judges, two English judges and one Northern Irish judge. There are no criteria.

However, following the devolution settlement, it was thought that it would be appropriate in some cases if devolution issues were heard by a majority of Scottish judges. In those cases, the permanent judges have been augmented by bringing in another Scottish judge.

Colin Fox: Is it really more about delivering speeches than about the panel itself?

The Lord Advocate: I do not think that I can answer that question on delivering speeches because I am not aware of there being any convention that says that judges will not deliver speeches in those cases. Whether or not they feel that they can usefully add to the speech that has been delivered will depend on individual judges. Of course, they will participate in the judgment that is reached, but they may feel that they do not wish to write a speech. In many cases, there will be just two speeches, or even only one. It depends on whether or not the judges are divided, but it often depends also on the importance and complexity of the case.

Colin Fox: Would exactly the same thing happen in the proposed new supreme court?

The Lord Advocate: Yes.

Jackie Baillie: We are all aware of the background to why devolution issues were dealt with by the Judicial Committee of the Privy Council, but have you considered whether there are any disadvantages at all to transferring that function to the supreme court.

The Lord Advocate: There are none, in my view.

Jackie Baillie: You will be aware that Lord Bonomy said that devolution issues should not include acts of the Lord Advocate in his capacity as head of prosecution. Could you tell me whether you agree or disagree with that statement, and why?

The Lord Advocate: I do not think that any change is necessary in that respect. In any event, I do not think that it would be open to the Department for Constitutional Affairs to include in the Constitutional Reform Bill an alteration to the Scotland Act 1998: that would be outside the scope of the bill.

Let me explain where my thoughts are on that. I hope that you will forgive me if it takes a little bit of time; I am sorry about that. First of all, the Lord Advocate and the Solicitor General are, as you know, members of the Scottish Executive—Scottish ministers—and are bound by collective responsibility. However, that is not true of the Lord Advocate when he acts as head of the system of prosecutions or in the investigation of deaths in Scotland. Those are known as the retained functions of the Lord Advocate. What Lord Bonomy was suggesting was that, in so far as the Lord Advocate was exercising his retained functions, he would not be bound by section 57(2) of the Scotland Act 1998, but for everything else he would be. That is a rather anomalous situation.

The Convener: To help the committee, could you illustrate a non-retained function?

The Lord Advocate: A non-retained function might relate to the Scottish charities office, for example, although that is all changing, anyway. I certainly exercise jurisdiction in that respect, which is a non-retained function. It would also be open to me, as a minister, to sign a statutory instrument or something of that nature. Indeed, before devolution, the Lord Advocate had quite a number of policy responsibilities—in diligence, for example—and I am very pleased not to have that responsibility. Poinding and warrant sales were always matters that the Lord Advocate had to deal with before devolution.

As a law officer my general responsibility to the Scottish Executive is in a non-retained function; it is outside the scope of prosecution or the investigation of death. To do as Lord Bonomy suggested would create a curious anomaly; it would look very odd, although I concede that it would be possible.

A second point to make is that among the reasons that were given by Lord Bonomy for wanting the change was delays in criminal trials. I noted that Gerry Brown made a valid point in his evidence to the committee when he said that the Criminal Procedure (Amendment) (Scotland) Bill, which came after Lord Bonomy's

recommendations, puts far greater emphasis on the preliminary diet, which is where such matters should be cleared up.

A third point is that there was a time when I was very concerned about the operation of section 57(2) of the Scotland Act 1998 in respect of my role as prosecutor. The reason was this: in a case in the Privy Council called R v HMA, the Privy Council interpreted article 6 of the European convention on human rights in such a way that I was simply barred from prosecuting if there was undue delay in prosecution, which stopped me from bringing a prosecution in a number of cases. I felt that, if that situation continued, there would be public concern about the Lord Advocate's being prevented from prosecuting criminal offences.

That situation has changed, partly through our internal actions in getting on top of prosecutions and doing our best to ensure that delays do not happen because of the Crown. I say candidly to members that, in the past, there have—because of the Crown—been delays that have prevented us from prosecuting. If a delay was caused by a reporting agency or the police—or, more likely, the Inland Revenue or HM Customs and Excise, where things are more difficult—that was a problem.

However, there is a case called the Attorney General's reference no 2 of 2001, in which the House of Lords sat, including all the people who had sat in R v HMA apart from one Scottish judge, Lord Kirkwood. A panel of nine sat to consider the interpretation of article 6 and the effect of the Human Rights Act 1998. Two important things came out of that. First, the House of Lords interpreted article 6 differently, so I think that it is now open to us to prosecute even when there has been undue delay. The accused would receive some other remedy, such as a shortened sentence or possibly damages.

The second important thing—I apologise for the fact that this explanation is taking some time—is that the House of Lords made it absolutely clear that a public authority could not act in a way that was contrary to the European convention on human rights; to do so would be illegal. The lords said that illegality in terms of article 6 was the same as acting ultra vires in terms of section 57(2) of the Scotland Act 1998.

Now to get back to me. I am a minister in the Scottish Executive and so am bound by section 57(2) of the Scotland Act 1998. However, I am also bound by section 6 of the Human Rights Act 1998, so I still cannot act in a way that is illegal. If Lord Bonomy's recommendation was followed through on section 57(2), which affects me as prosecutor, I could not appeal to the supreme court against a decision in the High Court. I would not have that protection and that right to appeal; I would be far more concerned about that than I would be about not being able to prosecute because of a delay.

Was that all right?

The Convener: I think a round of applause is in order. [*Interruption.*] [*Laughter.*]

The Lord Advocate: Yes. The downside is that I do not believe that the recommendation is good, for the reasons that I have set out.

Jackie Baillie: I regret having added, "and why?" now.

The Convener: I do not think that you should. I thank the Lord Advocate for that full explanation.

15:00

Colin Fox: I turn to the question of how many judges should sit as supreme court judges and how many of them should be Scottish judges, which is covered in paragraphs 18 to 26 of the Executive's submission to the House of Lords Select Committee on the Constitutional Reform Bill. The submission says that the Executive would be content with there being 12 supreme court judges, no fewer than two of whom should be suitably qualified judges from Scotland. However, the submissions that the Law Society of Scotland has made both to our committee and to the House of Lords reiterate the society's belief that 15 judges would be better. Perhaps that is a matter of jobs for the boys—I do not know whether judges are members of the Law Society—but the society argues that three of the 15 judges should be from Scotland.

A related issue, which touches on an issue that you mentioned, is the number of Scottish judges who should be on any panel. According to the Faculty of Advocates, if there are to be 15 supreme court judges, not only should three of them be Scottish—the faculty believes that that should be the proportion—but any panel of five judges that hears a Scottish case should contain a majority of Scottish judges. Why does your view differ? Why do you maintain that two out of 12 would be a better proportion?

The Lord Advocate: On the number of judges that should make up the supreme court, a case would need to be made for expanding the proposed number from 12 to 15. Any such case would need to be based on the number of cases that will go before the supreme court. Given the combined number of cases that go to the House of Lords and to the Judicial Committee of the Privy Council, there is no pressing case for increasing the number that is proposed. That being so, the present 12 lords of appeal in ordinary, including the two who are Scottish, will simply move over to become justices of the supreme court. Of course,

if the number of supreme court justices were to expand because of an increase in the amount of business, the proportion of Scottish judges would need to be considered. If the number increased to 15, there might be a case for having three permanent members who were Scottish judges.

It is valuable to have a majority of Scottish judges in certain cases, but that can be done by augmenting the panel with judges who are on the supplementary panel. I do not believe that it is appropriate to have a hard and fast rule because that would, in effect, mean a permanent division in the court, with a Scottish supreme court that required a majority of Scottish judges and a different requirement for everywhere else. To use my earlier example, the definition of article 6 of the ECHR might be interpreted in two different ways by different panels of the same supreme court. It would never be possible to bring the two panels together to sort out the matter, because there would always need to be a majority of Scottish judges if there were a hard and fast rule.

The appropriate way forward is a flexible approach that recognises that many cases that go before the House of Lords or the Judicial Committee of the Privy Council do not raise particularly Scottish common-law issues, despite what some academics have suggested. Equally, there are cases in which there are peculiarly Scottish issues that need to be dealt with by a Scottish majority. I think that we need the flexibility that is inherent in the settlement.

Colin Fox: On whether the supreme court should have 12 or 15 judges, is it your argument that there might be a case for expanding the number to 15 if the 12 judges were to be worn out by excess business, but as that is not the case at the moment, you do not believe that the number will need to expand?

The Lord Advocate: I have not seen a business case for there being more than 12 supreme court judges. The argument that there should be 15 judges comes from a desire to have three Scottish supreme court judges rather than from a desire to deal with the appropriate level of business.

Karen Whitefield: In your written submission to the special Select Committee on the Constitutional Reform Bill, you said that you did not believe that it was necessary for the number of Scots judges to appear in the bill and that the convention should continue. Why do you think that that is the preferable route? How sure can you be that the convention will be adhered to? In future, things may change. What discussions have you had on this issue with the Department for Constitutional Affairs to give you reassurance that a convention is the most appropriate route to take?

The Lord Advocate: In my view, quotas that are stated in acts are inflexible. Sometimes, they are inflexible in ways that could not be anticipated when they were written into legislation. Things that look like guarantees at one point become straitjackets over time.

There is a philosophical point. I see this as a United Kingdom supreme court, albeit that it will have a separate jurisdiction in relation to each of the territories. In that context, I do not like the idea that we will send our two representatives to the supreme court.

Clearly, it is important that at least two of the 12 judges should be Scots. If that were stated on the face of the bill, what would happen when the number was increased? I want there to be an understanding that if the number of judges increases, the number of Scots judges will increase in proportion to that. If we say that there should be at least two Scots judges, the figure will be two for all time. It is not inconceivable that the judge who was best qualified to be appointed to the supreme court would come from Scotland, even if the court already had two Scots judges. In that situation, we might get a third judge.

On the issue of how the convention works, the Lord Chancellor made clear in written evidence to the select committee that there should be two criteria for appointments: merit, which is the most important criterion, and territorial jurisdiction. The submission states that the supreme court appointments commission

"will be responsible for applying both the merit and territoriality tests to eligible candidates rather than just the merit test as under my previous proposal."

It is right to ask just how that will work. One way in which it will work is through the guidance that will be given to the commission, which will include the requirement to maintain a balance between merit and territorial jurisdiction. In every case, the commission will include a member of the Judicial Appointments Board for Scotland and there will be a requirement to consult the senior judiciary and the First Minister, even if the appointment relates to an English or a Northern Irish judge. When the recommendation goes to the Secretary of State for Constitutional Affairs, he will consult the First Minister, who would be minded to reject it if the commission said that it did not want to appoint a Scottish judge. There are guarantees. However, we want the bill or guidance to set out in a little more detail how the system will work in practice, so that we can flesh that out in the Sewel memorandum.

Nicola Sturgeon: Earlier, you said that you did not like the idea of Scotland sending representatives to what is a UK court. I suppose that you could say that the logical conclusion of that view is that cases should be decided on merit

across the UK. I know that that is not your position, because you have said that you think that the existing convention should continue. However, as I understand you, you are saying that, although that convention should continue, it is not necessary to enshrine it in the bill.

That is a similar position to your position on the protection of the separate jurisdiction streams. You say that fears about that issue are groundless because the bill does not compromise that area. Nevertheless, you are happy to support an amendment in that regard, presumably to allay some of the fears that have been expressed. Would it not be sensible to take a similar approach to the issue that we are discussing at the moment? You might not think that the amendment is necessary, but it might help to offset people's fears in that regard if the convention were enshrined in the bill. If the wording said that there should be a minimum of two Scottish judges, that would not necessarily preclude there being a third one, if, for example, there were an outstanding Scottish judge who could be appointed.

The Lord Advocate: I recognise the point that you are making but, as I said, I think that quotas in bills have the propensity to become straitjackets rather than guarantees. I think that we would face that problem in this case. Further, I think that there is a difference between the jurisdictional issue, which relates to the need to ensure that the court continues to have a distinct jurisdiction, and the issue of specifying that there must be a Scottish judge.

I can envisage a problem arising in relation to someone who has trained and practised in Scotland and England. Is that person a Scottish or an English judge? There are dangers in prescribing that there should be a set proportion of Scottish judges when we do not know, for example, whether the size of the court will change. The way in which the provision might be read in the future might mean that it was a constriction rather than a guarantee.

Nicola Sturgeon: I appreciate that you might say that this would never happen because the convention has always been respected and will continue to be respected, but what would happen if a Scottish judge on the supreme court retired and, for some reason, they were not replaced by another Scottish judge? Leaving aside how unlikely that might be, what would happen in that circumstance? How could we ensure that that longstanding convention would be upheld?

The Lord Advocate: A number of guarantees are in place already. As I said, the commission includes a Scottish member and there will be a two-stage consultation, involving the First Minister and the senior judiciary.

The only conceivable circumstance in which a Scottish judge would not be appointed in the situation that you describe would be if there were a widespread acceptance that the candidates that one would be happy to have in that position were not available or if there were agreement that there was no one who was suitable. All conventions operate by people respecting them and this one is no different.

You are right to say that we would want to see how the convention is maintained and operates in future. That is something that we would want to bring back to the committee.

I have just realised that I did not finish off my answer to Karen Whitefield about the discussions that we have had with the Department for Constitutional Affairs. Discussions continue on that. We will inform the committee and the Parliament of the outcome of those discussions.

15:15

Karen Whitefield: You said in response to Jackie Baillie that you see no disadvantages in the supreme court considering devolution cases. The Executive has said that the majority of judges who consider such cases should be Scots. Why is that a prerequisite to the supreme court considering such cases?

The Lord Advocate: We have said that we see advantages to the system of having a majority of Scots judges in most cases that concern devolution issues. The one case that I have argued in the Judicial Committee of the Privy Council did not have a majority of Scots judges, but I did not think that that created any disadvantage. A unanimous decision was taken—it had always seemed to me that the decision would be unanimous. Lord Bingham, who was in the chair, and Lord Carswell, who is a Northern Irish judge, in particular—and Lady Hale, the third non-Scots judge—contributed a great deal to the discussion and did that well.

It was recognised when the Scotland Act 1998 was passed that cases that involved Scottish sensitivities over devolution issues should have a majority of Scottish judges. That has happened with most of the devolution issues that have gone to the Privy Council. However, in the one case that I have seen at first hand, I saw no disadvantage in not having a majority of Scottish judges.

The Convener: Do you draw a distinction between your recommended approach to devolution issues and the position on civil appeals?

The Lord Advocate: I will return to the reasoning that was advanced when the Scotland Bill was discussed, when it was recognised that

devolution issues could have sensitive political dimensions. Devolution issues have hitherto almost always involved acts of the Lord Advocate as prosecutor, but devolution issues really involve the devolution settlement as a whole.

It has not happened yet but, for example, a reference on the compatibility of a Scottish act of Parliament might raise sensitive political issues that might be thought to be better addressed by a majority of Scottish judges. That was the reasoning when the Scotland Act 1998 was passed. I do not know whether the feeling was that we ought to be careful and adopt that system, but the reasoning was that peculiarly sensitive political issues might arise from the devolution settlement.

The Convener: I am conscious of the time. A few questions remain, so I ask questioners to be brief and the Lord Advocate to respond similarly, if that is appropriate.

Nicola Sturgeon: You have talked about Scottish involvement in the appointments process—I will not ask you to go over that. Two smaller and specific points have been raised in evidence to us and to the Select Committee on the Constitutional Reform Bill. Lord Cullen told us that a commission is to be appointed to produce a shortlist of candidates because commission members will have a deeper knowledge and understanding of likely candidates. He said that it would therefore make more sense to allow that commission to recommend who should be appointed, rather than simply to pass a shortlist to a minister who does not have the knowledge and understanding to pick the candidate for appointment. I accept that, either way, the minister would make the appointment. Do you have a view on that?

The second point is even smaller and relates to medical retirement, which the Law Society of Scotland has raised with the select committee. Under the Adults with Incapacity (Scotland) Act 2000, the opinion of two doctors is required to declare any individual incapable but, under the bill, one doctor could declare a judge incapable. That is a small point, but you might have a view on it.

The Lord Advocate: On the question whether a minister or the commission itself makes a recommendation, I think that the position has moved on since the bill was introduced. In his evidence to the select committee, the Secretary of State for Constitutional Affairs made it clear that there would be only one nomination, which he would have the option of rejecting.

I acknowledge the arguments for cutting ministers out of the process completely. That said, I am concerned that in a democracy we should be wary of letting powers seep away from those who are democratically elected to non-accountable bodies.

Nicola Sturgeon: I agree with that.

The Lord Advocate: Although it is right that we should have the openness and accountability in making judicial appointments that a commission would give us, I think that someone should ultimately be accountable.

As for the issue of medical retirement, I have no idea. Paul Cackette has offered to respond to your question, but I do not know whether you wish to hear from him on that or not.

The Convener: We are happy to do so.

Paul Cackette (Scottish Executive Justice Department): I am aware of the issue that has been referred to, because representatives from the Law Society of Scotland who gave evidence to the select committee a couple of weeks ago mentioned it. In amplifying their evidence, they pointed out that the bill's procedures for medical retirement of judges required only one medical certificate and drew to the select committee's attention the fact that the Adults with Incapacity (Scotland) Act 2000 required two certificates. Indeed they went on to say that, as the 2000 act was a more recent and modern piece of legislation, it might provide a more useful and appropriate model than the existing provision in the bill, which simply replicates the current position. I understand that the Department for Constitutional Affairs has noted the point and is considering whether it might be appropriate to follow the Scottish parliamentary example in that respect.

Colin Fox: Does the fact that the DCA will administer and support the supreme court provide sufficient independence for Scotland's interests? Given the sensitivities that the Lord Advocate mentioned, what would be the Scottish input into these processes?

The Lord Advocate: I understand that, under the proposed system of governance, the supreme court would have a chief executive who, with its president, would draw up an annual budget. That budget would then be presented to the DCA, which would be responsible for arguing with the Treasury for the funds for the court and for ensuring that the court itself produced value for money.

People have argued that the fact that the department deals with constitutional affairs—and is therefore responsible for the English court service—means that it is part of the English court process. With respect, I do not think that that is right. Although the majority of the DCA's activities concern England and Wales and although it has responsibility for the English court service, the

supreme court will stand apart from all that. Moreover, we must not forget that the Secretary of State for Constitutional Affairs is a UK Government minister and that the DCA has UK responsibilities.

On the second, more general point about independence, I would make the same response. Clearly, we do not want courts to be overly influenced by spending and resource decisions that are made by people with a political motivation. However, we need a minister to argue for funding for the court and to be responsible to the Parliament for that funding. The court itself should also be accountable to ensure that it produces value for money. After all, we all have to do that. As a result, I feel that the DCA has addressed the Scottish aspects of the proposal and concerns about independence.

Colin Fox: Finally, is the intention to secure funding for the supreme court from charges on lower civil courts?

The Lord Advocate: The Executive is still considering a couple of options for how Scotland should finance the supreme court. After we have thought about our own position and discussed it with the DCA, it will be set out in the Sewel memorandum.

Colin Fox: Can you give us an idea of the proportion of funding that would come from those channels?

The Lord Advocate: The bill's financial memorandum mentions a 0.8 to 1 per cent charge on court users in England and Wales. The question whether we in Scotland will fund it in the same way is still live. As I have said, we have not yet reached a view on how that should be done.

The Convener: As members have no further questions, I thank the Lord Advocate, Glynis McKeand and Paul Cackette very much for attending the meeting. Your evidence has been extremely helpful. The committee will have to formulate its thoughts in a draft report and the intention is to consider that report at its meeting on 25 May. Given the time constraints, I suggest that we ask our clerks to produce a rough first pass at that report, which can be circulated to members. That will give us something to work on before 25 May.

I am minded to have a five-minute comfort break before we go into private session.

15:27

Meeting suspended until 15:35 and thereafter continued in private until 16:59.

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