OFFICIAL REPORT
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Finance and Constitution Committee

Wednesday 18 September 2019

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 18 September 2019

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FINANCE AND CONSTITUTION COMMITTEE
19th 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)
*Angela Constance (Almond Valley) (SNP)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Patrick Harvie (Glasgow) (Green)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)
*John Mason (Glasgow Shettleston) (SNP)
*Alex Rowley (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dame Sue Bruce (Electoral Commission)
Mark Conaghan (Society of Local Authority Lawyers and Administrators in Scotland)
Chris Highcock (Electoral Management Board for Scotland)
Andy Hunter (Association of Electoral Administrators)
Andy O'Neill (Electoral Commission)
Bob Posner (Electoral Commission)
Pete Wildman (Scottish Assessors Association)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 18 September 2019

[The Convener opened the meeting at 09:33]

Referendums (Scotland) Bill: Stage 1

The Convener (Bruce Crawford): Good morning and welcome to the 19th meeting in 2019 of the Finance and Constitution Committee. We have received apologies from Neil Bibby. It is the usual story for everyone's phones.

We have one item on our agenda today, which is evidence on the Referendums (Scotland) Bill from two sets of witnesses. Our first panel consists of Andy Hunter, chairperson of the Scotland and Northern Ireland branch of the Association of Electoral Administrators; Pete Wildman, chair of the electoral registration committee, Scottish Assessors Association; Chris Highcock, secretary, Electoral Management Board for Scotland; and Mark Conaghan, chair of the elections working group, Society of Local Authority Lawyers and Administrators in Scotland. Welcome to the meeting and thank you for your submissions.

Given that, to outside observers, it could appear that the field is quite cluttered, could each of you give us a short description of the role of your organisation? It would be very helpful to get that on record before we move to general questions. I do not know whether anyone wants to go first, but I will choose Mark Conaghan to start us off.

Mark Conaghan (Society of Local Authority Lawyers and Administrators in Scotland): I am the chair of the SOLAR elections working group. SOLAR is a collective organisation for local authority legal services and administrative services. The elections working group allows those who are running elections and returning officers in local authorities to get together. As part of that role, I am an adviser to the Electoral Management Board for Scotland.

Pete Wildman (Scottish Assessors Association): I am the electoral registration officer for central Scotland, covering Stirling, Clackmannanshire and Falkirk councils. I am chair of the SAA's electoral registration committee. The committee is made up of the 15 Scottish electoral registration officers and their senior staff. The purpose of the committee is to be a consultative body and to ensure consistency of practice across Scotland in electoral registration matters. I am also a member of the Electoral Management Board for Scotland.

Chris Highcock (Electoral Management Board for Scotland): I am deputy returning officer for the City of Edinburgh Council. In that role, I support the Electoral Management Board for Scotland as secretary. The EMB supports and co-ordinates the work of electoral registration officers and returning officers in Scotland. It was established under the Local Electoral Administration (Scotland) Act 2011 with the aim of co-ordinating that work, developing best practice and keeping everything consistent across Scotland. The convener of the EMB was appointed as chief counting officer for the Scottish independence referendum in 2014 so, in effect, the EMB project managed and oversaw the delivery of the 2014 referendum.

Andy Hunter (Association of Electoral Administrators): The Association of Electoral Administrators is a non-governmental, non-partisan body that represents members who work in electoral administration across the United Kingdom. It has just under 2,000 members across the UK and it is divided into branches. As the convener said, I am the chair of the Scotland and Northern Ireland branch. Essentially, the organisation's role is to support its members and their interests so that they are able to deliver electoral administration well in a safe environment.

The Convener: Thank you. It is very helpful to have an outline of the roles of the different organisations. Do the organisations that the panel members represent agree with the policy intent of the bill? If they do, can the panel members explain why?

Pete Wildman: Speaking for the SAA and the EROs, I can say that we welcome the framework approach to referendums, which means that there will be one set of legislation to govern all referendums in Scotland. It allows for consistency—it avoids individual bills being introduced and, therefore, potential variation between one referendum and another. The fundamental approach of having a framework agreement is welcome.

Chris Highcock: I agree with that. The EMB sees its role very much as making sure that electoral events are operated in the interests of the voter. As Pete Wildman said, the UK has a history of fragmented and piecemeal electoral legislation. Often, new legislation needs to be introduced for the delivery of each event.

The more consistency can be brought into the electoral process, the better. It is to the advantage of the voters, the administrators, the campaigners and the political parties that may be involved in electoral events. To the extent that the bill is

introducing a consistent, simpler framework, we support that policy direction.

Andy Hunter: I concur with those points and emphasise the need for consistency. Particularly for our members, having that framework makes it easier for them to deliver effectively to a high standard on a regular basis.

Mark Conaghan: Consistency and, most of all, notice, are the important things for those of us who are trying to organise elections on a day-to-day basis.

The Convener: There is a bit of a danger in the process that we are involved in that we might view the bill through the prism of one particular polling event—the potential indyref 2. We could lose sight of some of the flexibility and end up amending the bill to address concerns about a specific referendum, which could inadvertently undermine the policy intention of having this framework legislation in the first place. Does the panel share those concerns?

Mark Conaghan: The point that all of us probably agree on is that it is good to have a template, so that we know how any referendum that is going to be run in Scotland under the jurisdiction of the Scottish Parliament will be run. It means that we would have a set of rules that we can work to, we would know exactly what is happening and there would not be changes from referendum to referendum. To that extent, it is helpful.

Pete Wildman: I agree. For us, it is about certainty in planning and delivering elections, particularly for electoral registrations, so that we know exactly what the franchise will be and how it will operate. The certainty that that brings is important.

Chris Highcock: As Mark Conaghan mentioned, one of the key things that we would look for in all electoral events is time. The bill should not focus on a single event and, if it is intended to apply to different events, we need to have adequate time to prepare for those events, in order to identify the guidance and other resources that are needed to deliver them. Therefore, the bill should not be seen as focusing on a single question.

Andy Hunter: I concur with that and have no further points.

The Convener: Given that we have got into this area, would Adam Tomkins like to pick up on potential inconsistency in the legislation?

Adam Tomkins (Glasgow) (Con): Yes, I want to pick up on the question of consistency, which the panel has already landed on. Mark Conaghan and Chris Highcock said that consistency and timing are the two most important things. Other members will ask about timing in due course, but I will focus on the question of consistency. To what extent should we be concerned with inconsistencies between the bill and the UK equivalent legislation, the Political Parties, Elections and Referendums Act 2000?

Mark Conaghan: From the point of view of administrators, we are looking for a consistent set of rules to run to. To that extent, it is not a concern for us whether the bill is consistent or inconsistent with the equivalent legislation of the UK Parliament. The issue for us is that, when we have a referendum to run, we know what the rules are. If it is envisaged that more than one referendum will come from the Scottish Parliament, which could be on many different issues, it would be good from our point of view to have a consistent set of rules.

Under the equivalent legislation from the UK Parliament, a set of rules still has to be published for whatever referendum is conducted. The last referendum that we had to deal with was the European Union referendum, and before that it was the alternative vote referendum, which I think was in 2011. As far as I recall, the rules for those two referendums were not the same, so there was no consistency coming from the UK Parliament in that regard. If we have a set of detailed rules, as set out in the bill, that is helpful for us.

Chris Highcock: That is right. As administrators, returning officers and electoral administrators will deliver the electoral events in accordance with the rules that are laid down in the legislation. In some ways it is beyond our remit to comment on the policy of whether it is a good or a bad thing to have differences between the UK and Scotland. We will do what the legislation says.

In terms of convenience and having rules that are clearly intelligible and understood by those who are delivering the event, it is obviously helpful to have things the same from event to event.

Andy Hunter: On consistency, it would be ideal if it was exactly the same across the whole UK for all events, but, as Chris Highcock said, the administrators will deliver what is in front of them. Adam Tomkins mentioned timing, and consistency would help with that. If the rules are going to be slightly different, advance warning and time to prepare would be big advantages.

Adam Tomkins: Pete Wildman, would you like to answer?

Pete Wildman: No. I think that electoral registration and PPERA are slightly separate matters.

Adam Tomkins: That is very helpful. Mr Highcock and Mr Hunter said that it would be ideal, or helpful, to have the same rules from event

to event, whether they are authorised by an act of the Scottish Parliament or the UK Parliament. It is notable that one of the principal differences between the bill and PPERA as enacted in Westminster is the vastly greater degree of ministerial discretion that the bill would confer on ministers to set questions, bypassing the Electoral Commission, and to make rules by order, rather than by primary legislation, on questions, subject matters for referendums, periods of time and so on and so forth. Although that flexibility may be convenient from a ministerial perspective, it is unhelpful—or not ideal—from an administrative perspective. Would that be fair to say?

09:45

Chris Highcock: I think that that would be stretching into policy matters around the bill that might be outwith our concern. We will deliver what the law says. In terms of what is helpful, the ideal is that we have as much time as possible to prepare guidance and the approach that we will take in doing so. The longer we have in preparation, the better. A number of people have referenced the Gould principle that any changes need to be in place at least six months ahead of the event taking place. Reference has also been made to the Venice commission, which talks about the rules being clear 12 months ahead of any event. Consistency is very helpful because it increases the understanding of all those taking part, including the campaigners, the voters and the regulators, but we will do what the legislation tells us.

Pete Wildman: Having certainty ahead of the event on what the rules are and how it is going to run is key.

Mark Conaghan: From our point of view, it would be ideal if the rules were the same for any referendum, whether it is a UK or a Scottish referendum. For UK referendums, we would still expect to see ministers publishing secondary legislation to set out the defined specific rules for any referendum that happens under the UK Parliament's remit. That is what happened with the EU referendum, for which there was a set of secondary legislation that set the rules.

Adam Tomkins: But it did not set the referendum question.

Mark Conaghan: No, it did not set the referendum question. We have to apply the rules; the question is a matter for politicians. All we are interested in with the question is what we have to put on the ballot paper. Once we know the format of the ballot paper, it is the rules that we are interested in.

The other observation that I would make on the EU referendum is that we ended up with secondary legislation that was rushed through at the point of the close of registration due to the difficulties with the registration site crashing. There was secondary legislation passed in the middle of the referendum period.

Adam Tomkins: Thank you.

The Convener: Other members have raised issues of timing; Murdo Fraser has asked about that previously.

Tom Arthur (Renfrewshire South) (SNP): I have two brief supplementary questions. Could you outline the differences between PPERA and the Referendums (Scotland) Bill, in terms of the amount of detail that is specified on operational matters? My understanding is that the EU Referendum Bill ran to more than 60 pages, and a lot of the detail was bespoke for that referendum. For the committee's benefit, could you briefly outline the differences in the amount of detail that is specified in PPERA and in the bill?

Pete Wildman: Certainly. In terms of electoral registration, there is more detail in the Referendums (Scotland) Bill than there is in PPERA. PPERA sets the framework for how a referendum should be conducted in the UK, but the detail on cut-off for postal votes and things like that comes in legislation for each particular event.

Andy Hunter: Yes, I agree. PPERA is higher level and the detail comes from the secondary legislation. I think that that is what drives the issues of consistency, because that legislation is written every time for each event, so there is much more room for variance. The bill will probably make it more likely that it will be consistent across the board.

Mark Conaghan: I would have to go back and look again at PPERA. It is not my recollection that it has, for example, detailed rules on how postal votes are to be dealt with or the particular periods for the electoral process or dates and so on. That is set out in the bill which, to that extent, gives us a more detailed platform from which to work. It is still subject to ministerial changes that might come at a later date.

Tom Arthur: I have a second brief supplementary question. Reference was made to variation between Scotland-specific and UK-wide referendum events. Is it not just a reality of devolution that you have to adapt? For example, you are charged with delivering elections to the UK Parliament and the Scottish Parliament, which have different methods of voting and different franchises. Does this create an insurmountable barrier for you?

Mark Conaghan: Again, nothing is insurmountable, provided that we have sufficient resources, time and warning. Every election that

we deal with—be it the Scottish Parliament, UK Parliament or local government elections—has different rules applied to it. One of our frustrations is that there is not a common set of rules or approach. Things change from event to event. In some cases they change in ways that make it difficult to understand why there are differences.

We can apply different rules, but the point is that we need enough notice to prepare, based on the changes or different rules for each event. We can deal with it, but if the changes are happening or the rules are issued close to the event, it eats into our preparation time and makes it difficult for us—hence the reference to the need for six months.

Pete Wildman: It is not just about our preparation time. It is also about engaging with the public so that the nature of the franchise, who can register to vote and the cut-off dates for that are very clear. It is also about getting that messaging out early to ensure that the public are fully informed and advised of the rules around which the election is conducted.

Mark Conaghan: That is no doubt the point on which the Electoral Commission will comment when it gives evidence later. It prepares detailed guidance for electoral returning officers, candidates and agents and, in the case of a referendum, for designated groups. It has to do that and, if the period running up to an election is shorter than six months, it becomes very difficult. You will find that the guidance that is issued will perhaps come out without the statutory references. For example, it is harder for them to produce associated paperwork and templates that people can use. It truncates the period and creates issues.

Chris Highcock: For the 2014 Scottish independence referendum, the chief counting officer was responsible for the production of guidance. To return to Mark Conaghan's comments, that was a large task; a huge amount of work went into producing the guidance, so that electoral registration officers, deputy returning officers and electoral administrators knew exactly how to interpret the legislation and what they had to do, step by step, to deliver the referendum. That took a lot of time, and whoever is charged with delivering guidance for a referendum will need time to so that, particularly if it is used for a variety of different referendums.

The guidance that might be applied to an independence referendum would potentially be quite different from the guidance that might be applied to other events. The question is how that guidance is produced, updated and hosted. We are moving away from big booklets of guidance to have much more material online. That is key to supporting the referendum process.

Andy Hunter: Chris Highcock is probably right. There will always be some differences. The real difficulty will come if there are ever events on the same day. If we decide to have a referendum when there is another UK-wide event, that would lead to a different franchise situation. Such events are extremely difficult, although, as Mark Conaghan said, usually they are not insurmountable. However, they add a lot of stress and difficulty. Again—we sound like a broken record—it is best to avoid that and to time events so that they arrive when there is nothing else going on.

The Convener: We got into a fair number of timing issues there. Does Murdo Fraser want to take on that area of questioning?

Murdo Fraser (Mid Scotland and Fife) (Con): I have a couple of follow-up questions on timing, which we have touched on. The Gould principle of six months' notice has already been referred to. However, the last two electoral events that we have had in Scotland, which were the 2017 general election and the European Parliament election, were conducted in much shorter timeframes of, I think, five weeks and six weeks respectively. I appreciate that you would like more time, if possible, but how essential is it to have that period of six months for a referendum?

Pete Wildman: In the European Parliament election, the issues for us as electoral registration officers were the registration of EU citizens and the timescales in which they had to respond once the election was set to go ahead. There was pressure on us to contact everybody; there was also pressure in the timescales for the electors to engage with the process. A short election can be delivered and will be delivered, but some of the risks change. The shorter the notice that we have, the greater the risk that something may not run as smoothly as we would like.

Chris Highcock: We are talking about what would be ideal and what we would like to be in place in order to deliver the gold standard of an electoral event. We want as much notice as possible to ensure that people are fully aware of the rules and what they need to do to take part. We should remember where the Gould principle came from—it was in response to what happened in 2007 when rule changes took place close to the event and as a consequence there were problems in the delivery of that event.

Mark Conaghan: Murdo Fraser referred to two particular electoral events. The rules for a UK general election are well established, and therefore we knew about the practicalities of what we had to do in advance for the 2017 general election. Equally, the Electoral Commission was able to go back to the guidance from two years before—the guidance did not need any changes

because there had been no legislative changes. The EU election was perhaps more problematic because, to some extent, it came out of the blue and, given the circumstances, we had been operating on the assumption that there would be no election at all. Again, we were able to go back to the rules from five years before, which had already been established, and run the election following those.

If we take a bespoke event, such as a referendum, it is obviously better to have the rules in advance, rather than for them to be sprung on the electoral community six or seven weeks away from a poll.

Andy Hunter: Short notice—particularly where there are legislative changes or new developments—adds a lot of stresses for the administrators who deliver the event, which leads to further risks in relation to not only their health and welfare, but the delivery and integrity of the election.

Murdo Fraser: Thank you. That was very helpful and you have all been very clear in your answers.

At what point should the six months start? Should it start from the point at which the Parliament approves a statutory instrument that sets out in detail issues such as the franchise, the wording of the question, the period of the campaign and so on, or from some other point?

Mark Conaghan: As administrators considering timings, we start from the date of the poll and work backwards, and that is what I would be looking for—that would be my assumption. If we know the date of a poll and the rules under which we have to conduct it, other aspects can still be determined. We would be looking for that six-month period where we know how we have to run the event and what the guidance will look like—or we have a chance to put it together. That gives us an opportunity to consider the registration rules and so on.

Pete Wildman: For the electoral registration officers, six months from the date of the poll would allow sufficient time for people to be aware that they can register and for them to register.

Chris Highcock: The Gould report clearly defined the period; the phrasing that it used was:

"electoral legislation cannot be applied to any election held within six months of the new provision coming into force."

However, in practical terms, it is a case of being clear about what is happening six months in advance.

Andy Hunter: I concur with those points.

The Convener: This is an interesting area. At a previous meeting, we had evidence from Dr Alan Renwick about how rules will be established. I do not know whether you managed to read the evidence; it is not all black and white. Dr Renwick said:

"if all the rules are in place and the only matters to be decided subsequently are the question and the date, the Gould principle would not be broken by setting a referendum somewhat less than six months in advance of the poll."—[*Official Report, Finance and Constitution Committee,* 4 September 2019; c 2.]

If the bill is enacted, and given that we have a framework, is that a reasonable point?

10:00

Chris Highcock: As we have said, the time period is not just about what is in the interests of the administrator; it is also about what is in the interests of the voter. The EMB would always come back to ask what is in the interests of the voter. We need to make sure that, when the electoral event is delivered, we think about the interests of the voter and not just about our interests. That is why we go back to the period of time in Gould, which is as much about making sure that the voter is prepared for the event as it is about making sure that we are prepared.

Mark Conaghan: From the point of view of an administrator, if the two outstanding matters are the date of the poll and the question, the key issue is the date of the poll. As long as we have the question to go on the ballot paper sufficiently in advance of polling day, the wording of the question is not a concern for us. The decision on that could made considerably closer to the date of the poll.

In the current system for elections, until nominations close, we do not know who the candidates are. We can produce ballot papers only at the point when we know who they are, so we are used to producing ballot papers at relatively short notice. To that extent, if the wording of the question was in dispute, a decision on that could be made closer to the end of the six-month period.

However, it would not be helpful to us if we knew that there was going to be a poll in, say, June, but we were not told what date in June. We need to know the specific date, because that sets the timetable for everything else. It also relates to practical issues of staff recruitment and booking polling places and count venues. All that planning needs to be done as far in advance as possible.

The Convener: No one has anything further to add, so I will move on.

The issue of the question has been raised. Given the witnesses' respective areas of interest, I

am not sure how much they will be able to go into that area, but Alexander Burnett has a question.

Alexander Burnett (Aberdeenshire West) (Con): I appreciate that this is not within the witnesses' remit, but do they have a view on question testing and the role of the Electoral Commission?

Pete Wildman: That is a policy matter on which the SAA would not offer a view.

Chris Highcock: I agree that it is a policy matter. We will put whatever we are told to put on the ballot paper. [*Laughter.*]

Mark Conaghan: In blunt terms, that is the position. You tell us what to poll on and we go and poll.

Alexander Burnett: You have all mentioned consistency in relation to the bill. Would question testing apply to all questions, including one that had been previously asked?

Chris Highcock: Again, that is a policy matter, which I will not get into.

Patrick Harvie (Glasgow) (Green): The witnesses will be aware that, in relation to referendums and democracy generally, there has been a significant amount of debate about accountability and donations. Enforcement of those rules is not a matter for any of your bodies but some of our witnesses have suggested that a single national database of electors would make it easier for campaign bodies to check the permissibility of donations—those electors being permissible donors. What are your views on the desirability of such a database? Might problems arise from a mismatch between the national database and locally held registers?

An alternative came up in discussion: we could require local registers to be held and published in the same format, which would make it technically easier for campaign bodies to use the data that they contain to check the permissibility of donations. That suggestion was brought up previously but was never progressed.

What are your views on either of those options?

Pete Wildman: How the published printed copy of the register is set out—by parliamentary constituency and polling district—is laid down by the law. The order is set out so that there is consistency in the printed document. The issue arises because not many people require the printed document; people tend to use data exports.

The reports that I have seen are UK-wide reports, rather than Scotland-wide ones. There is a difference in the structure in Scotland, because there are 32 local authorities but only 15 electoral registration officers. Most of us serve more than one council area, so there are fewer people to contact. Also, there are only four electoral management systems in use in Scotland. I took the opportunity to have a look at data exports from each of them and found that there is a degree of variation but nothing significant. The basic data is the same, but the columns are in a slightly different order and the headings are slightly different, with some containing a bit more information than others. It is perfectly possible to produce a standard export from them. What is required is agreement on the standard—the ordering and naming of the columns, basically—and on who would pay for the software development.

Groups are entitled to access the register to check donations; they are also entitled to use it for electoral purposes. With regard to data protection, an advantage of the current system is that the data is transferred from one data controller to another. It is important to note that the electoral registration officer, not the local authority, is the data controller for the register, so in transferring data to a third party, they take responsibility for data protection.

If you were to set up a national database, you would have to get feeds from all the local databases and somebody would have to be the data controller and manage access to it. It could become quite a bureaucratic and costly process to achieve that aim. I can see the argument for a more standard format for data export but I am not certain that a national database would provide that. Political parties are certainly able to produce national datasets, so the issue is more about individuals.

Patrick Harvie: Political parties and large campaign bodies face fewer problems with that because they have the resources to spend time and energy on it. If we want smaller campaign bodies to be able to easily comply with the donations rules, can we achieve some consistency?

Pete Wildman: Yes—although somebody would need to decide who would meet the cost of development.

Patrick Harvie: Who would have responsibility for that? Who is in a position to say that they have that authority?

Pete Wildman: That is one of the questions that perhaps explains why a national database has not proceeded elsewhere.

Patrick Harvie: There are some other nodding heads.

Mark Conaghan: What Pete Wildman is setting out is that a national body would have to be created for the ingathering and control of that

information, and it is difficult to see how that could be done without primary legislation. If all that is sought is consistent formatting to make things easier for political parties or groups, some work would need to be done on the software to achieve that, as Pete indicated, from which a cost would arise. However, if all the data were to be pulled into a single place to which parties or groups would go to get information, somebody would have to create a body with the statutory power, or give an existing body the statutory power, to pull in the data and deal with the data protection issues that arise.

Patrick Harvie: Achieving consistency in formatting at a local level would have a lower cost than creating a new body.

Pete Wildman: Yes. The SAA—the 15 of us—would be more than happy to engage with people and work out how to do it. It would be harder to justify who should fund the work because, as electoral registration officers, we already deliver our duty to supply a data format of the register. It does not seem reasonable for us to have to fund standardising the format, too

Patrick Harvie: One of the reasons why I was uncomfortable with the idea of a national database—albeit that witnesses have suggested that that is not the way to go—is the potential unintended consequence of an undermining of trust. People react against the idea of their name being held in too many places, as we have seen in relation to the national identity register and other schemes.

Trust is hugely important. I feel that we have a trustworthy electoral system in this country. We also have a very polarised political culture at the moment, in which trust in facts and expertise is being deliberately undermined. In between elections, are electoral administrators doing, or considering doing, anything to build trust or consider how the process can be more transparent and more easily understood by members of the public?

Chris Highcock: We agree that confidence in the electoral process is fundamental. We often say that confidence is the currency of elections. People need to trust the result. In 2014, the objective of the chief accounting officer was to deliver a result that would be trusted as accurate.

Confidence comes from trust in the individuals who deliver and are involved in the process. We have a role in trying to engender and encourage confidence, throughout the process. As you said, we are operating in an increasingly polarised atmosphere. Because of that, the scrutiny levels that we face in electoral events are extreme. We are often asked to prove a negative, which is impossible. We are told to prove that there was not some strange cyberconspiracy, and there is a limit to what we can do to prove that. That is where we rely on other people, including politicians and campaigners, to uphold trust in the process.

We are considering whether we need experts in cybersecurity to provide assurance on the security of the process—things such as the printing, the register and postal vote verification. That would involve additional resource; we are not currently resourced for the degree of cybersecurity that we might have to have in future.

Beyond that, the tasks that we undertake day by day as electoral administrators focus on transparency throughout the process. That is built into the legislation and is delivered in all elections. People are free to come along and watch processes in elections. There are electoral observers, and the Electoral Commission is there to monitor and report on things. The candidates and electoral observers are there to provide scrutiny of the process.

We do things ourselves to promote transparency. We also rely on the people who are there to witness elections to promote transparency and support our efforts to deliver confidence.

Pete Wildman: Electoral registration officers take cybersecurity extremely seriously. We are connected to the public secure network and therefore we meet high standards, to ensure continued compliance. We work with the cyber essentials scheme and the cyberresilience framework. The issue is high on all EROs' risk list.

One of the advantages of having 15 databases, as opposed to a single database, is dispersal.

Chris Highcock: We are picking up on efforts around the United Kingdom and indeed around the world to view electoral administration as critical national infrastructure for the security of the civic life of the nation, in the same way as the power supply and water supply are viewed.

We take those responsibilities seriously and are constantly looking at what we can do to promote confidence. If the voter does not have confidence in what administrators are doing, it is game over. We need to keep that in sight all the time.

Mark Conaghan: One of the lessons that was learned from the Scottish independence referendum was about the nature of some of the conspiracy theories that grew up in the hours and days after the event: most of them were based simply on a lack of knowledge of how the system operates. I think that we all recognise that there is more that we can do in advance to explain and publicise the process, so that people understand it.

I give a simple example. I recall seeing videos that people had put up that showed ballot boxes being emptied. People were saying, “There are votes that are already bundled. Oh my god, they have been interfered with.” No: they were postal votes. Postal votes are processed and bundled, and then put in a sealed ballot box and kept until the day of the count.

If we put more of that information online and talk about it in advance, perhaps that would assist people’s understanding and they would not have such concerns. There is possibly more that we can do to explain the process better, particularly in the run-up to major events such as an independence referendum.

10:15

Chris Highcock: It comes back to what Mark Conaghan said about the need for time ahead of a referendum. I came to Parliament after the independence referendum to talk about how the difficulty with some of those conspiracy theories was that there were ignorance gaps. People were ignorant of the process and they filled in the gaps with their own assumptions. The more time that we have ahead of a referendum, particularly if it is on a contentious issue, the more we can fill in those ignorance gaps and ensure that voters are knowledgeable about the process that is being applied.

The Convener: Why wait? Why not do it now?

Chris Highcock: We can, and we try to, but the attention that someone will pay to the technicalities of the postal vote process when nothing is imminent may be limited.

The Convener: Fair point—I surrender.

Gordon MacDonald (Edinburgh Pentlands) (SNP): I want to look at a couple of areas, the first of which is voter registration. We heard in evidence last week that up to 8 million people across the UK either may be missing entirely from the electoral register or may have been incorrectly registered. The Office for National Statistics produced a report earlier this year, which highlights that 65 per cent of council wards in Scotland have seen a drop-off in voter registration. What are the difficulties with voter registration and what underlies that drop?

Pete Wildman: One of the things to understand is that electoral registration is a voluntary matter. It is up to the citizen to engage with the process or not. It is not a compulsory system, unlike in some other countries, and registration levels will vary over time; they rise and fall. Back in 2014, ahead of the independence referendum, it was reported that we achieved 97 per cent registration levels. The public really engaged with that event and we saw very high levels of registration. Not only were people registering, campaign groups were getting out there, registering people and pushing the message.

Registration levels will vary. You mentioned the change that occurred in 2018, but there was no major electoral event in Scotland during that year and I am sure that that played in. The difference is small. There was a drop but it was 0.4 or 0.6 per cent between the different registers. That is disappointing, but it is not a significant drop. During the financial year 2018-19, we added 230,000 people to the register across Scotland, deleted 245,000 and made 31,000 changes.

Registration is not just for an electoral event. Those events push and promote registration, but it is a year-round activity. We are constantly inviting people to register, doing an annual canvass, which identifies new people, and using data sources such as council tax, university and schools lists to invite unregistered people to register. However, that relies on the person engaging. Harder-to-reach groups include people in the private rented sector. When people are in short-term accommodation they do not necessarily have a connection to the area that they are in. Those people will, perhaps, wait until a poll is called before registering. We do our best, but there will always be a peak in registrations at that time.

If we look at the UK general election in 2017, there were about 600,000 applications on the last day across the UK. In Scotland, which normally has about 10 per cent of the UK electorate—we have an electorate of just over 4 million compared with a peak 4.6 million—we had about 30,000 on the last day. That shows that Scotland gets fewer applications at the last minute.

Gordon MacDonald: As you said, many European countries have compulsory voter registration. I realise that the procedures are reserved to Westminster, but is there any way that we can improve voter registration? For example, could we use changes in tenancy for people in the private rented sector, or contact people when house sales take place or national insurance cards are issued?

Pete Wildman: We do a fair amount. In some other European countries, as you mentioned, there is compulsory registration and people cannot access public services unless they have registered. That would be quite a cultural change for the UK. However, we are proactive in going out there.

We could look at a form of automatic registration whereby, if we have a data set, we could add people to the register. However, there would be a risk with that, because no data set is 100 per cent accurate and there would be currency issues. We

could add people to the register who should not be on it. It is not just about the completeness of the register; it is also about accuracy. If we had high registration levels but poor accuracy, we would not have a good register. It is a double-edged thing.

We could look at national insurance numbers, but because the registration process starts at a younger age in Scotland, we find it more effective to make contact through schools. Perhaps schools could do more work on promotion. We have had good working relationships with schools across Scotland and the toolkits that the Electoral Commission has produced over the years have been really effective. I would like the democracy cookbook that it produced to be digitised and updated because, if we give educators a resource that they can use, they tend to run with that and deal with it effectively.

Gordon MacDonald: In the EU referendum, there was a crash of the UK Government's website for voter registration. Was there any impact on Scotland when that happened?

Pete Wildman: It was a tricky time, because there was a degree of uncertainty. At about 10 o'clock in the evening, we began to realise that things were not running smoothly. There was a period when it was uncertain whether the deadline would be extended. There were relatively few applications after it was extended; I think that that was because the failure came at cut-off. I am assured that the UK Government has taken steps to replatform and boost the resilience of the online service.

Picking up on another point that was made, I note that local government registration is devolved to the Scottish Parliament. It is UK parliamentary registration that is reserved. We could operate two different systems, but that would be fraught with difficulty. If we had, say, automated registration in Scotland and individual registration for the UK, we would find that people had to register twice because the two systems are not compatible, and we really do not want that. We want to have a system whereby, if people register for local government, they can automatically go on to the parliamentary register as well.

Mark Conaghan: The duties of registration lie with electoral registration officers. However, for some events, returning officers will be given specific tasks to do with voter engagement, and part of voter engagement is registration.

I hate to return to the timing of events, but a clear indication that something will slip or disappear entirely is that the period before the event in question is short. For the independence referendum, we knew the date well in advance and returning officers were given the specific task of promoting voter engagement. We knew that 16 and 17-year-olds were going to be voting, and in my area, which is Renfrewshire, we went out to the schools and engaged with all the children in that age group, taking them through what was involved in the voting process. With colleagues from our local ERO, we then sought to give them registration forms so that they had the option to register there and then. We took the forms away and processed them. That significantly boosted the registration among that group of people—the 16 and 17-year-olds—for that event, and it gave them electoral knowledge.

That is what happens if we have time. If you give us three months' warning of a poll, that will not happen, because there will not be enough time to make arrangements to get into the schools and do that at the same time as running the event. If we have a run-up, we can do it.

On private rented accommodation, houses in multiple occupation in particular create an issue. One of the tasks that we complete in the run-up to an election is that we write to HMO landlords, reminding them that there is an electoral event coming up, asking them to raise the question of registration with their tenants and referring them to their local ERO. We do similar work with care homes.

That is all the additional stuff that has no statutory basis. There is no requirement for us to do that, but we do it if we have the time available. If we do not have the time, and the event is compressed, that is the kind of thing that gets put to one side and does not happen. That is one of the reasons why it is in our interests to have as much time as possible before any event.

Andy Hunter: Mark Conaghan is referring to the time and the resources that are needed to do some of these things. As well as that, there are difficulties for some of the local authorities and the EROs with regard to the necessary skill set. Having a standard template that can be applied locally—such as the democracy cookbook for schools that Pete Wildman referred to earlier—makes it easier for people to achieve the necessary publicity and engagement. There are benefits for everybody.

Pete Wildman: When we engage with schools, they are more than happy to do the work, but they ask what we would like them to do. Being able to give schools a toolkit from the Electoral Commission to provide them with a framework is of assistance.

Chris Highcock: In 2014, a lot of work was done by education authorities and those who were developing the syllabuses for young people. Again, that relied on people having knowledge of the event well in advance, so that that could be

built into syllabuses and lesson plans and teachers could talk about the issues.

The Convener: I have a question that I will ask in order to get a point on the record. At our previous meeting, an academic said:

"It is widely thought that one of the effects of individual electoral registration has been a reduction in the completeness of the electoral register."—[*Official Report*, *Finance and Constitution Committee*, 11 September; c 35.]

Is that your experience?

Pete Wildman: Registration numbers have dropped in the past year but, on the whole, they have remained relatively static since the introduction of IER. The Electoral Commission is doing a study on completeness and accuracy. The last time that it did that was in 2015. I think that we will wait with interest to see what that result shows when it is published.

The Convener: That appears to be the view of the other witnesses, so there is no point in asking everyone else to comment.

John Mason (Glasgow Shettleston) (SNP): The submission from the Association of Electoral Administrators discusses the issue of having more than one poll on one day and suggests that

"Any polls coinciding in the same area on the same day must be combined, but with an upper limit on the number of polls being allowed to take place on any one day."

Is that a practical issue? Is it to do with voter confusion? Is it just that the ideal position is to have things on separate days?

Andy Hunter: It covers a few areas. For administrators, having more than one type of event on the same day adds to the pressures and difficulties in relation to resources. There is also an effect on voters, as there can be some confusion, particularly if the events involve different franchises—people might be able to vote in one poll and not the other, and there are practical issues around how that would be managed on the day.

The quotation that you read out is an extract from a UK-wide report. The issue is less pronounced in Scotland but, in some areas of England and Wales, four or five different events have taken place on the same day. When you get to that level, it adds to the confusion and difficulty.

John Mason: What is the most that we have had in Scotland? Was it the three papers—two for the Scottish Parliament and one for local government—that people were given in 2007?

Mark Conaghan: In 2011, the AV referendum and the Scottish Parliament elections were combined.

Andy Hunter: I am not sure whether any by-elections were run on the same day as that, but if there was also a by-election some people might have been given four papers.

John Mason: Is there a cost element to that? One might think that it is cheaper to run three or four things on the one day, because you only have to hire the school once and pay staff once.

Andy Hunter: There are some efficiencies around hiring the halls and so on, yes. However, more staff are needed, which means that the staff costs are greater than they are for a single poll.

10:30

Mark Conaghan: If polls are separated out entirely, you have to employ polling staff twice and book your venues twice, so the cost of two separate events is higher than the cost of a combined event. However, the cost of a combined event is significantly higher than the cost of one event. Significant practical issues are also raised, along with difficulty for the voters and legal issues.

If we combined the UK general election, for which 18-year-olds have the franchise, with a referendum that has a franchise including 16-year-olds, would we have two separate electoral registers? We would probably have to, and that would cause confusion for staff around which register to mark off or having to mark both. It would create issues for voters because of how the papers would be marked and which ballot box the papers should be put in.

At the count for the 2011 AV referendum, we opened up the first ballot box to verify the contents—it was the Scottish Parliament constituency vote—and came to a total that was slightly different from what the presiding officer had told us. We then opened up the box for the list vote, and came to a slightly different figure from what the presiding officer had told us. We then opened up the third ballot box, which was for the AV referendum, and found papers from all three ballots. That caused a lot of confusion on the night. I cannot speak for others, but we had to stop and change our count process on the night to deal with it. We were doing one count at a time, but when the situation became clear we had to open all three boxes and distribute them across three count tables to make sure that we did not have that problem.

The franchise issue is a real concern. If there is a mixed franchise, the law for one election says that nobody under 18 years of age should be in the polling place, but 16-year-olds would be entitled to vote in the other election. Would we have to have two separate polling places?

John Mason: Has that happened so far?

Mark Conaghan: It has not happened yet, but it could.

John Mason: I get that.

Mark Conaghan: It might have happened at a by-election or in local government.

Our only concern on that would be if there was a combined vote with the UK Parliament—the only one for which the franchise is over 18s—unless we had a UK-wide referendum.

John Mason: Yes. I think that we had Scottish Parliament by-elections on the same day as a UK general election in Berwickshire.

Mark Conaghan: Yes.

John Mason: Is the cost of running a referendum much the same as that of running a general election?

Mark Conaghan: It is very similar. The only process saving for us is that there are no nominations to deal with. That is dealt with by key election staff. The costs of the count and the polling stations are very similar.

For the independence referendum, we expected a much higher turnout than we would expect at any other electoral event. We staffed up accordingly, so the costs were higher.

John Mason: My final question is for Chris Highcock and the Electoral Management Board for Scotland. Your submission mentions adequate resourcing several times and says that, in 2014, there was adequate resourcing.

Chris Highcock: Yes.

John Mason: Have there been other situations in which there was not adequate resourcing?

Chris Highcock: The returning officers would always say that, although money is given to returning officers to deliver at elections, it does not cover all the costs that are involved in delivering elections and local authorities constantly subsidise national electoral events.

Resourcing is a key issue. It is partly about finance but time is also a key resource. The resourcing needs to be adequate in order for us to deliver. The framework that is being created by the bill is necessary as a consistent legal framework, but it is not sufficient. We also need the money, resources, people, expertise and time.

John Mason: Do we just need to bear that in mind, or should it be included in the bill?

Chris Highcock: It is addressed in the financial memorandum, so we need to make sure that adequate resources, including time, are included.

The Convener: Could you just confirm that you are content with the costs that are laid out in the financial memorandum?

Chris Highcock: The comment that we made is that the financial memorandum also needs to address the costs of EROs, which I do not think are adequately resourced at the moment.

Pete Wildman: I was going to make that point. The costs will vary from one event to another. For the independence referendum, when we saw very high registration levels, the costs for electoral registration officers were significant. My team was working overtime from July, as registrations peaked and peaked. In the final week, my whole office stopped doing valuation work—my whole organisation was dealing with electoral registrations, which involved an unprecedented, and significant, level of resource and costs. The costs will vary from one election to another.

Chris Highcock: I return to the question that John Mason asked about events being held on the same day. In the call for evidence, there were questions about learning lessons from the past and whether the bill is consistent with good practice. If we go back to 2007, one of the key points of Gould was to decouple electoral events, to make sure that each one is given the priority that it deserves and the right amount of attention in the eyes of the voter. That way, there is no confusion, not only about how to take part, but about which of the events is more important and how the issues of each event could affect a person's vote.

John Mason: Would you be happy to have different votes on three Thursdays in a row?

Chris Highcock: That is a separate question.

Mark Conaghan: That would be stretching the meaning of the word "happy" to its absolute limits.

The Convener: No other members are indicating that they want to ask questions, so I thank our witnesses warmly for coming along and giving us helpful evidence this morning.

10:36

Meeting suspended.

10:42

On resuming—

The Convener: We now commence this morning's second evidence session on the Referendums (Scotland) Bill, in which we will hear from representatives of the Electoral Commission. I welcome to the meeting Dame Susan Bruce, the electoral commissioner for Scotland; Bob Posner chief executive of the Electoral Commission; and Andy O'Neill, head of the commission's Scotland office. I thank them very much for providing the committee with the written evidence that we have received from them.

I will begin our session by asking whether panel members agree with the policy intent of the bill. If so, why is that? If not, why not?

Dame Sue Bruce (Electoral Commission): The Electoral Commission Scotland is very keen to see a bill to deal with future referenda and has argued for that in the wider UK context. Such a bill would help to give clarity and guidance on the conduct of future referenda and would provide an opportunity to establish a framework for questions that might be asked in the future on any referendum subject. It would also help to provide the electorate and the Parliament with assurance and confidence on the holding of referenda. All in all, we support the direction of travel that is represented in the bill.

The Convener: Okay, now let us get down to the nitty-gritty of some of the issues. Murdo Fraser, will you kick off, please?

Murdo Fraser: I want to start by looking at the regulation of campaigns and the fines that you might be able to levy, both of which are issues that you raised in your submission. I noticed that you suggested that you would want to see the maximum fine increased to £500,000. Campaign organisations that are permitted participants are able to spend only up to £150,000. In that context, how realistic might that level of fine be and how enforceable would it be in practice?

10:45

Bob Posner (Electoral Commission): Our starting point—and I am sure that it is your starting point as well—is that we all want well-run referendums and well-run elections so that voters have confidence in the legitimacy of the results.

What regulatory rules are appropriate and what deterrents—what sanctions—should we build into the system? Our prime aim is compliance. When we work with campaigners and political parties, our prime aim is to enable them to comply with the rules. We need suitable deterrents that make people think that it is not worth breaking the rules. There is that phrase about the cost of doing business, and there is a huge prize of an election or referendum result. You need that level of deterrent so that people think that is not worth breaking the rules. If people break the rules, we need to think about how to enable law enforcement agencies, including the Electoral Commission, to enforce those rules and, where appropriate, to apply proportionate sanctions.

If we look at the history of the sanctions and fining regime, we see that our organisation has been able to impose fines for breaches since legislation came into force in 2010. There have been caps on those fines—in Scotland, the maximum fine has been £10,000 and, in the rest of the UK, it is £20,000. That is helpful—it has been a good system.

However, by definition, when we investigate and we find breaches, we have to apply proportionate fines. We cannot always apply the maximum fine of £20,000. We have to apply fines that are proportionate to what has happened and, quite honestly, from our experience over a number of years now, we do not believe that it is a suitable deterrent.

In other regulatory fields, for example in the financial world and in the data protection world, the fines that are set to deter people from breaking the rules have gone up. It is a form of financial regulation. The view has been that you need a level of deterrent that says to people, “It is not worth breaking the rules.” The figure of £500,000 is quoted in our submission. We are not saying that it needs to be set that high, but we are definitely saying that the maximum amount needs to be higher than it currently is.

We draw a parallel with the UK Information Commissioner’s Office. The figure of £500,000 is interesting because, after the ICO was created, it got the ability to fine people £50,000 for data protection breaches. With practice, the view became that that was not sufficient and the amount was increased to £500,000. The ICO has further powers now on certain data protection matters. It seems to us that political regulation, which is about maintaining the confidence of the public in the system, is now out of line with other regulation. I fully take your point about small campaigners. The key point is that fines have to be proportionate, but we think that, where appropriate, it should be possible to set a higher level of fine.

Murdo Fraser: That is helpful, but I will probe a little bit further, because I wonder how effective a deterrent a fining system might be as opposed to other possible measures. I can understand a situation where, for example, a political party has a fine levied on it and it would not have a major impact on it. Correct me if I am wrong, but I am assuming that by the time you investigate a breach that has been reported to you, it might be many months after the electoral event or referendum, and there will then inevitably be an appeal process to go through before a fine is levied.

If somebody set up a campaign group to campaign for a yes vote in a referendum, for example, they will have raised money to fight that campaign and they will have probably spent that money by the time you levy your fine of £500,000. The coffers will be empty, the campaign will be finished and the votes will have been counted. What is the point? What impact does a fine have? How does a campaign group that was set up for

one event pay your fine months if not years after that event?

Bob Posner: That is a really good point. It is really relevant in a referendum context. In the context of elections, political parties are in it for the longer gain, as it were, and their reputations are at stake. With referendums, campaign groups naturally form, but experience tells us that they will not necessarily remain in existence. It is therefore important both to have a deterrent so that people think that it is not worth breaking the rules and to make sure that the regulator and other law enforcement agencies can move quickly—we use the phrase "in real time" in our submission.

Under the current regime, we have a toolbox of investigatory powers from Parliament and we are grateful for that; it is very helpful. However, it does not always enable us to move quickly. Another thing that we have been saying is that we need to be able to get information more quickly from campaigners and others involved in elections and so forth, so that we can act more quickly.

It is true to say that in the current regime it sometimes takes quite a while to complete our investigations. It is particularly difficult in the context of a referendum, but it is difficult in all electoral contexts. We are commending the view that we should be given more powers to require information more speedily from third parties—to use the phrase.

That is consistent with the approach in other regulatory fields, where things are important enough. For example, health regulators, quite rightly, can move very quickly when necessary. The health sector is not absolutely comparable, but democracy is pretty important, albeit that it is not about life and death. We think that we should have the ability to move more quickly.

We would have to use such powers proportionately. Members should remember that, given that we are a public body, there is always protection for everyone whom we regulate, because we are completely accountable not just to you, the Parliament, but directly to the courts; appeal procedures are built into the systems. If we were to fine a body unreasonably highly or so forth, the body could appeal to the courts and I dare say that we would lose, if we had acted unreasonably. There are protections in the system.

Andy O'Neill might want to add something about the Scottish context.

Andy O'Neill (Electoral Commission): I just add that the responsibility of someone who is a permitted participant continues. The responsible person still has the duty to have complied with the law. Although the organisation might disappear, the legal responsibility continues.

Murdo Fraser: I understand that point. However—to give a hypothetical example—if someone is setting up an organisation that will have a responsible person who might face a fine, they will just put up what we call, in legal terms, a man of straw to take on the role. If that person is hit with a fine of hundreds of thousands of pounds, they will just say, "I have no assets and no way of paying that."

I take from what Mr Posner said that it is infinitely preferable to try to address breaches in advance of the date when the votes are cast, because once the votes have been cast and counted, what you do is pretty irrelevant.

Bob Posner: When we talk about being a regulator, it is always important to remember that the large part of our job is about assisting and enabling people to comply with the rules. Enforcement and the investigative work are the tail of the job, as it were. Most of our staff are working all the time on helping campaigners and political parties to comply, that is, by issuing regulatory guidance on how the rules work, working with organisations, running advice lines and being available.

Like regulators in other fields, we proactively go out and audit organisations, outside and in between events, and as events go on. We look for information. We gather our own intelligence about what is going on, and if we see that part of an organisation might be heading towards breaching the rules, we will contact it and encourage it not to do that and to comply. We will call out what is going on, as quickly as possible.

We are very much focused on people not breaching the rules. That is the large part of our job. I hope that that reassures you.

Murdo Fraser: Okay.

Andy O'Neill: We go out and talk to everyone who becomes a permitted participant. We explain their responsibilities and, as Bob Posner said, we monitor what is happening. During the 2014 referendum, there were instances when we talked to people to ensure that they were complying with the law by following our guidance. We said, "We realise that you are going to do this" and talked about what they were actually going to do to ensure that they complied. At the end of the day, under the legislation under which the 2014 referendum was held, we could have published a stop notice to prevent them from taking the action. There are things that we can do in real time.

John Mason: Does there need to be an upper limit on fines? If we had had a referendum on restricting tobacco sales, for example, there would have been a huge incentive for the tobacco companies to oppose restrictions, and a fine of £500,000 would have been nothing to such

companies. Could we look at, for example, a percentage of turnover, rather than a limit? That happens in other sectors.

Bob Posner: There are other options, which we see in other regulatory fields, one of which is percentage of turnover.

One is looking for a system that is so structured that one feels reasonably confident that it is not in the best interests of organisations to look to breach the rules; it must be in organisations' best interests to look to comply. One is also looking for proportionality, so that organisations are not unfairly put off even participating in democracy and campaigning. We have to have a balance there. It all comes back to voters' interests.

John Mason: In your paper, you raised the issue of transparency around money or the assets that campaigners may have before they register. I experienced that when an organisation that I was with was given money before we registered and did not have to report it. Can you explain the problem with that?

Bob Posner: As we are currently structured, and as is normal, we have regulated periods. In the lead-up to major electoral events or referendums, there is a point when the rules kick in. We have regulated referendum periods where the rules apply. In between or before events, we do not have those rules. Organisations collect money and assets, and that is fine. They may even be campaigning, but if we are distant from an election or referendum, the vast bulk of the rules do not apply. There still has to be regulation of donations, but a lot of rules do not apply to money coming into organisations or being reported.

The first question that that raises is whether the periods to which one decides the rules apply start far enough in advance of the electoral event and the final result in which one is looking to have confidence. One might say that one should have year-round application of nearly all the rules. However, we have regulated periods of 10 or 16 weeks, or of a number of months, for an event. There is a balance regarding how long before an event one wants the rules to apply, so that there can be transparency of regulation for campaigning organisations.

The second question concerns organisations that register to campaign that bring assets with them into the event. They may have gathered their assets and funding before the need to register and campaign. They may have invested in technology. What is the source of their funding? As it stands, the rules say that if an organisation is going to try to influence voters and spend money, it has to register with the commission. All the rules apply in the lead-up to the event, so that we have transparency. There are currently no rules that say that when those organisations begin to campaign, they have to declare their assets. One could just ask them to declare at a very basic level, for example, where they sourced their funding, going back over a certain period.

The point that we have raised is whether it would be good practice, and in the public and the voters' interest, for campaigning organisations that are going to try to influence voters to declare the assets with which they come into an electoral event. If they did, one could understand from where an organisation might have got what seem to be a lot of funds and be satisfied with that.

John Mason: You mentioned that voters will not have the information. It seems to me that voters will find it quite strange that an organisation that buys a computer on day 1 has to report that, but the organisation that had one two days previously does not.

Another issue is staffing. It is strange to me—and, I think, to the public—that if an organisation spends half of its money on staffing, that portion does not have to be reported, and yet that is a huge part of campaigning. Do we need to look at those rules?

Bob Posner: Yes. The commission is on record as saying that staffing costs of campaigning should come in under the rules and be reported. When one goes back a number of years to what is referred to as "the analogue age", with people campaigning on the streets, with posters and with a lot of volunteers from political parties, one can see why the rules were structured to say that it was not necessary to see that staff spending.

However, modern campaigning takes place with people sitting at call centre desks and telephoning people, and through digital campaigning, which requires staffing, so it involves considerable expenditure. It seems odd that that is not part of the reporting regime, and that we cannot see what money is being spent there.

John Mason: Generally speaking, you want more detail on what money is being spent on.

Bob Posner: Yes, we think that staffing should come in under the rules. To expand slightly, you will see from our written submission—this applies across the UK and to other events as well—that we have lag periods after electoral events or referendums, before campaigns have to report their spending. Traditionally, the periods are three months for smaller campaigns and six months for larger campaigns. At the stage we are at with technology in the digital age, in which everyone keeps their accounts in information technology systems, do we need such long periods after events before we can begin to do our work and investigate any problems, if there are any, or can reporting periods be shorter? Would that be

practical for campaigners? It would have to be. Can spending be reported more quickly, or even at various stages during the event? To do so seems reasonable to us.

We have also made your second point, which is that when we get reporting of information, it is perfectly practical for there to be more detail on the spending so that the public can also see what it has been spent on.

The legislative framework of the Referendums (Scotland) Bill is good and sets out categories for which spending has to be reported, but it does not yet suitably specify the nature of some of the spending in the categories, or digital campaign spending, which is obviously a major activity and spend these days.

11:00

John Mason: We have had evidence that some people feel that the upper spending limits for permitted participants are too high. Do you have a view on that?

Bob Posner: Spending limits are a matter for Parliament to decide. When asked, the Electoral Commission can make recommendations on what spending limits should be, and, over the years, we have done so.

In practice, for the referendums that have happened, we think that the spending limits have been practical. We have not noticed a major problem.

Andy O'Neill: The spending limits in the bill reflect the spending limits in the Scottish Independence Referendum Act 2013, which were based on the advice that we gave the Scottish Government and the Scottish Parliament in 2012. We were content then. Obviously, over the years, costs change. There is provision in the bill to allow us to recommend changes. At some point in the future, we might recommend changes to spending limits.

Patrick Harvie: The Electoral Commission's written submission raises the issue of checking the permissibility of donors, which I discussed with the previous panel. We want large and small campaign bodies—not just big, experienced organisations but those that are not well resourced or hugely experienced—to be able easily to check the permissibility of donors. One suggestion has been that a national database of electors should be available. The previous panel raised a number of objections to that but agreed that greater consistency in the formats of locally available electoral registers could be achieved, in order for it to be easier for campaign bodies to check donors against a data version of the register rather than a printed version.

Your submission goes on to discuss the difficulties. Even if we achieve that consistency in Scotland, if donors from outside Scotland but within the rest of the UK are able to donate, how do campaign bodies ensure that they can easily check permissibility?

What can be done to improve the ease with which campaign bodies, in a range of scenarios, can check the permissibility of donors? Would one option be to ensure that only donors who are registered in Scotland can donate?

Andy O'Neill: I will start and my colleagues will chip in accordingly.

The problem that existed in 2014 was that, although a permitted participant could obtain the Scottish register and check that any individual who made a donation was on the register and that, therefore, it was a permissible donation, the campaigner could not get the registers for people from Northern Ireland, Wales or England, who were allowed to donate. That put the campaign bodies in a difficult situation, because they had to trust that the people who gave them money were on the register. On such an occasion, we advised people to use a workaround: to go and see the local ERO's register or to get the donor to give them a letter of comfort from their local registrar saying that the donor was on the register.

Electoral law is now devolved to the Scottish Parliament and the Senedd in Wales; some remains in the UK. Because there are three policy centres or legislatures, they have to work together. We see that in electoral registration, which we might talk about later. This framework bill is for ever; it is not a one-off event. Therefore, we suggest that the Governments of Scotland, Wales and the UK—and, perhaps, in the future, Northern Ireland, whose Assembly is suspended at the moment—work together so that permitted participants can obtain the registers. In the long term, that would be useful.

Joined-up registers that talk to each other would help people. The National Assembly for Wales is thinking about a national register and it might legislate for that towards the end of the year. Whether that would be a single register or registers for the 20 council areas that talk to one another is a matter for them. We could supply the committee with evidence on that, if it was wanted. We can talk to our Welsh colleagues.

Patrick Harvie: Are people in Wales talking about having a new national body that would be the data controller for a new national register or about co-ordinating at local level?

Andy O'Neill: I think that they are still discussing it. It is probably more about co-ordination than establishing a national body and having a single register.

Patrick Harvie: Is there any reason why we could not achieve co-ordination within Scotland to ensure that the data that is available to campaigners against which they can check the permissibility of donors is in a consistent format? That would remove some of the difficulties.

Andy O'Neill: You should aim to achieve that. Essentially, three major providers of register software are used in Scotland. A national standard whereby they can all talk to one another would be a good thing. The commission would support that.

Bob Posner: The registration system is archaic in many ways, as I think Patrick Harvie was suggesting. We all want it to be modernised and that will require a national approach. We have published a number of feasibility studies. It makes sense for local electoral registration officers to be able to draw on other databases, such as Department for Work and Pensions data, to get information and keep up to date. As you identified, some of them are on different platforms.

On the question of whether, when one looks at the electoral registers in Scotland, it is possible to know whether a donor is permissible, the answer is yes. Of course it is possible, because the registers are available and one can check them to see whether a donor is permissible, but the system is a bit clumsy and it could be more streamlined. Taking that further, one might ask about someone who wants, say, to donate to a referendum in Scotland but who lives elsewhere in the UK; that gets more difficult because the bill does not include the ability to put legal requirements on the rest of the UK, so it requires co-operation. We experienced that issue at the 2014 referendum, so the problem exists. It was okay, but there was no proper structure to deal with it.

The other thing to remember when one talks about permissibility of donors is that it is not so easy to have a Scottish-only ring fence around other types of donors that donate to political campaigning, such as institutions, organisations and companies. In those cases, you would not be dealing with a Scottish electoral register, and a Scottish companies register, or a register for other organisations, does not exist as such. It is difficult to check permissibility and have a system that says, "This company or organisation is Scottish-only so it can donate", because a company may have a nameplate here but its business may be elsewhere and so forth. That is a much more difficult thing to do in a UK context.

Patrick Harvie: I appreciate that that is probably the case for companies, but surely it would be relatively simple—and defensible, in principle—to say that individual electors should be registered in Scotland if they want to use their money to influence a Scottish referendum.

Bob Posner: That would be a political decision, for politicians, obviously.

Patrick Harvie: Would it be straightforward to achieve that?

Bob Posner: You could ring fence the electoral registers in Scotland and say that. That would be a practical issue.

Patrick Harvie: I was going to move on to the issue of digital imprints. Shall I take that now?

The Convener: Just do it.

Patrick Harvie: The discussion about the extent to which we should regulate the online space has come up, and it is an issue that a lot of countries are grappling with. There are probably no absolute answers about where that will end up. What is your view about the bill's provisions on digital imprints? Do we need to go further than the bill goes at the moment and think more about online activity rather than simply regarding it as the digital equivalent of a printed leaflet that needs to have an imprint? We are seeing much more disruptive uses of online campaigning. What questions should we be going into in the longer term about how to achieve transparency and accountability in that space?

Bob Posner: First, we very much welcome the fact that the digital imprint provisions are in the bill. In the 2014 referendum there was a basic provision for all imprints including online, which was a first crack at it. It was helpful, but it was a bit clumsy. Digital campaigning has moved on from there, so we welcome the provisions in the bill that say that all campaigning material, including online material, must carry imprint information.

More work is to be done on the provisions. Our fundamental concern is that, as drafted, there is an exception that says that, for online campaigning, there needs to be an imprint unless it is "not reasonably practicable" to have one. We understand why the exception is there—online campaigning is new and, due to its nature, it might not always be practical to have an imprint—but our current practical experience is that the exception is not needed. Our work with the social media companies Twitter, Facebook and Google, and what we have seen in elections in democracies overseas, shows that it is absolutely practical in all forms of digital campaigning for there to be imprint information by clicking on it or other means.

Having the exception is a bad idea, because it creates a hole in the system and means that there is no incentive for the social media companies to include the imprint. That needs to be an absolute rule and we see no practical difficulty with it. It is our strong recommendation, which we made in our written representations and are repeating today, that there is no need for the exception.

More broadly, in June 2018, we published a report on digital campaigning, which we can send to the committee, in which we made a number of recommendations about moving the law on in the voters' interests. Some of those recommendations relate to things that we have said already today about needing to enable greater transparency.

There are now ad libraries on social media platforms. Facebook, for example, publishes libraries of the adverts that it displays. Publishing ad libraries is helpful and good, but doing so is voluntary, so there is no guarantee that it will be done tomorrow; it is done how Facebook chooses to do it and a different social media platform can do it differently; and it is not necessarily being done in a way that is consistent with UK legislation with regard to a definition of what is and is not campaigning and, therefore, what gets captured in the ad libraries.

One of our recommendations in the report is that we need overview regulations and rules that require social media platforms to provide transparency in a way that is consistent with UK law and requirements. That does not necessarily mean that that needs to be picked up in the bill, but it needs to be picked up in the context of elections and referendums.

One of our recommendations for the bill is that it enables law enforcement agencies, including us as the regulator, to be able to acquire information swiftly from social media platforms to give the public more confidence. The idea is that, if there are concerns that people are being targeted in a certain way or there are rumours that things are not being done legitimately, we can go directly to social media platforms—where we can, as it is not always possible—and require that information. It should be a requirement and not voluntary that they provide the information, because that makes it easier for them. It is interesting to hear the evidence from America, where the social media platforms are saying that, because they are commercial companies, they want the authorities to put rules and regulations in place and require them to do such things. There is further development to be done there.

The third big strand that I will mention today, which we can do something about, is helping voters to raise their awareness about how people are trying to influence them, particularly online. It is a form of digital education. It is important for voters to think about and understand the fact that they are being targeted; that could be obvious or more indirect through campaigns and issues, but it is all campaigning. They must think about who is trying to influence them and the source of information. If there are imprints, they can see who is trying to influence them, but if they cannot see where it comes from, they should be suspicious.

We met the Australian Electoral Commission a few weeks ago and learned that, in the recent Australian federal elections, the commission ran, for the first time ever, a national public awareness campaign telling voters to be aware and think about who was trying to influence them. By all accounts, it was a good campaign that was successful and well received by voters. That is the sort of public awareness work that we would like to help with in the UK context, if it were the wish of the UK and Scottish Parliaments. We would probably work hand in hand with other organisations and have joint campaigns. Data protection is important, for example, so we would work hand in hand with the information commissioner on that.

There is more to be done, including strands of work that we can do on digital awareness to help voters. That is the direction of travel.

11:15

Andy O'Neill: If we look at the European Parliament elections in recent months, we can see that social media platforms such as Twitter, Facebook and Google are struggling towards getting social media imprints. Our concern is that, if the bill suggests that it may not be "reasonably practicable" to include an imprint, that will give them an out and a way not to develop this sort of stuff.

We have been working with the Scottish Government to give it some international comparators. In Canada, for example, personal opinion is exempt from all this stuff. However, we are still discussing the work around that with the Scottish Government.

Patrick Harvie: I think that we are all struggling to find a set of answers on this, or even to define the questions.

Your written submission draws a distinction between how campaigners should be regulated and how individuals should be treated, and there is a sense that you do not want voters who are simply discussing a referendum to be held to the same standard as campaigners. I think that we would all agree with that in principle, but is there not a danger that it almost implies that we should have the same sense of a binary separation between campaigners and individuals who are discussing a campaign? The online space disrupts that and blurs the distinction between discussion and publishing, given that discussing things online is also publishing.

We have seen that what we used to call astroturfing—corporations producing fake grass-roots material—has been taken to an industrial scale with the use of either fake accounts or very targeted data to manipulate the way in which

people experience political debate online. Do we need to look at the space between a campaign body and an individual voter who is discussing a political matter such as a referendum, and think about what we need to regulate there? For example, should the rules be different for individuals who have a social media reach that is beyond a certain size? Should there be a threshold on follower counts or what have you? Should someone who has more than 50,000 followers be regulated and held to a higher standard than an individual who is just discussing things with their friends?

Dame Sue Bruce: That is a very interesting question. I suppose that it would go to the heart of questions about freedom of speech if people who were having conversations about campaign issues in a cafe were not regulated but people having the same conversations online were regulated. That is the medium that is used now. It becomes much more difficult to pin down those conversations and to regulate. It is probably a much wider question than one that we at the Electoral Commission could address, but—

Patrick Harvie: The point is that they are not just conversations. They are also publications. When someone discusses something on social media, they are also publishing.

Dame Sue Bruce: Yes.

Bob Posner: It is a wider question. Traditional newspapers, radio and TV are all regulated. In Patrick Harvie's example, the question is at what point someone has sufficient reach, perhaps because they are regular and major bloggers and they have a certain number of followers, that they should be regulated. However, that is not our field of regulation. I suggest that that is about the regulation of publishers and the rules that they should follow. That is absolutely a live debate, but I do not think that it is one that you would look for us to control.

I think that you would look for us, quite rightly, to regulate a situation where someone has crossed the threshold and is campaigning. We look at that in the sense of organised offices of campaigners who are spending money on campaigning and so forth, and not just people who are expressing views, whether that is to a large reach or just a few people. They are not campaigning.

Newspapers, for example, include editorial comment and publish views and so forth, but they are not regulated by us, and that is right. On the other hand, if a newspaper starts to produce leaflets in the paper saying, "Vote for so-and-so," it will fall within our rules and become a campaigner, so there is already crossover.

I can see what Patrick Harvie is saying, but I think that you would look for us to define who is a campaigner within the rules. If someone is spending money and they are organised as a campaigner, they should fall within the rules. That is the distinction that we draw for the purpose of regulating campaigners.

The Convener: I have a couple of follow-up questions for the record.

Mr Posner, you talked about carrying out a publicity campaign that allows the public to understand how best to deal with the information that they get online. Forgive me for what is a very ignorant question, but does the Scottish Parliament have the powers to mandate the Electoral Commission to do that?

Bob Posner: I am going to say yes. Responsibility for public awareness is part of the bill. We can check this after the meeting, but I will say yes, absolutely. We are under a duty to do a public awareness campaign. That has been the case in the past, and it will be the case for future referendums. The question is how we structure the public awareness campaign. One focus is on encouraging people to register, another is on encouraging hard-to-reach groups to register, and another is on getting people to protect their vote against fraud and so on. Perhaps there is a whole new strand—an emerging strand—which is about helping people to think a bit harder about who is trying to influence them. We are seeing that emerge overseas now.

The Convener: Patrick Harvie raised the issue of electoral registration and we have heard from previous witnesses about a study on electoral registration that the Electoral Commission is undertaking. Is there such a study? If so, what is its remit and when do you expect it to come to any conclusions?

Bob Posner: The UK Government is looking at reforming the annual canvass system across the UK, to make it easier for electoral registration officers to get information more speedily by having access to other Government and national databases, in order to see where voters are. One can then begin to look at moving, not necessarily to automatic registration, but to automated registration, whereby the EROs could get information on voters and then confirm that information with voters—for instance, by asking them to confirm that their address is as shown on other records. It is about modernising the system, and we are working with the Government on that. It is a good, positive project.

We have also published feasibility studies about how one can go further with the registration system and get the registers more joined up through increased use of databases. In the UK context, once the registers are on more consistent platforms and it is easier to draw down information

straight away from registers anywhere in the country, one can deal with issues of duplication, accuracy and completeness much more effectively. For voters, one can also open up some of the good options that we see overseas, where there are national databases. For example, voters would not necessarily have to go to one polling station in one corner of the country to vote; arguably, they could go to any polling station in any corner of the country. That would surely be a good thing. One could also look at advance voting or other innovations. Such things open the door to modernising the system in the interest of voters. When one thinks of the premise, one would have never have written a system in which there are 380-odd separate registers in the UK that do not talk to one another. We need to move on from that.

The Convener: What are the timescales for that work?

Bob Posner: It requires Governments to introduce legislation and Parliaments to legislate, and those things are not in our gift. Just a few months ago, we published what we call feasibility studies, which set out how such things could be done. At the next stage, we would love to work with Governments and agree a policy timetable to take the work forward.

Alexander Burnett: Where permitted, the panels that we have taken evidence from have been very clear about the need for testing the referendum question and the Electoral Commission's role in that, including when the question has been asked before. For the record, will you explain your position on that issue?

Dame Sue Bruce: Yes. We strongly believe that the Electoral Commission should be asked to test the question. I refer again to putting the voter at the centre of the process. We think that a formal testing of the question helps to provide confidence and assurance to the voter and to the Parliament that is posing the question and, with regard to the integrity of the process, to establish that the question is clear, transparent and neutral in its setting.

Alexander Burnett: Could you explain briefly how you go about such testing? What is involved in the process?

Andy O'Neill: We have a standard testing procedure. It normally takes up to 12 weeks and the bulk of that time is used for research with the public—we do focus groups and in-depth interviews. For instance, we did that in 2013 across Scotland, including the Western Isles—we went everywhere. We take advice from experts, such as accessibility experts and plain English experts.

We also undertake what is effectively a consultation exercise—there are people in this room from whom we got responses in 2013; we had more than 450 responses the last time that we did a Scotland-only referendum. At the end of the process, we publish a report that we supply to the Scottish Parliament and Scottish ministers.

Alexander Burnett: Unsurprisingly, most of the debate around this part of the bill has concerned the 2014 referendum and the question—or, more particularly, the answer options. What specific study would you undertake in view of the fact that, for the EU referendum, the potential answers were changed, with the answer options in the Scottish referendum being seen as flawed? How would you go about measuring that against, say, the issue of intelligibility, given that the Scottish independence question has been reused so often in polls?

Bob Posner: It is important to say that we do not start with a pre-formed position at all. The fact is that there was a referendum in Scotland in 2014 and, if there were to be a repeat—if I may put it that way—of that referendum, one material consideration would be the fact that there was a question that was in the public's mind back then and which is familiar to the public because of polling and so on. All of that would be picked up as part of the assessment process. However, we would not start with any position. Obviously, there would be a proposed question for us to assess, but we would not start with a position about whether it was right or wrong; we would simply test it. The whole point is to be evidence-based, and, based on the evidence, we would make a recommendation to the Parliament about what seemed to be the right question.

No one should think that the fact that there was a referendum in 2016 that used "remain" and "leave" means that there is any reason why that formulation would or would not be relevant or appropriate for another referendum. It is our job to do the assessment that takes everything material into account, and we will do that.

The real strength is the public opinion research that Andy O'Neill referred to. That is the absolutely best way to understand questions about intelligibility. We will see—one sometimes gets surprised by issues around wording and so on.

Alex Rowley (Mid Scotland and Fife) (Lab): That seems to be the argument that the Cabinet Secretary for Government Business and Constitutional Relations is making. He says that we have already had a referendum on the issue, with a question that was tested by the Electoral Commission and found to be fine, and some might say that not a lot has changed in five years. What is the answer to that? The issue is becoming one of the key arguments in relation to the bill. The cabinet secretary has given evidence to another

committee to the effect that there is absolutely no need to test the question. What is your response to that?

Andy O'Neill: We would argue that our expertise lies in question assessment. We believe that contexts can change. The context might not have changed, but we will not know that until we do the question testing, whereupon we will give our advice.

One of the things that you get from our expertise is confidence in the question. People—the voters and campaigners—can have confidence in our advice, if we provide a good product. You can choose to accept our advice or not, but we give you our advice. That confidence brings acceptance from the voters and campaigners, which allows you to go off and debate the issues rather than the question. That is why we think that question assessment—irrespective of whether we tested the question five, six or 100 years ago—is important.

Alex Rowley: So you are saying that it is crucial that testing be done. The way that the bill is framed, once a question has been asked, you can keep having referendums every five or 10 years and stick to the same question. However, you are saying that it is crucial to re-test the question.

Dame Sue Bruce: It is important to emphasise that the provisions in the bill should require us to test the question, and there should not be a caveat excluding a question that has already been put. That is important in relation to the point about assurance and the provision of confidence to the electors and those proposing the question that the integrity of the question has been tested and advice has been given. We would emphasise that all questions should be tested.

11:30

Adam Tomkins: I have three further follow-up questions on that point, on which your written evidence is very strong. It says:

"The Bill should be amended to ensure that:

The Electoral Commission must be required to assess any referendum question proposed in legislation ... regardless of whether the Commission has previously published views on the question proposed."

Is it your evidence that you can envisage no circumstances in which that element of the referendum process should be bypassed?

Dame Sue Bruce: That is correct, yes.

Adam Tomkins: In some of your answers to questions about testing the question, you talked about "intelligibility". That is the word that PPERA uses and it also appears in the relevant section of the bill. In other answers, you talked about the "integrity" of the question. Is there a difference between intelligibility and integrity? Is there a narrow or a broad definition that you give to "intelligibility" when you are testing a question? Does it include integrity? I am interested in exactly what is tested, the breadth of meaning that is used and how elastic the idea of intelligibility might be, in your view.

Dame Sue Bruce: We focus on whether the question is demonstrably clear and neutral. The outcome of that will, in turn, have an impact on whether the integrity of the process is intact, so one would lead to the other. Andy O'Neill or Bob Posner might want to add to that.

Bob Posner: That is right. As we all know, nothing could be more core to a referendum than that voters understand the question that is being asked and are not misled by it in any way. As Andy O'Neill said, it must also provide confidence and legitimacy. As Sue Bruce said, that is where the aspect of integrity comes in.

Adam Tomkins: So integrity is part of intelligibility.

Dame Sue Bruce: Yes.

Bob Posner: Yes.

Adam Tomkins: Okay, thank you.

As I understand it—it is a long time since I looked at it, so please correct me if I am wrong—PPERA legislates for a three-way relationship as regards to the roles of the Electoral Commission, the Government and the Parliament. The Government proposes a question; the Electoral Commission is consulted on the question's intelligibility; and the Parliament then enacts, in primary legislation, what the question should be. However, the Electoral Commission's recommendations are not binding on either ministers or the Parliament. Is that correct?

Andy O'Neill: Yes.

Adam Tomkins: Is that the relationship that you would like to see set out in the bill? Do you think that it is the right one, as far as the respective roles and responsibilities of the Government, the Electoral Commission and the Parliament are concerned?

Dame Sue Bruce: Yes.

Adam Tomkins: Does it follow from that that you think that the Parliament should legislate, in primary legislation, for any referendum question? If it does not so follow, why is that?

Bob Posner: However one structures the point about the use of primary or secondary legislation, our position is that, at the end of the day, we would have given our expert advice. Ultimately, whether the Parliament approved matters directly

through primary legislation or via secondary legislation, it would still own the question.

Adam Tomkins: I can understand why you want to sit on that fence, but I am not going to allow you to—I am sorry. From a parliamentarian's point of view, the material difference is that individual MSPs can seek to amend primary legislation, whereas, whether as individuals or in large groups, we cannot amend secondary legislation.

The appropriate relationship is that the Electoral Commission makes recommendations, but what if there is no way that MSPs can then act on them? If the commission were to say that a proposed referendum question needed to be changed because it lacked intelligibility or integrity in a certain way, we could change it only if that question were set out in primary legislation and not secondary legislation.

I am sorry, but it seems to me that the force of your earlier answers very strongly suggested that, in your view, referendum questions should be enshrined in primary and not secondary legislation. If I am wrong about that, I need you to explain to me exactly why I am wrong.

Andy O'Neill: I would need to check on this—we might need to write to the committee—but our understanding was that, assuming that a question had not been asked before, we would have to give a view on it. However, that question could still be dealt with by primary or secondary legislation and we would have to provide our advice before consideration of any secondary legislation.

Bob Posner: Secondary legislation might not be amendable, but presumably it would have to be approved.

Adam Tomkins: It might be that we take the view that we want to have the referendum, but we want to have it in accordance with the Electoral Commission's recommendations and not contrary to them. If the referendum question is set in secondary legislation, that is an impossible position for an MSP to take. That cannot be best practice.

Andy O'Neill: If Parliament decides to do that, we would have to live with it. You make the decisions; we only give you the advice.

The key thing that we want is to be able to give you our advice on any question. We have followed the other debates at which people have talked about the super-affirmative procedure and suchlike. That might be the mechanism that you choose to adopt, and we can give you our advice. The key thing for us is that we want to give you our advice.

Adam Tomkins: I understand that. You want to give us advice, but I presume that you also want us to be able to act on that advice if we choose to. If we proceed with the bill as drafted, we simply will not be able to do that because we will not be able to amend a proposed question to take into account the Electoral Commission's recommendations. That cannot make you very happy, can it?

Bob Posner: If you end up using a form of secondary legislation that members cannot amend, that will be a form of secondary legislation that Parliament does not have to approve. It is ultimately a matter for Parliament; it is not a matter for us. It is your bill and will be your legislation. As Andy O'Neill says, our role is to give advice and a transparent framework so that people can see that advice.

Adam Tomkins: This is my last go at this, convener; you have been very patient.

The Convener: I have.

Adam Tomkins: The Electoral Commission's advice is not about whether a referendum should be held but about the intelligibility of a proposed referendum question. That is the advice that you need to feed into the democratic process to enable us to make a decision about whether we should go ahead with the particular wording in a particular referendum at a particular time. If we are able to say only that there should be a referendum or that there should not be a referendum, we will not be able to change the referendum question in the light of your recommendations, and that makes your recommendations nugatory, does it not?

The Convener: That is the same question being put in a different way.

Alex Rowley: Does the Electoral Commission not have to be happy that the public have confidence in the question? To go back to what Adam Tomkins said, would the public have confidence in the question if the Electoral Commission said that there were issues with it but Parliament was not able to do anything about it? Does that bring into question the integrity of the question and of the referendum?

The Convener: That takes us back to what the panel said earlier. Parliament can still decide whether to give its support or not, irrespective of whether primary or secondary legislation is used. If Parliament felt that the question put by the Electoral Commission had been altered to an extent that it was not happy with, Parliament could vote it down.

Alex Rowley: I suppose where I am trying to go with this is to say that, at the outset, we should try to find the best way to ensure that the public can have confidence in—

Adam Tomkins: I would like to hear the answer to my question.

The Convener: I agree. We are having a debate here. The witnesses have told us a couple of times that it is for parliamentarians to decide and I am trying to give the witnesses the space to restate that so that they do not feel under pressure. On you go, Mr Posner.

Bob Posner: I think that you are right, convener. We are reluctant to step into a space that is for members, for Parliament and for political viewpoints. We are obviously reluctant to step into that space.

However, it is fair to say that, if we have given advice, we would hope that it was followed. Why would we not hope that? We would have given that advice and, if it was not followed, we would be disappointed but we would respect the democratic outcome and voters would have to make what they could of it. That is the right democratic position.

What is really important to the Electoral Commission as an organisation with responsibilities around integrity—I agree with that—is that we say, "This is what we think the question should be. Here's our advice." There could be a good reason for Parliament or the Government to say that we have got it wrong—it might be a very persuasive reason. However, we would want to give our advice.

The Convener: Gordon MacDonald has a question.

Gordon MacDonald: I have a few questions that are mainly to help with my understanding of the testing regime.

You highlighted the testing methods, but looking back to the 2014 independence referendum, were you satisfied that the question that was asked at that time was easy to understand, clear, simple, concise and neutral?

Dame Sue Bruce: Yes.

Andy O'Neill: Yes.

Gordon MacDonald: Good. I understand from the Ipsos MORI report on the 2014 testing carried out on behalf of the Electoral Commission that the

"sample size was relatively large for this type of research".

Why was that?

Andy O'Neill: Sorry, but could you repeat that question?

Gordon MacDonald: The report on the testing of the question in the 2014 referendum says:

"The sample size was relatively large for this type of research".

Why did you require a larger research panel than is normal for testing questions?

Andy O'Neill: From memory, I would say that that was because we wanted to give you a very good answer and good advice. We went all over Scotland—we did focus groups in Stornoway and elsewhere. It is a very important question and that is why we did what we did.

Gordon MacDonald: Would I be right to say that the phrasing of the question used in the 2014 referendum was suggested and recommended by the Electoral Commission?

Andy O'Neill: Yes. The question that we were asked to test was: "Do you agree that Scotland should be an independent country? Yes or No". After 12 weeks, we recommended that the question should be:

"Should Scotland be an independent country?"

Gordon MacDonald: How robust was the testing of that question to ensure that voters had a clear choice of the options available to them?

Bob Posner: I can perhaps assist here. That was in 2014, and as I said earlier, one should not draw any conclusions from that about what we should be saying now. It is not right for anyone—politician, academic or anyone else—to take the view that they know the answer and that they know that the same question is clear now in 2019. No one can say, "I know that voters will understand it and it will be the right question for any given referendum"—after all, this is a framework bill for any referendum. It is far wiser and more prudent to say that referendum questions are so core to the whole function of a referendum that we should ensure that they are always assessed.

We will always look at the best way in which to assess the question, at the time, taking into account the material considerations. We publish all that information for everyone to see. We have not heard any argument why one would not want to do that when we are making legislation.

Gordon MacDonald: I am just trying to understand. We have a question that was robustly tested, suggested by the Electoral Commission and was widely understood. The question that was asked in 2014 was recommended by the Electoral Commission and has been asked in 231 opinion polls since 2011, 99 of which took place between 2014 and 2019, with an average poll size of about 1,000 people—a normal sample size. That means that a quarter of a million people have been asked the question on top of the 3.6 million who voted in the referendum in 2014—the highest turnout of any referendum that has ever taken place in the UK. Is there a potential danger that by changing the question, the Electoral Commission will introduce a level of confusion in the mind of the electorate?

Dame Sue Bruce: We are not proposing to change the question but simply to test whatever question is proposed to be put. It could be the same question and then that question would be tested—it does not necessarily imply that it would be changed.

Andy O'Neill: The important thing about testing is to give the electorate confidence in the question, whatever the result is. We do question testing case by case—no precedent is set. We go through the process, collect the evidence, consider it and give you our advice. We have no preconceived ideas on that. Other people may state that we have such ideas, but we do not.

That is important because, for example, the independence question has itself become part of the debate. We want to test that, so that the electorate can have confidence in whatever question they are asked—if there is another referendum—and accept it.

11:45

Gordon MacDonald: I accept that. Most commentators said that the referendum in 2014 was the gold standard of referenda and that it should be a template for referenda that take place elsewhere in the UK. I am trying to understand what the grounds would be for changing the question, if that was what you proposed after testing. What would be the triggers for suggesting a change to the question?

Dame Sue Bruce: That would follow the evidence.

Andy O'Neill: It would depend on the evidence.

Patrick Harvie: To follow up on that, is it fair to say that, in testing a question, you do not look only at the objective words; you look at how the question is understood by the public, and that involves cultural questions about the way in which the words convey meaning to the public so, if those cultural factors had changed, that would be a reason to change the question? Although in the run-up to the 2014 referendum it might have been possible to make a case for saying that the question should involve words such as "leave" or "remain", those words were changed profoundly in the run-up to and aftermath of the 2016 campaign, so it would not be appropriate to apply them to a different question from the one that was addressed in 2016, which was about EU membership.

Dame Sue Bruce: That is the kind of material that would be tested were the question to be tested in that context. Of course, there would be electors who did not vote in 2014 and are new to elections and referenda. The idea would be to test the question to ensure that it was understandable and was not nuanced on either side and that electors felt confident that they could participate in the referendum and cast their vote appropriately in light of the question.

Bob Posner: In 2014, the Scottish Government proposed a question, which I presume it thought was the right and fair one, but we recommended a change, which was accepted. Gordon MacDonald is absolutely right that that referendum is looked on as the gold standard. I assume that, going forward, you want any other referendum also to be a gold standard. Why would you introduce risk into the system? With an independence referendum, we might end up with exactly the same question, but you would want it to be tested and you would want people to have confidence in it. That is what we are suggesting.

The Convener: Angela Constance has a follow-up question on the same issue.

Angela Constance (Almond Valley) (SNP): It is very quick. Would the commission always need 12 weeks for the testing of any question in any referendum?

Andy O'Neill: The short answer is yes. One reason for that is that the bulk of our testing is of public opinion, and that takes time—it takes about eight weeks for the way that we do it. We also consult lots of other people. We need time to do it. We could shave off days or a couple of weeks if we were told beforehand that we were going to do it and we had someone contracted to undertake work on our behalf, but it takes time to give you quality advice.

Angela Constance: I suppose that you have described a process that could be done differently depending on resources.

Andy O'Neill: We do it in a particular way. As others have said, it is the gold standard. Personally, I would not want to move away from that standard.

The Convener: Tom Arthur also has a question. I knew that this area would take a long time, which is why I dealt with all the other questions first.

Tom Arthur: I promise that it is a very brief question, just to assist my understanding.

We have heard that a question would be proposed and the commission would assess it and reserve the right to suggest another question, based on where the commission is led by the work that it undertakes. How do you test the intelligibility of any change of question among politicians so that, whatever instruction is issued by the electorate in the referendum, that is clearly understood by the Government and the Parliament?

Bob Posner: The process involves continually talking to campaign groups, politicians and other interested groups and individuals—that is partly why it takes a while. If, along the way, the information shows that the question needs to be amended in a certain way, we test the amendment as well as part of the process. We go back through the loop again with everyone who has an interest to ensure that we have a view on the question. We endeavour to achieve the understanding that you are concerned about.

Tom Arthur: So there would be an open dialogue, and if a certain question was suggested but it was the opinion of politicians and experts that that question might be ambiguous or vague in the instruction that it gave, that would form part of the on-going process of consideration of what the final wording would be.

Bob Posner: Yes.

Andy O'Neill: Apart from the public opinion research, we talk to lots of different people all the time. We run a mini consultation exercise and talk to plain English experts. We do a lot of other things, which then come into the pot before we give our final advice.

Alex Rowley: I have a brief follow-up question. Is it not ironic that we got the answer from the European Union referendum but then Parliament and everybody else seemed to be confused about what it was that people voted for and proceeded to argue about that? That is the worry with referendums, is it not? The outcome of the 2016 referendum is not accepted by politicians and they are all running around saying, "That's not what people voted for."

Bob Posner: A distinction can be drawn between an advisory referendum and a binding referendum. With the referendum on the alternative vote system for the Westminster Parliament, all the legislation was in place, so we were able to say clearly to voters, "Whichever way you vote, this is what will happen." That contrasts with the position on advisory referendums. Sometimes, an advisory referendum might be dealing with clear facts—it might be about abortion, for example—but, with other issues, that might not be the case, as you described.

With the 2014 referendum, we asked the Scottish and UK Governments to issue a joint statement—which they did—about the consequences of the outcome, whichever way the vote went. I think that that was helpful for voters, but it went only so far.

Andy O'Neill: That was one of the interesting by-products of the process for assessing the intelligibility of the question in 2014. People understood the question and what it meant to leave the UK or to break with Westminster—Patrick Harvie alluded to the fact that lots of different language was used—but the electorate told us that they did not know what would happen next. Therefore, we spent a considerable period of time working with the UK Government and the Scottish Government to produce information on what would happen next in the event of a yes vote and in the event of a no vote, which we included in the public awareness leaflet for households that we circulated to 2.5 million electors in Scotland. We included a page for the designated leads for the yes and the no side to give more information, because we thought that that was extremely important.

The Convener: I think that we have got through that area. Angela, do you still want to ask about the corporate body issue?

Angela Constance: Yes. I have two specific questions about the Electoral Commission as a body.

As parliamentarians, we are elected, whereas the commission's commissioners are not elected. I looked at the commission's website, where I discovered that it has 10 commissioners. There is a 50:50 gender balance—that gets a big tick. There are people who are tasked with looking after Scotland, Wales and Northern Ireland. Some commissioners are former civil servants who have operated at the highest levels of the UK Government, while others are representatives of political parties. There are representatives of the Conservative Party and the Labour Party, as well as a minorities representative, who is someone with a background in the Democratic Unionist Party.

How do you ensure your impartiality? That is what I am interested in.

Dame Sue Bruce: That is a fair question.

The appointment process for the commissioners for the regions is routed through the Speaker's Committee on the Electoral Commission, which is a committee in the UK Parliament. We overtly state our neutrality. At the commission board, we are required to speak openly about any interests or conflicts of interests, and that is refreshed on a regular basis.

The commissioners who are appointed as political representatives to the board look at the issues in the round. They bring their point of view as experienced politicians to the table, but they try to always act neutrally as far as their role as commissioners is concerned. Bob Posner may want to add to that as chief executive.

Bob Posner: Yes—there are layers of protection to make sure that there is not partiality. I am the accounting officer of the commission, which is a statutory role. I have to account to

Parliament that any public money that the commission spends is spent lawfully. If I saw something that was perhaps not proper on the commission board, I would have to step in as accounting officer and deal with that and, if necessary, make a public statement and report to Parliament, so that is another layer of protection.

When there have been accusations that the commission is biased—it has happened only very occasionally, but it has happened—we have always looked to deal with those accusations in as independent a way as possible. In the case of the EU membership referendum, there were accusations of bias against the commissioners. We appointed an entirely independent person to look into those accusations. The commission stepped back entirely—it was an independent report. The person was satisfied and reported to the UK Parliament that there was no bias in that instance. We do everything that we can to ensure our impartiality.

The commission is under a strict code of conduct, which is public. We have to sign up to it and we have to live up to the principles of public life and other principles. All the staff are subject to a strict code of conduct; there are restrictions on staff in relation to their backgrounds. There are protections against them coming directly from political parties, they cannot work for them for a number of years and so forth.

Our regulatory work is particularly sensitive politically, so we have strong internal standards about how we handle our regulatory work. If we investigate something, someone else also assesses it and it is then looked at by a third person. In the past couple of years, appeals against some of our regulatory decisions have been taken to the courts; those have included accusations of bias, but the courts have not upheld those appeals in any instance. Bias is always a possibility, though, so we do our best to protect against it.

Angela Constance: Okay. Thank you very much for that. The bill says that

"any expenditure incurred by the Commission"

must be met by the Scottish Parliamentary Corporate Body. That is out of step with how the SPCB funds other independent organisations, where a budget is agreed and the SPCB is not under any obligation to fund expenditure above that budget. Do you think that it is right that the Electoral Commission should be treated differently from other independent bodies? If so, can you explain why?

Andy O'Neill: I have seen the report that you allude to. We have no problems with what is being suggested as an alteration. Interestingly, another bill that is before the Scottish Parliament, the Scottish Elections (Reform) Bill, says that we need to be accountable to the Scottish Parliament, which we are keen to do. I do not think that the provisions in that bill reflect the provisions in the referendums bill. However, we have no problems with the suggestion.

The Convener: I think that we have exhausted all the questions. I am grateful to the people from the Electoral Commission who have appeared before us to help us with this evidence session on the referendums bill.

Meeting closed at 11:58.

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