PROCEDURES COMMITTEE

Tuesday 1 March 2005

Session 2

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PROCEDURES COMMITTEE
3rd Meeting 2005, Session 2

CONVENER

*Iain Smith (North East Fife) (LD)

DEPUTY CONVENER

*Karen Gillon (Clydesdale) (Lab)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*Mark Ballard (Lothians) (Green)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Mr Jamie McGrigor (Highlands and Islands) (Con)

COMMITTEE SUBSTITUTES

Robin Harper (Lothians) (Green)
Tricia Marwick (Mid Scotland and Fife) (SNP)
Irene Oldfather (Cunninghame South) (Lab)
Murray Tosh (West of Scotland) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

David Crawley (Scotland Office)
Hugo Deadman (Scotland Office)
Mrs Anne McGuire MP (Parliamentary Under-Secretary of State for Scotland)
Rt Hon Henry McLeish
Lord Sewel

CLERK TO THE COMMITTEE

Andrew Mylne

SENIOR ASSISTANT CLERK

Jane McEwan

LOCATION

Committee Room 1

Scottish Parliament

Procedures Committee

Tuesday 1 March 2005

[THE CONVENER *opened the meeting at 10:31*]

Sewel Convention Inquiry

The Convener (Iain Smith): Good morning, colleagues, and welcome to the third meeting in 2005 of the Procedures Committee. I apologise for the slight delay in starting this morning's meeting, which was due to the weather problems. I note that Jamie McGrigor is running a little late because of the weather.

This morning, we will take evidence for our inquiry into the Sewel convention. Our first witness is the right hon Henry McLeish, who was the minister of state who piloted the Scotland Act 1998 through Westminster. I thank him for taking the time to come to the meeting and invite him to make some remarks before I open the meeting to questions from members.

Henry McLeish: I thank you for the invitation to address the committee on the Sewel convention, although as John Sewel is behind me I feel that I am bowing to a superior authority. John took matters through the other place, as it is described at Westminster, and he did an exceptionally good job.

I will make a few brief comments. They will be quite discursive and may seem to you to lack logic, but in a curious way if we look at the contributions that have been made by the United Kingdom Parliament and the UK Government we are constantly reminded of the parliamentary sovereignty of Westminster. There is no end of it in the documents that they have produced. Thinking back to the time when we planned to take the monumental step of creating a devolved Government and a devolved Parliament, I suggest that the Sewel convention could be regarded as significant progress, because without it parliamentary sovereignty at Westminster would remain entirely intact. I am not saying that that sovereignty has been changed in a dramatic fashion, but the Sewel convention means that, to all intents and purposes, the parliamentary sovereignty of Westminster concedes to the Parliament in Edinburgh the ability to legislate on devolved matters, which are now considered by an alternative organisation. Contextually, I think that that is an important concession. I hope that it will be the forerunner of more devolution in the future and that eventually there will be a move towards the sharing of power in Britain rather than devolved power, which is substantially different.

I am sure that John Sewel will elaborate on Sewel motions, but I believe that it was a good idea for Westminster to try to provide a solution. We knew that setting up any changes to government is always messy and cannot be tidy. Even the best bill—and I think that the Scotland Bill was one of the best bills that the House has produced—would leave an interface between the two Parliaments, between the two Executives and between reserved and devolved matters, so tidying up will always be required.

The Sewel convention allows an opportunity for matters that can be legislated on in London to be influenced by decisions that are made in the devolved Government in Scotland. I reject the criticism, which some people have made, that the Sewel motion is about conceding legislative authority back to Westminster. It is not. It could be argued that the Sewel motion is constitutional or political, but essentially it is a practical measure at the start of a new political era.

If we look at other countries in Europe and at federal systems worldwide, we find that there is an interface that has to be dealt with to address overlaps, inconsistency and the sheer volume of political debate that takes place between different organisations. No real concession has been made. The Sewel convention is a practical measure that, in the short term, has helped us to secure a working relationship with Westminster and to avoid any major difficulties in having inconsistent policies north and south of the border.

If a devolved matter of a technical nature is being considered at Westminster—in other words, no issue of substance is at stake—there can be little argument about a legislative change being made there, except on the basis of the principle that all such changes should be made in Scotland. On cross-border issues, we must be sensitive to the fact that the border is a land border and that people who live 10m to either side of it share the same culture and the same ideas. That means that it would be silly to try to have different pieces of legislation on either side of the border for no good reason.

On some matters of importance, there could be a divergence in thinking and in policy making in Scotland. Those issues might have to be dealt with in a different way. I am talking about matters such as those that were thrown up by the Civil Partnership Bill—especially the proposals on civil unions—and the Constitutional Reform Bill, which, one could argue, were sufficiently important to be dealt with separately in Scotland. One could argue that both ways. One could say that, because a different view pertained in Scotland on what were important issues, there should have been separate legislation. The argument has been aimed at the

Executive—unfairly, in my view—that the Sewel convention provides an opportunity for it to duck issues that could prove controversial in the public arena. I have not come across any Government that would not take the opportunity to minimise ill-informed debate on major issues. It is in that area that the Parliament must exercise more authority in the future.

That leads on to the point that there are two Executives or Governments—the one in London and the one in Edinburgh—that exchange ideas and legislative proposals. The Scottish Parliament then intervenes. I suspect that, in future, the Parliament needs to be given more control over what happens. If there is a bill or clauses in a bill that are likely to cause difficulties, they should be considered closely against an informed checklist of when it will become crucial to bring in such provisions in Scotland. That would allow us to decide whether to leave matters to Westminster. I should acknowledge that that is John Sewel's suggestion, not mine. The Parliament is just on the fringe of the interface between the two Governments; it needs to move much closer to the Executive.

I mentioned parliamentary sovereignty at Westminster. Many people believe that devolution is a process rather than a finished product. It is important to have a sense of perspective on the Sewel convention and to give a proportionate response to its critics. Life will move on. There will be an evolution of government and governance in the United Kingdom. The people who argue against Sewel motions on the basis of the principle that legislation affecting Scotland should always be passed in Scotland are missing the essential point that there are other big constitutional issues that we should consider.

The Sewel convention started out as a commitment that was made in the House of Lords. It then became a convention and a memorandum of understanding. It is based on guidance notes on policy development. None of that is law. Westminster could change all that tomorrow, although it will not. Life is not about having Labour Administrations in London and Edinburgh in perpetuity. Do not get me wrong—I would like Labour to remain in power, but that is not the nature of government in Scotland, which is based on proportional representation, and the present system of government at Westminster may not endure for ever.

One of the challenges is to ensure that backing for the Sewel convention is not based solely on good will. In future, we must ensure that many of the issues that affect devolution are in some way constitutionally safeguarded. That will be difficult, given that there is no written constitution and that devolution affects only 10 million people in the UK and not the 50 million people in England. That is an issue and it shows that good will might not always be guaranteed. We must have something robust so that, if changes occur in London or Edinburgh, they will not alter the good governance of the UK or Scotland.

I am sure that committee members will want to develop some of the points that I have raised, convener. I thank the committee for giving me the opportunity to speak.

The Convener: Thank you. One of the issues that has been raised, and one of the reasons for our inquiry, is that the Sewel convention is used more frequently than was envisaged and deals with more issues than was envisaged. In his written evidence, Lord Sewel suggests that the convention was never intended to be used for extending ministerial power. Given that you were involved in the decisions that led to the convention being announced by Lord Sewel, is it your view that the Sewel convention is being used more frequently and for more purposes than was initially envisaged?

Henry McLeish: I am not quite sure that, on balance, I would agree with that. Although the white paper on the Scotland Bill, the thinking before the bill was introduced, the passage of the bill and the debate around it were all of a high order, we were in unknown territory. To be fair to John Sewel and the House of Lords, I think that the approach that we took was important in making it clearer to the UK Government and Parliament that Scotland wanted to be genuinely involved. We could not see into the future.

The nature of the Sewel motions that have come through the Scottish Parliament has varied from the significant and important to the minor. Again, we could not have envisaged the type of legislation that would come up; I am not sure that anyone could have foreseen that. The rather ill-informed remark has been made that there have been more Sewel motions than pieces of legislation in the Scottish Parliament. That is an inane comment, especially as some of the Sewel motions were about small things that were not hugely symbolic for the future of our country—those matters should be viewed proportionately.

I am not overly surprised at what has happened. I believe that devolution is evolution; it is a process, not a product. We are only six years into devolution and things will be happening constantly that could not have been foreseen. The question then has to be whether we have reached a point at which a more clinical and parliamentary approach is needed to answering some of those questions that could not have been envisaged between 1997 and 1999.

Mr Bruce McFee (West of Scotland) (SNP): I am reminded of Enoch Powell, who said that power devolved is power retained. I see that reflected in Lord Sewel's contribution. I am grateful to you for outlining so vividly the truly subservient position of the Scottish Parliament, in which it legislates by the grace and favour of the English Parliament. We will draw our conclusion from that and it will not be a Labour Government.

I take you to one of the issues that are important for the Parliament and the Scottish electorate as a whole. Do you agree that, if the Scottish Parliament transfers legislative responsibility for major policy issues to Westminster, it looks as though the Parliament is avoiding accountability and that that will inevitably undermine the Parliament's authority?

Henry McLeish: If that were true, I would agree with you, but I do not think that it is true. It is my job to be neutral and I think that the Sewel convention is a working tool for the Scottish Parliament. In the Parliament's early days—and it is still early days—I think that it has been successful. I also said that we were not conceding back to Westminster any legislative authority that we had gained.

Michael Keating and Paul Cairney have written a paper, to which the committee has had access, surveying 41 Sewel motions up to 2003. Only 20 of those were opposed. Nineteen of those opposed were opposed by the SNP, 13 for reasons of principle and six because the motions related to private members' bills, with which there is a particular problem. Twelve were debated and not opposed and nine were rubber-stamped, to use a media phrase. As a result, I do not get the impression that there has been a strong ideological and principled debate around the issues.

Since I have left the Parliament, my views have evolved and I now see a future for devolving further powers to Scotland. However, I say with great respect to all political parties that it is easy to use the Sewel convention to hit the constitution publicly. I could give the committee another 25 serious constitutional issues of principle and safeguards that should be addressed.

Although I believe that the Sewel convention is working, you are right to say that it will raise issues. As I have pointed out, the Parliament must, in certain cases, have the power to say to the Executive that an issue should not be decided at Westminster because it raises points of substance on which there might be a divergence of policy and that might require a distinctive Scottish solution. I feel that, if the committee and the Parliament agreed to such a criterion, they would be saying that they had legislative power and that they were going to use it in the interests of the devolution settlement.

10:45

Mr McFee: I am grateful that you set out those statistics, because they show that the Scottish National Party did not use the Sewel convention to hit the constitution. After all, many Sewel motions have gone through without opposition.

On your comment that the Sewel procedures do not concede legislative authority, I understand that they were devised on the basis that, although the English/UK Parliament has absolute authority to legislate on anything that it wishes, it would not normally intervene on issues on which the Scottish Parliament had legislative power. In a way, the procedures effectively hand back to the UK Parliament areas on which the Scottish Parliament could otherwise legislate.

Henry McLeish: I do not think that that is the case. If we are talking about absolutes, the Parliament at Westminster—which, I should add, is the UK Parliament, not the English Parliament—is supreme as far as parliamentary sovereignty is concerned. However, on the question of the Scottish Parliament's devolved responsibilities and legislative authority, it is important to point out that, on bills whose provisions can affect devolved areas of responsibility in Scotland, the Westminster Administration asks the Scottish Executive, "Should we deal with this technical point or do you want to legislate on it?" As a result, you should not criticise Westminster, because it receives the authority to discuss, debate and approve any measures that affect devolved areas from the Scottish Parliament.

I suppose that I am arguing that, if you fight as passionately for devolution as I do, you have to live with the responsibilities of that devolved authority. As a SNP Opposition member, you might not agree with the decisions that the Labour-Liberal Democrat coalition takes. However, the people of Scotland through their elected representatives and the Parliament and Executive of Scotland all have a role to play.

That said, even if the Scottish Parliament says that Westminster can decide on a particular issue, it cannot be conceding legislative authority back to the UK Parliament. The convention is simply a pragmatic approach that allows some workability in the first years of the Parliament.

The other question that arises from your earlier suggestion is how much the Scottish Parliament wishes to get involved in the consideration of 20 or 30 Westminster bills. Does it really want to go through the whole pre-legislative scrutiny stage, all the consideration stages and all the debates on the floor of the chamber for half a clause in a huge Westminster bill, when the outcome of the rest of the legislation is exactly the same for the other parts of the UK and exactly the same wording is

used? I imagine that, as far as scrutiny and financial effectiveness are concerned, the public will wonder why the Scottish Parliament does not allow any coming and going on these matters. Of course, that does not mean that, in future, devolution will not evolve and there will not be any bigger issues for committee members, the Executive and Westminster to deal with.

Richard Baker (North East Scotland) (Lab): Your remarks have clarified some of the debate around Sewel motions, Mr McLeish. Do you agree that some of the comments that we have just heard are based on a misunderstanding of the process? People feel that they are handing back powers to Westminster but, if properly understood, the convention is clearly all about retaining powers and accountability at Executive level in Holyrood. Do you think that, if there were a more informed debate, there would be less opposition to the convention, even as it currently stands—as you say, however, it might evolve—and that a lot of the debate is created by people who are not satisfied with the current constitutional settlement, either because they are unhappy with the powers of devolution or because they think that we should have independence?

Henry McLeish: I accept the notion that it is much easier to sell high political drama to the public through the media than it is to discuss quite technical issues of procedure. That said, my views have changed on the settlement. We could go further in that regard, but I would like to debate those issues where it matters. I do not believe that a debate on the Sewel convention provides that forum.

If the issue were considered more objectively, there would be no occasion on which it could be argued that we were ceding legislative authority to Westminster. Those who argue that point have to deal with the fact that we are talking about our Parliament and our Executive. That is to say, if you accept the notion that we would be handing back parliamentary authority to Westminster—which I do not—you have to accept that that decision would be made by a devolved Scottish Parliament with responsibility for devolved issues. You cannot have it both ways. John Sewel has won that power and has ensured that Westminster has made that concession. Parliamentary sovereignty means that, in theory, a one-line bill in Westminster could abolish devolution. I said that when I appeared before the Parliament's European and External Relations Committee. We should not forget that that is the reality. However, we are not concerned with that; we are concerned with the workability of our Parliament, how and when it moves on and what shape it should take.

Richard Baker: You also made interesting and important points about how the convention works at the moment, given that we have a Labour Government in both Westminster and Holyrood. [*Laughter.*] I accept that the Liberal Democrats are involved at some level in Scotland, but the point is that, at the moment, we have two Administrations that are willing to co-operate. I appreciate that that relates to parliamentary involvement in decisions about when the convention should be used and what safeguards there should be. However, is it not inevitable that the key dialogue will be between the Executive and the Government at Westminster? After all, that is the level at which policies are developed. That is the practical nature of bill teams as they work towards a Queen's speech.

Henry McLeish: What you have said is largely true. Since 1999, there have been a number of issues that, it could have been argued, had a sufficiently important, specifically Scottish dimension. If you agree to a Sewel motion in the Scottish Parliament, you lose control of that bit of the legislation that affects Scotland. The Scottish Parliament tries to debate the Sewel motion at the last opportunity before amendability issues kick in. However, that does not always work, because of considerations relating to the House of Lords and a range of other procedures. Technically, the Scottish Parliament can agree to a Sewel motion because it sees no particular problems with the legislation but, at that point, it gives up accountability because it leaves the issue largely to Westminster and those Labour MPs at Westminster who can participate in the committee that is dealing with the bill.

It is also important to remember that the Scottish Parliament has established a process of consulting the Scottish people that is hugely superior to that which has ever existed or can ever exist at Westminster. Some people feel that, if the Scottish Parliament allows Westminster to proceed on a substantive matter, the consultation process will not be as good as the one that would be undertaken in Scotland and will not allow as much access for people to the legislative process.

The Scottish Parliament has won respect in that area. We have to safeguard the Scottish Parliament's committee work and the work with the public that is done in relation to bills. We must ensure that, if we allow Westminster to progress a bill, there is some way in which we can retain some accountability.

Another issue is how much should be done through the two Governments at work—the Government of devolved matters in Scotland and the Government at Westminster—and how much should be done by us as parliamentarians, because we are the law makers; well, you are the law makers; I was a law maker here, but you are the law makers, and not the Executive. Members

of the Executive, as MSPs, vote and participate in the law making, but the supreme authority for law making in Scotland, on devolved matters, is yourselves. The structure of the Sewel motion process should reflect that and John Sewel's excellent paper gives you some ideas about how that could be done.

There will be those in the Executive—and I have been a member of the Executive—who think that the less fuss the Parliament makes, the better. That is a natural, instinctive reaction from people who are governing. However, it is the parliamentary involvement that is crucial in ensuring that, even if the Scottish Parliament allows Westminster to do something, it is done to reflect the best practices of the Scottish Parliament and not some of the practices of Westminster, which are not as good as ours.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Thank you, Henry, for the interesting evidence that you have given this morning. It has given an insight into where we are now and, in some cases, the situation away at the beginning, in 1997 and 1998, when the Scotland Bill was being developed. I am sure that you will agree that the party that you represented and that I represent saw devolution as a partnership between the people, the UK Government and the Scottish Parliament. Let us go back to when you were in the early stages of developing the Scotland Bill, when the Sewel convention was announced in the House of Lords. Can you give us examples of some of the issues for which it was thought that a Sewel motion would be used?

Henry McLeish: Everybody could foresee a position in which Westminster would retain the power to legislate on both reserved and devolved matters. The settlement meant that 99.9 per cent of devolved matters were primarily ours, but there would always be situations—such as we have seen in relation to gambling, the supreme court and sexual offences—in which a UK bill would be used. I do not think that we talked in specifics but, in terms of the civil service advice, those were the kind of areas in which there was a bit of untidiness. There would be occasions when a UK bill would carry out everything that we wanted to do, so why would we replicate that in the Scottish Parliament?

The question of partnership is important. Even in countries such as Austria, Germany, the United States and Spain—where there are autonomous regions, not a federal system—no matter what degree of autonomy an authority or a part of the Government of the country has, it is necessary to have some kind of partnership model. It would not make sense for a country such as ours within the United Kingdom if we in Scotland were constantly saying, "We will have different legislation just for the sheer hell of it." To me, that is not a point of principle; it is a point of bloody-mindedness. I agree that partnership is essential.

What is good about the partnership is the fact that it has to be respected by both London and Edinburgh. In the future, there may be evolution of the process and things happening that the Westminster Government will not appreciate to the same extent as we do. I make a final point on that. It will be no surprise to you to learn that I believe that England—a country of 50 million people—cannot continue to be governed by one sole legislator for the next 50 years. That is, essentially, a matter for Westminster, but it highlights the fact that Ireland, Wales and Scotland are vulnerable—we are always exposed and isolated, whether on the Barnett formula or whatever. If we had some structure in the UK that reflected more regionalism and devolution in England, that would make our position much clearer.

You are right: no matter who you are, where you are or what party you represent, partnership has to make sense. It is something that we have indulged in for a couple of thousand years and we should indulge in it at the present time.

Cathie Craigie: I totally agree with you about devolution to the English regions, but it is up to the people down there to make that decision.

In answering Richard Baker's question, you reminded us that members of Parliament are the law makers and that Parliament should be making the decisions. Could you give us more of your views on that?

If we are talking about Sewel motions and whether a Parliament—whether the Scottish Parliament or the UK Parliament—has to set out its programme of legislation for the year, surely it must be the two Governments that get together to consider the areas in which they are going to legislate and to decide what Sewel motions, if any, will be required. That has to come from the Governments before it comes to the Parliament.

Do you accept that, over the past few years, as the Parliament has come to understand the workings of the Sewel convention and as it has become more familiar with the operation of Sewel motions, much more power has been given to the committees of the Scottish Parliament to scrutinise legislation proposed through the means of Sewel motions? Do you accept that the committees have been able to establish and develop expertise and that, if we set up a separate committee, as Lord Sewel suggests, that committee might not have such expertise in the specific field that might be being considered?

11:00

Henry McLeish: John Sewel's paper is excellent in some respects. He is clearly suggesting a committee. I do not think that the debate on whether a committee is the main structure for the future undermines in any way the points that have been made. I do not see devolution as a product that is delivered and finished. It is a process, and you have highlighted that. With greater understanding and with greater evolution, parliamentary committees have been strengthened and have become more experienced and mature, and that is all positive. As you implied, Cathie, it is early days. I get dismayed when I hear people say that the Parliament has done this or done that or has been a failure. It has been around for less than six years, after an absence of 292 years. I think we have to put it in perspective.

The second area of concern is communication between the Westminster Government and the Scottish Executive. In our parliamentary system, the Executive introduces most legislation, although proportionally more legislation is generated from outwith the Executive in Scotland than happens at Westminster. My concern is that there will never be a relationship between the Parliament here and the Parliament at Westminster, because Westminster just does not do that. The Scottish Parliament is a completely different set-up.

All I am arguing is that we should evolve further by ensuring that the Parliament has a clearer idea of what is in Scotland's interests, a clearer idea of substance and a clearer idea of when the consultation process would be undermined if we allowed something to be done at Westminster. The Parliament must also have a clearer idea that, when something is to be dealt with by way of a Sewel motion, there is a rounded way of saying, "Look, that's an issue that, quite frankly, makes a lot of sense and, in the interests of efficiency, we should do it," or of saying, "No, this is a matter of substance and there is a divergence." In the latter event, you would then have to persuade the Executive, because it has the majority of votes in the Parliament.

That is my view of how things should work. That does not prevent people arguing on points of principle, outside the committee system, that everything but everything should be done in Scotland. All I am saying is that, although one can respect that position, it does not make good sense in the early days of the Parliament, particularly on certain items. The public will soon round on us and say, "This is unnecessary duplication," even though, in 20, 30, 40 or 50 years' time, the Scottish Parliament could be a very different place, as could Westminster.

Cathie Craigie: The present convention allows the Parliament as a whole to have the final say. It could vote down any Sewel motion that the Executive may lodge. Do you accept that the Parliament has the ultimate control in the present situation?

Henry McLeish: Yes, but I think it would be far, far better if the committees strengthened their views of the convention and of the substance of the items and if they had a much clearer view. The 129 members who comprise the Parliament are the custodians of the parliamentary part of what we are doing, so I do not disagree with you. We are talking about fine differences here, but I think that the parliamentary regime can be stronger. That does not mean to say that it exists to undermine the Executive, but it will be a far better relationship if you have a clearer idea of when a Sewel motion really matters in relation to keeping something in the Scottish Parliament, as against a Sewel motion that allows Westminster to undertake legislation. I am talking about strengthening rather than radical change in the structure.

Mark Ballard (Lothians) (Green): I thank Mr McLeish for his evidence, particularly his affirmation, as someone who has experienced Westminster and Holyrood, that our methods of consultation are effective and working well to engage the people of Scotland.

I was struck by what you said in your opening remarks about the need for constitutional safeguards. Like some other members of the committee, I was struck by the fact that, according to the memorandum produced by the clerk of the Parliaments,

"The Sewel convention has little effect on procedure in either House. The fact that the Scottish Parliament has passed a Sewel Resolution is not communicated formally to either House".

Given that, and given the fact that the passing of a Sewel motion has no real bearing on the legislative competence of the UK Parliament, which retains sovereignty, and that the process is a commitment that became a convention and a set of guidelines, can the Scottish Parliament do anything to affect those procedures at Westminster? We can change the rules for this Parliament, but given that there is no formal relationship with the Westminster Parliament, can we do anything here that will have a formal impact on Westminster?

Henry McLeish: It is not often that I can say no to a question, but I will say no and then elaborate. We are talking about the realities of power and its distribution in the United Kingdom. The devolution settlement has been an enormous step forward for Scotland. Whether Westminster views it as an

enormous step forward for the United Kingdom is an entirely different question.

Because the Executive talks to the Westminster Executive and the Scottish Parliament uses the Sewel convention, the effect that you are seeking will not ever be a part of it. Westminster's practical procedures reinforce its culture of parliamentary sovereignty. I do not believe that that should be on our agenda.

If we want to see the relationship between Edinburgh and London change significantly, we cannot escape the concept of devolved federalism, in which power is genuinely shared. If power is shared, Westminster would have no say or involvement.

It would be constitutionally and politically unrealistic to try to press change on Westminster procedures. To be fair to Westminster, why should it accept that? It is more important that there are other factors at work in the dynamic of the United Kingdom that will evolve the consideration of regionalism in England. Our task in Scotland is to improve the quality of the committee system, of consultation, and of scrutiny of legislation, and get to a situation where the Parliament gains control of the issue with specific criteria and a better acceptance of what is in the interests of Scotland. At present, I do not think that we have quite reached that point.

Mark Ballard: You talked about a piece of legislation where the Scottish Parliament might go through the full pre-legislative scrutiny process, but the outcome might be exactly the same. If we had had the kind of model that you talked about—better committee involvement and consultation—during your time as an MSP and particularly as First Minister, would there have been substantial changes to the outcome? Would the improved process that you have outlined have led to improved or different outcomes?

Henry McLeish: I do not think that that would necessarily have happened. The academic literature, especially Keating and Cairney's paper, is interesting in that if we analyse the content of Sewel motions, although I know that that is not within the committee's remit, it ranges from what I regard as very important issues to those which are much less important.

My argument is that the Parliament and its committees must get a better grip on the Sewel convention if they are to handle more objectively some of the criticisms that have been levelled, such as that the Executive simply leaves Westminster to handle the controversial issues or that the Executive feels slightly intimidated and believes that it had better not say what it wants to do. We need to be much more open.

At the end of the day, certain political parties will argue that every issue, no matter how small or large, should be dealt with in Scotland rather than be the subject of a Sewel motion. However, at this stage, I think that the Parliament should be concerned more about the constitutional niceties and the technical partnership working and less about the principles of the Sewel convention. If people want to argue ideology or principles, there is enough scope for them to do that. There is a big debate to be had on those issues, but that debate should not be hung too much on the hook of the Sewel convention.

In this world, it is just too easy—I am sure that Mr McFee will not object to my making a slight political point—to pick the easy hit by attacking the Sewel convention because it involves our conceding legislative power back to Westminster. With the greatest respect, such a position is completely and utterly ridiculous. If the same political party argued for constitutional safeguards or whatever, that might be of interest to the Scottish people.

To answer Mark Ballard's question, we will never get rid of politics and principle and the big ideas. However, with the greatest respect to John Sewel, the Sewel process is a great convention that works. If we look at it on that basis, it will serve our interests well. However—I will end on a note that might cheer up Mr McFee—let us not exclude the possibility that, since it is a process rather than a settlement, it will undoubtedly move on.

Mr Jamie McGrigor (Highlands and Islands) (Con): Are Sewel motions being used too often or more often than was originally envisaged? Secondly, should there always be an opportunity for a debate in the chamber before the Parliament consents to a Sewel motion? Thirdly, what ought to happen if a Westminster bill is amended in such a way that it goes beyond the consent that was originally given in the Sewel motion?

Henry McLeish: The third question concerns an important issue, which is more than just a technical issue. As I said earlier, the provisions of a bill to which the Parliament agrees under a Sewel motion might look fairly innocuous, but they could change when the bill goes through the machine at Westminster, which includes a so-called revising chamber—it is revising some fairly significant legislation today. When such a bill is amended, members of the Scottish Parliament might feel that they should not have used the Sewel convention or that they should have some mechanism to allow them further involvement. That is where things get quite difficult, but that is a challenge for the committee. As Jamie McGrigor will be aware, I have been away from the deep recesses of the solutions for such things for a couple of years now, but I certainly agree that it is an issue.

On Mr McGrigor's second question, it might make practical sense to release the chamber from the need to be the forum in which such debates take place because some issues might not need to be dealt with in the chamber. However, we must be careful not to undermine the importance of the Sewel convention by saying that the decision is up to the committee and that we should not bother if the motion is nodded through. It would be dangerous to remove such decisions from the chamber without thinking the matter through fully. It would give people ammunition in that they would be able to say that the Parliament does not even bring the issue to the chamber when it decides to allow Westminster to do something. Both public and private considerations need to be taken into account.

As to whether the Sewel convention has been used more often than was envisaged, I am not convinced that I could say that it has. As John Sewel will explain in his evidence, those were heady days at Westminster. After campaigning on the issue for many years—the Liberals in particular had done so for nearly 100 years—we had white papers and bills on devolution as soon we took power at Westminster.

When we went through the issue on the floor of the House of Commons—I spent about 104 hours discussing it on the floor of the House—the Sewel convention was a crucial part of ensuring that Westminster took seriously the issue about parliamentary sovereignty, which would no longer mean entirely what it had meant. We did not ask how many times the Sewel convention might be used or what kind of issues it might be used for. I think that the Sewel convention was a necessary feature of that interface, as has proven to be the case.

Karen Gillon (Clydesdale) (Lab): I am interested in some of the points you make about the role of Scottish MPs at Westminster, Henry. I belong to a United Kingdom party, unlike my colleague from the nationalist party, who is on pretty shaky ground as his leader is a member of the United Kingdom Parliament.

Mr McFee: That is the comment of a British nationalist, as opposed to a Scottish nationalist.

11:15

Karen Gillon: No, I am a member of the United Kingdom and a member of the devolved Parliament within that United Kingdom. I respect the will of the Scottish people in determining that; it is evident that you do not, Bruce.

Henry, you mentioned that Scottish MPs might be involved in committees. Lord Sewel talks in his memorandum about establishing a committee of the Scottish Parliament to oversee Sewel motions, but is there any potential for the Scottish Affairs Select Committee to have a role in monitoring the work that is done at Westminster after a Sewel motion has been passed? I do not know, which is why I ask the question.

Henry McLeish: I do not know either. As I have said, because of the way the Westminster Parliament is structured, the way it works and the way it views the United Kingdom, you would be unlikely to secure change in any procedures at that Parliament.

If a bill is going through the House of Commons, after its second reading, it goes to a committee. There might be Scottish MPs on that committee, but that does not necessarily follow. The other possibility is that the bill is small and wholly Scottish. It is highly unlikely that such a bill would be taken, as it was before devolution, by a grand committee and go back to the House of Commons for proper procedures.

There might be a role for Scottish MPs, but would you want that? Although it would be largely to ensure accountability after the Sewel motion, it would also allow them to get involved in devolved issues, and some people might be upset with that, although I would not necessarily be. Perhaps, if the Parliaments are working in partnership, it should be considered.

Just because I think that there would be no response from Westminster does not mean that those ideas should not be developed. At the end of the day, Scotland must look like it is a progressively run country with a progressive Parliament and we do not mind partnership. Only those who put their heads in the sand on every issue do not want partnership. Whatever our long-term aim, those ideas might be able to take the matter forward.

The Convener: In his memorandum, John Sewel refers to the need, between a bill's going through the committee stage and its being enacted, for some sort of post-legislative parliamentary process in Scotland to ensure that what has happened with that bill is what we approved in the Sewel motion. Is there any merit in such a second chance for the Scottish Parliament to consider a Westminster bill before it is enacted? If so, is the mechanism that Lord Sewel suggests in his memorandum viable, or is there an alternative mechanism—for example that the bill include provisions that those parts of it that refer to devolved Scottish matters can be enacted only on a commencement order that is approved by the Scottish Parliament?

Henry McLeish: I say yes to the principle that the issue is more than worthy of consideration. The second point is to consider the practicalities, which do not rule out the principle or determine

how good it is. John Sewel is trying to highlight the fact that there is an issue with control and accountability and the fact that, when the Parliament passes a Sewel motion, it is putting faith in the decision making of another Parliament.

Let us be mature about it: the Scottish Parliament is crucial and the Westminster Parliament is crucial. Therefore, if we accept the partnership view of the arrangements, it is vital to retain involvement in and control over what has happened on substantive issues. I sign up to that, but I have some problems—perhaps because I have been away from the Parliament for a couple of years—with how that might be realised without losing the momentum of Westminster's legislative process, which can take for ever, just as ours sometimes can in Scotland.

There is an argument to be had about efficiency, but in principle I say yes. John Sewel will be able to elaborate. However, I have some concern about the practicalities.

Mr McFee: I have a brief question that relates to evidence we received from an individual who had considered the US and Canadian versions of federalism. Is it necessary or desirable to amend to the Scotland Act 1998 to enshrine and institutionalise the Sewel convention?

Henry McLeish: The problem is that if you accept that the Scottish Parliament is a creation of an act of the Westminster Parliament—which it is—you could put anything in a bill, but you would still have to leave it to the parliamentary sovereignty of Westminster. There is no reason why such an amendment could not be considered, but I suggest that writing the Sewel convention into the law would not have a dramatic effect.

I mentioned constitutional safeguards, which takes us to another level of thinking about devolution. We talked about federal countries, such as Spain, where the power is shared. I do not want to get too technical, but the point is that devolved power is power that an Administration devolves on the basis of what that Administration decrees in a piece of legislation; shared power is genuinely shared, and that is not the settlement that we have. If we want to have constitutional discussions, we should have them on the big issues, but the Sewel convention and similar issues are not, for me, deep-seated intellectual, political or constitutional areas of concern that need to be addressed.

The Convener: I thank you very much for your evidence and for coming along to the committee. Your evidence has been informative and helpful.

Henry McLeish: Thank you, convener, for extending the usual courtesy.

11:22

Meeting suspended.

11:25

On resuming—

The Convener: I welcome our second witness, Lord Sewel, who, as has been said, was the minister who took the Scotland Bill through the House of Lords and who has been immortalised in the terms "Sewel convention" and "Sewel motion". I thank him for the helpful and interesting memorandum that he sent to the committee. I give him a few minutes to add anything to the memorandum before we ask questions.

Lord Sewel: I thank the committee for offering me the opportunity to give evidence and for imposing on me the discipline of bringing somewhat incoherent thoughts together in a more structured way.

I will briefly run through the main points. Within the constitutional framework of devolution, something like the Sewel convention is absolutely essential to mediate the relationship between the sovereign United Kingdom Parliament and the devolved and subordinate territorial Parliament. Without such a procedure, we would open up the possibility of all sorts of frictions developing and issues about who legislates where and for what, even in relation to devolved subjects.

To anticipate the question on the frequency of Sewel motions, I will avoid the temptation of saying, "The more regular, the better," but instead say that the test is not so much the frequency of the motions, but the subjects that they cover. To be honest, when we considered the issue, we did not have the faintest idea of how often the motions would be used. We were looking into a darkened room, towards something that did not exist. We helped to establish the procedure, but you have given it reality. Although we did not know how often the procedure would be used, we had a fair idea of the circumstances in which it should be used. Roughly, we thought that Sewel motions would be appropriate for relatively minor and technical matters and to avoid the back door to evasion—as Mr McLeish said, we have an unregulated land border, so we would not want to open up a back door to evasion by having incomplete legislation on one side of it. Also, we thought that the procedure would be appropriate when there was a real advantage in having identical legislation in Scotland and the rest of the United Kingdom, even on devolved matters.

One concern, although it is perhaps a matter for vigilance rather than anything else, is the idea of creep. The idea is that, over time, the use of Sewel motions may be extended and get into substantial policy issues, which would be an

inappropriate use of the procedure, especially if controversial policy issues were concerned. One of the benefits and one of the great achievements of the Scottish Parliament, through the electoral system and through the way in which you have organised yourselves, is that it enables the diverse voices of Scotland to be heard and represented. That is a good thing and I would not like anything to work against it.

11:30

As you will see from what I said all those years ago, the original formulation of the Sewel convention was that it dealt absolutely in a very narrow way with legislation in the devolved areas. Its focus has been extended, initially through the guidance notes and memorandum of understanding, to cover such things as the transfer of functions and changes to the powers of Scottish ministers. It is absolutely right that there should be some means by which Westminster—more accurately, the United Kingdom Government—consults the Scottish Executive and the Scottish Parliament on any proposed change to the functions of the Parliament or the powers of Scottish ministers. However, that is not really within the compass of the Sewel convention as it was originally defined. It was originally limited purely to legislation on devolved matters. There should be another route for that process—call it something else, but do not call it a Sewel motion.

I have tried to raise what I think are relatively important matters of process with the aim of locating the Parliament more centrally in the process. After all, the convention is about the interface between two Parliaments; it is not about the interface between two Executives. There ought to be a clear beginning point at which the Parliament approves the Sewel route and there should be parliamentary monitoring of what happens once the Sewel route has been agreed. I know of no bill that has been before the United Kingdom Parliament that has not been changed—I hesitate to say made significantly different, but there are always many changes and Government amendments to a bill as it progresses, which do not necessarily change the character and main provisions of the bill but which are sometimes significant. There ought also to be some form of signing-off for the Parliament at the end of the process. I am not wedded to the specific process that I have outlined in my memorandum. The convener has mentioned the use of commencement orders, which seems, on first flush, to be a singularly appropriate way forward. It might be a lot simpler than what I have suggested.

The Convener: Thank you. One of the key points in your memorandum concerns the use of the Sewel convention to extend powers to ministers. In paragraph 10, you state:

> "The use of Sewel motions in relation to modifying the powers of Scottish ministers is both constitutionally questionable and confusing."

Can you please expand on that and tell us what sort of mechanism you envisaged would be used to extend powers to Scottish ministers?

Lord Sewel: It is fair to say that I did not envisage that at all. A provision is clearly necessary to facilitate discussion and consultation on the extension of the powers of Scottish ministers; that is wholly right. However, I do not think that the Sewel convention is the appropriate way forward in that respect.

As I said, the Sewel convention, as originally formulated, is focused purely on legislation affecting the devolved areas; clearly, an extension of powers to Scottish ministers is not a devolved area. A route is outlined in the 1998 act for the necessary orders and for the approvals of the two Parliaments that are necessary if an order is to be made. However, that is not a Sewel route, in my view.

That was the constitutional issue. The confusion is well illustrated by the case of the Gambling Bill. The Sewel route was used in that case to give Scottish ministers some powers on licensing. As soon as the term "Sewel motion" came about, a fair bit of the public debate became couched in terms that assumed that gambling was a devolved matter—which it is not, as we all know—and some confusion arose.

The Convener: Is this not just an issue about terminology, rather than a constitutional issue? Was it not appropriate to ask the Scottish Parliament's permission for powers to be given to Scottish ministers through the UK bill on a reserved matter? Surely it was just because of the terminology that was used that confusion was caused in the minds of the media and the public—and indeed some Opposition members.

Lord Sewel: The confusion is undoubtedly over a matter of terminology. When the UK Parliament legislates in a devolved area, that is of such importance that it ought to be almost isolated and protected—the route ought not to be used for other matters. You could just call it something else.

Karen Gillon: Being an elected member brings with it particular responsibilities towards those who elect us. Part of the responsibility is about how we best use the time that we have.

You made a point about confusion, in particular with respect to the Gambling Bill. Is such confusion real or manufactured? Is it misleading for the purposes of a certain political perspective? It was fairly clear to me what the Sewel motion was about in the case of the Gambling Bill, but other people decided to use it for a particular political purpose. We cannot legislate against that.

Part of my problem is that we do not have many conventions in the Parliament. If a convention is the best way of doing something, and if it happens to be called the Sewel convention and happens to confuse some people, or if people use it for political gain, why do we need to adopt a new process? Why should we do that just because people misuse the current process? Would it not be preferable to explain more fully what we are doing?

Setting aside the matter of the Civil Partnership Bill, on which I understand there is considerable debate, which of the Sewels that have gone through do you think should not have been Sewelled?

Lord Sewel: I would much prefer to speak in general terms, if I may, rather than going through a checklist of Sewel motions. The general approach is as I outlined and the questions that must be taken into account are whether the matters concerned are minor and technical; whether they can be addressed other than by through a Sewel motion; whether identical legislation is necessary; whether a back door to evasion might be opened up through not passing the motion; and whether there are good reasons to have the same legislation north and south of the border. Another issue is the importance of not using the convention where substantive matters of policy are involved, particularly where those matters of policy are controversial. If you will excuse me, I do not really want to go through a list of Sewel motions and tick some and cross others.

On your other point, I think that the matter is relatively easy. It is a question of finding another term. "Sewel motion" conveys something to a wider public now; in a non-technical sense, it conveys the idea that the whole subject is being handed back to Westminster.

Karen Gillon: It is not being handed back.

Lord Sewel: I know. However, in many conversations that I had on the Gambling Bill, for example, people said, "It is disgraceful. The Scottish Parliament is handing back responsibility for gambling to Westminster." The Scottish Parliament was never in a position to hand back gambling: the subject is reserved. The matter that was the subject of the motion was a very minor one.

Karen Gillon: With all due respect, you have just reinforced the misconception. If I were to look at the *Official Report* and pick out one line, it would be the one in which you said

"handing back responsibility … to Westminster."

Lord Sewel: I did not say that.

Karen Gillon: I know that you did not, but my colleague Bruce McFee is getting excited at the thought that Lord Sewel is saying that the Sewel convention is all about handing back powers to Westminster. The issue is neither about the Scottish Parliament taking a decision as a democratically elected Parliament nor about it giving away anything on which its members chose not to allow the Westminster Parliament to legislate.

Lord Sewel: I agree entirely with that; it was a happier formulation than mine.

Mr McFee: If I may I say so, you are perfectly clear on the issue, Lord Sewel, both in your evidence and in your memorandum. First, I want to clear up the issue of additional powers being handed to the Scottish Executive and Parliament that might otherwise have gone to the Secretary of State for Scotland. Essentially, what you are saying is, "That is not the purpose of the Sewel convention." We should call the process something different; the term is becoming confused with the purpose of the convention, which is to act as an interface between the two Governments.

Lord Sewel: The Sewel convention is the interface between the two Parliaments.

Mr McFee: I beg your pardon.

Lord Sewel: What you say is very fair; you put my position very fairly.

Mr McFee: That is great. I understand what you are saying in that context. I turn to paragraph 7 on page 2 of the memorandum. One of my colleagues said that I was under a misunderstanding when I asked Henry McLeish a question that was based on your memorandum. The second sentence of paragraph 7 says:

"Political accountability for members of the Scottish Parliament must mean an acceptance of responsibility for decision-making in the devolved areas. If Sewel motions were used to transfer legislative responsibility for major policy issues to Westminster there would be a very real danger that the electorate would perceive this as an attempt to shuffle-off responsibility and avoid accountability. The longer-term effect would be an inevitable undermining of the authority of the Parliament."

Henry McLeish disagreed with that statement, as did Richard Baker, who accused me of misunderstanding the position.

In effect, what you are saying in that paragraph is that the Sewel convention should not be used other than in cases of relatively minor and technical issues. However, when the convention has been used, the Scottish Parliament has effectively handed back to the UK or English Parliament—whatever one wishes to call it—the right to legislate in Scotland on an issue; the Scottish Parliament has the right to legislate on that area and the Sewel convention says that Westminster would not normally legislate on it.

Sewel motions are being used to hand back not power but the accepted right of the Scottish Parliament to legislate on a particular issue.

Lord Sewel: Mr McLeish made the point that, from time to time, any Executive might wish to find a device to move away from controversial issues in order to get someone else to take the rap. The idea is not a good one, however.

Mr McFee: Thank you. That is fine; it is absolutely crystal clear.

The Convener: All of us should be crystal clear that there is no such beast as an English Parliament: there is a UK Parliament, a Scottish Parliament, a National Assembly for Wales and a suspended Northern Ireland Assembly.

Lord Sewel: I was waiting for Mr McFee to say an "English Parliament"—

Mr McFee: I think that I did. For the avoidance of doubt, I will say again on the record that I regard the Westminster Parliament as the English Parliament.

Lord Sewel: We then get into different—

Karen Gillon: What a—

Mr McFee: What else—

Lord Sewel: Can I say—

The Convener: Order. Everyone must speak through the chair.

Lord Sewel: It is important that we clear the matter up. I find the phrase "English Parliament" somewhat offensive. As a parliamentarian, I sit as a member of the United Kingdom Parliament; I have no intention of sitting as a member of an English Parliament.

11:45

The Convener: That is a valid point.

Richard Baker: After that exchange, I should reinforce a point that I raised with Henry McLeish. Sewel motions do not affect the Parliament's legislative competence on an issue. There have been accusations that we have been avoiding debate on certain substantive areas of devolved policy by allowing Westminster to legislate on them. Do you agree that, in fact, using the convention in that way has ensured that there is parity of legislation throughout the UK? After all, UK-wide legislation has been important in allowing cross-border flows and in dealing with issues of timing. For example, some people might cross the border to avoid becoming subject to legislation in another part of the UK.

Lord Sewel: That is a fair point. In such circumstances, it is totally appropriate to have similar legislation north and south of the border. Some judgment has to be made when such situations arise.

The Convener: The Civil Partnership Bill is an example of a situation in which the Sewel convention was used because the policy objective could not have been achieved through devolved legislation alone—some of the issues that it touched on were reserved. Do you agree that Sewel motions can be considered in such circumstances? Obviously, it is up to the Parliament to approve that approach.

Lord Sewel: I think that we are getting into pretty arcane matters. It is better to exercise judgment within a broad set of guidelines.

The Convener: I understand that. I was simply wondering whether a Sewel motion would be appropriate for legislation that touches on a mix of devolved and reserved matters.

Mark Ballard: Thank you for your memorandum, Lord Sewel, which I am sure will prove useful in the committee's discussions. Reading the memorandum, I think that you are talking about three quite distinct interfaces. First, in paragraph 10, you refer to modifying the power of Scottish ministers and suggest that the Sewel motion route is not necessarily appropriate for that interface. In that regard, you mention the Scotland Act 1998, which I understand contains a provision for making orders in council. Why have Sewel motions been used instead of such orders?

Secondly, you mention the use of Sewel motions for minor and technical matters. However, as other colleagues have pointed out, you say in paragraphs 7 and 8 that it is inappropriate to use Sewel motions for some of the cross-border legislation issues that Richard Baker mentioned or for achieving policy objectives that cannot be achieved through devolved legislation alone.

It seems to me that you are also talking about a third, separate interface. Could we retain the Sewel procedure for minor and technical matters, but introduce a mechanism to deal with ministerial powers and another for the matters that Richard Baker and Iain Smith have raised?

Lord Sewel: No. I return to the convention's original formulation, which I remember almost by heart. We wanted quickly to establish a convention by which the UK Parliament would not usually legislate on devolved matters, except with the support or approval of the Scottish Parliament. As a result, a Sewel motion should be used only in relation to legislation that touches on devolved matters. There must be some means by which the Scottish Parliament could approve a transfer of functions and powers. Those topics are not the subject of devolved legislation; they are different and they should require a mechanism that is called something else. That is all that I am saying.

I have been talking about UK bills rather than about orders. I am not sufficiently familiar with whether orders have been used. I can see why a UK bill has been used from time to time rather than an order, because that provides a different route. The orders under schedule 7 to the Scotland Act 1998 that affect powers and functions require the approval of the Scottish Parliament in any case.

Mark Ballard: But they would not be Sewel motions.

Lord Sewel: They would not be Sewel motions on the orders; they would be Sewel motions if they related to UK legislation.

Cathie Craigie: Thank you for your paper. It contains quite a lot that I could take issue with, but I will confine myself to a few points.

You say that you would prefer a parliamentary committee to be established to consider Sewel motions that come before Parliament, and you argue that such a committee would be able to establish and develop expertise in the field of Sewel motions. I believe that it is more important that people in the Parliament and committees establish expertise in the subject of the Sewel motion rather than the mechanisms for it.

The Parliament has changed the way in which it deals with Sewel motions during the past couple of years. Does that satisfy your wish that the Parliament should be more involved? The committees now have an opportunity to scrutinise legislation that is going to be Sewelled.

Lord Sewel: Members of the Scottish Parliament are best placed to know how they can put in place procedures that will allow them to get to the desired end. However, having technical knowledge in a subject area is slightly different to being sensitive to process and procedure. Expertise in the way in which the Parliament deals with secondary legislation and whether that secondary legislation goes that wee bit too far has been developed in committees that have dealt with secondary legislation rather than through any subject committee. It is up to you.

My only point is that I think that there is merit in a committee—it could well be this committee, which is called the Procedures Committee, after all—recommending that the Parliament go down the Sewel route. That committee should monitor what happens during the parliamentary process; I suppose then that it would not have to take another look at the principles. It would say whether what comes out of the Westminster process is the same as what the Scottish Parliament signed up to and formally tick the box. However, I suggest that there is merit in parliamentary involvement at the beginning and at the end of the process. I recognise, however, that timing is enormously difficult.

Cathie Craigie: We have parliamentary involvement at the beginning and at end of the process. The Sewel motions come from the Scottish Executive as a suggestion—the two Governments are responsible for putting through the legislation, as I suggested to Mr McLeish.

The Parliament is involved at an early stage. It is involved in scrutinising legislation through the committees, and Scottish Executive ministers are committed to advising the Parliament of any substantial changes to what was originally proposed. Does that not satisfy the requirement to involve the Parliament?

Lord Sewel: No. I am more a parliamentarian than I am anything else and while I would not question the fact that members of the Scottish Executive are all decent and honourable people, I would not be happy with the situation that you describe. In a parliamentary process, you should not rely on the Executive advising you; you have to satisfy yourselves as parliamentarians.

The Convener: You are suggesting that there could be a separate committee to consider Sewel motions. Is there not an argument for following the model wherein the Subordinate Legislation Committee considers the technical aspects of subordinate legislation but the relevant subject committee considers the policy aspects?

Lord Sewel: There might well be; that is something for you to consider. With so little knowledge of how you work on a day-to-day basis, I would not dream of trying to tell you what to do in that regard. What I am suggesting is that you should do the three things that I mentioned and that there should be some considered parliamentary start to the process after some examination. Going straight to the floor of the Parliament is most likely not a good idea. There should be some monitoring of the process and some endorsement of the outcome.

Cathie Craigie: It seems that you are not aware of the way in which we operate. Sewel motions go to committees—even some of the technical ones—and it is for the relevant committee to recommend whether they should be agreed to or not.

Lord Sewel: Am I right in my understanding that that is at the beginning of the process?

The Convener: It would be fair to say that there is no formal monitoring process but that, if an amendment were to change the basis on which the Sewel motion had been agreed to, the matter would come back to Parliament. As you rightly say, there is no final decision on the part of the Scottish Parliament after an act has completed its Westminster stages.

Lord Sewel: As I understand it, the monitoring is done by the Executives.

The Convener: I think that that is the case.

Cathie Craigie: Earlier, Lord Sewel sort of answered one of our questions before we could ask it when he talked about what was in his mind and the minds of other politicians back in 1998 with regard to how the Sewel procedure would operate.

Karen Gillon asked a question on this subject. The Sewel convention is a big issue for some people but it is certainly not a big issue for the people who I represent and who come to my surgeries. Very few of them—none, in fact—have ever come to a surgery to say that they disagreed with the Sewelling of an issue. However, what people agree with and have voted for is a system in which the Scottish Parliament and the UK Government operate in partnership. The Sewel procedure—which will evolve and improve over time—seems to be an effective way of sharing in that partnership. I am not convinced by the paper that Lord Sewel has put before us. I do not think that we should re-examine the system and change it drastically.

In relation to Sewel motions that involve the powers of ministers, is Lord Sewel suggesting that we call them a different name or that we should change the system drastically?

Lord Sewel: Just give that process another name.

Karen Gillon: We could call them Gillon motions.

Mark Ballard: Lord Sewel, in your paper, you propose that there should be a new stage involving

"the Scottish parliament adopting Westminster legislation immediately prior to Royal Assent".

Could you give more explanation of how you envisage that working? In particular, could you say whether it would require procedural change and, if so, how such procedural change at Westminster might be instituted?

12:00

Lord Sewel: This is the difficult bit, to be honest. In that bit of my paper I was trying to set out a procedure that would satisfy what I think ought to be the main stages in the process. I reiterate that those are: parliamentary approval to go down the route in the first place; parliamentary monitoring of what happens; and parliamentary sign-off at the end that the Parliament is satisfied that what it signed up to is what is being delivered. I am not wedded to the particular details of the process that is in my paper. On reflection, something like a commencement order may be much more workable and a much simpler route to take. I recognise that the process that I have outlined in the paper is quite difficult to deliver.

Mr McGrigor: Do you think that limits should be set that would restrict Westminster from amending a bill outwith the original consent that had been given after a Sewel motion had been agreed to?

Lord Sewel: I think that you would find it impossible to prevent Westminster from deciding to legislate how and on whatever it wished. If the process of amending a bill during its passage produces legislation with which the Scottish Parliament is no longer satisfied, it can reasonably withdraw the Sewel motion and not adopt the bill.

Mr McGrigor: That would surely be rather difficult if consent has already been given.

Lord Sewel: I thought that, even under the Scottish Parliament's existing procedures, if a bill is significantly amended a supplementary memorandum is submitted and the Parliament can agree or disagree to that. Is that not the procedure?

The Convener: That is certainly the case, but if a bill is amended at the final stage in the House of Lords or the House of Commons, it may be difficult for a Sewel motion that withdraws our support to go through when the bill has already passed through the previous stages. The process essentially works up until the very final stage of the Westminster process, but it cannot possibly work after that, which is where commencement orders or some other post-Westminster procedure may come in.

Lord Sewel: It is important that the initial decision to go down the Sewel route is taken pretty early in the parliamentary process. I would prefer it to be taken before the second reading of a bill in the UK Parliament. To be fair to Westminster parliamentarians, there ought to be an appreciation by them that the intention is that the legislation should apply to Scotland.

Mr McGrigor: You have given us a hint that you think that Sewel motions should be between Parliaments rather than between a Government and an Executive. As the architect of the arrangement—or the arrangement that should have been—how do you feel that it has gone?

Lord Sewel: First, it is essential and, secondly, I think that it has worked reasonably well. Obviously, as things develop it is necessary to change, adapt and modify the process. We have most likely reached the right time to examine how the process is operating, how it is developed and whether there is a need for any modification. As I have indicated, there is a case for there to be some modification, but that is not about throwing

out the whole business. I do not think that you can throw out the whole business.

Richard Baker: My question is on the decision on when and for which pieces of legislation the Sewel convention should be used. I take your point entirely that the Sewel convention is between the two Parliaments rather than between the Executive and the Government, which is of course an important principle. The memorandum from the UK Government gave us useful information about how decisions on whether to use the Sewel process were reached at that level. There is already a lot of dialogue between the Executive and the Government at that stage. Perhaps their decisions are more informed than a committee's decisions would be. There is a lot of debate about having greater parliamentary scrutiny of legislation that goes through the Sewel process and about the length of time allowed for debates on Sewel motions. Could concerns about that be met not only by considering the earlier part of the process but by changing the way in which committees scrutinise Sewel motions and the amount of time that they spend on them?

Lord Sewel: You made a lot of points there, which I will try to address. If the United Kingdom Government introduces legislation that could relate to Scotland although its subject is devolved, discussions are held initially between the UK Executive and the Scottish Executive. That is absolutely essential, right and proper. However, legislating is a parliamentary process, which is why it is important to have parliamentary involvement all the way through, from approval to monitoring and signing off. That is a parliamentary function. Mr McLeish made the point that the Executives do not legislate; the Parliaments legislate. The Sewel convention deals with legislation and the interface between two Parliaments.

The Convener: In paragraph 14 of your memo you refer to scrutiny and the fact that the Scottish Parliament has a more developed process of involving the public in evidence taking, which is lost once we agree to a Sewel motion and legislation is dealt with at Westminster. Do you think that there is merit in considering whether Scottish MPs should be involved in processing bills that have been Sewelled to ensure a level of scrutiny? My colleague Karen Gillon suggested to Henry McLeish that the Scottish Affairs Committee could be involved in that.

Lord Sewel: I am reluctant to say anything about the procedures of the House of Commons. For legislation that is purely Scottish, it has the Scottish Grand Committee; for other legislation it has standing committees. I will not say that it is a matter of chance, but it is a matter of selection whether a Scottish MP is on a given committee. It is important that it is made clear at a bill's second reading whether the intention is to apply it in Scotland, because that gives Scottish MPs the opportunity to contribute.

The Convener: There are no other questions. Thank you for your interesting evidence and memorandum, which I am sure will give the committee a lot of food for thought as we continue our inquiry. Thank you for coming along.

Lord Sewel: Thank you.

Commissioner for Public Appointments in Scotland (Draft Changes to Standing Orders)

12:09

The Convener: We will deal with item 2 and then suspend for a short time before the next witness arrives—we are not expecting them until 12.30.

Item 2 is on the draft changes to standing orders and the report that we agreed at a previous meeting on the Commissioner for Public Appointments. We will go through the changes one by one to see whether members are content with them. I refer to paper PR/S2/05/3/6.

Are members content with change 1, to insert new rule 17.5 on consulting the Parliament?

Members *indicated agreement*.

The Convener: Are members happy with change 2, to rename chapter 3A "Commissioners"?

Members *indicated agreement*.

The Convener: Are members happy with change 3, to delete the words "for appointment"?

Members *indicated agreement*.

The Convener: Are members content with change 4, to rename rules 3A.3 and 3A.4.

Members *indicated agreement*.

The Convener: Are members content with change 5?

Members *indicated agreement*.

The Convener: Are they content with change 6?

Members *indicated agreement*.

The Convener: Are they content with change 7?

Members *indicated agreement*.

The Convener: Are they content with change 8?

Members *indicated agreement*.

The Convener: In that case, we can say that we are content with the proposed changes, which will be appended to the final version of the report. The intention is to publish the report on Monday 7 March. It is presently scheduled for a short, half-hour debate in the Parliament on 16 March.

I suspend the meeting until 12.30, at which point we will resume the evidence taking on the Sewel convention inquiry.

12:12

Meeting suspended.

12:32

On resuming—

Sewel Convention Inquiry

The Convener: I am pleased to welcome Mrs Anne McGuire MP, who is the Parliamentary Under-Secretary of State at the Scotland Office. She is accompanied today by David Crawley, who is the head of department at the Scotland Office, and Hugo Deadman, who is the head of the constitutional policy branch at the Scotland Office.

Thank you for coming, Anne. We will give you a few minutes to make an opening presentation, after which we will have questions from committee members.

Mrs Anne McGuire MP (Parliamentary Under-Secretary of State for Scotland): Thank you very much, Iain. I am delighted to be here. At one point this morning I was not sure whether I would be able to get here: Edinburgh airport was closed and British Midland cancelled our flight. Thankfully, we could go into a second airport, and we came via Glasgow.

You have already mentioned my two colleagues, David Crawley and Hugo Deadman, and I understand that you have already received the Government's memorandum. We have deliberately gone into some detail about the issues connected with the machinery of Government, as the committee is especially interested in how the Sewel convention works within the UK Government. In my opening remarks, I will reiterate some of the messages from the memorandum.

Devolution works through the partnership between the United Kingdom Government and the Scottish Executive and the UK and Scottish Parliaments. It has worked well, and dialogue on the process is part of that partnership and success. The Sewel convention is an integral part of the devolution settlement. It recognises and caters for the fundamental principle of the British constitution that the UK Parliament is sovereign and adapts it to allow for the reality of devolution.

The convention is not in any way a derogation of the competence of the Scottish Parliament; the Government that created devolution is not about to undermine it. There is no question of Westminster railroading the Scottish Parliament or telling the Parliament what to do and when to do it.

The convention also delivers eminently practical solutions. I can see no evidence that it has been used to sidestep difficult issues by sending them down to London. Instead, the convention is the means of continuing to knit together Scotland and the rest of the United Kingdom.

Many Sewels relate solely to small but important areas of UK bills that make the law in reserved or devolved areas work across the whole of the United Kingdom. It is used not just for matters on which the Parliament can legislate but for other purposes too—the executive devolution of functions to the Scottish ministers in reserved areas and variations of the legislative competence of the Parliament. Given that the convention is about practical outcomes, it must continue to be about a practical process. The Sewel convention is a convention of the UK Government, but the way in which consent is sought is a matter for the Executive and the Parliament to determine.

The other main point that I would like to underline relates to the practicalities. The two Parliaments do not share a common legislative cycle and the Sewel convention is the point at which the two Parliaments touch. I note the calls for the formalisation of reference and consideration as part of the seeking of Sewel consent, but that is a matter for the Parliament. That said, I would like to underline the need for flexibility so that the Executive and Parliament's consideration of Sewels and the UK Parliament's programme do not lose touch with one another. After all, it is the UK Parliament that will take through the legislation if consent is given.

I am sure that, if the reason is solely that a rigid structure does not allow a desirable policy outcome, we all share the view that Scotland should not lose out because provisions do not extend to Scotland.

That said, I am happy to be before the committee in order to show how seriously the UK Government takes its obligations and how our consideration of the need for Sewel consent is factored into the development of our legislation. I also want to show how seriously we take our close liaison with the Executive. All of that goes to show that the Sewel machinery is designed to respect the rights of both the UK and Scottish Parliaments.

The Convener: Thank you. Before I open up the meeting to general questions from the committee, I will raise an issue that was highlighted in earlier evidence. I appreciate that you did not hear the evidence, minister. The evidence concerned the way in which the convention has operated. Although it is meant to be about the interface between the two Parliaments, it has become about the interface between the two Governments—the Scottish Executive and the Westminster Government.

The role of the Westminster Parliament in the process is relatively peripheral to the extent that it does not even get formal notification of the Scottish Parliament's acceptance of a Sewel motion. Is there a need for a more formal relationship between the Scottish Parliament and

the Westminster Parliament in respect of Sewel motions? At present, the process by which the motions go before the two Parliaments appears to be one that largely involves the two Governments.

Mrs McGuire: The issue is one that is difficult to manage. The reality of government, both in Scotland and in the United Kingdom, is that the legislative programmes are driven by the Executive arm. I appreciate that there are areas within the Scottish Parliament in which back benchers have a role in determining legislation. Indeed, there is a similar situation in the United Kingdom Parliament. We have to start from the practicalities of government, however.

The other major difficulty is the fact that a great deal of preparatory work is done for Sewel consents. Significant liaison takes place between officials in the lead-up to the Queen's speech, for example. If the convention were to be made a Parliament-to-Parliament only convention, we would lose the co-operation and preparation that the present convention allows officials and the Executive in preparing memorandums and so forth for Scottish Parliament committees. The Scottish Parliament would not get to know what was in the Queen's speech until the United Kingdom Parliament got to know it, which is on the day of the speech.

I am sure that members appreciate that the Queen does not magically produce bills on the morning she goes to open Parliament—I am talking about the preparation of bills, rather than the Queen's speech itself. We must ensure that the preparatory work is done.

As I said in my opening remarks and emphasised in my memorandum to the committee, the issue is good government throughout the United Kingdom and we must deal with the reality of the legislative process. The issue is not about undermining the Scottish Parliament. Members of the Scottish Parliament are in control of the parliamentary process and we do not seek to interfere in the process or to predetermine how it operates. However, the relationship between the Executive and the Government works.

The Convener: I was not proposing a Parliament-only process; I was perhaps suggesting that there might be a need for a slightly more formal relationship between the two Parliaments and in particular a mechanism for notifying the two Houses when the Scottish Parliament agrees to a Sewel motion. As I understand it, there is currently no such formal notification procedure.

Mrs McGuire: It would be difficult to include a formal procedure for notification in the standing orders of Parliament. I will explain how the system worked in relation to the recent Civil Partnership Bill. I indicated in my winding-up speech at second reading that the bill would be the subject of a Sewel memorandum. When the bill reached its remaining stages and I dealt with the Scottish provisions, I mentioned that the Scottish Parliament had agreed to the Sewel motion.

I take the point that there might be an informal way of asking UK ministers to acknowledge that there has been a Sewel discussion in the Scottish Parliament, but it would be incredibly difficult to create a formal procedure for doing so. I appreciate that due recognition should be given to the process in the Scottish Parliament and we can consider the matter.

Cathie Craigie: Thank you for your memorandum and your statement, which were very helpful. I am sure that we all want practical outcomes to flow from Sewel motions.

I do not know whether the minister has had the opportunity to read Lord Sewel's memorandum to the committee, in which he reminded us of his expectations of the Sewel convention. Lord Sewel said at Westminster:

"we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament."—[*Official Report*, *House of Lords*, 21 July 1998; Vol 592, c 791.]

That is clearly what has been happening.

However, Lord Sewel's memorandum expressed concern that the scope of the convention appears to have been broadened to include the devolution of additional powers to Scottish ministers. I do not think that Lord Sewel has a problem with the devolution of additional powers, but he took issue with the use of the Sewel convention for that purpose, given that that was clearly not the intention of his remarks in 1998 or the will of the UK Parliament at the time. Will you comment on that?

Mrs McGuire: It is for the Scottish Parliament to decide how it wants to manage its consent for proposals in UK Government legislation. In some instances, it might be quite complicated if the Parliament had, in effect, to manage two processes in order to reach one outcome. I will provide an example: two clauses in the Disability Discrimination Bill, which has recently been introduced, relate to devolved matters. The bill also contains a variation on the executive competence of the Scottish ministers.

As I understand it, Lord Sewel is saying that the Scottish Parliament needs one procedure for varying the competence of the Scottish ministers or the Scottish Parliament, and another procedure for UK legislation on a devolved matter. That would mean that both procedures would be required in relation to the Disability Discrimination

Bill. It is for the Scottish Parliament to make up its mind on the issue, but I think that such a system would be unnecessarily bureaucratic.

Lord Sewel said in 1999 that the UK Government would not normally legislate in areas of competence of the Scottish Parliament. We have fulfilled that commitment and that convention with the exception of one case, in which there was an error—I mention that in case anyone wants to pick it up. The minister concerned put his hands up and issued an apology to the Parliament and nothing was enacted.

I think that the Sewel approach has worked. If we want to have a different process, we could call it the McGuire convention, the Craigie convention or—I will be even-handed and see whether I can pick out anyone else—the Smith convention. I trust that you understand what I am saying. My advice is that that would be unnecessarily bureaucratic, but it is for you to make the decision.

12:45

Cathie Craigie: We know that the Sewel convention is a convention and not a law—that was emphasised to us in the evidence that we received this morning. You said that the Government that created devolution is unlikely to do anything that would damage the Scottish Parliament. Do you think that there is any need to enshrine the convention in law in some way or will future Westminster Parliaments honour the convention that has been established?

Mrs McGuire: One of the advantages of the convention is that it has built up significant credibility during the past five years. There have been about 60 Sewel motions. As I am sure colleagues will know, a great deal of the British constitution is, in effect, based on convention and practice. I foresee the processes that have been established in the past five years being robust enough to take us through a continuing partnership between the United Kingdom and the Scottish Parliament.

A great deal of the work is done at official level. With the greatest respect to political colleagues, we come and go—some of us might face going slightly sooner rather than later. However, the official, core work of government goes on and a great deal of that expertise and practice is embedded in the civil servants both in the Scottish Parliament and at Westminster. There is always a debate about entrenchment. I am sure that Cathie Craigie will remember some of the debates that we had about whether one could entrench the powers of the Scottish Parliament. We dealt with that though the referendum and the Scotland Act 1998, which we made as robust as possible. The Sewel convention is pretty robust and I think that it will survive.

Mark Ballard: You quite rightly said that the Scottish Parliament has the prerogative to discuss, in relation to its own procedures, how consent is sought. The issue about the relationship between the Scottish Parliament and the Westminster Parliament is how consent is communicated. In the helpful paper that you prepared for us you identify the fact that a wide variety of different provisions fall under the heading of Sewel motions. Do you have any thoughts about how those different provisions might give rise to different methods of communicating consent?

In addition to the convener's point about the formal communication of consent in the debate, do we need provisions for communication between Scottish Parliament committees and Westminster committees and provisions for communicating consent after the last amendable stage? Amendments may come in after the Sewel motion has been passed by the Scottish Parliament, and therefore after the opportunity for consent to be communicated from the Scottish Parliament to Westminster.

Mrs McGuire: As you will be aware, there has been a change of process in the Scottish Parliament. There was discomfort that a Sewel motion had been lodged between the first reading and the second reading in the first house—you have to remember that we have two houses, which can complicate matters slightly. The bill had to lie on the table for two weekends—the period could be as short as that, so it can be a tight timescale.

Looking at the matter as an observer from Westminster, I think that the current process, which encourages the Sewel memorandum to come in before the last amending stage in the first house, allows a lot more opportunity for discussion and comment. The Justice 1 Committee undertook a significant consultation on the Civil Partnership Bill, and I met representatives of the committee to talk through some of the issues that they still had a bit of a niggle about. There are various ways of communicating that sort of information.

At Westminster, where there is a bicameral system, for the most part we try to discourage amendments in the second house for an obvious reason. If an amendment is lodged in the second house that has not yet been considered by the first house, the bill has to go back to the first house. In respect of the machinery of government, it is quite complicated to do that; therefore, we try to keep to a minimum the number of amendments that are lodged in the second house. So, for example, if a bill is introduced in the House of Lords, we will try to deal with as many of the amendments as we can in the House of Lords. Otherwise, we would get into a game of ping-pong, with the bill passing between the House of Lords and the House of Commons.

I return to something that Iain Smith asked about, on which I perhaps did not answer fully. If major changes are made to a bill as it is amended, the Executive submits a supplementary memorandum to the parliamentary committee that is scrutinising the bill. I am not sure which Westminster committees would be the appropriate ones for any communication. We have standing committees for bills but we also have select committees, which may be more like the committees of the Scottish Parliament.

I talked earlier about encouraging a notification to Westminster that something has been or will be the matter of a Sewel discussion—whichever is the appropriate phrase at the time. I think that that would be helpful. It would alert 651 members of the House of Commons to the fact that there was a devolved matter on which the UK Government was seeking to legislate. That would be an informal agreement or understanding, and we would use our good offices to encourage that to happen.

I do not know whether that quite answers your question. The issue is the management of the legislative programme at Westminster. With the two houses and amending stages, timescales can sometimes be quite swift and can sometimes extend for quite a long time, which means that we need to work closely with our Executive colleagues to ensure that they can relay the information appropriately to the Scottish Parliament and the relevant parliamentary committee.

Mr McGrigor: You said that our two Parliaments work on different cycles. What are the procedural implications if the amendments go beyond the original consents that are given by the Scottish Parliament for the Sewel motion? If the amendments at Westminster were debated when the Scottish Parliament was in recess, what would you do about that? Would there be any circumstances in which it would be appropriate for Westminster to proceed without consent?

Mrs McGuire: That harks back to my earlier point and the point that we make in the memorandum: there needs to be a great deal of co-operation. It is correct to say that we operate on different legislative cycles although, to be frank, the difference is now only a matter of a few weeks during the summer when there is a long recess. The other recesses are a bit more manageable. The preparation work that is done helps us to manage the two cycles and ensures that the Scottish Parliament has adequate time to consider the issues.

One of my colleagues may want to comment on the two legislative cycles.

Hugo Deadman (Scotland Office): If there is to be a Government amendment and there is a suggestion that it might apply in a devolved area, the choice would be the Executive's—it would be for the Executive to decide whether it wished the amendment to apply in that devolved area, and that would be one of the subjects of the prior formal ministerial correspondence. The moment at which the amendment concerned is debated in the UK Parliament would have been preceded by some consideration, albeit sometimes fairly short, within the Government and the Executive. Such things do not come as a bolt out of the blue. UK bill teams liaise very closely with Executive officials as bills progress, and a great deal of prior consideration is usually given to such issues. Were an amendment to be debated during a recess of the Scottish Parliament, things would have happened prior to that.

Mr McGrigor: Lord Sewel, having obviously been one of the major architects of the Sewel convention, hinted in his evidence that the mechanism was meant to apply to minor, technical issues. Do you think that it has been used too often?

Mrs McGuire: I am not sure what Lord Sewel said, as I did not hear his evidence. He is on record as saying that, in his opinion, the Sewel convention has worked well and has delivered a pragmatic approach in those issues that cut across devolved and reserved areas. I am not sure what he said here, however.

We need to look back to where we were in 1997, 1998 and 1999, when the Scottish Parliament was established, when a major constitutional change and a major decentralisation of government was taking place. In many ways, that was a major unpicking of the ways in which Government had operated. I am not sure whether, in 1999, we could have said with total confidence that Sewel motions would be used only to deal with technical matters.

As we have all developed under the devolutionary partnership, colleagues at both the Scottish Parliament and Westminster have come to work with the way in which legislation operates. There is not always such a thing as a clean line between the devolved and the reserved. We have learned to appreciate the fact that the Sewel convention was there to let us deal with some issues in an open and transparent manner. Lord Sewel, in saying his prophetic words during the passage of the Scotland Bill, might not have known how important the convention was going to be for good government across the United Kingdom.

Mr McFee: When a bill that covers both reserved and devolved matters in relation to Scotland is going through the Westminster Parliament, and the consent of the Scottish Parliament is withheld, all that that means is that

the devolved, Scottish element is removed from the bill, but the reserved issues simply proceed. Is that correct?

Mrs McGuire: Yes.

Mr McFee: Sometimes, there seems to be a misconception that the whole process would stop dead in relation to Scotland. That is not the case; only those areas that relate to the powers that have been devolved are affected.

Mrs McGuire: I am sure that Mr McFee and I can agree that there are significant elements of UK Government policy that still impact on Scotland. You are right to say that the provisions covering those issues would go ahead, because it is the reserved right of the United Kingdom Parliament to legislate in those areas. Given what I have already said, when consent has been withheld for a piece of a bill that would impact on Scotland, we would not normally seek to legislate in that area.

I will give you an example. The Serious Organised Crime and Police Bill was the subject of a Sewel motion about four or five weeks ago, I think, and there was an element within that bill with which the Scottish Parliament was uncomfortable. In fact, it was about giving powers to Scottish ministers and the Parliament decided that it did not want to accept those powers. That part of the bill was then removed and the bill was amended. We had all the ducks lined up. We had all the contingent measures in place to ensure that we did not legislate in the face of the lack of consent from the Scottish Parliament. You are right to say that the reserved areas would still continue.

13:00

Richard Baker: Your paper was useful in giving us some background on how the convention works in practice in dialogue between Administrations and officials.

I have two questions. First, a lot of questions in the debate seem to be arising just now. Perhaps that is because of different parliamentary timetables and the fact that a lot of legislation is going through at Westminster, which has had an impact on the number of Sewel motions. Do you feel that any particular pressures have been put on the convention because of the different timescales of the Parliaments?

Secondly, you made some helpful suggestions about Parliament-to-Parliament dialogue, but much of the debate here has been about the extent to which Sewel motions are scrutinised in the Scottish Parliament. What needs to be highlighted more in the debate is the fact that this Parliament always has a final say on the motions. Would it be productive for us to take a look at how committees debate and scrutinise the motions?

Mrs McGuire: The second point is a matter for the Scottish Parliament's committees, but I shall deal with the first point, on timescales and pressure. One of the reasons why I was quite firm in my view that the initial relationship must be between the Executive and the UK Government is the very issue of timescales, because such a relationship allows the preparatory work to be done. For example, it allowed Margaret Curran to highlight to the Scottish Parliament, within a few minutes of the Queen sitting down after making the Queen's speech, the areas in which it was anticipated that the Executive would be asking for a Sewel motion. That was done as quickly as it possibly could be, but behind all that there is a great deal of preparation.

In the Scotland Office, we ensure that officials at Whitehall realise the importance of the convention and appreciate that they must get it right and on time. I was going to say that we take very seriously the education of Whitehall officials, but that might be seen as pejorative. Part of that is about working with the appropriate Scottish Executive officials. Indeed, Margaret Curran and I spoke to a packed house of both Scottish Executive and UK officials just after the Queen's speech, to ensure that all the bill teams recognised the importance of the convention and knew what they would have to do to ensure that it worked.

Reference was made to there being two different timescales. We try as hard as we can, with colleagues in both the Executive and Whitehall, to ensure that we get it right. The timescale issue is one that we manage. I cannot look into a crystal ball and say that, if some emergency comes up, we will not have to work together to make that happen, but for the most part, we want to maximise the time and preparation that are given to colleagues.

The convention is important and we feel that some of the publicity that is given to it is not always the most appropriate. I hope that the Procedures Committee's inquiry will allow some of the facts about how the Sewel convention operates to get a public airing in a way that has not happened recently.

The Convener: In the interest of airing those facts, could you comment on the fact that much of the publicity about Sewel motions is couched in terms of the Scottish Parliament handing back powers to Westminster? The Government's memorandum makes it clear that that is not the case, but perhaps you could confirm that your understanding is that legislative competence, and therefore the powers of the Scottish Parliament, are not affected by the passing of a Sewel motion?

Mrs McGuire: I am delighted to give you that assurance. The passing of a Sewel motion does not in any way challenge the competence of the Scottish Parliament as laid out in the Scotland Act 1998. The convention is a mechanism for ensuring that we work together for the benefit of people in Scotland. Regardless of our political views, that is an aim that we can all share. The convention is a mechanism for maximising the use of parliamentary time in the Scottish Parliament and at Westminster.

Karen Gillon: If an MSP has not been on a committee that has dealt with a Sewel motion, their experience of Sewel motions is relatively limited. As you were involved in the Sewel motion on the Civil Partnership Bill, I ask you take us through what happens at your end and your dialogue with the Scottish Parliament committee or the Scottish minister. I am not asking you to go into the specifics of who said what, when, where or how, but to explain the process so that we can get a better understanding of its workings from your end.

Mrs McGuire: The Civil Partnership Act 2004 is, in some respects, a model of how to operate. There were parallel consultations by the Scottish Parliament, the Department of Trade and Industry and the Northern Ireland Office on the Civil Partnership Bill. A great deal of work was done to build up to the bill. I will ask one of my colleagues to speak about the involvement at official level, but I liaised closely with Jacqui Smith, the DTI minister who was in charge of the bill, and with Margaret Curran and Hugh Henry. We ensured that we kept in touch during the bill's passage through Parliament.

I cannot remember whether it was highlighted earlier how we did the briefings, which were really helpful, but discrete elements of Scots law and Scottish practice on tenancies were involved in the briefings. The officials who supported me in the House of Commons were from the Executive departments that deal with those matters. It was not a case of DTI officials assuming that they knew about Scots law; Executive officials—and, of course, some of our Scotland Office officials—supported me, as the minister who handled the core elements of the bill that dealt with Scots law. I also took the opportunity to meet Margaret Smith, Pauline McNeill and one other person whose name escapes me at the moment, and to talk informally through some of their concerns on pensions and give them an understanding of what would happen.

Thereafter, when the bill was going through its second reading, after its second reading and at a couple of points at committee stage, I made sure that I communicated with Hugh Henry. My line of communication is with the minister. At one point at the end of the process, we did a final wind-up letter to Hugh Henry to let him know what had happened.

The process worked quite well. We worked at it, and the bill was passed. In spite of the comments that were made about the bill being controversial, the result of the vote in the House of Commons was more than 400 to about 40. In the same way, the bill was supported overwhelmingly in the Scottish Parliament's consultation and its discussions on the Sewel motion.

Karen Gillon: That helps.

Mrs McGuire: There is nothing that I need to add to that, is there, David?

David Crawley (Scotland Office): I do not think so. You have described the relationship between officials well. It is important to acknowledge that the Executive has significant experience in some areas and that the Whitehall department bill teams for the Civil Partnership Bill and other bills realise that. With support and encouragement from the Scotland Office, they use that expertise. The Civil Partnership Bill was a good example of how that can be done.

Mrs McGuire: We did a similar exercise on the Proceeds of Crime Act 2002, which is a tremendous piece of legislation and a credit to Westminster and the Scottish Parliament. We also did a similar exercise on the Railways Bill, which was Sewelled in the Scottish Parliament to give the Scottish ministers powers and vary their competences.

Those are good examples. I am trying to get over to the committee the point that robust processes exist and co-operation takes place, because the process is about trying to get the best possible legislation. It is in nobody's interest to come up with inadequate legislation.

The Convener: Whether there should be some final process by which the Scottish Parliament can prove that what actually comes out of the Westminster machine is what the Scottish Parliament agreed to in the first place has been the subject of quite a few comments this morning. That was mentioned in Lord Sewel's memorandum and he has suggested that there should be something between the end of the amendment stage and a bill's receiving royal assent. Another suggestion is that the commencement order for the Scottish provisions in a bill should be subject to approval in the Scottish Parliament. Does the Government have any views on whether a formal final approval stage for the Scottish Parliament might be appropriate? Do you have any comments on the options that have been suggested?

Mrs McGuire: The commencement order option is superficially attractive, but having varying

commencement orders could, frankly, lead to difficulties in some instances. For example, if there had been different commencement orders in the Proceeds of Crime Act 2002, there could have been a regime for drug dealers and money launderers furth of Carlisle that was different from that north of the border for six months or a year, depending on the length of the Scottish Parliament's deliberations. The option is superficially attractive, but I am not sure whether it would meet the need.

I suppose that I could hand the other suggestion back to the committee through a question. When the Westminster Parliament finishes its deliberations on a bill it will have gone through all the processes, ticked all the boxes and had all the votes. Would it be appropriate that between that point and royal assent there would be a further stage—a stage at which legislation that has been worked on hard could be amended? I do not think that that stacks up constitutionally. I hope that members of the committee see that there would be a problem with that approach, even in practical terms.

At Westminster, when the final stage of the final discussions in the second house is reached—sometimes a bill will come back again—there is a point at which, as in the Scottish Parliament, we say, "That's it—it's finished," and the bill goes for royal assent. To return to the answer that I gave earlier, it is not that the Scottish Parliament is handed back competence. The Scottish Parliament can still legislate in the areas for which it has given Sewel consent. I think that it is a win-win in terms of managing the legislative process.

Mark Ballard: As you point out, we are not talking about a transfer of competences, but a transfer of responsibility, and Lord Sewel was keen to stress that safeguards are needed for that transfer of responsibility. One important safeguard is surely that, after everything has been done, the Scottish Parliament has a chance to consider the final version of the bill, as opposed to the bill as it was when the Sewel motion was passed. One would think that there will eventually be congruence of legislation in areas such as the proceeds of crime, but the Scottish Parliament might be unwilling to transfer responsibility in an area in which it has competence because it sees no safeguards in place.

Mrs McGuire: We must be clear about the language that we are using. The Scottish Parliament would not transfer its competence to deal with issues.

Mark Ballard: I did not say that.

Mrs McGuire: Right. I understand that safeguards are built into your processes through the supplementary memorandum. If a substantial amendment is made, other than a change that has been agreed to by the Scottish Parliament through the Sewel procedure, Executive ministers will submit a supplementary memorandum to the committee. The safeguards are already there. I hope that you understand that, in building up the partnership, there is also an issue of trust. When the issues have been debated and Executive ministers have ensured that the Parliament is informed through its committees of any substantial change, a point comes at which we must say, "That is it." However, that does not vary the Scottish Parliament's competence to reconsider the provisions that it has asked the UK Parliament to deal with. The important safeguard is that the competence does not change.

13:15

Cathie Craigie: What mechanisms operate when a piece of legislation goes beyond a Sewel motion that the Parliament has agreed to? The Scottish ministers could give the Scottish Parliament information, but what mechanisms would operate between the Scottish Executive and the Scotland Office to deal with that?

Mrs McGuire: There is constant traffic during the progress of legislation. As I said, with big bills such as the Civil Partnership Bill and the Railways Bill, Scottish Executive officials can see what is happening and our officials ensure communication. If a substantive change was made from what the Scottish Parliament voted for, Executive ministers would produce a supplementary memorandum or lodge another motion to reinforce the Scottish Parliament's consent to the original Sewel motion. I say to Mark Ballard that those are the safeguards. I do not mean to be aggressive, but there is no amending stage after the final amending stage in the House of Commons nor, I suspect, in the Scottish Parliament.

The Convener: The Scottish Parliament has such a stage. If it legislates outwith its competence, it can be asked to change the legislation before royal assent.

Mrs McGuire: I know that the Scottish Parliament is full of competent people. Perhaps we need to use a different word.

The Convener: Your memorandum makes it clear that the present process is that the UK Government will not support a private member's bill unless it has the Scottish Executive's agreement to lodge a Sewel motion on it. Why is a request not made to the Scottish Parliament? Why could a private member's bill not go direct to the Scottish Parliament? The Executive is not the Scottish Parliament and might not win a vote, or the Scottish Parliament might support a bill that the Executive did not.

Mrs McGuire: Even the business of a private member's bill is managed through the Government. For the most part, the Government does not whip private members' bills, but management of that business in the House of Commons and the House of Lords remains the Government's prerogative. We have had no requests for Parliament-to-Parliament contact on that issue and the system has worked well.

What became the Fireworks Act 2003 is a good case in point. It is horses for courses. Back benchers in Westminster and in the Scottish Parliament took a great interest in that legislation and the mechanism for making it happen was the Sewel convention. I suggest respectfully to the committee that the best way to operate is between the UK Government and the Executive, after which the Scottish Parliament's mechanisms kick in. As with Government legislation, the Scottish Parliament had the right to withhold its consent to that private member's bill. Many people are glad that it did not do that.

The Convener: I thank Anne McGuire for attending. That concludes the evidence session. I appreciate the time pressures that you are under and the effort that you made to arrive via the other airport that we do not talk about on this side of the country.

Mrs McGuire: I think that Edinburgh airport runway is now open, so I will take the next flight back to London.

The Convener: I thank members for their attendance.

Meeting closed at 13:19.

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