



OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 26 June 2019

Session 5



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FINANCE AND CONSTITUTION COMMITTEE

16th Meeting 2019, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)

*Neil Bibby (West Scotland) (Lab)

*Alexander Burnett (Aberdeenshire West) (Con)

*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

Angela Constance (Almond Valley) (SNP)

*Murdo Fraser (Mid Scotland and Fife) (Con)

*Emma Harper (South Scotland) (SNP)

*Patrick Harvie (Glasgow) (Green)

*James Kelly (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

George Adam (Paisley) (SNP) (Committee Substitute)

Anouk Berthier (Scottish Government)

Colin Brown (Scottish Government)

Penny Curtis (Scottish Government)

Graham Fisher (Scottish Government)

Ivan McKee (Minister for Trade, Investment and Innovation)

Hilary Pearce (Scottish Government)

Carol Sibbald (Scottish Government)

Rebecca Whyte (Scottish Government)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 26 June 2019

[The Convener opened the meeting at 09:30]

Structural Fund Priorities (Post-Brexit Funding)

The Convener (Bruce Crawford): Good morning and welcome to the 16th meeting in 2019 of the Finance and Constitution Committee. For this meeting, George Adam is substituting for Angela Constance.

Agenda item 1 is our final evidence session in our inquiry into European Union structural funds in Scotland. I welcome to the meeting Ivan McKee, who is the Minister for Trade, Investment and Innovation. From the Scottish Government I welcome Hilary Pearce, who is the deputy director of the European structural funds and state aid division, and Susan Tamburrini, who is team leader of smart growth in the European structural funds division.

I invite the minister to make a short opening statement, if he wishes to do so.

The Minister for Trade, Investment and Innovation (Ivan McKee): I thank the committee for inviting me to contribute to its inquiry into the funding of EU structural fund priorities in Scotland post-Brexit. I know that the committee is keenly aware of how important European structural funds are to Scotland's economy and society, particularly in rural areas and smaller communities where attracting private investment can be difficult. It is difficult to think of a sector or region in Scotland that has not benefited from structural funds since we joined the EU in 1973, which is why it is deeply regrettable that Scotland is set to lose out on that much-needed funding as a result of the United Kingdom's exit from the EU.

Regarding the current programme, the EU's aim of smart, sustainable and inclusive growth towards the Europe 2020 targets and the Scottish Government's ambition of sustainable, inclusive growth, as set out in the national performance framework, are neatly aligned. We are using the European social fund to develop the skills of our workforce, to alleviate poverty and to increase social inclusion. The European regional development fund is supporting small and medium-sized enterprises and is developing energy-efficient renewables technologies to help Scotland's transition to a low-carbon economy.

Looking to the future, this committee is aware that the UK Government promised to publish its consultation on the shared prosperity fund by the end of last year, but we are still waiting for it. In our dialogue with the UK Government on the shared prosperity fund, we have consistently reiterated five key principles: first, that Scotland should not lose out financially compared with the current level of funding that it receives from the EU; secondly, that the devolution settlement must be respected and the UK Government must make no attempt to take back powers that the Scottish Government has rightfully executed to date; thirdly, that the Scottish Government must be an equal partner in development of the shared prosperity fund; fourthly, that the current level of flexibility in allocation of funds should not be reduced; and fifthly, that the replacement scheme should be operational in time to be implemented in early 2021, so that our stakeholders do not suffer difficulties as a result of funding gaps.

Members will be aware that we are running out of time to provide certainty about future funding to our stakeholders. It is difficult to plan when the UK Government is providing no information, especially on simple questions such as what the value of the shared prosperity fund will be. We cannot wait for the UK Government any longer, which is why I have agreed with the Cabinet Secretary for Finance, Economy and Fair Work on a proposal to hold our own consultation exercise on future funding.

I intend to establish a steering group that will be made up of a range of stakeholders, including lead partners, delivery organisations and end users and beneficiaries of European structural funds. The steering group will ask key questions on future funding for Scotland and will identify possible priorities, administration practices, methods of allocation and funding periods. The group will also collate existing research, including the evidence that the committee has obtained, to inform the structure of the future programme. That work will generate interest not just across our huge range of stakeholders but across ministerial portfolios. I will be happy to provide an update to the committee, as that exercise progresses.

I am happy to answer questions.

The Convener: Thank you, minister. Thank you for telling us about the steering group. You are right—some of the evidence that we have taken from around the country will be very useful to the steering group. We have had some extremely useful contributions from many organisations.

In Scotland, the structural funds are currently worth €872 million across the seven-year EU budget period. The Scottish Government is the sole managing authority and the largest delivery agent. How does it see its role in relation to

managing funding post-Brexit? How is the Scottish Government preparing for the transition from EU structural funds to new funding arrangements?

Ivan McKee: We foresee the Scottish Government continuing in its role as the managing authority. That is the most effective and sensible way to continue. It will allow us to co-ordinate with the strategic priorities of the Scottish Government and to identify priorities for the deployment of funds.

On the question of transition, if we take a step back and look at the wider context of Brexit, we are not even sure that we are leaving the EU, never mind under what terms we might leave. We are not sure whether there is to be an implementation period. Even at that macro level, there is huge uncertainty.

We are having to watch all the bases. We continue to engage with the European Commission to ensure that, in the eventuality that we stay in the European Union and continue with these programmes, we are up to speed. We are pushing the UK Government hard to understand more information about the shared prosperity fund. It is unfortunate that little has been forthcoming. It is difficult to look at the transition in any great detail. As I said, the time has come when we can wait no longer. The purpose of the consultation will be to understand what the future programmes should look like in Scotland, from our perspective and the perspective of users and beneficiaries in Scotland, and what that transition might look like.

The Convener: Emma Harper will ask about the allocation of funding.

Emma Harper (South Scotland) (SNP): I am interested in how funding will be allocated. There might be a UK pot, then some money will come to the Scottish Government and then it will be further devolved to, for instance, local authorities. How will it be allocated? Will the allocation be based on needs or on population, or will it be done on a rural versus urban basis?

Ivan McKee: The consultation will look at those issues. That is a core part of what it will do. When it comes to the overall picture, our red lines are that Scotland should not receive any less money than it receives under the current programmes or than it would otherwise have received, for example, under any future EU programmes. We are very clear on that. The mechanism for the distribution of that money in Scotland at the moment is through the lead partner structure down to individual projects. Applications come forward from projects through lead partners to enable us to disburse that money. The consultation exercise will look at the mechanics of how we do that. As you say, it will also look at the most effective way to do that to deliver benefits across Scotland. At

the moment, as a transition area, the Highlands and Islands is a separate area and, in the EU process, it operates under slightly different rules on matched-funding percentages. All that will be considered as part of the consultation.

Emma Harper: Is there a risk to funding if the UK Government retains that money? We have already seen how £160 million of convergence uplift money that was due to Scottish farmers was not delivered. Is there a risk to funding in the future if the UK Government controls everything?

Ivan McKee: Yes, of course. There is always a risk of that. The other point to bear in mind is that the size and scale of the shared prosperity fund will be considered as part of the comprehensive spending review at UK Government level later this year. That is one of the reasons for the delay. It also talks to that fund being wrapped up in other spending issues that will be considered at UK Government level. The context is not as clear as we would like. As you say, there is always a risk, but our position is clear. Reflecting on the evidence that you have heard over the previous two sessions, I note that the vast majority of the witnesses have been clear that these decisions should be made in Scotland, that the money should come to Scotland and that that is where we should decide what the priorities are.

The Convener: Other members might want to come back to the allocation of funding later but, given that the minister mentioned the relationship with the UK Government a number of times, it is probably better for us to get into that area now.

Patrick Harvie (Glasgow) (Green): You said that there is still very little information coming to you about the shared prosperity fund. I was going to ask whether the situation had moved on and whether the Scottish Government had been given any more insight, but the answer to that seems to be no.

Ivan McKee: That is correct, unless it has happened in the past 10 minutes.

Patrick Harvie: You also said that there will be a consultation and that an expert group or working group—I cannot remember exactly—will be set up.

Ivan McKee: It is a steering group.

Patrick Harvie: What is the relationship between the two? Will the steering group receive the outcome of the consultation and decide what to do?

Ivan McKee: There are two consultations. There is the UK Government consultation that was promised at the end of last year but which has not happened yet—we are still waiting for it. The process for the Scottish Government's consultation is that, in the next few weeks, we will set up the steering group which, as I said, will

have input from all groups that are engaged in the process so that we get a breadth of expertise. We have initial ideas on the areas that it may want to consider, which are the fairly obvious ones that we have talked about, such as regionality, the needs-based approach, the length of the funding period and the balance between flexibility and control of public funds.

The steering group will consider those questions and formulate a consultation exercise, which will then be put to public consultation in the autumn. The feedback will come back to the steering group, which will have a look at it and then the Scottish Government will engage to see how we want to take that forward in our position on what the shared prosperity fund should look like in Scotland. We hope to have that wrapped up in the early part of next year to give us time to move forward to the future funding arrangements.

Patrick Harvie: So the timeline is that the steering group will be set up, it will develop the consultation, the consultation exercise will be carried out and then ministers will decide. Will ministers then make proposals to Parliament or will they simply announce their preferred way forward?

Ivan McKee: I expect that that will be done through a statement or an announcement of some kind. I am happy to come back to the committee to talk through that when we have clarity on where we are going. As I said, I am happy to keep the committee up to date on how we progress through the process.

Patrick Harvie: I get the feeling from the people we have spoken to in Scotland that it will not be hugely difficult or controversial to arrive at a sense of how we want the fund to operate. The difficulty will be trying to achieve that outcome with the UK Government. Has the Scottish Government spoken to the UK Government about its intention to consult and has it sought any engagement on that?

Ivan McKee: We continue to talk to the UK Government. My ministerial colleague Ben Macpherson spoke about the issue on 13 June at the joint ministerial committee and pressed the UK Government for a solution back in March, the cabinet secretary Derek Mackay pressed for details in a letter to Philip Hammond—et cetera, et cetera. There has been a series of interactions at ministerial level and many more at official level in which we have sought clarification from the UK Government on what the process will look like. To an extent, it is important that we do that work on our own in Scotland so that we understand the balance that we want to strike between flexibility and strategic intent and so on. However, you are absolutely right that the engagement process with the UK Government has not proved to be as fast

moving as we would like, and that could be challenging.

Patrick Harvie: We all realise that it will be difficult to get policy changes immediately from the UK Government given the current situation, but you said that the consultation is to be in the autumn and it is reasonable to expect that, by that point, we will be able to get an indication of the policy intention of the incoming Administration and newly formed Cabinet. When does Scotland need to have that clarity?

Ivan McKee: We needed it months ago, because the clock is ticking. There is a UK Government briefing paper that indicates that it wants the fund to be based on the UK industrial strategy, with a focus on productivity as a mechanism for rebalancing and for assisting areas that need to benefit from inclusive growth. That is the broad outline statement, but the real challenge is on the funding magnitude. As I said, we understand that that is now tied up with a comprehensive spending review. There is also an issue with the mechanics. You have heard from witnesses about the structures that we adopt at the moment compared with the structures that we adopted in previous programmes relating to issues such as the audit regime and the level of paperwork required.

There is a series of issues that are built on the EU regulations. Clearly, in relation to where the UK Government is going with the shared prosperity fund, an important issue is how much scope we will have to define it ourselves. Will it be constrained in the same way as it was constrained under the Commission, or will a different mechanism be used?

All that very much informs the mechanics and the focus of the structure that we are able to design in Scotland.

09:45

Adam Tomkins (Glasgow) (Con): Good morning, minister. If I understood what you said in response to Patrick Harvie, there will be a steering group over the course of the summer and a consultation in the autumn, and that will pave the way for the Scottish ministers to design, deliver and administer a Scottish prosperity fund that will be announced to Parliament by ministerial statement. Is that correct?

Ivan McKee: You have to remember that this is in the context of the shared prosperity fund. We are laying out the Government's position on how the shared prosperity fund should operate. It is the UK Government's fund—it is designing the fund and putting the money into it. Clearly, our red lines are that the funding should come to Scotland and we should be able to operate in relation to it.

However, we have to work in the context that we are in. We had hoped that there would be a framework that we could work within, but there is nothing. In effect, we are starting with a blank sheet of paper and saying what we would do if we had free rein to design what we wanted.

Adam Tomkins: I am curious about how the approach fits in with what the Scotland Acts say about devolved competence and reserved competence. You seem to be saying that the UK will design the fund and the Scottish ministers will deliver it on the ground in Scotland. Is that right?

Ivan McKee: No, what I am saying is that, as we exit the EU, the funding that previously went from the UK Government to the EU in order to fund the budget that funded the programmes and which, typically, flowed back to Scotland to allow us to run programmes here will now be with the UK Government, because it will no longer be sending it to Brussels. The UK Government has said that it will set up a shared prosperity fund, and that is pretty much all that we know about it. We need to understand the framework within which that will operate but, clearly, our red lines are that there should be no detriment in terms of the funding that comes to Scotland and that decisions about that funding should be made in Scotland, because of the impact that the way in which that funding has been operating up to now has had on devolved areas.

Adam Tomkins: Do you foresee that primary legislation will be required in this Parliament? At the moment, the authority under which the money is disbursed in Scotland is authority that comes from EU law. You have just put your hand on a thick pile of papers and said "EU regulations"—I do not know what is in that file, but it may very well be a fragment of EU regulations. Once the United Kingdom leaves the European Union, there is no guarantee that those EU regulations will continue to have any legal effect. That depends on the terms of the withdrawal agreement, if there is one.

You can take this question literally: do you foresee that there is a possibility, probability or likelihood that there might be a requirement for legislation to give the Scottish ministers the legal authority to act in this area?

Ivan McKee: To be honest, it is not something that we have considered. Our expectation is that there will be a funding stream that flows to the Scottish Government, which will design a programme to use the money. However, I will look further into the issue to decide whether there might need to be legislation.

Adam Tomkins: That would be helpful. We know that there are disagreements between the Scottish Government and the UK Government about where certain legal powers will fall after

Brexit. For example, there does not appear to be any agreement about whether state aid regulations will be reserved or devolved.

In terms of the legal authority that underpins the interventions that the Government can make to support prosperity in the form of EU structural funds or a Scottish or UK shared prosperity fund, it would be helpful to have a clearer sense than I currently do of the legal framework, and how the Scottish Government foresees that legal framework rolling out.

Ivan McKee: We will certainly consider and reflect on that. It is clear that many funding streams operate without primary legislation being needed. We will reflect on the question.

Alexander Burnett (Aberdeenshire West) (Con): I have a question about reporting requirements. Before we started to take evidence, there was probably a belief in the committee that a lot of the bureaucracy around reporting requirements originated in Brussels. However, we saw that the reality was slightly different as we got into the issue. A lot of the bureaucracy seems to be home grown and created by the Scottish Government.

South West Aberdeenshire Citizens Advice Bureau, which is in my constituency, came to see me last week. It is still awaiting clarification from the Government on what the new reporting requirements will be for moneys that it paid out in 2017. That seems to be very much a case of not just moving the goalposts but moving them after the game has finished and everyone has gone home. Are you aware of such issues? What have you learned from them in considering how you would construct a new system?

Ivan McKee: I do not accept that the Scottish Government invents bureaucracy for no good reason. It operates within the regime that we have from the European Union, which determines what we have to deliver. That regime and its execution are tightly audited at all levels, and we have to comply with it. Therefore, I do not accept the premise of the question that the Scottish Government is inventing unnecessary bureaucracy or is putting in place barriers that do not need to be there.

I know that there are specific issues relating to the citizens advice bureau that Alexander Burnett mentioned, and I know that there are issues to do with its funding relationship and challenges in its communication with Aberdeenshire Council but, as the council is the lead delivery partner for these programmes and projects, it is the council and not the Government that is having conversations with the CAB. It is important to understand that it is the lead delivery partner that moves the matter forward.

The general point about the bureaucracy is that it is about striking a balance between ensuring that we spend public money correctly—as everyone would want—and allowing as much flexibility as possible for organisations to deliver. All of that has to sit within the context of the European regulations. If there are specifics that the CAB wants us to look at, we can go into the regulations and the Scottish Government's management system chapter and verse to understand exactly what the problem is.

That is the context that we are operating within. I do not know whether Hilary Pearce wants to add anything.

Hilary Pearce (Scottish Government): For context, it is important to be clear that the managing authority, which is my team in the Scottish Government, manages the funds through the lead partners. There are 45 lead partners throughout Scotland, including all 32 councils. They, in turn, deliver the projects through the delivery agents, such as citizens advice bureaux, which do very valuable work. It is for us in the managing authority to ensure that the lead partners comply with the monitoring, reporting, compliance and audit regime that all member states have to comply with for the European Commission. That is audited by the audit authority on behalf of the European Commission and also directly by the European Commission.

Alexander Burnett: You have said that it is all being directed by the European Union. You might want to go back and consider some of the evidence that we have heard. When a lot of the delivery teams that we have spoken to have met delivery teams in other European countries, they have been surprised by the different levels of bureaucracy that have been imposed on them. There seemed to be an element of choice in what the Scottish Government was doing in comparison with the reporting requirements that Governments in other countries were imposing on delivery teams. You might want to look at that.

Ivan McKee: You must remember that, in different countries and for different programmes, different structures will have been designed to suit their requirements, so there will be differences in the ways in which things are done. That is the nature of the different types of projects and programmes that are being executed. However, if delivery teams have specific examples from other countries where things are done differently and they believe that there is something unnecessarily cumbersome in how the Scottish Government is managing things, we will be happy to look into it.

James Kelly (Glasgow) (Lab): I have a supplementary question on the allocation of funding and the processes for that. I see that £22 million of funds was frozen recently, and there was

a suggestion that that was due to issues with the audit process. Can you give us some background on that?

Ivan McKee: Yes—there is currently a pre-suspension in place on the ESF funds. I do not recognise the figure of £22 million; £9.6 million is the amount of money that has been claimed by the lead partners in the process but the Scottish Government is currently unable to claim that back from the EU.

There are a number of issues, which speaks to the complexity of the regime that we are working under. There are four main issues; one is to do with flat-rate costing and the other three are procurement issues. There is some confusion around the definition of public versus private; another issue is to do with the definition and interpretation of grant awards versus the public procurement process; and there is also an issue to do with match funding and the level at which that operates within the structure. There are a number of complex technical issues in there. The EU looked at it from an audit perspective and had some questions. As a consequence of that, the pre-suspension is in place, but we are confident that that will get cleared in the next few weeks and we will be able to move on.

James Kelly: Just to be clear, you are saying that the EU had issues with some of the processes that the Scottish Government was working through and that is why the money was suspended.

Ivan McKee: Yes. The lead partners are continuing to pay delivery agents. It is important to understand that non-payment of the delivery agents will not be a consequence of the pre-suspension.

James Kelly: You have given some general commentary, but it is a matter of concern that that money has been frozen. What specific action is the Scottish Government taking to address the issue and to ensure that the funds get released?

Ivan McKee: The solution to all of the four issues that were raised by the audit is a move to a unit cost system. That has been agreed in principle by the EU and we are working through the details of how that would operate in the Scottish context. The EU made a change recently that allowed us to move from a system whereby we had to list a specific national unit cost structure to an off-the-shelf unit cost system that is available across the whole of the EU. That change has allowed us to move much more easily towards that unit cost system, which will allow us to clear the blockages in relation to all four of the process issues that I have identified.

The conversations with the EU are moving forward and officials are engaged almost on a weekly basis. We are certainly expecting this to be

cleared before November, but it should all be resolved prior to that. It will be resolved within that timeframe.

As I said, the important point to recognise is that it is to do with the flow of funds from the EU to the Scottish Government to the lead partners. The flow from the lead partners to the delivery agents on the ground has continued and has not been affected by the pre-suspension.

James Kelly: From the point of view of an organisation receiving funding, it will receive a block of money, so how does a unit cost system apply to that?

Ivan McKee: It works on the outputs. For example, if you are training a number of individuals, it will be based on a certain amount per individual you have trained. The current system has typically involved flat costs, so it has been either the actual costs or the costs for the number of people who are employed directly with a percentage add-on on top of that for indirect costs. The unit cost system is a change in the structure, but it resolves a number of the audit issues because there was misinterpretation of how that flat cost system operates in the current context.

The unit cost system is the solution, because the EU has recently changed the process and rules for that. That has allowed us to move towards that system, which will clear the audit issues. That has been agreed in principle with the EU and we are just working through the mechanics of how to roll it out.

10:00

The Convener: Neil Bibby also has a question on that area.

Neil Bibby (West Scotland) (Lab): Yes, it is on the issue of ESF money being suspended. I have asked in a written question for a list of projects in the west of Scotland that are affected by that suspension. I do not expect you to list them today, but when can I expect an answer?

Ivan McKee: In terms of delivery bodies on the ground, the answer is none, because, as I said, the flow of funds from the lead partners to those local organisations is continuing.

Neil Bibby: Thank you.

The Convener: Willie Coffey has some questions on outcomes.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Minister, you talked earlier about having to get the process under way in the absence of any guidance on the shared prosperity fund and what is potentially in it, and you are right to do that. You also talked about how the EU 2020 targets neatly

align with Scottish Government targets. What happens if we proceed down the road of developing the approach that we would prefer to take and at some stage get presented with an entirely different approach by the UK Government? It sounds as though there could be a pretty major moving of the goalposts at that stage. What is your view of that and how might we try to resolve such differences if they occur?

Ivan McKee: It is unfortunate. I reiterate that we are moving forward with the consultation and steering group at this point because we have waited, asking and encouraging the UK Government to give us more detail so that we would know the context within which we would be working. In effect, we are starting with a blank piece of paper and having to design something from the ground up, but Willie Coffey is right that, at any point during the process over the next few months, the UK Government could say, "This is what we think it should look like."

The UK Government has said that it will go through a consultation, which I suspect may run in parallel with its process—who knows? We will see how that goes. However, it could at some point tell us how it sees the structure of the shared prosperity fund working at UK level. We have laid our red lines and, in that context, there will clearly need to be a discussion. Even if all the red lines, which are on aspects such as the funding value and the level of control, are accepted, the UK Government could come along with its own rulebook, equivalent to the EU book, and we would have to figure out how it would work, taking what we think the fund should look like in the context of the rulebook that the UK wanted to implement. It could be messy at a number of levels, from very detailed up to more overarching considerations.

Willie Coffey: Are you getting any indication that the UK Government is willing to continue to embrace the principles of cohesion and social inclusion that we are familiar with in a lot of the programmes, or are you getting a sense that it is diverging from those principles?

Ivan McKee: As I said, what we know from the UK Government's statements is that it will be based on the UK industrial strategy and focus on productivity as a mechanism to support and help to develop less well-developed communities. That is the overarching focus but, as we go into the detail, the question will be how well that aligns with the Scottish Government's focus on inclusive growth, our economic strategy and our focus on climate change and low carbon. That is part of the drive in the current programme and I do not doubt that it will be a large part of what we do in future. The question is how that will gel with the UK

Government's focus and there are potential points of discussion.

Willie Coffey: Finally, can you gaze into your crystal ball and give the committee some idea of when you might know?

Ivan McKee: I would not care to comment.

The Convener: Your crystal ball is cloudy.

Ivan McKee: If we know anybody who is able to do this—and we know some—we might encourage them to go along to one of the Conservative Party leadership hustings and ask the candidates for their view on the shared prosperity fund and how they see it moving forward. The reality is that we are stuck until a lot of those larger issues shake down and we understand where we are in the bigger context.

The Convener: George Adam had a question on the allocation of funds. Has that already been answered?

George Adam (Paisley) (SNP): It has more or less been answered.

The Convener: Minister, we have spoken to some groups who are very passionate about the way in which they deliver the European funding, including the LEADER group. We have also taken a fair bit of evidence on LEADER funding. Will representatives of LEADER be on your steering group?

Ivan McKee: To be clear, the LEADER group falls outside my portfolio; it comes under the rural portfolio. We will have a discussion with ministerial colleagues about whether the scope of the consultation should encompass that. I am only empowered to set up a consultation that includes the ESF and ERDF funds. That discussion with ministerial colleagues will be part of setting up the terms of reference under which the steering group will operate.

There are two ways to look at that. If LEADER funding is in scope and rural colleagues are comfortable with that approach, there will clearly be an input. I also take the point that there could be learnings from the way that LEADER funding has operated that could add value, in a generic sense, to the work that we are doing. We will certainly consider whether there are individuals in that group who could add value to our consideration.

The Convener: I am assuming that you will write to the committee when the steering group and its terms of reference are in place, so that we can understand where we have got to on that journey.

Ivan McKee: Indeed.

The Convener: As there are no other questions, I thank the minister and other witnesses.

10:06

Meeting suspended.

10:15

On resuming—

Referendums (Scotland) Bill: Stage 1

The Convener: Under item 2, we will take evidence from Scottish Government officials on the Referendums (Scotland) Bill. I welcome Rebecca Whyte, the bill team leader; Penny Curtis, the deputy director of elections and freedom of information; and Colin Brown and Graham Fisher, who are solicitors in the Scottish Government.

Does Rebecca Whyte want to make an opening statement?

Rebecca Whyte (Scottish Government): No. I am quite happy not to make one.

The Convener: Okay. I also welcome to the meeting, from Newcastle University, Dr Alistair Clark, who will be advising the committee on the bill.

Given that there has been no opening statement, I will start by asking some very simple questions. In simple terms, why has the Scottish Government introduced the bill? What are the bill's aims and purpose? Does similar legislation exist elsewhere in the United Kingdom? For the purposes of getting it on the record, and to help my fellow committee members, will you answer those questions?

Penny Curtis (Scottish Government): The bill proposes a legal framework for holding referendums on matters that are within the competence of the Scottish Parliament. Broadly, it is a technical bill that sets out rules, including those relating to the franchise for any referendum, voting and conducting a poll, designation and participation in campaigns, and spending and donations. The bill is based largely on existing legislation in Scotland and the United Kingdom. It draws on the rules that are set out in the UK Parliament's Political Parties, Elections and Referendums Act 2000 and the Scottish Independence Referendum Act 2013. We started from the basis of looking at the existing legislation, and we reflected on the process that worked well in 2014. The referendum is considered to have been well run, and the legislation has been adapted to reflect changes in practice since then.

The Independent Commission on Referendums recommended putting in place a framework for referendums in Scotland. The recommendation reflected the fact that electoral law is dispersed, so the bill brings it together in a single framework for Scotland. The bill will ensure that we have in place the rules for any future referendum in Scotland, so that, at the point of the framework being used, the debate can be about the merits of the referendum rather than about the technical detail of the rules.

The Convener: Thank you for that general overview, which was very helpful. There are some differences from the 2013 act. Why has the Scottish Government proposed that secondary legislation be used to initiate the question that might be asked, or the date that is set, for specific referendums, rather than primary legislation, particularly given that the parliamentary scrutiny period for primary legislation is much greater, in terms of its length and intensity, than it is for secondary legislation? Why has the Government chosen to go in that direction?

Penny Curtis: The primary reason that the bill proposes that, in relation to the powers, secondary legislation and the affirmative procedure be used relates to the certainty of the timetabling. That will ensure that we have a predictable timetable from the point at which secondary legislation is introduced, and that Parliament has an opportunity to scrutinise that legislation and agree or not with the proposed question, date and so on.

Adam Tomkins: I am sorry, but I did not understand that answer at all. What is it about the timetabling of secondary legislation that makes things clearer than the timetabling of primary legislation and requires you to act in this way?

Penny Curtis: The time for considering secondary legislation is set out in parliamentary procedures, whereas there is a lot more flexibility in the time that a bill can take to go through those procedures.

Adam Tomkins: I see; it is because our standing orders restrict the amount of time that we can spend deliberating on secondary instruments. So, the Scottish Government thinks that it is appropriate to restrict the amount of time that Parliament can spend considering referendum questions rather than having that in primary legislation.

Penny Curtis: No. We are not looking at the issue from the perspective of restricting the time for scrutiny at all. It is very much about predictability, so that we can enable a referendum on a certain timescale.

Adam Tomkins: Our standing orders restrict the time for which Parliament can consider secondary legislation. Is that correct?

Penny Curtis: They certainly put a fixed timetable around that.

Adam Tomkins: Standing orders restrict the amount of time that we can spend considering secondary legislation, and there is no equivalent restriction with regard to primary legislation. Is that correct?

Penny Curtis: That is my understanding.

Adam Tomkins: So, the intention behind section 1 of the bill, which allows the Scottish ministers to make regulations providing for a referendum—including, as the convener said, the date of the referendum and the question—is to restrict the amount of time that Parliament can spend on scrutinising those issues.

Penny Curtis: No; I would not characterise it in that way. That is not the intention behind that decision. It is not about restricting scrutiny. Our driver—

Adam Tomkins: With respect, your answer to the convener's question—this was not going to be my line of questioning until I heard that answer—was that the reason for the Scottish Government wanting to proceed by way of secondary legislation rather than primary legislation concerned the predictability of timetabling. That took me by surprise. As I said at the beginning of my questions to you, I did not understand it. You are saying that the predictability that you are talking about is a product of the fact that, unlike the case with primary legislation, the Parliament is restricted in the time that it can spend considering the instruments.

Penny Curtis: That is certainly not the intention behind the decision. You are right to say that the decision concerns predictability, but the intention is absolutely not about restricting scrutiny. Clearly, the Parliament has the ability to scrutinise whatever is brought forward in that legislation and to decide whether or not to agree to it.

Adam Tomkins: But the effect will be that there is a restriction on the amount of parliamentary time that is available. That is understood.

What other countries in the world legislate for referendums in this way? That is, what other countries in the world confer on ministers the power to make regulations setting out referendum questions?

Rebecca Whyte: As I am sure you know, there is a wide range of approaches to administering referendums in various countries. It can be difficult to derive exact parallels between legal systems and the way in which referendums are run. In developing the bill, we considered various jurisdictions that have general legislation covering the administration of referendums, including Denmark, Ireland and Poland. Some of them have general legislation that provides for some types of referendums and not for others. For example, in New Zealand, Governments can initiate non-binding referendums—they have citizen-initiated referendums—but that framework cannot be used for binding referendums.

We considered a number of examples in relation to the issue of what a framework does. I cannot at this moment give you specific examples of places

that have processes that are exactly analogous to the secondary legislation process that is proposed for the Scottish Parliament.

Adam Tomkins: I know that you cannot do that, because no other country in the western world proposes to construct a framework for referendums in the way that the Scottish Government proposes to do. What is proposed is unprecedented, is it not?

Rebecca Whyte: As I said, I cannot give you a specific example.

Adam Tomkins: Because there isn't one—there is not a precedent or an example that you can point to anywhere in Europe or in the Commonwealth that enables ministers to set the date of a referendum and the questions that will be asked in the way that is provided for in section 1.

Rebecca Whyte: That is right.

Adam Tomkins: Thank you.

You talked about binding referendums. Is it the intention that referendums that are established under the bill will be binding?

Rebecca Whyte: Because the referendum framework is intended to provide for any referendum that might be held within devolved competence, it is silent on the question of whether referendums are binding. That is to ensure that there is flexibility for the different circumstances in which polls might be run for different decision-making purposes.

Adam Tomkins: Does the Scottish Government understand there to be a difference between a referendum and a focus group or an opinion poll?

Rebecca Whyte: Yes.

Adam Tomkins: What is that difference?

Rebecca Whyte: A way of reframing that question would be to ask what scenarios referendums would be used in. Is that what you are asking?

Adam Tomkins: My understanding is that referendums are devices that decide things, and decisions, by their nature, are binding. Is that the Scottish Government's view?

Rebecca Whyte: I see what you mean. Given that there might be referendums in different circumstances, we felt that it would not be appropriate to set out in the legislation a singular process that says, "This is how things will proceed once the referendum has been conducted." The idea is that it will be possible for the framework to be used for different polls, so there needs to be some flexibility on the circumstances and the packaging.

Adam Tomkins: Okay. To be clear, the intention behind the bill is that some referendums that are established under it might be advisory—non-binding—and other referendums that are established under it might be binding, but we are not quite sure on whom they would be binding.

Graham Fisher (Scottish Government): There is certainly no provision in the framework for making a referendum legally binding in any way, as with the independence referendum in 2014, which was held under the Scottish Independence Referendum Act 2013. That is the legal position.

Adam Tomkins: That is the legal position under the bill as introduced.

Graham Fisher: Yes. As with the referendum under the 2013 act, referendums under the bill would not be binding in that sense but, in any referendum, the decision of the people might have significant political and moral force behind it, especially given that section 1 provides for the referendum to be held “throughout Scotland”.

Adam Tomkins: But, as introduced, the bill does not resolve and does not seek to resolve the uncertainty that exists in the UK at the moment, including in UK law, about the binding nature of referendum decisions.

Graham Fisher: That is correct.

Adam Tomkins: Yesterday—or certainly within the past few days—the constitution unit at University College London published a blog on the bill. I will read out a quotation from that blog, which I will ask you to reflect on. The author wrote:

“I am aware of no well-functioning parliamentary democracy that gives ministers blanket authority to call a referendum by secondary legislation. The proposal”—

he is talking about the proposal in section 1—

“runs counter to the principles for good referendum design advocated by the Independent Commission on Referendums and the Council of Europe. Both emphasise that the decision to hold a referendum is a big one and ought to be subject to exhaustive scrutiny.”

What is the Scottish Government’s reaction to that?

Penny Curtis: We have set out the reasons for our proposing a secondary legislation power. Clearly, the Parliament will want to consider the bill’s provisions, and it might want to take evidence on that issue as part of its scrutiny of the bill.

10:30

Adam Tomkins: Do you accept that the proposal in section 1

“runs counter to the principles for good referendum design advocated by the Independent Commission on Referendums and the Council of Europe”?

Penny Curtis: I do not particularly want to get drawn into the pros and cons of the policy that has been set out in the bill; it would not be appropriate for me to do that. You will want to take evidence on that from ministers as the bill goes through the process.

Adam Tomkins: That would not be appropriate. It also would not be appropriate for me to ask you that, and I was very careful not to do so. I am asking whether you accept the view that was published on the UCL constitution unit’s blog that, as a matter of fact, the proposal in section 1 runs counter to established international standards of best practice on referendums, as set out by the Independent Commission on Referendums and the Council of Europe. Does the Scottish Government accept that verdict or not?

Penny Curtis: I am not entirely sure that I accept all that is set out there. As I set out at the start, there is a process for scrutiny and approval of what is in a referendum question, on the timing and so on, and we are not trying to circumvent that with the bill. Having this debate around whether that is appropriate in the bill, and in the consideration of the bill, gives me a degree of confidence that that will be tested as we go through the process.

Patrick Harvie: Adam Tomkins’s initial questions explored the timing. The regulations would be subject to the affirmative procedure. Has the Government given consideration to using the super-affirmative procedure, which would allow more time and flexibility for scrutiny inside and beyond Parliament of any proposed regulations?

Penny Curtis: At this stage, we have not done that, but we recognise that the committee will want to consider that issue as it looks at the bill.

Patrick Harvie: The Government has not ruled that out.

Penny Curtis: It is not in the proposals that have been made or in the provisions in the bill. We recognise that the committee will look at the issue during its deliberations.

Tom Arthur (Renfrewshire South) (SNP): Good morning. Will you clarify a matter for me on the issue of scrutiny? I have a very simple question, which is for my own benefit. Section 1 says:

“The Scottish Ministers must consult the Electoral Commission before laying a draft Scottish statutory instrument”.

There is further reference to consulting the Electoral Commission in section 3(2)(a), and section 3(2)(b) mentions the need to lay a report before Parliament. Pre-scrutiny would have to take place before any regulations even reached the Parliament. Is that understanding fair?

Rebecca Whyte: That is correct.

Tom Arthur: There is nothing in the bill that would preclude the Government from consulting more widely.

Rebecca Whyte: There is nothing in the framework that excludes that possibility.

Tom Arthur: So, there would be an extensive period of consultation with the Electoral Commission, the potential for further consultation more widely and, via the process for secondary legislation, a 22-day period during which the Delegated Powers and Law Reform Committee would scrutinise that legislation thoroughly on technical grounds. After that, there would be a further 40-day period for a lead committee—that would likely be this committee—to report on the legislation. During the committee's scrutiny, a motion to annul an instrument subject to the negative procedure could be laid, or, if the instrument is subject to the affirmative procedure, the committee could recommend that it not be agreed to. Is my understanding correct?

Rebecca Whyte: Yes.

Tom Arthur: I just wanted to clarify what room the Parliament had for scrutiny. That is fine; thank you.

Willie Coffey: Was the referendum on membership of the European Union also advisory?

Rebecca Whyte: Yes.

Willie Coffey: Thank you. I want to ask for your views about overlap with reserved matters. The bill proposes a 28-day purdah period and covers the control of financial donations during a referendum. It also talks about electoral registration: how systems might cope with potential surges and how the rules would be respected in relation to the UK Government, which would have a clear interest in a referendum process in Scotland. In addition, the bill seeks to address how we manage concerns about broadcasting, data protection and so on. Can you give us a flavour of your thoughts about potential overlaps with reserved matters in that respect?

Rebecca Whyte: I am happy to do that. I will take the point about registration first.

As you say, aspects of the registration system—most notably, the website through which voters register—are reserved to the UK Government. Since the devolution of election powers in the Scotland Act 2016, the Scottish Government has been working with the UK Government to ensure that, where our policy intersects with reserved matters, there is good co-operation and close joint working to ensure that the system, while it is controlled by the UK Government, is able to flex to allow for Scottish policy decisions. The best

example of that is the specialised user journey for 16 and 17-year-olds through the website, which was put in place after the Scottish Elections (Reduction of Voting Age) Act 2015. Registration issues would be a matter of negotiation and co-operative working with the UK Government.

On the issue of purdah, the framework includes provisions that are analogous to some of the provisions in the Political Parties, Elections and Referendums Act 2000, which limit the activities that public bodies can undertake in the 28 days before a poll. Within the competence of the bill, those provisions can legally bind only Scottish public authorities. If we were organising a poll with a UK dimension, any restriction on UK public bodies would be done by negotiation with the UK Government, as happened in the Edinburgh agreement and as was respected by various public bodies.

With regard to some of the aspects around donations and permitted participants being able to check registers, they will, for UK registers, have access to publicly available versions of the register. Any further access would require the agreement of the UK Government.

Willie Coffey: Suppose that some sort of pressing conflict arose during the process. How quickly could one party influence or stop a process with which it was unhappy, instead of waiting until it was too late, post the process, to complain about something? How quickly could the system respond to concerns that may be expressed by either side?

Rebecca Whyte: Is that in relation to breaches?

Willie Coffey: For any reason. Imagine that there was a broadcasting issue, or we discovered that there was a huge financial donation coming from somewhere and any party raised an objection to that. How quickly could the system respond in order to deal with that during the process?

Rebecca Whyte: During the period in which the Electoral Commission is acting as regulator, it monitors campaign activity. To use your example, if it was felt that a donation was suspicious, that information could be passed to the Electoral Commission and it could take action as it considered appropriate.

The bill includes provision for a stop notice, which is effectively a notice to a campaigner or campaign group during the campaign period that the activity that they are undertaking is in breach of the campaign rules and that they should not do it. There is some provision for ensuring that any issues that are identified during a campaign are dealt with. The Electoral Commission is very familiar with dealing with reports of any issues to do with campaign regulation from its work on other elections and referendums.

Willie Coffey: Did you touch on broadcasting?

Rebecca Whyte: Yes.

Graham Fisher: The legislative framework for broadcasting would remain within the control of the UK Government anyway, and the detail is likely to be subject to the broadcasting regulators, as was provided for in the section 30 order in relation to the independence referendum. Similar provision could be made by a Scotland Act 1998 order, whether under section 104 of the act or otherwise, to provide for broadcasting regulation if the UK Government agreed in consequence of the framework bill.

Willie Coffey: So the Scottish Government would have to obtain agreement.

Graham Fisher: Yes.

Rebecca Whyte: Yes.

James Kelly: Section 3 is on the interpretation of referendum questions. Section 3(5) states that the Electoral Commission has to publish a report on the wording and “intelligibility” of any question, but section 3(7) goes on to say that the whole of section 3 does not apply if the Electoral Commission has “previously published a report” on the question or has suggested the wording of the question or statement.

Ahead of the 2014 independence referendum, the Electoral Commission published a report on the question that was being considered. Section 3(7) could be interpreted as saying that that report stands and that the Electoral Commission does not have a role in looking at the wording of the question or statement in any new independence referendum. What is the policy intent?

Penny Curtis: The policy intention is that, where questions have already been tested and used and are familiar and understandable to voters, there should be no requirement to test again. The process of question testing is quite expensive—it probably costs in excess of £100,000. Our main policy intention in that regard is not to do anything that gets in the way of voter intelligibility around the question.

James Kelly: I gave the example of another independence referendum and the Electoral Commission’s role in the 2014 referendum. Would the Electoral Commission be asked to look again at the question and any potential statement?

Penny Curtis: The framework would not require ministers to get the commission to test the question again if they were seeking to use the same question again.

James Kelly: That is clear, but I think that there will be an issue about that—it is a political issue.

Emma Harper: I am interested in the length of referendum periods. There have been various periods, such as 10 weeks, 16 weeks or 14 and a half weeks. Obviously, we need to ensure that spending and donations are transparent, traceable and clear. Is it the intention to follow what the Electoral Commission recommends, which is a 16-week period, or would there be flexibility? *[Interruption.]*

The Convener: Emma’s laptop says, “Okay.” Is that the official answer? *[Laughter.]*

Rebecca Whyte: As the framework is designed to accommodate a range of possible referendums, the referendum period is not specified in the bill. That would be set by the regulations that establish a particular poll.

Emma Harper: I have a wee supplementary question about the issue of binding versus advisory referendums. Could we ask a question that was based on a reserved matter? For instance, Scotland might wish to use a public health policy relating to drugs and alcohol—the Scottish Affairs Committee is looking into that right now. Currently, drugs policy is reserved to Westminster. Under the bill, could a question be asked that is based on a reserved matter as a way to gather information from people in society that would be stronger than asking a focus group but would not be binding because the matter was reserved? Is that an understandable example?

Graham Fisher: The basic answer is that because the framework in the bill is intended to be used for questions within the competence of the Parliament, it would not allow a question about a reserved matter.

10:45

Alexander Burnett: Forgive me if I have missed it, but the most important bit—how the winner is decided—is missing and does not seem to be provided for in the bill. Will you point me to the bit of the bill where that is specified? If it is not specified, please tell me how the winner is decided.

Colin Brown (Scottish Government): It is decided by those who analyse the outcome of the vote. In an advisory referendum, a result is produced and those who look at it make of it what they wish.

Alexander Burnett: I thought that it was said earlier that the referendum could be binding or advisory.

Colin Brown: If it was binding, the rules about its binding nature would say what was to happen.

Rebecca Whyte: The bill as drafted does not include rules that specify how a referendum would

be legally binding in the sense that people would be legally obliged to follow the result. The bill does not set out any provision for additional majority thresholds or other ways of approaching the issue, which means that, according to the bill as drafted, it would be a simple majority.

Alexander Burnett: So if it is not specified in the bill, the thresholds for turnout, victory, the qualifying majority and so on would be in section 1, at the discretion of the minister.

Rebecca Whyte: The bill as drafted does not make provision for those matters as part of the regulations.

The Convener: Did the Scottish Independence Referendum Act 2013 include such a provision?

Graham Fisher: No—there was no provision in that act, either. It simply made provision for the vote and the announcement of the outcome.

The Convener: Did the referendum on the EU contain such a provision?

Graham Fisher: No.

Alexander Burnett: Given all the discussions that took place for the previous referendums about what the thresholds should be, have there been any discussions with ministers on that issue? Have they asked you to look for examples in other countries of how a majority has been defined?

Penny Curtis: We have not specifically looked at questions around what different thresholds or turnout might apply, but the fairly consistent approach of ministers has been for a straight majority in the outcome of the results.

Alexander Burnett: Is there no plan for that to be specified?

Penny Curtis: We have no plans to do that.

Colin Brown: There was some discussion before the 2014 poll about what would happen if the vote produced a dead heat. The 2013 act would not have answered that question.

I could be wrong but, from memory, the only legislation for a referendum in the UK that mandated a specific outcome was the legislation for the 2011 alternative voting referendum, which mandated the Government to introduce some legislation in the event of a majority in favour of a particular proposition.

Patrick Harvie: Given that there are certain things that the framework and legislation for a referendum need to do, such as explain how the referendum is conducted, what the rules for participants are, how the count is carried out and the result announced and who carries out those functions, is it the Government's intention to say that the decisions about what to do with the result

are political judgments? For example, it would be for the Government of the day to say that it would honour the decision of the people if the result was a simple or two-thirds majority and would restrict its actions if there was no majority, but, as that is a political judgment, it should not be set out in the legislation or framework. Is that the intention?

Penny Curtis: Having that discussion in a political or parliamentary space is certainly the approach that has been used in most referendums to date.

Patrick Harvie: That would be quite normal.

Rebecca Whyte: Yes.

The Convener: Adam Tomkins has a supplementary question.

Adam Tomkins: My question is not on the binding nature of the result, but on the threshold issue, which Alexander Burnett asked about. If a minister wanted to use the section 1 power to put a question in a referendum, could they set a threshold at more than 50 per cent in the regulations?

Rebecca Whyte: That would not be under section 1; it would be under section 2.

Adam Tomkins: Right—thank you for that. Could a minister, using regulation-making powers under the bill, establish a referendum in which the threshold would not be 50 per cent plus 1, but higher—or, indeed, lower—than that? The threshold would therefore be a question for ministerial regulation rather than primary legislation.

Graham Fisher: Certainly, but Parliament would have control over the affirmative regulations and would have to pass that proposal.

Adam Tomkins: There is no like power in the Political Parties, Elections and Referendums Act 2000, is there? Ministers do not have powers under the 2000 act to change the threshold or, indeed, turnout requirements in the way that they would have under the bill if it were passed in its current form.

Graham Fisher: The 2000 act certainly depends on other legislation that provides for the mechanism for the vote, although there are some ministerial powers in it relating to what can be applied.

Adam Tomkins: You said “other legislation”. Do you mean other primary legislation?

Graham Fisher: Yes. The 2000 act basically relies on other primary legislation although, as I have said, there are some regulation-making powers.

Adam Tomkins: Let us be absolutely clear. Ministers have the potential power under the bill to set threshold requirements or minimum turnout requirements for referendums established by regulation under it, and there are no like powers in the UK legislation.

Graham Fisher: Yes—provided, obviously, that Parliament agreed to those regulations, as the affirmative procedure is involved.

The Convener: Neil Bibby has questions on franchise issues.

Neil Bibby: Obviously, the bill will overlap with the forthcoming electoral reform and franchise bill. When can we expect that to be published?

Rebecca Whyte: The Scottish Elections (Franchise and Representation) Bill has now been introduced and published, and the electoral reform bill is scheduled to be published shortly—that is probably my best estimate on the timing.

Neil Bibby: Okay. On the franchise, the bill has been drafted while the UK is a member of the European Union. Is it suggested that, if and when the UK leaves the European Union, all EU citizens who are resident in Scotland will have a vote in all future referendums in Scotland? What about non-EU citizens who are resident in Scotland—for example, people from Canada, Australia, New Zealand or America?

Rebecca Whyte: It is clear in the bill that EU citizens would be included in the franchise, as currently happens. Ministers have been very clear in many public statements that their intention is to keep EU citizens in the franchise for all devolved elections. That is a clear policy statement.

Neil Bibby: Even if we leave the European Union?

Rebecca Whyte: Yes. I am drawing on a previous job, but my understanding is that there has been quite a lot of consideration of how to do that and that, in a number of Brexit scenarios, EU citizens will continue to be allowed to register and vote in Scotland.

Neil Bibby: But not citizens of Canada, Australia, the USA and New Zealand who are resident in Scotland.

Rebecca Whyte: I am sorry—I will come to that. The Scottish Elections (Franchise and Representation) Bill, which has been introduced in the Scottish Parliament, includes proposals to extend the franchise to nationals of all countries who are legally resident in Scotland, including people from New Zealand. The franchise in the Referendums (Scotland) Bill is set to what the current local government franchise is. It is hoped that the Scottish Elections (Franchise and

Representation) Bill will amend the local government franchise.

Obviously, we did not want to prejudge Parliament's scrutiny of that legislation—it is an important debate, and the Scottish Elections (Franchise and Representation) Bill is subject to a supermajority. Clearly, the Parliament will have a lengthy discussion about the merits of the proposals in that bill. Once it has concluded its parliamentary passage, there will be the ability, under powers in the bill once enacted, to update the legislation to reflect that change in electoral law. In his statement to the Parliament, Mike Russell was clear that his intention is to do that to ensure that the franchise for referendums continues to match the local government franchise.

Neil Bibby: You mentioned the local government franchise. We are talking about referendums in Scotland, but, in times past, local authorities have organised referendums, such as the Strathclyde water referendum and the referendum on the congestion charge. What is the legal position on local authorities running referendums? Could the Referendums (Scotland) Bill impact on them?

Rebecca Whyte: The bill provides for referendums that are held across the whole of Scotland. It does not facilitate referendums that are held in single or multiple local authority areas. Existing legal provision helps local authorities to do that. Given the weight and gravity of some of the rules, particularly on the campaign side, and taking into account wider policy around community empowerment and democratic engagement, it was felt that it would be incredibly heavy handed if local referendums had to follow some of the rules in the bill.

Neil Bibby: However, there are still provisions for local authorities legally to hold referendums.

Rebecca Whyte: Yes, the bill makes no change to that.

Colin Brown: The bill has no impact on that. Obviously, the bill will be out there and local authorities can look at it and decide how they design their local referendums, but it leaves that for local authorities to determine in local circumstances.

Neil Bibby: Thank you.

Murdo Fraser (Mid Scotland and Fife) (Con): I apologise for arriving late. I was moving amendments to the Transport (Scotland) Bill at the Rural Economy and Connectivity Committee, so I missed the start of the session.

I will ask about the policy intent behind the bill. We know that the Scottish Government has talked about the prospect of an independence

referendum. Have ministers discussed with you other issues that they might want to put to a referendum?

Penny Curtis: No. Ministers have not talked to us about other issues, but they have been clear about wanting to have the framework in place so that it is available for whatever issues come up in the future.

Murdo Fraser: Thank you. That is helpful.

In other countries, such as Switzerland, there is a tradition of putting issues to referendums—or, to be precise, referenda. Do you get a sense from Scottish ministers that there is an interest in pursuing more referenda? Is that the direction that we might go in?

Penny Curtis: Ministers have not made any statements about how they see referendums being used more, less or in exactly the same way. They have been clear about recognising that they have a legitimate place in democratic decision making and involvement in Scotland.

Murdo Fraser: You have given me an interesting response. What is that place?

Penny Curtis: I am just being thoughtful about how I set that out. Clearly, ministers have previously used a referendum on an issue of importance in Scotland. I point to that as an example.

In her statement at the end of April, the First Minister announced that we were going to bring forward this bill and she set out other ways in which she wanted to involve the people of Scotland in thinking about the future of the kind of country that Scotland is. Beyond that, I cannot offer more around your question.

11:00

Murdo Fraser: That is fine. You have just clarified that, as far as you are aware, nothing else—other than independence—is in contemplation that ministers might want to put to a referendum.

Penny Curtis: Nothing that ministers have talked to us about.

Murdo Fraser: Thank you.

The Convener: Patrick Harvie has a question on transparency.

Patrick Harvie: Earlier, Emma Harper asked some questions about donations. I wonder whether we could explore those and also the questions of publications and campaigning. Has there been an attempt to learn lessons from the two recent big referendums that took place in 2014 and 2016? Some of the concerns about those referendums revolved around so-called dark

money and the lack of ability for members of the public to know who was spending what and how. If there have been attempts to learn lessons and to implement changes, could you pick out for me what specific changes have been made, compared with how we conducted the 2014 referendum, to take account of such concerns?

Rebecca Whyte: I will talk about the two recent referendums in turn. The draft referendum bill that we published for consultation in 2016 included a number of updates that were intended to respond to issues that had emerged from the 2014 referendum and pick up on issues from the Electoral Commission's report on the conduct of that poll. Subsequent changes to that bill, which was then transformed into the one that we are discussing today, picked up further points from electoral stakeholders and the wider debate. Among those updates, I highlight the one on online imprints, on which the drafting that was included in the 2013 act was refined to capture campaign activity more closely rather than restricting individual freedom of speech. There have also been updates to other aspects of campaign regulation.

I turn to the EU referendum, which, as Patrick Harvie said, significantly increased interest in and attention on referendum campaign rules and concern about the ways in which those rules might be manipulated. We have looked at the recommendations of the Electoral Commission and other electoral bodies and groups with an interest in the space. It is fair to say that some of what we might call the policy remedies to those concerns are still very much under development by bodies such as the Electoral Commission. The debate on how best to go about improving electoral legislation as a result of the lessons learned from those polls is on-going. As Mr Russell set out in his statement, we are interested in hearing comments on the bill to help us to consider how we can continue to ensure that it meets our ambition of being of a gold standard.

Patrick Harvie: Do you think that that is achievable within the devolved powers, or are there concerns about the limits on how the Scottish Parliament can legislate to address such concerns?

Rebecca Whyte: There is a difference between elections and referendums with regard to how the rules are devolved. Within the powers of the Parliament, there is decent scope to make a number of improvements to ensure that the framework is as robust as it can be.

Patrick Harvie: I will give an example. In 2016, large amounts of money were spent on online advertising, including graphics that were created by AggregatIQ, and on the leave campaign. Much of that been criticised as being extremely

misleading or containing outright lies. Obviously, that campaign would refute such allegations, but they have been made.

Political advertising is not regulated, and it would clearly be outwith our devolved competence to try to change the exemption that prevents the Advertising Standards Authority from doing so. However, if I read it correctly, the reservation in the Scotland Act 1998 on misleading advertising relates to consumer protection and trade and industry. Would it be within our devolved competence to say that we were going to regulate misleading political advertising?

Graham Fisher: My initial reaction is to say that it is complicated. [*Laughter.*] Certainly, the broadcasting framework, including the rules on political advertising in that sense, is reserved. As I mentioned earlier, the application of the bill would depend on using reserved powers, with the agreement of the UK Government under a section 30 order to make regulations for broadcasting, which is required. That said, there is quite a lot of leeway about what the framework can provide for within the devolved powers. There are other complications and restrictions on that—for example, the Parliament's making any provision in relation to the BBC is completely outwith its competence, so its ability to do that would depend on provision being made in orders under the Scotland Act 1998. Any particular provision would have to be considered very carefully and explored with the UK Government as necessary to ensure that something robust and reliable could be put in place.

Patrick Harvie: Let us set aside broadcasting for a moment and imagine that there was a referendum on banning cheese. If I were campaigning against that and saying, "If we ban cheese, everyone in Scotland will starve," that would be a lie and it would constitute misleading advertising. People might be unhappy that they could not eat cheese, but they would not starve. Would it be within our devolved competence to say that people could not publish, in the print media, a misleading advert in that sense? I know that that is a silly example, but I could not think of a better one.

Graham Fisher: I think that I can say yes to that.

Patrick Harvie: It would be devolved.

Graham Fisher: If it were in the print media, I think that that is correct. However, I would want to reflect on the detail of any particular proposal.

Patrick Harvie: What about online?

Penny Curtis: As it stands, the bill regulates matters that happen online. It is when we get into the restriction on political advertising, about which

there is particular provision on broadcasting, that we run into the reserved areas.

Patrick Harvie: Thank you.

Adam Tomkins: I have two mop-up questions arising from other things that you have said this morning. Does section 4 of the bill require a two-thirds majority in the Parliament in order that it can be passed?

Rebecca Whyte: We are clear that the bill does not engage the supermajority provisions in relation to franchise, as the protected subject matter is about the Scottish Parliament franchise rather than the local government one.

Colin Brown: And Scottish Parliament elections.

Rebecca Whyte: Yes, of course. I am sorry—I was thinking particularly about the franchise and not section 4.

Adam Tomkins: Thank you. I want to explore your answers to Murdo Fraser's questions, which were about the issues—other than independence—on which referendums might be held in Scotland. What would happen if a minority Government were unable to get its budget through the Scottish Parliament? Could a minister then lay regulations, under the act that the bill would become, to put that budget to a referendum? Could such regulations specify that the outcome of that referendum would bind the Parliament?

Graham Fisher: I suppose that that would be the case if the Parliament approved the affirmative regulations.

Adam Tomkins: So the power in sections 1 and 2 is potentially so broadly drafted that ministers would be able to use it, subject to the affirmative procedure, to bypass a vote in Parliament in which the budget might be voted down. Thank you. I have no further questions.

The Convener: Graham, I see that you are hesitating and shaking your head.

Graham Fisher: I was going to say that I do not see how that process bypasses Parliament.

The Convener: If you need to reflect on that and come back to us, please do so.

Colin Brown: I suppose that that would be the case if the Parliament saw that as a way of bypassing a deadlock and invited ministers to bring such regulations.

The Convener: I thank our witnesses very much for coming along today and giving us their evidence. I suspend the meeting for about 10 minutes to allow for a change in witnesses.

11:09

Meeting suspended.

11:17

On resuming—

Non-Domestic Rates (Scotland) Bill: Financial Memorandum

The Convener: Under item 3, we will take evidence from Scottish Government officials on the Non-Domestic Rates (Scotland) Bill. I welcome Carol Sibbald, the bill team leader, and Anouk Berthier, from the bill team.

I invite Carol Sibbald to make an opening statement, if she wishes.

Carol Sibbald (Scottish Government): I am very happy to move straight to questions.

The Convener: The information that we received in response to the financial memorandum shows that a considerable number of individuals are opposed to the removal of charitable relief from independent schools. They claim that that would result in more children moving to state schools, because parents would not be able to afford increased fees, which would increase the burden on local authorities. How do you respond to those claims?

Carol Sibbald: The recommendation was made in the Barclay review, and ministers decided to implement it. The Scottish Government has done analysis and has looked at various sources of information that are available to the public in relation to rateable values and the amount of charity relief that each of the affected schools receive. Across the board, charitable relief totals 2.9 per cent of income. I am aware that, as with any business, schools have to take on board a variety of costs, of which rates are just one element.

Murdo Fraser: I will pursue that issue a little further. When I saw the financial memorandum, I was somewhat surprised that there was no information on the allocation of additional costs to local government following the introduction of non-domestic rates on independent schools. The bill proposes a £7 million annual tax take from independent schools. In Perth and Kinross, which is part of the region that I represent, there are a large number of independent school places—I think that there are several thousand. All those independent schools are charities and do not run at a profit; they operate on quite a marginal financial basis. Therefore, the only way in which such schools would be able to meet the additional rates charges would be by increasing fees for parents, reducing the availability of bursaries or perhaps a combination of both.

A simple law of economics is that increasing the cost of something will reduce demand. As a result of fee increases or a reduction in the number of bursaries, a number of people who currently choose to send their children to an independent

school will not make that choice in future. That means that children will go back into the state sector, and there will be an increase in costs to the local authority—in this case, Perth and Kinross Council. Why does the financial memorandum not reflect the increased costs to local authorities that cover areas in which there is a high number of independent schools, such as Perth and Kinross and Edinburgh?

Carol Sibbald: The figures in the financial memorandum on the impact on local authorities were provided by the Convention of Scottish Local Authorities. A number of people, mainly those from independent schools, have made the point that you made about the impact not being reflected. In relation to estimating how many children will be affected, I point out that parents might choose to have their child leave one independent school and go to another or to a local authority school. Local authority moneys are sorted out on a needs basis. The education element of the money is based on the number of pupils so, if there were to be additional costs, that would be reflected.

However, we are alert to the fact that people have commented on the issue, and the Scottish Government and COSLA will explore it further in their discussions. If it is appropriate, we can make a change to the financial memorandum for stage 2.

Murdo Fraser: You say that, if there were additional costs to local authorities, that would be reflected. That is a perfectly fair point to make, but such costs are not in the financial memorandum at the moment. If the objective of the change is to raise £7 million from the sector in non-domestic rates, we can easily foresee a scenario in which the additional costs to the public sector exceed £7 million. In that sense, the policy could end up costing money, rather than reducing costs. For example, in general terms, if 10 per cent of the pupils who currently attend independent schools in Perth and Kinross were to choose to attend a local authority school instead, that would add about £2 million in additional revenue costs to the local authority. That figure does not take into account any additional capital costs that would be required from building new capacity. That is only one council, and the figures for Edinburgh would be much more substantial.

Carol Sibbald said that the Government might want to look at the financial memorandum. I suggest that the issue needs to be addressed if there is to be proper parliamentary scrutiny of the bill and the financial memorandum.

Carol Sibbald: We are prepared to take that point on board.

Murdo Fraser: Thank you.

Patrick Harvie: Whenever we talk about taxation, there is some pleading from people who would quite like to pay less tax, thank you very much. Does the Government have an evidence base that would allow it to predict or model the demand for private fee-paying education if the change were to be introduced? Are we just plucking numbers—for example, one in 10 or one in 30—out of the air, or is there a basis for them?

Carol Sibbald: We do not know, because that is down to what parents choose to do. As Mr Fraser has indicated, it depends on how the schools deal with the situation. They could use any reserves that they might have, they could increase the fees or reduce bursaries, or they could absorb the cost. I am not quite sure how the unknowns could be modelled.

Patrick Harvie: So, at the moment, the Government does not have any evidence base for saying what the extra cost would be, based on lower take-up of private, fee-paying education.

Carol Sibbald: No.

James Kelly: According to the financial memorandum, the total cost of the bill will be £100 million over a number of years. The bulk of that—about two thirds of it, or £67 million—will come from ratepayers. Could you describe the thinking behind that and how the calculation breaks down?

Anouk Berthier (Scottish Government): Absolutely. The increase in the non-domestic rates tax bill, which is focused on the independent schools and the cost of adding commercial activity on parks, is set out in detail in table 1 in the financial memorandum. In terms of revenue, the cost to independent schools will be £7 million in 2020-21. Over five years, the total will be £37 million. Commercial activity on parks will be legislated for from 1 April 2020, so that cost is reflected from that year onwards—it will cost a total of £5 million over the three years post 2020.

Carol Sibbald: There are also the additional costs—the civil penalties—that will become payable only if ratepayers do not comply with the requirement to provide information to the local authorities or to the Scottish assessors.

Anouk Berthier: We make it quite clear in the financial memorandum that the costs for the penalties can only be illustrative at this point. We are having on-going discussions with councils and assessors on the use that they could make of those penalties, but that will depend on ratepayers' compliance and what councils and assessors decide to do with those powers.

The Convener: As no other member has indicated that they wish to ask a question, I thank our witnesses for being here. It has been a short

session, but we are grateful to them for their participation.

11:27

Meeting continued in private until 11:39.

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