The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SCOTLAND BILL COMMITTEE

Tuesday 25 October 2011

Session 4

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SCOTLAND BILL COMMITTEE
8th Meeting 2011, Session 4

CONVENER

*Linda Fabiani (East Kilbride) (SNP)

DEPUTY CONVENER

*James Kelly (Rutherglen) (Lab)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*Nigel Don (Angus North and Mearns) (SNP)
*Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP)
Alison Johnstone (Lothian) (Green)
*John Mason (Glasgow Shettleston) (SNP)
*Stewart Maxwell (West Scotland) (SNP)
*Joan McAlpine (South Scotland) (SNP)
*David McLetchie (Lothian) (Con)
*Willie Rennie (Mid Scotland and Fife) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Michael Clancy (Law Society of Scotland)
Patrick Harvie (Glasgow) (Green) (Committee Substitute)
Blair Jenkins
Richard Keen QC (Faculty of Advocates)
Ken MacQuarrie (BBC Scotland)
David Mahoney (Ofcom)
Bill Matthews (BBC Trust)
Alan McCreadie (Law Society of Scotland)
James Mure QC (Faculty of Advocates)
Vicki Nash (Ofcom Scotland)
Christine O'Neill (Law Society of Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Committee Room 1

Scottish Parliament

Scotland Bill Committee

Tuesday 25 October 2011

[The Convener *opened the meeting at 14:30*]

Scotland Bill

The Convener (Linda Fabiani): Good afternoon, everyone, and welcome to the eighth meeting in this session of the Scotland Bill Committee. I remind those who are present to turn off completely their mobile phones and BlackBerrys, please, as even when they are on silent they interfere with the sound system.

I have received apologies from Alison Johnstone, for whom Patrick Harvie is substituting. I welcome him. Nigel Don will be late because he is on other parliamentary business.

I welcome our first panel of witnesses. David Mahoney and Vicki Nash are from Ofcom and Ofcom Scotland; Blair Jenkins is the former chair of the Scottish Broadcasting Commission; Ken MacQuarrie is director of BBC Scotland; and Bill Matthews is trustee for Scotland in the BBC trust. I thank you all very much for coming.

We are fairly pushed for time and there is a large panel, so I ask the witnesses to make very short opening remarks before I open up the meeting to questions.

Vicki Nash (Ofcom Scotland): Thank you very much, convener.

Members have our written submission, which I do not propose to go into in any detail. Suffice to say that we indicate how Scotland's cultural and economic circumstances are reflected in Ofcom's operations—in our governance procedures, accountability, research and policy making, and our general engagement in Scotland.

Blair Jenkins: I will confine myself to making brief remarks. Perhaps I can send in something a bit longer for the committee.

It is hard to imagine that we will go much further into the age of devolution without at least some of the responsibilities for broadcasting policy being transferred to the Scottish Parliament. To be honest, I think that even if nothing else in the current devolution settlement changed, we would still need to reconsider how and where the key decisions that affect Scottish broadcasting are made.

In the next few years, big decisions are coming up on the renewal of the channel 3 licences—or perhaps not—the awarding of local television licences and, of course, the next renewal of the BBC's charter and agreement. Those matters will require constant attention and detailed scrutiny in Scotland, and we need a permanent parliamentary capacity for monitoring, challenging, asking awkward questions and getting the right answers for the Scottish public interest. The capacity for such detailed engagement and the close scrutiny of broadcasting, the media and communications more widely is in Edinburgh. That is the suitable place for them. That is exactly what the Scottish Parliament was set up for, and that should be your responsibility.

Ken MacQuarrie (BBC Scotland): We have just published the conclusions of our delivering quality first—DQF—work, which is going out to a public consultation to be run by the BBC trust.

We are at the end of a strong year for our BBC Scotland services. We have been to the Scottish Parliament in the past and looked at the level of business for our network services. We are pleased to report that we hit 7.4 per cent of all the network's spend in the United Kingdom last year and that we are comfortable that we will reach our 8.6 per cent target before 2012. Members may recall that that was one of the Scottish Broadcasting Commission's recommendations.

In addition, we hope to have more of our programmes that are made for Scotland broadcast on the network and to increase the visibility of those programmes throughout the UK. Obviously, news has been critical for BBC Scotland, and our news services are stronger than ever before. There are audiences of more than 2.3 million for our television news bulletins, 700,000 for our radio bulletins and in excess of 2 million for our online services. We intend to ensure that the quality, range and depth of those services are maintained in the period to the end of the charter.

Bill Matthews (BBC Trust): I am grateful for the invitation. I am a relatively new trustee for the BBC in Scotland, and my job brings with it the role of chairing the Audience Council Scotland and having a direct connection to listeners. I suspect that I could not have landed at a more interesting time for broadcasting. The good thing is that I recognise everything that Ken MacQuarrie has just said, so I think that there is a reasonably strong connection between the trust and the executive in that regard. We have been working closely together on the delivering quality first proposals that he discussed.

I will end my opening comments there. If required, we will supply you with further information after the meeting.

The Convener: Before we move on to questions, I mention that we expected to have on the panel Jane Muirhead from the Producers

Alliance for Cinema and Television, but unfortunately she is unable to attend.

Joan McAlpine (South Scotland) (SNP): I address my question to Mr MacQuarrie. Thank you for coming along. I note what you say about the increase in network spend in BBC Scotland and the fact that that was recommended by the Scottish Broadcasting Commission. However, there has been a substantial fall in the amount of English-language programming that is made in Scotland for Scots. The fall was 30 per cent over five years for the two national broadcasters, according to an Ofcom report. Has Scottish broadcasting for Scotland suffered because of BBC Scotland making programmes for the network?

Ken MacQuarrie: I do not believe so, although it is fair to say that the greater thrust of the programmes for the network have not had as much portrayal of Scottish voices and Scottish issues as we would like. It was an economic strategy that we embarked on. The emphasis from now on for our network programmes will be on ensuring that Scotland's stories are heard across the United Kingdom.

As far as the decrease in our local hours is concerned, we have tried to make bigger programmes with greater impact and put an absolute emphasis on quality. For example, we made programmes such as "Men of Rock" and "Making Scotland's Landscape" to address Scottish audiences, but they then had a network showing. It has been a deliberate strategy to put emphasis on the impact and quality of programmes. It is fair to say that, for local audiences, there has been some decrease in television hourage, but if you take the total hourage of network programmes plus local programmes and BBC Alba, we are producing some 2,000 hours per annum.

Joan McAlpine: That includes programmes in Gaelic.

Ken MacQuarrie: Yes. That includes 600 hours of BBC Alba programmes, but the network programmes have risen to 600 hours.

Joan McAlpine: Some of your network programmes, such as "Question Time", will not have changed at all in the way in which they deal with Scotland.

Ken MacQuarrie: That is fair to say. Such programmes address a UK audience and there will not be a Scottish dimension, but we make other programmes. We recently announced that the head of UK arts will be based in Scotland. Having such leadership posts based in Scotland will ensure that a Scottish perspective on the arts is present in programming throughout the UK. You can see from the arts programmes that we have made that the diversity of voices in those programmes is greater than it was.

Joan McAlpine: I accept your point that audiences throughout the UK will be keen to learn about Scottish subjects. However, do you agree that there are specific ways of handling Scottish subjects that will be of interest to a Scottish audience but not necessarily to the 90 per cent of people in the UK who live outwith Scotland?

Ken MacQuarrie: Yes. We make programmes specifically for Scotland that are not designed to be network output. Similarly, we make programmes that start out being only for Scotland and are from a Scottish perspective, but which the network is then interested in. There have been a number of examples of that over the past 10 days.

Joan McAlpine: You outlined the cuts that you are facing. We have been told that, UK-wide, Radio 4 is a jewel in the crown and it is being protected, whereas Radio Scotland is being cut considerably. One of the programmes that you are proposing to cut is "Newsweek Scotland", which is probably the highest quality current affairs programme on Radio Scotland. Do you not think that that is a jewel in your crown?

Ken MacQuarrie: We are proud of all our news and current affairs on Radio Scotland. I can guarantee—without discussing specific programmes, as I would like to leave the teams free to implement their policies as they wish in relation to the audiences—that the depth, range and quality of Radio Scotland's news and current affairs programmes will be maintained absolutely, and it is certainly my ambition to increase those things.

Joan McAlpine: Given what you have said about the reduction in the number of Scottish programmes for a Scottish audience, and your acknowledgement that it is a problem, did you argue the case for such programmes to be protected in the current round of budget cuts?

Ken MacQuarrie: With regard to the reduction in the number of hours, I said that we would put our effort into making high-impact programmes—I do not view the reduction as a problem in terms of the hours lost. In terms of the impact on our audience, we have maintained the reach and quality scores in our audience assessments extremely well. As I said, we have built our audiences in news and current affairs.

There was a large discussion in the BBC in which every part, including BBC Scotland, argued for the areas that they wished to protect. News and current affairs, for example, has fewer cuts than any other part of the operation in Scotland, and there are certainly fewer than there have been in the London newsroom.

Joan McAlpine: As the BBC Scotland representative, how do you feel about Radio 4 being described as a jewel in the crown and being protected when services for Scotland are not?

Ken MacQuarrie: I believe that the services that we offer Scotland are of immense value to the Scottish people. We contribute a lot to and produce for Radio 4: we are hugely proud of the drama that we make for the station, as it gives Scottish writers and actors a great platform. We also contribute to a range of its documentary and science-based programmes from Edinburgh and Glasgow.

In essence, the decision to protect Radio 4 will mean that some of the programming that we produce for the station will be unaffected.

Joan McAlpine: I wonder if I could invite Blair Jenkins to comment.

The Convener: I ask you to make that your last question, Ms McAlpine.

Joan McAlpine: Perhaps Blair Jenkins can comment on the cuts in English-language Scottish programmes for a Scottish audience. Do you think that that is a concern?

Blair Jenkins: Cuts are always a concern, particularly as this is not the only set of cuts that BBC Scotland programmes have had to endure. There have been efforts to make savings for a number of years; there was an annual savings target throughout my time at BBC Scotland.

The problem to manage is the need to make fresh savings to compound previous savings that have been achieved. I cannot comment in detail on what that will mean for particular programmes, but it would be a concern if some of the programmes that are quite tightly resourced became even more so.

Joan McAlpine: Can I ask one more question?

The Convener: Very quickly.

Joan McAlpine: I want to press Blair Jenkins on that point. There is an idea that programmes on Scottish issues for a UK audience from Scotland can somehow replace the 30 per cent decline in Scottish programmes. Do you think that that serves Scottish audiences?

Blair Jenkins: The underlying problem, which we may come on to, is that the model of Scottish broadcasting that involves occasionally opting out of the BBC and ITV schedules is somewhat old-fashioned and produces limited returns. There are problems for Scottish broadcasters in opting out of the UK schedules.

Just as Scottish politicians have come to understand the West Lothian question, Scottish broadcasters have had to face what we might call the "Downton Abbey" question. How do we find decent slots for Scottish programmes without taking off air UK programmes that audiences want to see? That is a real limitation on the current broadcasting arrangements.

The Convener: Before I move on to another theme, would any committee member like to follow up on anything relating to that particular question?

Stewart Maxwell (West Scotland) (SNP): I would like to ask Mr Matthews the same question. As a BBC trust member—our man on the trust—how do you view the BBC Scotland cuts? How do you think that they will affect Scotland's creative economy?

Bill Matthews: As has been said a number of times, cuts are never a great thing. The BBC has been through quite an extensive programme of evaluating the options, and a further consultation period is still to take place. Every area of the BBC—every nation in the UK—has argued its case for having less of the agenda of cuts.

BBC Scotland is in a good place because of the recent investment in facilities and technology, and recent announcements about drama coming to Scotland. While none of us would like cuts, there are opportunities for us in Scotland.

14:45

Stewart Maxwell: I am not entirely sure that that answers my question. From your point of view, how do the cuts affect the creative economy? Surely the cuts will have a damaging impact in Scotland, given that we are trying to build up a creative economy from a relatively small base. The investment in the new BBC Scotland headquarters is welcome, as is, I am sure, the additional production of network programmes, with people flying up here, filming a programme and flying away again. However, you must have a view about the long-term impact of the cuts on BBC Scotland's efforts to build up a base of creative expertise and to create high-quality jobs in the Scottish economy.

Bill Matthews: In the face of the licence fee that the BBC has to contend with, when I said that there were opportunities for Scotland, I meant—as you mentioned—opportunities to contribute more to network. Although we have yet to see how that plays out, given the recent investment in BBC Scotland it is in a good place to compete for that.

Let us take "Waterloo Road", for example, which Ken MacQuarrie could no doubt say more about. That is not people flying up and flying back again; it is a significant investment here. As a strategy, DQF looked at how we try to use best the resources around the UK. None of us will sit here

and say that cuts are a good thing but Scotland is well placed in terms of opportunity.

The Convener: Mr Maxwell has some questions on sports coverage.

Stewart Maxwell: I raise the issue of the free-to-air events, particularly the sports events. First, what is the panel's view on the fact that the list has remained unchanged since it was established in 1998? Secondly, what is your view on the devolution of power over the list to the Scottish Parliament? While there are significant UK events, which I am sure that we could all list, there are also significant cultural events that are not UK-wide and that occur just in Scotland. Should the Scottish Parliament have either the power over the list of free-to-air events or at least be able to influence or add to that list?

Vicki Nash: We referred to that in the penultimate page of our submission. The secretary of state has the power to designate the key sporting events. As the regulator, we are required to draw up and, from time to time, review the code giving guidance on that.

My understanding is that the UK Government has deferred reviewing the list until digital switchover is complete. I do not know whether David Mahoney wants to add to that.

David Mahoney (Ofcom): There is not too much to add. The key differentiation is between the regulatory code, which is just a means of ensuring that broadcasters do what they are supposed to do in relation to the listed events, and the substance of the list. As Vicki Nash said, the substance of the list is a matter for the UK Government.

Blair Jenkins: In my view, the underlying principle of devolution is the principle of proximity. It seems right that working out which sporting events in Scotland it would be right to protect as free to air should be a devolved responsibility. There are different interests to be weighed as to which sporting events should be free to air and which should be available more on the basis of payment. Without prejudging the outcome of such a process, that should perhaps be considered as a devolved power in any new division of broadcasting powers between Westminster and this Parliament.

Ken MacQuarrie: We took the opportunity to give evidence to the Culture, Media and Sport Committee on the listed events, as did the Audience Council Scotland. As Vicki Nash said, the UK Government took the view that it would not move until 2012. Along with other broadcasters, we put forward our views on what should be free to air. Some rights holders take the view that it will imperil their existence if some events become free to air. It is a matter of weighing up the impact on the marketplace for the respective bodies.

As far as where the decision making on the listed events should take place is concerned, that is for the democratic institutions to decide. As an executive in BBC Scotland, we do not have a view on where that should sit.

Bill Matthews: I echo what Ken MacQuarrie said. In the trust, we have talked about sports rights quite a lot in the context of the delivering quality first process, just because of the cost of some of them. The list of events that should be free to air is for Government, not the trust, to decide.

Stewart Maxwell: You will not be surprised to learn that I agree with Mr Jenkins that if the events in question take place in Scotland, the Scottish Parliament should take that decision.

For many years, BBC Scotland has been criticised for its sports coverage and one sport's domination of that coverage. We have received a submission from Scottish Rugby—although rugby is by no means the only sport to offer criticism—that criticises BBC Scotland for its total lack of rugby coverage, the six nations aside. It compares the coverage of rugby on BBC Scotland with that on BBC Wales. Would you like to comment on the complete lack of coverage of non-football sports on BBC Scotland?

Ken MacQuarrie: First, it is our intention—and, indeed, our desire—to cover all sports that are sought after by the public in Scotland. The position that rugby occupies in Wales is different from the one that it occupies in Scotland from the point of view of popularity. It is the premier game in Wales, whereas soccer is the main game in Scotland. We look forward to hearing the Scottish Rugby Union's views on our coverage, and we will be happy to meet it to take account of its views.

Over the years, we have put quite a lot of investment into covering events at community level such as the Melrose sevens, which has been highly valued by rugby audiences in the Borders. It is true to say that the bulk of our effort goes into coverage of the six nations. We are proud to have coverage of the six nations, which we believe is a hugely important event for rugby audiences across the UK. That has been the focus of our spend.

We try to ensure that we cover a range of sports that are specific to Scotland, whether on radio or television. That is difficult to do, given the tight resources that are available. However, it remains our aspiration. For example, we have invested in doing much more shinty coverage than we have ever done. Clearly, the range of sports that are played in Scotland means that it is a challenge for us, as a public service broadcaster, to give every sport a place in our schedules. That is to do, as

much as anything, with the lack of room to accommodate such coverage.

Stewart Maxwell: Given that rugby is one of the biggest team participation sports in Scotland, is it not curious that the only way of watching a Scottish rugby team—I do not mean the Scotland rugby team—play against a Welsh rugby team in Scotland, is to watch it on BBC Wales on a digital channel? BBC Wales will send up crew—camera people, sound people and technicians—to film the game, but the coverage will not appear anywhere in the Scottish schedule.

Ken MacQuarrie: We have taken a view about where we put our resources in sport. Clearly, we did not just pluck something from the air. We analysed the audience and the demand for particularly rugby games and took a decision about where to put our resources. However, as I said, we look forward to hearing from the SRU—it is a rolling discussion.

I reiterate the point about the popularity of the six nations, which is where we have put our major investment in rugby—it is a considerable one across the BBC.

Stewart Maxwell: I have just one more question, then, sticking to rugby, although I think that points were also made about other sports. You will be aware of the world rugby sevens series, which is a popular event all round the world. We managed to achieve holding one of the events in Edinburgh for a number of years, but there was a threat to withdraw that event from Scotland, which invented the game of rugby sevens, because of the lack of broadcasting in Scotland. Does it not in any way concern you that a broadcaster could lose Scotland one of the premier events in world rugby because it refuses to invest in coverage?

Ken MacQuarrie: On rugby sevens, as I said, we have had a long-standing investment in the Melrose sevens to encourage the game of sevens on the ground. I think that you will agree that that is a hugely respected event not only in Scotland but across the world. It is attended by many teams and an international audience. It has been a decision year on year to invest in the Melrose sevens.

Stewart Maxwell: So it does not concern you that Scotland could lose its place on the international sevens circuit because of the lack of broadcasting.

Ken MacQuarrie: Your argument that that would be a direct consequence of the broadcasting decision is not one that has been put to me before, so I would like to hear more about the exact detail of it.

Stewart Maxwell: Okay, but I am surprised that you have not heard that argument.

The Convener: I never thought that I would ever say this, but I am starting to feel very sorry for the BBC. You seem to be being put on the spot, Mr MacQuarrie. Willie Rennie has a question that follows on from Stewart Maxwell's point, as has David McLetchie. After those, we will widen the agenda.

Willie Rennie (Mid Scotland and Fife) (LD): We are talking about the devolution of broadcasting powers and I am not quite sure what role the UK Government or department plays in directing what sports programmes you do or do not show, Mr MacQuarrie, other than free to air. I am therefore not sure about the relevance of the questions on that subject. There might be a legitimate question for you to answer about what programmes you do or do not show, but it is not really for the Government to dictate what the BBC shows or does not show, other than for free to air and perhaps other areas. I am a bit puzzled, but that is the case, is it not? It is not the UK department's role to tell you what programmes you show.

Ken MacQuarrie: No. All our decisions are based on our audience research information. We are responsive to the audience and make a decision that is based on what is valuable to it. We analyse the audience figures for a particular event or proposition. Our link is with the audience in order to deliver to the audience, uninfluenced by commercial or political factors.

Willie Rennie: This is not to diminish the questions that Stewart Maxwell asked—they are legitimate questions—but the question of what programmes you show is at one remove from the question of powers.

David McLetchie (Lothian) (Con): I want to pursue the issue of listing, particularly of rugby, that Mr Maxwell asked about. Our briefing paper refers to the written evidence that we got from Scottish Rugby on the subject, stating:

> "Scottish Rugby has succeeded in having the RBS 6 Nations taken off the Category A events list and 'would ask that the requirement is protected if any future new powers were granted.'"

Does that not suggest that, by and large, rights holders, whether Scottish Rugby or anybody else, are not keen on their sport being put on the free-to-air list because it diminishes the value of the sporting rights, and that Scottish Rugby has been instrumental in increasing the value of its rights by reducing its protection level? Is that not what is going on here?

15:00

Ken MacQuarrie: I would prefer not to talk about a specific sport. It is always a challenge for the rights holders to take a view on what should be free to air and the value of the rights. That varies depending on what commercial value a rights holder assigns to a particular sport and from sport to sport.

David McLetchie: Yes, but in the context of the six nations was it not the case that the England games were shown on Sky while other games were shown on the BBC?

Ken MacQuarrie: That was the case. Yes.

David McLetchie: I presume not only that the English Rugby Football Union got more money from Sky than it would have got from the BBC, but that, because of the competitive situation that arose, the BBC ended up paying more money to the Scottish Rugby Union and the Welsh Rugby Union than would have been the case had they all been forced into a monopolistic situation in which there was only one purchaser. Is that correct?

Ken MacQuarrie: It is for the various authorities to decide how the rights money is allocated between them. I am sure that that has been an issue of lively debate between the various authorities. It would be more for the SRU to answer that particular question.

David McLetchie: Yes, but I am asking you as the person who buys the rights. If you, as a buyer, restrict the competition in the marketplace for buying the rights, you will get them cheaper. If you open up the competition to other broadcasters, there will be a competitive bidding situation and the price will go up, so the sporting body, as the rights holder, will maximise its return from the broadcasting of the events. Is that not simple logic, or am I missing something?

The Convener: I think that we are moving off the issue somewhat, but feel free to say a few words if you wish to, Mr MacQuarrie. The issue has been debated previously in Parliament and the BBC is being treated as though it is here to answer questions on how it operates rather than on the proposals for the Scotland Bill.

David McLetchie: With respect, convener, I point out that one of the Scottish Government's requests concerns the whole issue of free-to-air events, which Mr Maxwell—

The Convener: It is about the power to add or remove events from the free-to-air list, which is held at Westminster just now. That is a different issue from the commercial liability that is then incumbent on the BBC and Sky and the choices that the various sporting bodies may wish to make in lobbying terms. I think that that is a bit far removed from the terms of the Scotland Bill and I would like to move on to some other issues.

David McLetchie: Well, I do not. With respect, the organisations in Scotland that hold the rights do not want the events to go on the free-to-air list, which is what seems to be happening, judging by the evidence that we have received. So, the discussion is academic, is it not?

The Convener: I think that that is a discussion to have with Westminster, not with the Scottish Government or within the committee. We are discussing the potential for devolution of responsibility for some of these items.

Having said that, Mr McLetchie has raised the main reason why we are here, which is the Scotland Bill and the Scottish Government's submission to Westminster on it. The Scottish Government's paper takes the view that the accountability arrangements for broadcasting still need to adapt to match the devolution settlement, and it outlines various ways in which it feels that that could be done with regard to events—which we have just discussed—licensing, mergers, Ofcom and the Scottish digital channel. Before we move to Mr Ingram's questions on the digital channel proposals, can we have the panel's views on whether the accountability arrangements for broadcasting still need to adapt to match the devolution settlement?

Blair Jenkins: Shall I kick off? I think that we need a fresh and honest appraisal of the aspects of broadcasting on which it is appropriate to have decisions made at Westminster and the aspects of broadcasting on which it is appropriate to have decisions made at the bottom of the Royal Mile. Devolution has been a monumental change in Scottish life, and I would argue that the broadcasting response has, on the whole, been minimal and marginal. That really needs to change. Because broadcasting was not devolved, I think that the broadcasters assumed that nothing much had to change. That is why any changes in Scottish broadcasting have been pretty minimal and marginal.

Many of the benefits for Scottish broadcasting in recent years have come about because all the parties in this Parliament have taken a much more active interest in broadcasting. Some things went badly wrong in recent years—there was a steep decline in network television production from Scotland; UK news programmes were somewhat careless in their reporting for Scottish audiences; and our independent producers were not, in relation to UK broadcasters, getting fair and equal treatment in relation to access. Changes to rectify those problems have been driven from Edinburgh and not from London—one thinks of people in the previous session of Parliament such as Ted Brocklebank and David Whitton, and not just of the

current crop of MSPs. The parties in this Parliament have become very engaged with broadcasting, have demanded change, and have scrutinised things much more closely. That is why an awful lot more has been achieved in the past few years than was achieved in the decades before. Therefore, even if nothing else was changing in relation to devolution, there would be a strong case for both Parliaments to consider carefully what needs to be reserved and what needs to be devolved.

Vicki Nash: Members know that Ofcom has carried out two major reviews of public service broadcasting. For the second one, which was after the Scottish Broadcasting Commission had reported, we made numerous references to the aspirations of the Scottish Government and of all parties in the Scottish Parliament to have a Scottish digital network. When we get the opportunity to put those aspirations on record, we will do so. We keep in touch with what is happening in Scotland; that is very much the remit of me and my team.

Ofcom has a range of regulatory powers, which include licensing channels; putting a range of obligations on public service broadcasting channels; ensuring that those obligations are met; drawing up the broadcasting code; ensuring that all UK broadcasters adhere to that code; and, if they do not, applying appropriate sanctions. What we do not have is the magic bullet of a cheque for £75 million. Clearly, any funding for a digital channel will have to be the subject of discussion between the Parliaments and Governments.

On accountability, it is worth noting that two major pieces of work are coming up. Blair Jenkins mentioned one of them—the channel 3 relicensing process. In that process, we acknowledge the interests of the nations, especially in the kind of programming required for the nations, which many people have referred to this afternoon.

The second major piece of work on the stocks is, of course, the new communications bill, which is being considered at Westminster. A range of parties will be feeding into that review, and I am sure that the Scottish Government and Parliament would wish to express their interests.

I will ask David Mahoney to comment on how we are proceeding with channel 3.

David Mahoney: Under the Communications Act 2003, we have an obligation to write a report recommending whether or not channels 3 and 5 should be relicensed for another 10 years from 2014. We are just starting that report now. We have written an interim document that sets out the procedure. We were asked to produce that document by the UK Government's Department for Culture, Media and Sport. As Vicki Nash says, this is an interesting point of intersection between the relicensing process for channels 3 and 5 and the new communications bill.

The report does not allow us to open up and fundamentally examine the public service broadcasting system, as defined in, predominantly, the Communications Act 2003. However, it allows us to consider the obligations—and the associated benefits—of public service broadcasting on channels 3 and 5, and to recommend to the secretary of state what might be sustainable for a further 10 years, including issues that relate to the nations.

The secretary of state has powers to extend the existing licences. An issue being considered—and one of the reasons for our writing the report that we wrote in July—is whether existing licences should be extended to allow a fuller assessment of the wider public service broadcasting system through the communications bill. We have offered the department our advice on the process, and we wait to hear from it about its next steps.

Bill Matthews: Obviously, the BBC trust is observing the debate. As I have said, this is an interesting time in broadcasting in general. We note that the discussion is wider than a BBC discussion and that the decision is ultimately for the Government, not the BBC trust.

Ken MacQuarrie: We have had a programming response to devolution from 1998 onwards. In 2007, in Pacific Quay in Glasgow, the director general stated that we would match the network programming with the proportion of the population. As far as the executive side of the house at the Scottish Broadcasting Commission is concerned, the director general and the other senior executives gave an undertaking that, on invitation, they would come to any Scottish Parliament committee to give evidence, discuss or inform in accordance with however the relevant committee wanted to set out the particular issue or stall.

The Convener: Richard Baker may ask the BBC a brief question before I bring Blair Jenkins back in.

Richard Baker (North East Scotland) (Lab): My question is for the panel in general, if that is all right, convener.

The Convener: As long as it is brief.

Richard Baker: It is. It is about a fundamental point relating to the new powers that have been proposed in the Scotland Bill. I have considered the problems and issues that have been raised in the submissions and those that have been discussed today relating to generating more production in Scotland. Blair Jenkins was right to say that the parliamentary focus on broadcasting has been beneficial, but are not some of the

issues really to do with resources? It seems to me that they are. Are they fundamentally to do with the pressures on budgets rather than with the legislative powers that are held in the Parliament?

Blair Jenkins: I could probably assure you that, if broadcasting were further devolved and more powers were held in the Scottish Parliament, you would find that a bit more resources would come the way of Ken MacQuarrie and his colleagues at BBC Scotland.

Richard Baker: How do we know that? Is not that a bit of an assumption?

Blair Jenkins: It depends on the degree of devolution of influence. For instance, if aspects of broadcasting were devolved to the Scottish Parliament, it might wish to say in the next BBC charter review that a greater volume of programming would be required of the BBC in Scotland. From a broadcasting point of view, the more levers of influence you have, the better. Broadcasters tend to assume that where they are not required to do something, whether they do it is absolutely at their discretion. If one wished to stop the trend of fewer programmes and diminished resources, devolving at least some of the power over broadcasting would be one way to do that.

If members do not mind, I want to make quite an important point on issues that Vicki Nash and David Mahoney raised to do with the renewal of the channel 3 licences in Scotland. I was not clear whether the Scottish Government's proposed amendment to the Scotland Bill on local television services in Scotland was intended to encompass the channel 3 licences. If it was not, that was probably an omission, as it is important that the Scottish Parliament has levers of influence over the terms under which the channel 3 licences in Scotland are renewed. The decline in channel 3 services in Scotland post-devolution has been one of the most notable and regrettable things about Scottish broadcasting in recent years. I cannot believe that, if the Scottish Parliament had had an overview of the matter, we would be in a position in central Scotland in which STV is down to around 25 per cent of its licence commitments pre-devolution and viewers in Dumfries and Galloway and the Scottish Borders, for instance, have seen their news service diluted and dislocated. That service now emanates from Gateshead, and I think that I am right in saying that every party in the Scottish Parliament opposed the change. The Parliament should seek to have levers of influence over the terms on which the channel 3 licences are renewed and the obligations that go with them.

The Convener: We shall certainly ask for clarification on that issue. Thank you for raising it.

Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP): It is apparent that there is very little on broadcasting in the Scotland Bill, but there seems to be consensus across the parties on the establishment of a Scottish digital network—although I stand to be corrected on that. The Scottish Government wants the power to establish public sector broadcasting institutions such as the SDN. How likely is it that a Scottish digital network will be established without that power being devolved to the Parliament?

15:15

The Convener: It looks like another question for you, Blair.

Blair Jenkins: I should say right away that it is always possible that private discussions of which I am unaware are going on between the Administrations. As far as I know, at this point in time, the DCMS is taking no proactive steps towards helping to establish a Scottish digital network.

The reason why it has been proposed that the Scotland Bill be amended to include the right to establish broadcasting institutions is that all the existing public service broadcasters in the United Kingdom—I am sure that Ofcom will correct me if I have got this wrong—are underpinned by legislation, so there are statutory requirements around their governance, funding and remit. That gives a durability and a resilience to those broadcasters and means that they cannot disappear at the whim of a passing Government, because they are enshrined in legislation. The ability to have a statutory underpinning is hugely important. As I understand it, this Parliament does not currently have that ability. I imagine that that would be one reason for having the power.

There is probably also a connection to the other suggested change, which involves the question of how the television licence fee is determined. Last week, I spoke at a conference in Wales that covered much of the ground that we are covering today, but with different accents, and it seems to me virtually impossible that the devolved Administrations in the UK will not require a seat at the table the next time the licence fee and the BBC charter and agreement are being determined. Those things impact on the smaller nations so profoundly that the days of people sitting back and leaving it to a smoke-filled room in Whitehall are probably over.

The Convener: Does anyone else want to comment?

David Mahoney: Blair Jenkins is absolutely right that there is statutory underpinning for public service broadcasters. At the last count, there were about five definitions of a PSB in different parts of the Communications Act 2003, so that is something that probably needs tidying up.

The key point is that there are certain benefits that are associated with public service broadcasting status. That is fundamental to this issue. One of the major benefits—electronic programme guide prominence—can be achieved through secondary legislation, and the UK Government has said that it is considering that in the context of local television. There are other things that can be done through secondary legislation rather than primary legislation, but, broadly, Blair Jenkins is absolutely right.

David McLetchie: Convener, can someone explain to me—and perhaps to others—what exactly are the obligations and what the quid pro quo is for accepting them? What are the benefits of that statutory right or underpinning?

David Mahoney: Basically, there are two benefits of public service broadcasting status. One is EPG prominence, which guarantees the broadcaster appropriate prominence on electronic programme guides. The fact that 1, 2, 3 and 4 appear at the top of every programme guide is a result of the regulatory system. Obviously, that gives broadcasters access to audience and, therefore, to advertising. The second benefit is access to free spectrum—that is where the major benefits are for channel 3 and channel 5, in particular.

In return for those benefits, the channels pay a nominal licence fee. The majority of the benefit is offset by the obligations that are imposed on them, which include original production, national news, out-of-London production, current affairs and—in the case of ITV, nations and regions news—and one other obligation that I am sure I have missed.

David McLetchie: Have your research and analysis shown that some value is attributed to those benefits, relative to the costs of the obligations? What do television companies think is the value of those benefits?

Blair Jenkins: The value varies depending on whether the broadcaster is publicly funded or commercially funded. As David Mahoney said, the value for a commercial broadcaster lies in getting the best possible access to as many people as possible, on preferential and privileged terms. If they have universal access, they will attract more revenue.

For the public service broadcasters, the legislation will usually specify the level of funding, where it comes from and what they have to do for it in return. In the case of S4C, the Welsh language service, the service that has to be provided is specified, as are the level of funding and the governance arrangements. The very important thing in broadcasting is that politicians—wonderful people though you all are—are kept a million miles away from any programme decisions. There are fairly robust governance arrangements to make sure that there is sufficient distance between publicly funded broadcasters and political institutions.

The Convener: Mr McLetchie, although I am quite happy to have a free-flowing debate, you should really direct questions through me as convener, rather than pose them straight to the panel. You did come in in the middle of Mr Ingram's questioning.

David McLetchie: I beg your pardon.

The Convener: I should think so too. I call Mr Ingram again.

Adam Ingram: Thank you, convener. I want to follow up my original question. What I take from Mr Jenkins's response is that although pressure from Edinburgh since the start of the Scottish Parliament has been effective in enhancing Scottish broadcasting, we should not hold our breath when it comes to the establishment of a Scottish digital network—unless we get devolved to us the powers to establish a public sector broadcasting institution. I just want the panel to clarify that.

Vicki Nash: Like Blair Jenkins, I am not aware of what discussions have been happening at Westminster with regard to prospects for the Scottish digital network. As I said, in any document that we produce on public service broadcasting, we make very clear the discussions that we have had with the Government and the Parliament and that it remains the aspiration here in Scotland to have a dedicated network, but whether that becomes reality is out of our hands. Suffice to say that, if required to do so, we will license and carry out other regulatory functions.

Blair Jenkins: Having had many discussions in recent years with all the political parties here and at Westminster, and with various civil servants in the Scottish Government and at Westminster, I know that everybody thinks that the Scottish digital network is a great idea. No one really takes issue with the case that we made; everyone says that it was very well made, and they were deeply impressed that it received unanimous support in this Parliament.

The issue comes down to funding, as it often does in broadcasting. The important point to make is that now all the political parties agree that the television licence fee is intended for a number of different public service purposes, not just the BBC. Although the BBC will always get the vast majority of the licence fee, that fee is now funding S4C and will make a chunky contribution to the cost of local television. The previous UK Government wished to use part of the licence fee to fund the continuation of regional news on ITV. There is now agreement that the licence fee will fund other things than just

the BBC. As soon as discussion opens up again as to how the licence fee is best utilised, we will be able to argue that an allocation of 2 per cent of the fee to secure, for the first time ever, a distinctive Scottish public service broadcaster would be an extremely important and valid use of that money.

As members are probably aware, we also put forward an interim solution, as it were, until the licence fee opens up again, which is that there should be a ring-fenced allocation from the auction of clear digital spectrum next year, which would more than meet the costs of the digital network until the licence fee became available to provide a longer-term solution.

The Convener: I call Patrick Harvie. David McLetchie might want to come back in quickly after Mr Harvie before we move on.

Patrick Harvie (Glasgow) (Green): Blair Jenkins's previous answer was heading towards where I was going to go with my questions. I have supported the idea of a Scottish digital network too, albeit that I admit that I am slightly unclear why it is being called a network, because it sounds to me like a channel rather than a network. However, we should not be debating it in a stand-alone way. If there is going to be a Scottish digital network—or channel—and devolution in terms of the parliamentary scrutiny that Blair Jenkins called for earlier, as well as some control over accountability and the financing of all these things, there has to be a coherent package. Whether that happens through the Scotland Bill or a future legislative or constitutional route, my concern is that it should happen in a way that does not accidentally undermine what we already have, which I would argue is greater than the sum of its parts.

We know that the principle of public service broadcasting has come under political attack down south, and that it will do again. Does the panel feel that we can achieve some degree of devolution of these issues without—while creating something that is nice to have and better for Scotland—incidentally equipping those who would seek to attack the principle of public service broadcasting and the licence fee in the next round of that attack?

Blair Jenkins: I am happy to answer that while the others gather their thoughts. Let me begin with the point about why it is a network and not a channel, which is important. A linear television channel is an important part of the concept, but we are now moving into the era of connected television, with a merger between broadcast and broadband, and with most people able to move between the two in their homes. It is important to see the linear service as the main calling card of the service that most people will watch, but it is also important to have a lot of online content alongside that. Let me give a concrete example: in a connected television world, which is where we are heading shortly, if my good friend Murray Grigor made an architecture documentary, it would be possible to offer half a dozen other Murray Grigor architecture documentaries alongside it so that people could watch them fairly seamlessly, sitting in their living rooms. It is important to think of this not just as a linear television service but as something with a huge, multilayered online dimension, too. That would enable the very best of Scottish content to be made much more easily available to people in their homes.

On the more general point, I do not see any reason why the inclusion of the Scottish digital network in any way undermines any broader case in relation to the television licence fee or public service broadcasting. I agree with the point you made, and another is worth making: the television licence fee is not particularly onerous in this country compared with what happens in other countries. People who have an anti-BBC agenda usually make the point that the licence fee is very high, but the fee in Switzerland, Denmark and Norway is almost double the UK rate. The fee is significantly higher than the UK rate in Germany, Austria, Finland and Sweden. It is about the same in Ireland. I am not suggesting that it is a negligible sum, but the notion that we would never again be able to revisit the level of the licence fee is not one that I accept.

Vicki Nash: From our perspective, it is remarkable that television viewing has held up in the way it has, given the enormous change that Blair Jenkins briefly sketched out. Just this morning we published some research that showed that even though teenagers would give up television before their mobile phone or the internet, viewing remains relatively high even among that very young group. It remains high, as it always has been, among older groups. We are seeing an increasing convergence and, as Blair says, the television is and will increasingly become the device in the corner of the room through which people access not only television, both linear and on demand, but video on demand, the iPlayer and other such services as well as the internet. The technology is rapidly changing and the way that people are consuming it is changing enormously.

There will always be a role for public service broadcasting channels. They will remain the cornerstone—we have seen that repeatedly through our research. Although the audience share of the PSB channels has been falling, here in Scotland, viewing is as high as ever. I should note, given the remarks made about Border Television, that the viewing for the early evening news slot on Border Television is the highest for any channel 3 slot in the whole of the UK. STV's viewing for that slot is the third highest. There are

some quite robust viewing figures for such programmes, but there is increasing pressure in the system for all the reasons we have talked about. Whether there is room for another player is, as I have said, clearly a matter for debate in another place. For the reason that I have already given, I am not going to mention the devolution word because that would be inappropriate, given that Ofcom is a statutory regulator and given the framework that we work in at present.

Does David Mahoney want to add anything to that?

David Mahoney: A very interesting point has been raised. There is a system that was built for a world in which there were four or five channels, and there is a future that involves the internet and lots of other things. I think Vicki Nash is right—you can get ahead of yourselves and the question you have to ask at this point is how you can take the best of the old system into the digital world. There are those who would shout for greater disruption to the entire public service broadcasting system. If you talk about that, you need to be conscious of what you might lose as well as what you might gain.

The Convener: Does Ken MacQuarrie wish to comment?

15:30

Ken MacQuarrie: Our position on the Scottish digital network has been clear—we welcome plurality in the public space. Our concern is that whatever funding method is put in place should not damage the extant public service provision across all our three platforms in Scotland. The exact funding mechanism will be a matter for bodies such as the Parliament and the UK democratic institutions, but our clear view is that what we have is valuable and should be protected, whatever funding mechanism is put in place.

The Convener: I am aware that time is moving on. Would David McLetchie like to come back in?

David McLetchie: No—

The Convener: Are you in the huff or is everything all right?

David McLetchie: I am happy with the evidence.

The Convener: That is good.

Joan McAlpine: I want to ask a quick supplementary about the points that Blair Jenkins and Vicki Nash made about the internet, but the main thrust of my questioning is about south of Scotland television coverage.

The Convener: I am aware of that. I ask you to make your questions tight, please.

Joan McAlpine: Relevant points were made about people watching television programmes on the internet more. I will ask Mr MacQuarrie and Mr Matthews about the fact that live Scottish content cannot be watched on the internet—for example, people cannot watch Scottish news live. Is that likely to change and will your internet service for Scotland-based viewers improve?

Ken MacQuarrie: You are right that programmes are available on the iPlayer but not as a streamed service. We wish to change that so we are looking at providing UK nations editions of the BBC home page, which could take a year to roll out. We are absolutely aware of that deficit.

Joan McAlpine: Do you have a timescale? You mentioned a year. Is that a year from now?

Ken MacQuarrie: I will not provide an exact timescale, but the period will be about a year. Considerable work will go into creating the nations editions. We have not pinned down the timescale, but I have given an indicative ambition for when that feature will be delivered.

Joan McAlpine: The south of Scotland—the Borders and Dumfries and Galloway—gets its news from ITV Tyne Tees and has little access to Scottish programming. There are several solutions. When licensing comes up in 2014, we could have an all-Scotland licence. In the interim, STV could provide programming for the Tyne Tees and Border Television areas, if Ofcom directed it to do so.

Alternatively, local television licences could be used. Jeremy Hunt has said that local television licences will go to some urban areas of Scotland but not to the south of Scotland, which already has a democratic deficit. Every party accepts that that is important. The people in the areas that I named get health, education and justice services through the Scottish Parliament, but have fewer means to scrutinise aspects of other services that they receive.

Decisions on all the solutions that I have outlined would be made in London. My question is to Vicki Nash and David Mahoney. I have met them to discuss the matter, as I am sure my colleagues from all parties have, but I was directed to make my submissions to, and to lobby, Ofcom in London. What power does Scotland have to deal with the matter for the south of Scotland?

Vicki Nash: I will take those points in reverse order and my colleague will deal with the 2014 issue.

We are very aware of the interest that exists in the south of Scotland, and in several other parts of Scotland, in the local television proposals that the Westminster Government is advancing. We have hosted several meetings to provide technical

advice on that. Of course, we give technical advice to the Secretary of State for Culture, Olympics, Media and Sport, Jeremy Hunt, but we have also supported groups here in Scotland in advancing their cases.

We are aware of the proposals, for which Jeremy Hunt has identified nine possible places throughout Scotland, which were, I understand, based on two criteria: the technical ability for transmitters to carry local television and population coverage.

I am aware of remarks that have been made by another MSP about transmission arrangements in the Borders. What was said was not a pattern that I recognised, but I would be happy to enter into more detailed debate with your colleague who raised the issue at a recent debate in the chamber; we are aware of the strength of feeling. My understanding is that that MSP has undertaken to consider the matter further.

On Scottish programmes, I should say first that no one is more aware than I am of the strength of feeling that there was when the old arrangement for Border Television came to an end. I received 13,000 postcards in my office, and I went to public meetings in Hawick and Dumfries. Suffice it to say that the arrangements that are now in place are better than those that were initially offered by ITV, but they did not follow the old pattern and we were always very clear that the status quo was not an option. We have a solution and, as I said earlier, the viewing figures for the early evening news slot are the highest of any of the channel 3s throughout the UK. ITV must be doing something right to get that audience.

I understand that ITV does carry some Scottish programming: any arrangement for it to take programmes would be a matter to be arranged between Tyne Tees and Border or ITV and STV. We cannot direct ITV to take that programming. It is required to meet certain quotas for news coverage and current affairs; it meets those obligations, and we monitor that.

Joan McAlpine: Ofcom sets the quotas, however.

Vicki Nash: We set the quotas for news and current affairs, but we cannot direct broadcasters to take specified programmes. Scheduling is a matter for them.

Joan McAlpine: Would such a situation arise if the person who had to make the decisions was a culture minister based in Scotland?

Vicki Nash: I am sorry. What situation do you mean?

Joan McAlpine: I mean the situation in which the south of Scotland does not get adequate coverage of Scottish television.

Vicki Nash: We are talking about historical transmission arrangements. My colleague David Mahoney is much better able to talk about that, particularly in respect of what could happen given the 2014 deadline, to which Joan McAlpine referred.

David Mahoney: To manage expectations slightly, I say that the report that we are undertaking just now is not a review of the public service broadcasting system in its entirety.

We are aware of the strength of feeling around the single Scottish licence. Our initial document for the UK Government—to which I referred earlier—set out clearly that we think that the nations issue will be critical in the relicensing process. That is one of the positives. The truth is that when we write our report we will have, under the current legislation, to look at the question of renewal in the context of how the licences are currently structured. We do not believe that we will be able to get to a single Scottish licence without the consent of ITV plc; we do not think that we have the powers to impose that in the relicensing process.

Joan McAlpine: I do not understand why that would be.

David Mahoney: That is simply because of the way in which the legislation is currently constructed.

Joan McAlpine: The licensing structure has, however, changed so much since Border TV was originally founded 50 years ago, or whenever.

David Mahoney: I am unaware of significant changes in the licensing process.

Joan McAlpine: There have also been significant political changes since then. Will you take account of those?

David Mahoney: I understand that, which is why in our initial document we said that the issue is significant. I am just pointing out that the legislation limits our ability to make changes.

The Convener: That was really interesting to listen to. I wonder how quickly things would change if people in Kent were getting their TV from France because it happens to be just across the channel, but we will let that stick.

Adam Ingram: I have a quick question on interconnections within the digital economy. In Westminster, Ofcom made a presentation to parliamentarians that said that although Glasgow is well connected, people do not use the internet, which is having a negative impact on the local economy. How important could Scottish content be to driving, for example, uptake of broadband and broadband usage? Is there a wider dimension

to the production and broadcasting of Scottish content?

Vicki Nash: Thank you for quoting our figures. Scotland is indeed the least connected nation in the UK, with an average broadband take-up of 61 per cent. The UK average is 74 per cent. I think that I have that more or less right.

Year on year, the gap is becoming ever wider. As you say, Glasgow is the least connected city in the whole UK. One can question the reasons for that—as you have pointed out, broadband is widely available in the city—and the question of what drives internet usage is very real. At this point, I will bring in Blair Jenkins, who had particular views about the role that Scottish content could play in that respect.

Blair Jenkins: Television-type content delivered via broadband will drive universal connectivity and get broadband into homes that might otherwise have chosen not to have it, and more high-quality Scottish content will play a valuable role in all that.

Going back to local television licences, I note that although Ofcom has a lot of discretion in deciding which areas will be awarded the first wave of such licences—one might say that it has been asked to make some of the unpopular decisions that now have to be made—it is required to award licences in seven UK cities, one of which would be Glasgow. One of the reasons why we should closely watch the awarding process for that licence and who might end up holding it is that, although it will nominally be a Glasgow service, it will broadcast from the Black Hill transmitter and will therefore reach half of Scotland's population. In other words, it will verge on being national.

The Convener: I am sorry to interrupt, but that is interesting. How can that be reconciled with the Scottish digital network, as far as the spectrum is concerned?

Blair Jenkins: The two could be connected, if people were so minded. My view is that local services should feed into the Scottish network.

The questions about who controls the licence and what other parts of the Scottish media they own will become quite important. The industry has real doubts about the profitability of the licences, but given the prominence of the channel on the programme guide and the fact that there is public funding available, I think that the direction of travel with regard to the ownership of the licence will be very important.

I agree with the comment that was made earlier that if you were making the decision here, you would put the south of Scotland rather than Glasgow at the top of the list for local licences. I live in and love Glasgow, but it does not need a local TV licence. To be frank, it needs one less than anywhere in Scotland does.

The Convener: We have overrun our time for this evidence session, which shows how interesting the witnesses all were.

It has been drawn to my attention that the UK culture secretary has said publicly that nations and regions quotas for commercial broadcasting—not for the BBC—are to be scrapped. I do not know whether the BBC wishes to express an opinion on that, but I suspect that Blair Jenkins does. How might that affect Scotland? If the quotas are scrapped, will Ofcom continue to regulate the content of commercial broadcasters in Scotland?

Vicki Nash: I, too, had noted the culture secretary's comment. Suffice it to say that it has not translated into any regulatory direction for us. The Communications Act 2003 is quite clear and, as we discussed earlier, it sets a variety of obligations. However, the new communications act that might be in the making might take a radically different approach.

David Mahoney: I should point out that there is an out-of-London quota as well as a nations and regions quota, and I think that the culture secretary was referring to the former.

The Convener: Indeed.

David Mahoney: As Vicki Nash has said, we noted the comment but have not had any conversations about it. On whether it was a clear policy intention or just a thought, I cannot comment.

The Convener: As other committee members were, I was quite concerned by the comment when I heard about it.

Blair Jenkins: The BBC will still have its obligations and targets. As for ITV and Channel 5, their direction of travel is so commercial that anything that they sign up to in any licence renewal will be very limited. I do not think that you can look to the commercial broadcasters for any preferential treatment, quotas or whatever; you are talking about the BBC and perhaps Channel 4, which I suspect will continue to have obligations.

The Convener: Would you like to comment, Ken?

Ken MacQuarrie: Yes. As far as we are concerned, the more investment that is made in talent, writing and the craft industries in Scotland, the better, because it is possible to sustain a much stronger talent base when there are a lot of contributors to it. Drama is a good example of that. At the moment, we are making plans for "Waterloo Road" to be filmed and completed wholly in Scotland, with an investment of £20 million and the creation of 200 jobs. Mr Maxwell's earlier

comment about flying people up here and back again might have been true of programmes in the past, but that will certainly not be the case in that example.

I will also reassure members by pointing out that the earlier figures relate to the Ofcom criteria for qualifying programmes, but we would welcome a commensurate investment from the other channels because that would allow us to deliver more effectively on our purposes.

Bill Matthews: I cannot add to that. We in the trust will concentrate on meeting our own obligations.

The Convener: I thank our witnesses for their highly interesting contributions. Our discussion might bring up points on which we need further information. If that is the case, we will write to you.

I suspend the meeting until 4.15 for a briefing from our adviser. I am sorry but I must ask non-committee members to leave the room.

15:46

Meeting suspended.

16:16

On resuming—

The Convener: I welcome our next panel of witnesses. From the Law Society of Scotland, we have Michael Clancy, who is the director, and his colleagues Christine O'Neill and Alan McCreadie. From the Faculty of Advocates, we have Richard Keen QC, who is the dean, and James Mure QC.

Thank you for coming along. I apologise for the later-than-planned start. I ask Michael Clancy on behalf of the Law Society of Scotland and Richard Keen on behalf of the Faculty of Advocates to make some short opening remarks before we move to questions.

Michael Clancy (Law Society of Scotland): I think that the Faculty of Advocates takes precedence over the Law Society, convener.

Richard Keen QC (Faculty of Advocates): Thank you for inviting us along to give evidence. I can be fairly brief. The Faculty of Advocates has submitted a written response to the committee, which follows on from the written submissions that we made to the expert group and the review group.

I can quickly identify the one issue that causes us considerable concern, which is the proposition that there should be a procedure of certification by the High Court of Justiciary appeal court in respect of cases going to the United Kingdom Supreme Court. We are materially concerned by that proposal. It would put Scotland in a different position from that of the other devolved Administrations and it would mean that the High Court, in effect, would certify whether the United Kingdom Supreme Court could determine Scotland's compliance with the United Kingdom's international treaty obligations in the context of convention rights.

That is the one area of concern that the Faculty of Advocates has about the proposals in the Scotland Bill with regard to the Supreme Court. I appreciate that the committee has a much wider remit, but I thought that I ought to focus on what is relevant from our perspective.

Michael Clancy: We are delighted to be here to answer your questions and assist your scrutiny of the bill. We have a long trail of involvement in the issues. We made submissions to the earlier Scotland Bill Committee in the previous session of Parliament and we participated in each major stage of the bill's passage through the House of Commons and, latterly, the House of Lords. I think that members have copies of the written submission that I sent to Stephen Imrie on 25 August together with a copy of the amendments that we have issued to peers.

In some respects, our concerns mirror those of the Faculty of Advocates, which the dean articulated, but we have also looked at other aspects of the bill and commented on the competence provisions and the tax provisions. If time allows, we will sketch out our views on those aspects.

The Convener: Thank you for your opening comments.

James Kelly (Rutherglen) (Lab): I welcome the panel, particularly Mr Keen, who is making his second appearance of the day at a Scottish Parliament committee. I realise that time is short, so I will try to be brief. Both the review group and the expert group took the view that the inclusion of the Lord Advocate's retained functions in the previous devolution settlement was a constitutional error and that they should be removed. What is your view?

Michael Clancy: In paragraph 4.22 of its report, the expert group stated that it was

"constitutionally inept to treat the acts of the Lord Advocate ... as raising a 'devolution issue'."

However, the idea that it was an error is not as I remember it. I had the pleasure—I think that I would use that word—of attending the second reading debate and the committee stage of the Scotland Bill in the House of Lords in 1998 and I took the opportunity to refresh my memory by reading Hansard. The House of Lords considered the issue deeply. I direct you to the *Official Report* of 28 July 1998, where you will be able to read a

range of discussions about amendments that Lord Mackay of Drumadoon lodged to extract the Lord Advocate from certain aspects of dealing with matters, and at one point to make the Lord Advocate a UK law officer.

Lord Hardie, who was the lead minister for the Labour Administration at the time, took the view that the white paper "Scotland's Parliament", which was published before the bill and on which the referendum was based,

"recognised that the Scottish executive would require the services of Law Officers to provide it with advice on legal matters and to represent its interests in the courts and that the role and responsibilities of the Lord Advocate as prosecutor were to be devolved with his traditional independence maintained."—[*Official Report, House of Lords*, 28 July 1998; Vol 592, c 1453.]

You will know that there are provisions in the Scotland Act 1998 that maintain that independence, such as section 29 and the exclusion from competence of legislation that would remove the Lord Advocate from his capacity as head of the prosecution system and head of the system of investigation of deaths.

That debate shows that the issues were thought about. "Inept" might be a description that some people bring to the matter with hindsight, but I do not think that the inclusion was an error. It was deliberate on the part of Parliament. I think that Sir David Edward said at one point that it was not profitable to examine Hansard from 1998, but under the case Pepper v Hart, one can look at Hansard to decide whether there are ambiguities. I submit that, in this circumstance, looking at Hansard would have been helpful.

Richard Keen: I do not disagree with the points that have been made. I would not describe it as an error. It is perhaps an anomaly, but it seems to me that the expert group's proposal for resolving it is relatively straightforward. I mean the second proposal, to remove it from the scheme of devolution issues but ensure that there is a means of ensuring that a part of the United Kingdom is complying with its international treaty obligations. It is not a question of how we get there. What we have at present might not be a particularly attractive or logical route, but we still get there. That is what is most important in this context.

James Kelly: It is good to have the benefit of Michael Clancy's experience, because he was around at the time of the 1998 act.

Michael Clancy: I am much older than I look. [*Laughter*.]

James Kelly: Very much so—you have put me off my train of thought, Michael.

Michael Clancy: Sorry about that. Shall we return to the questions later?

James Kelly: He has used that tactic often in parliamentary committees.

That was 1998. You have now had not only the benefit of the discussions that you were involved in then, but experience of how the act has operated in practice since then. The expert group and the review group point to the fact that the practical reality is that it has caused delays and disruptions in how cases are processed. I am thinking, for example, of the provision that allows the Advocate General to make an intervention and the time that that takes. Looking at how the act has operated in practice and reflecting on the criticisms of the review group regarding the delays, how do you feel it has impacted on the process?

Michael Clancy: In 1998, Parliament could not envisage all circumstances. However, given the fact that you have just availed yourself of parliamentary privilege in your defamation of me, I note that Parliament at least had the foresight to include parliamentary privilege in the act.

It is important not to confuse the role of the Advocate General with the role of the Lord Advocate. We would probably be at some distance from the Faculty of Advocates in saying that removing the Lord Advocate from the vires controls under the Scotland Act 1998 is the correct way to go. That is obviously a matter for members to decide.

Alan McCreadie might want to take up the question of delays.

Alan McCreadie (Law Society of Scotland): I am not entirely sure whether section 98A, as inserted by clause 17 of the bill, would necessarily remove any delays. My understanding of devolution procedure is that the issue can be raised in the inferior court, perhaps in terms of a preliminary plea, and it will then go through the process as allowed for in schedule 6 to the 1998 act.

If you take acts of the Lord Advocate out of devolution minute procedure and put the matter into section 98A, where it becomes an issue of compatibility, you will still have delays. If a test case is taken, there may be other courts elsewhere in which sheriff clerks are having to continue cases that address the same point and that may be sitting on the back of that case, which is making its way through the system and awaiting a decision at the High Court of criminal appeal. Thereafter, if there is a certification—although we agree with the Faculty of Advocates that there should not be—the case will then find itself at the Supreme Court. So, I think that there will still be delays.

The Convener: Thank you. Would you like to respond to that, Mr Keen?

Richard Keen: My only additional comment is that it is exceptional for the Advocate General to enter the process. He will do so only when there is a matter of wider UK constitutional significance. We do not generally see the Advocate General coming in by way of minute.

The Convener: Thank you. We will move on. I ask both questioners and respondents to be as concise as is possible for politicians and those of the legal profession.

16:30

Richard Baker: My question is about the procedure of certification. Although there has been a very heated debate about the Supreme Court's powers, there has been a great deal of consensus between the expert group chaired by Sir David Edward and the review group chaired by Lord McCluskey about seeking a resolution to the issue. In that respect, the issue of the procedure of certification that Mr Keen raised becomes a very important point of debate. Mr Keen pointed out that if we in Scotland were able to take appeals to the Supreme Court, it would put us in an anomalous position with regard to other devolved legislatures. However, others will argue that if we do not proceed in that regard we will be put in an anomalous position with regard to courts in England, where there is a procedure of certification. What are the panel's views on that matter? Moreover, do you have any information on how the procedure of certification works in the English courts and, therefore, how the process might work in Scotland?

Richard Keen: We should begin by putting this into context. There is a certification procedure for appeals in England and Wales, but that is in the context of a much wider appeal process. As I understand it, the reality is that certification is very rarely given. As far as devolution issues going to the Supreme Court are concerned, the process in Scotland is entirely comparable with that applied in Northern Ireland and in Welsh legislation. It seems to me that there is no need to introduce a certification process on what are presently termed devolution issues.

There is also the wider issue of the status of the United Kingdom Supreme Court. Constitutionally, it has at present an identified role and it seems to me that the review report has advanced no justification for seeking to circumscribe that jurisdiction as it is going to be applied to our position in relation to international treaty obligations.

Michael Clancy: I might defer to colleagues on this but our basic position on this issue is that at the moment appeals to the Supreme Court under the devolution issues procedure relate to contraventions of the European convention on human rights. It is more in the character of constitutional decision making than determining a substantive criminal matter. The distinction I would draw is that the constitutional or ECHR matter might arise out of a criminal case but it is not the substance of the appeal.

Richard Baker: So the procedure of certification south of the border applies to purely criminal cases and does not involve convention rights.

Michael Clancy: Indeed.

Richard Baker: That explains the situation.

The Convener: That is interesting. Nigel Don has a question on that specific theme.

Nigel Don (Angus North and Mearns) (SNP): I wonder whether I can continue this line of questioning. I entirely understand Mr Keen's point about comparing Scotland with other devolved circumstances if devolution is indeed the issue. However, I am not convinced that it is, if the argument for taking it forward is that the Supreme Court should be the arbiter of the United Kingdom's international obligations. Should the same argument not apply to the Court of Appeal in England? Because that court does not certify to the Supreme Court, the Supreme Court does not have that ability. Surely the UK's international obligations apply as much in England as they do in Scotland, n'est-ce pas?

Richard Keen: That is the case. However, I think that you have got to go back to the process of certification as it applies in England and Wales. It is a general certification process for all criminal appeals and does not simply identify what we would otherwise term devolution issues. There might be an omission in their procedure but, in my opinion, it does not justify any move away from the position that we adopt in order to allow these devolution and international treaty obligation issues to go to the Supreme Court.

Nigel Don: You must forgive me, convener. Mr Keen has said that there might be an omission in that respect but I am trying to establish whether the Supreme Court in England has the stewardship of international obligations if the Court of Appeal fails to give it. If I understand you correctly, the Supreme Court does not have such stewardship—which is the omission that you have just identified.

Richard Keen: In the absence of that certification, it would be necessary to apply to the UK Supreme Court for leave, which might be granted.

Nigel Don: And that might be granted anyway.

Richard Keen: Indeed.

Nigel Don: So your concern is that, if certification is withheld and if it were appropriate for the Scottish criminal court to certify the appeal—if indeed we get to that point—it should be possible for the Supreme Court to bring the matter to itself anyway.

Richard Keen: No, I do not think that that reflects the way in which the review group wants to introduce the certification process. You need leave to go to the Supreme Court anyway, either from the High Court or from the UK Supreme Court. It is interesting that out of 18 applications to the UK Supreme Court for leave, only two have been granted by the UK Supreme Court. They happen to be the cases of Fraser and Cadder, which, of course, tended to make headlines. I may add that it is important that those cases did go.

What the review group proposes is that it is only competent to seek leave either from the High Court or from the UK Supreme Court when the High Court has already certified the matter as being of general public importance or something of that kind. That is a barrier that does not stand in the way of any other jurisdiction, so far as access to the UK Supreme Court is concerned.

Nigel Don: But if the Supreme Court in England can ignore the absence of certification by the appeal court in England and give leave to appeal anyway, what has certification got to do with anything?

Richard Keen: In a way, that just takes the argument full circle.

Nigel Don: Yes, it does.

Richard Keen: There is no point in having this process of certification when you already have a leave provision. It adds nothing.

Nigel Don: So it adds nothing in England, either.

Richard Keen: Well, I would not hold myself out as expert on English legal procedure in that context, but I would say that, as it is proposed in the context of the review group, it certainly is either a complete bar to access to the UK Supreme Court or it serves no purpose if, in fact, the UK Supreme Court can overrule it.

Nigel Don: Thank you.

Joan McAlpine: I will pick up on the same issue, in particular today's letter from the right hon Lord Hamilton, the Lord President, in which he states that he finds much to commend Lord McCluskey's proposal and, in particular,

"the proposal that the High Court should be brought into line with the Court of Appeal ... and the Court of Appeal of Northern Ireland by the requirement of certification by these intermediate appeal courts as a precondition of any criminal case being taken to the UK Supreme Court."

Why is there such a divergence of opinion between yourselves and the Lord President?

Richard Keen: If I may respond to that question ahead of Michael Clancy, I think that one has to look very carefully at the wording that is used by the Lord President or, in this context, perhaps the Lord Justice General, because that is the hat that he should be wearing in this context.

Joan McAlpine: It says "Lord President" on the letter.

Richard Keen: I know. That is interesting, is it not, because he is dealing with a matter that falls under his jurisdiction as Lord Justice General. Be that as it may, however, he addresses the issue of criminal appeals. When we actually look at this, we are not dealing with criminal appeals; we are dealing with cases within the criminal law that happen to raise constitutional issues relating to our treaty obligations under the European Court of Justice and the ECHR. Those are constitutional appeals, not criminal appeals. It so happens that they arise in the context of criminal cases, but the comparison that is drawn is, in my submission, not well drawn. As I say, we are not dealing with criminal appeals as such. We are dealing with constitutional issues that arise in the context of there being a criminal case.

Joan McAlpine: So you are saying that the Lord President is wrong.

Richard Keen: I would never say that. I am merely disagreeing.

Joan McAlpine: Okay. I have a more general question about the appeals—whether they are constitutional or criminal is obviously a disputed point. On the number of devolution issues that have gone to the Supreme Court, can you tell me, as a non-lawyer, how much more money lawyers from Scotland make from taking cases to the Supreme Court as opposed to a higher court in Scotland?

Richard Keen: I cannot imagine that they make any more money in that sense. However, if you are saying that if there is a further level of appeal they will be remunerated appropriately for going on to that further appeal, so be it. However, that is not the real issue. The real issue is whether people have the right to vindicate their constitutional rights in accordance with the rule of law, which includes our international treaty obligations under the ECHR.

Joan McAlpine: It strikes me that that is the difference between the Lord President, who does not have a financial interest, and representatives of bodies of lawyers who may—I am not saying that they do—have a financial interest in cases being taken to a higher court.

Richard Keen: I suppose that all of us round the table have a financial interest in the law: you have a financial interest in claiming to make it and I have a financial interest in claiming to apply it.

The Convener: I was enjoying that exchange and it suddenly came to an end.

John Mason (Glasgow Shettleston) (SNP): James Kelly mentioned delays and disruptions; Joan McAlpine mentioned costs. I am an accountant and, I think, in touch with the public, who would like speedier and less expensive justice across the board. How can we make justice speedier and less expensive? Do any of the options in this debate help us in that regard?

Michael Clancy: It is difficult to devise a comparison that would say that one path would be more economical than another because, fundamentally, we are dealing with speculation.

I saw the remarks of the expert group and Lord McCluskey's review group to the effect that the current system was cumbersome and slow. Expense was not highlighted in either of those reports. Cumbersomeness and slowness are, in one sense, relative. Over many years, the Law Society has contributed to many discussions with the Scottish Government and others to try to ensure that we get as quick and effective a system of justice as we possibly can.

Notification of cases might cause delay, but there might be ways to redraft the statute to deal with notification requirements. On the time that it takes to deal with various stages in any criminal matter, we have all seen Audit Scotland's recent review paper, which gives an indication of the pinch points that induce delay in criminal trials.

The Scottish Government clearly has that in its sights in the making justice work programme to make proposals for speedier, more effective and more efficient justice. However, I do not think that we can see whether the proposals that we are discussing would, of themselves, contribute to that policy objective.

Richard Keen: John Mason mentioned what might be regarded as the holy grail of any justice system: get it quick, get it cheap. People would like their lawyers to be quick and cheap but, more important, they would like them to be right. The victim of injustice will perhaps wait for the right answer rather than rush headlong into the wrong answer. Cost must be at the forefront of our minds, and time is related to that.

In the letter that he sent to the Advocate General's review group last year, Lord Hope pointed out that the scope for dealing with applications to appeal to the Supreme Court was limited; that such applications were not numerous; that they were

"almost always dealt with on paper without the need for an oral hearing";

that the court refuses many more applications for leave to appeal than it ever allows to go forward; and that, when it allows applications to go forward, the hearings

"do not occupy an excessive amount of the Court's time."

One other observation is that a decision of the United Kingdom Supreme Court can make for certainty. There might be any number of cases pending that raise the same or a similar issue, but one finds that they are resolved by a conclusive decision of the UK Supreme Court. Ultimately, there can be a net saving of time and expense in circumstances in which such a case proceeds and is determined by the Supreme Court.

16:45

John Mason: You used terms such as "cheap", which I did not use—I think that I said "less expensive"—and "rush headlong", which I am sure that none of us would want to do. Certainly, the Fraser case has dragged on for a long period, although I am sure that there are good reasons for that. Do we have the right balance between good-quality product and value for money? In education, health and other areas, we are having to constrain costs.

Richard Keen: The process is not fixed in time or writ in stone; it is constantly developing. The best that I can suggest is that the process must always be monitored in the context of time and cost. It is difficult to say that one model works better than another. It is a dynamic process. We must remember that justice is a demand-driven environment, so cost and delay are often a product of the number of victims in the court process, rather than of the way in which their cases are processed.

Patrick Harvie: There are many appeal rights that we could remove to save ourselves a lot of time and money but, by doing so, we would end up with a system that is a great deal less just.

I want to ask about some of the evidence from the Law Society, just to be clear that I understand it properly, and to find out whether the Faculty of Advocates agrees. Is the Law Society saying that, under the proposed changes, a decision or action by the Lord Advocate that was found not to be compliant with human rights would still stand and would not be declared invalid? You are concerned about what that does for the level of protection on human rights grounds of someone who might already have been convicted and be in prison—perhaps, arguably, not legitimately convicted or in prison, given the decision about the incompatibility of the Lord Advocate's decision. Is that the core of

the Law Society's argument against the proposed changes? What is the faculty's view?

Christine O'Neill (Law Society of Scotland): We probably could not put it better ourselves. That is the Law Society's position on the proposed changes. Under the existing system, in which we have what is described as the vires control on the Lord Advocate, the Lord Advocate has no power to prosecute in a way that breaches someone's convention rights, which is why prosecutions fall if there is found to be something that is in breach of the convention as part of the process. Under the proposed scheme, an action by the Lord Advocate, or some other part of the criminal process that leads to a conviction, could not be a nullity per se. It would therefore stand and be thrown into the mix with all the other circumstances of the case in deciding whether a conviction should stand.

On the process, at present, a point can be taken at the beginning of a trial before a person is convicted, and if that is taken all the way to, say, the Supreme Court, a decision can be made in advance of conviction about whether there has been a breach of convention rights. Under the proposed system, at least some people might have to wait until they have been convicted and put in custody before a decision is made that their convention rights have been breached so seriously that their conviction should be overturned. There is a shift in the balance of protection under the proposed scheme. The Law Society takes the view that the current system ensures robust protection for individual human rights, and particularly for those who might be innocent and the victims of an unfair process. The proposals shift the balance in favour of the prosecution and away from the robust protection of human rights.

Richard Keen: We agree with that analysis of the position, but one has to bear it in mind that, ultimately, there will be a right of appeal. It is the manner in which that right can be vindicated that is affected.

Nigel Don: My question follows on from that point, because it raises the issue, at one level, of what the powers of the Supreme Court should be and whether it should have powers—rather like those that the European Court of Human Rights seems to have—to send the matter back and tell a court that it has got it wrong and should sort it out, or whether it should have the power to quash a conviction and direct.

The situation also raises a question, which Mr Clancy might be able to answer, about how other jurisdictions deal with such issues. We are talking in the context of Scotland and the UK, but similar issues have been raised in mature European jurisdictions. I suspect that Mr Clancy might be more of an expert than he would wish to let on and might be able to give us some advice on what happens elsewhere.

Michael Clancy: Yes, maybe, but before we get to that, the powers of the Supreme Court in new section 98A(9) of the Scotland Act 1998 that is proposed in the Scotland Bill provide that the Supreme Court has all the powers of the court below and may, in consequence of determining a question relating to compatibility, affirm, set aside or vary any order or judgment made or given by that court, remit any issue for determination by that court and order a new trial or hearing. The provision in the bill is a replica of provisions in the Supreme Court rules. Something is being taken from subordinate legislation in the Supreme Court rules and put into primary legislation. Alan McCreadie may have something to add about that.

Alan McCreadie: As Michael Clancy says, proposed new section 98A(9) reflects what is in the Supreme Court rules.

On the compatibility issue, to which Christine O'Neill referred, it is not clear to my mind when the right of challenge, in general, under section 98A kicks in. What there is at present, under schedule 6 to the 1998 act, is the ability to take the devolution minute issue on the basis of vires and whether the Lord Advocate has the authority to raise a prosecution under section 57. That is perhaps where we seek some clarity.

Michael Clancy: That has given me enough time to collect my thoughts about what is going on internationally. About a year ago, just after the Cadder judgment, I went to a Franco-British Lawyers Society lecture by Nicole Questiaux, who is a judge at the Conseil d'Etat in France. During that lecture, she said:

> "We now in France hold our breath, as the message from the Executive has radically changed. Our minister of justice is caught between the pincers of the Constitutional Council and the European Court of Human Rights."

Does the situation not sound the same? Other jurisdictions are wrestling with the issue.

When it comes down to it, the ECHR, like any other treaty, is dealt with in two ways. A system can be either monist or dualist. Countries with monist systems enact the treaty by virtue of signing up to it as a prerogative act, whereas countries with dualist systems must not only sign up to the treaty as a prerogative act but implement it into national law. The impact that is being felt across Europe as a result of signing up to the ECHR differs from country to country, because running alongside the ECHR are invariably structures within a written constitution, such as a Supreme Court, which can determine the validity of legislation made in the light of that. In preparing for today's session, my colleagues back at the

office and I were chatting about the issue. Marina Sinclair-Chin and Katie Hay gave me a great deal of assistance in pulling together some comments on France, Germany and Spain.

In France, the constitutional council alone reviews the constitutionality of laws, while the civil and administrative judges control the compliance of laws with the convention. In the recent case of Mazurek v France at the European Court of Human Rights in Strasbourg, the French law provided that a child born of an adulterous relationship got a reduced entitlement to the parents' estate, which created an imbalance as it was incompatible with article 8 of the ECHR. After the case had gone through all the courts in France, it was found that there was no breach of the ECHR, as France was pursuing a legitimate aim and intended to protect the interests of an adulterer's legitimate children and spouse—such peculiarities sometimes arise in the process. At the European Court of Human Rights, a violation of ECHR was found, and France proceeded to change the law.

One gets the same sense from the French system as one would get from the UK system at present: that if there is a breach, the case goes back to the country, which then responds. I can send the committee a note on cases relating to Germany and the case of López Ostra v Spain, which was quite significant for the Spanish system, so that it can be fully apprised of the situation.

Richard Keen: It must be borne in mind that the Strasbourg court—the European Court of Human Rights—cannot interfere with the order of the domestic court in any way whatsoever. It can declare that there has been a breach of convention rights, and it may award damages—usually very modest—for what has happened in the past. Thereafter, it is for the national court to examine its domestic law and order and ensure that it complies with convention law, but there is no question of the Strasbourg court being able to reverse, interfere with or indeed do anything with the decision of the national court that led to the application.

Michael Clancy: That is absolutely correct, although the damages can sometimes be quite hefty: in the López Ostra case, the award was something like 4 million pesetas, with 1.5 million pesetas in costs. If you were to change that into today's money, I am not quite sure what it would buy you.

The other aspect of all this is that the European Court of Human Rights has around 150,000 cases pending, which means that there are 150,000 possible opportunities for Scots law to be at some distance from compliance. It all depends on what the court decides—as Lord Rodger indicated in the Cadder case, we are obliged to follow that which the European Court of Human Rights lays down. We must therefore be aware as a society—with a small s as well as a big S—of the possibility that changes will take place of which we may currently be ignorant or only marginally aware.

That process of constant review of our legal system is up to you, ladies and gentlemen.

David McLetchie: I think that 1.5 million pesetas was only £75,000 in old, pre-euro money, for which I am sure many people would not bother getting out of bed. It seems quite cheap for a judicial procedure at that level.

Michael Clancy: Is it more than an MSP gets paid?

David McLetchie: Indeed, it is.

I want to go into what is perhaps a more fundamental question: the business of devolution notices and minutes. All of those arise because the Lord Advocate is described by the Scotland Act 1998 as a minister. If the Lord Advocate were just a public prosecutor and not a minister, many of the problems would not arise. It is because he is designated, perhaps because of the antiquity and history of the office, as a member of the Government of the country as opposed to an office-holder who is simply an independent public prosecutor that his actions as a minister are subject to a review process. Is that correct?

17:00

Richard Keen: I suppose that we could say that that is procedurally correct. However, one way or another, we would expect persons to be able to vindicate their human rights—their convention rights—that are breached as a consequence of a criminal prosecution. What you are addressing is the route to the resolution of that problem rather than anything else. I cannot conceive of a situation in which you remove the Lord Advocate as a minister and thereafter determine that someone in Scotland would not be able to vindicate their convention rights in the context of a criminal prosecution by an independent prosecutor. The net result would be that, having been convicted, they would eventually have to apply to the Strasbourg court to have their convention rights vindicated, which is a very long drawn-out process.

Michael Clancy referred to the number of cases pending before the European Court of Human Rights, but the problem is not just the number of cases but the time that it takes the court to deal with them. That court is very quick to criticise national courts for taking more than about four years to resolve a case, but it normally takes nearer 10 years to do that. To leave people to

vindicate their rights by reference to Strasbourg would not be at all satisfactory. You can say that, if the Lord Advocate is not a minister, a devolution issue does not arise, but, ultimately, you will have to apply your mind to the breach of convention rights that occurs due to the actions of an independent prosecutor.

David McLetchie: That is right but, presumably, the actions of the Director of Public Prosecutions in England are subject to the same criteria?

Richard Keen: The DPP is a public authority and so is susceptible to human rights legislation.

David McLetchie: So the actions of the Director of Public Prosecutions in England are treated in exactly the same way.

Richard Keen: The DPP is a public authority and is therefore amenable to complaint that he has not complied with someone's convention rights as applied—

David McLetchie: So if we had an independent prosecutor, that would be the same for us, would it not?

Richard Keen: In my view, yes.

Christine O'Neill: There is a difference of substance in terms of the protection of individual rights. Under the current regime, the Lord Advocate simply cannot act in a way that breaches someone's convention rights whereas, under the English system and under the proposed system, it would be possible for the Lord Advocate to prosecute someone in a way that breached their convention rights and for the conviction that resulted to stand.

Richard Keen: I agree that the breach is taken into account, rather than rendering the decision a nullity.

David McLetchie: I think that that is partly the point that Patrick Harvie raised. We are back to the same issue again. Is that right?

Christine O'Neill: Yes.

Richard Keen: Yes.

Willie Rennie: I have found this evidence session extremely instructive and measured. Bearing in mind that the faculty's written submission refers in paragraph 9 to the "ill-informed and ill-tempered" remarks that were made earlier in the summer, do you detect a change in how the Scottish Government and Scottish ministers are approaching the issue now? Is their approach now much more measured and instructive?

Richard Keen: I am not in a position to judge that. I believe that remarks were made that must be regretted by the persons who made them, given their standing in public life. However, I am not in a position to judge that matter.

The Convener: Michael, do you wish to respond to that?

Michael Clancy: I think that the question was about the faculty's submission.

The Convener: It is ultra vires perhaps. Are you finished, Mr Rennie?

Willie Rennie: I am.

The Convener: That was all that you wanted on the record.

Joan McAlpine: Is Mr Keen perhaps referring to Lord Hope's interview in *The Times*?

Richard Keen: I do not believe that I was.

Joan McAlpine: Earlier, we had a discussion about the equivalence of human rights in Northern Ireland and Wales from the point of view of devolution. Every schoolboy and schoolgirl in Scotland is taught that we have a separate legal system, the independence of which was enshrined in the treaty of union. Given that we are a separate jurisdiction, what prevents us from having our own higher court to deal with these important human rights issues?

Richard Keen: We are a separate jurisdiction, but we are a part of the United Kingdom, which is a party to the international treaty obligations that are enshrined in the European convention on human rights. We have to obtemper those international treaty obligations.

I return to the observation that was made earlier, which is that, if we analyse them properly, we find that we are dealing with issues not of criminal law but of constitutional law. If there were no other route for people in Scotland to vindicate their convention rights, there would at least be the route to Strasbourg but, as I indicated earlier, that is not an entirely satisfactory route.

Joan McAlpine: You are saying that if Scotland were independent, we would have our own higher court.

Richard Keen: That would be a matter for those who determined independence and the judicial system post-independence. We would not be obliged to maintain any right of appeal to the UK Supreme Court.

Joan McAlpine: Does Mr Clancy have something to say on that?

Michael Clancy: He might.

The issue of the current constitutional arrangements is as Richard Keen has described it. The Supreme Court has a particular role to play in the context of the current constitutional

arrangements. If those arrangements are changed, the builders of the future constitution would be able to provide for a Scottish supreme court. That is quite clear. Any country that has become independent in the recent past has its own court structure within the context of its own constitution. It would be interesting to find out what kind of constitution is in the minds of some MSPs and how they think that the structure could work.

You are quite right. Article 19 of the treaty of union set out certain prescriptions that were about ensuring that the Court of Session and the High Court of Justiciary should continue "in all time coming". Those provisions in the treaty of union are reflected in schedule 5 to the Scotland Act 1998. The foresight of the people who, in preserving the system of Scottish courts and the system of Scottish law, drafted article 19 is one of the principal reasons why we are seated here today and why we can have the discussion that we are having.

The fact that the treaty of union prohibited the sending of cases to England, particularly to the courts in Westminster hall, meant that it was inevitable that people would analyse and think about the treaty with a view to finding ways round it, which they did very promptly after the union, when both civil and criminal cases were taken to the House of Lords—but that is a story for another day, and it is getting quite late.

The Convener: And there are plenty of those.

Nigel Don will ask the final question.

Nigel Don: I am grateful to you, convener.

I take Mr Keen's point that, fundamentally, we are talking about issues of constitutional law; it is just that they happen to have arisen in criminal cases. If I have read this right, perhaps it is surprising that the miscarriage of justice test will be part of the process. Am I right in thinking that, under the bill as it is currently drafted, the Supreme Court will apply some kind of miscarriage of justice test? If I am right, am I also right in thinking that that is inconsistent with the position that you have espoused?

Richard Keen: I do not believe that there is any inconsistency. As the Supreme Court made clear in the McInnes case, it is axiomatic that the accused will have suffered a miscarriage of justice if his trial was unfair. That is the test that is applied by the Supreme Court, and it is the test that is applied by the High Court sitting as the court of criminal appeal in Scotland. There is no distinction.

Nigel Don: So incompatibility with convention rights equals unfair equals—or, at least, includes—miscarriage of justice.

Richard Keen: Under the present system, if someone's convention rights have been impugned, they will have suffered a miscarriage of justice and, consequently, the trial will be regarded as unfair.

Going forward, under the proposed changes in the scheme, it may be possible—although others may disagree with this—to arrive at a conclusion whereby it is determined that there has been some breach of convention rights but that the trial is, nevertheless, fair.

Nigel Don: That is the point that I was trying to get to. Although I know that this will offend my colleague Patrick Harvie, it seems to me that there are occasions when the process was not right but we got to the right answer, and that we should not automatically overturn such decisions.

The Convener: Christine O'Neill would like to comment on that.

Christine O'Neill: That is certainly the Law Society's concern—we are concerned that the miscarriage of justice test may allow for convictions to stand even though there has been a breach of fundamental rights. It is essentially a political judgment for the Parliament whether it takes the view that convictions that are reached in breach of human rights should stand.

Nigel Don: Yes, it is a question of whether we regard a breach of human rights as being so fundamental that, even though we know the guy is a crook, we will still let him out.

Christine O'Neill: The presumption of innocence is maintained.

Nigel Don: We may know that he is a crook from previous examples of his behaviour. I am sorry—I am playing devil's advocate, but you do it, too. There are occasions when we know fine well that we got the right guy.

Christine O'Neill: My understanding of our system is that the presumption of innocence applies, even when someone has previous convictions.

Richard Keen: It arises on a case-by-case basis.

The Convener: We could have a separate meeting on that topic alone.

Michael Clancy: Nigel Don has obviously been studying closely the 18th century determination of being by habit and repute a thief.

The Convener: Would you like to refute that, Nigel, before we close the meeting?

Nigel Don: Mr Clancy is welcome to put on record as much as he likes. I am grateful to him for recognising that maybe I have studied something,

but I do not recall that being part of my education; I was merely arguing the point, as everyone knows.

The Convener: Okay. I draw the meeting to a close. I thank our panellists very much for their forbearance with our timing and for the fulsome answers that they have given.

Our next meeting will be on Tuesday 1 November, when we will again take evidence on issues relating to the UK Supreme Court.

17:12

Meeting continued in private until 17:58.

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