



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

DEVOLUTION (FURTHER POWERS) COMMITTEE

Thursday 12 March 2015

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DEVOLUTION (FURTHER POWERS) COMMITTEE
8th Meeting 2015, Session 4

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Duncan McNeil (Greenock and Inverclyde) (Lab)

COMMITTEE MEMBERS

*Linda Fabiani (East Kilbride) (SNP)

*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

*Alex Johnstone (North East Scotland) (Con)

*Alison Johnstone (Lothian) (Green)

*Lewis Macdonald (North East Scotland) (Lab)

*Stewart Maxwell (West Scotland) (SNP)

Mark McDonald (Aberdeen Donside) (SNP)

*Stuart McMillan (West Scotland) (SNP)

*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bill Kidd (Glasgow Anniesland) (SNP) (Committee Substitute)

John Swinney (Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Devolution (Further Powers) Committee

Thursday 12 March 2015

[The Convener opened the meeting at 09:31]

Devolution of Further Powers and Scrutiny of Draft Legislative Clauses

The Convener (Bruce Crawford): Good morning, colleagues. Welcome to the eighth meeting of the Devolution (Further Powers) Committee in 2015. I remind everyone about the usual convention mobile phones.

Mark McDonald will not be joining us today. It might be a couple of weeks before he is back. I do not know whether anybody has heard but, unfortunately, he had an accident and broke his leg.

Duncan McNeil (Greenock and Inverclyde) (Lab): Oh dear.

The Convener: Bill Kidd is here as his substitute.

Tavish Scott (Shetland Islands) (LD): Was Mark playing football?

The Convener: He was indeed.

Tavish Scott: That is an Aberdeen football game for you.

Duncan McNeil: Sympathy all round the table.

The Convener: Now that we have had that little bit of muttering, we will move on to agenda item 1: the proposals to devolve further powers to Scotland and scrutiny of the United Kingdom Government's draft legislative clauses.

I welcome John Swinney, the Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy, to the meeting. The Deputy First Minister has with him Sean Neill, acting deputy director of finance in the fiscal responsibility division; Donald McGillivray, deputy director, elections and constitution; and Stephen Kerr, head of social security policy and delivery.

For the information of our witnesses, I point out that we have our three advisers with us today: Christine O'Neill, Heidi Poon and Nicola McEwen.

We have only two hours. As I said to my colleagues earlier, let us try to make our questions succinct. Deputy First Minister, if you could do the same with your answers, that would be most

helpful. Would you like to make an opening statement?

The Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy (John Swinney): I will make a brief opening statement. I am grateful for the opportunity to set out for the committee the Scottish Government's response to the draft clauses that have been published by the United Kingdom Government to devolve further powers to the Scottish Parliament. Following the publication of the draft clauses on 22 January, I made a statement to Parliament on 27 January. I have also written to the committee, setting out the Scottish Government's views on a number of Smith commission-related issues.

The Scottish Government does not believe that the Smith provisions go nearly far enough, but they are nevertheless an important step in providing the Parliament with further levers to improve the lives of the people of Scotland. The Scottish Government's objective now is to develop a bill that commands broad support and that will be ready for introduction as soon as possible after the UK general election in May.

There are a number of areas that the Scottish Government wishes to be improved. I have set those out previously, but the key areas include employability programmes, the power to create benefits and the degree to which some clauses require consent from a UK secretary of state.

As well as draft legislation, the UK Government command paper sets out a discussion of various aspects of the proposed fiscal framework. That will be a key element of the package. I met the Chancellor of the Exchequer on 2 March to progress that aspect of the work. I was encouraged by the fact that the command paper recognised the need to proceed by negotiation and agreement in this area.

My objective is for work on the proposed legislation and the fiscal framework to proceed in parallel, so that both will be ready before the Scottish Parliament is asked to pass a legislative consent motion in the spring of 2016.

The reality of dissolution at Westminster on 30 March means that time is now short to make progress on the draft clauses with ministerial input. The Scottish Government has been pressing for progress in key areas, such as the clauses on employability programmes, but we have no commitment to date from the UK Government that there will be any movement on those matters before the election. However, we continue to take forward those discussions.

I am very happy to discuss those issues with the committee.

The Convener: We had a quick discussion before you arrived about how we were going to deal with this question session. We will start off with welfare and then move on to tax and borrowing, the Crown Estate and constitutional and intergovernmental relations.

Normally I would ask an opening question, but I want to get straight into the meat. Stewart Maxwell will open up on welfare issues.

Stewart Maxwell (West Scotland) (SNP): I wish to start with a general question on whether the draft clauses reflect the spirit of the Smith commission recommendations. You will be aware of a number of quotes from a number of organisations. For example, the Scottish Trades Union Congress has said:

"it is already clear that in key areas such as welfare ... the recommendations will not match the intentions of the Smith Commission proposals."

Paul Spicker, professor of public policy at Robert Gordon University, was before the committee recently. He has written:

"It all falls some way short of even the rather restricted settlement in Smith. This is not what was promised."

What is the Scottish Government's view of the clauses in general terms in relation to what was recommended by the Smith commission? Are there any particular areas where you agree that they do not match up to what was in the Smith report?

John Swinney: It would be fair to say that there are different positions regarding some of the different clauses that the UK Government has set out in its command paper. Some clauses either come very close to fulfilling, or do fulfil, what was expected by the Smith commission, but there are a number of instances where we do not believe that to be the case, and we have made representations to the UK Government.

I will highlight the cases where we think the commitments have been fulfilled. We think that that is the case in relation to elements of paragraph 49 of the Smith commission report, on

"Benefits for carers, disabled people and those who are ill"

and

"Benefits which currently comprise the Regulated Social Fund".

We believe that those commitments have been properly translated into draft legislation. That is also the case in relation to paragraph 51 of the report, which is about allocating to the Parliament

"autonomy in determining the structure and value of the benefits at paragraph 49",

to which I have just referred.

We do not believe that the Smith commission proposals have been properly translated into detailed legislation in relation to clauses 20 and 21 of the draft Scotland bill, on universal credit; nor in relation to the power to create new benefits, under draft clause 18; nor in relation to paragraph 55 of the Smith commission report, which provided for

"benefits or discretionary payments introduced by the Scottish Parliament"

providing

"additional income for a recipient".

We also have issues with the arrangements that are being put in place for the employability programmes.

That is a fairly comprehensive summary of where we think the terms of the Smith commission have been translated into the detail of the draft clauses and the areas where we need to have further dialogue to make improvements.

Stewart Maxwell: Thank you—that was very helpful.

Before I move on to the general powers to create new benefits, which you mentioned—referring to draft clause 18, I think—I wish to ask for a quick response on the argument that has been taking place on whether vetoes have been put in place by the UK Government over some of the areas that are supposed to be getting devolved.

John Swinney: This gets to the nub of one of the points that I made in my opening statement, on clauses 20 and 21 in particular, which require agreement from the secretary of state on changes made by Scottish ministers in relation to universal credit. That is an area of particular difficulty in the command paper and the draft bill. It is not terribly difficult to foresee how what appear to be pretty innocuous requirements to consult the secretary of state and secure his or her agreement could be translated into what is essentially a blocking power, because all sorts of excuses could be used to prevent something from happening. Our concern is that how clauses 20 and 21 are drafted conveys the ability of a UK minister to prevent the Scottish Government from doing something. If that minister has a reasonable explanation for why they are doing that, that passes the test in the clause, which to me therefore gives the UK Government the ability to veto a decision that the Scottish Government and Scottish Parliament have taken.

The UK Government contends that the arrangements in clauses 20 and 21 are about administrative operation and efficiency and all the rest of it but, having just spent a couple of years of my life trying to make progress on the block grant adjustment and being stalled and delayed with

more analysis—before I knew it, two years of my life had passed—it seems to me that the clauses present a serious impediment to the ability of the Scottish Parliament to exercise the powers that were envisaged by the Smith commission.

Another important point of principle is involved about the proper definition of devolution. To me, devolution involves passing over the power to the Scottish Parliament to do with as it sees fit. It is not about the UK Government saying, “We’ll pass over the power, subject to our agreeing that it is all fine for it to proceed.” That is not devolution, as it retains control in the UK Government in the form of a veto and the ability to say, “Actually, we don’t approve of what is happening here and we’ll find some way of preventing it from happening.”

In the interests of clarity and so that we have a clear and well-understood devolved settlement and devolved arrangements, the clauses need to be revisited.

Stewart Maxwell: I assume from that that you think that there is at least the potential for any changes that a future Scottish Government and Scottish Parliament wish to make to get bogged down in serious delaying discussions, shall we say, and there is the possibility that the will of the Scottish Parliament could be blocked by a future UK Government.

John Swinney: Yes, that is entirely possible.

Stewart Maxwell: I will move on to the general power to create new benefits, if you do not mind, convener.

The Convener: Before we move on, I want to tease out that issue a bit more. I hear what the Deputy First Minister says about the clauses, but I think that he would recognise that the UK Government could be faced with a potential change that has significant technical or financial implications relating to information technology or other such areas, and that a mechanism needs to be in place in any future settlement to allow discussions on such issues between the Scottish and UK Governments.

John Swinney: I accept that there is a need for proper administrative arrangements. For example, on the devolved taxes of land and buildings transaction tax—I should call it stamp duty land tax, which is what was being devolved—and landfill tax, we have gone through clear administrative arrangements with the UK Government and with various agencies of Government such as Her Majesty’s Revenue and Customs and Revenue Scotland, and we are now at the point at which agreement has been reached between the Governments and all the practical arrangements are in place so that the UK Government can now proceed to switch off stamp duty land tax and landfill tax in Scotland with effect

from 1 April and I will be in a position to switch on land and buildings transaction tax and landfill tax. All those arrangements are proceeding to operational implementation in a completely orderly fashion, as I indicated to Parliament would be the case. Therefore, it is entirely possible to do that on an operational and administrative basis.

Crucially, the approach that I have taken with land and buildings transaction tax is fundamentally different from the original stamp duty land tax that was being devolved. Of course, the UK Government has now mirrored the reforms that I put in place, but the approach that we are taking with that tax is completely different from what came before. I was free to take that different approach, but there was the ability to put it in place in an orderly administrative fashion, so the administrative and operational arrangements can be perfectly well taken forward in dialogue with the UK Government. What the command paper provides, however, is a statutory ability for the UK Government to prevent us from doing something in an area in which we all believe—and all of us who were on the Smith commission believed—that the Scottish Government should be able to exercise that discretion.

09:45

The Convener: Was that done through the mechanism of the joint Exchequer committee, or through a different mechanism?

John Swinney: I suppose that, in principle, the joint Exchequer committee oversaw that, but there was then an intergovernmental assurance board, in which my officials and UK Government officials were full participants, and the point of comfort that the arrangements could be switched off in the UK and switched on in Scotland was reached only because the intergovernmental assurance board said that it was confident of the arrangements that were now in place.

The Convener: That terminology, “intergovernmental assurance board”, is certainly new to me. It would be useful to get some information about that so that the committee can see as much of what has been done as transparently as possible.

John Swinney: We are happy to share that with the committee. It is an intergovernmental mechanism that enables us to do the detailed work that has got to be done to ensure that things can be changed and to effect the political choices made by ministers.

The Convener: I think that Stewart Maxwell’s next questions are on a slightly different area.

Stewart Maxwell: They are on the power to create new benefits.

The Convener: I will take a couple of supplementary questions first.

Duncan McNeil: I have a question about the general proposition. In the stage of devolution that we have come from, the administration of the health service, for example, was already being dealt with in Scotland, so the devolution of the health service in Scotland was relatively easy. The Smith commission recognised implicitly that, as we devolve further and get greater opportunities and risks through further devolution of areas where responsibilities are shared, it raises challenges. Was it not completely to be expected that there need to be new arrangements about how we share the devolution of welfare? Was that not implicit in the Smith agreement when the issue of better working arrangements between Governments was highlighted? Why would it be a surprise, and why is a reasonable request for Governments to work more effectively together described as a veto? It is entirely possible to overcome that and to reach an agreement, just as it is entirely possible to get into a negative situation. Both scenarios are possible.

John Swinney: Let me put on record the Scottish Government's commitment to work constructively in an intergovernmental fashion. I have just relayed to the committee how, on the devolution of land and buildings transaction tax and landfill tax, it has been a completely orderly process, with the exception of the block grant adjustment, which has been a bit fraught, but that involves money and most things that involve money are fraught. That has been done, and I commit myself and the Government in general to good intergovernmental working on those questions. There are a lot of examples of where that takes place.

The difference with clause 24 is that it essentially provides a statutory backstop for a UK secretary of state to prevent something from happening. As long as they can present that as reasonable, it is their entitlement to do so. That is not, in my view, in the spirit of the type of intergovernmental working that Mr McNeil referred to in his question. If there is an acknowledgement that there has to be joint working to co-operate and implement that, I would not be making an issue of it, but clause 24 gives a UK minister the ability to stop something that the Scottish Parliament may consider should happen in that area, if they can present reasonable expectations.

Duncan McNeil: Is the UK Government refusing to move from that position? Have we engaged with it to make our view known strongly? Are ministerial meetings taking place?

John Swinney: There has not yet been movement on that question in discussions at either official or ministerial levels, but we will continue to

pursue the matter as part of our work in discussions with the UK Government. We have raised with the UK Government the content of the clauses.

Lewis Macdonald (North East Scotland)

(Lab): Duncan McNeil talked about things being implicit in the Smith commission report, but does the report not explicitly state, in the paragraphs that relate to universal credit, that the Scottish Government will be given the administrative powers to change the frequency of universal credit payments? Paragraph 43 says:

"Universal Credit ... will remain a reserved benefit administered and delivered by the Department for Work and Pensions ... Within this framework, the Scottish Parliament will have the powers outlined"

If that is the case, the Smith agreement says that universal credit will be devolved within a framework of overall reservation. The requirement that it should be a shared benefit, rather than wholly devolved, as you would have wished, is quite clear in the agreement.

John Swinney: It comes down to a pretty simple concept: we will either be able to or we will not. Will we be able to do it? We will only if we have the agreement of a UK secretary of state. To me, that is not devolution of administrative responsibility without a veto.

Lewis Macdonald: Surely the point of devolution from the outset, in the very first Scotland Act, and in the Smith agreement, is that it is not a simple choice between an area being wholly devolved or being wholly reserved; there are a number of areas in which executive powers are devolved and legislative powers are reserved. The Smith agreement seems to say that universal credit is reserved and that anything that is done in relation to it is done within that context.

John Swinney: The Smith agreement is quite clear that there should be the ability to vary the provisions according to the will and wishes of the Scottish Parliament. Clause 21 says that such variation will be subject to a decision by a UK secretary of state, who could stop that happening. That is not consistent with the Smith commission agreement.

Lewis Macdonald: Do you not accept that the Smith commission explicitly says that

"Universal credit ... will remain a reserved benefit"?

John Swinney: Of course I accept that universal credit will remain a reserved benefit, but if a power is being devolved to the Scottish Parliament and we cannot actually use it, because we have to secure the agreement of a UK secretary of state, then no power is being devolved. We should not try to suggest that a power is being devolved if it is not being devolved.

Lewis Macdonald cannot have it both ways; on the one hand, he is trying to sustain the argument that a power is being devolved—he will tell me that in the chamber—but he is also now saying to me, “Well, of course you’ve got to accept that the UK Government has to be able to decide, because it’s a reserved benefit.” Which is it? It is either devolved or it is reserved.

Lewis Macdonald: I am putting it to you that whether or not you like what you have signed up to, that is what you signed up to. Perhaps it is you that is trying to have it both ways, because the Smith agreement is clear about what is being devolved.

John Swinney: No—I am not trying to have it both ways. I am trying to ensure that the commitment that was given, which was that the ability to vary the terms of universal credit would be allocated to the Scottish Parliament in order to enable the Scottish Parliament to make those decisions—will be fulfilled. Lewis Macdonald has suggested to me that it is acceptable for the UK Government to constrain that ability—to veto it. That is not acceptable to the Scottish Government.

Lewis Macdonald: I am not suggesting any conclusion. I am simply trying to draw out your understanding of the agreement to which you signed up.

John Swinney: I am absolutely crystal clear about what I signed up to: I signed up to the Scottish Parliament being able to vary the terms of universal credit. I am now being asked to accept a clause that gives the UK Government a veto over that. I am simply saying to the committee that that is not consistent with what I signed up to in the Smith commission. I have the advantage over Mr Macdonald in that I was in the room with the Smith commission along with my friends Linda Fabiani and Tavish Scott. I cannot speak for others—maybe they will speak in a moment—but what I describe was the intention of the Smith commission.

Tavish Scott: My memory has got very blurred at this moment. [*Laughter.*] Mr Swinney described the intergovernmental discussions very fairly.

I wonder whether I can risk a factual question. Since the welfare clauses that Mr Maxwell has rightly raised this morning were published, how many ministerial meetings and how many official meetings have there been to go through the issues that you have discussed, and how many are planned to take place before purdah? The answer will help us to get a feel for the engagement.

John Swinney: There have been two formal meetings of a ministerial working group on welfare issues. One was yesterday and one was a few weeks ago, during the February recess, and for

which I was in London. I should also have participated in the meeting yesterday, but was involved in chamber business, so Alex Neil, Roseanna Cunningham and Joe FitzPatrick represented my interests at it. If my memory serves me right, there was at least one other preparatory meeting between Mr Mundell and Mr Neil in advance of the two formal meetings.

I would need help to tell you how many meetings of officials have taken place, but there have been a number of discussions and videoconferences to try to advance the arguments.

Tavish Scott: I take your point about the UK general election, but are more meetings planned before purdah kicks in in London?

John Swinney: I can certainly commit to official discussions. By the end of March, ministers will be entitled formally to be involved in election matters full-time. In advance of that it will become more difficult to engage at ministerial level, but the commitment has been reached.

One of the points from my discussion with the chancellor on 2 March is relevant. This strays into wider territory, but I think that it will help to reassure Tavish Scott. The chancellor agreed with my recognition that he has an election to fight in which I may—who knows?—also have a passing involvement. We agreed that our officials would progress many of the substantive discussions on the fiscal framework in order to try to ensure that, by the time ministers are able to re-engage after the UK election, as many issues as possible have been either wrestled with or identified and evidenced. That will mean that ministers can engage in the discussions at a more advanced stage so that we do not—to put it bluntly—lose six to eight weeks of the process. As much official work as possible will be done to create a platform for decision-making by ministers.

Tavish Scott: I am grateful for that answer. An illustration of how many meetings have taken place at official level—not what goes on at them—would probably be helpful.

John Swinney: Certainly. It might be helpful if we provide that information on meetings across the whole range of provisions, because that type of dialogue will have been happening on all subject areas.

Tavish Scott: That would be helpful.

The Convener: Thank you for that. Alex Johnstone has a supplementary question. After that, we will go back to Stewart Maxwell.

Alex Johnstone (North East Scotland) (Con): Tavish Scott moved into the area that I wanted to deal with, but I have a couple of extra questions. First, has the joint ministerial working group

proved to be an effective mechanism for dealing with the type of disputes that you described?

John Swinney: We need to be careful with our terminology: they are not “disputes”. They are examples of our properly engaging to try to ensure that we get the best outcome in implementing the Smith commission proposals. I know a dispute when I see one—I have been involved in a few.

Alex Johnstone: Has the UK Government proved to be open to discussion on those areas?

John Swinney: The UK Government is certainly open to discussion, but I cannot report to the committee that we have reached a point of conclusion at which we have got the UK Government to change its mind.

The UK Government published the clauses in January and is consulting on them. It is talking to us and to stakeholders from a wide variety of areas. Mr Maxwell highlighted in his questions some of the issues that stakeholders have raised about the clauses, some of which are similar to the points that I would argue.

We are in a period in which the United Kingdom Government is considering the questions. We have not got to the conclusions of those discussions and nothing has been closed down in that process. In reality, and given my answer to Tavish Scott of a moment ago, many of the issues will not now be resolved until ministers re-engage after the Westminster election.

10:00

At a meeting on welfare yesterday, a number of points and different questions were discussed and Mr Mundell agreed to consider them. Whether we have a substantive response by the time the United Kingdom Parliament is prorogued is a different matter. Nothing has yet been closed down in the process.

Alex Johnstone: Having asked whether the UK Government is open to discussion of those matters, I am tempted to ask whether you are, too, but I will not go that far. Is the mechanism effective or does it need to be developed beyond its current status in order that it can begin to deliver the decision-making process that we need in order to make this work?

John Swinney: My view is that such issues are, ultimately, only ever sorted out at political level between ministers—we can have whatever “mechanism” we want. I will illustrate what I am saying using the block grant adjustment. When Bruce Crawford was in the Government, he and I started off the joint exchequer committee so that we could discuss the block grant adjustment. We had processes, all the means of resolving issues and all the evidence work and research that was

done by our officials: ultimately, however, the resolution came down to a 15-minute conversation between the Chief Secretary to the Treasury and me. Such questions will be resolved politically by ministers, as long as there is willingness to do that.

I want to record that the Scottish Government’s approach is about simply trying to ensure that what we consider came out of the Smith commission is turned into legislative reality. I made the point at the Finance Committee that we are not in the process in order to extend what was in the Smith commission report or to get things into the process that were not agreed; we are simply trying to get into legislation what the Smith commission conceived in the agreement.

Alex Johnstone: I will close with the observation that I agree entirely with what the cabinet secretary says; ministerial agreement is the secret success in this area. However, I find it hard to interpret how this committee can monitor that and work with it.

The Convener: That is part of our job. Next week we are having a meeting to discuss intergovernmental relations. That will allow us to get under the skin of the issue.

Stewart Maxwell: I want to take us back to draft clause 18, if I may. We have had a reasonable amount of evidence on the ability, or power, of the Scottish Parliament to create new benefits. My understanding is that the Smith commission agreed on

“new benefits in areas of devolved responsibility”

but draft clause 18 seems to be about new benefits or to be restricted to areas whose devolution is being discussed. It is not about new benefits across all areas of devolved responsibility. Does the Scottish Government agree with the clause or some of the evidence that we have received on whether the clause actually meets what was laid out in the Smith commission?

John Swinney: I do not think that draft clause 18 meets what was set out by the Smith commission. Within the commission, there was quite an explicit discussion on this point of distinction: whether the issue was the creation of the ability to establish new benefits in the areas that were being devolved, or

“in areas of devolved responsibility”.

My clear recollection is that there was agreement around the creation of new benefits in areas of devolved responsibility. To me, that should shape the clause, but that is not what happened.

Stewart Maxwell: Thank you for that. Is there any scope to amend the draft clauses, or is there a

serious problem that means that they would have to be completely redrafted?

John Swinney: The clauses might have to be entirely redrafted, but we should not consider that to be a gargantuan task. There might be ways of revising the wording in order to fulfil the agreement that I believe was reached by the Smith commission, or it might be that we have to draft other wording.

To go back to my earlier point, the current period, when ministers from the UK Government are not as closely engaged in the process because of election issues, would be a good opportunity to do that drafting, so that when UK ministers come into office after the UK election, we can reach agreement on that point. Obviously, there is drafting capacity within the Scottish Government; we would be only too happy to work collaboratively and to take such an approach.

Stewart Maxwell: Is it the Scottish Government's view that the draft clauses could be implemented and incorporated without removing the general reservation on

"assistance for social security purposes"

that is in schedule 5 of the Scotland Act 1998?

John Swinney: Realistically, it is inconceivable that the UK Government will remove the reservation in schedule 5. To be practical about it, in the context of the UK Government, I cannot think of lines of argument that I might advance that would get me very far in that respect.

We have to ensure that sufficient space and scope are carved out so that the policy position that was envisaged by the Smith commission can be delivered in the context of a reservation of social security functions in schedule 5.

Stewart Maxwell: I have a concern on which I would like to hear your view. If we do not resolve the disagreement on clause 18 about whether it relates to areas of devolved responsibility or to new benefits in areas that are about to be devolved, is it the case that the Scotland Act 1998 will, in effect, govern the position, which will mean that the areas that are currently reserved will be the de facto position, and the areas of devolved responsibility in the Smith commission report will not happen?

John Swinney: That would, of course, be the case. Members should be fully aware of the difficulties and the limitations that are associated with the reservation on social security provisions. I can think of one particular issue that has stretched us significantly in trying to resolve policy questions. With regard to the council tax reduction scheme, the social security reservation was a significant impediment to the Scottish Government's being able to work with our local

authority partners in ameliorating the reduction that was applied in council tax benefit by the UK Government. We were able to do so, but it was a major impediment, and we should not underestimate the significance of that reservation in relation to handling legitimate aspirations of the Scottish Government and the Scottish Parliament. That is why, in my previous answer to Mr Maxwell, I made the point that it is vital that sufficient scope is carved out of that reservation to enable us to create

"new benefits in areas of devolved responsibility",

as the Smith commission envisaged.

Bill Kidd (Glasgow Anniesland) (SNP): When the Scottish Parliament introduces new benefits or discretionary payments, we obviously do not want to rob Peter to pay Paul. We are already seeing the Department for Work and Pensions claw back money through deductions from existing benefits and payments at the UK level. How can we be sure that the legislation explicitly guarantees that new benefits can be delivered without the fear of deductions and clawbacks?

John Swinney: The problem is that the command paper indicates that there is no legislative provision in the Scotland Act 2012 to enable individuals to gain the benefit of any new benefit provision without losing any existing benefit provision. That is not put into legislative form, and the UK Government says that it will consider the matter case by case. Again, Smith made it crystal clear that, if a new benefit is created, it should not be used as a device to reduce any other existing benefit that the UK Government provides.

The legislation could involve a Scottish welfare provision disregard, which would make explicit a guarantee that, in all circumstances in which the Scottish Government and the Scottish Parliament decided to act in that area, the individual would be protected from loss of benefits as a consequence.

Bill Kidd: In evidence to the committee, Paul Spicker, among others, expressed concern that existing devolved competence in that sphere could be diluted. Clauses in the bill may exempt provision for discretionary payments to people who have been subject to a benefit sanction, unless their need is exceptional, immediate and short term. The Scottish welfare fund, which also exists to deal with such circumstances and works successfully, could be superseded, and undermined, by the UK Government's new benefits system. Is there any provision to ensure that new benefits that are introduced will not have an effect in that way?

John Swinney: It is important that we translate the principle of what the Smith commission proposed into legislative reality. We should ensure that, as Smith envisaged, individuals should gain

the benefit of any additional benefits that the Scottish Parliament puts in place. We should legislate for that, so that there is absolute protection to prevent those new benefits from resulting in any consequential loss for individuals.

It would be fair to say that, at present, there is legislative provision to protect Scottish welfare fund payments from any such netting-off—if I can call it that—by the UK Government. We should simply ensure that, in order to guarantee that the Smith provisions are turned into legislative reality, those provisions are put in place for any new benefits that would be envisaged and applied by the Scottish Parliament.

Bill Kidd: That is very reasonable.

The Convener: I think that Linda Fabiani was trying to catch my eye.

Linda Fabiani (East Kilbride) (SNP): Yes—I have a supplementary. I want to make it clear that the issue is not just new benefits but top-ups for existing benefits. I would have some concerns about a Scottish disregard. First, would the systems that are in place for the UK Government's change to universal credit, personal independence payments and so be able to cope with such a disregard? Have there been discussions on that?

Secondly, it seems that some of the provisions in the draft clauses, such as the provision on direct housing payments, do not reflect the spirit of what was discussed during the Smith talks, and there is no ability to make any changes.

What I am trying to get at is that we need to look at the whole picture. We seem to be talking about having only the administration benefit for some benefits, rather than being able to make changes and top the benefit up, and there seem to be issues even at this late stage, given that we are talking about the potential for a Scottish disregard. How far down the road are we in trying to achieve what was applauded in the Smith agreement by so many people and put out there as something that is already happening?

10:15

John Swinney: We are at a fairly critical point in the process. When the United Kingdom Parliament reconvenes, the bill will need to make very early progress if it is to complete the parliamentary processes in Westminster and attract a legislative consent motion in this Parliament before the Scottish Parliament rises for the 2016 parliamentary election.

My view is that the space to influence that process is between now and the point at which the bill is introduced in the House of Commons after the UK election. Thereafter, it will be much more difficult to amend the process and to amend the

substance of the bill. I take at face value that the UK Government says that it is consulting on the provisions, and I hope that that means that it is open to considering the issues that are being raised.

The advantage of the very detailed scrutiny that the committee is undertaking, and the dialogue that is being facilitated, is that it is able to reach a range of individuals who participated in the process. I am talking not just about Linda Fabiani, Tavish Scott and I and our colleagues on the Smith commission, but about those who made representations to the Smith commission, who have subsequently engaged with the UK Government on many of the questions and who would share many of the points that I am expressing today.

It is important that that is all considered, consumed and listened to by the UK Government, and that changes to the clauses are introduced in advance of the bill coming to the UK Parliament after the 2015 election.

The Convener: We need to move on—if we do not get on to taxation and borrowing now, we will not do so. I apologise for having to cut the discussion short. We need to make our questions and our answers a bit sharper, and I will try to lead by example.

Cabinet secretary, what discussions have you had with the UK Government around the fiscal framework, and what progress has been made?

John Swinney: I met the Chancellor of the Exchequer on 2 March to discuss how we would take forward the fiscal framework. We acknowledged that the timing of the election was going to interrupt ministerial engagement on the question, and we agreed that a process would be led by senior Treasury and senior Scottish Government officials to take forward the detailed work on the fiscal framework that will be necessary to enable ministerial engagement and discussion after the election. That was agreed on 2 March; there have already been discussions between Scottish Government and Treasury officials on the question, and various further discussions are to take place.

The Convener: We discussed purdah and the impact on discussions between ministers. I understand that, but I am assuming—I think that I am right to assume—that, despite the fact that there will be no ministerial contact, there will, throughout the period of the general election, still be opportunities for officials to develop the whole process further.

John Swinney: I should have made that explicit—that was the very point that the chancellor and I agreed on. We wanted to make sure that as much of the groundwork on the fiscal

framework that could be undertaken was undertaken. We want officials to marshal the evidence and to get a sense of how we can resolve some of the issues and of what arrangements can be put in place so that when ministers interact after the UK election, the discussions are not where they are today. We want to ensure that the evidence and the detail are gathered together so that as much of the ground that can be closed off is closed off by the time ministers engage after the election.

The Convener: That is quite helpful, because it means that there is no inertia in the system and that activity is still going on. Therefore, there is still the opportunity for those who want to influence the outcomes to do so.

As far as the committee and the wider Parliament are concerned, transparency on what the fiscal framework will look like will be hugely important to us. What assurances can you give us that we, the Finance Committee and the Parliament in general will be kept informed of how that is developing? We will face the crucial issue of whether agreement can be arrived at before we are presented with an LCM next February. What is your view on that?

John Swinney: To be honest, I think that it is quite difficult territory.

The Convener: That is why I am asking about it.

John Swinney: Thank you for that helpful remark, convener. It is always nice to be encouraged.

If I look back at the block grant adjustment discussions, for the best part of two years I said to Parliament that discussions were on-going on the matter. I did not feel that I could say, "They've said this and I've said that." To put it bluntly, I think that acting in that way removes the scope for ministers to come to some form of compromise. Ultimately, the agreement that was reached on the block grant adjustment was a compromise between the Chief Secretary to the Treasury and me on two different numbers—£524 million and £461 million. We settled halfway at £494 million.

Tavish Scott: It was an issue of principle.

John Swinney: We reached agreement in a very well-evidenced fashion and after detailed consideration, as you would expect. We agreed on a figure that was halfway between our starting points. That involved compromise on both our parts—I acknowledged that and the chief secretary acknowledged that. Although I want to be as open as I can be with Parliament, I must be honest and say that being as open as possible about all the steps in the process creates difficulty, because it might restrict the room for compromise.

The Convener: Do you accept that this committee, the Finance Committee and the Parliament will need to be absolutely clear about what the agreement is before any LCM is agreed to?

John Swinney: Yes. There has to be a fiscal framework in place that is acceptable to Parliament before any LCM can be agreed to. It is in no way possible or plausible for an LCM to be agreed to without an agreed fiscal framework that is to the satisfaction of Parliament being in place.

Duncan McNeil: I saw the civil servants who are with you look a bit crestfallen when you dismissed their efforts and implied that all that was needed for agreement to be reached was a 15-minute meeting between ministers and that anything that went before it was unnecessary. Your officials appeared somewhat diminished at that point.

John Swinney: If that were the case, it would certainly slim down the civil service.

Duncan McNeil: I am sure that the point that you made was important, but it is important from the point of view of understanding and transparency that we know the terms of reference for the engagement process, the types of issue that will come up, the rules of engagement that will apply, how the facts, figures and analysis will be agreed, and how neutrality can be ensured so that we can make a judgment about the statements that the UK Government, or indeed the Scottish Government, will make in public. Public statements have been made about the difficulties that have been experienced, whereas that was never the case in relation to your dealings with local government on the concordat. Everyone accepted that those were closed meetings, and any difficulties were resolved in private through access to the appropriate people.

We just want to be sure about the terms of reference and what information committees of the Parliament will be able to get about the process. If committees are to have a real understanding of the negotiations, a certain level of information must be available to them and subsequently to people outside.

John Swinney: I do not in any way want to appear as if I was trivialising the issue by making that remark about a 15-minute conversation. I was saying that, ultimately, that was the point of agreement.

Duncan McNeil: I understand that.

John Swinney: However, Mr McNeil makes an absolutely fair point about understanding the issues that are involved and the topics that are being considered, whether that is borrowing, the application of the no detriment principle,

administrative arrangements or cost arrangements—all those questions will be material to a fiscal framework. I do not see any issues with all that being shared with committees. Obviously, an evidence base will be gathered and, subject to dialogue with the United Kingdom Government, we should be as open as possible about the evidence base part of the exercise that civil servants will have to carry out—I say that just to reassure them that they will have things to do in the intervening period.

The civil servants have to try to work their way through all the possible evidence that could be considered to do with resolving just one question in the fiscal framework, and there will be many such questions to be resolved. The civil servants have to marshal the evidence, test it and get it to a point at which they can extract the issues that ministers need to resolve so that, after the election is out of the way, ministers can consider the evidence and see what those issues are. We should be open to considering how much of that evidence can be shared with parliamentary committees to ensure that they have confidence in the process. Although there was a 15-minute discussion on the block grant adjustment, a lot of detailed work went into evidencing both propositions. Ultimately, we had to resolve the issue, and we did that by deciding on a figure that was in the middle. There was plenty of evidence that supported a block grant adjustment of £526 million and plenty of evidence that supported a figure of £461 million. We came to a political agreement about what was reasonable within that.

Subject to reaching an agreed position with the United Kingdom Government about how comfortable it is with information sharing with committees, I am keen to be as open as possible about the process, because I acknowledge the importance of the Parliament being satisfied that a robust fiscal framework is in place.

Alex Johnstone: I will try to rush through my questions, to please the convener.

My first question is on taxation. We have seen what has been described as gaming around tax, such as what happened with stamp duty. With the Scottish rate of income tax, how can accountability and transparency be achieved to avoid continuous gaming in future?

John Swinney: That is a general issue, because it relates to the parliamentary processes of this institution versus the parliamentary processes of the Westminster Parliament. Obviously, our budget process is different from the UK Parliament's. By agreement with the Finance Committee, I am required to set out a budget by 20 September, to consult on that for an eight-week period ideally, or maybe even a 12-week period, and then to come to Parliament to legislate for it

over three successive weeks. The chancellor can stand up at 12 o'clock and announce something that then takes effect at midnight or even earlier. We operate in two very different spheres of parliamentary accountability. I have worked consistently within the parliamentary framework that has been put in place here, and I have no desire to change it, but we have to acknowledge the risk that there is a potential for gaming to take place as a consequence of the different parliamentary arrangements that are in place.

Alex Johnstone: Let us talk about the specific example in which you acquire the right to define rates and thresholds, but not the power to define the tax base, which could change quite radically. How would a future Government build contingency into the budgetary function to create a buffer against any unexpected variations?

10:30

John Swinney: That question takes us into some of the substance of the fiscal framework and the interpretation of the term "no detriment". I can easily see how there could be detriment to the Scottish tax base as a result of a decision taken by the chancellor on income tax that affected issues beyond my control and which as a result affected income tax take in Scotland. The issue of detriment would arise as a consequence of those actions, and the fiscal framework would be material in determining such points.

That example relates to no detriment, but there are other protections that we have to think about. First, we need to think about establishing a cash reserve to deal with the fact that a much more significant part of our budget will be dependent on a revenue stream that will require predictions to be made and with the volatility around all that. Secondly, there must be an acknowledgement that we might require revenue borrowing to provide us with the capacity to deal with any fluctuations that affected us significantly. Those aspects are material to agreements on the fiscal framework.

Alex Johnstone: The proposed changes to income tax come on top of a set of changes that we have agreed but which are still to be implemented. We have spoken to accountants who are at an advanced stage of preparation for the next set of changes, and they see the subsequent set of changes as something that they will have to build on top. What kind of timescale do you see for the implementation of the proposed changes? What can and needs to be achieved?

John Swinney: I am working on the assumption that we will be able to reach agreement on all questions for the Scotland bill to be passed by spring 2016. In April 2016, the Scottish rate of income tax, which is being introduced as a result

of the Calman proposals, will begin to take effect. Given that the proposals envisage a two to three-year transition period or assurance about the sums that would be raised by a Scottish rate of income tax, we will be in a transition period in that respect for at least two or three years.

I cannot give Mr Johnstone a definitive idea today about when I would see the full tax powers being implemented. My preference is to move as quickly as we can towards the full provisions envisaged by Smith instead of having a long period for the implementation of the Calman proposals, but we would have to test out the detail to determine how readily that could be translated into practical reality. Obviously, it is dependent on interaction with HMRC, as it will collect the Scottish rate of income tax under both the Calman and Smith scenarios.

Alex Johnstone: I had intended to ask about borrowing but perhaps other members want to raise other tax issues.

Tavish Scott: Deputy First Minister, is the cash reserve that you mentioned to Mr Johnstone a new financial line that you think is needed, or which will be put in place in your accounts, because of the changes that are envisaged as a result of the transfer of powers?

John Swinney: The cash reserve provision comes in as a consequence of Calman. Under the current pre-Calman arrangements, I am prevented from carrying a long-standing reserve; the only reserve function that I have is the ability to use the budget exchange mechanism to carry forward about £190 million of expenditure from one year to another. The Calman proposals have changed that to enable us to put resources into a cash reserve, which we can use to protect ourselves against volatility as a result of some of the tax changes that are being implemented.

The reserve is a Calman arrangement, but a more apposite issue that emerges out of the Smith commission is the access to revenue borrowing. I stand to be corrected on this point, but once the resources are put into a cash reserve, they can be used only for mitigating volatility. As a result, I could not put money into the cash reserve to mitigate volatility and then spend it on, for example, new roads in Shetland.

Tavish Scott: Which would be very welcome.

John Swinney: Well, I thought that I would clarify the matter for the avoidance of doubt. The money goes in for that purpose alone and is accessed for that purpose alone. Obviously, as we move into the Smith provisions, the parameters for potential volatility become much greater, and the cash reserve and revenue borrowing will provide us with more flexibility in financial management.

Tavish Scott: That is fair. Please forgive my lack of knowledge on the matter, but have you already set out a statement of policy in this area, or will you set out either during the course of next year's budget or at a certain point a policy position to the Finance Committee on what you envisage the cash reserve to be in the context of the transfer of powers under Smith?

John Swinney: I have not set out any particular details on the amounts of money that I would allocate to that. If, for example, I found that what have been called the smaller taxes raised in their first year a surplus beyond what I thought would be raised, I would put that money into the cash reserve. That would be one of the policy approaches that I would consider taking. Obviously, I would be free to allocate other resources to the reserve if I thought that that was important, but I would have to be careful about locking away resources that I could not use for another purpose. Nevertheless, the cash reserve arrangements are sensible, because we must be able to protect against volatility.

Tavish Scott: Thank you. That is helpful.

The Convener: Before I come back to Alex Johnstone and his questions on borrowing, Lewis Macdonald has a question on the no-detriment principle that probably plays into this bit of the discussion.

Lewis Macdonald: In making the point that the legislative consent motion must be clear about the fiscal framework, you described the process of reaching agreement on the block grant adjustment. Given what the Smith commission said about no detriment post devolution—in other words, about the procedures for ensuring that neither Government disadvantages the other post implementation—how far do you envisage the detail of how that would work being included in an LCM this year? In other words, how far do you see that as something that needs to be pinned down in detail?

John Swinney: It has to be crystal clear.

Lewis Macdonald: But how do you envisage that? I am not asking you to tell us your negotiating position in advance, but what are the broad terms on which you would seek to reach agreement over the next few months?

John Swinney: To be honest, I think that this is very difficult territory. What is envisaged with regard to the no-detriment principle at the point of devolution is probably reasonably clear, but the secondary issues are much harder to grapple with. We need to use the next few weeks to do some very detailed work on what might be involved and how things could be taken forward before we come to any conclusions.

Lewis Macdonald: Again without prejudging where things stand, do you think that the issue might require further legislation, or would it be best to incorporate it in the bill that comes forward next year?

John Swinney: It is absolutely critical that the issue is nailed down beyond peradventure in the fiscal framework.

Lewis Macdonald: That is very helpful. Thank you.

The Convener: Alex, let us go back to borrowing.

Alex Johnstone: Are you confident that the spirit of the Smith commission will be met and that you will have powers to borrow more than the £2.2 billion limit that is provided for under the Scotland Act 2012?

John Swinney: Again, that takes us into negotiation territory. What was set out in the Smith report and what we will have to put into practice must acknowledge the importance of the revenue borrowing issue that I was discussing a moment ago to deal with volatility in revenues. We need greater flexibility and a greater facility to undertake borrowing for capital investment purposes, and the fiscal framework will have to determine how those things should be put in place and deployed.

All of that must be in addition to the acceptance in principle of the continuing role for the capital departmental expenditure limit in the Scottish Government budget. I sense that borrowing for capital purposes might lead to a removal of the Scottish Government's CDEL provisions, and I want to make it absolutely crystal clear to the committee that that is not my interpretation of Smith. I think that Smith envisages that we will have on-going CDEL capability and the ability to use capital borrowing to enhance our CDEL provision. Revenue borrowing is quite a different proposition altogether.

Alex Johnstone: You have rightly matched revenue borrowing with responsibility for covering tax revenue volatility. What level of borrowing will be necessary to cover the level of tax that is being devolved under the Smith process?

John Swinney: We are at an early stage in trying to determine that. Despite what I said in my earlier answer to Mr Johnstone about the transition period for implementing the Calman SRIT proposals, that transition period will give us more detailed information about the Scottish income tax base and its performance, which will give us better details about our likely revenue borrowing requirement in the years to come. We need to see more data on Scottish income tax performance and collection before we can reach a definitive conclusion on revenue borrowing, and

that data will emerge over the course of the next couple of years.

Alex Johnstone: That perceived volatility will inevitably have an effect on cost and on the opportunity to borrow. I will not go into the details, but if, for example, you are exposed to the volatility of oil revenues in Scotland, the revenue borrowing requirement will have to be much higher. Is there anything in the current process that might change significantly the revenue borrowing requirement that you would need?

John Swinney: With the move from the Calman SRIT proposals to the Smith SRIT proposals, the risk is certainly greater, purely and simply because of the sums of money and the proportion of the budget that would be involved. It would be necessary to look at that arrangement.

Alex Johnstone: What borrowing mechanisms do you envisage for achieving that?

John Swinney: As far as capital borrowing is concerned, there is a variety of different models and options. We could go to the Public Works Loan Board or the markets; or we could issue bonds. Obviously, we would have to make careful judgments about the terms and conditions of any such borrowing.

10:45

Alex Johnstone: Although many of the variables are hard to assess at this stage, do you think that the Scottish Government would have to pay a significantly higher interest rate than the UK Government for its borrowing?

John Swinney: No.

Alex Johnstone: Given the potential additional volatility to which you would be exposed, do you envisage any circumstances in which there might be a demand for a different interest rate from the Scottish Government?

John Swinney: No, for two reasons. First, all of this discussion must take place within the UK fiscal framework. As Alex Johnstone is familiar with my politics, he will know that I accept that situation reluctantly. Secondly, we have a track record of performance. Since 1999, the Administrations in Scotland, of all political colours, have operated an orderly financial regime. The reliability of successive Administrations in handling public finances counts for a great deal.

The Convener: Alex, you have done pretty well up to this point. Do you mind if I open up this discussion on borrowing by moving to a slightly different area? You might have been going this way anyway.

The Scotland Act 2012 gives us a capital expenditure borrowing ceiling of £2.2 billion. Some

experts have told us that the amount should be nearer £5 billion, while other experts have said that there should be no false limit and that the amount of potential borrowing should come down to affordability. What is your view on that?

John Swinney: Ultimately, the most robust position is to have a prudential regime in place. That essentially reinforces my point to Alex Johnstone about financial stewardship, because Parliament is required to consider all questions of affordability and sustainability. We have embarked on some of that in our financial framework for revenue-financed investment, as a result of which we should essentially anchor 5 per cent of our total DEL budget in support for revenue-financed investment. That should be a rule for sustainability; it is the most robust and reliable mechanism that we can utilise.

Lewis Macdonald: There is a lot of merit in having a prudential borrowing arrangement. Does that have any impact on your answer to Alex Johnstone about the credibility of the UK fiscal framework in protecting the level of interest rates at which the Scottish Government would be able to borrow?

John Swinney: No, because the same strictures on financial performance will be required of the Scottish Government in participating in the United Kingdom's public finances. Regardless of what happens with Smith, the Scottish Government's finance minister must, as all finance ministers have done since 1999, still deliver a budget that is balanced and consistent with all the fiscal rules that apply.

The Convener: I will move on to VAT, followed by the Crown Estate, if that is okay with everyone. Are you okay with that, Alex?

Alex Johnstone: Yes.

The Convener: What discussions have taken place between the Scottish and UK Governments about the proportion of VAT that will be assigned? How will that be calculated? We had interesting evidence on that from experts at a previous session, so an understanding of those matters would be useful to the committee.

John Swinney: A lot of technical and analytical work will need to be done to determine on what basis VAT should be assigned. As with all such matters, there is no one straightforward way of doing that, so we will have to work our way through a multiplicity of options. The opportunity to define much of that presents itself in the work that the Chancellor and I have commissioned from civil servants, which will be undertaken in the course of the next eight weeks or so.

The Convener: Will the work that has been commissioned also look at how Scotland will retain

any benefit from an increased VAT take in Scotland? Is that part of the mix?

John Swinney: There are two separate issues. One is establishing the analytical base for how VAT should be apportioned and the other is the policy question of guaranteeing that if those estimates are exceeded, Scotland retains the benefit of that improved economic performance and consequential improved VAT take. Those two separate issues have to be resolved as part of the exercise, and the policy question is an inherent part of the fiscal framework that must be put in place.

The Convener: You said that you would let us know a bit more about the progress that is being made on welfare and the fiscal framework. Obviously, a fair bit of work has been commissioned. Could you provide the committee with an outline of what that work looks like? It would be quite helpful for us if we could know the sort of challenges that we face.

John Swinney: Certainly, convener. Duncan McNeil asked a question about the transparency of the process, and there is a very strong argument that the analytical work on the way in which VAT could be assigned to Scotland needs to be more widely understood and appreciated. Individuals with considerable expertise in this area will have advised the committee in evidence and it would be beneficial to see some of the material being considered more accurately.

These are parts of the process in which there has to be understanding about why things are done one way and not the other. It is important that there is wide public understanding and scrutiny of the questions. Your suggestion is a good example of where we might be able to share material, subject to the views of the UK Government, which would address the point that Duncan McNeil raised.

The Convener: That is very helpful. We move on to the Crown Estate, starting with a question from Tavish Scott.

Tavish Scott: The obvious first question is whether your Government believes that the clauses will give effect to what the Smith agreement said on transferring the Crown Estate to Scotland and the Scottish Parliament. If it does not, dare I ask you, with a heavy heart, what discussions are on-going to resolve any outstanding issues?

John Swinney: The best answer that I can give is that I am not sure, because we do not quite have the necessary detail to come to a conclusion. We need to do more work on this area to be absolutely satisfied that the intent of the Smith commission process has been translated into the proper legislative form.

Tavish Scott: Does that fall into the category of the on-going official discussions that will lead to ministerial discussions post election?

John Swinney: Yes.

Tavish Scott: Have there been discussions at official level with the Scottish Crown Estate team—the team here in Edinburgh—to look at some of those aspects?

John Swinney: Yes, there have been.

Tavish Scott: As you will recall, one of the draft clauses deals with devolution within Scotland, to the islands. Angus Campbell, representing the three island authorities, made it clear in evidence last week that the islands are looking to see devolution of both management of the sea bed and the revenues. I very much understand your position on the revenues, but can you set out your position on the management of the sea bed?

John Swinney: That is one of the material issues that we need to understand better, with regard to what is envisaged will come forward in the scheme. Some of the things that the UK Government proposed to put into the scheme would be better undertaken through a memorandum-of-understanding approach, rather than by statute. We need to go through quite a bit of detail to satisfy ourselves that those issues can properly be addressed.

Tavish Scott: That is fair, but you will be very familiar with the fact that the island authorities are particularly keen to—dare I say it?—have control over both the management and the revenue functions of the sea bed out to 12 miles. Is that a reasonable proposition, from your Government's point of view?

John Swinney: That is certainly the area of our active discussion with the island authorities. We are open to pursuing that discussion with island authorities. We recognise their specific and special interest in the area. That is why Mr Mackay is working with the island authorities on those points. We have to see it within the wider context of the framework that is put in place.

Tavish Scott: Thank you. My last question concerns something that was, I suspect, a bit of a surprise to Linda Fabiani and I. As we heard last week in evidence to the committee, the Crown Estate will continue to invest in Scotland. What is your Government's perspective on that proposal? I must confess that it was a bit of a surprise to the rest of us.

John Swinney: The Crown Estate continuing is a very interesting concept. This is where we get into the space in which I think that the spirit of the Smith commission is not being respected. We all know what we are talking about here. This issue has been around for a long time and lots of people

have got long-standing commitments in this area that they thought would be fulfilled by the Smith commission. Hey presto! One Thursday morning a committee is advised that, although it has been devolved, the Crown Estate will still be here and continuing its activities. It is disrespectful to the spirit of the Smith commission and what it concluded.

Tavish Scott: You will have a better view of this than I. However, there might be an argument that an investment vehicle for bringing money into Scotland to invest in projects is a good thing but that is different from devolving the sea bed, which is predominantly what we were arguing for.

John Swinney: There are differences. We used the phrase, "Crown Estate continuing" but we could be talking about the Crown Estate continuing and competing and that is in no way respectful of what the Smith commission put in place.

Alison Johnstone (Lothian) (Green): I want to pursue that issue. Any future property acquisition by the Crown Estate would be owned by the Crown in a situation in which the administration and revenues of the property rights have since been devolved. That situation seems difficult. Would it not make more sense that, if the Crown Estate carries on investing in Scotland, it would have to immediately pass over the responsibility for the management and revenues of those assets to stop the kind of competition that we are concerned to learn about?

John Swinney: I return to what the Smith commission said on this, which was about the devolution of the Crown Estate to Scotland and, within Scotland, to our island communities. If the Smith commission had said that the Crown Estate assets would be devolved but the Crown Estate would be allowed to continue in Scotland, people's jaws would have hit the table. There is a real danger of having an undesirable and confusing competitive environment, but more importantly, the Crown Estate has taken a fundamentally disrespectful view. In looking at the long-parked political discussion and debate in Scotland, we get to a point at which we think that we get agreement and the opportunity to go forward with the Smith commission proposals, notwithstanding what I have said about the need to look at the clauses in more detail, and the Crown Estate comes along and tries to thwart that agreement. I do not think that that is the right way to proceed.

11:00

Alison Johnstone: As someone who was not a member of the Smith commission, can I just be clear that when you were having those deliberations everybody assumed that the Crown

Estate was going to be devolved in its entirety and that there was no discussion about a proposal that said, "On this date, you will have all these assets and from then on we will start to build up a large portfolio again"?

John Swinney: No.

Alison Johnstone: So this is quite a surprise.

John Swinney: Oh yes—it is a surprise. I come back to my earlier point: I am very confident that if this proposition had been put on the table at the Smith commission the commission members would have said, "We're having none of that", given the nature of the discussion that the commission had been having about the Crown Estate.

Alison Johnstone: Given that, are you hopeful that the matter can be resolved satisfactorily?

John Swinney: The issue was aired only last week, and we will now have to pursue it.

Alison Johnstone: I have a final, very brief question. Last week, we discussed the fact that Fort Kinnaird, which is a large property in the Lothian region, will not be devolved for various legal and accounting reasons. Does the Government have a view on the fact that this very important economic asset will not be transferred and that there could be similar cases in future if people find a way of preventing it from happening?

John Swinney: That is a very good example of what I have been talking about. If Fort Kinnaird were not to be devolved, that would strike me as not being in the spirit of what the Smith commission agreed.

Alison Johnstone: Thank you.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): In your discussions about draft clause 23, have you bottomed out the question of what "the Scottish zone" actually is? Given that definitions are usually attached to bills, is it appropriate to sort out this issue before the bill is published and a definition is added? Should such a definition include Andy Wightman's suggestion, which refers to

"Ownership of the seabed (excluding hydrocarbons) within Scotland's territorial seas out to the 12 ... mile limit, where this has not been granted out"

and

"Rights over the continental shelf to minerals (excluding hydrocarbons) and sedentary species from Scotland's territorial seas to 200 nautical mile limit",

both of which were set out in the land reform review group report?

John Swinney: The Smith commission made it very clear that the management of the Crown Estate's economic assets in Scotland should be

transferred to the Scottish Parliament and that that should extend to 200 miles and cover the sea bed. The committee will forgive me if I rehearsed this point before—I think that I might have done at a previous meeting—but one of the reasons why I am so absolutely certain and confident that the Smith commission envisaged ownership out to 200 miles is because of the inclusion of paragraph 34 in the Smith agreement, which covered concerns that were expressed in the commission about UK interests in relation to

"critical national infrastructure ... on defence & security, oil & gas and energy".

As I have said, that paragraph was drafted to address concerns that had been expressed by some of my colleagues in the Crown Estate that in taking ownership out to 200 miles some critical UK interests had to be taken into account. In other words, we would go out to 200 miles and ensure that the UK's critical interests would be covered by a memorandum of understanding. That should be made explicit.

Again, as I said in response to Tavish Scott a moment ago, we do not have all the detail on this matter for us to be conclusive about it. It is really important that we have that detail absolutely crystal clear before Parliament delivers its view on a legislative consent motion, so that these things are beyond dispute after the passage of the Scotland bill.

Rob Gibson: So it should still be possible to discuss that between now and the UK election, even in the purdah period, so that the bill deals with that.

John Swinney: Yes.

Rob Gibson: Draft clause 23 states that

"The Treasury may make a scheme transferring"

the functions. We have discussed previously the fact that Donald Dewar said:

"There shall be a Scottish Parliament."

Is the drafting respectful of the conditions of devolving all the Crown Estate's assets in Scotland and the Scottish zone? Would it be easier to get the scheme to work if the bill said "shall" and set a timetable so that it can be done speedily? Stakeholders such as aquaculture people are terribly concerned about the length of time that it takes to put such agreements in place and the uncertainties therein.

John Swinney: It would be better if two things happened. First, the clause should say that the Treasury "shall" do that, or even "will" do it, which is a bit firmer.

Rob Gibson: What about "must"?

John Swinney: Under all circumstances, perhaps.

Seriously, “may” is used in legislative terms to suggest discretion as opposed to obligation, which is what “shall” is designed to say. That would clarify that point firmly.

Secondly, we need to interact closely on the scheme, because it looks very complicated when, in fact, it was envisaged that the Crown Estate function and the management of the assets would be devolved to the Scottish Parliament. From looking at the scheme, it seems overly complicated for the realisation of the policy objectives that we all share.

Rob Gibson: In that regard, proposed new section 90B(3) in the Scotland Act 1998 talks about the exclusion of limited partnerships that are registered under the Limited Partnerships Act 1907. I suspect that that refers to Fort Kinnaird. Is there any intention in the discussions before the bill is framed to discuss whether there can be any exceptions with regard to Scottish property? Might it be possible for the continuing Crown Estate to invest in the offshore area in competition with the Crown Estate in Scotland?

John Swinney: I suppose that that is technically feasible, although it is undesirable. I come back to my point that there is a clear policy intent. We have to be careful with the wording of draft clause 23, as it is intensely complex and runs the risk of leaving us in circumstances in which we find a variety of exemptions and exceptions that we do not think should be there.

Rob Gibson: If the exemptions in the draft clause had been discussed at the time of Smith, you would have found them completely unacceptable.

John Swinney: Paragraph 32 of the Smith agreement is clear. It states:

“Responsibility for the management of the Crown Estate’s economic assets in Scotland, and the revenue generated from these assets, will be transferred to the Scottish Parliament.”

There are no exceptions. It goes on to define those assets as

“the Crown Estate’s seabed, urban assets, rural estates, mineral and fishing rights, and the Scottish foreshore for which it is responsible.”

It could not be clearer. To then put in exemptions and exceptions does not properly give due regard to the Smith commission recommendations.

Rob Gibson: I will be interested to see what the Secretary of State for Scotland has to say on those.

The Convener: That may take a couple of weeks.

Lewis Macdonald: I am curious about the question of the Crown Estate and the successor bodies. Mr Swinney has expressed his surprise about that, as have other members of the Smith commission. Would it be fair to say that the expectation in wider Scotland was that the devolution of the Crown Estate’s assets was focused primarily on the foreshore and sea bed assets and rights, in the way that has been described?

John Swinney: That perception may be out there in Scotland, but the Smith commission report is clear. It states:

“This will include the Crown Estate’s seabed, urban assets, rural estates, mineral and fishing rights, and the Scottish foreshore for which it is responsible.”

Lewis Macdonald: So it goes beyond the perception, but it is defined as economic assets. Do you accept that there is a distinction between those assets that you have just read from the list and investment portfolio acquisitions that may be acquired by any public commercial body, in any part of the UK?

John Swinney: We are not talking about any commercial operation; we are talking about the Crown Estate. Mr Macdonald is trying to get me to suggest that I would be concerned about a commercial operation in the United Kingdom investing somewhere in the United Kingdom, which might be in Scotland. I have no objection to a commercial operation in the United Kingdom investing in Scotland. I have no problem with that at all. I have a problem with the Smith commission coming up with a view that the economic assets of the Crown Estate should be devolved to Scotland and then for us to find that that objective has been thwarted by the Crown Estate saying, “We’ll keep on doing what we do”. That is disrespectful.

Lewis Macdonald: The Crown Estate, which is the centre of public attention, manages the property of the Crown. The fact that it may operate commercially—as Scottish Water might do in certain circumstances—is not odd or unusual for a public corporation in the current UK tradition.

John Swinney: It is not unusual, but then it is not every corporation that gets mentioned over four paragraphs in a landmark constitutional document signed by all five political parties in Scotland, which says that those functions should be devolved to the Scottish Parliament. No other corporation or investment vehicle is mentioned in that fashion. For that to be defined and then for the Crown Estate to say that it will go over the head of the Smith commission is disrespectful.

Lewis Macdonald: What is your proposition? Do you propose that the Crown Estate specifically should be the only public commercial body that could not invest in Scotland?

John Swinney: Well, I think that we are just getting into—

Lewis Macdonald: If there is a problem, what is your solution?

John Swinney: I am simply saying that what the Smith commission suggested should be respected. That is all that I am saying. My entire line of argument in my time with the committee this morning is that the Smith commission report should be respected. That is a classic example of an area where it is not being respected.

Lewis Macdonald: The assets that the Crown Estate transfers to a successor body in Scotland would then become the assets and property on which the Scottish successor body operates. Would you regard it as unusual for that successor body to choose to make investments other than in those assets in order to make a return for the assets?

John Swinney: No, because that would be the legitimate function of the devolved Crown estate.

Lewis Macdonald: Would it be legitimate for that devolved Crown estate to make business investments elsewhere in the UK to support its central core?

John Swinney: I do not think that that would be a legitimate proposition to be taken forward by the Crown estate in Scotland.

Lewis Macdonald: But, unless you make a legal adjustment, that would be a policy decision to be made either by the Scottish successor or the UK successor body.

John Swinney: That is why the detail of what is appropriate and what is not appropriate in all of this must be correct. If we are going to say that the Scottish Crown estate is not going to invest in England, we should say to the Crown Estate continuing in the rest of the UK that, rather than compete with another Crown estate, it should allow the Crown estate in Scotland to get on with its business.

Lewis Macdonald: I am looking at your remit as finance minister and wondering why you regard investment by the Crown Estate in Scotland as competitive rather than supportive. Why would external investment not always be welcome?

John Swinney: I welcome investment in Scotland—I reiterate that point, because I do not want Mr Macdonald to go away creating misconceptions. I am regularly criticised for some of the investments that I bring into Scotland, but I welcome such investment nonetheless. However, the Crown Estate is not any old investor. The Crown Estate is a significant body in the structure of the United Kingdom. The Smith commission has judged it appropriate that the management of its

assets in Scotland and the revenue that is generated by those assets should be within the province of the Scottish Parliament. I simply think that that should be respected as part of the design of the scheme.

11:15

The Convener: We need to move on.

Stuart McMillan (West Scotland) (SNP): Paragraphs 32 and 33 of the Smith commission report were very clear about the proposals on the Crown Estate. After what we heard last week, it struck me that, if there were to be, in effect, two Crown estates in operation in Scotland, and the Crown estate in Scotland is devolved to local authorities such as those in the islands, as mentioned in paragraph 33, that could be overly bureaucratic. The cabinet secretary said that it will be a bit more complex, but it has struck me that local authorities could have an additional cost burden if they have to deal with two different Crown estates when it comes to potential investment. Could that argument be deployed against having two Crown estates?

John Swinney: I think that it is less of an issue in this sphere. I suppose that there is a recipe for confusion if the Crown Estate starts to become involved in areas that are under the responsibility of the Scottish Parliament and that we agreed to devolve to local authorities. There is certainly an opportunity for confusion. Whether there is an opportunity for more bureaucracy is a different question.

The Convener: We move on to the constitutional area, for want of a better description, and to intergovernmental relations, although we have had a fair bit of discussion about that already. Deputy First Minister, what is your take on the clauses on the Sewel convention and on permanency?

John Swinney: On the issue of permanency, particular words are used in the clause that I am not sure need to be there. I do not know quite what the purpose is of adding the words “recognised as”, and I think that it would be clearer if they were not in clause 1. The proposed new subsection (1A) in section 1 of the 1998 act states:

“A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements.”

It would be blunter if it read, “A Scottish Parliament is a permanent part of the United Kingdom’s constitutional arrangements.” We all know the limitations of that type of arrangement. Given that knowledge, I think that it would be better if we stated it as boldly as possible.

The Convener: Everyone recognises that the legal standing of such a measure is only as good

as the next UK Government. I guess that the purpose of having it in the Smith proposals and in the draft clauses is to give a political assurance that the Scottish Parliament is as embedded and as permanent as can be achieved. Is that the intent behind the Smith proposals?

John Swinney: Yes, that is right—people were very clear around the table at the Smith commission on that. I should possibly have said at the outset that I was a member of the Smith commission and I am here giving evidence, but other members of the Smith commission may have a different view of some of the things that were transacted. I am simply expressing a view on behalf of the Scottish Government, and I am obviously dwelling on my experience as one of the members of the Smith commission. Everybody agreed to this type of mechanism on the clear understanding that, in the absence of a written constitution, there is no stronger assurance than that. However, the draft clause would be clearer if the words “recognised as” were not there.

Draft clause 2 would put the Sewel convention into statute as a convention, rather than put the convention on a statutory footing. That is an issue that we need to explore with the UK Government.

The Convener: The Sewel convention seemed to run in my blood for a fair bit of my time as a minister. From my perspective, the convention worked reasonably well. There were occasions when there were challenges, but the convention allowed for a bit of discussion and movement. Is there any danger in having Sewel in statute in a permanent way? Could that reduce flexibility, room for movement and the ability to find a way forward?

John Swinney: We have to take care to ensure that there is always room for flexibility and negotiation. As we embark on the issue, we must ensure that what we put in place to define those arrangements is not unnecessarily restrictive.

Lewis Macdonald: Will you expand a little on your distinction between putting Sewel on a statutory footing and putting Sewel into statute? What is your concern there?

John Swinney: The issue is about whether the substance—the process—is put into statute to give us confidence around the substance of Sewel, as opposed to stating in statute, “There shall be a Sewel convention”. That gets to the point of the convener’s questions about whether, if we put more of the substance into statute, that would restrict the flexibility to negotiate. All that I am saying is that, if we put the substance into statute, we have to do it in a fashion that respects the point that the convener has made about the necessity for flexibility.

Lewis Macdonald: Do you regard the clause as adequate as it stands? You sound quite open-minded about it.

John Swinney: No. I think that we would benefit from putting the Sewel convention into statute, but in the fashion that the convener set out in his question.

Stuart McMillan: We have heard about the intergovernmental assurance board, the JMC and the Joint Exchequer Committee. Are there any other examples of intergovernmental relations, and can we learn any lessons from the experience of the Joint Exchequer Committee?

John Swinney: A number of mechanisms currently exist. There are the domestic and European joint ministerial committees and the Joint Exchequer Committee. There is the finance ministers’ quadrilateral, which involves the finance ministers of each of the Administrations in the United Kingdom meeting to discuss relevant issues. Now, as part of the new arrangements, there will be the welfare devolution working groups. In addition, a variety of other intergovernmental interactions will take place.

Stuart McMillan: Are the various things that you gave as examples adequate and suitable? Should they be increased or improved on?

John Swinney: They certainly should be improved on. One of my frustrations with the finance ministers’ quadrilateral and the Joint Exchequer Committee is that, ultimately, if we do not like what happens, the Treasury view tends to prevail. I do not think that that enables the obtaining of an outcome that is satisfactory to the Scottish interest in all circumstances.

One issue that needs to be explored is how we can make the intergovernmental machinery a more meaningful part of the process—how we can enable discussions to take place in such a fashion that they lead to devolved Administrations feeling that they have made some progress, as opposed to being thwarted by a final view being taken by the Treasury or the UK Government.

The Convener: Duncan McNeil has a supplementary question.

Duncan McNeil: We have almost had an audit of all the points of contact. It was interesting to hear the cabinet secretary mention the necessity to improve the machinery. I am sure that many of us would support him on that.

We have an Institute for Government paper that states:

“Work is already underway to reform the UK’s intergovernmental machinery: a working group has been established to revise the principles and structures of intergovernmental relations in the UK. This group will meet for the first time in February 2015.”

Is the Scottish Government participating in that working group? If so, is it alone in that or are there representatives from Wales and Northern Ireland? What positions do you take into that working group with regard to principles that need to be established and reform that needs to take place? It would be useful if that information could be shared with the committee.

John Swinney: The Scottish Government is participating in that exercise, as are the other devolved Administrations. The meeting in February was chaired by a civil servant from the Scottish Government—the discussions have all happened at official level. Subject to the necessary checking of the comfort of the other Administrations with the sharing of information, we will happily share what information we can with the committee.

On Mr McNeil's point about what we take into those—

The Convener: I am sorry, Deputy First Minister, but we are running out of time and I want to spend a little time on equality issues. Will you write to us on what you take into the working group? I do not want to curtail the discussion, but we have a time issue. Stuart McMillan had not finished, and I want to bring in Alison Johnstone, because we need to get something on the record about equality issues.

Stuart McMillan: Earlier, the cabinet secretary gave as an example the budget processes of the two Parliaments and how they differ. Post implementation of Smith—that is, under devolution post Smith—how do you see the parliamentary processes having an effect on intergovernmental workings?

John Swinney: Basically, Governments have to relate to the requirements of their Parliaments. I am a servant of the Parliament and the public. If the Parliament wants to design how it wants to interact with ministers, that is the Parliament's business and I should respect it.

One of the points that I have made in answer to some of the committee's questions has been that, although I might wish to be open with the Parliament about particular issues in evidence and all the rest of it, out of respect, I have to say to the UK Government, "Are you comfortable with this?", because that is the proper way to act. The parliamentary culture here might be more open than the parliamentary culture or the parliamentary requirements in the House of Commons. The only bit of intergovernmental activity that I would have to be mindful of is whether the UK Government is comfortable with my responding positively to the requirements of Parliament.

11:30

The Convener: We need to move on to Alison Johnstone, who has a question on equality issues.

Alison Johnstone: The Smith commission report states that the Scottish Parliament will have all powers in relation to elections to the Scottish Parliament, but there is no mention of gender quotas for the Scottish Parliament. Do you agree that the Parliament, therefore, does not really have all the powers in relation to elections?

I will ask a further, final question, if I may. Does the Government consider that the drafting of clause 24 is sufficient to allow the Scottish Parliament to legislate to impose gender quotas on public bodies, as a starting point?

John Swinney: On Alison Johnstone's final question, the command paper says that that should be the case, but our reading of the clause is that it is far from clear that that is actually the provision. It may be a question of drafting and interpretation. We would certainly want the ability to act in that fashion, but we are not confident that what is in front of us enables us to do so.

On the question about elections, we certainly want to engage constructively to ensure that that point is properly addressed. My objective is to ensure that that is the case, and if there are concerns about the provisions that are in place, I would want to ensure that they are properly acted on.

The Convener: Thank you, Deputy First Minister. We have come to the end of the session. We have to be careful of the clock and I know that you have to think about questions in the chamber, which are coming up soon. We have not completed our discussions in a number of areas, so we might write to you to follow through with further questions, and you have given us commitments to follow up on a number of areas in writing, for which we are grateful.

I thank you and your officials for being here today.

11:31

Meeting continued in private until 11:36.

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