The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SCOTLAND BILL COMMITTEE

Tuesday 1 February 2011

Session 3

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

Tuesday 1 February 2011

CONTENTS

SCOTLAND BILL COMMITTEE
4th Meeting 2011, Session 3

CONVENER

*Ms Wendy Alexander (Paisley North) (Lab)

DEPUTY CONVENER

*Brian Adam (Aberdeen North) (SNP)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Tricia Marwick (Central Fife) (SNP)
*David McLetchie (Edinburgh Pentlands) (Con)
*Peter Peacock (Highlands and Islands) (Lab)

COMMITTEE SUBSTITUTES

Michael Matheson (Falkirk West) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Kathleen Braidwood (Royal Society for the Prevention of Accidents Scotland)
Michael Clancy (Law Society of Scotland)
Professor Sir David Edward (University of Edinburgh)
Temporary Assistant Chief Constable Tom Ewing (Association of Chief Police Officers Scotland)
Phil Flanders (Road Haulage Association Scotland and Northern Ireland)
Neil Greig (Institute of Advanced Motorists)
Chris Highcock (Interim Electoral Management Board)
Mr Richard Keen QC (Faculty of Advocates)
Christine O'Neill (Law Society of Scotland)
Jeremy Peat
Mary Pitcaithly (Interim Electoral Management Board)
Dr Colin Shedden (British Association for Shooting and Conservation Scotland)
Mr James Wolffe QC (Faculty of Advocates)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Committee Room 2

Scottish Parliament

Scotland Bill Committee

Tuesday 1 February 2011

[The Convener *opened the meeting at 14:15*]

Decision on Taking Business in Private

The Convener (Ms Wendy Alexander): Welcome to the fourth meeting of the Scotland Bill Committee in 2011. Before we start, I will deal with housekeeping business, as usual. I invite everybody present to turn off mobile phones, BlackBerrys and any other similar devices.

We have received no apologies from committee members today. David McLetchie will be rejoining us very shortly, and Dave Thompson will be joining us for our consideration of drink driving.

Our first item is to ask whether members agree that item 3 be taken in private.

Members *indicated agreement.*

Scotland Bill

14:16

The Convener: Under our second item today, we continue to take evidence as part of our scrutiny of the Scotland Bill and the relevant legislative consent memoranda. Those who have had a chance to look at the agenda will have noticed the huge range of areas that we will try to cover today. We are also trying to ensure that the committee has a little bit of time to process what it has heard. If all the witnesses will forgive us, we will rather race through the questions. It may be that only one or two committee members engage each witness in questioning so as to ensure that we keep to time. We are very grateful to all the witnesses who have provided written evidence, which has guided the committee in advance of today's deliberations.

Without further ado, I welcome Jeremy Peat to the meeting. Jeremy is a familiar face to many of us. He is here today in his capacity as a former member of the BBC trust, and he will be discussing with us the Scotland Bill's provisions in relation to the appointment of members of the trust. I invite you to make any opening marks that you might wish to share with us, and we will then move to questions.

Jeremy Peat: I am very pleased to be here. I left the BBC trust at the end of 2010, having served for six years as its first national governor and then as national trustee for Scotland. I remain chairman of the BBC Pension Trust Ltd, so I still have some links with the organisation, but they are, in effect, as an independent member of the pension trust; I have no other links with the BBC trust.

When I was first appointed to my position from 1 January 2005, the committee that interviewed me and the other candidates included representatives of the then Scottish Executive, as well as of the Department for Culture, Media and Sport and the BBC board of governors—the chairman, Michael Grade—so I was interviewed by a group that represented both the Scottish Government and the United Kingdom Government before a decision on the appointment was taken.

Having noted that, I am at your disposal to answer such questions as you and other members wish to ask, convener.

Peter Peacock (Highlands and Islands) (Lab): I wish to pick up on what the Calman commission recommended, which was that the Scottish ministers should, in the future, determine the appointment of the BBC trustee from Scotland. Our interpretation of clause 17 of the Scotland Bill is that, although that decision regarding a trustee

would require the consent of the Scottish ministers, the actual decision would still be made by UK ministers. Do you have a view on whether or not that meets the terms of the Calman recommendation?

Jeremy Peat: That does not appear fully to meet the proposal that was set out by Calman. What really matters in my view, however, is that whoever is the member for Scotland on the BBC trust must have the confidence and ability to satisfy both the UK Government and the Scottish Government. That person is a member of the UK board, with all the responsibilities that that includes, but is at the same time the member for Scotland, which involves chairing the BBC audience council Scotland and having particular responsibilities to licence fee payers in Scotland. It is important that both elements of the role are appropriately fulfilled and therefore that whoever is appointed has the confidence of both the Scottish Government and the UK Government that they are able appropriately to fulfil those roles.

Peter Peacock: Does the proposed arrangement strike the right balance?

Jeremy Peat: That will depend on precisely how it is implemented, but my understanding is that what is proposed under the bill is that an agreement should be reached on who should be put forward, and that the appointment should be made following consideration by Scottish as well as by UK ministers. I suspect that my successor, who is now in post, went through a similar interview process that involved representatives of both organisations.

I repeat that it is critical that both parties accept that a candidate is the right person to carry out the role. I am not particularly perturbed about who makes the recommendation. What matters to me is mutuality of agreement.

Peter Peacock: In your experience as a governor and as a trustee for six years, would you have been inhibited or assisted in any way in your deliberations if you had been appointed only by a Scottish minister rather than by a UK minister?

Jeremy Peat: The difficulty is that, at times, one must consider matters on which a genuine UK issue is at stake. In such circumstances, there are advantages in the appointment being made by both sides that enable one to fulfil the function.

However, I believe that the governor—the trustee, as it is now—should be available to a committee of the Scottish Parliament to report on how he or she is fulfilling their responsibilities to Scottish licence fee payers. I was disappointed that I came before a committee of the Scottish Parliament only once in six years. Of course, I appeared before the Scottish Broadcasting Commission and worked with Blair Jenkins and co many times, but I would have found it desirable to be asked questions by a committee of this Parliament on how I was fulfilling my responsibility to licence fee payers.

I will make one other point on that, if I may. I am delighted that under the new arrangements that were outlined in the BBC trust strategy document that came out shortly before I left, there is agreement that once a year, the director general will produce a report explaining how the BBC is meeting the requirements of licence fee payers in Scotland, as in the other nations. That is a major step forward and it is the first time that such an annual statement will be made. I think that that will provide an admirable foundation for the new trustee, along with a representative of the BBC executive, to come before a committee of this Parliament to discuss how the BBC has been working for the interests of licence fee payers in Scotland and how the trustee is fulfilling his duties in that regard.

Peter Peacock: Thank you very much. My questions have been answered fully.

Brian Adam (Aberdeen North) (SNP): Good afternoon, Mr Peat.

You mentioned your involvement with the Scottish Broadcasting Commission. Mr Peacock asked whether the proposal in the Scotland Bill on a Scottish trustee fulfils the Calman commission's recommendation. Is it fair to say that the Scottish Broadcasting Commission's recommendations will not be fulfilled by the bill's proposal, either? How might the proposed changes help to deliver the Scottish digital channel that has the Parliament's support? How do you feel about the fact that the appointment of the board of MG Alba, which, in essence, is a Scottish broadcaster, will still lie in the hands of UK ministers as opposed to the Scottish ministers, when it is a Scottish broadcaster, full stop? Do you not think that the UK Government could have gone a little further in fulfilling the expressed wishes of the Scottish Broadcasting Commission and the Parliament in how it set about developing its proposal?

Jeremy Peat: I think that I am clearer on my position on MG Alba than I am on how the digital channel can be progressed, which is an extremely complex issue. Money comes into it to a rather large extent.

As far as MG Alba is concerned, I agree that that organisation works on a joint venture with the BBC to deliver BBC Alba. It is a Scottish-related institution. As I understand it, the funding comes from the Scottish Government rather than the UK Government. Under those circumstances, it seems to me to be logical that the board of MG Alba should be Scottish Government appointed rather than UK Government appointed. I accept that.

Brian Adam: On funding, Mark Thompson certainly suggested that BBC spend in Scotland should move towards population share. Do you think that the influence that the Scottish Government might have over appointments to the BBC trust might help in getting that kind of shift in investment by the BBC, as opposed to the current arrangement or the proposed halfway house?

Jeremy Peat: I think that what Mark Thompson has proposed, and what the trust has carried forward, has been that network commissioning in Scotland should be proportionate to population share. That is an important development that will aid the sector in Scotland and will help to deliver the interests of licence fee payers throughout Scotland.

I am glad to say that during my tenure we made significant progress. We are above the interim target and I hope that the trust and the BBC will deliver the population-proportionate achievement ahead of target. That is extremely important. As the BBC trust member for Scotland—I am sure that my successor will be the same—I can say that it is something to which extremely close attention will be paid. I suggest that it is the type of issue that can periodically be discussed with a committee of this Parliament, or whoever, to ensure that Parliament understands what the trustee is up to and the trustee understands what the Parliament's wishes are. The two can interrelate.

Brian Adam: Do you recommend that we suggest amendments that would put such accountability into the bill?

Jeremy Peat: That is for you and others to consider. I am not sure whether it requires amendments to the bill. I do not believe that there would be any difficulty if you were at any time to seek the presence of the trustee and BBC Scotland or the BBC executive on, say, an annual basis. I do not think that that would cause any problem. I was just saying that that is the way that I believe that accountability can be enhanced. To me, that would be more valuable than simply a transfer of responsibility for the appointment from one minister to another. I believe that the dual agreement will yield the best result.

The Convener: Jeremy, thank you very much for your evidence and for joining the committee today. We will pause for a moment to allow the next panel to take their places.

14:27

Meeting suspended.

14:28

On resuming—

The Convener: We will now look at elections in Scotland. Sir John Arbuthnott, who we had hoped would be able to join us today, is unfortunately unwell and unable to attend. We are delighted to welcome to the committee Mary Pitcaithly and Chris Highcock of the interim electoral management board for Scotland. I invite Mary and Chris to make opening remarks before we go to questions.

Mary Pitcaithly (Interim Electoral Management Board): Thank you very much. We have not prepared anything in particular. I am happy to try to answer questions from members on elections. I am here as chair of the interim electoral management board. For members' information, I am also a returning officer and the regional counting officer for the referendum, which is to be held—or potentially to be held—on 5 May. Mr Highcock is secretary to the board.

The Convener: Thank you. You will be a busy woman, so we will try not to detain you too long.

The Electoral Commission's evidence raises a question about whether the bill, as drafted, would allow the remit of your new organisation—the electoral management board for Scotland—to be extended to cover Scottish Parliament elections. Is the Electoral Commission right to have concerns and does the bill need to be amended in order to extend the board's remit in such a way?

14:30

Mary Pitcaithly: Obviously, the best way of ensuring that you have the power to do something that you anticipate when you draft a bill is to be absolutely specific about it. In the absence of that, however, I am sure that the committee's deliberations will help you to reach a conclusion about whether something more specific or detailed has to be said on the matter.

The interim electoral management board would welcome the potential for our remit to be extended to cover elections, including those for the Scottish Parliament, beyond local government elections. I do not feel competent to speak about how that might be achieved, however. The Electoral Commission has highlighted that there is potentially an issue there that requires to be resolved during the passage of the bill.

Tricia Marwick (Central Fife) (SNP): The bill will transfer some administrative powers from the Secretary of State for Scotland to the Scottish Government, but not the legislative power over elections, which will remain reserved. Does that have the potential to create confusion?

Mary Pitcaithly: Returning officers have long cherished the idea of having a consolidated piece of legislation that covers everything that could potentially relate to elections—or one piece of legislation for each of the main elections—as we would be able to keep a copy of that on our shelves and get rid of the other copies of all the other pieces of legislation that we have gathered over the years. In the absence of that, there is always the potential for confusion.

My understanding of the proposals is that there would be two sets of rules to which returning officers would have to refer. However, that is not so unusual; we are used to having to check a variety of rules and regulations before we can be confident about what we are doing.

Tricia Marwick: It might not be that unusual, but everyone would agree that the 2007 elections were an absolute debacle, which is why Gould was tasked with examining the elections in Scotland. Gould's recommendation, which was supported by all the parties in the Parliament, was that only by fully devolving the powers of the election could we avoid a repetition of the confusion and disenfranchisement that surrounded the 2007 elections. Do you support the Gould report and the views that were expressed by all the parties in this Parliament at that time?

Mary Pitcaithly: I have no difficulty whatever with the findings of Mr Gould. I did not interpret his findings as suggesting that the entirety of the 2007 election was a "debacle". There were many things about that election that went well, although there were some things that did not go so well. I have not read the Gould report in detail recently, but I had no difficulty with its findings at the time, and I understand that Parliament endorsed those findings.

The Convener: Under the bill, the Secretary of State for Scotland will retain a number of responsibilities, including voter registration, rules about the composition of the Parliament, the procedure for filling a vacancy in a regional seat and the rules relating to disqualification. Those areas are to be covered by separate Scottish Parliament rules that are to be made by the Secretary of State, but there is no requirement at the moment for the Secretary of State to consult the Scottish ministers about those rules. Would it be preferable if the provisions called for consultation between the Secretary of State and the Scottish ministers on any proposed changes in those areas?

Mary Pitcaithly: The bill provides for consultation the other way, but I think that it would not be at all unreasonable for it to require there to be mutual consultation.

Chris Highcock (Interim Electoral Management Board): There should also be consultation of the practitioners who are involved—it is not just a matter for legislators. We all need to be involved in the decisions that are being made.

Brian Adam: Would not a much cleaner solution be simply to have all those matters fully devolved, as was the expressed will of the Parliament and as was suggested by Professor Gould? That could be done rather than have the complications and potential for confusion to which you referred earlier. That solution should be considered particularly in the light of the issues relating to the 2007 elections and the potential complications, which are being widely aired, with the alternative vote referendum being held on the same day as the Scottish Parliament elections this year.

Mary Pitcaithly: I think that I have already acknowledged that there is potential for confusion, but I suspect that difficulties would not necessarily be avoided either by having responsibilities entirely reserved or entirely devolved. What matters is the quality of the legislation that is passed by whichever chamber has the responsibility for it.

The issue is difficult. As I have said, it would be perfect if there was a single elections act in which everything was clearly set out and we knew well in advance what was required of us; that would be our ideal. However, what we have at the moment is the Scotland Bill, and we would make its provisions work if it were passed. If entire responsibilities were devolved, I am quite sure that we could make that work, too. Our job is to work with whatever parliamentarians deliver to us.

Peter Peacock: I understand the point that you are making and am sure that it is correct, but can you see the logic for the division of responsibilities that is proposed in the bill, which would mean that the Secretary of State for Scotland would retain powers over the things that the convener outlined, which would not be devolved to the Scottish ministers?

Chris Highcock: We understand some of the approach, with the franchise being a UK issue at the moment, but as Mary Pitcaithly said, we have been asked to comment on policy issues. Our job is to implement rather than to develop policies.

Peter Peacock: Are you convinced by that logic? Is there a strong enough reason for keeping responsibilities split in the way that has been proposed?

Mary Pitcaithly: I can certainly see the logic in such an approach where it is desirable to have consistency across the UK, but perhaps somebody can explain the logic to me where

things are less obvious. I presume that the main driver for what has been proposed is the desire for consistency on matters that affect the whole of the UK.

Tricia Marwick: On matters of consistency that affect the whole of the UK, surely the rules or procedures for filling a regional seat vacancy in the Scottish Parliament have less to do with the UK Government than the Scottish Parliament, but the Secretary of State will be able to make rules on that without any consultation of the Scottish ministers or the Scottish Parliament. Do you find that a bit strange?

Mary Pitcaithly: That is certainly an area in which consistency is not immediately obvious.

The Convener: I thank Mary Pitcaithly and Chris Highcock for their evidence, which is very helpful. I am sorry that the session has been so brief.

I suspend the meeting to allow our next panel of witnesses to join us.

14:38

Meeting suspended.

14:39

On resuming—

The Convener: I welcome the next panel of witnesses, with whom we will look at the provisions of the bill concerning airguns. We are delighted to be joined today by Colin Shedden, the director in Scotland of the British Association for Shooting and Conservation; Tom Ewing, temporary assistant chief constable of Fife Constabulary, who is here today representing the Association of Chief Police Officers Scotland; and David Scott, who is accompanying Tom Ewing.

Robert Brown (Glasgow) (LD): Thank you for coming. We are dealing with the partial devolution under the bill of legislation on air weapons. I invite you to put on record your views on whether that is a good thing. Should the issue remain reserved, or should it be devolved in the way that the bill suggests? Given some of the comments that you have made, would there be any merit in full devolution of the issue?

Temporary Assistant Chief Constable Tom Ewing (Association of Chief Police Officers Scotland): I will put the issue in context. The best estimate is that there may be as many as 500,000 air weapons in Scotland. At the moment, those weapons—apart from the most dangerous, which are classed as section 1 firearms under the Firearms Act 1968—are unregulated. ACPOS's position is that, in an ideal world, to avoid confusion, one set of legislation would be the best option for licensing. However, if the Scottish Parliament decided that it wished to license air weapons, we would be happy to be involved in consultation on the issue.

Licensing air weapons is a complex issue. Ideally, we would prefer them to come under the 1968 act, so that we did not have two sets of rules. Given the number of such weapons, cost and resources would have a definitive impact on licensing them from a policing perspective.

Dr Colin Shedden (British Association for Shooting and Conservation Scotland): I agree with Mr Ewing that, in an ideal world, firearms would fall under one legislative competence. Partial devolution of firearms legislation is the worst-case scenario and would cause a lot of confusion.

Fundamentally, we believe that, apart from the Calman commission's view that there appears to be an appetite to deal with air weapons in Scotland differently from south of the border, no case has been made for the partial devolution of firearms legislation to Scotland. A large number of individuals could be caught up in the new legislation, as there may be as many as 500,000 airguns in Scotland. We agree with ACPOS's statement in its written submission that the current legislation is "unnecessarily complex" and that any additional legislation would have to be considered extraordinarily carefully. This is a complex area. The landscape is already complex and will become more complicated if there is partial devolution of airgun legislation.

Robert Brown: Arguably, the test of whether the provisions in the bill are workable is how precise and understandable the definition of an airgun is, especially against the background of the exception for specially dangerous weapons, responsibility for which is reserved to the UK Government. Is the definition workable in policing terms? Will it allow you to identify what is and is not a devolved airgun?

Temporary Assistant Chief Constable Ewing: This is a complex area. In terms of poundage, airguns may be considered section 1 firearms, but there are various opinions on what constitutes a lethal air weapon. It is simplistic even to define it as a weapon with 1 joule of power, because the dangerousness of a weapon depends on the projectile that is used, as well as on the weapon's poundage. Paint-ball guns are a good example. Their power may exceed 1 joule but, because of the nature of the missile that is used, they do not ordinarily cause serious injuries. What constitutes a dangerous air weapon, below the level of those that are already classed as section 1 firearms, is a complex issue.

14:45

Robert Brown: I suppose that the other possible outcome of all this discussion is the devolution of all firearms legislation to the Scottish Parliament. Is that a practical solution? What issues might arise if such an approach were taken? There might be issues to do with the border and the movement of weapons, for example.

Dr Shedden: There is an elegance to the complete devolution of firearms legislation, which would give an opportunity for review. Review is much needed, because the legislation is complex and virtually unworkable in certain areas. However, the complete devolution of firearms legislation to Scotland would introduce pretty complex cross-border issues—indeed, the devolution of airgun legislation will do that.

There could also be major issues with respect to the Commonwealth games. Airguns are used in the Commonwealth games and I do not think that anyone has yet considered how Scotland could cope with that if it had its own airgun legislation.

Robert Brown: I am not sure that I entirely follow. Will you expand on what you said?

Dr Shedden: The issue is that people will come to the UK with airguns, as they do now. Currently, airguns that are under the 12 ft lbs limit do not fall under any legislative regime. If Scotland had its own legislation, under which people who were resident in Scotland had to have some form of licence and security for their airguns, it would be only fair to expect people who came to Scotland with an airgun to fall under similar provisions or to have a visitor permit—or something along those lines. That would add layer on layer of bureaucracy to an activity that is currently taking place with few real issues or problems.

Robert Brown: Do members of the British Association for Shooting and Conservation Scotland travel around the country to go to competitions that involve the type of airguns that might be devolved?

Dr Shedden: There is a series of competitions that involve airguns for target shooting, which take place in Scotland, south of the border and elsewhere in Europe. The Commonwealth games and the Olympic games also feature airgun shooting, so there is a pretty big international picture.

Brian Adam: Given that competition takes place at international level, is it not the case that the regulation of such matters is already complicated, in that there are different rules in different jurisdictions? It cannot be unreasonable to assume that people who want to be involved in competition shooting must already address such issues. Where is the problem?

Dr Shedden: It is not unreasonable to assume that. However, there are not many restrictions on the use of low-power airguns as used in the Commonwealth and Olympic games.

Brian Adam: Perhaps Mr Ewing will tell us whether we have a problem with airguns at all in Scotland.

Temporary Assistant Chief Constable Ewing: That depends on the definition of "problem". Statistics for 2009 showed that there were 92 injuries from air weapons, of which 15 were serious. That is in the context of there being some 500,000 guns.

Tricia Marwick: Mr Ewing, did you say that there are 250,000 unregulated air weapons in Scotland?

Temporary Assistant Chief Constable Ewing: The best estimate—and it is an estimate—is that there could be as many as half a million air weapons in the country.

Tricia Marwick: Sorry, I picked up the wrong number; there are some 500,000 unregulated weapons.

The bill provides that the regulation of air weapons, with the exception of specially dangerous weapons, can be devolved to the Scottish Parliament. When Mr Mundell gave evidence, he said that the reason for the exception was that specially dangerous weapons—he gave some sort of definition—are already banned. He suggested that the need for such weapons to remain banned was the reason for not devolving their regulation to Scotland. I argued that I could not envisage a Scottish Parliament that wanted to regulate all airguns ever lifting a ban on more dangerous weapons. Is there a reason why the whole issue of air weapons cannot be devolved to Scotland?

Temporary Assistant Chief Constable Ewing: I take it that Mr Mundell was referring to the air weapons that are prohibited under the Firearms Act 1968, such as revolver-type airguns and those over a particular poundage.

In essence, there is no block to devolving the regulation of those weapons. From an ACPOS point of view, it is about the cost and resources that would be needed to manage them. Before we got to that stage, we would probably seek to propose an amnesty so that we could reduce the numbers, because there would be significant difficulties involved in trying to license 500,000 weapons.

Tricia Marwick: Is it your perception that the number of air weapons is growing in Scotland?

Temporary Assistant Chief Constable Ewing: That is a difficult one to answer. I do not think that we are seeing an increase in dealers selling them. The problem is that, when the weapons are not licensed, it is difficult to come up with an estimate: 500,000 is an estimate because there is no licensing system. It is therefore difficult to have any idea whether the numbers are increasing. The feeling is yes, but it would be difficult to provide science or evidence for that claim.

Tricia Marwick: So, in essence, we need some sort of licensing scheme to allow us to get a true picture of how many air weapons there are in Scotland.

Temporary Assistant Chief Constable Ewing: There is no measure at the moment—to get some sort of measure of what is out there would require some form of licensing scheme.

David McLetchie (Edinburgh Pentlands) (Con): I have a couple of questions. First, I offer my apologies for not being here at the start of your evidence session; I was attending another meeting.

Is there any evidence to suggest that the dangerous use of air weapons is any different in Scotland than it is elsewhere in the United Kingdom? There is a table in the BASC submission that shows the number of offences going up and down, with a bit of a spike a few years ago; it seems that there has been some progress in reducing the numbers. Is that pattern proportionately true elsewhere in the United Kingdom, or does Scotland have a particular problem with the misuse of air weapons?

Dr Shedden: It is often quoted in the press that Scotland has a particular problem with air weapons and that there is an increasing problem with firearms offences in Scotland. The figures that we present in our written evidence show that there is a declining pattern in both. The particular problem in Scotland does not exist: there are proportionately more air weapon offences in England and Wales than there are in Scotland, as there has been a significant decrease here in the past 10 years.

We certainly feel that the work that the Scottish Government has been doing of late to educate youngsters and their parents, as well as the work that the police have done to enforce the various pieces of legislation that cover airguns, has led to the decline in the number of offences. I think that that will continue, and the Crime and Security Act 2010 will introduce new provisions from 10 February that will make it an offence for anyone to allow unrestricted access to air weapons to those who are under 18.

There is commonsense work going on that will enhance safety with regard to air weapons in Scotland.

David McLetchie: Do you have a police perspective, Mr Ewing?

Temporary Assistant Chief Constable Ewing: I do not have an intimate knowledge of the England and Wales figures, but my perception is that they are reducing, as the figures for Scotland have been since 2006 when the last spike occurred.

There is a scalability issue to do with the numbers, which are greater in England and Wales than they will probably ever be in Scotland because of the population.

David McLetchie: Head for head, is there any reason to suggest that the problem requires particular and special Scottish attention as opposed to attention on a UK-wide basis?

Temporary Assistant Chief Constable Ewing: Not that I am aware of.

Tricia Marwick: More than half of all firearms offences in Scotland last year involved an airgun. In England, just over a third of all firearms offences involved an airgun. Surely those figures suggest that there is a distinct problem in Scotland.

Temporary Assistant Chief Constable Ewing: You could argue that both ways with regard to firearms offences: for example, you could say that there is less of a section 1 firearms issue in Scotland than there is in England and Wales. Again, I do not have an intimate knowledge of England and Wales—it is probably open for analysis, but I cannot give a definitive opinion on where the England and Wales figures are going.

The Convener: I thank the witnesses for their answers. As you will be aware, this panel is primarily dealing with the issue of airguns. However, while we have a police representative here, it will be very valuable to have his thoughts on the issues of the drink-driving limit and the speed limit, to which we are just coming.

Temporary Assistant Chief Constable Ewing: ACPOS welcomes the bill's provisions on the drink-driving limits. We have long campaigned to reduce the problem of drink driving on Scotland's roads, and the drink-driving limit offers one way in which that could be done.

Local authorities already have a large degree of autonomy in setting speed limits, so the bill's provisions relate particularly to the national speed limits. We would welcome consultation on those. Scotland is probably different from England in that different roads would benefit from different speed limits. An issue that arises is that the national

speed limit sign—a white circle with a black stripe—may not be interpreted correctly by visitors to the country, so one option may be to put the speed number on the sign.

Brian Adam: Might it also be better if there was full devolution of the issues to do with alcohol levels? At present, there are no proposals to devolve issues to do with the tests or the penalties for breaking the law.

Temporary Assistant Chief Constable Ewing: Are you suggesting that the penalties would change as well?

Brian Adam: As I understand it, there is no intention to devolve issues to do with breath tests or the level of penalties for any breach of the law. Would it not make sense to devolve the whole package?

Temporary Assistant Chief Constable Ewing: I think that the current powers are sufficient. Obviously, it is a matter for the courts and not for the police. Our position is that a reduced drink-driving limit would assist the police in enforcing and, hopefully, reduce the number of deaths on the roads.

Brian Adam: Not devolving issues to do with random testing might also have implications for safety. I cannot understand why that and the penalty regime for any breaches are not being devolved as well.

Temporary Assistant Chief Constable Ewing: Sorry, I maybe misunderstood your question. Although the penalties are probably sufficient at the moment, random breath testing would certainly be of benefit to policing enforcement.

Peter Peacock: If there were powers in Scotland to set speed limits on national roads, do you envisage any safety implications arising from traffic coming north of the border that would be unaccustomed to a different speed standard and, equally, from traffic heading back south?

Temporary Assistant Chief Constable Ewing: Yes, that is one of the reasons for my point about the national speed limit sign meaning two different things. It would probably be better if the sign had a number.

Peter Peacock: Do you think that, if there is a problem, it could be addressed by different signage and that that might be sufficient to take care of the problem?

Temporary Assistant Chief Constable Ewing: The problem is not insurmountable.

Tricia Marwick: I think that mainland Europe, which has many different countries, copes very well with having different speed limits from country to country. I see no reason why that should not happen between Scotland and England.

The bill devolves some aspects of speed limits but not others. We will be able to set speed limits for cars but not for lorries or buses, or for towing caravans. That suggests to me that there might be grounds for confusion. Do you have a view on that?

Temporary Assistant Chief Constable Ewing: Again, I do not think that there would be insurmountable problems. It is almost the same argument as with the national speed limit, is it not? If the national speed limit was different in England and Scotland, would it be different for a lorry driver or a coach driver? Yes, it would. Again, however, I do not see the problems as insurmountable.

Tricia Marwick: Let me understand, because maybe I did not explain my question fully. Are you saying that, if all speed issues were devolved to the Scottish Parliament, including for lorries, buses and the towing of caravans, that would not be an insurmountable problem?

Temporary Assistant Chief Constable Ewing: I do not think that it would be. ACPOS has a position, in that we would probably not like speed limits to increase.

Tricia Marwick: Provided that we kept speed limits the same or reduced them, you would be quite happy.

Temporary Assistant Chief Constable Ewing: Yes.

Tricia Marwick: Thank you.

The Convener: I thank the witnesses for their time and suspend for a few moments to allow the next panel to take their places. Thank you, gentlemen.

15:00

Meeting suspended.

15:03

On resuming—

The Convener: I welcome the next panel of witnesses, with whom we will focus mainly on drink driving and speed limits. We have before us Neil Greig, who is known to many and is the director of policy and research at the Institute of Advanced Motorists; Kathleen Braidwood, who is road safety officer for the Royal Society for the Prevention of Accidents Scotland; and Phil Flanders, the Road Haulage Association director for Scotland and Northern Ireland. Welcome, ladies and gentlemen. Does anyone wish to make a couple of opening remarks? If not, we will move straight to questions.

Kathleen Braidwood (Royal Society for the Prevention of Accidents Scotland): I represent

ROSPA, whose mission is to save lives and reduce injuries. We welcome the opportunity to be represented here today, to enable Scotland to lead the way in the significant aspects of casualty reduction with regard to road safety, reducing the drink-drive limit and reviewing the speed limits.

Phil Flanders (Road Haulage Association Scotland and Northern Ireland): I thank the committee for the opportunity to speak to you today.

The Road Haulage Association submitted its views to the Calman inquiry, and we are in favour of the Scottish Parliament having the power to set speed limits in Scotland. The current levels for lorries were set many decades ago, and they are now a bit archaic and past their sell-by date due to significant safety improvements in trucks and cars. In England, there is a better network of motorways and dual carriageways the length and breadth of the country than in Scotland, where most of our roads are A-class single carriageways. We would be pleased for consideration to be given to increasing the speed limit for trucks on single carriageways from 40mph to 50mph. We fully support the amendment from the Scottish Government, in the letter from Fiona Hyslop.

The Convener: Will you expand on which amendment that is?

Phil Flanders: If I can find it. It was in a document that came out today on speed limits—the Government has taken some legal advice. I think that it was circulated earlier today.

The Convener: The amendment would allow a change in national speed limit for classes of vehicles other than simply cars.

We will deal with the drink-driving limits first. I invite David McLetchie to ask the questions.

David McLetchie: Good afternoon. Will you indicate to me why it is thought that the Scottish Parliament has a keener interest in reducing the drink-driving limits than does the Parliament at Westminster? Is the road and public safety agenda not shared between both Parliaments? Why is the reduction not simply being enacted UK-wide?

Neil Greig (Institute of Advanced Motorists): Obviously there is a shared interest in road safety in both Parliaments—I hope that it is fairly fundamental. The issue is that there has perhaps been a greater degree of coherence among safety organisations in Scotland, the police and local authorities in campaigning for a lower limit, which has led to a little frustration at the slow pace of change.

This is an opportunity for the change to happen in Scotland. By devolving the powers, we can try out the lower limit. At the IAM, we are keen on trying it out, because that has not really been done. The drink-drive limits have remained the same for many decades. There have been a lot of changes around the world, with different countries doing different things, but we have not tried anything. At least here in Scotland there is an opportunity to do that, with a lot of support from a wide range of public bodies.

David McLetchie: Therefore, you are in favour of the devolution of the power because you think that it will facilitate a particular policy outcome, which is not the same as saying that the power should be devolved. If the power was devolved and a policy outcome that you disapproved of was put forward, would that mean that you were not in favour of the devolution of the power?

Neil Greig: Our concern is not the devolution of the power but how the power is used. Our expertise is in informing the Scottish Parliament and the Scottish Government what might happen if the power were enacted. Clearly, the implication that we are hearing about is that there would be a reduction in the drink-drive limit. That is certainly worth trialling and piloting, because it is working in other areas, and we have a fairly consistent level of drink-drive offences and deaths in Scotland, which needs to be attacked.

David McLetchie: If the UK Government came forward next month to say that it was going to introduce a bill to reduce the drink-driving limit across the United Kingdom from 80mg to 50mg of alcohol per 100ml of blood as soon as possible, I presume that you would be happy with that and, therefore, would not think that it is necessary to devolve the power.

Neil Greig: We would be happy. We would raise exactly the same concerns, information and approach—

David McLetchie: But that would be on your outcome. You would not be bothered whether the power was devolved—is that correct?

Neil Greig: Yes.

David McLetchie: What is the ROSPA position?

Kathleen Braidwood: As a UK national organisation, we would like the reduced drink-drive limit to be rolled out across the UK. The Great Britain strategy "Tomorrow's roads: safer for everyone" in 2000 highlighted that reducing the limit to 50mg would reduce fatalities. We have had 10 years to consider that under the GB strategy—we had the North review last year and then the House of Commons Transport Committee inquiry into drink-driving limits—but there has been no movement.

In Scotland, we are fortunate in that, with its framework to 2020, the Scottish Government has

committed to reduce casualties, has set targets and has developed something that we can work to. As Neil Greig said, there is more cohesion among the agencies and organisations in Scotland, which helps to support agency partnership working and move us in the direction of reducing casualties and fatalities on our roads.

David McLetchie: Forgive me—I am not familiar with the details—but I take from what you have said that neither the North review nor the House of Commons Transport Committee report recommended a reduction in the drink-driving limit.

Kathleen Braidwood: The North review recommended a reduction—

David McLetchie: From 80mg to 50mg?

Kathleen Braidwood: Yes. It examined the issue very closely and highlighted examples of good practice from Europe, Australia and America that had worked and the impact that they had had. One of the review's main recommendations was to reduce the drink-driving limit, but it seems to have gone nowhere.

David McLetchie: What about the House of Commons Transport Committee's report?

Kathleen Braidwood: It looked at the drink and drug-driving situation in August 2010, but I am not sure where those deliberations have gone or what has happened to them.

Tricia Marwick: Is there any logical reason for devolving power to set the alcohol limit but not powers to introduce random breath testing or to set penalties for drink driving? Would it not be more coherent to devolve the other two powers to Scotland?

Kathleen Braidwood: In its response to the North review and the House of Commons Transport Committee, ROSPA recommended the introduction of random breath tests, greater police powers, a higher police profile with regard to drink driving and maintaining the same stringent penalties.

Tricia Marwick: But in your opinion, should this committee recommend in its report that all powers over drink driving, including random breath testing and the right to set penalties, be included in the bill?

Kathleen Braidwood: From a road safety point of view, if we are to reduce casualties and injuries on our roads, one can only conclude that the penalties are right but that there is a need to lower the limit. In fact, one might even consider lowering the limit even further, because any amount of alcohol can impair drivers' judgment and affect their ability to drive safely.

Neil Greig: I tend to agree with Kathleen Braidwood. However, the IAM's one concern about lowering the limit is the implications that such a move would have for police enforcement. A detailed look at the statistics shows that those who kill as a result of drinking and driving are often two or three times over the limit; in other words, they simply ignore the limit and drive illegally. If you dilute police effort by stipulating that they catch people at a lower limit—who, although not having fatal crashes, are still breaking the law and should not be drinking and driving—you might ultimately end up with the police catching people who are not killing others on the road and therefore having no real impact on road safety.

Some European countries that have lowered the limit have also introduced a lower penalty for those who are caught at that limit, and we think that such an approach should be linked with the power to change limits. The campaign against drink driving has been a huge success and has attracted a lot of support. In all the surveys that we have carried out, the vast majority of people agree that the drink-driving limit should be reduced, but the point is that we do not know how many people would be caught if we reduced the limit from 80mg to 50mg.

Before the power is used, we would like a proper research survey of the numbers between the current limit and the proposed lower limit. Are large numbers of drivers out there having one or one and a half glasses of wine regularly, who are not currently caught but who might be caught? Might they become a big issue for the police in simple number terms?

I agree that, for road safety, it does not really make sense to have just the power to alter the drink-driving limit without having the powers over penalties and without considering the impact on the police, which is also a devolved matter.

15:15

Brian Adam: The normal precursor to measuring the blood alcohol level is a breath test. It would be better to devolve control over the circumstances in which a breath test might happen, given that a larger group of folk might be affected. Does that suit the logic of your position?

Neil Greig: Absolutely. The fear of being caught is the biggest deterrent to drinking and driving. In Scandinavia, people expect to be stopped and tested all the time, whereas people are stopped fairly infrequently in Scotland, so the fear does not exist. All those matters are linked together as a total package on drink driving.

Robert Brown: I understand entirely that, for road safety reasons, all three witnesses want the drink-driving limit to be reduced and perhaps want other changes. That does not necessarily require a power to be devolved rather than exercised by the UK, except that you assume that a devolved

power would be used faster. Is that fair? I do not want to misinterpret your evidence.

Kathleen Braidwood: The landscape in Scotland is different, because we have the road safety framework to 2020. Legislation on some matters also differs. For example, in the recent ACPOS campaign on drink driving, a forfeiture scheme was introduced in Scotland. That could be done because Scotland has some unique legislation. It would be good to continue the momentum to reduce casualties and injuries on our roads and to promote road safety by making it clear that drink driving is really antisocial and by influencing public opinion. We have gone down the route of the forfeiture scheme in the past 12 to 14 months as a way of gaining momentum.

A report from the National Institute for Health and Clinical Excellence for England and Wales showed that lowering the drink-drive limit would reduce casualties in the first year or two, build momentum—so the number of people whose lives were saved would increase—and influence public opinion on the fact that drink driving is unacceptable. As Neil Greig said, people in Scandinavia expect to be stopped—drink driving is considered antisocial. We could combine our legislation with greater enforcement, greater public awareness and rehabilitation for people who have a problem with alcohol—of whom there are quite a few—or a way of helping them to cope with that clear problem.

Robert Brown: We need a number of different weapons, as it were.

The Convener: We move on to speed limits. I plead with the panel and committee members to try to focus on whether powers should be devolved or reserved rather than on the desirability or otherwise of policy change, because panel members have different views on the way forward for speed limits. With that caveat, I call Brian Adam.

Brian Adam: I ask Phil Flanders whether any confusion could result from devolving the suggested powers to set speed limits, which could mean different sets of speed limits here from those south of the border. Some speed limits would continue to be controlled from London and some would be controlled here. How would the RHA expect that to pan out?

Phil Flanders: We think that speed limits in Scotland should be set in Scotland, because of the differences in the roads. The vast majority of roads in Scotland are rural roads. Local knowledge of how safe those roads are, and of the volumes of traffic concerned, means that there would be a benefit from speed limits in Scotland being dealt with in Scotland, rather than at Westminster, where the majority of people have probably never been in Scotland or seen the roads here. There are differences, and we believe that the Scottish Parliament is best placed to make the decisions for the roads here.

Brian Adam: What response would you give to WWF, which is in favour of devolving powers, but in order to reduce speed limits? You suggest that it would be safe and sensible—and perhaps even environmentally friendly—to increase speed limits on some of Scotland's roads.

Phil Flanders: We are coming at it from an economic point of view. Take the current 40mph speed limit for lorries. Most roads in Scotland could probably cope: most roads have a 60mph limit for cars, and most car drivers are sensible when they go round corners and so on. Lorry drivers and van drivers are the same: they know that the speed limit is the maximum, and they know that they will not be able to reach the maximum speed on many occasions.

With regard to many roads, and the A9 in particular, the Scottish Parliament's inquiry into freight in 2005 or 2006 recommended that we trial an increased speed limit to see how it would work. There are arguments for and against that, but in the long term, as far as the safety element is concerned, people would see that such a change would not increase the rate of accidents. We have evidence from studies that were carried out by Transport Scotland that shows that if trucks were allowed to do 50mph, and if that limit were rigorously enforced, and if cars stuck to a limit of 60mph, and that was also rigorously enforced, the number of accidents on the A9 would reduce by 18 per cent.

There is also a report from New Zealand, which has fewer motorways than we do. The speed limit for trucks there was increased from 80kph, which is 50mph, to 90kph, which is about 56mph. Over the past four years in New Zealand, there has been a reduction in the number of accidents involving lorries. There are arguments for doing that.

We can argue all we want, but if we do not have a trial to see what happens we will never know. We have a chance to do that up here, and to lead the UK yet again.

Brian Adam: Presumably, that would be possible only if the power over speed limits was increased, but that is not in the bill at present.

Phil Flanders: We are disappointed that that is not in the bill. We had hoped that that would be included, and we would like it to be in the bill.

Peter Peacock: Are you advocating that, if such devolved powers existed, there should be a different speed limit for the A9, for example, as

opposed to other A-class roads, or that all roads of that standard should be covered?

Phil Flanders: Not every road will be as suitable as the A9, but the A9 would be ideal for a trial. Neil Greig can correct me if I am wrong about this, but the speed limit for cars on all single-carriageway roads in Scotland is 60mph unless otherwise specified. Buses have different speed restrictions. They can do 50mph on A-class roads, 60mph on dual carriageways and 70mph on motorways. For lorries, the respective speed limits are 40mph, 50mph and 56mph. If we consider the chassis of both types of vehicle, we see that the vast majority of them are identical—they are a lump of metal with a wheel at each corner. If it is okay for buses to do those speeds, why can it not be okay for lorries to do them?

Peter Peacock: You have illustrated why, because of the unique circumstances, there is a case for having separate powers in Scotland—it is because of the proportion of our roads that are not motorways or dual carriageways. Do the other panel members agree? Are there unique things about Scotland that justify a new devolved power?

Neil Greig: The unique feature of Scotland is that it has a much greater length of road per head of population. Whichever way we look at it, we have a much greater length of single-carriageway roads. We also have a higher proportion of rural fatal crashes. In Scotland, about 75 per cent of fatalities are on rural roads; in England, it is about 66 per cent. There is a uniqueness there, if you wish to put it that way.

Most of our comments about the proposal relate to its desirability and detail. The key point for us is that it would be very welcome if the devolution of the power provided flexibility to deal with local issues such as those on the A9.

Peter Peacock: Of course, there is a tension in the evidence that we have had, to which Brian Adam has alluded. If the outcome were that the speed limit on the A9 went down rather than up, you would not be in favour of devolution—or would you? Is it perfectly legitimate for responsibility for that decision to be devolved, or is it the case that, as Mr McLetchie suggested in relation to drink driving, you want a particular outcome? The problem is that each of you wants a different outcome. WWF wants speed limits to come down for environmental reasons and ROSPA wants them to come down for safety reasons, whereas the RHA would like them to go up slightly. Does that negate the argument about devolution, or is that the nature of the devolution argument?

Phil Flanders: If the speed limits came down, we would have to accept that, but it would not prevent us from lobbying for them to be changed again. People would have to make a balanced judgment about how that would affect the economy. It would affect the economy badly and it would not do anything for road safety, because people would still speed. We would have no choice other than to accept it, just as we would have to do if Westminster took the decision.

Peter Peacock: I want to be clear that you are arguing for the power over speed limits to be devolved not simply because you want the speed limits to be changed, but because there are unique circumstances that require to be addressed. Is that correct?

Phil Flanders: Yes.

Peter Peacock: Does that go for ROSPA as well?

Kathleen Braidwood: I looked at the issue only from the point of view of the national speed limits of 60mph and 70mph. ROSPA's view is that all the research shows that excessive speed and inappropriate speed for the conditions are a major accident causation factor. In Scotland, travelling too fast for the conditions and exceeding the speed limit accounted for 75 fatalities last year. As Neil Greig says, three out of four fatalities are on rural roads.

We would not advocate increasing the 60mph or the 70mph speed limits. If the power to change speed limits were devolved, the potential would exist to raise the limit on motorways to 80mph. The more speed, the greater the danger, so we would advocate reducing speeds. Our view is that local authorities are more familiar with the roads and with where speed reductions would have a better result for their area. Local authorities are well placed to make that judgment.

At the moment, a big excuse for drivers who are caught speeding is often that they did not know the speed limit. If speed limits on roads are to be altered, it must be very clear what the speed limit is on any given road.

Peter Peacock: You heard my question to the policeman about whether having different speed limit regimes north and south of the border would have any cross-border implications. Would that be entirely manageable through signage?

Kathleen Braidwood: The signage would just need to be clear—drivers need to be properly informed.

Peter Peacock: Do the rest of the panel agree that the cross-border issue would be manageable?

Neil Greig: It would be manageable. It is a signposting issue, but it is also a matching issue. If the speed limit matches the road environment, the vast majority of drivers will adhere to it. Recently, we did a poll of 3,000 visitors to our website—who are meant to be advanced drivers, of course—

and, surprisingly, the top reason that they gave for speeding was that they did not agree with the limit that had been set. There is a lot of research to suggest that if there is a dichotomy between the fact that a road is nice and open and the fact that it has a 30mph limit on it, drivers wonder what is going on and they are more likely to speed. Provided that the speed limit matches the road environment, there will not be an issue and people will drive at the right speed anyway.

I agree that if any cross-border issue arose, it could be dealt with by signposting. Repeat signposting is common on our roads. There are many areas to which I could take you where there are three or four speed limit signs in the course of half a mile. That happens all the time. People should be looking out for the speed limit, provided that the signs are there. However, there might be confusion about what the derestriction sign meant, so that would have to be clarified.

The Convener: I have one final question for the panel. The proposal before us is for the power to change the speed limit for cars to be devolved, but we have touched on some of the complexities surrounding the limits for caravans, buses and commercial vehicles. Does anyone see merit in devolving control of the national speed limit for cars to Scotland but retaining uniformity as regards other vehicles, which is where we are with the bill at the moment?

15:30

Neil Greig: From my point of view, people do not understand the complicated area of speed limits for trailers, caravans and heavy goods vehicles, so if you added an extra layer on to that, my gut feeling is that that would be a complication. If the power was just for cars, people would understand what that was about.

Kathleen Braidwood: ROSPA's view is that if you are going to alter the speed limit for cars, there is a need to address corresponding limits for other types of vehicle, so that the differentials are not so great and therefore we do not have such high-speed impacts.

Brian Adam: The issues here are to do with economy, safety and the environment. Do the panel members believe that if you reduce speed, you improve the environment? Alternatively, is it counterintuitive, so that if you increase speed, you improve the environment?

Kathleen Braidwood: If you reduce speed, you improve the environment for people living in the vicinity of roads.

Brian Adam: That is in terms of safety. I suppose that I was really talking about pollution. The RHA has employed some arguments around safety, whereby if you have a convoy—for want of a better description—of heavy goods vehicles going up the A9 at 40mph, you will build up a lot of frustration behind it and then you will get increased accident levels, which you might not get if the speed limit was 50mph. That is certainly the RHA's view. Do other members of the panel share it? On fuel efficiency, current road haulage vehicles actually perform better at 50mph than at 40mph. Is that fair comment?

Neil Greig: My view is that the issue is much more complicated than just the speed limit. It is about congestion, free-flowing traffic, hold-ups, crashes and so on. All the things that stop free-flowing traffic add to the amount of fuel that people use, as does how they accelerate. If everybody travelled at a consistent level, that would be great; you would have the best possible eco-driving, if you like. One of the things that we do not train our drivers to do is to drive to the full eco-potential of their modern vehicles. I do not think that speed limits are a huge eco-issue; for us, they are more of a road safety issue.

Brian Adam: Given that there is already a whole range of speed limits on the same road, I assume that having a different set of speed limit signs as you come across the Scotland-England border would not make any difference. The question is where the limits are best set. This is the mirror image of the point that Mr Peacock and Mr McLetchie made. Where do you think that the speed limits are best set for Scotland's trunk roads and A roads outwith built-up areas?

Neil Greig: For us, it has to be where the risk is highest. There is a well-accepted system of risk mapping. We know where the crashes take place and where the roads with the highest number of crash incidents are. Speed limits should be part of the armoury of the road engineer in trying to address the problem of road safety. For us, it is about how the power would be implemented. It would give that extra element of flexibility to tailor limits for specific Scottish needs, such as the rural issue, but it should not be a blanket; it should be targeted at those areas where we know that there is a crash problem.

Brian Adam: Would that include HGVs as well as motorcars?

Neil Greig: Absolutely. I am very much with Phil Flanders on using the A9 for a pilot trial. For us, it is about where the crashes take place and whether there is a speed-related problem there—there would be an extra speed limit that you could apply to that location.

Brian Adam: But not caravans?

Neil Greig: As I have said, I think that that would just complicate the whole issue.

Robert Brown: I want to be clear about the difference. I understand that the national speed limits relate to all vehicles, not just cars, and that, on top of that, lower speed limits apply to lorries, buses, caravans and so on. The two sets of speed limits are in different sections of the Road Traffic Regulation Act 1984. My understanding is that the national speed limits—the 60mph, 70mph and 30mph—relate to the safety of the road, whereas the other ones for buses and lorries relate to the safety of those vehicles, in relation to their sheer size, ability to corner and so on. Am I right in thinking that, or is there some other reason for distinguishing between general vehicles and heavier vehicles of certain classes?

Kathleen Braidwood: The stopping distances are different. The highway code gives a stopping distance that is estimated on a reaction time of 0.7 seconds. The stopping distances for larger vehicles are greater than those for cars, because of the increased weight of the vehicle.

Robert Brown: But am I right in my general proposition that the distinction in the legislation between the section that deals with national speed limits and the section that deals with buses, lorries and caravans is the difference between the road on the one hand and the vehicle on the other, and that the latter distinction is to do with factors such as the size and make of the vehicle?

Neil Greig: I cannot say for certain what the thinking was. As was said earlier, a lot of the limits were set decades ago, when vehicles just could not achieve those speeds. Of course, we now have a European level on top of that, which means that the biggest lorries are speed limited anyway, so there is a certain limit that they will never legally go above.

The Convener: I thank the panel members for their time. The area is complex, as you have beautifully elucidated for us today.

I will suspend the meeting at this point. As we will not resume before 4 o'clock, I ask the public to leave as well.

15:36

Meeting suspended.

16:08

On resuming—

The Convener: I welcome the next panel. We are about to deal with some legal issues that the committee finds rather challenging, so we look to an immensely expert panel to help us in that endeavour. The most significant matter that we hope to cover relates to section 57 of the Scotland Act 1998, so we will deal with that first. We will then move to clauses 7, 10 and 16 of the Scotland Bill. I say that by way of guidance to the panel, so that witnesses can identify the areas about which they have more to say. I invite members of the panel to introduce themselves.

Mr Richard Keen QC (Faculty of Advocates): I am dean of the Faculty of Advocates.

Mr James Wolffe QC (Faculty of Advocates): I am the convener of the Faculty of Advocates law reform committee.

Michael Clancy (Law Society of Scotland): Good afternoon. I am the director of law reform at the Law Society of Scotland.

Christine O'Neill (Law Society of Scotland): I am a partner with the law firm Brodies and the convener of the Law Society's constitutional law sub-committee.

Professor Sir David Edward (University of Edinburgh): I was a European Court of Justice judge and I was a temporary Court of Session judge. I am a University of Edinburgh professor emeritus.

The Convener: Thank you very much.

Sir David, we want to test your professorial ability to explain and make simple to those of us who are not lawyers the report on section 57(2) of the Scotland Act 1998 that you have drawn up, the purposes behind it, and why we have ended up where we are. We may come to Richard Keen and others thereafter.

What was the genesis of your report? Why is it so important that we deal with it in considering the bill? There is a slight sense that we have got to drafting rather late in the day, but it would be helpful if you took us through things.

Sir David Edward: Right. Under the Scotland Act 1998, the Lord Advocate is a Scottish minister. Section 57(2) of that act states that an act of a Scottish minister is ultra vires, or incompetent, if it

"is incompatible with any of the Convention rights"—

that is, any right under the European convention on human rights—or Community law. Section 57(3) excludes from that acts of the Lord Advocate

"as head of the systems of ... prosecution and investigation of deaths in Scotland",

but only in so far as the Lord Advocate's act is compelled by a primary act of the UK Parliament. The consequence is that any act that does not fall into that exception category and any act of the Lord Advocate as head of the system of prosecution in Scotland that is alleged to be incompatible with a convention right or EU law is, ipso facto, ultra vires and unlawful. It must also be borne in mind that, with some very limited exceptions, all prosecutions in Scotland are

brought in the name of the Lord Advocate or the fiscal as a subordinate to the Lord Advocate. In effect, that means that any act done by the prosecutor in Scotland is subject to the criterion of section 57(2).

The Judicial Committee of the Privy Council and the Supreme Court were given jurisdiction to consider issues concerning compatibility with convention rights and EU law. That meant that the Supreme Court acquired a limited jurisdiction in relation to criminal prosecutions in Scotland that was entirely new, because under the law as it existed since the union of the crowns, the House of Lords—the previous supreme court—had no jurisdiction in Scottish criminal matters. The ingenuity of lawyers and, to some extent, the ingenuity of the members of the Supreme Court caused that jurisdiction to become fairly extensive.

The problem was that the prosecutors found themselves facing a very large number of devolution minutes that claimed that aspects of criminal cases were contrary to convention rights. In addition, various provisions in the Scotland Act 1998 mean that any claim that something is incompatible with convention rights must be intimated not only to the Lord Advocate, but to the Advocate General for Scotland. For various reasons, the Lord Advocate and her department and the Advocate General for Scotland and his department were faced with a very large number of devolution minutes.

16:15

There was also concern among the judges of the High Court of Justiciary, because although under the Criminal Procedure (Scotland) Act 1995 the issue in any criminal appeal is whether there has been a miscarriage of justice, the issue in a case before the Supreme Court was whether there had been a breach of a convention right, and the Supreme Court was given power to quash any conviction on the ground that there was a breach of a convention right, implicitly without considering whether in the whole matter there had been a miscarriage of justice. The judges in the High Court thought that they were required to consider, looking at the case as a whole, whether there had been a miscarriage of justice, whereas the Supreme Court was not so required. There was some dissatisfaction with the decisions of the Supreme Court in that respect.

In addition, there was dissatisfaction with the fact that the Supreme Court, by a process of interpretation, had acquired a jurisdiction to consider convention rights in circumstances in which the High Court had said that it was too late for the appellant to raise the matter. A matter could therefore come before the Supreme Court after having been rejected by the High Court.

A number of objections were put forward, and the Advocate General asked me to chair a small expert group, which consisted of Lord Boyd, who was Solicitor General for Scotland when the Scotland Act was passed and subsequently became Lord Advocate, Paul McBride QC, Frances McMenamin QC—distinguished QCs with long experience in criminal law—and Professor Tom Mullen, from the University of Glasgow. We produced our report in November.

We made various recommendations, the essence of which is that it is wrong to consider acts of the Lord Advocate as head of the system of criminal prosecution and investigation as being acts of the Lord Advocate as a devolved Scottish minister, and that in reality those functions of the Lord Advocate are retained functions, which the Lord Advocate has had since time immemorial and are nothing to do with the devolution settlement.

There was a considerable body of evidence that the system of treating the matter as a devolution issue had caused considerable complications for the Scottish criminal prosecution system, not only for the prosecutors but for victims of crime and potential witnesses, because any delay in the process of prosecution that was caused by the system of devolution minutes caused delay, uncertainty and upset for witnesses and victims.

We concluded that, in the first place, the constitutional error should be remedied and that the Lord Advocate, acting in this capacity, should be removed from the system of devolution, simply by deleting the final words of section 57(3), so that the subsection would read:

"Subsection (2) does not apply to an act of the Lord Advocate—

(a) in prosecuting any offence, or

(b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland".

Had that been left alone, it would have meant that, in Scottish criminal cases, there would have been no appeal to or review by the Supreme Court; indeed, a number of representations suggested that the proper solution would be to revert to the previous situation in which the Supreme Court had no competence in Scottish criminal questions. An equally strong body of opinion suggested that there be a resort to the Supreme Court, because having someone from the outside looking at a case would be a healthy check on the Scottish criminal system as far as the European convention on human rights and European Union obligations were concerned.

However, we concluded that the best approach was that once the High Court of Justiciary had determined an appeal there should, within limits, be a right of appeal to the Supreme Court, the limits being that there had been a breach of a

convention right or of EU law. There were two additional requirements: that there should be a clear statement of the limit of the Supreme Court's jurisdiction in relation to Scottish criminal questions and that, before quashing any conviction, the Supreme Court should be required to apply the test applied by the High Court of Justiciary, namely that there had been a miscarriage of justice. In our view, that coincides with the jurisprudence of the European Court of Human Rights, that issues concerning the fairness of prosecutions or article 6 of the convention have to be considered in the context of the whole case and that it is not enough simply to consider the question whether a convention right has been breached, if in fact that has not caused a miscarriage of justice.

That is what we proposed. I suspect that our group was rather unusual in having its recommendation accepted in its entirety. I have now seen the statutory amendments that the Advocate General is laying before Parliament and, as far as I can see, I have explained exactly what they do.

The Convener: You might or might not have seen them, but I wonder whether you are able to comment on the Lord Advocate's thoughts on the matter, which have been shared with the committee in the past 24 hours.

Sir David Edward: It is perhaps significant that in their submissions to us the Scottish Government, the justice directorate, the Scottish Law Commission and, indeed, the Lord Advocate all said that the Supreme Court's jurisdiction should be totally brought to an end. Our view was that there was a case for giving the Supreme Court some jurisdiction, but not in the form in which it had previously existed.

The Convener: I am minded to hear other panel members' views before I seek questions from committee members. Mr Keen and Mr Clancy, do you have comments to make?

Mr Keen: Convener, do I understand your reference to the recent material to refer to the Advocate General rather than the Lord Advocate?

The Convener: Forgive me. The Scottish ministers have responded to us, attaching the Lord Advocate's thoughts. I am aware that the Advocate General is broadly in favour of the proposal. Given the time limits, we are trying to establish the degree of consensus or otherwise that exists around the policy intention set out in the expert group report.

Mr Keen: I am obliged. Briefly, for clarity, if I refer to the Supreme Court, I use that reference to embrace what was previously the Privy Council and the jurisdiction of the House of Lords.

If the Human Rights Act 1998 had come into force before the Scotland Act 1998, then, given that there was no right of appeal in criminal matters from the High Court of Justiciary in Scotland, anyone who had a convention issue arising in Scotland would have had to take the case to the European Court of Human Rights at Strasbourg and their action would of course have been against the United Kingdom, it being the relevant signatory in respect of our international treaty obligations.

Section 57(2) of the 1998 act seems to me to have introduced almost accidentally an additional level of review in respect of convention issues. It is interesting that the Lord Advocate is referred to in section 57(2), because constitutionally of course the Lord Advocate's role in the matter of criminal prosecution was not a devolved matter but a retained matter; it was a jurisdiction that she had always enjoyed. It is not immediately obvious and logical to see why it was embraced within the 1998 act in the way in which it was. Nevertheless, that happened and I will not rehearse the various complaints that have arisen with regard to devolution minutes and what was apprehended by some in Scotland to be the Supreme Court's willingness to extend its jurisdiction into matters of Scottish criminal law, where before, of course, it had no jurisdiction whatsoever.

It appears to me that there is a certain logic in the suggestion that a party in Scotland can have a convention issue brought before the Supreme Court rather than having to go directly from the High Court of Justiciary in Scotland to Strasbourg. To give just one example, it would not be open to the European Court of Human Rights in Strasbourg to quash a criminal conviction; what it could do is impose a fine or order compensation. It would impose that on the United Kingdom Government for an act of a minister of the Scottish Government. So, the results in that situation could be rather peculiar.

It seems to me that the Advocate General has come up with a rather neat solution, which is to recognise the role of the Lord Advocate as it has always been in the context of criminal prosecution but to allow for what has emerged over the past 10 years as an important facility for those subject to criminal prosecution, which is the right to raise a convention issue, ultimately in the Supreme Court, where of course appropriate orders can be made in respect of the individual case, including, for example, the ultimate quashing of a conviction. So I agree with Sir David Edward's suggestion that it would not be appropriate to take the halfway position of simply removing the Lord Advocate from section 57(2) of the 1998 act; it would be appropriate to go on and confer an express statutory role on the Supreme Court—in respect

only, however, of convention issues as properly defined.

It strikes me that if that step was taken, the Supreme Court could perhaps more readily appreciate—I am not inferring that it does not appreciate, lest anyone construe it that way—and clearly define the true scope of its constitutional jurisdiction in these matters. At the end of the day, I suspect that it will not make a major difference to the number of appeals that actually go to the Supreme Court, but one has to remember that although the Lord Advocate talks about 10,000 devolution minutes, only a tiny fraction of those are granted and result in appeals before the Supreme Court. Lord Hope made that point in his letter with the papers: only a very small fraction of those proceed as appeals. I suspect that that number will not change radically under this procedure, but it might remove the vast undergrowth of devolution minutes. I suspect that the Advocate General was prompted as much as anything else by the desire not to receive intimation of 10,000 minutes, and one can hardly blame him for that.

I will conclude my remarks. It seems to me that, although the faculty took a slightly different position and anticipated the matter in its paper, the Advocate General has come up with what is constitutionally a neat and attractive way of addressing the matter. Thank you.

The Convener: Michael, would you like to add anything on behalf of the Law Society of Scotland?

16:30

Michael Clancy: Yes, convener. Thank you. The Law Society is in a slightly different position from either the dean of the Faculty of Advocates or, indeed, members of the expert group that the Advocate General established to look at the issue. We responded to what was described as the informal consultation by the Advocate General last year and, at that point, we took the view that it was not appropriate to remove the Lord Advocate from the ambit of section 57(2) and that, instead, the so-called criminal jurisdiction that the Supreme Court was exercising in relation to devolution minutes actually emanated from the Scotland Act 1998—from contraventions of ECHR or convention rights as defined in that act. That they arose within the context of criminal cases, I cannot gainsay, but nevertheless they were more centred on the human rights issue than on the criminal law, properly so called.

That distinction lay at the heart of our submission, because it then led us to a different conclusion, certainly from that of the expert group and to a certain extent from that of the faculty. We did not have the perspicacity to foresee what solution the Advocate General might reach. In that context, we have to stay with the view that we expressed to the Advocate General last year, for a number of reasons. The first is that the expert group's report was sent to us only yesterday. The second is that we have not formally seen the amendments—I am not sure that the committee has seen them—that the UK Government intends to lodge to the Scotland Bill. We want the opportunity to look at those in detail, because although there might be some superficial merit in the ideas and even some deeper merit in the ideas of the expert group, it would ill behove me to bind the society, which is a group of 10,500 solicitors, some of whom earnestly love devolution minutes and might even write them automatically in their sleep. [*Laughter*.]

The Convener: You reveal more than you intend, Michael.

Michael Clancy: Others might have only passing relationships with devolution minutes.

Sir David Edward made one or two comments about the nature of the Lord Advocate. If I may, I will detain the committee on those for just a moment before I hand over to Christine O'Neill, if she wants to say anything. I am not sure about this division—the idea of splitting the Lord Advocate into her retained functions and her functions as a Scottish minister, and the idea that this was not within the perspective of the United Kingdom Parliament in 1998.

We have to remember that the role of the Lord Advocate was specifically related to and referred to during the passage of what became the Scotland Act 1998. The act is peppered with references to the Lord Advocate. Section 44 states that the Lord Advocate and the Solicitor General shall be members of the Scottish Executive, and section 30 states that an act of the Scottish Parliament that

> "would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland"

would not be law. Features such as those turn up in the Scotland Act. Given that the Parliament clearly thought of the Lord Advocate as head of the system of prosecution, I find the idea that we could construct a theory of the Lord Advocate's powers retrospectively a difficult concept to grapple with. It is not impossible to grapple with the concept, as Sir David and the expert group have shown, but nevertheless I think that there are issues into which one would want to delve a little more deeply after we have been given adequate opportunity to examine the expert group's report and the amendments that seek to bring it into effect.

On one other point, I know that there is a matter of some contention—academic dispute, even—about appeals from the High Court to the House of Lords. There were a number of attempts to appeal from the High Court to the House of Lords from 1707 until the case of Mackintosh v Lord Advocate in 1876. In that judgment, it was stated definitively that the appeals would go nowhere because the appeal right that is in the claim of right of 1689 relates to remede of law at the old Scottish Parliament, which passed on to the United Kingdom Parliament as its successor body. Statutorily, that was finally dealt with in the Criminal Procedure (Scotland) Act 1887. Sometimes people take it for granted that there were no appeals, but there were attempts at appeal. We would do well to remember that.

The Convener: Christine, would you like to add any opening remarks?

Christine O'Neill: I do not want to detain the committee on this point, as there has been quite a lot of discussion already. Those in the room who know me will know that one of my best qualities is the ability to be self-righteous, so I will be a little self-righteous to begin with.

We have to start from the principle that in prosecuting individuals it is important to observe their convention rights. I do not think that anyone on the Advocate General's expert group was suggesting otherwise, so we are really discussing not the protection of human rights but how they are protected—the mechanism—and where they are protected—who the final arbiters are in the United Kingdom.

So far as how the rights are protected is concerned, as Michael Clancy mentioned, the society still has to consider the particular mechanism that is being advanced. All I would say is that this attempt to correct what is seen as a procedural hiccup will not be the end of devolution issues in criminal cases. Cases where the issue is the validity of an act of the Scottish Parliament in the field of criminal law will still be dealt with under the devolution issue process. This is a little bit like squeezing the toothpaste tube in a different place—the change will correct one aspect of the procedural hiccup, but it will not solve everything.

So far as where the issues are to be determined is concerned, the society is pretty clear that we would not welcome any restriction on the ability of the Supreme Court to be the final arbiter of convention rights issues in the United Kingdom. Without that appeal court, cases would go directly from Scotland to Strasbourg, which in the society's view is in no one's interest.

Tricia Marwick: I am sure that the panel will be extremely gentle with me. I come to the issue completely new, so this may be the daft lassie question. As I understand it from what Professor Edward was saying, the problem—if it is a problem—is that the Lord Advocate is both a Scottish minister and the independent head of the prosecution service. Could those difficulties not be resolved by removing the Lord Advocate as a Scottish minister and keeping her as the independent head of the prosecution service? Would that not be a more elegant solution than what the expert group has advanced?

Sir David Edward: With respect to Michael Clancy, I think that he should read what we said about the position of the Lord Advocate. We have set out in detail why the Lord Advocate's retained functions are retained functions. That is at paragraph—I cannot remember where, but it does not matter. The Lord Advocate has always had two hats: one is the autonomous hat as head of the system of public prosecution, and the other has been as a minister of the crown. That set-up remains.

The problem is that the Scotland Act 1998 does not sufficiently clearly distinguish the two functions. To remove the Lord Advocate entirely from the category of the equivalent of a minister of the Crown and member of the Scottish Government would be a step too far in another direction.

Tricia Marwick: In 2007, one of the first acts of the new Scottish Government was to remove the Lord Advocate from the Cabinet to depoliticise her role, notwithstanding what is in the Scotland Act 1998. If there is a conflict because she is simultaneously a Scottish minister and the independent head of the prosecution service, I would like someone to explain why it would be more difficult to remove her as a Scottish minister than to go through the convoluted series of amendments that we are looking at now.

Sir David Edward: With great respect, it is not convoluted; it is straightforward. The Lord Advocate would retain certain executive and ministerial functions. The fact that she is no longer a member of the Cabinet does not remove her executive functions.

Tricia Marwick: Why can we not just remove the executive functions?

Sir David Edward: Because the Lord Advocate has to exercise them.

Tricia Marwick: Could someone else not do that?

Sir David Edward: I do not think that our function is to reform the system of government of Scotland; it is simply to overcome a problem.

Tricia Marwick: I am suggesting that there might be an easier way to overcome the problem that has arisen. I bow to your greater knowledge,

but if the problem is that the Lord Advocate is simultaneously a Scottish minister and the independent head of the prosecution service, and that those two roles are incompatible, which is why we are where we are with the amendments, would it not be a more elegant solution to remove the Lord Advocate's functions as a minister of the Crown? Could those functions not be carried out by someone else, leaving the Lord Advocate as the independent head of the prosecution service?

Sir David Edward: With great respect, it is not a question of the incompatibility of the Lord Advocate's functions, but the fact that there are two separate functions. They are perfectly compatible and have been so for centuries. The Lord Advocate used to be the equivalent of the Secretary of State for Scotland and has always had executive functions.

Mr Keen: There is a division of functions in England and Wales. The Director of Public Prosecutions is not a member of the Executive and the Attorney General is a minister of the Crown and is also able to instigate prosecution in appropriate circumstances. There is a separation there. Historically, both functions have been held by a single individual.

From the perspective of those who are giving evidence to the committee, my observation is that a step towards removing the Lord Advocate as a member of the Scottish Government would have major constitutional and political implications and would have to be the subject of vigorous and detailed analysis. I do not see it as a mechanism that would resolve the present issue without creating other major constitutional issues.

Robert Brown: What we are discussing is reminiscent of the previous Government's attempts to deconstruct the Lord Chancellor's office and the complications around that.

I readily understand Michael Clancy's position that the Law Society has to consult and examine the details, but it was helpful of Christine O'Neill to give us her assurance about the retention of the mechanism to appeal to the Supreme Court.

I want to make sure that I understand the position although, if I may say so, the document is elegantly written. On the question of the validity of acts of Parliament, on which Christine O'Neill touched, I would be grateful to hear any further thoughts that she might have on any complications that might exist in the interstices of that issue. We have not heard about any such problems until now and I hope that that will continue to be the case. However, the focus might change if we make any other changes. Have you any comments on that? You might want to come back to us in writing at a later point.

16:45

Christine O'Neill: Briefly put, the term "devolution issue" is just a label for a series of questions that might arise. One of those questions is whether an act of the Parliament is compatible with convention rights. At the moment, another devolution issue is the question whether something that the Lord Advocate does is compatible with convention rights. As I understand the Advocate General's proposal, a question about how the Lord Advocate has behaved would cease to be a devolution issue but the question of whether an act of the Parliament is compatible with convention rights would not cease to be a devolution issue. One can imagine circumstances in which a prosecution is taken by the Lord Advocate on the basis of a piece of legislation that is passed by the Parliament, where the question at issue is the validity of the act itself and not just the actions of the Lord Advocate—

Robert Brown: So that might move it back a stage, as it were.

Christine O'Neill: As I understand it, the question whether the act were valid would follow the very devolution issue procedure that we are talking about so, in that regard, we would be back to where we are at this point. I have no particular difficulty with that, but I wanted to make the committee aware that this solution will not eliminate devolution issues altogether from the context of criminal proceedings.

Robert Brown: I think that the issue arises in a slightly different context. If you want to get back to us on some of the issues at a later date, when the Law Society has considered them in more detail, that would be useful.

Michael Clancy: The other observation that one could make is that devolution minutes and the procedure that Christine has outlined all stem from acts of adjournal, which might be amended in such a way as to avoid some of the practical difficulties that have arisen in relation to the 10,000 devolution issues that have arisen over the 11 years of the Parliament's existence. There are many ways in which to get at some of the practical problems.

Robert Brown: The ECHR is part of the law of Scotland in the sense that it falls to be applied by sheriff courts, justice of the peace courts and everyone else. Therefore, what we are talking about is whether it is applied correctly and whether it works its way up through the system.

Am I right in saying that, no matter what direction we move in, the substance of Scots law will remain subject to the final jurisdiction of the High Court, which means that matters cannot be taken further than that, except on convention issues?

Mr Wolffe: Community law is important, too.

Robert Brown: Community law, absolutely. So the situation is reasonably clear cut.

The submission touches on the differences between the Supreme Court and the High Court—I believe that you mentioned the McInnes case as well, Sir David—and how exactly those differences apply. Was that limited to the issue of miscarriage of justice not being taken fully on board by the Supreme Court, or were there other ramifications to that?

Sir David Edward: From the perspective of the Scottish judiciary, the difficulty is that, under the present system, you have to give notice of a claim that there has been a breach of a convention right. There are time limits and procedures that have to be gone through. On some occasions, the High Court has held that a claim has been made too late, the procedure was not followed and that is the end of the matter, therefore leave to go to the Supreme Court has been refused. However, when the matter gets to the Supreme Court, the Supreme Court grants leave and says that the fact that the High Court refused to entertain the claim of a breach of the convention right is itself a determination of the convention issue and, therefore, the Supreme Court has jurisdiction, even though the High Court has said that it will not listen to the claim, because it came too late. That has caused considerable concern.

The other major concern is that the High Court is instructed by Parliament to consider whether in the circumstances there has been a miscarriage of justice, whereas the Supreme Court has focused entirely on the convention right and not on the rest, although I think that it has now backed down from that approach.

Robert Brown: On the point about the time limit for claims, will the solution that you are presenting—which the Advocate General recommends—resolve that problem as well as the miscarriage of justice problem?

Sir David Edward: It will mean that the case would go to the High Court by the normal process of appeal, and then, with leave, to the Supreme Court. I suppose that it would still leave open the possibility that the Supreme Court would hope that the High Court would say, "We're not hearing this claim; it comes too late," and would still maintain that that was a determination of the convention right. It does not solve that problem.

Robert Brown: No—absolutely. To follow that through briefly, the issue is—as you mentioned before—not so much the number of decisions by the Supreme Court, but all the other procedural things that are lurking about, which mean that people want to go to the Supreme Court even if they are not allowed to do so. Will that fade over time as decisions are made that obviously indicate that heading in that direction is a waste of space, or will it continue, even if we stop intimating it to Jim Wallace?

Sir David Edward: One can never put a limit on the ingenuity of lawyers, but like most other things, these issues tend to go in waves. To give you an example, there was a period relatively soon after we joined the European Community—as it was then—in which it was regularly claimed in contract cases that a contract was illegal because it was contrary to the anti-trust or competition rules. Just as that faded out, it is likely, broadly speaking, that the convention issue will calm down, although it will not totally disappear.

Robert Brown: I have a final question on that point, with regard to the alternative. One can still go to the European Court of Human Rights after the Supreme Court or the High Court as may be, depending on the procedure. Can you give us some guidance on how many Scottish judges sit on the Supreme Court and the European Court at present? Can you tell us something about the timescales and expense of the two procedures?

Sir David Edward: On the United Kingdom Supreme Court there are currently two Scottish judges, who are both former Lord Justice Generals. On the European Court of Human Rights in Strasbourg there are no Scottish judges. If a case involves a Community issue, there are likewise no Scottish judges on the EU Court of Justice.

In Strasbourg, the defendant state is always entitled to have a judge on the bench. If the British judge is prevented from sitting for some reason, the UK can appoint an ad hoc judge, but it would not necessarily be a Scottish judge.

We said rather caustically in our report that we could not understand why it is so important to have remedy in Strasbourg where there are no Scottish judges, rather than a remedy in London where there are two.

The Convener: I am keen to move things on, but Peter Peacock has a brief question.

Peter Peacock: My question is for Michael Clancy, on a procedural matter. As Robert Brown mentioned, you quite rightly reserved the position of your organisation on these matters. However, you indicated that there was superficial—indeed, probably deeper—merit in the proposals, and you wanted "adequate opportunity" to examine them.

What would represent "adequate opportunity"? We are discussing a process that started in Westminster: there was a recognised problem and an eminent group of people considered a potential answer. That answer has commended itself to the

UK Government, and we have heard some support for it already today.

It would be a great pity to think that the "adequate opportunity" might delay the process in any way. What is your view on that?

Michael Clancy: I am not sure that anything that the Law Society might do or not do would delay the process of the Scottish Parliament.

Peter Peacock: Indeed so, but I am trying to give you the opportunity to conclude your deliberations as quickly as possible. I am wondering how quickly that would be.

The Convener: I am tempted to prevent an answer to that question. Along the lines of the questioning that Peter Peacock has begun, it suffices to add that the committee briefly discussed the issues informally before the witnesses joined us. The committee desires to help in addressing the devolution minutes issue that Sir David Edward has outlined. Scotland Bills do not come along every moment, so the opportunity should be taken if it exists. That said, action should be commensurate with proper consultation by the expert groups that might have a view. A complication is that the evidence that we received from the Scottish Government yesterday indicates that it does not support the proposed solution; another issue is the Lord Advocate's unavailability to join us today to resolve the matter.

The committee is minded not to take further evidence on the issue now but to invite all the witnesses to submit in short order further evidence if they wish to, which might allow the committee to reach a view before producing its report, which needs to be completed by the end of this month. The timetable is not ideal, but it is where we find ourselves. With that, I call David McLetchie. I will take closing remarks on the subject, after which we will move on to the other issues.

David McLetchie: I will follow up Tricia Marwick's questions on the Lord Advocate's dual functions in such matters. Are we satisfied that continuing those dual functions is compatible with the European convention on human rights? Has that been adjudicated or determined? Has it been suggested that the functions might not be compatible and that a complete separation of executive functions—or rather, the insulation of the independent prosecutorial service from any responsibility of the executive government of the country—would be sensible?

Mr Keen: I am not aware of the matter having been adjudicated on. One must make a distinction with the situation of the Lord Chancellor, who discharged a judicial function as well as an executive function. The arguments that applied to the Lord Chancellor do not apply to the Lord Advocate. Beyond that, I wish to make no comment on a matter of such far-ranging constitutional significance.

David McLetchie: Under the bill, we are moving to a strict separation of functions between the executive, the legislature, the judiciary and prosecutorial services. Long established our system might be, but it might not fit with jurisprudence that is based on the separation of powers.

Mr Keen: That might be a case for a director of public prosecutions in Scotland.

David McLetchie: Indeed. Tricia Marwick made that point in her questions.

The Convener: The question of the capacity in which the Lord Advocate will speak next week is interesting. I presume that she will speak as a law officer rather than a prosecutor and in terms of her devolved rather than retained functions, although the matter that is at hand is her retained functions. I simply make that observation.

David McLetchie: My second question might have been partly covered. I understand that the issue in relation to the proposed statutory right of appeal to the Supreme Court is whether that court—rather than the High Court in Scotland—should be the final arbiter in the United Kingdom of whether convention rights have been breached. In either instance, the ultimate arbiter would be in Europe. What is the rationale for an intervening stage? The Scottish Government's case asks why we do not just let our judges arbitrate on such matters in Scottish courts and say that if someone is aggrieved, they can go off to Strasbourg. What is the objection to that?

17:00

Christine O'Neill: There are two short answers to that: expense and delay. Considerable expense and delay are involved in getting to the Strasbourg court. You may think that there is expense and delay in getting to the Supreme Court—there certainly is—but a particular problem in Strasbourg at present, following the accession of a large number of eastern European countries to the Council of Europe, is that there is a big backlog of convention rights cases. People from Scotland who went directly to Strasbourg might wait for four or five years to have a convention rights claim determined.

David McLetchie: I do not understand. If someone could go from the High Court to the Supreme Court under the statutory right of appeal and then—as that is not the end of the road—on to the Strasbourg court, surely the whole process would take even longer, or am I missing something?

Christine O'Neill: In effect, the Supreme Court would act as a sift. It would certainly be the case that the number of cases that went to the Supreme Court would not be reflected in the number of cases that went all the way to Strasbourg. Many people's claims would be determined at Supreme Court level without their having to go on to Strasbourg. There would a volume issue if people could go directly to Strasbourg.

There is a broader constitutional argument for convention rights being determined at Supreme Court level, which is that within the UK—the signatory state to the convention—convention rights should be interpreted and applied consistently across the state by a single court. That is the constitutional argument for having a single arbiter in the UK.

Mr Keen: I agree with the point about the UK being the signatory to the international treaty obligation, but there is, in addition, the issue of resolution. If an appeal goes to the Supreme Court, it may resolve it by quashing a conviction, for example, but we should remember that an action that goes to Strasbourg is not an appeal from the UK Supreme Court. It is an entirely new process involving an action against the UK that may result in an award of damages, but which cannot result in the quashing of the relevant conviction. Although the Strasbourg court seems to be the ultimate arbiter of a breach of convention rights, the process is different and the outcome is different.

The Convener: I thank the witnesses for those helpful answers on section 57(2), on which I invite you to submit even the briefest of memoranda, because it has been outwith the formal evidence taking.

Let us move on to the three other legal matters that we would like to discuss with you. The panel will be aware that clause 7 creates the opportunity for two different types of reference on competency. As well as allowing for a general reference of a whole bill—such a power already exists but has not been used—it includes a new, much more limited reference provision. Does anyone have any objections to or observations on that provision?

Mr Keen: Clause 7 appears to be directed at a tension that exists between two distinct constitutional principles. First, legislation that has been validly enacted by a Parliament should come into force in accordance with the will of that Parliament. Secondly, if a Parliament has not legislated validly—in other words, if it has legislated outwith its powers—there should be a means of determining that it has done so and that the relevant legislation is not law, as it would be said in the terms of the Scotland Act.

It seems to me that there might be circumstances in which it appears attractive to have a law officer make a referral in respect of a part of an act yet allow the remaining part of the act to become law. I disagree with the Law Society to the extent that it suggests that there should be guidelines on or some form of regulation of how the law officer should determine whether to make a referral. That is very much a matter for the law officer. Ultimately, the legality of the provision will be determined by the Supreme Court. However, there might be circumstances—you will be better informed on this than I am—in which an act of a Parliament involves a degree of checks and balances. The Parliament decides to legislate on a matter because there is a check or a balance elsewhere in the same act. It may very well be that Parliament would not have legislated in respect of one part of an act without the benefit of the check or balance that exists elsewhere in the same act.

Consequently, if you allowed a referral in respect of one part of the act, then simply allowed the other part of the act to come into force and become law, that might not reflect the will of the Parliament. It might never have legislated in respect of the part of the act that is coming into force without the perceived check or balance that is covered by the matter subject to referral. One way of resolving that would be to make the non-referred part of the act subject to the positive approval mechanisms within the Parliament so that it has an opportunity to look at that part of the act that is intended to and is going to become law and decide whether it is content that that should be law, even in the absence of the referred section.

So, that is the one proviso that I would express with regard to clause 7. It seems to me that, on the face of it, it would not necessarily reflect the will of Parliament, but that that can quite easily be resolved by using the relevant mechanism, in particular the power of ministers to lay an order that is subject to the affirmative resolution procedure of the Parliament.

The Convener: That is an interesting suggestion, and we will reflect on it.

What are the panel's views on the reverse Sewel provision?

Christine O'Neill: You refer to clause 10, which, as I understand it, is intended to be part of a mechanism for allowing the Scottish Parliament to ask Westminster for temporary powers to legislate on particular issues. The Law Society has no particular difficulty at all with that. However, we have some questions about the practical effect of clause 10 and are a bit puzzled about the need for some of its provisions.

Clause 10 itself is not about the request that goes from the Scottish Parliament to Westminster but about what happens when an order is made that confers the temporary competence to legislate. The clause appears to say that the order that comes from Westminster can be time limited and have an expiry date, but where it has an expiry date, the same order can include a provision that says that once an act is made under the temporary provision, even though the temporary provision expires, the act made under it does not. That raises a question in our minds. If an order confers temporary competence but does not include the provision for the act to live beyond that temporary competence, is it the UK Government's view that when temporary competence ends, any act made under it disappears? If so, that is quite contrary to our understanding of the validity of acts of the Scottish Parliament.

If it is the Government's position that the act disappears when the competence power disappears, there is nothing special about temporary competence that makes it different from ordinary competence. Therefore, if there is a need to preserve the validity of acts made under temporary competence, there is an equal need to preserve the validity of acts made under competence that is just taken back to Westminster in the ordinary way, as in the case of insolvency law and the regulation of health professions, which are being taken back. Is it the UK Government's position that any measures taken under the old competences on insolvency or regulation of health professions disappear on the enactment of the Scotland Bill? I do not know the answer, but that is the question that is raised in our minds.

The Convener: It is helpful to have that issue discussed on the record.

We will now move to clause 16, on international obligations, which is perhaps the smallest of the matters that we will deal with today, and we will conclude there. [*Interruption*.] I beg your pardon—we also have Somerville to deal with. That was my mistake. We will deal with Somerville first and then international obligations.

Does the panel have any views on the plans for dealing with the outcome of the Somerville case?

Michael Clancy: So your question is about clause 16.

The Convener: Yes—my apologies.

Mr Wolffe: Before making some comments on the matter, I should first mention that I was junior counsel for the Scottish ministers in the Somerville case. However, I am sitting here with my convener of the faculty law reform committee hat on.

In principle, it seems that there cannot be any objection to having an appropriate time limit placed on claims, including claims for breaches of convention rights. It is in the public interest, and generally in the interests of litigants themselves, that matters are brought before the court promptly if they are to be brought at all. The European Court of Human Rights itself applies a six-month time limit to claims.

Views may differ about the appropriate time limit for any particular claim. The logic of the provision that was enacted in the wake of the Somerville case, and which is proposed to be re-enacted in the Scotland Bill, is that it is on all fours with the provision that would apply to claims that are brought against any other public authority under the Human Rights Act 1998. There is plainly a strong argument that, simply from the point of view of consistency, a like claim brought against a UK minister on a matter that would be within the remit of the Scottish ministers should be subject to the same limitations and controls. Within Scotland, claims against a local authority should be subject to the same rules as a claim against the Scottish ministers. As I say, there is a case for the approach that has been adopted simply on the ground of consistency.

I infer from its paper that the Law Society takes a somewhat different view. The society invites the committee to take the view that time should start to run from the point at which the complainer is first aware of the breach of convention rights. I think that the Law Society is also questioning the period of time that has been selected.

On the first of those points, the answer perhaps lies in the terms of the provision. Proposed new section 100(3B) of the 1998 act, which is introduced by clause 16(6), tells us:

"Proceedings to which this subsection applies must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place, or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances".

The second of those provisions is important, as it allows the court—in any case in which, under the whole of the circumstances, it would be "equitable" to do so—to allow a claim to proceed even if it has been brought after the end of the one-year period.

Where a claimant is justifiably ignorant of his claim, that would no doubt be, or would form part of, the basis on which the court could be invited to exercise its discretion. I emphasise "justifiably". If we start the time running from the point at which the applicant is aware of the breach, we immediately encounter issues of whether he or she was justifiably aware of it. It should not be an answer for someone to turn a blind eye to something that they should know about. The point is that the court should consider all the facts and

circumstances in considering whether, if the one-year time limit has expired, the claim should be allowed to proceed.

17:15

Ignorance is not the only circumstance that might justify a time extension. If an applicant was not ignorant of the basis of a claim, but was induced to refrain from making a claim because of the way that correspondence had been progressing between the applicant and the public body, the nature of that correspondence might justify their asking the court to allow the claim to be brought out of time. Therefore, the Law Society's approach, if it is hanging its hat on awareness—that is the critical starting point—is not sufficient. One would want to look at a whole range of possible alternatives. Leaving it to the court to make the judgment is the most sensible approach in the circumstances.

There is currently no time bar for judicial review claims generally, but it was suggested in the civil justice review under Lord Gill that a three-month time limit should be introduced, subject to a similar discretion for courts to allow claims out of time. Perhaps that gives members a sense that a shorter period of time is being considered as appropriate. There is always the caveat, of course, that the court can allow a claim to be brought later if that seems right in the circumstances.

Michael Clancy: Tempting though it may be to rise to a debate with James Wolffe about the various merits of the submission from the Faculty of Advocates and our submission, I will not do so because, in a sense, that would not address the substance of clause 16. Clause 16 would replace legislation that the Scottish Parliament has passed. My anxiety revolves around that issue rather than around provisions that have already been debated and passed by the Scottish Parliament.

This is not the first time that I have seen clause 16. It appeared in the Constitutional Reform and Governance Bill in the United Kingdom Parliament last year along with two other clauses that sought to correct—if that is the word that one wants to use—the time limits in human rights cases in Northern Ireland and in convention cases in Wales, under the Government of Wales Act 2006. The Constitutional Reform and Governance Bill sought to do something along the same lines as clause 16—indeed, almost to the exact word—before the election in May 2010, but those clauses were lost when the wash-up came prior to the election. The resurrection of the provisions in clause 16, detached from the concomitant clauses for the other jurisdictions in the United Kingdom, puts us into a slightly different situation. Sure enough, clause 16 aligns Scots law relating to convention rights claims with the Human Rights Act 1998, in which the one-year time bar applies. However, the changes that were proposed for Northern Ireland and Wales were not carried through. I did a quick search to check that the Northern Ireland Act 1998 and the Government of Wales Act 2006 have not been amended and, as far as I am aware, similar provision has not been made for those jurisdictions.

We must consider the issue and ask whether the proposal is necessary. The Scottish Parliament enacted the Convention Rights Proceedings (Amendment) (Scotland) Act 2009. What in that act needs that replacement provision? That is the question that I would want to ask. If I was going to be mischievous—one could never accuse me of being mischievous, of course—I would refer to the UK Parliament's explanatory memorandum to the Scotland Act 1998 (Modification of Schedule 4) Order 2009, which enabled the Scottish Parliament to enact the 2009 act. Paragraph 12.1 of that memorandum states:

"This Order provides the Scottish Parliament with the competence to pass legislation which could create a time-bar in relation to certain matters. It is for the Scottish Parliament to consider how best to monitor and review legislation within its legislative competence."

The Convener: I think that you have given us enough to chew on. We will have the Secretary of State for Scotland with us a mere 36 hours hence.

Do the panel members wish to make any observations on clause 23, on implementation of international obligations?

Sir David Edward: As I understand it, the purpose of the provision is to put the making of statutory instruments in the same position as the making of statutes. Under the Scotland Act 1998, the United Kingdom Parliament has the power to pass a statute even if it relates to a devolved matter, but the United Kingdom Government does not have the power to make a statutory instrument where competence lies with the Scottish ministers. Although there is not much explanation in the explanatory notes, I understand the problem to be that many international conventions are highly technical. It is highly desirable that the implementation of such conventions should be uniform throughout the United Kingdom. The provision is simply a means of ensuring that a single statutory instrument has effect throughout the United Kingdom. It seems to me that some form of Sewel convention is needed in relation to the use of the power.

The Convener: We will consider that helpful observation. Before we finish, I offer panel members an opportunity to comment on other aspects of the bill. As you will see, we are working to an incredibly expedited timetable, so this is

probably the only opportunity that you will have to put other issues on the table.

Sir David Edward: Mr McLetchie had two questions. The first was about whether the position of the Lord Advocate breaches the principle of separation of powers. I was unable to note the second.

David McLetchie: It was about why we do not allow final determination of matters in the Scottish courts. A case may go to Strasbourg, but why should there be the potential for an intermediate stage in the Supreme Court? Some other observations were made on that point. Mr Keen explained the rationale for the provision.

Michael Clancy: First, I do not believe that we are necessarily moving towards the doctrine of separation of powers; we are moving more towards a doctrine of distribution of powers. That is a point for us to discuss later. Secondly, I track back to our interesting and in-depth discussion of section 57(2) of the Scotland Act 1998. It would be helpful and extremely useful for stakeholders to see the amendments that the Government proposes to table at committee stage.

The Convener: I agree. Within days, at most, of receiving them, we will formally launch a consultation inviting all interested parties to contribute on the issue, to a tight timescale. I thank all members of the panel for their evidence.

17:23

Meeting continued in private until 17:34.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Members who wish to suggest corrections for the revised e-format edition should mark them clearly in the report or send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP.

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by RR Donnelley and is available from:

Scottish Parliament

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

For more information on the Parliament, or if you have an inquiry about information in languages other than English or in alternative formats (for example, Braille, large print or audio), please contact:

Public Information Service
The Scottish Parliament
Edinburgh EH99 1SP

Telephone: 0131 348 5000
Fòn: 0131 348 5395 (Gàidhlig)
Textphone users may contact us on **0800 092 7100**.
We also welcome calls using the Text Relay service.
Fax: 0131 348 5601
E-mail: sp.info@scottish.parliament.uk

We welcome written correspondence in any language.

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders, subscriptions and standing orders
business.edinburgh@blackwell.co.uk

Blackwell's Bookshop

53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

Accredited Agents
(see Yellow Pages)

and through other good booksellers

e-format first available
ISBN 978-0-85758-486-1

Revised e-format available
ISBN 978-0-85758-499-1

Revised e-format ISBN 978-0-85758-499-1