The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

SCOTLAND BILL COMMITTEE

Tuesday 1 November 2011

Session 4

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SCOTLAND BILL COMMITTEE
9th 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 ALSO PARTICIPATED:

Lord Wallace of Tankerness (Advocate General for Scotland)
Paul McBride QC
Lord McCluskey (Supreme Court Review Group)
Frank Mulholland (Lord Advocate)
Sheriff Charles Stoddart (Supreme Court Review Group)
Alan Trench (University College London)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Committee Room 4

Scottish Parliament

Scotland Bill Committee

Tuesday 1 November 2011

[The Convener *opened the meeting at 14:39*]

Scotland Bill

The Convener (Linda Fabiani): Belatedly, I say good afternoon to everyone. Welcome to the Scotland Bill Committee's ninth meeting in session 4. I remind those present that, unless they have been told otherwise, they should turn off their mobile phones and BlackBerrys, which can interfere with the sound system. I do not think that such devices interfered with the sound system before the meeting started; that problem related to something altogether different.

Apologies have been received from Nigel Don, who will be late—he will be here as soon as his other committee finishes. As the meeting will be long, I would appreciate succinct questions with a minimum of preamble from members. That will give all members the opportunity to ask questions.

I welcome our first witness: Paul McBride QC. By way of opening, what are your views on the Supreme Court issue and on what you have heard about it so far?

Paul McBride QC: To save a little time, I did not plan to make an opening statement. I served on the United Kingdom working group that the Advocate General for Scotland set up and which Sir David Edward chaired, and I will put my position succinctly.

Scotland has a unique legal tradition and maintaining our unique Scottish legal system's independence is vital—I hope that that does not become a political matter. We must trust the High Court of Justiciary in Scotland to decide whether a case is of general public importance and therefore requires the granting of a certificate for leave to appeal to the Supreme Court.

I very much welcome the report by the independent review group that Lord McCluskey led. That group has given us a first-class measured report that draws on much expertise from various individuals. That provides the committee with a proper basis for progressing matters. I support that report's key recommendations, which are not inconsistent with those of Sir David Edward's working group.

Adam Ingram (Carrick, Cumnock and Doon Valley) (SNP): Welcome to the meeting, Mr McBride. You have stated your position succinctly. As you endorse Lord McCluskey's recommendations, what is your view of the Lord Advocate's proposed amendments to address the issues in the Scotland Bill?

Paul McBride: As I understand it, the Lord Advocate has put forward several proposals and amendments, and parliamentary draftsmen will obviously deal with some of the issues that he has raised.

I support what the Lord Advocate has said. I understand that both he and—as of yesterday—the Lord President and the judges support the independent review group's recommendations. The arrangement would put the Scottish appeal court in the same position that the Court of Appeal in England is in. It cannot be right to treat one part of the country differently from another part.

As for removing the acts of the Lord Advocate from section 57 of the Scotland Act 1998, provisions for appealing to the UK Supreme Court should not be limited artificially to acts of the Lord Advocate. The provisions should extend to all acts of public bodies, including the Scottish ministers. Otherwise, the position is artificial.

Adam Ingram: Certification is controversial. Critics such as the Law Society of Scotland oppose certification on two grounds. The High Court of Justiciary has been criticised for its interpretation of the European convention on human rights in some decisions. It is also alleged that a hierarchy of rights could emerge—cases of general public importance would be certificated, and others would not—and that access to justice for some individuals whose rights had been breached could therefore be limited. What is your response to those criticisms?

14:45

Paul McBride: It is dangerous for the Law Society to proceed on the basis of what appears to be a couple of individual controversial cases—presumably the Cadder case and the Nat Fraser case. To be critical of particular judges for the decisions that they have taken is one thing; to extend that to a general principle that somehow judges in Scotland cannot be trusted to work out what is a matter of general public importance to the people of Scotland is a leap too far.

If we are talking about a hierarchy emerging, it cannot be the case that, if the Court of Appeal in England can say that someone cannot go to the Supreme Court because the matter is not of general public importance, the position should be different in Scotland. If the Law Society's position was correct, two parts of the United Kingdom would have different types of access to the Supreme Court—and that cannot be right.

Richard Baker (North East Scotland) (Lab): On that point, are you confident that, if there had been a certification procedure in place in Scotland, the High Court would have issued such a certificate in the case of Cadder or McLean? I know that that is hypothetical, but you can see what I am driving at. Can we be confident that we would not end up in a situation in which, because a certificate was not issued, Scotland could be deemed to have acted outwith ECHR compliance for a number of years before a case was ever heard at Strasbourg? That situation could have far-reaching impacts for a number of years to come.

Paul McBride: I appreciate what you are saying. I spent the first 10 years of my career at the bar in front of the court of appeal, and we can never second-guess what the appeal court or any court will do.

One imagines that Cadder, which dealt with suspects' rights in police stations, would ultimately have been certified as a matter of public importance and made its way to the Supreme Court. As I understand it, the McLean case had nine judges deciding unanimously in a particular way, and the difficulty was that Mr McLean pled guilty, so the case could not be taken any further. I have no doubt that issues surrounding suspects' rights and access to legal representation would, at some point, be certifiable as a matter of general public importance.

James Kelly (Rutherglen) (Lab): You indicated that there was quite a lot of overlap between the McCluskey recommendations and the Edward group, on which you served. What was the Edward group's thinking on certification?

Paul McBride: The Edward group never really got to look at certification; the issue was not a direct part of the group's remit. We were primarily concerned with whether people in Scotland should have access to the Supreme Court at all. We came to the unanimous view that they should, and Lord McCluskey's review also came to that view.

The question is about the route that is used to achieve that access. If the position remains as it is at the moment, people in Scotland will have access to the Supreme Court without the leave of the Scottish appeal court while the position in England is different. All that is being sought—and it is perfectly reasonable for the committee to address the matter—is for the rights of people in Scotland to access the Supreme Court to be the same as those of people in England. We seem to trust the appeal court in England to judge certification correctly, so why should we not extend that same trust to the Scottish appeal court?

James Kelly: I understand what you are saying, but I just want to be clear about how the Edward group considered the certification issue. I understand that two submissions to the group supported certification. Was any consideration given to those submissions?

Paul McBride: The report's conclusions show that we addressed certification. The group was primarily devoted to the issue of whether there should be access to the Supreme Court from Scotland. There was a body of opinion, including some judges, that there should be no access at all to the Supreme Court from Scotland if the Scottish appeal court said no. Lord McCluskey's group has come to what appears to be a sensible middle-road conclusion that, if certification is granted that the matter is of general public importance, access to the Supreme Court can be gained.

One must remember that, if certification is not given and the appellant feels strongly that there is an ECHR point that he will be successful on, he can still follow the Strasbourg route. He will not be cut off in any way from access to any rights; he can still take another route.

Stewart Maxwell (West Scotland) (SNP): We heard evidence last week from the Law Society of Scotland and the Faculty of Advocates, which seemed to argue—I hope that I do not misrepresent them—that we are not comparing like with like on certification. They seemed to state that we should compare our system not with the appeal court in England but with the systems in other devolved areas such as Northern Ireland because the issue is not about appealing criminal cases, for which certification is not required, but about devolution matters. They stated that, in that regard, the Supreme Court is a constitutional court.

If we look at the situation in that sense, the comparison between the Scottish appeal court and the English appeal court is incorrect. What is your view of that argument?

Paul McBride: That is a classic lawyer's semantic distinction—it really does not mean anything at all. The real question is: if you live in Scotland, do you effectively have the same rights as somebody living south of the border? It does not matter whether it is dressed up as a devolution matter.

That is how the matter should be approached, not through semantic arguments about whether this is a devolved Parliament with certain types of powers. The issue should be about the citizens of Scotland and the citizens of England having the same kinds of rights as envisaged by the Human Rights Act 1998. That really is the issue for the Scotland Bill to address.

Joan McAlpine (South Scotland) (SNP): Mr McBride, you will be aware of the letter that the committee received last week from Lord Hamilton, the Lord President, generally supporting Lord McCluskey's recommendations, in particular on certification. In your opinion, how significant is that letter?

Paul McBride: It is a very significant letter. I had thought that such a letter might have been written sooner, but the judge correctly decided to wait for the publication of the full report rather than simply the interim report.

As I understand the Lord President's letter, it reflects the widely held view of the judiciary that their position is undermined by people in Scotland being able to go through a back door to the Supreme Court without their leave, when that system does not apply in England. The intervention of the top judge in the land to support Lord McCluskey's independent review group is therefore very much to be welcomed and is a matter of great significance for this committee to take into account.

Joan McAlpine: How significant would it be if the Lord President's recommendations were ignored in the Scotland Bill, which we are considering and which is going through at Westminster?

Paul McBride: We then stray into a matter of politics—and I am very conscious that the issue has, to a degree, become a political one.

I would have thought that it would be very hard for the Westminster Parliament to ignore the clear will of the Scottish judiciary, including its top judge and the chief executive of its court system. If this committee came to the view that it supports the independent review that Lord McCluskey led, it would be very hard for Westminster to ignore that. One would not expect Westminster to ignore an independent review group in England or the view of the Lord Chief Justice in England, so why on earth would it choose to ignore what the Lord President says or, indeed, what this committee or the Scottish Parliament says?

Willie Rennie (Mid Scotland and Fife) (LD): I am struggling to understand what practical difference certification would actually make. Surely an issue of human rights and a failure to meet our international obligations would be regarded as a very serious issue that probably requires to go to the Supreme Court. Why is certification necessary when we would have the further filter of all applicable cases having to apply for leave to appeal to the Supreme Court?

Paul McBride: It is very important to have certification because, if we do not have it, people will simply be able to bypass the highest court in this land, which has been the apex of our system for a significant period of time, and go to a court down south. They will simply bypass the views of the judges here on leave to appeal, when that system does not apply in another part of the country. If the Supreme Court in the United Kingdom is to have consistency, it is very important for there to be a consistent approach to those who are able to enter through its front door. At this moment, we do not have that.

We also have to respect the decisions that are made by judges in this country, bearing in mind that we have an entirely separate and independent legal system with safeguards that are not available in England. We have corroboration, particular rights in relation to legal aid and access to senior counsel, three verdicts, a different jury system and different practices in relation to disclosure.

It is important that we recognise that we have a different system while still allowing the citizens of Scotland to have the same access to decent human rights, as envisaged by the 1998 act, as those in England. However, the people have to enter through the same door. In England, they enter through the front door and in Scotland they enter through the back door. It is important that we have consistency.

Willie Rennie: We are not really talking about consistency. The Supreme Court plays a role in criminal matters in Northern Ireland, Wales and England, but we are not talking about extending that appeal court to Scotland, because we have a separate system.

To return to my original point, what practical difference would certification make? How many more cases would or would not go to the Supreme Court as a result of certification?

Paul McBride: It is very difficult to predict that. I was not on Lord McCluskey's independent review group, and he might have access to those statistics, but I made some inquiry and I understand that a great number of applications for certification made down south are refused. I do not know what the statistics are, because I do not have access to that information.

We have to be able to tell our top judges that they are the ones who are best placed to decide what is a matter of general public importance in relation to human rights. We have to give them their place. If we do not do so, it undermines the integrity of our independent court system in Scotland.

David McLetchie (Lothian) (Con): I think that you said that we cannot have a process that allows us to bypass the highest court in the land. However, we are not talking about a bypass, because the court will have adjudicated on the matter in question. It is an appellate process, not a bypass process.

Paul McBride: If someone goes to the appeal court but their appeal against conviction is refused and they then apply for leave to appeal to the Supreme Court but the appeal court says no, that is pretty much be the end of the matter in England. In Scotland, it is not the end of the matter, because they can apply to the Supreme Court down south for special leave to appeal. Such people are bypassing the decision of our court and going directly to the Supreme Court to ask it for leave to appeal. People cannot do that down south. All that Lord McCluskey's review group suggested was that we have an equivalence between Scotland and England.

David McLetchie: I find one thing slightly puzzling in terms of the attitudes to the issue. Time and again we hear about the unique system of Scots law, how it must be preserved and protected, and how different it is from legal systems elsewhere in the United Kingdom—which it manifestly is. However, when Her Majesty's Government and the Edward group come up with proposals that, in their view, respect that difference, why is it that all the people who say that Scots law is unique and has to be protected start complaining that we have to be treated the same as England?

Do you see what I mean? On the one hand, people shout and dance about how the system is different, has different processes and has to be protected, but on the other hand, when a proposal comes along, the same people say, "Ah no, but we are being discriminated against because it is not the same as it is in England." I find that slightly contradictory. Would you not say so?

Paul McBride: I am not suggesting that we are being discriminated against; I am just saying that we are not being treated on the same playing field.

We should bear in mind that, when the Supreme Court is deciding on Scottish issues, there is an in-built majority of non-Scottish judges in every case. I am not suggesting that they do not know Scots law or get things right, but one has to recognise the fact that when we go to the Supreme Court down south we are faced with five judges, three of whom are English—or from Wales or Northern Ireland—and two of whom are from Scotland. Regardless of the size of that court, there will always be an in-built majority of judges who are not Scottish and, although I am not saying that I agree with them, some people might think that that is not necessarily the correct way forward.

A great deal depends on how we approach the Human Rights Act 1998. There is a big issue about whether we should be signed up to the act at all, whether it should be amended and whether there should be a British or indeed a Scottish bill of human rights, but we are where we are.

As I understand it, the proposal by Lord McCluskey is fairly modest; it simply puts the status and integrity of our court in the same position as that of the court down south. Can you imagine someone saying to the Court of Appeal down south, if it said that they were not getting certification, that it did not really matter because they could just go to the Supreme Court anyway? People would be furious. One imagines that the Lord Chief Justice would write letters to everybody and there could be strikes and all sorts of problems. People seem to be far more dogmatic about such issues down there.

The only thing that is happening here is a reasonable debate about a very young court that has been set up by politicians. I believe that politicians are allowed to comment on what happens in that court, despite what some people may say. It is a young court that is developing its jurisprudence, and this committee is entitled to examine the way in which it is developing it.

15:00

David McLetchie: The McCluskey report said that the number of judges in the Supreme Court is not a problem.

Paul McBride: It is not a problem, although there is perhaps an issue of perception. When I used to appear in the predecessor of the Supreme Court—the Judicial Committee of the Privy Council, which was held in Downing Street—it had the power to involve more Scottish judges to deal with matters that were exclusively Scottish. In fact, Lord McCluskey might even have been eligible to be one of them. That power is not available to the Supreme Court, which has an in-built majority of non-Scottish judges.

As a matter of perception, some people find it difficult to understand how nine of the most senior judges in Scotland can arrive at a decision and not grant leave to appeal but, by the back door, a case gets to the Supreme Court, where two Scottish judges with three non-Scottish judges overturn the decision. That is a matter for the committee to consider.

David McLetchie: Do you agree with the proposition that many of the difficulties that are under consideration arise because the Lord Advocate is not only head of the prosecution service but a minister in the Government? That is significantly different from the situation that pertains in the rest of the United Kingdom, where the independent heads of the prosecution services are not part of the devolved Administration or Her Majesty's Government. Is that not the root of the problem?

Paul McBride: No, I do not think so. The Lord Advocate has made suggestions, understandably

and correctly, about removing his role from certain parts of the legislation.

I am not saying that you are old, Mr McLetchie, but you and I will remember the days of a Conservative Government when there was a Tory Lord Advocate in the Crown Office who was a member of the Government but who was still independent and gave proper independent advice. As I understand the way in which the current Scottish Government administers its affairs, the Lord Advocate is not involved in overtly political matters and attends Cabinet only when he is required to give independent legal advice.

When the Lord Advocate comes to the committee later this afternoon, he can explain his role and why he wants to remove himself from certain parts of the legislation.

David McLetchie: He could remove himself entirely if he was simply a prosecutor and another person was a minister in the Government providing it with independent legal advice. That is exactly what happens in Her Majesty's Government and in the devolved Administrations in Wales and Northern Ireland, is it not?

Paul McBride: I have not heard it suggested seriously by anybody that the independence of the Lord Advocate is in any way compromised, or even perceived to be compromised, because he has a role in the Crown Office and in public law matters relating to the Government.

David McLetchie: I am not sure about that. Several writers on constitutional law would say that we have inadequate separation of powers in Scotland and that the development of most jurisprudence suggests that we should separate those offices.

Paul McBride: That is perhaps a matter for debate for another day, because I am not sure that it relates to the bill.

As I understand it, the Lord Advocate accepts the point in Lord McCluskey's key recommendations that the basis for appealing to the UK Supreme Court should not be artificially limited to acts of the Lord Advocate but should be extended to acts of all Government ministers and all public bodies. Is that not fairer for the people of Scotland, rather than have everything on the shoulders of the Lord Advocate, who carries out a particular job in the prosecution service?

The idea is to extend the provision to all the Scottish ministers and all acts of public bodies. Surely that will benefit people in Scotland who claim that their human rights have been infringed, not by an act of the Lord Advocate or Crown Office but by an act of any Scottish minister or public body. Is that not the way forward?

David McLetchie: If I understand them correctly, the Lord Advocate's amendments relate to criminal proceedings only, so the legislation will not cover all acts of ministers and public bodies in any context, although I might be wrong about that.

The Convener: We can clarify that with the Lord Advocate later.

Richard Baker: I have a question about the difference between appeals on convention rights and those on criminal cases. Obviously, in Scotland, appeals to the Supreme Court can relate only to convention rights, whereas, as Mr Rennie said, in other jurisdictions there can be appeals on criminal matters. I imagine that many of the instances in England in which leave to appeal is not granted relate to criminal matters. How significant is it that, in Scotland, only matters relating to ECHR compliance can go to the Supreme Court? Does that not create a material difference that might need to be reflected in the process?

Paul McBride: The proposal is that the Lord Advocate and Advocate General will retain the right to refer cases to the Supreme Court. They will be able to identify early in the process cases that raise potentially significant breaches of ECHR and refer them directly to the Supreme Court.

Such cases often arise in the lower courts, such as the district court, and in the smallest cases. The Lord Advocate or Advocate General could identify such a case and refer it directly to the Supreme Court without its having to go through the process of trial, conviction, appeal, leave to appeal, certification and all the rest of it.

It would be possible for such issues to be identified early. It would be open to people to make representations to the Lord Advocate to say, "This is the kind of case that might become a problem in future. Identify it early and refer it for us, if you will." He would then have to consider it.

Richard Baker: That is an important point. Would it not create tensions with the judiciary if the Lord Advocate or Advocate General made decisions at that stage?

Paul McBride: There are always tensions between the Lord Advocate and the judiciary—and between Parliament and the judiciary and between this Parliament and the Westminster Parliament. Tensions are part of the way in which the system operates. We hope that, if we have sensible people occupying all those positions—as we have at present—the tensions can be resolved appropriately.

Joan McAlpine: I have a quick supplementary question on your comments about the dominance of English judges in the Supreme Court. Obviously, there are two eminent Scottish judges

but, hypothetically, if those two judges disagreed, the onus would be on each of them to persuade the English judges to support him or her. Would we have a human rights issue if, in such a case, a majority of English judges went against one Scottish judge?

Paul McBride: It is not entirely unheard of for the two Scottish judges to disagree. We do not know who will replace Lord Rodger in future.

I am not sure that any human rights issue applies in those circumstances. To be fair, all the judges do their best in dealing with Scottish matters. I am not being critical, but it must be recognised that there is a minority of Scottish judges that will decide on matters that often involve a unique and separate jurisdiction. We cannot ignore that, because it is the fact of the matter.

The Convener: Mr McBride, I would be grateful if you would confirm my impression from what I have heard that you support the Lord Advocate's comments on Lord McCluskey's report and the way in which the bill should be amended.

Paul McBride: Yes, I fully support the Lord Advocate in that respect.

The Convener: Thank you for coming. Your evidence is much appreciated.

I suspend the meeting briefly while we change witnesses.

15:08

Meeting suspended.

15:11

On resuming—

The Convener: I welcome Lord McCluskey and Sheriff Stoddart and thank them for coming along. I understand that Lord McCluskey would like to make a statement to outline where things currently stand.

Lord McCluskey (Supreme Court Review Group): Thank you for the opportunity to give evidence. Sir Gerald Gordon and Professor Neil Walker, the other two members of the review group, are unfortunately unable to attend today as they are both abroad.

Following my brief opening remarks, Sheriff Stoddart and I will be happy to take questions. I hope that the questions that were addressed to Paul McBride will be reformulated for us, because while I am happy with his answers, I would like to add a few frills and flourishes.

As you know, our report was published on 14 September; its main conclusions are set out in the executive summary. I want to make it clear that we had—and have—no political or other interest in the outcome of the discussion. Our only interest was to ensure—standing aside from the unfortunate rhetoric that accompanied the opening of the debate—that the best solution is arrived at. This is a once-in-several-decades opportunity to get the thing right, as it was not got right the last time.

First, we think—as has been made clear, so I will not emphasise it—that the certification process should be adopted in Scotland. I am happy to explain the full reasons for that if required to do so. Secondly, we do not believe that the Supreme Court needs—and it therefore should not have—the same powers as the High Court of Justiciary. That is not its job. I am anxious to deal with that issue, as Joan McAlpine raised a question with Paul McBride to which I hope to return.

The basic point of principle is simple. The constitutional position is that since 1707, there has never been any right of appeal in criminal matters from Scotland's High Court to the House of Lords or to any other such body. When the Human Rights Act 1998 was passed, it made it appropriate that judges with a UK jurisdiction should have an oversight to ensure consistency of interpretation of the act and the convention that it incorporates. However, it is also important that the High Court should have the right to apply the law—as it has been doing for hundreds of years—to the particular circumstances identified by the jury or by the judge who finds the facts.

The new procedures should have been limited to what was necessary in order to allow the Supreme Court to do that necessary job of defining the rights and saying what they were and whether there was a violation, before leaving it to the apex court—whether it is in Belfast, London or Edinburgh—to apply the law to the case in hand.

15:15

The current schemes—the one that exists in the Scotland Act 1998 and the one that is contained in clause 17 of the Scotland Bill—both go far beyond what is necessary. All that is required is that the Supreme Court should have that limited jurisdiction of defining and explaining what the Human Rights Act 1998 means and how it applies to a particular case and to cases in general, and then it should send the case back to the High Court in order for that court to apply the law. I add that the High Court has been doing that for a very long time. For example, if the law for the European Union is defined by the European Court of Justice in Luxembourg, as has to be done from time to time, the ruling is sent back to Edinburgh and the Court of Session in Edinburgh applies it. Similarly, if the European Court of Human Rights in

Strasbourg determines a matter of law and rules against what the High Court has been applying, the High Court will accept that and apply the law. The distinction between the definition of the convention right and the application of the law is vital but has not been properly made.

The danger—of which there has been some sign in the much higher number of cases that go from Scotland in comparison with the number that go from England—is that the Supreme Court will see itself, and be seen by others, as a court of criminal appeal. That was never anyone's intention. I am sure that you, as parliamentarians, understand this, but I want to make the distinction in this area quite clear. One court decides questions of vires—that is, whether the subordinate body is exercising powers that are within its statutory competence. That is and should always remain a devolution issue.

However—and this reflects the point that Mr McLetchie raised—when it comes to defining human rights and applying the law, the Lord Advocate is not exercising a devolved right at all; he is exercising the power that Lord Advocates have enjoyed for five centuries. Those powers are known in statute—and are referred to in the Scotland Act 1998—as retained powers. They are dealt with magnificently in the report by Sir David Edward, and we have echoed what he said. In exercising his retained powers, the Lord Advocate is not engaged in exercising a devolved power; he brought the power with him when his office was, in certain respects, devolved and changed. That is a really important distinction to make, and I would be happy to enlarge on it, given the opportunity.

There are many reasons why we go for certification, and I am sure that they will be explored in the questions. The basic issue, however, is this: are the judges in the High Court in Scotland, who enjoyed for centuries an excellent reputation in the matter of distinctive jurisprudence, less trusted than the judges in Belfast or in London to decide whether a point of law of general public importance has been raised? I emphasise that we are talking about whether something is a point of law of general public importance, not just whether it is important.

In our analysis, the system in the Scotland Act 1998 was not properly thought through. It came along as a kind of add-on when it was discovered that the Human Rights Act 1998 could not be brought into force for two years—actually, it was only 14 or 16 months after the Scotland Act 1998 came in that it was implemented. Donald Dewar was anxious to get on with bringing the Scotland Act 1998 into force, so the stop-gap provisions were made, and they were not thought through. If you read the sections—section 129 and section 57—you can see that almost nothing is said. It was assumed that they would provide a stop-gap measure until the Human Rights Act 1998 came into force. However, the ingenuity of lawyers is such that they will make cases out of every opportunity that they have, and those provisions created those opportunities. I can illustrate that, if you like.

We have a unique chance—perhaps the last for several decades—to correct what is an egregious error that distorts the system of criminal justice in Scotland. I hope that you will advise, as we do, that the opportunity should be taken to remedy it in the way that is proposed. I should add that we largely, although not entirely, support the Lord Advocate's proposals.

The Convener: Thank you very much, Lord McCluskey. I will open questions by referring to devolution issues. It seemed plain at the time of the Scotland Act 1998 to all the lay people who read it what devolution issues were. You used strong language in describing the current application as constitutional nonsense.

Lord McCluskey: Those are the words of David Edward.

The Convener: But you echo them.

Lord McCluskey: I do.

The Convener: The Lord Advocate, on behalf of the Scottish Government, has perhaps been a little kinder in talking about unintended consequences, to paraphrase him. Given the ingenuity of lawyers that you talked about, could there be a reluctance by those who drafted the interim measures that you spoke of to admit that they got it wrong in the first place?

Lord McCluskey: There might be, but I am not a psychologist and I do not have that insight into human nature. Forgive me if this sounds too simple, but if I go to a pet shop, buy a little puppy and take it home, and my wife decides to call it Felix the cat, a mistake has been made. We do not change the nature of a thing by giving it a name. The nature of the Lord Advocate's exercise of his retained functions was not a matter of devolution, because it had existed for centuries before devolution and remained unchanged afterwards. So, to call it a devolution issue was just a mistake.

That point goes to the heart of the mistakes made by the Law Society of Scotland and the Faculty of Advocates. They say, "Let's treat devolution issues in Scotland in the same way as they are treated in Wales and Northern Ireland." When we look at the Government of Wales Act 1998 and the Northern Ireland Act 1998, we find that the devolution issues are defined differently and that they do not include the exercise of anything like the retained functions that we are

discussing—it is a totally different story. The Scottish statute made the mistake at the last moment of calling a dog a cat.

Richard Baker: I will ask you more about the issues around the certification procedure. There has been discussion at this meeting about the equity of the Scottish courts and other courts in different parts of the United Kingdom. Of course, the courts in England, Wales and Northern Ireland have the certification procedure, but they deal with criminal matters and not only with convention rights. Quite rightly, as you said, there is no avenue of appeal in Scotland to the Supreme Court in criminal matters. However, there is obviously an avenue of appeal in relation to convention rights. Is that not a significant difference in the courts' processes, and should it not be reflected in way in which the process of appealing to the Supreme Court is handled in Scotland?

Lord McCluskey: I would say not. The first thing to remember is that certification is a fairly modern phenomenon. There was no appeal to the House of Lords in criminal cases in England until 1907. Thereafter, appeals were allowed but only if the Attorney General certified that there was a point of law of general public importance. That was changed in 1960 so that the apex court had to decide that question and not the Attorney General. Relatively few cases have gone through in that regard.

The reason behind the change when it was brought in was that they had to keep the number of cases down—they did not want trivial cases going to appeal. When the Human Rights Bill was before Parliament, a deliberate decision was made to retain the certification process for alleged breaches of human rights in criminal cases. There are exceptions to the certification process, such as courts martial, habeas corpus—wrongly spelt in our report at one stage, I regret to say—and one or two other minor things. However, even when new rights of appeal have been introduced by legislation since 1960 and 1968, care has always been taken to retain the certification filter at the court of criminal appeal stage in England and to leave it to the judges.

By the way, I want to make a point that is strongly allied to the jurisdiction point, in case I should miss it. The Supreme Court has a great deal of expertise that is not Scottish, Irish or English but is just expertise in jurisprudence and defining the law. That is what the Supreme Court has to do. What is the Supreme Court's jurisdiction? Is it to apply the law? No. In our report and in the Edward report, Lord Hope specifically said that applying the law is not the job of the Supreme Court. The job of the Supreme Court is to ask whether the right test has been applied. In Fraser, the Supreme Court came to the view that the right test had not been applied so it interfered. If it comes to the view that the right test has been applied, it will refuse the appeal. If it comes to the view that the right test has not been applied, it should say which is the correct test and pass it back to the apex court in Scotland to apply. The High Court has been applying such tests, certainly since the 1920s when the right of appeal was created.

The Supreme Court should not therefore act as an extra level of appeal court; it should decide questions of law. The certification and jurisdiction points are therefore closely related.

I have one final point on this issue. Any lawyer or parliamentarian will recognise that when we in the UK create a crime or enact any law, we customarily define it with great precision. However, in the ECHR, the actual rights are contained in a few sentences. For example, the main provision for trials is that they should be fair. What does the word "fair" mean? We could ask any child whether it is fair that his brother got this or his sister got that, and we will get no for an answer. Fairness is rather subjective and it creates the opportunity for ingenious people to come up with events at a trial and say that they are not fair. Almost everything that goes wrong for the accused in a trial could be represented as unfair. We have to prevent the floodgates from opening. That is what makes a practical difference here.

Richard Baker: I have a final question. It is fair to argue that the cases that the Supreme Court has taken up from Scotland have not been trivial. If the Supreme Court had not made a decision on Cadder, the Scottish system might have been deemed not to be compliant with the ECHR for some years to come, and that would have had far-reaching consequences. I know that this is a bit of crystal ball gazing—a hypothesis—but are you confident that, if the Scottish courts were able to grant leave to appeal to the Supreme Court, they would have done so in the case of Cadder and in similar cases?

Lord McCluskey: I will speak for myself and not for the review group. Cadder was a wrong and bad decision, and I have written an article for the *Edinburgh Law Review* explaining in some detail why that is so. You can get access to it on the website.

England was faced with a similar situation involving a Turkish case when the European Court of Human Rights, without looking at English law, chose to announce a rule that would overturn decades of English practice and law. The English court said that it was not going to follow it—it refused to follow it. The case is called Hornchurch

and it has now gone to the grand chamber. I wait with bated breath to see what is decided.

Sheriff Charles Stoddart (Supreme Court Review Group): The case was Horncastle.

Lord McCluskey: Horncastle. That case is pending. We were not robust enough to deal with it.

The point is not trivial, and I have one final comment. There seems to be an assumption that somehow, if you go to a higher court, you will get a better result. Sometimes you do and sometimes you do not. I have written about the American Supreme Court and I am familiar with the Indian Supreme Court, and with our own, and sometimes a Supreme Court overturns itself—sometimes, it comes to a bad decision. In America, it came to such a bad decision that they had to have a civil war to reverse it, which they duly did. In the case of the UK and Scotland, we have had a situation in which two Scottish judges have ruled one way and they have been overruled by the English in a subsequent case.

15:30

Richard Baker: So you would have been happy enough under the new system if the Cadder case had not been referred by the Scottish courts to the UK Supreme Court. Would you have been satisfied with that outcome and, as far as you are concerned, would that have been the right operation of the procedures in Scotland and throughout the UK?

Lord McCluskey: The procedures that were overturned in Cadder were practised for 30 years. A committee that was led by Lord Thomson, who was one of our leading criminal judges, and which included the then deputy Crown Agent, Laurence Dowdall and various other people, devised the system. It worked well and was much praised by Hope and by Rodger. Yes, I would have been reasonably happy. If those involved in the case had wanted to go to Strasbourg, they could have done so, and perhaps that would have made a difference.

The trouble was that in the Salduz case, which was applied in Cadder, the Turkish court did not hear a single word about Scottish procedure, Scottish evidence, Scottish rules of exclusion and so on.

Richard Baker: Other countries—Belgium and Ireland, for example—face the same limits. Other jurisdictions are in exactly the same position as Scotland.

Lord McCluskey: They are all continental countries. They do not have the adversarial system that we have here, which is quite different.

Joan McAlpine: I am glad that you raised the case of Regina v Horncastle, because I was going to ask you a little more about it. My understanding is that the court, under Lord Phillips, judged that the Supreme Court was not bound by ECHR precedent and that it was particularly concerned to find in a particular way because a different finding would have disrupted the strength of common-law tradition in England. Could you say a little more about why you think that the Supreme Court came to that conclusion to protect English law but came to a completely different conclusion in the case of Cadder?

Lord McCluskey: I do not quite know. Horncastle was referred to as a kind of footnote in Cadder and it was not examined—I do not know why. The position is that the judgment that the Horncastle court refused to follow was a judgment of a chamber of five or seven judges. The court said that it was not bound by that judgment and that it needed to send the case back for the whole chamber of 19 or so judges to consider, and that if they made a new ruling, it would become binding. The same could have been done in relation to Cadder. In my view—this is a personal view—it should have been said that because the Turkish court in Salduz ignored the common law and, in particular, was ignorant about and did not mention the Scottish system, the judgment should not be followed until the court says that it was an absolute rule that must be followed.

Joan McAlpine: You also said that you wanted us to reformulate some of the questions that we put to Paul McBride. I will not reformulate the question, but I will perhaps ask it again. Would the hypothetical situation in which the two Scottish judges on the Supreme Court disagreed and had to get the English judges to back either one of them or the other raise a human rights issue as regards a fair trial?

Lord McCluskey: I think I have already indicated the answer to that. When you are sitting in the Supreme Court, your job is not to decide what the Scots law is, what the English law is or what the Northern Irish law is. Your job is to decide what the European convention prescribes as the law applicable throughout Europe. If one Scottish judge thinks one thing and another thinks something different, the majority in the court decides the question and the answer is sent back to Edinburgh, where Edinburgh applies it. In similar cases, the answer would be sent back to Belfast, where Belfast would apply it. That is the way to do it. It does not matter if judges disagree. In other words, contrary to much popular thinking, if the Supreme Court does its job, which is to interpret the European convention, it does not need a predominance of Scottish judges in a Scottish case, because the law will be the same for the Scottish case as it is for the Northern Irish

case, although its application it will be different. We have a different system, with a 15-man jury and a majority—eight to seven—verdict, different police practices, different rules of evidence and so on.

Joan McAlpine: Thank you. Finally, on another question I asked Paul McBride, what do you think would be the significance if Westminster decided to ignore your recommendations and the letter from the Lord President?

Lord McCluskey: The significance is that we would be left with a system that David Edward properly described as "constitutionally inept" and which I have described as egregious nonsense. Forgive me for being direct, but there is not time to be polite. We just tell the truth.

Alison Johnstone (Lothian) (Green): Are you satisfied that the system of certification proposed by the review group is sufficient in protecting individuals' rights?

Lord McCluskey: Yes. How are an individual's rights in relation to the convention protected in Belfast? The answer is that they are protected by the apex court in Northern Ireland—the Northern Ireland criminal appeal court. How are the rights of a person in Cardiff or Birmingham protected? They are protected by the court of criminal appeal sitting in London. In other words, the local apex court is charged with the responsibility of safeguarding their human rights. If, however, a person raises a point of law of general public importance, they should by all means go to London and get a ruling on it from the Supreme Court. Individual rights are protected now, as they have been since 1707, by the High Court of Justiciary.

Adam Ingram: Are you content and satisfied with the Lord Advocate's proposed amendments to the Scotland Bill? Will those fulfil all the recommendations in your report?

Lord McCluskey: I will make a couple of points. First, we stood back. We could have joined in with the Lord Advocate to help to draft the amendments, but we decided that we would not do that. Secondly, the actual terms have not been seen by Professor Walker and Gerald Gordon, although Sheriff Stoddart and I have both seen them. I have a number of criticisms; in fact, I think that there are two errors in the draft and I will be happy to point them out.

Speaking entirely for myself—because I have the good fortune to be a member of the House of Lords and can speak at the committee stage there—I shall put forward my own amendments. If I think that the Lord Advocate's amendments are better phrased, which they almost certainly will be, I may adopt some of them. However, I will move amendments to his amendments to ensure that the errors, as I see them—I think that Sheriff Stoddart has picked up an additional error that we have not yet had time to discuss—are addressed.

There are perhaps three errors that we would correct as individuals. I will attempt to correct them in the House of Lords. I might have time to write to the Lord Advocate and say, "This is a boo-boo—change it."

Adam Ingram: Would you like to give us a hint? The Lord Advocate will be in front of us later in the afternoon.

Lord McCluskey: If you want, I will give you the precise example. I do not know whether you have the amendment before you. Subsection (8) of the new clause that the amendment seeks to insert in the bill proposes to insert new section 288ZA into the Criminal Procedure (Scotland) Act 1995—I may say that the numbers become pretty hideous because we legislate too much. Proposed new section 288ZA states:

"(1) For the purposes of this section ... the following are compatibility questions—

(a) a question whether a public authority within the meaning of section 6 of the Human Rights Act 1998 has acted (or proposes to act)".

The phrase in brackets is a flaw, because subsection (3) states:

"An appeal under this section lies from such a court only—

(a) after the final determination of the proceedings".

If the Lord Advocate proposes to act while he is prosecuting a case in the sheriff court or the High Court, that becomes a compatibility question, and it can be dealt with only after termination of the proceedings. The words that are used are therefore somehow inappropriate and should come out. The result is that one first provides that these questions are taken when the whole facts are known and then Lord Hope's dictum can be applied. The whole circumstances of the case should be looked at, and the law should be defined in that context, and it would then be for the High Court to apply it.

If you want the issue to be sorted out quickly—as was the case with the temporary judges cases, when it was suggested that a lot of people could not sit as judges or sheriffs—you give the High Court, the Lord Advocate and the Advocate General the power to go to the Supreme Court. They do not require a certificate—they just go. That provides a mechanism for sorting problems that need to be sorted quickly, and the ultimate safeguard for ensuring that the Supreme Court decides the matter in the light of the whole circumstances of the case as revealed and decided in the courts below.

The Convener: I have this wonderful image of the Lord Advocate sitting at this moment biting his

nails and hundreds of Government legal clerks running about.

Lord McCluskey: Not before time, if I may say so. [*Laughter*.]

The Convener: Follow that, Willie Rennie.

Willie Rennie: Perhaps you can help me clear something up, Lord McCluskey. I came to the meeting partly of the belief that the issue was about the place of the High Court in Scotland, but you have confused me. You say that you would have come to a different view on Cadder. We have already established that the Supreme Court has a role in human rights issues, and that it is expert and competent enough to do what it is doing in that regard. However, if it had been up to you, you would have done something different here, and the Cadder case would not have gone to the Supreme Court. That is my understanding.

Lord McCluskey: No, that is wrong.

Let me go back to the case of McLean—the seven-judge case that decided the Cadder issue. It decided what the convention right was. Cadder was then dealt with by the sifting judges, but not at a hearing. They decided that, because the case was governed by a seven-judge High Court of Justiciary unanimous ruling, it needed to go no further. That was the position.

In our report, we have suggested that that exposed a flaw. If a case goes to the sifting judges—the ones who sit behind a desk in an office and decide whether an appeal should go ahead—first, their attention should be drawn to the fact that the case of McLean might have been wrongly decided; and, secondly, they must decide whether there exists a point of law of general public importance. That is not a question that we have ever asked in Scotland until now; it has been asked in England for a century. Therefore, it was not asked in the Cadder case. We need to repair that flaw.

Willie Rennie: Following on from that, would the introduction of certification make a practical difference to the number of cases that the Supreme Court would hear?

Lord McCluskey: It is possible that there could be a reduction in the number of cases that it would hear. I do not want to go on at enormous length, but the advantage relates to the fact that the whole character of the Human Rights Act 1998 is to give rights to people against a public authority. Therefore, if, for example, I were to murder Mr McLetchie—I have no such thoughts—

David McLetchie: Justifiable homicide.

Lord McCluskey: Mr McLetchie's relatives might think that his right to life had been interfered with, but because I am not a public authority, they would not be victims of that violation of his right to life. However, if I were to appear in a court charged with the crime of murdering Mr McLetchie, I would have rights, which would derive from section 6 of the Human Rights Act 1998. There is something odd about the fact that the whole focus is on the rights of accused persons, whereas the rights of the victims of most crime are not taken into account at all. There is something bizarre about that whole thing, which needs to be looked at, but not in the present context.

Adam Ingram: You probably heard my questions to Paul McBride about certification. In particular, I tried to articulate the Law Society's criticisms of certification and—if I interpret the Law Society correctly—the potential creation of a hierarchy of rights. Either one has rights that are of general public importance as certificated by the High Court of Justiciary or one has rights that are not of general public importance, in which case breach of those rights cannot be appealed to the Supreme Court. How would you answer those criticisms?

15:45

Lord McCluskey: I have tried to indicate the answer. Sixty million people are subject to the jurisdiction of the Supreme Court and those who live in England, Wales or Northern Ireland have the same rights as those who live in Edinburgh or Dundee. In the vast majority of cases, their rights are defined by the local apex court—the court of criminal appeal or whatever it is called in Northern Ireland. We trust the judges in the local court, who know the conditions because they live in the area and were brought up in those conditions, to apply the law and confer people's rights on them, and the court does that. In the exceptional case where there is a point of law of general public importance—that is, UK-wide importance—it goes to London.

There is not a hierarchy of rights. There is a distinction between points of law of general public importance and people's rights throughout the United Kingdom. If there was a hierarchy of rights and the Scots were being deprived of their rights by certification, it would mean that 55 million people in the rest of the United Kingdom might have been deprived of their rights because they have no right to go except via the certification route.

Adam Ingram: That might be an argument for doing away with certification all together.

Lord McCluskey: It might be. We deal with that in the report. In particular, we appended to it an interesting article from the *Law Quarterly Review* that narrates, correctly, that there is a sense in England that certification should be withdrawn.

That idea has come up from time to time and Parliament and ministers have considered it, but they decided not to withdraw it. If they decided to end certification for Belfast, Cardiff and London, that would be the time to end it for Scotland too, and I would join in and say yes.

Stewart Maxwell: Paragraph 8 of the executive summary of your report states that, if there has been a breach of a convention right,

"the Supreme Court should simply remit the case to the High Court".

As the Scotland Bill stands, the Supreme Court would be given all the powers of the court below, with all the consequences that follow from that. I am clear about your view on that point, but will you outline what the implications would be for the Scottish legal system if the bill went through unamended?

Lord McCluskey: That is a big question because it also concerns the acts of the Lord Advocate. I hope that Sheriff Stoddart will be able to deal with that.

At present, the provision is such that, if the Lord Advocate acts or proposes to act in a particular way, it can be challenged by the accused on the ground that it is a breach of the convention. If the court upholds that challenge, the act of the Lord Advocate is deemed to be void and of no effect. In England, Wales and Northern Ireland, because of the provisions of the Human Rights Act 1998, if the public prosecutor proceeds in such a way, the legality of what he has done can be looked at and the Supreme Court can rule that it is unlawful, but that simply opens the door to consideration of what to do next.

Because of the difference between the position in Scotland, where something can be rendered unlawful from the beginning and therefore void, and the position in England, where things are not rendered void, there have been entirely different approaches to dealing with the matter. For example, we have had to rush in emergency legislation to deal with the Cadder situation because the Lord Advocate was held to be acting in a way that was beyond his powers. He could not act, so lots of other cases had to be scrapped.

Sheriff Stoddart has a particular interest in the definition of the acts of the Lord Advocate and might have something to add.

Sheriff Stoddart: Yes, indeed. As you will have gathered, we were very supportive of the Advocate General's group when it suggested that acts of the Lord Advocate should be taken out of the realm of devolution issues. Unfortunately, clause 17 of the Scotland Bill keeps that focus as it still refers to the Lord Advocate's acts or failures to act as being the key to the Supreme Court. We recommend that it should be broadened to cover the acts of any public authority by focusing on the nature of the right and the protection given by the right rather than naming a particular public authority that might be responsible for that.

We have had 10 or 12 years of jurisprudence about what constitutes an act of the Lord Advocate and whether that act is or is not compatible with the convention, and some ingenious legal contortions have been undergone to bring something that has happened within the ambit of an act or failure to act of the Lord Advocate. That is why we say that, in suggesting that the focus should still be there, the Advocate General's group did not go quite far enough. That is an important part of our recommendations, and it was good to hear that Paul McBride supported that.

Lord McCluskey: You must remember that the Lord Advocate could find himself in this situation. He is prosecuting A. He decides that he cannot ask a Cadder-type question because A was interviewed without a lawyer being present. When B's turn comes to cross-examine the policeman, he introduces the evidence that the Lord Advocate could not introduce. The Lord Advocate stands up and says, "You can't do that because of Cadder," but the sheriff or judge says, "This is a different type of case, so I am going to allow that evidence." The evidence is therefore allowed over the objection of the Lord Advocate but, for the case to be brought before the Supreme Court, that must be called an act of the Lord Advocate. That is just one instance—we have thought of at least another half dozen—in which it would be wrong to focus on the act of the Lord Advocate. The focus should be on the right of the person under the convention.

Sheriff Stoddart: I will give another example, which we used in our discussions when we were formulating our report. Under article 6 of the convention, the accused person has a right to have the proceedings interpreted into a language that he understands. A foreign accused in Scotland is therefore entitled to an interpreter. Under the present arrangements, it is not the Lord Advocate who provides the interpreter; it is the Scottish Court Service on behalf of the court. If the interpretation of the proceedings is faulty and is challenged, it is the court that must do something about it. If the court does something that is not convention compliant, there may be a breach and, under the present law, that might—if it could be fitted into the straitjacket of the description of an act of the Lord Advocate—lead to an appeal to the Supreme Court. We thought that it would be much cleaner and clearer to remove any reference to the act or failure to act of the Lord Advocate and to say simply that the right has potentially been breached by a public authority and that that is justiciable and raises a compatibility issue. It has nothing at all to do with the Lord Advocate, who

did not provide the interpreter and does not have to.

Stewart Maxwell: I am very clear about the apparent flexibility of acts of the Lord Advocate in recent years, which has been mentioned by a number of people. However, let us return to the practical implications of the power as it stands in the Scotland Bill. You have talked about emergency legislation having to be introduced to deal with the Cadder situation and the fact that the act is deemed unlawful or void, as though it had never existed. In the rest of the UK and in other European jurisdictions, is that not the case? I understand that they have time to stop and consider what action should be taken in the light of a decision. Is Scotland the only jurisdiction in Europe in which that problem arises?

Lord McCluskey: I do not know whether Scotland is the only such jurisdiction, because Europe has 47 jurisdictions and I am familiar with only one and a half of them—the Scottish one and that of the rest of the United Kingdom. People might well say that the effect is direct; I do not know about the situation.

Stewart Maxwell: Is Scotland the only such jurisdiction in the UK?

Lord McCluskey: In the UK, you must proceed under section 6 of the Human Rights Act 1998, which was carefully designed—Derry Irvine, who wrote it, got a lot of praise for it—to preserve the UK Parliament's sovereignty. Instead of saying, "This is void and must be quashed," all that the court can do is make a declaration of incompatibility. It is then up to Parliament or whatever the public authority might be to change its rules and procedures. If Parliament has enacted something that the court says is illegal, as in the Belmarsh imprisonment cases, Parliament must change the rules for the future.

The situation is totally different. We would be equated with the rest of the United Kingdom. The court would declare the unlawful character of the incompatibility and, under section 6 of the 1998 act, the normal consequences would follow—it would be up to the appropriate public authority to take the appropriate measures. We must remember that the Strasbourg court has no power to compel us to do anything at all—it cannot order a Scottish court or a Belfast court to do a particular thing in a particular case; it can just make certain declarations.

Stewart Maxwell: That is clear.

The Convener: Mr Rennie can ask a short—I repeat short—supplementary.

Willie Rennie: I am trying to gauge the importance of certification. In answering one of my questions, you said that certification would reduce the number of cases going to the Supreme Court. Then you said that, if England and Wales and Northern Ireland decided not to have certification in the future, which they have considered in the past, you would fall in line with that. What are the value and purpose of certification in its own right? As you would give it up so easily if the rest of the UK decided not to have it, how important is it?

Lord McCluskey: I have tried to deal with those points, on which we say something in the report. As a Scot and as a lawyer who inherits a wonderful tradition of unique criminal jurisprudence, I find it deeply offensive that an act of Parliament—a devolution act—says that, although the apex court in Belfast or in London decides such questions, we cannot trust the Scottish judges to do it.

Willie Rennie: You say that, if England and Wales and Northern Ireland decided to do something different, you would go with that. That does not sound like pride in independence, does it?

Lord McCluskey: If it was decided that certification was not required in Belfast or in London, I would be happy to say, "Okay, we'll go along with that." Why should we differ on what is ultimately a question of the court's definition of a human right under the convention?

The Convener: I call David McLetchie.

David McLetchie: I am pleased to have survived proceedings so far.

I will refer to the Horncastle case, which you and others have mentioned. If the European Court of Human Rights disagrees with the Supreme Court's decision, what will be the consequence for Mr Horncastle—I assume that he is the accused—and for the laws or rules of court or whatever the applicable issue is?

16:00

Lord McCluskey: As you know, the powers of the Strasbourg court are very limited. It can make declarations, award damages or make a very strong recommendation that there should be a retrial or something of that kind, but that is all. Take for example the case of the child who was kidnapped by two other children in Liverpool. What was that case?

Sheriff Stoddart: The Bulger case.

Lord McCluskey: That case was held in Strasbourg to have involved an unfair trial of the two accused—end of story, because Strasbourg has no power to do anything about it. If the Horncastle case is decided in favour of the Supreme Court's ruling, that is well and good—end of story, and I will regret even more that we

did not do the same in Cadder. However, if Strasbourg decides against the Supreme Court, it raises a huge political and constitutional question: are we bound by a ruling of that kind, which takes no account of our position?

I will explain the issue in the Horncastle case for those who have not read it. There is a general rule that excludes hearsay evidence. The English, like the Scots, make an exception to that rule. If a person makes a statement before he dies, then he dies, that statement can be introduced, albeit as hearsay, because it is the best evidence that you can get—you cannot revive him from the grave. In a case coming from Turkey, Strasbourg ruled that that could not be done because you have an inalienable right to cross-examine the witness and you cannot cross-examine the person in relation to what was said if he is dead. The English said, "But we've been operating this system for decades. We have complicated and carefully worked out rules of evidence. There is nothing comparable in Europe, where the system is entirely different, so we're not going to follow that." That is the issue. If Mr McLetchie's question is to be answered differently by Strasbourg, it raises a big constitutional crisis: do we have to subvert our procedures and laws just because a bunch of Lithuanians, Georgians, Armenians, Russians, Frenchmen, Maltese and Cypriots have come to a view without considering the Scottish or the English position?

David McLetchie: Thank you for that.

Suppose that a case goes from our High Court to the European court that is founded on a law passed by this Parliament or a set of rules of procedure being declared contrary to article 6, and the European court says that that was wrong; would that not have a different consequence in respect of the law made here?

Lord McCluskey: Yes, but that is the point that we make, which is fundamental: if legislation or acts of ministers that are truly executive acts are struck down, that is a vires question. We are quite happy that such things should go to the Supreme Court and, if necessary, to Strasbourg. If they go there, the end result will be that, inevitably—we have done it hitherto—we in the United Kingdom say that we will obey the rules and change the law by repealing or amending the legislation so that it conforms with what the ruling of law is.

David McLetchie: I see that. You said that that would be a vires question. If I understand this correctly, the Lord Advocate's proposal removes as a devolution issue, in relation to criminal law or procedure, an act of the Scottish Parliament.

Lord McCluskey: I think that that is another one of the blips that we are looking at.

David McLetchie: That is very interesting, because I think that it is a blip that has been identified by the Law Society in the paper that we have.

Lord McCluskey: Could you direct me to that particular proposal?

David McLetchie: I think that it is in the section headed "Convention rights and EU law: appeal to Supreme Court" in the paper supplied by the Lord Advocate. It attempts to follow on from your own recommendation about contracting the scope of what is a devolution issue and expanding the scope of what is a compatibility issue. Is that not right?

Lord McCluskey: Well, I think that we are going to be critical of that. I say "we", but I should say that I will be critical of it, because I have not been able to consult my colleagues about it. There is a flaw there.

David McLetchie: Right, because that would be a vires issue for any other act of the Scottish Parliament.

Lord McCluskey: It is a vires issue. Quite simply, if the Scottish Parliament passed an act saying that, in a sex abuse case, the accused would be presumed guilty until proved innocent, that would plainly be a contravention of the European convention on human rights, but it would be a vires issue: the Scottish Parliament does not have the power to legislate contrary to the convention. That is fairly straightforward.

David McLetchie: That is very helpful. May we have the benefit of your general view on the sustainability in the long term of the position of the Lord Advocate as both a prosecutor and a minister in the Government?

Lord McCluskey: We will both say something about that, if we may. I was the Solicitor General for a number of years and, with the Lord Advocate of the day, I had responsibility for the exercise of the retained functions. Never in my experience nor, indeed, by hearsay from others, was there any hint of an attempt by the political power to interfere with the exercise of our jurisdiction, even when there was a big political point, as there was, I remember, particularly in relation to the blockade of harbours in about 1976. No minister approached us at all. We made our decision. In fact, there was a kind of glass wall between the Lord Advocate and the others when it came to the exercise of the retained functions. I regret the decline in status and power of the Lord Advocate and I have written about that. I do not think that we need to go as far as creating a director of public prosecutions, but we could. However, I do not think that that question, interesting though it may be, arises in the context of this amendment in clause 17.

David McLetchie: No, but it is the root of a lot of the problems, is it not?

Lord McCluskey: No; it may be the cause of the mistake. The mistake that was made by section 57 of the Scotland Act 1998 was suddenly to stick the Lord Advocate in as if he were the minister of public hygiene, or sewers, or something of that sort, which he is not. A different kind of sewer, of course, is the Lord Advocate's field. The Lord Advocate was exercising his retained functions. It was nothing to do with devolution and that is why we recommended that this alteration should be made not in the Scotland Act 1998, but in the Criminal Procedure (Scotland) Act 1995, and I am happy to see that the Lord Advocate has picked that idea up.

James Kelly: This is in a similar vein to one of the points that Mr McLetchie made. You have outlined your position on certification for compatibility issues. From your study of the cases for which an application has been made to the Supreme Court, do you think that it is possible for a case to contain both a devolution issue and a compatibility issue? Under your report recommendations, how would such a case be dealt with?

Lord McCluskey: A devolution issue might be a compatibility issue, but not all compatibility issues are devolution issues. That is the simple answer. All admirals are sailors, but not all sailors are admirals. That is the position—you can have a compatibility issue of the kind that Mr McLetchie mentioned a moment ago whereby a statute enacts something or a minister does something that is in contravention of the rights that are contained in the convention. That is a vires issue and it is a devolution issue. When the Lord Advocate exercises his or her retained functions, that is not a devolution issue at all—that is the dog called Felix the Cat.

James Kelly: Does that not potentially create inconsistent routes to the Supreme Court, under your proposals?

Lord McCluskey: No, no; it just adopts what was done in the British Commonwealth for years in the Judicial Committee of the Privy Council. You create a subordinate body and, with all due respect, the Scottish Parliament is not a sovereign body; it is a creature of statute. You create that, you give it certain competences and, if there is a suggestion that it breaches those competences and steps outside them, that is a devolution issue. You give a constitutional court the power to rule on that—that is what the Supreme Court is; a constitutional court—but when it puts its human rights hat on and is dealing with the retained functions of the Lord Advocate, it is not a constitutional court in the same sense. We have tried to draw that distinction and I hope that it is fairly clear in the report.

James Kelly: So if there are two issues in one case, two applications could be made to the Supreme Court by two separate routes.

Lord McCluskey: I do not think so. First, the matter would not reach the Supreme Court, under our proposals, until the final determination of the proceedings—that is what the Lord Advocate is proposing, which we agree with. The Supreme Court then sits down with all the facts and arguments in front of it and considers the alleged violations of the convention rights, which might be purely to do with an incompatibility with retained functions or might bring into play vires issues, and makes its decision. There would be no separate routes; there is only one route: the section 6 of the Human Rights Act 1998 route, basically.

James Kelly: If you are saying that going down the certification route that you are proposing would be restricted to compatibility issues, what would be the route if it were a devolution issue, under the same case?

Lord McCluskey: I do not see how that is going to arise. I do not know how an act of the public authority in the course of the criminal proceedings can be raised in the same case as a separate vires question about whether the Parliament had the right to legislate in those terms.

James Kelly: You think that a situation would not arise in which there would be a devolution issue and a compatibility issue in the one case.

Lord McCluskey: Can you give me an example?

James Kelly: I do not have an example to hand.

Lord McCluskey: It is not just a case of one being to hand, I am afraid; it is whether it is in one's head. I cannot think of one at the moment.

James Kelly: To return to my original question, from the knowledge of the cases that you and the review group have studied, are you aware of any cases where there might be a devolution issue and a compatibility issue in the one case?

Lord McCluskey: Not both. Some of the cases were indeed true devolution issues. For example, section 170(2) of the Road Traffic Act 1988 says that you can demand of a driver of a car that he say who was driving the car at a certain time and a certain place, and he must answer, under penalty. That sort of rule has been challenged in various places, including in Canada, as a breach of human rights. I can see that arising. However, it is difficult to see how it would arise in the way that you suggest.

In fact, that matter was raised in a case that came from Scotland, and—if I remember correctly—the position of the High Court was maintained. However, there was no separate challenge to the validity of section 170(2).

I wish I could think of an example of the situation that you are talking about, but I cannot. I will try to think of one.

The Convener: I know that it will annoy you if you cannot think of one. You are welcome to write to the committee after further reflection.

Lord McCluskey: If I can think of one, I will write to you with the details. If I cannot, the letter will be very short.

James Kelly: I am sure it will.

I am interested in your views on new section 98A, which requires the Supreme Court to apply the miscarriage of justice test.

Lord McCluskey: You will find that our reasoning on that is contained clearly in the report. In essence, however, the Supreme Court must apply the test of whether there has been a violation of the right to a fair trial. The test that we apply in Scotland in relation to certain types of case is the miscarriage of justice test. Unfortunately, as Lord Cullen has pointed out, the term "miscarriage of justice" is not known in England, Northern Ireland or Wales. They do not use that term; they use different ones. The Supreme Court will sit down and say, "What does 'miscarriage of justice' mean?" An Englishman, an Irishman or a Welshman will say, "I have never heard of such an animal—what is it?" The only way that they can find out what it means is to look at previous cases in Scotland. You would get a bizarre situation in which people were trying to understand the meaning of that term and also the interplay between that on the one hand and "unfair trial" on the other. Do they mean the same thing? In that case, the reference to miscarriage of justice is superfluous. Do they mean different things? In that case, where do we go? It is very confusing.

Our view is that that is just bad thinking. We should take those references out. I am happy to see that the Lord Advocate's proposal is to dispense with that altogether.

The Convener: I thank both of you for coming. It has been an extremely interesting session. If members would like anything further clarified, may we write to you?

Lord McCluskey: Yes. I will write a short letter in answer to the question that Mr Kelly asked. At least, I hope and believe that it will be short.

I will give you the details that you can use to contact me directly, and I will undertake to consult my colleagues. We have been extremely well served by the people who were supplied to us by the First Minister's office—I think that they came from that office. In any case, they are excellent civil servants, and we can communicate through that route.

The Convener: Thank you for that, and for the attention that you have given us. It is clear to me that you want to get this right in the interests of the integrity of the law of Scotland.

16:16

Meeting suspended.

16:23

On resuming—

The Convener: I welcome the Lord Advocate and thank him for coming along. I invite him to introduce his team and give us a short opening statement before we move to questions.

The Lord Advocate (Frank Mulholland): Thank you, convener. On my far right is Fraser Gibson, who is head of the appeals division in the Crown Office; to my immediate right is Elspeth MacDonald, who is head of the constitutional and parliamentary secretariat and to my immediate left is Alison Coull, who is in the constitutional and civil law division.

As the convener noted, I wish to make a few opening remarks, after which I will be delighted to answer any questions as best I can.

I will summarise the Scottish Government's position on UK Supreme Court jurisdiction, and then speak to the evidence that I submitted last week in advance of today's session, which seeks to implement that position.

As has already been mentioned, Scotland has a unique legal tradition that is many centuries old and is proudly independent. The existence of a distinctive Scots law predates the treaty and acts of union by centuries. The distinctiveness of Scots law is part of our heritage and until 1999 the High Court of Justiciary sat in its rightful place at the apex of the Scottish criminal justice system.

Since devolution, the jurisdiction of the Judicial Committee of the Privy Council and the UK Supreme Court has developed, and has had many effects that were not foreseen. With that in mind, I welcome the reports prepared by Lord McCluskey's independent review group. The group's advice is objective and measured and has been informed by eminent experts. It provides a sound and sensible basis for progressing. The review group's analysis is considered: it recognises the need for change, and puts forward measured and achievable suggestions for how we can bring about that change.

I will summarise briefly the group's key recommendations. First, the UK Supreme Court should be limited in jurisdiction, ruling only on the interpretation of convention rights and not on any remedy for breach of those rights. Secondly, an appeal to the UK Supreme Court should be competent to proceed only where a point of general public importance is judged to be raised. Thirdly, provisions for appealing to the UK Supreme Court should not be artificially limited to acts of the Lord Advocate, but should be extended to acts of all public bodies, including the Scottish ministers.

The Scottish Government supports those recommendations and wishes them to be implemented. I note that the Lord President, speaking on behalf of the Scottish judiciary, shares that view and has come out in support of what is proposed, particularly on certification.

I note that others have different views, particularly on certification, but we must remember that Scotland has an independent legal system. We must trust the High Court of Justiciary to consider the merits of cases and rule accordingly, just as the courts of appeal in the other constituent parts of the United Kingdom are trusted. In that way, the High Court and the UK Supreme Court will both be able to fulfil their respective functions.

That is the Scottish Government's position. I turn now to the proposals to implement the McCluskey group's recommendations. What is required is a change to what is proposed in the Scotland Bill. The Advocate General for Scotland has published provisions that we find problematic. They establish the UK Supreme Court as a court of general appeal within the Scottish criminal justice system and they do not effectively address the difficulties that were raised initially by the Scottish judiciary. Those difficulties were highlighted in our submissions to the Scotland Bill Committee in the previous parliamentary session, and they have been addressed and explored in detail by two expert groups: one for the Advocate General and one led by Lord McCluskey.

The establishment of a general appeal without any filter mechanism could even exacerbate the original problem. We have developed alternative draft illustrative provisions in the form of a clause, which could replace clause 17 of the Scotland Bill. The committee may note that no distinction is made here between ECHR and EU law issues in criminal proceedings, and we see no grounds for making one following the Advocate General's approach in the Scotland Bill thus far.

With regard to delivering the McCluskey recommendations, we are proposing provisions that create a new avenue of restricted appeal to the UK Supreme Court from the High Court based on whether there has been an act by a public authority that is incompatible with convention rights or EU law. The issue before the court will be compatibility only.

A prerequisite for such an appeal is that the High Court has issued a certificate confirming that the point that is raised is of general public importance. The High Court will give reasons for whether it grants that certification and, in addition, it will decide whether to grant leave to appeal.

16:30

It may be that in some cases the High Court grants a certificate but does not grant leave. In such cases, it would be open to the UK Supreme Court to grant leave. The key point is that if the High Court does not grant a certificate, the Supreme Court has no powers to consider the matter. Thus, the High Court has the final say on the test of general public importance, as the Court of Appeal does in England and Wales. We have confidence that the High Court can be trusted to apply that threshold test. That practical measure will help to maintain the High Court's traditional position at the apex of the Scottish criminal justice system.

There are a number of other points. Appeals are time limited in line with those in England and Wales under relevant legislation. The proposal makes provision for lower courts to refer matters to the High Court for consideration prior to trial, and while normally appeals to the Supreme Court will go only after the conclusion of proceedings in the courts below, the High Court can exceptionally refer a question to the UK Supreme Court prior to that stage.

The committee will note that we propose that the functions of the Lord Advocate and the Advocate General to refer cases where a point of general public importance is raised should be retained. The clause on the Advocate General in the Scotland Bill seeks to remove that power, but we accept that the Advocate General should retain that power to address concerns about ensuring consistent application of convention rights across the UK.

We are clear that the UK Supreme Court's role within the Scottish criminal justice system must be limited to declaring whether there has been a breach of convention rights or EU law. The Advocate General's proposals provide the UK Supreme Court with all the powers of inferior courts and, in consequence, the power to affirm, set aside or vary orders, remit issues for determination by that court and order a new trial or hearing. That is unnecessary, as the courts below can be trusted—it is second nature for any court—to make decisions on compatibility with convention rights. What we propose is a sharper focus on the

compatibility question, restricting the powers of the Supreme Court to ruling on compatibility and remitting the case to the High Court to decide effective remedy.

I hope that this is a helpful run-through of what we propose. The committee will have noted that the matter of safeguarding the integrity of Scots criminal law was debated in the Parliament last week. I understand that, due to technical issues, a motion inviting the Parliament to endorse the recommendations was not voted on. When that vote is reconvened, which I understand will be tomorrow, I hope that we will see the Parliament join others, such as the Lord President of the Court of Session and Scotland's senior judiciary, in endorsing the McCluskey group's recommendations.

That completes my opening remarks, convener. I am more than happy to take any questions.

The Convener: Thank you very much, Lord Advocate. I thank you, too, for your letter and your draft illustrative provisions. You will have heard Lord McCluskey's evidence earlier. If you did not, I am sure that your officials did. In that regard, would you like to comment on the number of flaws and blips?

The Lord Advocate: I think that you referred, convener, to officials biting their nails. I can tell you that the officials were not the only ones biting their nails. We will obviously take on board what was said, but we need to find out in greater detail what Lord McCluskey's concerns are. I heard only one of them articulated in this forum, so I do not think that it would be appropriate for me to comment in detail on them. We need to find out what the concerns are and ascertain whether they need to be addressed. I am sorry if that does not sound very helpful, but I can promise you and the committee that once we have had the opportunity of considering Lord McCluskey's concerns, we can write to the committee with the Scottish Government's position on them.

The Convener: Thank you very much. That is appreciated.

Richard Baker: Lord Advocate, you refer to the fact that your amendment retains the right of the Lord Advocate or the Advocate General for Scotland to require the High Court to refer a question to the Supreme Court for determination. I will ask a hypothetical but important question. If that system had been in place for the Cadder judgment and the Scottish court had not given leave to appeal to the UK Supreme Court, would you have used your right to refer the matter to the Supreme Court?

The Lord Advocate: No application was made to the High Court of Justiciary for leave to appeal to the Supreme Court in the Cadder case. The matter was dealt with in sift, and there is a different test in sift.

Richard Baker: Absolutely. That is why I am asking a hypothetical question. If that case were dealt with under the new system and the proper process gone through, but the court decided not to give leave to appeal to the United Kingdom Supreme Court, would you decide, with the powers that you would retain under your amendment, to intervene in that situation and refer the matter to the UK Supreme Court?

The Lord Advocate: My direct answer is that I would look at the two full-bench decisions in Paton v Ritchie, in which five judges were involved, and the McLean case, in which seven judges were involved, and take the view that the law was clear, that there was not an issue, and that there was compatibility. Therefore, I would not exercise my power to refer the case to the Supreme Court.

Richard Baker: But the Advocate General could.

The Lord Advocate: He could, if he considered that there was a point that should receive a determination by the Supreme Court. However, I hope that I have answered your question directly.

There is a point here. To be fair to the appeal court, it did not refuse or grant leave to take the Cadder case to the Supreme Court. I referred to the McLean case, in which seven judges made a decision. As I understand it, McLean then pled guilty and did not seek leave to appeal to take the matter to the Supreme Court, so the appeal court did not have the opportunity of considering whether the case raised a point of general public importance on which it was appropriate to seek the views of the UK Supreme Court.

Let us rewind to prior to Cadder. The jurisprudence in Strasbourg and Salduz v Turkey have been referred to. The UK Government did not intervene in that case, which dealt with the detention and interview without access to a lawyer of a 16-year-old under the Turkish terrorism provisions—I think that I heard Lord McCluskey say that the Strasbourg court was not aware of the nuances of Scottish criminal procedure. As I understand it, the Strasbourg court was not looking in the round at what the implications would be throughout Europe. It would have been helpful if the UK Government had intervened, as it has intervened in cases on prisoners voting. Scoppola v Italy No 2, in which a review of the Strasbourg decision in the case of Hirst v United Kingdom is being sought, is due to be heard this month.

It is very important that we navel gaze and look at what is coming up in Strasbourg, what is important, and what has implications for not only Scottish law, but the law in England, Wales and Northern Ireland. I certainly welcome the UK

Government's intervention in the Scoppola case on prisoners voting and I wish that there had been an intervention in the Salduz case. I think that Judge Bratza, who chairs the Strasbourg court, gave a seminar to the Scottish public law group in which he publicly expressed concern or a desire—perhaps that is not the best way of putting things—certainly a wish that, in the Salduz case, the UK Government had intervened on behalf of the Scottish Government.

Richard Baker: It is sensible to consider what future decisions and the future direction of jurisprudence at the European level might mean for us in Scotland.

It strikes me that your proposed amendment to the Scotland Bill retaining the right of you or the Advocate General to refer cases to the Supreme Court means that the High Court will not be the final arbiter on which cases will go the Supreme Court; rather, you or the Advocate General will be. Is that a fair assessment?

I also have a brief supplementary question. In practice, you may decide that a case should not go to the Supreme Court, but the Advocate General may decide that it should. Are you happy with that arrangement? Will everybody be able to live with it without huge levels of controversy being created? Will that system continue to work? Is it already in place?

The Lord Advocate: It is already in place.

Richard Baker: Have there been any problems with it?

The Lord Advocate: I do not have a problem with it. If the Advocate General were concerned about a specific issue and wanted the determination of the UK Supreme Court, I would be content with that. I will give you an example. One of the sons of Cadder cases, Ambrose v Harris, which has, in the past month, been advised on by the UK Supreme Court, was a referral by the Lord Advocate seeking an early determination to ensure that a whole load of cases were not stacking up, awaiting a definitive judgment on the implications of the Cadder case.

Willie Rennie: It is accepted that the Supreme Court has a role to play. Lord McCluskey highlighted the fact that the judges are professional and competent to make judgments in the area. I want to focus on what practical difference certification would make. It would be difficult to conceive that human rights issues were not of sufficient importance to be considered by the Supreme Court, but there could be a filtering system, as there currently is. Why is that not sufficient? What is the real root of the issue?

The Lord Advocate: As you correctly point out, human rights issues are hugely important and are fundamental to any criminal justice system. The Scottish courts—whether at first instance or at appeal court level—are well versed in the determination, interpretation and application of human rights. I will give you a couple of quick examples.

The appeal court has led the judicial assessment of whether the jury system in common-law countries is compatible with the ECHR. The principal argument is that a jury does not give reasons when it returns a verdict, which is incompatible with article 6. However, the appeal court has considered that on several occasions and has ruled that the jury system is compatible with article 6. Another example relates to a case called Moir v HM Advocate, which considered the rape shield legislation that the Scottish Parliament passed. The appeal court looked at the legislation very carefully and ruled that it was compatible. A guy called Thomas Judge then took a case to Strasbourg, challenging those two issues, and a definitive judgment from Strasbourg ruled that our system, in which juries do not give reasons, is compatible and that the rape shield legislation is compatible. Those are good examples of a good judicial assessment of human rights issues being made by our appeal court.

One of our judges, Lord Reed, is an ad hoc judge in the Strasbourg court and has written a leading textbook on it. Our Lord President has recently sat in the Supreme Court, in the grandsons of Cadder case, which was argued two weeks ago. Lord Clarke, a senior judge in Scotland, also sits on the Supreme Court. So I disagree completely with the notion that our judges are getting human rights decisions wrong. They do sometimes get things wrong, as all courts do—the Supreme Court itself sometimes gets things wrong in Strasbourg's view. I cite, for example, the case of S and Marper v United Kingdom, which dealt with the retention of cellular samples and fingerprints and in which an accused person was not convicted. The Supreme Court ruled that the legislation in England and Wales was compatible with the convention, but Strasbourg disagreed and said that it was incompatible. In doing so, Strasbourg lauded the Scottish provisions, whereby an element of proportionality is applied in the retention of such samples.

I return to your question. There should never be a system of tiers of human rights. Where there is an issue or uncertainty about the interpretation or application of a convention right, it is important for the appeal court and the courts in Scotland to seek a definitive ruling from the UK Supreme Court. I say "definitive ruling", but it will still have to have regard to the fact that Strasbourg can disagree.

As Lord McCluskey put it—better than I can, no doubt—once the judgment is received, it is appropriate for the interpretation to be applied by our appeal court at the apex of the Scottish criminal justice system. I entirely support Lord McCluskey's recommendation on the need for certification. We should never overlook the fact that it is certification of a point of law that is of general public importance.

16:45

Willie Rennie: If England, Wales and Northern Ireland decided to do away with certification, would you go with that, or is certification so important that we should keep it?

The Lord Advocate: I agree with Lord McCluskey's point about ensuring consistency and parity for Scotland. Several members of the committee have alluded to the backlog of 150,000 cases that are awaiting decision or being dealt with in Strasbourg. Given that, the last thing that we would want to do is to flood the UK Supreme Court with applications. I completely agree, if you are proposing that there should be a filter system. In my view, the best filter system is a requirement for certification on a point of law of general public importance. That is the approach in England and Wales.

When Lord McCluskey gave evidence, someone raised a point about whether the requirement for certification should be retained. As I understand it, the concern about certification in England and Wales is that there is no requirement to provide reasons why something is certified or not as a point of law of general public importance. It should not be overlooked that the specimen clause requires our appeal court to provide reasons why a case is a point of law of general public importance, or not.

Willie Rennie: We are having a big argument over certification and its real value in its own right, but then we say that we will get rid of it if other jurisdictions decide to get rid of it. That just seems inconsistent. If certification is so important, why give it up so readily when somebody else gives it up? I do not understand that.

The Lord Advocate: One point about the benefits of certification that is perhaps overlooked but to which Lord McCluskey alluded is that there are victims in all this. There is a principle of Scots law of finality and legal certainty. I do not want to name names of cases, but I have dealt with several high-profile prosecutions, at first instance and at appeal court level, in which it was difficult to explain the process to the next of kin. For example, when an appeal against conviction is refused and the next of kin ask me, "Is that it? Is that final?", I have to tell them that, actually, it is not final because there is still the possibility, where there is a human rights point or a devolution issue, that an application can be made for leave to appeal to the Supreme Court. Then an application is made and it is refused by the appeal court. The next of kin then ask me if that is the end of the process, but I have to tell them that an application could still be made to the Supreme Court directly.

An important point is that there are time limits for the certification process in England and Wales. Certification must be applied for within 28 days of the final determination. If certification is granted, but leave to appeal is refused, there is a further 14 days to appeal that or to apply directly to the Supreme Court for leave to appeal. In Scotland, there are no time limits whatever for applying for leave to appeal to our High Court or the Supreme Court. You try telling that to the next of kin and explaining it to them. I can think of one example in which an application was made for leave to appeal to the appeal court and Supreme Court two and a half years after the refusal of an appeal against conviction.

Willie Rennie: With respect, that does not answer my central point. Why all the fuss about certification if you would get rid of it so readily?

The Lord Advocate: It depends what system you are looking at. Certification gives an element of certainty and finality. We can anticipate where we are going and whether—

Willie Rennie: So you would argue for it. You would not just give it up if England and Wales and Northern Ireland decided to do that.

The Lord Advocate: I have taken account of what Lord McCluskey said. He is a judge of great importance and eminence. My personal opinion is that certification is a good filter and that it provides victims' next of kin with an element of certainty and finality.

The Convener: I call Stewart Maxwell to be followed by David McLetchie. We are still on certification, so please keep your questions on that.

Stewart Maxwell: Unlike Mr Rennie, I do not have a problem with understanding parity between the jurisdictions. I will move on to a slightly separate question on certification.

You will have heard the Faculty of Advocates and the Law Society argue last week that we are not comparing like with like in terms of certification and that, instead of comparing ourselves with the criminal appeal court in England, we should compare ourselves with appeals on devolution issues in Wales and Northern Ireland. What is your opinion of that argument? Does it hold any sway? Is there a genuine case to be made that there is a difference between certification in

criminal case appeals in England and devolution issues in Scotland, or is that difference, which was argued by both the Law Society and the Faculty of Advocates, rather technical, obscure and frankly not particularly relevant?

The Lord Advocate: I do not agree with the Law Society or the Faculty of Advocates. In England, certification is required in order to go to the Supreme Court on human rights issues. The definition of a devolution issue in Wales and Northern Ireland is much narrower than the definition in Scotland. For example, the definition in Wales and Northern Ireland does not include acts of the Lord Advocate, so we are not comparing like with like.

Stewart Maxwell: So you agree with Lord McCluskey that the arguments that were put forward last week do not hold water and that the idea that the direct comparison should be with Northern Ireland and Wales is based on a false comparison.

The Lord Advocate: I completely agree with Lord McCluskey on that.

Stewart Maxwell: Thank you. That is very clear.

David McLetchie: I am trying to understand something. If the process of certification is necessary in order to support the position of the High Court of Justiciary as the apex court and to allow it to be the gatekeeper of what does and does not get to the Supreme Court on public importance grounds, why are proposed new sections 288ZB(4) and 288ZB(5) of the Criminal Procedure (Scotland) Act 1995 included in your draft provisions on compatibility questions? If the court is to be the final gatekeeper and determiner of these matters, and if it is so desirable to have finality, why have you included provisions in your proposals that would allow you and the Advocate General for Scotland, in effect, to subvert that?

The Lord Advocate: I do not think that they subvert it. They complement it. The power in the Scotland Act 1998 that allows the Lord Advocate and the Advocate General to make referrals is a good power, which is exercised sparingly. I gave an example of where it was exercised for the benefit of Scots law in seeking early clarification. It complements the system. I do not think that it is inconsistent with the requirement for certification, as we exercise it sparingly.

David McLetchie: It might well have been exercised sparingly, but we have heard for hours in the evidence so far that it is important that the High Court is the apex court and that it determines who gets to the Supreme Court and who does not. We have heard that all the way through, but here you are, on behalf of the Scottish Government, introducing clauses that, to use Mr McBride's words, enable somebody else to bypass the decision of the court. I think that that is what he said.

The Lord Advocate: The Advocate General and the Lord Advocate would refer a case direct to the Supreme Court only if it was a case of importance that raised real issues of law and application across the system itself.

David McLetchie: You say that you would refer a case if you thought that it was of importance. However, we have been hearing all afternoon that the High Court of Justiciary is perfectly capable on its own—without the benefit of your intervention, or that of the Advocate General—of determining issues of general public importance. I ask again: why do you propose to circumvent that process?

The Lord Advocate: I do not agree that the proposal is a circumvention. It would complement the process. The instances in which a direct referral has been made to the Supreme Court have allowed clarity and early determination of cases that apply across the spectrum of Scots criminal law. I think that the procedure has worked and that it should be retained.

David McLetchie: Circumvent and complement sound a bit like Lord McCluskey's dogs and cats and trying to define what is the case. I will leave that and pick up on something that you said in one of your answers to Mr Rennie.

If I understood you correctly, you said that, unlike England and Wales, we have no time limits for appeals. Whose fault is that? Have we in this Parliament not been perfectly capable of legislating to change that and putting time limits on appeals to achieve the finality that you have talked about?

The Lord Advocate: I agree. Appeals should have time limits.

David McLetchie: But you are a minister of the Government and I am not. I might be mistaken, but I have not heard anyone propose such time limits. Is that correct? We have passed at least four acts that relate to criminal justice in the 12 years during which I have been in Parliament and I have never heard of that. Why has it not been proposed?

The Lord Advocate: Supreme Court matters are reserved and are not for the Scottish Parliament. However, to return to your point, there should be time limits and I hope that you agree that appeals or leave to appeal should be dealt with by the High Court and, indeed, the Supreme Court.

Nigel Don (Angus North and Mearns) (SNP): On that point, I presume that the Lord Advocate or the Advocate General would intervene long before the final court of appeal had made a determination or possibly even considered the case. I presume

that the sons and grandsons of Cadder, or whatever, will be intervened upon long before they get anywhere near the High Court.

The Lord Advocate: Absolutely. The case was not concluded, so we required a definitive judgment in advance of the conclusion of the case so that we knew where prosecutors lay in relation to what the law was in the matter. That applied to a raft of cases. That is why we decided at that stage to take the case out of the lengthy procedural route in Scotland and take it directly to the Supreme Court for an early decision of general application.

Nigel Don: David McLetchie referred to certification being about gatekeeping, but I am talking about when we are well down the path, long before we can even see the gate. We would be able to see that there is an issue, but we would be nowhere near the High Court.

The Lord Advocate: Yes.

Nigel Don: Yes. I thought that that would be the case. I hope that I can come back in on another issue, convener.

The Convener: We shall see.

Stewart Maxwell: Mr McLetchie asked about proposed new sections 288ZB(4) and 288ZB(5) of the 1995 act. However, may I turn the question round? If the power did not exist for the Lord Advocate to take cases, or to require the High Court to refer them for appeal to the Supreme Court, what would be the impact of that? You talked about the sons of Cadder and other such cases. If the power did not exist, what would the practical implications be?

17:00

The Lord Advocate: We would need to see a case right through to its end before determining whether to go to the Supreme Court. We would prosecute that particular case without knowing the definitive decision on the particular point.

In the sons of Cadder case, the issue was access to a lawyer outwith the police station and it was argued by the Crown that the Salduz right, as interpreted by Cadder, did not apply outwith the police station. That is a point of huge importance to the system of criminal law in Scotland. If someone had to complete the case with their own assessment of the law, as opposed to that of the Supreme Court, they could obviously get it wrong. It is in the interest of prosecutors, in my view, to get a definitive judgment from the Supreme Court on that very important point, which flows from Cadder, so that we can then assess where we are in relation to hundreds, if not thousands, of cases that await decision in Scotland.

The benefit is that the decision can be taken at that stage. I suppose that it is like fast-tracking those cases to the Supreme Court. I imagine that, in relation to these issues, these are points of general public importance, so waiting until the appeal court had concluded the case would not be to the benefit of certainty for the Scots criminal law.

Stewart Maxwell: So, far from circumventing the apex of the Scottish criminal court system, the existence of this power would in fact allow you—when you spot a very obvious situation in which an important point of law is likely to need to be clarified—to establish very quickly what the answer from the Supreme Court would be, in order to avoid a long, drawn-out process that would end up at the Supreme Court anyway. It would benefit not only the prosecution service, but everyone else who was involved in such a case.

The Lord Advocate: Absolutely—including police officers who are investigating very serious crimes. They do not know, outwith the police station, what the definitive position is. We have now got that position from the Supreme Court, so that we can issue guidance in the light of that earlier guidance to police officers and prosecutors.

Stewart Maxwell: So the power would be very helpful.

The Lord Advocate: That is why we propose it.

The Convener: We are running short of time and are in danger of being very rude to the Advocate General, which I would not like to do. Those who have not had much time in this session will have first bite at the Advocate General, if you will excuse the expression.

Joan McAlpine: I want to raise an issue that Lord McCluskey discussed, which is the case of Horncastle in England and the fact that the Supreme Court came to its judgment because it felt that to do otherwise would contravene English law—basically, that it would mess up centuries of tradition in English law. What are your observations on the Supreme Court's view of English law in that case and how Scots law is dealt with under this system?

The Lord Advocate: It is important to make the point that there are implications from Horncastle, and the Strasbourg court is looking at a case called al-Khawaja, which has implications for Scotland. We are cheering on the UK Government's intervention to retain the admission of hearsay evidence, for example from deceased persons who may have given a statement—prior to death, obviously.

Lord Hope said that it is very important that there is a dialogue between the Supreme Court and the Strasbourg court; Judge Bratza, the chair

of the Strasbourg court, has alluded to that as well. On Horncastle, the Supreme Court expressed concern that the Strasbourg jurisprudence proceeded without a proper understanding of English law: that is the basis upon which it has asked the Strasbourg court to reconsider its earlier judgment. I welcome that: it is good when the Strasbourg court is adult enough to take that into account. We await the judgment from Strasbourg, but that is an important case for Scotland as well.

Joan McAlpine: Theoretically, why could Cadder not have been dealt with in the same way?

The Lord Advocate: If there had been an application to Strasbourg on Cadder, it could have received a judgment. However, the decision was taken to go the Supreme Court route on the matter, so we had a decision from that court.

Joan McAlpine: But the Supreme Court did not view Scots law in the way that it viewed English law in the Horncastle case. It did not say "Let's look at the implications of this for Scots law" in the way that it did for English law in the Horncastle case.

The Lord Advocate: There is a point in that, but the Lord Advocate must respect the decisions of the court. I respect every decision of the court. If I disagree with a decision of the court and I can do something about it, in the sense that I have the option of an appeal, I should exercise that option. However, I was the Solicitor General for Scotland for four years and I have been the Lord Advocate for nearly six months and I have never criticised the decision of a court, and I will not do so. I think that that is important for respect for the rule of law.

On the Cadder decision that was considered by the Supreme Court, we presented our argument and were obviously disappointed by the outcome. However, we respect the Supreme Court's decision and we took steps prior to, and in anticipation of, the Cadder decision to change police practice. We took steps in the emergency legislation that most members of the committee were involved in passing as an act of Parliament.

Nigel Don: We have a clear view of the cases that you think should get to the Supreme Court. What powers should the Supreme Court have? I am not trying to raise issues such as the writ of habeas corpus, which are side issues in that regard.

The Lord Advocate: I agree with Lord McCluskey that the jurisdiction of the Supreme Court should be in relation to the interpretation of convention rights. The disposal of cases should not be within its jurisdiction. In my view, cases should be referred back to the appeal court, which is the apex, in order for it to apply its judgment on the law to the facts of a particular case. It is not appropriate for the Supreme Court to have the powers of disposal that the appeal court has.

The Supreme Court has exercised the powers of disposal on two occasions, as I understand it. The first such occasion was the Sinclair case, which was a disclosure case. The second was the Fraser case, which the Supreme Court remitted back to the appeal court with the direction that a differently constituted bench should then quash the conviction. In my humble opinion, that should not be within the role of the Supreme Court, because it sets it up as a further court of review, which I do not think is its particular function. It is a constitutional court that is there to interpret the law, then to refer the matter back for implementation by the domestic court.

The Convener: Thank you very much, Lord Advocate. I know that Mr McLetchie had particular points that he would like to be followed up, so we will put those to you in writing along with any others that other members have. I would appreciate it if you could respond in writing to those points.

The Lord Advocate: Is that a response to the committee or directly to Mr McLetchie?

The Convener: To the committee. The request will come from the committee and should go back to the committee.

The Lord Advocate: I will be delighted to do that.

The Convener: Thank you very much.

17:08

Meeting suspended.

17:14

On resuming—

The Convener: I welcome the right hon Lord Wallace, the Advocate General, and Paul Johnston, who is not honourable [*Laughter.*] I am sorry, Mr Johnston—I am sure that you are very honourable. Mr Johnston is solicitor to the Advocate General. I invite Lord Wallace to make a short opening statement.

Lord Wallace of Tankerness (Advocate General for Scotland): I thank you for the invitation to appear before the committee. I was able to watch some of the earlier proceedings on a monitor, so I do not propose to rehearse the issues; I am sure that they will come out through questions.

The Government tabled in June the amendments that we now know as clause 17 of the Scotland Bill, following an extensive consultation process. As a member of the Calman

commission, I was conscious that we had received representations from the judiciary about their unhappiness about section 57(2) of the Scotland Act 1998. The commission did not feel able in the time that was available to address that complex subject, as this afternoon's deliberations have borne out. Given that constitutional bills such as the Scotland Bill come along only once in a blue moon, we decided that it was an opportunity to address the issues that the judiciary had raised. I therefore set up an expert group under Sir David Edward, which then delivered its report.

The amendments that were tabled substantially followed that report. Before they were tabled, we ran a further consultation on specific points, including on certification. It is obvious that we have been considering carefully Lord McCluskey's report. We will continue to do so. I want to continue to engage with stakeholders and I have a meeting arranged with the Cabinet Secretary for Justice later this month. There will be proper consideration of the bill when the committee stage at the House of Lords takes place, during which we will have the benefit of Lord McCluskey's contribution as a member of the House of Lords.

I am pleased that the debate has come a long way since the summer. In the early part of the summer there was quite a lot of polarisation of views around whether the Supreme Court had any role at all. In the light of the Lord Advocate's letter to the committee and comments from Scottish Government ministers, it seems that that is now accepted. The range of areas in which there are differences has been narrowed down and many of the differences are not necessarily matters of high principle. As I said, we are considering Lord McCluskey's proposals. I very much hope that after debate and consideration of your committee's report, we will find the right solution, which will work for the people of Scotland and protect and uphold their human rights.

The Convener: Thank you very much for that. If I picked up your comments right, you are saying that you are listening carefully to all the discussion that is going on and are more than willing to move some distance from what was originally proposed in your bill, and to come to agreements with those who are advocating what should be right for Scotland under Scots law.

Lord Wallace: I think that that is a fair summation. We are considering the points. I am not saying that we agree with all of them; let us say that I am more persuaded about some than I am about others. On some, I will perhaps require considerable persuasion.

I heard Lord McCluskey and Sheriff Stoddart refer to widening the scope to go beyond acts, or failure to act, of the Lord Advocate, to other public authorities. That was considered at an earlier stage, but given that the original remit for Sir David Edward's group was to look at the section of the Scotland Act 1998 on acts and omissions of the Lord Advocate, that was what was reported on and what we consulted on. Let us be honest: there were lots of sensitivities, so to have extended the remit did not seem right at that time. However, Lord McCluskey's group has put forward some important arguments. I have not finally decided on the matter and can hear the strength of the arguments. Sheriff Stoddart talked about some of the contortions that are used to bring things under the banner of acts of the Lord Advocate, when the complaint of the alleged victim is about another public body. There is much in that.

The Convener: I thank you for that. I am sure that the committee will want to explore issues in the light of what you have just said. I ask for succinct questions and answers.

James Kelly: I wanted to ask about the public authorities issue, so my question has been pre-empted, to an extent. Would broadening the provision to cover all public authorities widen the ambit for ECHR challenges? What are the advantages and disadvantages of that approach?

Lord Wallace: I think that broadening would inevitably widen the ambit for this particular pathway. Clearly, at the present time, if there is a breach, a person can raise an issue under the Human Rights Act 1998, but the provision in the Scotland Bill would be a separate pathway. I heard Sheriff Stoddart give the example of a situation involving an interpreter, which would be the responsibility of the Scottish Court Service, and the convoluted way in which that might be dealt with as an act of the Lord Advocate or, conceivably, under clause 17 as it stands, concerning the advocate depute being right to ask a question when there is a possibility that interpretation is not being done. That would be pretty contrived, and is a good example of a situation in which the more appropriate body to deal with the matter would be the Scottish Court Service. Of course, the issue concerns acts or omissions that arise in the context of criminal cases.

James Kelly: In summarising your position, would it be correct to say that you are still assessing matters?

Lord Wallace: Yes. However, I think that a persuasive case has been made not only in Lord McCluskey's report but in the evidence that I heard to the committee this afternoon.

Richard Baker: A great deal of the discussion that we have had on the proposals has been on the certification procedure. As the Advocate General said, the debate has moved on quite far

and we are debating some of the more narrow issues.

In your proposals, you have not agreed on the importance of introducing a certification procedure for the Scottish courts to the Supreme Court, which Lord McCluskey's group has recommended. Why have you come to that conclusion? Is that one of the other issues that you are reflecting on, in the light of Lord McCluskey's report?

Lord Wallace: It is only right that I reflect on it, but it is a point on which I will need quite a lot of persuasion—[*Interruption*.]

The Convener: There is some interference coming through on the sound system. Someone—Ms McAlpine—has forgotten to turn off their mobile phone.

Joan McAlpine: I apologise, convener.

Lord Wallace: As I indicated earlier, I was aware that this issue was being mooted earlier in the year. That is when I put the original clauses out for consultation and specifically asked, in a second consultation, whether there should be a certification point. I thank you for your response to that consultation, Mr Baker. The Faculty of Advocates, Justice, the Scottish Human Rights Commission and, indeed, your good self considered that there should be no requirement for certification on a point of law of general public importance before an appeal went to the Supreme Court. The previous Lord Advocate and the Cabinet Secretary for Justice said that there should be. I weighed up the views and concluded, when we tabled the clause in the report stage in the House of Commons, that the case for certification was not made. I will give one or two of the reasons for that view.

First, it is maybe not quite the same as calling your dog Felix the Cat, but it could be like peeling an orange with a potato peeler. We are not comparing like with like. The provision in England, Wales and Northern Ireland relates to all criminal cases, substantive criminal law, criminal procedure and criminal evidence, and no one is suggesting that that is the case in Scotland.

It is instructive to go back and consider why the provision exists. As Lord McCluskey indicated, prior to 1907 there was no appeal to the House of Lords in English criminal cases. From 1907 to 1960, there was the Attorney General's fiat on the ground of exceptional public importance and, in 1960, the law was changed.

In introducing the Administration of Justice Bill in the House of Lords in March 1960, the then Lord Chancellor, Viscount Kilmuir, outlined the historical background. He said:

"If there is to be a right of appeal from the Divisional Court, the question arises: what test is to be applied? For, clearly, some limitation must be imposed on the right of appeal if the House of Lords is not to be flooded with criminal appeals to an unmanageable extent. Then again, whatever test is applied, it ought to be the same for appeals from the Court of Criminal Appeal as from the Divisional Court."—[*Official Report, House of Lords*, 24 March 1960; Vol 222, c 249-50.]

I do not see in those remarks any point of high legal principle or jurisprudence. A very practical approach was taken to avoid the House of Lords being flooded by an unmanageable number of appeals. There is a question about whether the certification procedure succeeded in that respect, but we are not talking about the Supreme Court being flooded with cases from Scotland. The figures—as best we can tally them up—are that, since the Supreme Court's establishment some two years ago, permission to appeal has been granted on four and refused on 17 occasions. In the four cases in which it was granted, two appeals were upheld and two were dismissed. To me, that does not seem to amount to a torrent, so I do not think that the practical reason for the bringing in of certification in England and Wales applies in this case.

Richard Baker: The figures that you refer to speak for themselves. The counterpoint that would be put is that there is an issue of parity at stake. In England, Wales and Northern Ireland, a certification procedure would still be required, even for cases concerning convention rights.

Lord Wallace: I recognise the existence of that argument, but I am saying that parity goes only so far. It is not strict parity, because in England, Wales and Northern Ireland, we are talking about the whole of the criminal law—substantive criminal law, criminal evidence and criminal procedure. That is not what we are talking about here. We are talking about cases involving human rights law or those that involve issues arising out of compliance with European Union law, which are far more limited than is the case in the context of England, Wales and Northern Ireland, where we are dealing with the whole of the criminal law.

Richard Baker: I asked the Lord Advocate a similar hypothetical question. I asked him whether, if a system whereby it was a requirement that leave to appeal to the Supreme Court had to be granted by the Scottish courts had been in place when the Cadder case was being adjudicated on, he would have referred that case on to the Supreme Court—

Lord Wallace: Do you mean if there had been certification?

Richard Baker: Yes. I mean if a certification process had been in place when Cadder was being considered. The Lord Advocate said that, in the light of judgments by the Scottish courts, he would not have referred Cadder on to the

Supreme Court. I think that that is an understandable but fairly risky approach. Given that, at the moment, his proposal is that he and you would retain the ability to require the High Court to refer the matter to the Supreme Court, would you have decided to do so in those circumstances? I imagine that it would be quite politically sensitive to do so.

Lord Wallace: That is probably understating it.

Richard Baker: I would like to explore the practicalities of the provision and what it means.

Lord Wallace: It is an interesting proposal, which I was interested to see in the Lord Advocate's draft amendments. I will perhaps return later to the current position on references.

I was Advocate General when the Cadder case was heard, but had been in office for only about 10 days. The position that was argued was that of my predecessor—I have no complaint about that—and it was in support of the Lord Advocate, so I might well have taken the same view as the Lord Advocate. It is all hypothetical.

We have seen the proposal only in the past four or five days, and we obviously want to consider it, but two things strike me. I should add that I intend no disrespect to the Lord Advocate or to future Lord Advocates; indeed, a similar position was adopted by the Attorney General in England prior to 1960, when there were lots of comments in debates about how no one doubted that the Attorney General had always discharged the act of taking a case to the House of Lords quite properly and diligently in the public interest.

If a case went as high as the High Court of Justiciary on appeal and the accused won, and the High Court said that it would not certify that a point of public interest arose, the Lord Advocate—who was the other party to the case—could say, "I'm trumping that. We're going." However, if the Lord Advocate won, the accused could not ask for permission to appeal to the Supreme Court. That is an inequality, although the Lord Advocate obviously has a much wider remit in relation to the public interest.

17:30

The Advocate General could, but might not, have been party to proceedings until that point. I can see that I would be the focus of a heck of a lot of lobbying from people who wanted me to second-guess what the High Court of Justiciary had said. Given where all that comes from, a sensitive decision would have to be made—especially if it was suggested that the law officers somehow or other trumped the apex of the Scottish criminal judicial system.

Willie Rennie: I will follow what Richard Baker said. I struggle to understand the practical difference to the number of cases and so on that certification would make. I understand that human rights issues would probably be regarded as being of such importance that they would always pass the test, so I do not quite understand what certification would add to the process.

Lord Wallace: Perhaps that is why I have not yet been persuaded. I said that the test's origin was in regulating the flow and ensuring that the House of Lords was not overwhelmed by criminal appeal cases. My point is that I am not persuaded that the Supreme Court has been overwhelmed with cases. In 2010, the number of cases—as opposed to applications to seek permission to appeal—that the Supreme Court heard was one, which was Cadder. If the number had been fewer, there would have been none. There is not a huge volume of cases going to the Supreme Court, so the reason why certification came into play in England and Wales does not necessarily pertain to appeals on the limited issues of convention compliance or European Union law compliance.

Joan McAlpine: You began by saying that the whole process started because the judiciary told you that they were unhappy about how the Scotland Act 1998 was working, which has led to clause 17 of the Scotland Bill. A week ago, the committee received a letter from the Lord President, on the Scottish judiciary's behalf, that supported in general Lord McCluskey's recommendations and in particular his recommendation on certification. However, you say that you are not persuaded about certification. Why were you persuaded initially to take up the judiciary's concerns, which you now dismiss?

Lord Wallace: It is unfair to say that I "dismiss" the judiciary's concerns. I recognised that an issue existed. The outcome of the expert group that I set up, under Sir David Edward's chairmanship, and the outcome of the review group under Lord McCluskey's chairmanship, both indicated that there is an issue. It is clear that the situation is unsatisfactory. Various adjectives have been used to describe the position that was reached in the Scotland Act 1998. Sir David Edward's report says that it really is not right that the Lord Advocate's retained functions should somehow or other become devolution issues. It is clear that that is wholly anomalous, so an issue exists.

On the much narrower point of certification, there is scope for disagreement. The previous Lord Justice General, Lord Cullen, wrote to Lord McCluskey's review to say that he was not in favour of certification. The Law Society of Scotland has told the committee and has said elsewhere that it is not in favour of certification. I read the evidence from the dean of the Faculty of

Advocates last week, which made it clear that the faculty does not believe that certification should take place. It is not unsurprising that views should differ in many cases. We in Government will weigh up those views.

As I say, I have not ruled certification out. I hope that this is not betraying confidences, but following a conversation that I had with the Lord Justice General, Lord Hamilton, I am going to see the Lord Chief Justice of England and Wales, Lord Judge, later this month to discuss certification and to get the perspective of the head of the judiciary in England and Wales on the system's working. I am not being in any way dismissive of what has been said, but I have given reasons why I am not yet persuaded, given the origins of the certification and the fact that we are not comparing like with like.

As Lord McCluskey fairly says in his report, there are exceptions in England and Wales. Habeas corpus does not apply in Scotland, but some of the issues around article 5 of the ECHR that are covered by habeas corpus arise. For courts martial and extradition, certification is not required. In paragraph 35 of his report, Lord McCluskey says that the matter should be addressed. He states:

> "We do not dispute the need to examine the particular limitations that obtain in the rest of the UK in relation to certification and, as far as possible, to replicate them for the Scottish situation, *mutatis mutandis*."

I am not going to criticise the Lord Advocate's illustrative clauses, but that point in Lord McCluskey's report is not covered. So, there are other issues to tease out.

Joan McAlpine: To quote Mr McBride, that could be interpreted as a lawyer's answer.

Lord Wallace: I am a lawyer.

Joan McAlpine: Lord McCluskey used the word "offensive". As a Scot, he finds the lack of parity offensive.

Lord Wallace: I am not in the camp that says that there is a total lack of parity. No one—not the Scottish Government, not the UK Government, not Lord McCluskey—is suggesting that the UK Supreme Court should be the ultimate court of appeal for Scottish criminal cases, but it is the ultimate court of appeal for criminal cases in England, Wales and Northern Ireland. If there is a different system for getting through the gateway in England, Wales and Northern Ireland from that which exists in Scotland, it is not a question of lack of parity because we are not comparing like with like—we are going back to the dog called Felix the Cat.

Joan McAlpine: With due respect, there seems to be a clear disagreement on that point. Lord McCluskey does not think that and the Lord President does not appear to believe that. You have said that you have discounted the views of the Lord Advocate and the previous Lord Advocate, but you seem to have taken Mr Baker's views on board. I am interested to know why you have come down on that side and why you have dismissed the concerns of all those eminent legal minds.

Lord Wallace: You are misrepresenting what I have said. I have not said that I have "dismissed" them; I have given them a lot of thought. I have not yet finally concluded—I said that I would need a lot of persuasion. That is why I am meeting the Lord Chief Justice, for instance. If I had made up my mind, I would not be wasting his time and mine.

As I say, I undertook my own consultation on the matter because I knew that it was an issue and, with the exception of Mr MacAskill and the previous Lord Advocate, everyone who responded on that question was against certification. There is a substantial body of people who, in response to Lord McCluskey, have been against certification, including Lord Cullen of Whitekirk, who is the previous Lord Justice General of Scotland; Sir David Edward and the other members of his group, except Mr McBride; the Law Society of Scotland; the Glasgow Bar Association; the Scottish Human Rights Commission; James Chalmers, who is a senior lecturer in law at the University of Edinburgh; Professor Gerry Maher of the University of Edinburgh; and the Equality and Human Rights Commission. They are not people to be dismissed, either.

It is necessary to weigh up the arguments, and I have given reasons why I have not yet been persuaded that certification is the answer. It is not a question of putting numbers on either side or saying whose wig is bigger than someone else's; it is a question of weighing the matter up. That is why I am approaching it in a considered way and why I will consult further, including with the justice secretary himself.

Joan McAlpine: You seem to be doing just that—you seem to be playing a numbers game. We are talking about the Lord President speaking on behalf of the judiciary, but you seem to be dismissing that and citing all those other people. What he said counts for something. As Mr McBride said this morning, it is very unusual for the Lord President to write a letter such as that.

Lord Wallace: Of course it counts, and that is why I have given it proper consideration, including going to see the Lord Chief Justice of England and Wales. The judiciary would be the first to accept that Parliament makes the laws and the judiciary interprets and implements them. This is ultimately a matter for Parliament and parliamentarians must

make the judgment. I will listen to what is said in the House of Lords; I imagine that some interesting debates will take place. There are people there who have lots of judicial experience, including Lord McCluskey, Lord Cullen and previous Lord Advocates who no longer hold judicial office, such as Lord Fraser—I do not know whether he will participate or not. There is a wealth of experience there and I am sure that they will bring their experience to bear on this issue. Nothing has been "dismissed" and I think it would be wrong to characterise what I am saying as being "dismissive". It is far from it. I am trying to give this serious issue proper consideration.

Joan McAlpine: Just—

The Convener: I think that is enough, Ms McAlpine.

Joan McAlpine: Just to pick up on that last point. Please?

The Convener: Now, don't be pathetic. [*Laughter*.] We must move on. I am aware of the time.

Joan McAlpine: It is important—

The Convener: No, Ms McAlpine. We have done enough on that point.

I would like to ask a question before I move on to the other people who are waiting. It seems to me when I read the submissions and the reports that these issues go back to the drafting of the Scotland Bill. The report by Sir David Edward covers the point that has been endorsed by Lord McCluskey, which is that an error was initially made on devolution issues. May I have your view on that? Some of the language that has been used is quite strong. I think "constitutional nonsense" was one such term and the Scottish Government has said in writing that it feels that it was an unintended consequence of the drafting of the Scotland Act 1998.

Lord Wallace: It is clear from what was said in Sir David Edward's report and Lord McCluskey's report that things were not right, although I am not going to get into a match about who can use the more lurid adjectives to describe it. I thought that Lord McCluskey—I hope that I am not misrepresenting him—pointed out that the Scotland Act 1998 came into force some time ahead of the Human Rights Act 1998 and, as I interpret and understand it, there was an effort to ensure that the Human Rights Act bit from the moment the Scottish Parliament and the Scottish Executive took power. It might have been seen as an interim arrangement until the Human Rights Act came into play, but it was interpreted in a way that continued beyond October 2000, when that act took effect. I suspect that that is what happened and—at the risk of being asked why I did not take the opportunity to do something about it—I remember that when I was Minister for Justice here it used to frustrate me a bit, too.

The Convener: Excuse me if I am being simplistic, but why cannot we just fix it?

Lord Wallace: That is what we are trying to do, but in trying to fix it, a number of issues have arisen. When I asked Sir David Edward and his group to consider the issue, I did not know what solution they would come up with. They clearly took the view, which has been endorsed by Lord McCluskey's group, that there is a legitimate role for the Supreme Court in the very narrow area of convention rights and European Union law, and that in removing such acts as devolution issues, we need to put in place a new route to the Supreme Court so that citizens' human rights can be vindicated. The question of how we can best do that is what we are grappling with.

The Convener: Is not it the case that there is reluctance among those who did the drafting to admit that they clearly got it wrong, and that the answer might well be simpler than all the commissions, expert groups and so on that we are running around with? Do we accept that we got it wrong?

Lord Wallace: I was on the Opposition benches, so it wisnae me, guv. If memory serves me, many of these provisions were made in the House of Lords; Lord McCluskey, who has left the room now, would probably remember that. It was a temporary solution and the point is that we are trying to sort it. I believe that the provisions in clause 17 will sort it and that the Lord Advocate's proposals will, too. There are a number of detailed issues that we are trying to resolve.

Earlier in the year, we were much wider apart. There was a body of opinion that said that the way in which to sort the issue was for the Supreme Court to have no role whatever. That was not the UK Government's view, in the light of the work of the expert group that I established, and it no longer appears to be the view of the Scottish Government, in the light of Lord McCluskey's report.

17:45

The Convener: I know that you were not in government at the time but, in your opinion, why were none of the issues foreseen when the Supreme Court was being set up and agreements were being made at Westminster?

Lord Wallace: There are two issues. First, some people take the view that the situation was not unintended. That is why I draw back from saying that it is a mistake. I have heard, although we cannot now confirm it, that Donald Dewar was

anxious for the newly established Scottish Parliament to have a shining record on human rights and that we should not give any easy let-outs. I still remember the day when temporary judges had to be suspended. That is why I say that there might have been an element of deliberation, particularly in relation to the interim period.

The Convener: I would hate to think that we were not trusted in relation to human rights in Scotland.

Lord Wallace: Well, clearly, in some cases we got it wrong. That is why the courts are there.

The second point about the Supreme Court is that, originally, the appeals went to the Judicial Committee of the Privy Council and when the Supreme Court was established in 2009, that jurisdiction of the Judicial Committee of the Privy Council was transferred to it. I have asked why we did not retain the Judicial Committee of the Privy Council under the Constitutional Reform Act 2005, because one of its advantages was the potentially wider pool of Scots judges to draw on. I have not been given a satisfactory explanation as to why that was not done under that legislation back in 2005. However, that is the situation. The amendment that the UK Government has proposed and, substantially, the amendment that the Lord Advocate has proposed—although there are differences on some of the details—try to address the problem.

The Convener: Before I move to Stewart Maxwell, Ms McAlpine has passed me a note about the extra question that she wanted to ask. It is worth asking, because you might well want to answer it.

Lord Wallace: I hope so.

Joan McAlpine: In response to my earlier question, you said that parliamentarians make the law, not judges. However, we are talking about parliamentarians in the UK Parliament, some of whom are not elected if they are in the House of Lords, overruling the views of the Lord President, the Lord Advocate and quite possibly this Parliament. Surely you can see that there is a political difficulty there.

Lord Wallace: Obviously, weight is given to the views of the people to whom you refer. The matters are being given proper consideration. The Government does not have a majority in the House of Lords, so I cannot just decree what will happen. The issue is important, and it is important that parliamentarians—not just me—get a flavour of what is being said. However, in a proper constitutional analysis, it is Parliament that legislates and the judiciary that then implements and interprets the legislation.

The Convener: Stewart Maxwell and Nigel Don have questions on powers of the Supreme Court.

Stewart Maxwell: It has been interesting to get your current thinking on the issues that we have been discussing today and last week. I am grateful for that. Will you give us your current position on the issue that is dealt with in paragraph 8 of the executive summary of Lord McCluskey's report? Under the bill as drafted, the Supreme Court will have the powers of the court below. In other words, it will have the power to affirm, set aside or vary orders, remit issues for determination by that court and order a new trial or hearing. Lord McCluskey and the Lord Advocate take a different view. What is your thinking on the ability of the Supreme Court to make a ruling and then pass that back to the High Court for implementation?

Lord Wallace: The provision was included in the bill following a recommendation from Sir David Edward's group. The position it embodies is the status quo: it exists not by means of the Scotland Act 1998 but under the rules of the Supreme Court, which is why it has been replicated.

I am minded to consider changing the provision, because in practice most—if not all—cases have been remitted. Lord Hope has commented that the Supreme Court should determine the convention right and that the High Court of Justiciary should then apply that law to particular circumstances, and his argument carries a great deal of force.

I am not wedded to the provision, and some compelling arguments have been made for changing it. I would not die in a ditch over it—far from it; I am quite persuaded by some of the points that have been made.

Stewart Maxwell: That is very welcome. In the debate in Parliament last week, there was much cross-party agreement on the point that you have just outlined, if not on some other points. It is clear that there is a strong argument in favour of that particular position, and I am pleased to hear that you are considering the recommendations in a positive way.

Lord Wallace: On a related matter, the miscarriage of justice test was not in our original consideration, but was urged upon us so that the Supreme Court should be subject to the same test as is set out for the High Court of Justiciary. Those who were urging it are perhaps not so keen on it now. Again, I am more than willing to reconsider that provision, bearing in mind what Lord McCluskey's report said about the test.

Stewart Maxwell: I was going to ask about that very point.

Lord Wallace: There is a lot to recommend in what Lord McCluskey says on that matter.

Stewart Maxwell: That is very helpful.

Nigel Don: Good afternoon, Lord Wallace. I will go back to one of the subjects that the Lord Advocate talked about. I confess that I am not quite sure where the proposals currently stand, but I understand that they at least reduce the ability of the law officers to refer cases to the Supreme Court before they have gone through the full process.

In the previous discussion, some of which I think you heard, I queried with the Lord Advocate the point at which he would use those powers. He agreed with me that he would use them early on in the process, to avoid what might feel like rather hypothetical cases coming through the courts before a decision could be made on them.

Can you explain the current proposals in the Scotland Bill? If you are reducing law officers'—and perhaps your own—ability to refer cases, can you explain why?

Lord Wallace: Certainly. That is a perfectly fair question that I have wrestled with quite a lot. Although the bill proposes that the Lord Advocate or the Advocate General can seek a reference to the High Court of Justiciary, there is no provision in the bill as it is presently drafted for cases to go to the Supreme Court by bypassing the High Court of Justiciary as an appeal court. If the Advocate General or the Lord Advocate is by definition party to a case, there is provision for the case to go from the High Court of Justiciary sitting as an appeal court to the Supreme Court.

I consulted on that issue earlier this year—not so much on the reference as on the issue of leapfrogging the High Court, although the two things go hand in hand—and the responses that we got were fairly well balanced.

The response from Justice persuaded me to go in one direction. Its submission said:

"The Scottish Courts ought to hear incompatibility issues prior to the Supreme Court, otherwise it"

—presumably, the Supreme Court—

"would not have the benefit of the reasoning below, its jurisdiction would be extended and the concerns that have been raised about Scots law being subverted would be further exacerbated."

I recognise the strength of the Lord Advocate's comments about the sons of Cadder references with which he has dealt, but it is a fine judgment. I was persuaded by the argument that before the Supreme Court considers a case, it should have the benefit of the High Court of Justiciary as an appeal court having opined, so that it is at least informed by what the High Court has said.

Nigel Don: Right. I can understand why you took that decision, and I take your point about apparently being able to trump the High Court as well. I can see your problem there. However, is that really satisfactory? I find the argument that the High Court should be bypassed slightly strange. If we are dealing with sons of Cadder, or the next Cadder that comes along, is there a case for saying that it would be sensible to do that?

Lord Wallace: Of course, but I think that it is finely balanced. Perhaps the point that tipped me one way rather than the other was that the Supreme Court would at least have the benefit of the High Court's decision. However, there are clearly benefits in short-circuiting the process—for example, it could reduce the time taken or resolve other cases that are waiting. There is an argument to be made in that regard, but I do not think that it is a matter of great principle. I would be interested to know what the committee concludes on such matters of judgment.

Nigel Don: I would not disagree with you, but I must say that I do not think that the solution is entirely satisfactory.

Lord Wallace: Perhaps this is an opportunity to explain why I did not make provision for such cases.

The Convener: Can you give us until about 5 o'clock?

Members: No—6 o' clock.

The Convener: Sorry, 6 o'clock. I was putting my clock back two hours.

Lord Wallace: Yes.

Adam Ingram: Good afternoon, Lord Wallace. I return to the question of certification, on which I will take a different angle. We have seen in written evidence from the likes of the Law Society of Scotland and the Faculty of Advocates that there is a need for consistency in the application of the ECHR and European law across every jurisdiction in the UK, for obvious reasons. However, there will no doubt continue to be a lack of parity between jurisdictions on the question of certification if clause 17 goes through as drafted.

We heard from Lord McCluskey that if certification was no longer required in England and Wales or Northern Ireland, the lack of parity would be removed, which would be acceptable to the Scottish judiciary. Surely many of the arguments against certification in Scotland apply equally to the rest of the UK, because human rights are indivisible—they should not be divided into those of general public importance and others. Should the rest of the UK therefore not change to ensure that there is consistency across the UK in the application of the ECHR?

Lord Wallace: I acknowledge that point. It is self-evident that no matter which way we go, there is an element of inconsistency. We are not talking about the whole Scottish criminal justice system,

but there is a lack of parity there as well, although no one is advocating doing anything about that.

Certification would be needed in an English criminal case before it could go to the Supreme Court, but the position would be different if we did not have certification. Paragraph 10 of Sir David Edward's evidence to Lord McCluskey's review group outlines a number of cases that have gone to the Supreme Court on important human rights convention issues. I heard that, earlier in the meeting, there was discussion of the Horncastle case, which was another case in which there was a human rights issue that, following certification, went to the Supreme Court.

Clearly, in the time-honoured expression of ministers, the UK Government has no present plans to change certification with regard to England and Wales and Northern Ireland. However, I think that I have explained that the certification process came in to ensure that a huge deluge of criminal appeal cases did not go to the House of Lords. Of course, that does not apply in the present case.

18:00

We address another issue of parity—I do not think that there is any difference between what the Lord Advocate proposes and what the Government proposes. The Lord Advocate has been in the unique position of having a determination of ultra vires for a breach of the human rights convention, whereas prosecutors in other parts of the United Kingdom get a declaration of unlawfulness. In practical terms for the individuals involved, that might not have made much difference, but I know that the previous Lord Advocate felt that there was an important, although not necessarily justified, distinction. Our proposals at least provide public prosecutors throughout the UK with parity.

Adam Ingram: I am not entirely sure of that. We are comparing apples with apples when it comes to certification of EU compatibility—

Lord Wallace: EU compatibility?

Adam Ingram: I mean ECHR compatibility or compatibility with European law. If we are talking about leave to appeal in England and Wales and in Scotland, the situation is directly comparable. You will disallow that in Scotland while allowing the position in England and Wales to continue.

Lord Wallace: I am saying that you are not comparing like with like. In one case, you are dealing with the entire system of criminal justice and the criminal law, and in the other case you are dealing with constitutional or convention rights that arise in the context of a criminal case. That is an important distinction. The distinction that the dean of the Faculty of Advocates made last week between a criminal jurisdiction and a constitutional jurisdiction is a very important one.

The Convener: Thank you. I will now exercise convener's privilege and keep you until 5 minutes past 6.

Lord Wallace: I have one other point that I want to make, so if you do not ask me the question I will answer it—[*Laughter*.]

The Convener: Do you want to answer the question before I ask it?

Lord Wallace: No. Ask your question—you might allow me to answer the one that I want to answer.

The Convener: The privilege that I will take is to spread the question out a wee bit beyond the issue that we have been talking about to the Scotland Bill in general.

Lord Wallace: Before you do that, can I deal with—

The Convener: This is like a sketch from "The Two Ronnies".

Lord Wallace: My comment relates to a point that Mr McLetchie raised with previous witnesses.

I have serious misgivings about the proposal in the Lord Advocate's illustrative provisions, which would allow acts of the Scottish Parliament that may be ultra vires because they contravene the human rights convention to use the procedure advocated by the Lord Advocate. That is in a totally different category from the issues that we have been talking about.

It is my view and the view of the United Kingdom Government that, if acts of the Scottish Parliament are beyond the Parliament's competence as a result of section 29 of the Scotland Act 1998, they must follow the devolution issues route that is set out. In fairness, I think that Lord McCluskey possibly picked that up, too. The Lord Advocate's proposal is not consistent with what Lord McCluskey said in his report.

The Convener: We have already agreed to write to the Lord Advocate on that point. We will also write to you to cover some of the issues that have been raised, so perhaps it can be included in that letter. We can get your response and we will then have both arguments.

I will ask you about the Scotland Bill more widely. On 8 September, the Secretary of State for Scotland, Michael Moore, gave evidence to the committee. I expressed—if I can put it this way, Lord Wallace—discontent about something that you had said in Westminster a couple of days before.

Lord Wallace: I read your comments.

The Convener: Did you? In that case, you will know why I am not happy.

Lord Wallace: I do not think that you read all that I said.

The Convener: I did. The basic point was that the assumption that was taken from your comments was that this Parliament had agreed to the legislative consent motion on the Scotland Bill prior to dissolution and the election when, in fact, its agreement was heavily caveated, and we have come back to it. The Secretary of State for Scotland accepted that. Do you accept the secretary of state's position? He has stated that Westminster

"will proceed with the Bill only with the formal and explicit consent of the Scottish Parliament."—[*Official Report, House of Commons*, 27 January 2011; Vol 522, c 477.]

Lord Wallace: I agree with the words that the Secretary of State for Scotland used on that occasion. It is perhaps also important to put the issue into context. On the vote that was carried in the Scottish Parliament back in March before the election, substantial parts of the bill were not caveated. In the second reading debate in the House of Lords, I said that

"A new Parliament"—

The Convener: I have read that, too.

Lord Wallace: But it is important to put it on the record. I stated:

"A new Parliament with a new focus was elected on 5 May, and as we are all well aware, it represented a landmark change in Scottish politics. This new Scottish Parliament will consider the Bill again, and we will consider sensible recommendations for the Bill made in time for this House's"—

"this house" being the House of Lords—

"final amending stage. We will get the chance to consider any recommendations which come from the Scottish Parliament, and the Government will continue to work with the Scottish Parliament's Scotland Bill Committee, which is considering amendments to the Bill. My right honourable friends the Secretary of State and the Parliamentary Under-Secretary of State will give evidence to the Committee on Thursday of this week.

The noble Lord, Lord Sewel, who is with us today, has given his name to a convention that Westminster would not normally legislate with regard to devolved matters on Scotland without the consent of the Scottish Parliament. This convention has been developed and embodies the respect that this Parliament has for the Scottish Parliament. In keeping with the spirit of the convention, the Government will continue to work closely with the Scottish Parliament Committee reviewing the Bill, and we will look to maintain the support of the Scottish Parliament for the Bill."—[*Official Report, House of Lords*, 6 September 2011; c 163.]

Amen.

The Convener: Bless Lord Sewel. I would bless you, too, if you would agree to joint commencement for some of the bill.

Lord Wallace: It is a package.

The Convener: I thank the right honourable Lord Wallace and the extremely honourable Paul Johnston. I suspend the meeting for a few minutes.

18:06

Meeting suspended.

18:14

On resuming—

The Convener: I reconvene the meeting and welcome Alan Trench, who will talk about the Scotland Bill in general and constitutional issues.

I thank Mr Trench for coming and ask him to make a short opening statement before we move to questions.

Alan Trench (University College London): Thank you, convener. It is a great pleasure to appear before the Scotland Bill Committee once again. Mr McLetchie was a member of the previous committee, which I appeared before in January.

I would like to say three quite simple things to begin with. I hope that the committee has seen the memorandum that I submitted to you—I am afraid that it was rather late—as it sketches some of the key issues as I see them. I hope that you have also seen a copy of the memorandum that I submitted to your predecessor committee, much of which is equally applicable to the bill in its present form.

First, I would like to say by way of an opening that in the past four or five years Scotland has experienced a very disjointed constitutional process. That is regrettable and has not served the people of Scotland as well as they should have been served. For practical purposes, the committee and its predecessor committee are the only forums in which the various constitutional processes have joined up and the Calman commission and national conversation processes have started to encounter and talk to each other. That is welcome.

The problem that still arises is that the various options that are available to the people of Scotland for their constitutional future are not as fully fleshed out as they might be and people are therefore unable to set one against the other. We have heard a good deal in the news in the past few weeks about the problems that people have in choosing gas and electricity tariffs, and it seems to

me that something similar applies here. We are offered various schemes but they are hard to compare with each other. That makes the job of the people of Scotland harder than it should be. However, I am glad that the process is starting to come together in the committee, and I hope that the trend will continue in future.

Secondly, as is clear from the two memorandums that I submitted, although the bill seems limited in what it achieves, if it was enacted even in its present form it would constitute a significant upheaval for the UK Government and aspects of the way in which the UK state works, particularly when it comes to tax collection and the role of Her Majesty's Revenue and Customs. It is easy to underestimate the scale of that upheaval. Members might want to elaborate on the role and position of HMRC in due course. From that point of view, the bill represents a substantial set of changes, even if one takes the view that the degree of fiscal accountability, autonomy or responsibility—whichever word or phrase one wishes to use—is insufficient.

One of the bill's great virtues is that it requires HM Revenue and Customs to engage seriously with the issues for pretty much the first time. I suspect that subsequent changes will be significantly easier as HMRC will have had to engage with the issues, respond to them and find ways of addressing them. It will be important for the future to ensure that HMRC does that. Timescales and milestones will be important in achieving that end.

Thirdly, going somewhat beyond the scope of the bill, I remain concerned about an issue that I identified in my memorandum to your predecessor committee—the nature of the proposed intergovernmental mechanisms. In my view, they were somewhat overused in the Calman commission's report. To put it rather crudely, the Calman commission preferred to say, "We'll resolve that through an intergovernmental mechanism" or "We'll have an intergovernmental mechanism to look at that", rather than review the division of powers between the Scottish and UK Governments and between the Scottish and UK Parliaments. I would have preferred to see a bit more intellectual lifting and a review of the division of powers rather than a statement that there would be an attenuated intergovernmental mechanism, which might or might not work.

Although the Calman commission report put excessive emphasis on those mechanisms, they are underused in what is now proposed, particularly in the command paper that accompanies the bill and particularly considering the degree of fiscal devolution that is proposed, the working of the quadrilateral meeting of finance ministers that Calman recommended should become a formal finance group within the joint ministerial committee framework, the bilateral intergovernmental commission, and the issues relating to HMRC and its accountability to the Scottish Parliament. I regret that it has not been possible for the UK Government to come up with clearer proposals to make those mechanisms work.

That is all that I have to say by way of opening remarks.

The Convener: Thank you very much.

Your memo to the committee starts off by saying:

"Most of the issues to which I drew"

the attention of the previous committee

"have not been satisfactorily dealt with in the amendments proposed by the UK Government since January."

Is there anything in addition to the three main issues that you have raised that you think should have been addressed because of the dissatisfaction that you and others have expressed?

Alan Trench: The fundamental issue is how the proposed reduction in the block grant is calculated. That seems to me to be an outstandingly important issue, and I have drawn attention to it in my latest memorandum, particularly in paragraph 7.

It is nearly two and a half years since the Calman commission proposed—effectively in one sentence—that there would be a reduction in the block grant without setting out how that would be calculated. Obviously, the initial quantum of that reduction and the mechanism for its subsequent adjustment are fundamentally important.

The predecessor committee heard evidence from Gerald Holtham, who chaired a commission on financing devolved government in Wales. He set out the mechanisms that he had identified for doing that in his report. The report contained a detailed chapter of 30 pages in which the issue was considered in detail and various methodologies were set out. It was noted that the applicability of the different methods would vary according to the nature of the tax that was devolved, as they all involved sharing varying degrees of risk in relation to overall revenues. Therefore, it seems to me fundamental to identify both of the factors that I mentioned in order to understand what the bill will do and how it will do it.

I find it deplorable—I think that I have to use that word—that the UK Government has still not spelt out what the effect on the block grant will be. I simply do not see how we can clearly understand the effect of the proposed legislation until the

Scottish Parliament and the UK Parliament understand what the effect will be. There must be much greater clarity on that than there currently is.

The Convener: In a previous committee meeting, it was said that we are being asked to sign up to something of which nobody really understands the basis or on-going operation.

Alan Trench: Indeed.

John Mason (Glasgow Shettleston) (SNP): Thank you for coming to the meeting, Mr Trench. Given that the committee is new, we are probably going over some of the same ground that you have gone over before. Forgive us for that.

I want to ask about five or six points related to your most recent submission. First, you talk a lot about other countries, some of which are more decentralised than the UK and some of which are less decentralised. You say:

"regional-level governments in the more decentralised ones are raising between 70 and 80 per cent of their spending."

I take it that that includes countries such as Canada, Switzerland and the United States.

Alan Trench: Yes.

John Mason: Should Scotland raise that level of spending, or is the figure fairly arbitrary?

Alan Trench: I do not know whether I would want to use the word "arbitrary". There is variation from system to system.

The systems in Canada, Switzerland and the United States in particular are all long-standing federal systems. The fact that they are long-standing federal systems is important, but they are important not just because they are old. Those countries have built certain key aspects of their institutions and public policies around the federal framework.

Let us consider Canada, which of the three is probably the country that I know about in most detail. The division of taxing powers between the federal Government and the provinces comes out of the framework of what is now called the Constitution Act 1867, but which was originally passed as the British North America Act 1867. It is a pretty venerable piece of legislation indeed. It was construed as giving most of the key taxation powers to the provinces, because at that time powers over sales tax and so on were overwhelmingly the most important. It is the indirect powers that it left somewhat unclear that have ended up becoming important and which are sources of federal revenues.

Of course, what has happened since 1867, in Canada and all those other countries, is the building of a welfare state. That has required much higher levels of tax raising by whichever level or order of government is responsible for it and much greater public spending in order to pay for the services that are now provided. In those countries, the welfare state has been built around a federal framework. Since devolution, or 1997, the UK has embarked on rather a novel exercise, as it has been spinning out a welfare state that was built largely around UK-wide institutions, even allowing for the fact that there was administrative devolution to the Scottish Office before 1999.

That process of spinning out is an unusual one—the only other developed-world country that I can think of to have done that is Belgium. All the other decentralised countries in Europe have, more or less, built their welfare states around decentralised institutions. Certainly, Germany and Spain have done so. Belgium is the only country that, having had an extremely unitary welfare state, has spun it out to the regions and communities that make up the Belgian federation.

The figure that one picks to use for the level of revenue raising that should be done by the Scottish Government will be a matter of choice and of decisions that are made as a result of processes that happen in the UK, rather than simply lifted off the shelf from elsewhere.

John Mason: I accept that it is not an absolute figure.

Alan Trench: It cannot be an absolute figure. I do not think that—as I understand that Reform Scotland has suggested in evidence to the committee—the figure needs to be 100 per cent of devolved spending. That would be without parallel.

John Mason: When the committee met some representatives from the Government of Western Australia, I got the impression that, there, the way in which the taxes are split between the centre and the periphery is quite messy, but there seemed to be more of a negotiation process between the subsidiary and central Governments. Is that your understanding?

Alan Trench: There certainly would be that negotiation, but the key thing to remember, in an Australian context, is the role of the Commonwealth Grants Commission. It is a quango that advises the federal treasurer about the allocation of resources, and it uses a complex set of mechanisms to do that. The effect of the way in which it operates is largely to wash out the degree of fiscal autonomy that the Australian states have. It equalises to an extremely effective degree.

In reality, there is not much incentive for states to maximise their revenues from their own sources because, if they succeed in doing so, they will simply lose the grant allocations that they receive from the centre. Equally, there are few incentives

to decline what are called special-purpose payments, which are forms of conditional grants. States always accept them, even though they do not need to, because they could be fully compensated for doing that through the CGC's mechanism. I do not understand that, but that is what they do.

John Mason: You are concerned about the block grant and believe that we need a bit more detail. Is that because the relationship between what we would raise in taxes, whatever that might be, and its effect on the block grant is not clear at the moment?

Alan Trench: Yes. That is fundamental to my concern.

John Mason: It has been suggested that the main thing is to get the framework in place and that the details of the block grant and how they relate to each other can then be worked out in practice. Do you think that we or the UK Parliament face a risk if we do not get a bit more detail before the legislative consent motion?

18:30

Alan Trench: Yes, I do. This is not a technical detail but a fundamental issue. There will be technical aspects to which the idea of working it out later can apply but the basic principle of how the grant is to be calculated is not one of them.

John Mason: The next thing that you talked about in your memorandum was the way in which different taxes are useful or not. I find your analysis of the different taxes to be succinct and useful. If I am reading it correctly, you favour income tax, which is obviously the biggest one, and you seem to be fairly positive about it being devolved. I do not think that you say that all taxation should be devolved, but I wonder whether that would be the logical extension because you have reservations about some of the other taxes.

Alan Trench: Indeed. I ought to emphasise that my remarks about taxation come out of on-going work to develop what I have called a more or less federal model for funding devolution in the UK. That is why I am looking at comparisons with federal systems with due caution about the differences between those systems and the UK.

Of course, one must take into account the asymmetry of the arrangements in the UK. It is not only that there are differences between Scotland, Wales and Northern Ireland but also the fact that England is left out of the picture. There are big factors, but some valuable lessons can be learned from looking at practices in federal systems that are well worth taking into account.

Income tax is attractive not just because it is a big tax—although it is—but because people are in a place so it minimises the spillovers. There will always be problems at the margins, such as people living in England and working in Scotland and vice versa. You will have to have rules to enable you to decide how to deal with those cases, and there will inevitably be people who will gain from those rules and alter their affairs in such a way as to maximise the advantage they can get from them.

Nonetheless, taxes on people are generally good because people are relatively fixed. Taxes on land are always the first candidate for decentralisation to local levels because land is obviously very fixed. Whether it be taxes on residential property or forms of business rates, or such charges as landfill tax and aggregates duty, the fact that they all relate to specific places means that they are prime candidates for devolution. The problem with such taxes is that, although they might provide useful ways of shaping public policy in a Scottish context, they do not raise much revenue. If the aim is to start looking at ways of putting large chunks of revenue into Scottish hands, we have to look at the big taxes, which means that income tax becomes a prime candidate.

The work is in progress so I cannot say this definitively—my current state of thinking might evolve before I publish—but I think that personal income tax needs to be devolved in its entirety because it is such a large chunk of funding. One thing that it is important to remember does not come out as clearly as one would like in the published statistics: even if one was to devolve income tax, the UK Government would retain a source of direct tax revenue from individuals in Scotland. We do not call it personal income tax; we call it employees' national insurance.

John Mason: That is true, unless they are put together at some stage.

Alan Trench: Indeed. There is a tentative proposal to do that, but it is not likely to go as far as you might think because of something that is buried in the structure of how public expenditure and revenue works, which is the differential nature of the national insurance fund from the consolidated fund.

John Mason: In people's thinking, income tax and national insurance are separate things, although in practice they are very similar.

Alan Trench: It is important to say that that refers to employees and the self-employed because there is also employers' national insurance, which is a payroll tax.

John Mason: In your feeling or in your overseas experience, do people understand the idea of splitting a tax? Does it lead to confusion? I have asked previous witnesses whether having

some income tax in Scotland and some at the UK level means that we just end up blaming each other for income tax. Is it tidier to devolve it all? Do people understand it better?

Alan Trench: It depends how we levy income tax. We can look around the world: the United States levies both state and federal income taxes, with the federal tax by far the larger. As a result of that, taxpayers in the US have to fill out two tax returns—one for federal Government and one for the state. It is thankfully an easier job to fill out the state one once you have filled out the federal one, because the federal tax code is much more elaborate than the state tax codes—the state tax codes tend to be simplified versions of the federal one. I had to fill out the forms when I lived in the States for a couple of years. Everyone seems to do it. It is a chore that you do and, if you are as disorganised as I am, you do it in the second week of April, because tax day is 15 April.

John Mason: Does everyone in the States who is earning fill out a tax return?

Alan Trench: Yes. That makes quite a difference to how collection systems operate.

The Convener: May I interrupt? I wish that you would look round occasionally, John. [*Laughter*.]

I want to ask about the proposal in the bill for the Scottish Government to raise 10p of income tax. I am sure that you will have read the evidence that we took from Sir Kenneth Calman when he came to us a few weeks ago about how the 10p figure was plucked out of the air and there was no further thinking on it. He said that at the time he considered that it was a starting point; I guess that that would mean that he is quite surprised that, two years down the line, we are still sitting with that proposal in the bill. Taking on board your comments that income tax should be devolved and on how the proposals affect the block grant, do you have a view on the fact that the proposal is for 10p across the board?

Alan Trench: You are raising two issues. One is the relative arbitrariness of picking 10p, which is more or less half for the bulk of taxpayers. One could see that there is a certain rough and ready logic in partitioning the tax by saying that half goes to Scotland and half to the UK, and there were certainly many suspicions at the time, which have never been documented that the figure was largely arbitrary. I am afraid that I was not aware of Sir Kenneth's evidence, but I am intrigued that he is now able to be clear about that.

Another problem with the income tax proposals is that any cut has to be the same degree across all tax bands. It is certainly progress from the Scottish variable rate that was set out in the 1998 act, which provided for a 3 per cent change only to the standard rate and not any other rates. I was struck how the Holtham commission's report, which followed many of the Calman commission recommendations on tax, stated that that proposal was inappropriate in a Welsh context and instead went for a scheme that involves the power to vary the reduction for the proposed Welsh rate across the varying tax bands.

My own thinking about what one would want to do goes a bit further and would probably allow devolved Governments to introduce their own tax bands if they wanted. For collection reasons, you would need certain things to be defined in common across the whole of the UK. The other example I was going to cite in response to Mr Mason was Canadian practice.

The Convener: We are actually going to hear from Professor Richard Bird—although I am not sure whether he is a professor.

Alan Trench: He is indeed—a very eminent one.

The Convener: Oh dear—that is on the record. I shall be extra nice to him. We are talking to him from the University of Toronto by videoconference next week, which will be extremely interesting.

Alan Trench: Indeed. From what I know about Canadian practice—I am a little out of date so I need to double-check, but I understand from a contact in Ottawa that this still remains the case—the federal Government in Ottawa collects federal taxes in all parts of Canada, including federal income tax and other personal taxes, but it also collects provincial taxes on behalf of the Governments of all the provinces except for Quebec. Quebec insists on separate collection, though its definitions of what income is and of exemptions and reliefs largely follow those of the federal Government.

That makes life an awful lot simpler for taxpayers. Otherwise, people would have to wonder, for example, whether their mortgage interest is deductible from one order of Government but not the other or what they should do about deducting the cost of their childcare. There are very good reasons for taxpayers to want substantial similarity, if not homogeneity, between the tax principles.

In Canada, therefore, the federal Government collects on behalf of all the provinces except Quebec. It imposes certain restrictions on things like definitions of income in order for it to be able to do so. I am unclear about the detail, but when I went there in 2003 I was told that it charged the provinces a nominal amount for collection, and I am told now that it does not charge at all. In any event, the charge that the federal Government makes for collection is minimal and bears no relation to the costs of collection—even the marginal costs of collection. The Government sees

that as something that is appropriate in order to simplify life for Canadian taxpayers. That is the message that comes to me consistently whenever I interview people in Ottawa about it.

I am struck by that, because I suspect that HMRC's approach is rather different—it is looking to recharge marginal costs in full. That is certainly a problem in relation to the Scottish variable rate, as the collection costs would assume a substantial proportion of any tax revenue that was received. Under the Scotland Bill proposals, the revenues would obviously be much larger, and one would hope that the relative collection costs would be significantly smaller. However, it is still an interesting difference of approach that the federal Government in Canada believes that it is right to run an efficient tax system that is easy for taxpayers to use but creates certain economic differences and the UK Government believes that it is something for which Scotland should be fully charged.

The Convener: That is certainly something that we can query and probe a bit further next week.

Stewart Maxwell: I want to ask for your opinion, Mr Trench. You talked about the problems with the block grant and how, in order to ascertain whether the proposal is a good thing or a bad thing and how it would be calculated, we have to know the detail. What is your opinion on the restriction on the ability of the Parliament—if the bill goes through unamended—in relation to the 10p rate and the fact that there is no way that we can take account of, for example, changes in allowances by the UK Government?

Alan Trench: That seems to me to be a problematic aspect, which is why I talked about the need for an enhanced set of intergovernmental mechanisms. If Scotland is to have a relatively limited set of devolved tax powers that are attached to UK tax powers, it is clear that the UK Government will make its decisions about the use of its powers primarily for reasons that relate to England—because England is 85 per cent of the whole—and that the Scottish concerns are likely to figure to a much lesser degree.

I see a robust intergovernmental structure as the most practical way of ensuring that Scotland is heard at an early stage in the decision making. Effectively, the Scottish Government's revenues will be dependent on decisions that are made in the UK budget. Those decisions are often made very close to the wire, and in the past they have certainly been communicated at a very late stage indeed. If we are going to go ahead with the proposed system, the Scottish Government will need to be closely involved much earlier in discussions.

Stewart Maxwell: How does that flow into some of the problems that we have had explained to us before about Treasury forecasting? As you rightly say, a lot of the decisions are taken very close to the wire—sometimes on the day of the budget announcement—and yet we are expected to live with what is generally seen as a pretty poor set of Treasury forecasts at the best of times. That forecasting will have a great impact on our income and yet decisions are taken very close to the wire in the middle of the process.

18:45

Alan Trench: Indeed. The UK Government has not given the implications enough thought. It has been clear that the UK Government treats devolution as an event and not a process: devolution happened in 1998 and was then substantially forgotten. Devolved concerns rank only to a limited extent, if at all, in a lot of the UK Government's thinking.

We heard about the decisions that were taken in setting up the UK Supreme Court. It is evident that they were taken in a great hurry during the 2003 reshuffle, which was famously known as the botched reshuffle. As a consequence of decisions that were taken about the Lord Chancellor's role—which were fuelled by the difficulties in personal relationships between Derry Irvine and some of his colleagues—a Supreme Court that acquired jurisdiction over devolution issues suddenly popped out of the process. That was a great surprise to pretty much everybody, even though there had been some talk beforehand—indeed, I had been involved in projects that looked at problems with legal structures.

It will be problematic to leave the system to work in the proposed way without the UK's acknowledgement that it will have to restructure processes to make arrangements work. That is one reason why one wants to get a clearly defined tax base with autonomy that is anchored as securely as possible.

Another part of my thinking, which I did not elaborate on as fully as I might in the memorandum, is that the position of HM Revenue and Customs will have to be transformed. It will have to become an agency that serves multiple Governments. The fact that it is an agency of the UK Government, as the Government of the whole United Kingdom, should not mean that it looks simply to the UK Government—the Government that is based in Westminster—as its sole master.

Alison Johnstone: Thank you for your memorandums. You have outlined your views clearly—you think that the bill is flawed. The last paragraph in your memorandum to our predecessor committee says:

"The Committee, and the Parliament, need to be aware that these proposals present significant problems,"

which will be on-going. The start of that memorandum suggests that the proposals merit at most "a cautious welcome." Should the proposals be given a cautious welcome?

Alan Trench: I think so, on the basis that the proposals are a step down a road rather than the end of a journey. One problem is that they have been treated as though they are the end of a journey rather than the first of several steps down a path. In some ways, the first step down a path is the most difficult one.

Implementing a system that delivers fiscal decentralisation presents significant challenges. The bill makes that happen in a way that might not correspond to what the people of Scotland ideally want but which has the UK Government's support—and that provides a political impetus to ensure that decentralisation happens within the UK Government's framework. That is where one must start from, even if the present form is not necessarily where one will end up.

Joan McAlpine: I will ask about what was clause 23 of the bill, which I understand has become clause 27 since the House of Lords got its hands on the bill. You have made an important point about that provision, which enables UK ministers to make orders to implement international obligations that relate to devolved functions. That was never part of the Calman commission's recommendations but was added by Whitehall when the bill was drafted. Why are you so concerned about that clause?

Alan Trench: I discussed that in some detail in my memorandum to your predecessor committee. Subsequent to that, I had the advantage of hearing an explanation given by the secretary of state when he gave evidence on the bill to the Scottish Affairs Committee at Westminster. I then wrote a post on my blog, "Devolution Matters", which sets out my objections in some detail. I put up that post on 18 February 2011, if anyone is interested in following it up.

On the basis of what the secretary of state said, it turns out that the provision emerged because of the failure of the Scottish Government to implement legislation relating to international obligations that, I suspect, affect no Scots, involving two international organisations that I admit I had never heard of: the European Union Military Staff, and the European Organisation for Astronomical Research in the Southern Hemisphere. I do not believe that those are large organisations, no matter what. I cannot see—I explain why not in my blog post—what mischief the Scottish Government's failure to implement legislation in the area could cause. For example, if there were any conceivable financial liability arising for the UK Government because of the Scottish Government's default, the UK Government could reclaim from the block grant the costs that it had incurred as a result. Moreover, the UK Government has the power to implement primary legislation in this regard, as those organisations relate to an international treaty, which is a reserved matter.

However, I am concerned that there are cases—in particular, there are precedents in Australia—in which the existence of international obligations can act as a mechanism to allow a central Government to interfere in state-level matters. As a result of a 1983 judgment of the High Court of Australia in a case concerning the Tasman dam, the Australian Federal Parliament acquired carte blanche to legislate on state matters if an international obligation was involved. In the modern world, there are an awful lot of international obligations requiring one to do all sorts of things. I dislike the metaphor of the Trojan horse, but I am struggling to think of a better one. It is a way by which it is possible that the UK Government could intervene in a wide range of matters that are already devolved at an executive level without necessarily going through Westminster, which it would be entitled to do because it occurred to it to do so. It appears that there is no intention to do that at present, but it is a possibility. In my blog post, I conclude by saying:

"You don't need to open up a barn door when the most that's needed is a cat-flap."

There are other mechanisms by which the issue could be redressed. The scope of the clause could be limited to those organisations that are officially identified, as we do not know which organisations it relates to. Its scope could be limited to section 1 of the International Organisations Act 1968, which gives a scheduled list of international organisations to which it applies. The UK Government clearly rejects the idea of tying itself to something defined in that way but, as I say, there are mechanisms by which limiting the scope of the clause could be achieved.

Joan McAlpine: The way that you have described the clause suggests that it could lead to the dismantling of much of the progress that we have made with devolution so far.

Alan Trench: I would not necessarily go that far. It gives the UK Government the ability to act very selectively when it dislikes a specific thing that has been done by the devolved Government, but a number of other provisions in the bill also do that. The UK Government is able to allow the devolved Government to take away the chore of running health services in Scotland, but it is able to act selectively to deal with a specific matter that perturbs it. I think that that is incompatible with

what we are told devolution is about, which is that Scotland should become responsible for a wide range of devolved matters.

Joan McAlpine: Just to be clear, are you saying that the clause could allow the UK Government to interfere in health and education, which were administratively devolved, so to speak, even before devolution?

Alan Trench: It would depend. In this particular context, if the UK Government were able to identify an international obligation that in its view had not been adequately satisfied by the Scottish Government, the clause would allow the UK Government to take action in relation to whatever that related to, whether health, education or the status of the staff employed in the European Union Military Staff and the European Organisation for Astronomical Research in the Southern Hemisphere.

The Convener: On that note, I call Mr McLetchie.

David McLetchie: I will not pursue that line of questioning.

I want to return to tax issues. We heard your critique of the tax proposals in the bill, but I note from the memorandum that you submitted to this committee that you are critical of the Scottish Government's proposals, which obviously we are considering. In particular, you say that

"whatever the case for devolution of corporation tax might be, the present Scotland bill is not the appropriate vehicle to achieve it."

You say that that applies both to the bill as primary legislation and to secondary legislation made under the bill. Can you elaborate on that for us?

Alan Trench: To start with perhaps the least important point, it is a well-established principle of British constitutional law, but perhaps particularly of English constitutional law, that taxes must be levied explicitly by Parliament. I would hope that the Scots would regard that as a valuable part of a shared constitutional inheritance. One of the first cases that people learn about is that of ship money, which was a tax that Charles II arbitrarily levied to raise money to finance the navy to fight the French.

In an attempt to find a mechanism to devolve corporation tax, one of the Scottish National Party MPs at Westminster proposed that it should be devolved by order. He lodged an amendment at—I think—the report stage of the Commons consideration of the bill. That is certainly an inappropriate mechanism for devolving corporation tax. More generally, what one might call retrofitting legislation to accomplish a significantly different purpose from that which was originally intended can be a problematic exercise. A number of statutes have failed to work as one would like or as was probably intended. It is a question of choosing the legislative vehicle.

If corporation tax were to be devolved, some really difficult issues would have to be resolved. We would have to go through the process of identifying the principles and then the mechanism for working out what a Scottish share of corporation tax would be, which is problematic. I noted in my memorandum the suggestion by the Holtham commission that, for companies that operate across the UK, a proportion of corporation tax could be allocated on the basis of the proportion of the pay roll that is located in Scotland. I understand that such a mechanism is widely used in the United States. That makes an awful lot of sense because it ties the share of corporation tax that is devolved to one way of accounting for the real economic activity that is generated; it also avoids the hazard that is known as brass plating, which happens when companies simply put up a brass plate in a jurisdiction and claim their tax allowance on that basis.

I do not know whether the committee realises this, but Boots the chemist, which was formerly based in my home town of Nottingham—indeed, for practical purposes, it still is—is now domiciled in Zürich in Switzerland. Every time you buy toothpaste from Boots it pays much less tax on the profits, because its holding company has undertaken a brass-plating exercise and is now based in Switzerland. That issue would have to be gone through if corporation tax were to be devolved.

19:00

I am slightly puzzled as to why the Scottish Government is so keen on the devolution of corporation tax. It has an attraction as a mechanism for influencing economic activity in Scotland, but the other side of the issue is that taxation is the way in which we pay for public services, the costs of which remain pretty constant. If anything, the costs go up when times are bad, because there is more demand for things such as education and healthcare. People stay on at school rather than go into the workforce and they are more likely to present with illnesses. If anything, public spending is likely to increase countercyclically. Corporation tax is remarkably volatile. If one uses as a benchmark what happened between the peak year, which was 2007-08, and the last year for which we have data, which is 2009-10, the "Government Expenditure and Revenue in Scotland" estimate is that Scottish corporation tax revenues fell by 25 per cent, which is a pretty substantial hit. During that period, aggregate UK tax revenues shrank by 7 per cent

and Scotland's shrank by a little more than that, but not very much more.

To suddenly face a loss of 25 per cent from a main source of revenue when there might not be other ways of making that up would put public services under severe strain. Careful thought must be given to how those risks would be managed. For example, a substantially enhanced borrowing power would be required to cope with the risk. Thought would then have to be given to the status of that borrowing and the UK Government's position as a guarantor or potential guarantor. The issue is problematic and far from straightforward from the practical and fiscal policy perspectives. Therefore, corporation tax is a long way down my list of preferred taxes for devolution.

David McLetchie: We have heard evidence, as did our predecessor committee, that the power to set the rate might be devolved to the Northern Ireland Assembly. Professor Holtham, whom you mentioned, raised that issue in the context of funding for the Welsh Government, and our predecessor committee took evidence from him. Given that the proposals are swirling around in relation to the devolved Administrations in Scotland, Northern Ireland and Wales, and given what you said about the constitutional position and your reference to ship money and so on, would it be more appropriate to have a bill to deal with the devolution of corporation tax—if such a thing were to be a matter of policy—or a corporation tax reform bill or something of that nature? That would allow consideration of the issue in the United Kingdom context and in relation to Scotland, Wales and Northern Ireland, rather than as an adjunct to the Scotland Bill.

Alan Trench: Some sort of separate legislative vehicle would be a much better mechanism if we were to go about doing that. That would address the issues in a much wider context.

David McLetchie: Convener, can I ask a question about excise duty?

The Convener: Of course you can, but I am aware that time is moving on.

Alan Trench: I will try to be brief.

The Convener: John Mason wants to ask about borrowing, so I ask David McLetchie to be brief, too.

David McLetchie: You raise issues about the proposal to devolve excise duty, which has morphed into a much more limited proposal that there should be an assignation of estimated revenues from excise duties on drink that is consumed in Scotland. What do you think about that assigned revenues proposal as regards excise duty?

Alan Trench: As I said in my memorandum, I have become more of a fan of assigned revenues in relation to value added tax than I thought I used to be and certainly than the Calman commission and the Holtham commission were. Both commissions considered the idea of assignment of revenues with a degree of care, although they dismissed it quickly for reasons relating to the block grant and the system of consequentials.

I am far from sure that it would be appropriate in the case of Scotland, because the amount of revenue that comes from excise duties is pretty limited. According to GERS, in 2009-10, alcohol duties from Scotland amounted to about £816 million, which, in the context of total revenues of £42 billion and a Scottish budget of £28 billion, is a fairly insignificant amount of money.

As I understand it, the argument for devolution of excise duties is related to policy. It is about using tax as a means of increasing the price of alcohol in order to deal with drink problems. That perfectly proper social policy objective now appears to be being approached through the rather different and convoluted mechanism of minimum pricing—which, of course, enhances revenues for the sellers of alcohol, because they have to sell it at a price that may make them a higher profit than otherwise would be the case—along with the so-called supermarket tax, an enhancement on the business rate through which some of that higher profit can be recouped from the larger multiple retailers. That strikes me as a convoluted mechanism for achieving an understandable goal.

I would much rather see one get to the position where it is in the hands of the Scottish Parliament to decide which instrument it will use to tackle that goal. It seems to me that the duties on alcohol are a perfectly appropriate mechanism to use to do that, but the problem is that the excise system simply does not work that way. One must do something about how the tax works if one wants to get into the position in which the Scottish Government has the fiscal levers, as well as other policy levers, with which to deal with the problem of alcohol abuse.

David McLetchie: So, basically, if I understand your line of argument, you think that excise duty is unsuitable because of the way in which it is levied, but you favour the view that there might be some kind of sales tax that could have a similar impact on consumption.

Alan Trench: Indeed. It is easy to see how the use of excise duties—one of the effects of which is to inflate the cost of alcohol in the shops beyond the combined production, mark-up and distribution costs—becomes a more favourable approach, but although assigning a share of excise duties would marginally enhance Scotland's own-source

revenues, it would not give it the policy lever that is also being sought to deal with an understandable social policy concern.

The Convener: I know that John Mason has a strong desire to ask about borrowing powers.

John Mason: I was going through a list of things that I wanted to ask about. I will ask questions about just two more issues, if I may: borrowing powers and one other. I had intended to ask about HMRC, as well, but we have had some comment on that already.

The Convener: Could you combine the two areas that you want to ask about in a commentary?

John Mason: Okay. I will put everything into one sentence so that it is only one question.

Going back to the block grant as opposed to the alternative taxes, you seem to suggest that one of the disadvantages of the block grant is that it makes it harder for Scotland to have its own policies and so on. For example—this is the most obvious example—when health is protected in England, there is a pressure on the Scottish Government to protect health in Scotland. Much as we may all support the protection of health, that makes it more difficult for us to make our own choices. The other side of that issue is that, when fees are charged at English universities, it makes it harder for us not to charge fees here, because of a potential cut in the block grant. That is part A.

Part B, which may involve just a yes or no answer, is on borrowing powers. You talk about the limit on those powers. Our local authorities have prudential borrowing powers, which means that there is no limit and they borrow what they can afford. There are quite a lot of rules and regulations on prudential borrowing, which seem to work. Would you favour that model?

Alan Trench: The block grant is becoming more clearly problematic, because it is driven by the system of consequentials, whereby changes in shares of spending reflect changes in allocation in England for so-called comparable functions. That is fine when the structure of public policy is broadly the same across the various parts of the UK and, in particular, when money is rolling into the Exchequer and it becomes a mechanism simply for distributing extra resources, but neither of those is the case any more. We have Governments in Scotland, Westminster and Wales that have very different political compositions and different ideas about what public policy should be. That starts to create some quite significant difficulties when it comes to making choices, particularly when the revenues that are allocated are not increasing very greatly or are being reduced. That is one reason why I am keen to see a significantly greater reliance on own sources of revenue rather than the block grant.

The coalition in Westminster has an ambition to see a very different sort of welfare state from the one that has existed for a long time, and I suspect that that will cause some quite serious difficulties. We can see them appearing, in particular, in higher education. Before the coalition came into office, they were appearing through the system of deferred variable fees, and that is becoming all the greater now that English fees are going up so dramatically whereas the teaching grant has been slashed. That has fed through to the block grant, so Scotland must make a choice about how it will find the resources to fund its universities. The choice is much tougher than it was even five years ago.

I would love to feel comfortable endorsing the idea of prudential borrowing powers in the hands of the Scottish Government with no limit—let Scotland issue its own bonds, let Scotland bear the risks of those bonds and let the market sort that out. The problem is that significant spillovers come from that because the markets will assume that there is a UK guarantee, even if the legislation says that there is no UK guarantee whatsoever for Scotland-issued bonds. That could have all sorts of peculiar effects for the UK and, at an extreme, for the management of the UK economy as a whole. I would hesitate to draw parallels, but there is pretty good evidence that excessive borrowing by state governments in Brazil and Argentina has played a significant role in triggering economic crises.

John Mason: Does that mean that they borrowed more than they could prudentially afford?

Alan Trench: Absolutely.

John Mason: Whereas no council in Scotland has borrowed more under these powers. What would happen if Scotland was bound by the same limits?

Alan Trench: It depends what the rule is and who enforces it, but you will start to get into that sort of a system. The Australians dealt with this problem in the 1930s by setting up something called the Loans Council, which served as a major focus for intergovernmental disagreements for 10 or 12 years and then vanished from the scene. It still notionally exists and I suppose that it has a chairman who does nothing, but I do not believe that it is active at all. That is largely because the system has found another way of dealing with state-level borrowing.

John Mason: Okay. Thank you.

The Convener: May I come back to the international issues that Joan McAlpine was

discussing, which, as you told us, you also discussed in your blog? At the end of your memorandum, you say very strongly that

"the Parliament should decline to give legislative consent to this clause of the bill."

Alan Trench: In my view, it is a bad clause and it goes far beyond remedying the abuse with which it seeks to deal. In those circumstances, I do not think that it is an appropriate clause for the UK Government to have inserted or insisted on.

The Convener: You will also have heard the right hon the Lord Wallace—to give him his proper title—say that the bill is a package, however.

Alan Trench: Well, yes, and in that case it is a question for the committee to decide whether the mischief that that clause might cause outweighs the rest, and whether the bill actually is a package, given some of the statements that have been made by other ministers that seem to suggest that they were willing to consider amending specific provisions. Michael Moore has certainly suggested that on a number of occasions of which I am aware, although I cannot recall whether he said it directly in his evidence to you. I am therefore slightly puzzled about whether the bill is a package or not. If it is, why is it a package when the Calman commission's recommendations were not? The bill differs significantly from the recommendations that were made by the commission. It has added a number of provisions and subtracted certain things. We know about the provisions on air passenger duty and the aggregates levy, as well as the proposal for the assignment of a share of revenues from savings and investment income. Why does the bill become a package in the form it acquired on its entry into the House of Lords? I am unclear about that.

The Convener: Thank you for your attendance, which is much appreciated.

Alan Trench: You are most welcome—it has been a pleasure.

The Convener: We will now move into private session. May I ask anybody who is not on the committee to skedaddle?

19:15

Meeting continued in private until 19:17.

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