OFFICIAL REPORT
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Finance and Constitution Committee

Wednesday 25 September 2019

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 25 September 2019

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FINANCE AND CONSTITUTION COMMITTEE
20th 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:

Penny Curtis (Scottish Government)
Michael Russell (Cabinet Secretary for Government Business and Constitutional Relations)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 25 September 2019

[The Convener opened the meeting at 10:00]

Referendums (Scotland) Bill: Stage 1

The Convener (Bruce Crawford): Good morning, and welcome to the 20th meeting in 2019 of the Finance and Constitution Committee. I make the usual reminder about mobile phones.

We have a single item of business on the agenda today, which is to take evidence from the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell, on the Referendums (Scotland) Bill at stage 1. The cabinet secretary is supported by Scottish Government officials Penny Curtis, who is the head of the elections and freedom of information division, and Graham Fisher, who is a solicitor. I welcome our witnesses and invite the cabinet secretary to make a short statement before we move to questions from members.

The Cabinet Secretary for Government Business and Constitutional Relations (Michael Russell): Thank you, convener, and thank you to committee members for inviting me to be here. I am glad to have the chance to discuss the Referendums (Scotland) Bill. The purpose of the bill is to put in place a standing framework of referendum rules that could apply to different referendums that could be held across Scotland. The rules set a high standard and will ensure that debate on a future referendum can concentrate on the merits or otherwise of the referendum itself.

From the responses to the committee's call for evidence, it is obvious that, although they may not agree with all the individual details, a wide range of bodies, administrators, legal commentators and academics support the general principles of the bill. I have listened carefully to the evidence that has been presented to the committee during evidence sessions, and to the views of the Delegated Powers and Law Reform Committee, both for and against provisions in the bill. Our objective, as with all our work to update electoral law, is to ensure that the bill reflects best practice and puts the interests of the voter first.

I am keen to hear from members today to see where I can work with the committee to address any points that it wishes to consider. Collectively, we can ensure that the bill puts Scotland at the forefront when it comes to conducting referendums. My overarching aim is to ensure that the bill works well for voters and administrators.

As I indicated, I am sure that the committee will have noticed that, when I gave evidence to the Delegated Powers and Law Reform Committee, I stressed that I am open to alternative approaches to all aspects of the bill, where they would more effectively facilitate the aims of the bill. I want to come up with the best solutions that are available to make the bill as widely accepted as it can be. I am happy either to answer any questions and respond to suggestions here, or to take them into consideration as the bill moves forward.

The Convener: Thank you, cabinet secretary. The committee has received substantial evidence on the bill. Although there is strong support for the policy objective of having framework legislation for all future referendums in Scotland, substantial issues have been raised about some parts of the bill, in particular the regulatory powers of ministers and the role of the Electoral Commission in question testing.

Colleagues from around the committee will want to pursue those issues with you in more detail. First, however, for the purposes of the record, what is your general response to the evidence that we have received on those areas?

Michael Russell: My approach to bills has been the same for all the time that I have been a minister: to bring a bill to the Parliament and discuss it and see how it can be improved in the light of both evidence that we get from stakeholders and experts and the views of individual members. I have taken that approach to every bill with which I have been engaged and, in one way or another—as ministerial colleagues, members of a committee or Opposition politicians—members around the table have seen that in action.

I stress at the very beginning that I am listening to the concerns that are being brought forward. If people read—as I am sure that many committee members have done—my evidence to the DPLR Committee, they will see that I brought forward ideas about things that I thought could change. I introduced the concept of whether there should be a differentiation between types of referendum in relation to how scrutiny should take place, and I am pleased that the committee has taken up that concept and developed it, as there is huge potential there.

I am open to discussion and I am listening. Although there are political issues about which we will disagree, there are other, technical issues about which we can agree, and I look forward to improving the bill as it goes through stage 2 and stage 3—that is what I want to do.

The Convener: Will you tell us a wee bit more about the issue of differentiation?

Michael Russell: As is becoming clear, there is not just one type of referendum. We begin to see that when we look at how referenda exist in other parts of the world. In New Zealand, for example, the Government can initiate referenda on certain matters by an order in council, which is essentially an executive action. Those are postal referenda. One referendum that was held in that way was to do with the sale of state assets, which was—in a sense—a comparatively minor referendum. I am not saying that that will happen in Scotland, but Mr Tomkins has already suggested that referenda on financial issues should be excluded by the Government or by legislation. That is also worth discussing.

However, moral issues such as abortion or assisted dying might be subject to a referendum in Scotland. In those circumstances, it might be appropriate to have primary legislation as the adjunct to the bill. Issues arise from section 30 orders; again, that might create a category that would fit in in that way.

We should not see all referenda as the same; therefore, the scrutiny of all referenda should not be the same. We could have a super-affirmative process for some and primary legislation for others.

At the outset, I stress the approach that we are taking, which has sometimes been misunderstood by those who have given evidence. It is not an attempt simply to reproduce the United Kingdom Political Parties, Elections and Referendums Act 2000. It is an attempt to do something slightly different: to create in the bill the framework to hold any referendum, so that the specific referendum can be plugged into it when that is required.

For example, there were 60 pages of detail in the European Union Referendum Act 2015 about how the referendum should be held. If we take this approach, that would be unnecessary, because that detail would be in the framework bill. If Parliament decides to hold a referendum, any piece of primary legislation on that subject would be much smaller. It would deal with the question of timing and a few other details. That is the reverse of what has been done south of the border.

If you understand that, it becomes clear that we are trying not to evade scrutiny but to have the appropriate level of scrutiny for each type of referendum. I am open to what that should be. In a referendum on a moral issue or a section 30 referendum, the Parliament might wish to amend; in another referendum, it might not wish to do that but it would want to scrutinise. Of course, secondary legislation would allow that to happen.

Adam Tomkins (Glasgow) (Con): I welcome the tone of the cabinet secretary's opening remarks. I share your strong sense that we should ensure that Scottish legislation, with regard to referendums, reflects national and international best practice, which always puts the interests of voters first and foremost.

I will ask detailed questions about the regulation-making powers that are contained in the bill as presented to the Parliament. Before that, and given what you have been exploring with the convener, I have another question. The legislation was first discussed in the Parliament in a statement from the First Minister about Scottish independence. Since then, you and she have been keen to assure us that the bill is not about a second Scottish independence referendum but that it is broader than that. Is that correct?

Michael Russell: Yes. We have never hidden the fact that I see this bill being used by the Parliament and the Government to create the referendum for independence. However, it is also available to create other referenda. As you know, it is a reverse of the process that took place in 2013-14.

Adam Tomkins: Apart from independence, what are the other issues that the Government—of which you are a member—proposes to put to the people of Scotland in a referendum?

Michael Russell: We have made no such proposal, but once the legislation is on the statute book it would be available in those circumstances. That is not dissimilar to what happened with the UK legislation in 2000.

Adam Tomkins: When the UK legislation was introduced in 2000, the Government had no specific referendum in mind that, within the foreseeable future, it intended to manufacture. That is not the same as the current position.

Michael Russell: Respectfully, I disagree. We are going to have a respectful conversation on this, and the tone is important. The circumstances in the UK created the framework for a referendum, albeit in a different way. As I explained, we are doing something different. Similarly, this bill creates those opportunities. It also works within the context of the Scottish Government's request for a section 30 order. The Scottish Government believes that it has a mandate for a change. It believes that there should be a referendum and that this will be the means by which it could happen. However, it is not the only thing that the bill could be used for.

Adam Tomkins: Nonetheless, the context in which we are examining the bill is one in which the Scottish Government is committed to only one future referendum, which is a referendum about independence.

Michael Russell: I would not use the word "only"; the Government is committed to a future referendum, but it is perfectly possible that there could be others. Members of the committee could propose or suggest others, and the bill would be available to them.

Adam Tomkins: As could you—so why don't you? What are the other issues that you, as Cabinet Secretary for Government Business and Constitutional Relations, think should be put to the people of Scotland in the form of a referendum under the bill?

Michael Russell: I can speak only for my portfolio. As I am the cabinet secretary for constitutional relations, I am dealing with a constitutional issue. Other colleagues would no doubt have views on the matter; none of those issues is presently Government policy, because colleagues have not brought them forward. I have, however, indicated that an area of moral concern might be part of such consideration. I do not think that I am doing anything other than providing the circumstances in which referenda can take place, without hiding the fact that I would like to see a referendum on independence.

Adam Tomkins: That is understood—thank you.

I turn to the detail of two or three of the ministerial order-making powers that are contained in the bill. Section 1(1) provides that

"The Scottish Ministers may by regulations provide for a referendum to be held throughout Scotland on one or more questions."

You said that you have carefully studied the evidence that this committee and the DPLR Committee have received. Do you accept that the force of that evidence is that section 1(1) cannot stand?

Michael Russell: I accept that there is strong opinion that there should be a different type of scrutiny, or that there could be a different type of legislation. It may well be that, in certain circumstances, there should be primary legislation. I am open to that discussion.

Adam Tomkins: Do you think that a future independence referendum should be the subject of bespoke primary legislation, or do you think that such a referendum—given that that is the only example of a referendum that you are prepared to talk about—should be triggerable under a provision such as section 1(1)?

Michael Russell: It is quite clear—from the evidence that I gave to the DPLR Committee, which I am giving again here—that there is an argument to be made for having primary legislation for issues that are subject to a section 30 order. I am not going to resist that. I hope that, in those circumstances, we can craft a series of amendments that would allow that to happen.

Adam Tomkins: The effect of those amendments would be to ensure that any future referendum in Scotland that required a section 30 order, which would include any future independence referendum, would require primary legislation, rather than a secondary instrument.

Michael Russell: I have said that I am absolutely open to that as an amendment to the bill. I found the discussion that I had with the DPLR Committee very helpful in that regard.

Adam Tomkins: That is helpful—thank you.

Let us move on to ministers' powers to specify the referendum period, on which we have received equally strong representations from our witnesses. What is your reaction to that?

Michael Russell: A referendum period is as much a technical issue as any other. A referendum period is intended to allow those who are organising the referendum to do so in an efficient and effective manner. I can see no objection to that being specified by secondary legislation. However, if the mood of the Parliament is that it should not be, I am open to having a discussion on that.

I go back to what I said at the beginning: I treat the process of legislation as starting with a proposal, discussing that proposal and endeavouring to improve that proposal.

In the evidence that you have heard, some people have argued that the period has varied between a minimum of four weeks and 10 weeks. I am absolutely open to that being discussed and settled. That seems to represent a variable period if we accept that there are different types of referenda, so a variable period by order would seem to be entirely reasonable. However, if the Parliament wants to specify a period in primary legislation, as it would do in a referendum that required primary legislation, for instance, so be it.

Adam Tomkins: That is also helpful—thank you.

You have been very patient, convener. Depending on the answer, this will be my final question.

The Convener: Put your final question, and we will see how it goes.

Adam Tomkins: A third issue that is reflected in the evidence that we have received is the very broad power in section 37 that enables ministers to amend the eventual act by regulation. Are there circumstances in which you can see the force of the argument that that power should be curtailed?

Michael Russell: We need to discuss what we are endeavouring to do. I am not saying that that power should not be amended in the bill. However, what are we attempting to do? What we are attempting to do has been broadly welcomed, and that is to have dynamic legislation and to ensure that electoral legislation is not static. We can see how PPERA, which was enacted in 2000, has atrophied and how it has had to be subject to occasional change. I am very much open to finding a lock on that mechanism that reassures people that the bill is not about amending by the back door, but I want to meet the objective of developing dynamic legislation.

10:15

Electoral legislation tends to be shoved to one side and dealt with only occasionally. However, things are changing quite a lot in this area, and we might talk later today about digital imprints. Where we sit now, it is difficult to see how that legislation might work but that might not be true in two years' time. If it is not true in two years, it would be helpful if we were able to amend the act by upgrading it and making it better.

I am happy to discuss how we could make that more acceptable to the Parliament, but there is still an argument for making sure that we can use the section 37 powers in a way that means we can have dynamic electoral legislation.

Adam Tomkins: We will have to come back to that issue at stage 2.

The Convener: It is interesting that—if I have got this right—the Delegated Powers and Law Reform Committee also looked at this area. I want to make sure that we have everything on the record. If I am cutting across a question that Tom Arthur was going to ask, please forgive me.

The Delegated Powers and Law Reform Committee said:

> "The Committee focused its scrutiny on the delegated powers contained within the first three sections of the Bill. It was content with the delegated powers provisions in sections 11, 34, 37, and 38 and in the Schedule."

I think that we were discussing section 37.

Michael Russell: Yes, it was section 37.

The Convener: What is your reaction to that?

Michael Russell: We are on the same page on this. I think that we need dynamic legislation and that was clearly accepted by the Delegated Powers and Law Reform Committee. However, it is not just about the Delegated Powers and Law Reform Committee; this committee has heard evidence with some concerns. Mr Tomkins brought up those concerns and I am willing to discuss them, as long as we can meet the objective of having dynamic legislation.

Tom Arthur (Renfrewshire South) (SNP): I have a brief supplementary question on possible future referenda. I refer to what you said about the Delegated Powers and Law Reform Committee and what is in that committee's report. Earlier, you mentioned areas of moral significance, such as assisted dying. That is likely to be explored again in session 6, but it is likely to arise from a member's bill. Would such a bill be able to plug into the framework of this bill?

Michael Russell: I stand to be corrected by the clerks, who know the regulations better than I do. I think that a member's bill cannot have a financial resolution. If a member's bill required expenditure on a referendum, I wonder whether that would be possible. That is off the top of my head. I see that the clerks are conferring; they might have a better answer.

There is no reason why the framework of the bill should not be used for that sort of thing, but there are difficulties with a member's bill.

Tom Arthur: Such proposals have previously failed to command the support of Parliament, but there might be a way round that if the issue were to be put to the people. Even if it was possible for a member's bill to make provision for a referendum, it would be beyond its scope and capacity to have a piece of legislation that detailed.

Michael Russell: It is unlikely, but I would not say that it would be impossible. A question has been raised with me about local referenda; again, as I understand it, there is already legislation that allows local referenda, but it might be unduly onerous to expect local referenda to observe every detail of the framework. The bill does not impede or permit local referenda; it sits to one side of that argument.

Tom Arthur: Thank you.

The Convener: We will move on to further areas of questioning.

Neil Bibby (West Scotland) (Lab): As drafted, the bill precludes the Electoral Commission from fully testing a question when the issue has already been put to a referendum. Am I correct in saying that the Scottish Government's justification for demanding a second independence referendum is that there has been a material change in circumstances following the result of the referendum on the United Kingdom leaving the European Union?

Michael Russell: I can see where your question is going, Mr Bibby. The request for a referendum in Scotland is based on the manifesto, which sought a mandate based on whether there was a

material change, and it specified what that material change was. I do not think that that justifies a change in the question, but I see where you are coming from.

Neil Bibby: Do you believe that there has been a material change in circumstances? As you know, for the EU referendum in 2016, the Electoral Commission tested a question that was similar to the one that was used in 2014 but ended up recommending a different form of words. Given that your justification for having a second independence referendum is a material change in circumstances, why are you so reluctant to allow the Electoral Commission to fully test appropriate questions that reflect the experience that has been gained since 2014, particularly given that it adopted a different form of question in 2016?

Michael Russell: That is a fair question. I want to be very clear about my position: I am not against testing questions. In fact, I believe in testing questions, and the bill indicates that questions should be tested. I am against retesting in circumstances that do not require that.

Let me go back to what the Electoral Commission said in 2012 and 2013, when it tested the question that was finally used, because it is important that we clear away the myths and look at the facts. The question that the Scottish Government proposed in 2012 was:

"Do you agree that Scotland should be an independent country?"

The Electoral Commission's recommendation was:

"Should Scotland be an independent country?"

In its reasoning, it says at paragraph 5.26:

"In all aspects of our question testing, one version we tested was clearly preferred by most participants. We recommend this version because it is:

• a more neutral formulation than 'Do you agree ..?'

• it does not ask for a judgement of someone else's view or decision

• direct

• short and simple".

That question was used in 2014, and it has been used in opinion polls something like 56 times since then. I think that, in the past 14 months, there have been only 11 instances in which that question was not used. In our view, the question is in current use. The question met the criteria—indeed, we changed our question in order to meet those criteria. It has been tested.

Any allegation that I do not want testing is simply not true. I am entirely in favour of testing. Any new question that arises in a new referendum should, of course, be tested. The question that was used in 2014 is a question that is in current use. In such circumstances, it has been tested and therefore fits with the bill. Section 3(7) says:

"This section does not apply in relation to a question or statement if the Electoral Commission have—

(a) previously published a report setting out their views as to the intelligibility of the question or statement, or

(b) recommended the wording of the question or statement."

That fits precisely with what we have been talking about. The position, as set out in the bill, is the one that I have taken and, at present, it is the position that I want to hold.

Neil Bibby: I acknowledge the evidence that you have cited from 2013. However, over the past few weeks, witnesses have been overwhelmingly clear that the Electoral Commission should be involved in testing the question. Dr James said:

"I think that the Electoral Commission should be fully involved. I cannot see any advantage in limiting its role".—[*Official Report, Finance and Constitution Committee,* 11 September 2019; c 30.]

Professor Fisher said:

"I think that excluding the Electoral Commission ... would be inadvisable".—[*Official Report, Finance and Constitution Committee,* 4 September 2019; c 19.]

Those concerns were shared by Michael Clancy and Jess Sargeant. Dr Mycock said:

"It is appropriate for every referendum—if it is repeating an issue or if the material circumstances have changed—to go through that process",

in other words, testing the question,

"even if it is simply a confirmatory process, so that you get buy-in from as many citizens as possible on the legitimacy of the particular referendum."—[*Official Report, Finance and Constitution Committee,* 11 September 2019; c 30.]

Are you prepared to ignore the expert advice that we have received by continuing to sideline the Electoral Commission, through the way in which the bill is drafted? If so, why are you not concerned about getting buy-in from as many citizens as possible?

Michael Russell: I am entirely in favour of testing the question, as those witnesses are. The question has been tested and is in current use, which is an important factor that needs to be factored into any evidence that is received. I repeat: the question has been used more than 50 times. It is the question that is understood, so it should be carefully considered rather than simply cast aside.

I am in favour of testing questions—there is no doubt about that. However, in this case, the question has been tested, and the Electoral Commission recommended the question that was used and which continues to be used. That strikes me as extremely important.

Alexander Burnett (Aberdeenshire West) (Con): You say that the question has already been tested, but that was some time ago. Are you saying that bodies such as the Electoral Commission do not learn from experience or over time?

Michael Russell: I am not saying that. I am saying that, when we have a question that is not only tested but in current use, that question is understood. It has been used again and again, so I want to know why people think that it should not be used again and again.

Some people argue that there should be a different formulation. Some people argue that there should be further restrictions on the franchise—they desire that there should be, say, a two-thirds majority for a change to be made. Those are legitimate positions, but they do not seem to be fair and democratic positions.

I am in favour of doing exactly what was done and remaining true to what was passed by the Electoral Commission, which is understood and is still in current usage.

Alexander Burnett: I agree that there may be differing views on the franchise and all the rest of it, but does it not go to the heart of the credibility of the bill that you are prepared to say that your view on the matter overrules the credibility of involving the Electoral Commission?

Michael Russell: No. I have quoted what the Electoral Commission said and I am in favour of testing. I think that that is an entirely consistent and principled position. The question has been tested. My view would apply to any question in such circumstances. I am in favour of testing, but I am not in favour of confusing people. If a question has been used again and again and it continues to be in use, it would be a serious step to try to throw it out.

Alexander Burnett: I agree that that may be a point, but is the fact that you are saying that the question has been tested not less credible than the Electoral Commission saying the same thing?

Michael Russell: Clearly, if there is a difference of opinion, there is a difference of opinion, but the question has been tested by the Electoral Commission, and I quoted its report on the matter.

Gordon MacDonald (Edinburgh Pentlands) (SNP): When I asked the Electoral Commission some questions on the subject last week, it highlighted that the question was its question and that it was easy to understand, clear, simple and neutral. Over the past eight years, 231 opinion polls have carried that question, and 3.6 million people voted on it. Is there a danger that we would create confusion in the minds of the electorate if, at this late stage, we changed the wording of any referendum question?

Michael Russell: I think that that would be a danger if a question was in current usage, and the question that we are discussing is in current usage. There have been suggestions that we should shift to, for example, leave or remain. Anybody who makes that suggestion has clearly not thought it through very well, given the currency of leave and remain.

The question was tested. As the Electoral Commission indicated, it is

"direct ... short and simple"

and

"it does not ask for a judgment"

and it is

"a more neutral formulation than"

the one that the Scottish Government put forward. I think that that is pretty convincing.

Gordon MacDonald: Are you satisfied that the Electoral Commission's testing was robust and that it stood up to scrutiny?

Michael Russell: It is a bit late for me to be concerned about that, given that it was in 2012—

Gordon MacDonald: I accept that.

Michael Russell: I would have to say yes.

Alex Rowley (Mid Scotland and Fife) (Lab): Good morning, cabinet secretary. You have said that the question was tested and it was fine and that, if we have another referendum, the same question should apply. Should there be a time period that must elapse before the Government can call another referendum? Even if we forget the independence question, which is the one that you say the bill has been brought forward for, we could end up having referendums every time somebody is not happy, because they might want another one and another one until they get the right answer, and they might keep going with the same question.

Michael Russell: Of course that should be a consideration. Are there circumstances in which referenda should be repeated and are there circumstances in which they should not be repeated? This is not just a conversation that we are having in Scotland; it is one that exists about the Brexit referendum. In these circumstances, we have to look at the political circumstances and where things are. However, that is to some extent a separate matter from the question.

I am arguing that the question is in continued use. It is not the case that it was asked in 2014 and never asked again. As Mr MacDonald said, it has been asked in more than 200 opinion polls,

and people understand it. As it has already been approved by the Electoral Commission and it is in current use, I would want to know why it should be tested again in those circumstances. Would that not in itself create confusion?

Alex Rowley: That is a subjective point of view. Is it not important that people have confidence going into a referendum? We are disputing the use of the question that was asked in 2014 because the circumstances have changed significantly since then. As I have said to you before, my view is that it would be wrong for us to go into a referendum before we know the outcome of Brexit. What would we be asking? Would Scotland be an independent state in Europe or an independent state on its own? Arguably, things have changed significantly since 2014, but you just want to stick to the same question.

More importantly in this context, the principle of the bill is that we have to have confidence each time we go into a referendum. Would consideration of any question by independent experts not give us that confidence?

10:30

Michael Russell: It does. That is why I am happy that the Electoral Commission, when considering the question, said that the question is

"a more neutral formulation"

that

"does not ask for a judgement"

and that it is

"direct"

and

"short and simple".

Far from being against testing, I am devoted to the principle of testing. However, I am against retesting where a question is current. As I said, if the question had been asked and then forgotten about, of course it would need to be retested. However, this question is current. It has been asked again and again and again.

Far from lacking confidence, I think that those who are challenging the question are, in some cases, attempting to muddy the waters. The question is clear and has passed the test. It is current and continues to be asked. In all those circumstances, it seems strange to argue that in some sense the independence question—because that part of the bill is not just about one question but is about how referenda should be conducted—

Alex Rowley: Exactly.

Michael Russell: The bill says that, in these circumstances, if the question has been approved, that is fine. We might want to say that there should be a time limit on that—I thought that that was what you were about to suggest, Mr Rowley. One might say that the report would expire after a certain period. That is something worth discussing. If the question is still current, I cannot see how you can object to it continuing to be asked. It seems incredible. We would be asking one question in opinion polls all the way through and then suddenly there would be a moment when we were asking another question. How could we have any confidence in the data set in those circumstances?

Alex Rowley: Are we not establishing the principle that each time we have a referendum, whatever the question may be, an independent expert body will test that question?

Michael Russell: The principle is that no referendum should be held without the question having been tested. The question that we are discussing has been tested.

Alex Rowley: That was six years ago.

Michael Russell: The question has been tested.

Patrick Harvie (Glasgow) (Green): There is clearly a lot of politics in this, but perhaps there is not a huge difference in where we might arrive. Section 3(7) disapplies some of the requirements for consulting the Electoral Commission. You seem to be open to amendments to that and it would be helpful it you should clarify your position. Are you open to amendments to section 3(7) that would change the circumstances in which such consultation is disapplied, in terms of a time limit or expiry date or some other criteria that might give effect to what you said at the beginning, which is that you want testing to happen whenever it is necessary?

Michael Russell: Yes. I am open to discussion of all aspects of the bill. There is a lot of politics clouding things currently. However, it is important that we recognise that the independence question has been tested. Therefore, I am not—as has been represented—against testing; rather I am against retesting a question that is current. Just as I am suggesting that there are different categories of referendum, there may clearly be different categories of question and ways in which they are dealt with.

Patrick Harvie: That would mean that all we are looking for is a definition of what is current.

Michael Russell: I am sure that that can be found.

Murdo Fraser (Mid Scotland and Fife) (Con): You said at the start of your opening remarks that you wanted the bill to reflect best practice in running referendums. May I quote what the Electoral Commission said in its evidence to the

committee? It was very specific and recommended that

"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."

The commission's view on that is entirely clear. How can what you are saying to the committee possibly reflect best practice, when it goes against the view of the Electoral Commission?

Michael Russell: Well, I disagree with one element of that. Indeed, if you think about it, the way in which the Electoral Commission has phrased its position—if that is an exact quote, and I have no difficulty in accepting that it is—means that you might have a report one day but then change the question the next day and have to retest it. That is just not consistent. It also does not recognise a current question—a question that is still being asked. That is a very important distinction.

Murdo Fraser: With respect, the Electoral Commission does not make such a distinction. It makes very clear in the submission that it provided to us that any question must be tested, regardless of whether the commission has previously expressed an opinion on it. I do not think that there is any dubiety about where the Electoral Commission stands.

Michael Russell: I am entirely clear that testing should happen, but a question that has been tested and continues to be in use is in a different set of circumstances.

Murdo Fraser: Okay. Your position is contrary to that of the Electoral Commission. May I ask one more question, convener?

The Convener: Yes, if it is on the same area.

Murdo Fraser: It is. I think that we all accept that the 2014 referendum was the gold standard of referendums. All parties—the UK Government, the Scottish Government and all the campaign groups—agreed the basic rules and terms of the referendum, such as the timing, the franchise, the spending limits and, crucially, the wording of the question. All those things were agreed, so the outcome had credibility for everyone, regardless of whether people were on the winning side or the losing side.

If we are to have a rerun of the independence referendum—clearly, I do not want that—do you accept that the same level of credibility and agreement will need to be attached to the terms of the referendum, if the outcome is to be respected in the same way?

Michael Russell: I agree that we should endeavour to work towards that. I, in my role as minister in charge of this bill, will endeavour to do that. You, in your role as a member of this committee and a prominent member of the Opposition, will also want to do that.

I am making my position clear, just as you made your position clear in a tweet last week, in which you said:

"Leave/Remain and a Two-thirds majority required. Bring it on".

Clearly, there is a difference of opinion on the matter, and in those circumstances we will have to agree to differ.

Murdo Fraser: You will have noticed that there was a wink at the end of that tweet. [*Laughter*.]

Michael Russell: A wink? I am sorry, I do not think that that came across. Of course, you were responding to a tweet from the deputy convener of this committee, but I will not quote him, too.

The Convener: Perhaps you will describe for us what a wink means.

Angela Constance (Almond Valley) (SNP): I will try to ask a question that does not involve an emoji.

Cabinet secretary, I understand that, under the bill, you would have a duty to consult the Electoral Commission. Will you say what that means in practice? Will you talk about the timing? I assume that you would not send the commission an email on a Monday afternoon in which you were looking for a response by close of play on Friday. Would the discussion or consultation be fairly open? How would all that work?

Michael Russell: It is important to recognise that, in the development of electoral law, there is a close relationship with the Electoral Commission. My officials are sometimes in daily contact with the commission, on a range of issues. We should distinguish between that type of interaction, which is constant and seeks to deal with the minutiae of electoral law in practice—for example, I have an outstanding correspondence with the commission about a matter of electoral law to do with the ordering of candidates on ballots in local authority elections, with which every politician is familiar; such debates take place all the time—and formal consultation, where there is a duty under legislation to consult on a certain issue.

Such formal consultation would be prepared beforehand. There would be a conversation about how the commission wanted to do it and how we wanted to do it. I imagine that we would always publish; I cannot imagine circumstances in which we would not publish the material that went to the commission and the relevant committee and the material that came back.

Some people have argued that the bill should mandate the commission to make certain decisions. Like it or not, politicians are elected to make those decisions, and I see no indication that the commission would want to put itself in such a position. If we request information or views and we publish the information or views that come back, we can have the debate. The views of the commission are not holy writ; there will be differences of opinion about them, and there will be an open debate.

Angela Constance: I appreciate that a formal consultation would be shared, as would the responses.

The commission is an independent body. In your view, what stops it giving you any advice that it wants to give you?

Michael Russell: Absolutely nothing. I meet the commission from time to time. I met Bob Posner when he was in Scotland the time before last and had a lengthy chat with him about issues. That is important.

I have always been a bit of an anorak on electoral matters and I am interested in how they develop; therefore, I am keen to talk to the commission. I have also talked to the boundary commissions. Last year, I attended the annual event at which all the boundary commissions of these islands get together. I am interested in what they do and there is an interchange of ideas. We may or may not come on to details about the fines suggested by the Electoral Commission and digital imprints. We are in an area of emerging activity and that type of dialogue with the commission is, therefore, important, as are the views of the committee.

There may be things that we cannot do in this bill, such as the digital imprints that I mentioned, because it is difficult to see how that can be done. Over the next few years, however, those will emerge as issues for us to deal with. On the issue of fines, the Electoral Commission has indicated that it wants them to be increased massively. The question is how we will respond to that and take it forward.

Angela Constance: Last week, I questioned the commission to understand more about how it protects its impartiality and integrity, particularly given that there are political appointees or representatives on its board. Do you have confidence in the Electoral Commission, cabinet secretary?

Michael Russell: Yes, of course I do. I stress that that does not mean that I accept everything that it says or that it accepts everything that I say. However, it is a good and positive relationship and I have confidence in the commission.

The Convener: Angela Constance also has questions on the referendum period. Do you want to ask those now?

Angela Constance: Thank you, convener. During our evidence sessions, we have heard about the Gould principle. We were reminded last week that its origins grew out of events and the consequences of having two elections on the same day. Do you intend to adhere to the Gould principle, or do you foresee ever having to hold two electoral events on the same day?

Michael Russell: I am a supporter of the principle, having seen at close quarters the difficulties that can be created. Those of us who were at the counts on election night in 2007 will not forget the experience, with difficulties with ballot papers, electronic counting and all sorts of things going on. We recognise how important the principle is. I was a member of the Arbuthnott commission on boundaries and voting systems, which was a very positive experience under John Arbuthnott; it reflected on those issues.

I am broadly of the view that there should not be two—or more—electoral events on the same day. I want to stick to the principle, if at all possible—that is the best situation—but there are sometimes unavoidable circumstances in which it would have to happen. However, I would be very careful about that and I would not want it to happen. People can get shirty about elections imposing on other events. I remember that the Lanimer committee in Lanark was very offended when there was, twice, a UK general election on Lanimer day, which had to be postponed. Elections can be disruptive, but we do not want them to disrupt each other either, because that becomes damaging.

Angela Constance: There is a six-month period to give adequate time for the administrative process and for a proper debate. When should that kick in? Should it be from the passing of the primary or the secondary legislation?

Michael Russell: I am not absolutely committed to six months. That is the gold standard, but there might be circumstances in which that would change. It would probably have to kick in once the regulations were entirely clear, but that is not hard and fast. What is important is that the administrators know what they have to do and are confident that they can do it in the time that they have. It is not just about the administrators; in a referendum, time has to pass so that participants can register and that whole process has to go through.

As I said earlier, the timescales are more to do with the technical ability to deliver than anything else. I am not utterly convinced about the time needed. Somebody argued in previous evidence that people take 10 weeks to absorb political

debate. That would be true only if one was starting from scratch. Many people have already absorbed debates that may become referenda.

In these circumstances, it is about the technical ability to deliver, and we must be assured of that. Electoral administrators are very experienced, and sometimes they can do things faster than they think they can.

10:45

Angela Constance: My final question might be one for the officials. For the record, could somebody summarise which events need to be consecutive and which can be concurrent? Last week, I was reminded that the printing of the ballot papers occurs fairly late in the process.

Michael Russell: There is quite a long list of things that have to happen; I am happy to furnish the committee with the detail. Can we undertake to write to you about that? Is that acceptable? We will inevitably forget something if we give you the list verbally now.

Angela Constance: Can you just be clear about what has to be consecutive and what can be concurrent?

Michael Russell: Yes—we will send you that information.

Angela Constance: Thank you.

Alex Rowley: In respect of referendums and public information, what is the role of Government and of independent bodies in providing information? Sometimes referendums can be complex, and political parties can be strangers to the truth in terms of the information that they put out there. In the European Union referendum, as we know, many people were not aware of just how complex the whole thing was. Is that a problem? How do you overcome that?

Michael Russell: It is. With regard to political parties being strangers to the truth, you are a former general secretary of Labour and I am a former chief executive of the Scottish National Party, and I am sure that we would not admit to that being true. Nonetheless, there are issues about the respective roles of Government, political parties and politicians in an electoral process, and also influencing bodies. One can legislate for that by designating lead bodies and setting out how they would operate. In a referendum in which the Government is making the proposition, it must be entitled to do so—that is why the referendum is taking place—but there must also be arrangements for information about that proposition, and for and against it, to be distributed by others in a way that is effective. I would want to ensure, as the bill does, that the lead organisation and other organisations are well identified.

The Brexit referendum has taught us that we, as citizens, need to be more rigorous and more demanding about the information that we are given. I am not sure how we can legislate for that, but we will need to think about it.

The Convener: I think that John Mason wants to cover expenses, donations and so on.

John Mason (Glasgow Shettleston) (SNP): Yes, although first I will ask a more general question. We have had quite a lot of discussion so far this morning. There is not just one type of referendum. Until now, we have not held referenda very frequently. Do you still feel that we absolutely need this bill, rather than producing a bespoke piece of legislation each time we have a referendum?

Michael Russell: Yes—I would not be wasting the committee's and Parliament's time if I did not believe that.

John Mason: Despite the fact that the legislation will need to be updated.

Michael Russell: We recognise that—it is why section 37 is important. In a sense, there is a weakness of the panoply of electoral law in Scotland and we are remedying that.

John Mason: Thank you. Next, I want to raise a number of points around finances, donations, expenses, fines and that kind of thing. One issue that has come up is the challenge of checking the permissibility of donations. We have separate electoral registers not only across the UK but even within Scotland, and it is not so easy for organisations, especially smaller ones, to check them. Is there any way through that? Can we improve on that situation?

Michael Russell: That is the case, and I suspect that I am going to answer virtually all your questions in the same way. It is a matter of discussion between ourselves and the Electoral Commission. Of course, if there are people with ideas in that area, we will look at those. As you recognise, we have to balance the ability to scrutinise and to enforce electoral law with the need to eliminate undesirable practices.

There is always a balance to be struck. Nobody wants a succession of small donations coming in below the threshold—as we saw in a recent case—which might or might not be designed to subvert the threshold. Equally, we do not want to interfere when a small number of donations are made in a local authority election campaign by concerned citizens who have a problem in their community, so we need proportionate legislation and regulation. The discussion about what is proportionate for such matters will continue. Last week, you asked the commissioner questions about staff salaries—

John Mason: We will come on to that.

Michael Russell: Those are other areas about which we need to be cognisant of concerns, which might be expressed, but we do not want to get to the stage at which it is impossible for people to stand for election or be involved in the electoral process because the level of administration and record keeping is too great for them to bear. We have to be constantly aware of that.

John Mason: That is a fair point. I am aware of that, having been treasurer of a small organisation in the past.

You might have seen last week's evidence session on the practical difficulties of having a Scotland-wide or UK-wide register. Are you convinced by the arguments that the expense and effort involved would probably not be worth it?

Michael Russell: In the best of all possible worlds, it could be done, but, at the present moment, it would not be easy or speedy to achieve, and it might get in the way of a lot of other things that are happening. It is difficult to overemphasise the pressures that Brexit is causing on every part of the public sector, particularly south of the border. Additionally, we are moving forward with some fairly radical changes to electoral law in Scotland through this bill, the Scottish Elections (Franchise and Representation) Bill and the Scottish Elections (Reform) Bill so, in the circumstances, I do not want to add a further burden.

John Mason: Given that you have already told me that you will answer all my questions in the same way, I guess I know what you will say next. From the Electoral Commission, we heard evidence that it wants more transparency about money that is given earlier on in the process, because currently, information about where it comes from does not have to be disclosed. There is also the question of assets—one organisation might already have a lot of computers at the start of a campaign, while another has not yet bought them—and staff, as you mentioned. Presumably we would not put such things in the legislation, but should we be looking at them?

Michael Russell: Yes. The legislation is the umbrella, then there are lots of regulations and codes of practice. I have talked to the commission about how much we can do in statute to endeavour to drive out bad practice, such as things that happened during the Brexit referendum. There is a proposal for bigger fines and there are many other ideas. Yesterday, there was a case in regard to which the commission expressed some frustration about the powers that are available to it. In all those circumstances, I am open to helping, if we can.

John Mason: We heard evidence from Professor Justin Fisher from Brunel University London. One of his recommendations was that the

"spending limits for registered and non-registered participants should be reduced significantly to ensure that the designated campaigns are paramount".

There was a question about "permitted participants", who are allowed to spend £150,000, because it was felt that, if there were a lot of them, that would clash with the overall spending limit. Do you have any thoughts on that?

Michael Russell: Yes. I would like to see less money spent on election campaigning. Mr Rowley and I pioneered the first voluntary restriction on expenditure during the 1999 Scottish Parliament elections. It was an interesting experience and we think that, by and large, parties kept to the voluntary limit. However, things have substantially changed since then. The difficulty with bearing down heavily on the overall spend is that people might seek to spend illegally. We have to recognise where the debate is and, again, try to strike a balance. In general, I am against people endeavouring to buy elections, as we all should be.

John Mason: Following on from that is the question of fines if people break the rules. Until now, £10,000 has been the maximum fine, and the suggested fine is £500,000. I threw in the idea last week that it could be related to the potential benefit that an organisation would get, but that would be difficult. Is £500,000 reasonable?

Michael Russell: Absolutely. The committee will have a view on it but, if the Electoral Commission wants to set a level of £500,000, I am easy about it. You need to be able to indicate to people that the crime that they have committed is against every one of their fellow citizens, and, therefore, there should be an extremely heavy penalty.

Murdo Fraser: I have a question on that specific point—it is exactly same as the question that I asked the Electoral Commission last week. I do not disagree with the need for penalties, but many penalties are applied well after the event. When a referendum is established, campaign groups on each side will raise and spend money. What is the point of hitting a campaign group with a £500,000 fine six months after the outcome of the referendum, when the votes have been counted and the outcome has been accepted, and the group has, in effect, been wound up and has no assets? I understand the concept, but I do not understand how the penalty is a deterrent in practice.

Michael Russell: I saw that you had raised that objection, and I think that it is possible that the situation that you describe could arise. I do not

think that a fine would be levied without careful consideration of the case and without convincing proof. Imposition of a fine would be an indication of the seriousness of the crime. I do not think that one would, in other circumstances, refrain from imposing a fine because there was a view that it could not be collected. In such a case, you would impose the fine and then endeavour to collect it or accept that payment of it is outstanding. People perhaps being unable to pay the fine because they have gone off somewhere is not an argument for not imposing the fine. There might be an argument about whether the level of fine is appropriate, although I am comfortable with the level that has been suggested.

Murdo Fraser: I suppose that my question is whether a fine would be a deterrent if it were to be imposed so long after the event that the campaign organisation had been wound up or had no assets with which to pay a fine.

Michael Russell: We have, in recent times, seen people appearing to be contemptuous of such laws, and we have seen other people who take them seriously. I suppose that we should try to show that we take them seriously.

Patrick Harvie: I would like to follow that up briefly. You will be aware that the National Crime Agency has decided to drop further investigations into Leave.EU and Arron Banks. In responding to that, the Electoral Commission said:

> "We are concerned about the apparent weakness in the law, highlighted by this investigation outcome, which allows overseas funds into UK politics."

In such situations, surely the consequence should not be merely a fine for an organisation, but criminal penalties for individuals. That prospect would be a serious deterrent to people accepting impermissible donations or hiding donations that might be impermissible. A change in the law might be needed to remove that loophole.

Michael Russell: I do not think that it is an either/or situation. The Electoral Commission should have the right to fine—it has the right to fine at the moment, and that should continue, perhaps with an increase in the level of the fine.

However, I do not disagree with Patrick Harvie's point. I am not commenting on a particular case but, I think that when people are found guilty of serious breaches of electoral law—crimes against their fellow citizens that undermine democracy—they should be subject to the full penalty of the law.

Patrick Harvie: Is there scope for the bill to go further in preventing the use of overseas or impermissible donations in Scottish referendums?

Michael Russell: I am not sure—I need to think about that. There are issues around the primary purpose of legislation: I think that that suggestion might lead us into dangerous areas. However, I will consider the issue. I have had conversations in that regard with the Electoral Commission, but about fines rather than criminal action. I am happy to have more conversation with the Electoral Commission about the matter, as we approach stage 2.

Patrick Harvie: Is there a reason in principle why donations from within the UK but outwith Scotland should be regarded as permissible for a Scottish referendum?

Michael Russell: I have the greatest sympathy with the point that you make. Whether Parliament would agree with it, I do not know. There is probably a view among some political parties that donations from all over should be welcome.

John Mason: I want to touch on one other issue, which is public funding for referendum campaigns. Ireland is in a different position—it has to have a referendum every time it wants to change its constitution even a bit. That means that Ireland ends up with referendum campaigns in which there is not a lot of interest on either side, or on one side, so public money is put in to stoke up a bit of debate and get information out to the public. We have not had that experience, but if we were to have referenda on a variety of subjects, we might. Should there always be a bit of public funding available to both sides? If not, are there some circumstances in which that could happen?

11:00

Michael Russell: I would be reluctant to commit public money to referenda. There is a difference between information activity—which a Government and others might fairly undertake—and public funding of electoral activity. Both are always controversial. Although I would not rule out such funding absolutely, it would require very careful thought.

John Mason: I have a final supplementary question that is based on what the cabinet secretary has said. We got the impression that the electoral commission in Ireland is a little bit more proactive in providing objective information. For example, when the possibility of misinformation came up during one campaign, it was able to make a clear statement that there had not been misinformation. The Electoral Commission here has been a bit more reluctant to provide much detailed information. Do you have a view on that?

Michael Russell: The Electoral Commission is right to be cautious about getting into a situation in which it is the arbiter of truth, because that is not its role. Others might have that role, and it is interesting to see that.

However, we cannot absolutely absolve the citizen of the duty to be a critical observer of arguments that are put, and of what politicians say. That strikes me as being core to our democracy. We probably need to enable and encourage citizens to be more critical observers of the process, and to be more critical of those who are part of the process, in respect of what they say and the arguments that they put forward. I am a bit reluctant to say that we should have a state body that says what the truth is: such things tend not to end well.

Alex Rowley: I have a question on whether Government and Parliament have a duty. I agree that citizens have a duty to try to become informed. However, on complex issues, is there not also a duty for others? Ireland, for example, also considered education programmes. I certainly found in the 2014 referendum that some of the best-informed discussions that I participated in were in schools.

There is also the role of citizens assemblies to consider, which—again—we know from Ireland. Ireland had a referendum on what was a very difficult issue that I thought would cause a lot more problems, and people there have said that citizens assemblies certainly played a part in ensuring that there was a well-conducted and well-mannered referendum, and that people were informed. Is there a role for citizens assemblies?

Michael Russell: Yes, absolutely. Citizens assemblies are a very good example, and I am glad that we have started down that road. There are also roles for other bodies and organisations that can get involved.

We are living in a dangerous era of, sometimes, post-truth politics and, sometimes, anti-truth politics. What happened in the Supreme Court yesterday will, perhaps, result in a reversal of that tide: there is slow realisation that we require openness and honesty in politics and in public life. Maybe the situation will now change for the better and maybe we will be able to push it that way. If things were to continue as they have been going, I would be very fearful.

There is also a duty on us, as politicians, to stand up in such circumstances, and to have high standards against which to judge ourselves, what we say and how we present our arguments.

A citizens assembly can help with that. When I was talking to people in Ireland who were involved with the one on abortion, I was struck by how they felt. I was told that the advocacy organisations that were required to come and talk to the citizens assembly were allowed—I think—five sides of A4 on which to put their case. That was fact-checked, so they could not just assert things. We politicians assert, quite often. However, those organisations' cases were fact-checked, and they were not allowed to be put to the citizens assembly if they were not provable and true. If we could have such a situation, we would be a lot better off.

Alex Rowley: Is there a role for Government to support financially such initiatives? That is what I am trying to get to.

Michael Russell: Yes. We are, of course, supporting the citizens assembly. If there are other such initiatives, maybe we should talk about them. I am absolutely open to seeing how that could be done. However, I am also saying that citizens and individual politicians have roles, and that we should take those roles upon ourselves.

The Convener: Gordon MacDonald has questions about the purdah period.

Gordon MacDonald: The bill restricts publication of promotional material by the Government and public authorities in the final 28 days of any referendum in the same way as the UK PPERA of 2000. The Electoral Commission suggests in its written evidence that the purdah period should be extended to cover the full referendum period, with the restriction being applied to a narrower range of material. Is there a need for a change to the purdah period? How do you see that working in practice? What impact would it have on the day-to-day business of the Scottish Government and the Parliament if the referendum period was six months, a year or whatever?

Michael Russell: The purdah period should not be extended lightly or ill-advisedly. The restriction is in order to ensure that the Government does not seek to influence the outcome unduly. That is particularly relevant during election periods, when the Government might be tempted to use pork-barrel politics of various types in order to influence the vote.

A single-issue referendum is different in that regard. It is appropriate that the Government would have some form of stay put on it, but an extended period would disrupt normal business. In a purdah period, ministers do not make announcements, various issues cannot be dealt with and civil servants are not allowed to do certain things, so I would be resistant to anything longer than the 28-day period. That would need to be interpreted carefully; Government could not take action that would influence people on the subject. However, the Government should be free to continue to act in a wide range of other areas: a referendum is not the same as an election.

Gordon MacDonald: If there was a referendum that both the Scottish and UK Governments had an interest in, the difficulty—as we heard in previous evidence—is that the change to the purdah period under Scots law would not bind the

hands of the UK Government. In the 2011 referendum in Wales, the Electoral Commission asked both the Welsh and UK Governments to extend the purdah period. Wales agreed but the UK Government did not. What impact could that uneven playing field have on any referendum campaign?

Michael Russell: Concerns have been expressed recently that there might be a desire on the part of the current UK Government to eat into any purdah period and to treat it less seriously, so I am cautious about the issue.

In order to make an agreement between the Governments of these islands stick, we need to trust each other. It is no secret that that trust has evaporated—it does not exist. At present, I would have no confidence that such an agreement could be operated effectively. If there was a more trusting relationship, if the intergovernmental review had come to a conclusion and if there were enforceable checks and balances, that might be possible.

The Convener: Patrick Harvie has questions about online publications.

Patrick Harvie: The section in the bill on publications not by Governments but by anybody else—campaigners, campaign bodies, political parties and members of the public—clearly sets out that the requirement for information about the origin of the publications covers not only printed materials, including newspaper adverts, but other forms of publication. "Publish" is defined as

"make available to the public at large, or any section of the public, in whatever form and by whatever means".

Clearly, that includes online publications. How extensive is that provision? It seems to me that, as it stands, it would cover social media posts, for example.

Michael Russell: I think that the provision should include online publications. The great difficulty is how to construct the requirement such that it is effective and can be enforced. It is fair to say that all the evidence that the committee has received on the matter expresses the same view, which is that we are at a point at which it is highly desirable for electronic means of communication to be subject to the same restrictions as print material. The purpose is to identify who is saying what and who is publishing what. That is hard to do with electronic publication. It is even harder than dealing with anonymous posters, flyers or leaflets, which are comparatively uncommon. Electronic publication is easy to do and difficult to trace.

We continue to discuss the matter with the Electoral Commission, among others. I would like to find a way to couch the provisions and make them effective. I said earlier that I think that that will come—although on the question whether it comes in time to be included in the bill, or will be dealt with as part of the section 37 process, I think that the latter is more likely.

Patrick Harvie: Is it the Government's intention, in how it has drafted the bill, that social media posts by an individual that do not include a digital imprint will be regulated in the same way as a lamp-post poster, which does not include an imprint?

Michael Russell: Broadly, yes. I say "broadly" because there are differences in how we would regulate and how we might be effective in regulating them. However, the principle is the important thing: people who are intervening in elections should be identifiable. Anonymous leaflets exist and sometimes the sender can never be found. Equally, anonymous online posts exist and it is even harder to find the person behind them. In a democracy, the principle should be that the people who are taking part in an election should be identifiable.

Penny Curtis (Scottish Government): I will clarify. We are trying to make sure that we do not capture individuals expressing their personal views. The bill is very much about capturing publications that are intended for campaigning. The difficulties are in determining the margin between the two—how we make judgments around that and how we legislate for it. We acknowledge that doing so is very hard, as was reflected in a lot of evidence, and that things will evolve over time.

Michael Russell: That is a very important distinction that is harder to draw in respect of physical campaigning than it is in respect of electronic campaigning.

Patrick Harvie: Let us take the issue away from independence and instead use the example that you mentioned earlier of a referendum on assisted dying. If an individual publishes on social media that they are concerned about a particular aspect of the issue, or have a reason why such concerns do not apply to them and they want to exercise the right to assisted death, would that be fine? If they were to publish an image that included a message saying, "Vote yes" or "Vote no", would that be campaigning and therefore be covered by the bill?

Michael Russell: You have presented the difficulty. Would that be campaigning? That will need to be decided.

Patrick Harvie: Under the terms of the bill, such an image would clearly be designed to encourage a result in the referendum.

Michael Russell: I am not sure that it would. We have to understand the language of social

media. That becomes the issue. If somebody produces a graphic image that says, “Vote no”, is that a personal expression or is it a campaign? That is the issue: it is difficult to say. If a person published an anonymous series of personal remarks about another campaigner, would that be actionable, and would it constitute campaigning against them? Those issues need to be examined. It is genuinely difficult to know at the moment.

Patrick Harvie: Do you intend to lodge amendments on that, because the bill does seem to be ambiguous?

Michael Russell: I think that, inevitably, we will.

The Convener: That was a very interesting exchange. There are issues about freedom of speech and democratic engagement. If we are not careful, we might begin to curtail them.

Michael Russell: That is absolutely not the intention, so we must be very careful. Everybody knows that there needs to be some form of traceability of people who campaign—that is the purpose of the digital imprint. However, doing that in the 21st century is difficult.

The Convener: Nobody else has questions, so I thank the cabinet secretary for his evidence. It has been an informative and useful session. I also thank committee members for going about the process in a good tone and in the right spirit. The committee will reflect on the evidence that we have heard, and consider our stage 1 report.

Meeting closed at 11:14.

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