



OFFICIAL REPORT
AITHISG OIFIGEIL

Constitution, Europe, External Affairs and Culture Committee

Thursday 27 November 2025

Session 6



The Scottish Parliament
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot or by contacting Public Information on 0131 348 5000

Thursday 27 November 2025

CONTENTS

LEGAL MECHANISM FOR ANY INDEPENDENCE REFERENDUM.....	Col. 1
---	---------------

**CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
31st Meeting 2025, Session 6**

CONVENER

*Clare Adamson (Motherwell and Wishaw) (SNP)

DEPUTY CONVENER

*Jamie Halcro Johnston (Highlands and Islands) (Con)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)

*Neil Bibby (West Scotland) (Lab)

*Keith Brown (Clackmannanshire and Dunblane) (SNP)

*Patrick Harvie (Glasgow) (Green)

Stephen Kerr (Central Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Andrew Blick (King's College London)

Dr Elisenda Casanas Adam (University of Edinburgh)

Professor Nicola McEwen (University of Glasgow)

Professor Alan Renwick (University College London)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 27 November 2025

[The Convener opened the meeting at 09:00]

Legal Mechanism for any Independence Referendum

The Convener (Clare Adamson): Good morning, and welcome to the 31st meeting in 2025 of the Constitution, Europe, External Affairs and Culture Committee. We have received apologies from Stephen Kerr MSP.

The only public item on our agenda is to take evidence in our inquiry into the legal mechanism for any independence referendum. We are joined in the room by Professor Nicola McEwen, professor of public policy and governance at the University of Glasgow, and Dr Elisenda Casanas Adam, senior lecturer in public law and human rights at the University of Edinburgh. We are also joined online by Professor Andrew Blick, professor of politics and contemporary history and co-director of the centre for British democracy in the department of political economy at King's College London, and Professor Alan Renwick, professor of democratic politics at University College London. I warmly welcome you all.

The evidence that we have taken in our inquiry so far has included discussion about understanding the settled will of the Scottish people in relation to gauging levels of support for triggering a referendum. We have heard that the definition of settled will is somewhat abstract. Do you have views on that? What would be the trigger for a referendum?

Professor Nicola McEwen (University of Glasgow): I do not think that we can define what constitutes settled will or make that a precondition. I think that what will ultimately trigger a referendum, should there be one, is political circumstance and political opportunity, which might come in a variety of forms.

I was thinking about the subject this morning when I read the previous evidence that you took, where that discussion took place. In the aftermath of the second secession referendum in Quebec, where the yes vote lost by less than a percentage point, the premier at the time talked about "winning conditions", which is a little bit similar.

It is perhaps not so much about a precondition for a referendum but about wisdom. It was decided

that the 2014 referendum would take place at a point when support for independence was nowhere near majority support. It was a political gamble that ultimately paid off because it helped to elevate support for independence. We are now in a very different place, where the cost of losing a second referendum would be much greater than the cost of losing the first.

It is all about political calculation, really. It is certainly not anything that could be settled in law. It is probably a matter of political debate and political choice.

The Convener: Obviously, the 2014 referendum was agreed with Westminster. Who do you think took the biggest political gamble on that? Was it the Government in Scotland or was it David Cameron, who signed the section 30 order to allow it to go ahead?

Professor McEwen: I suppose that they both saw a political opportunity and took a gamble. For David Cameron, the judgment was informed by the state of support for independence at the time, but there was also something about the majoritarian political culture in the United Kingdom that recognised that a majority is a majority and a right had therefore been earned. However, as I say in my written submission, the fact that that was his judgment at that time does not set a precedent that we could expect to be followed by any subsequent Prime Minister who was faced with the same choice.

Dr Elisenda Casanas Adam (University of Edinburgh): On the point about settled will, I agree with Nicola McEwen and the comments that were made in the previous evidence session that it is unclear and hard to define. No one knows exactly what it means or what the threshold is.

The question has also been expanded to include what the trigger for a second referendum would be. That was discussed in the previous evidence session, and I know that there was a lot of discussion about the fact that legislation would be required at Westminster. We know that from the Supreme Court's reference. However, an interesting point that was not raised is that, in the current context, with the vagueness and uncertainty, it appears that a decision on the circumstances and conditions that would trigger a second referendum are currently in the hands of the UK Government to unilaterally decide. That is a concern in the context of defining clarity.

Professor Andrew Blick (King's College London): This may be a recurring theme in dealing with the questions and I might not add much to what has already been said, but I urge the committee to include the politics in all of this. A lot of these decisions will involve politics, including the political circumstances in which things happen

and the motivations of the different people who are involved, as has been suggested. Constitutional mechanisms can help with these things, but we can never fully take the politics out of the constitution. Any decision on what settled will means, if that is what we are looking for, will involve politics.

There are mechanisms that we can look at to try to establish whether support is more than just a bare majority. In a sense, the threshold requirement that was used in the 1979 devolution referendum was an attempt to say that there needed to be something more than just a bare majority of those voting, but that approach was then not used for the 1997 referendum, so maybe it was not a great experience, particularly for Scotland.

There are mechanisms out there, but there is also politics, which is not disappearing. I am not saying that it is not changing, but it is not disappearing.

Professor Alan Renwick (University College London): I agree with most of what has been said. It is important to recognise that the question of what settled will means and the question of what triggers might be appropriate are separate questions. It is not clear that the appropriate trigger would be attached to a notion of settled will.

I suggest in my written evidence that there are two ways in which the term “settled will” is often used. One is the idea that the majority that exists for a given position is a stable majority that is unlikely to flip in any foreseeable circumstance, and the other is the notion that it is broadly accepted across the board that something is the will of the people, including by those who do not share whichever view it is.

There are good reasons for thinking that, for some purposes at least, the first of those definitions of settled will should be a consideration. Andrew Blick went into the question of what the threshold in an actual referendum might be, which goes beyond the question of triggers. There may well be a case for saying that, before a decision is made, particularly a decision for change, there should be confidence that there is a stable majority in favour of that change and that it would not suddenly flip back.

It is a bit more problematic to suggest that you could not decide to make a change until there was broad agreement across the whole population that it was the appropriate way forward and that those who oppose it were fully reconciled to it. There is a danger there of being too conservative in your notion of settled will.

The Convener: Thank you. We move to questions from the committee. I will bring in Mr Brown first.

Keith Brown (Clackmannanshire and Dunblane) (SNP): Good morning. I proposed this inquiry, and when I did so, I posed the following question. Given that the current constitutional arrangements are said to be voluntary and democratic, what is the route or the mechanism through which Scotland could choose independence? I do not know whether we are any further forward in answering that, other than to simply say that it will happen when Westminster decides that it will happen. I am happy to be contradicted, but that seems to be where we are at, given the evidence of today’s panel and our previous panel.

I completely agree with Professor Rodger’s point—I have to call him that, because I did not catch his full name—that politics is much more the driver on this, rather than constitutional nostrums. I think that politics will be what drives it. However, am I missing something? Is there a mechanism other than saying that there will be a route when Westminster decides that it will happen?

Professor McEwen: The point about Westminster deciding is a point of law, but I do not think that that decision would be taken in the absence of other factors. Things will precede that decision. I guess that that is what we have just talked about—what would inform the decision. Whether it was election results in Scotland or some other demonstration of public opinion, we would expect something to suggest that we had got to a point where a referendum ought to be facilitated in the context of the union being a voluntary one. That does not mean that a referendum would have to take place—there is a hierarchy, and the ultimate authority rests with the Westminster Parliament—but the stakes would be considerably higher at that point, where it was confronted with what looked like an obvious expression of will, as far as we were able to tell prior to a referendum. Ultimately, the point about Westminster deciding is the case, but the decision would not be taken in the abstract.

Dr Casanas Adam: It is an interesting question. It was made clear last week that there is no international right to self-determination, so it becomes an internal question for internal constitutional law. The black-letter starting principle is that it is a decision for Westminster, but I tried to suggest in my written submission that there is a movement or a shift in approaching these types of situation.

It comes across from all the evidence that, in a way, Scotland is unique. There is a generally recognised right for the Scottish people to decide their own future. What we do not have is a legal avenue for them to do so. It therefore appears that we have to wait for Westminster to legislate or for the UK Government to agree to the holding of a

second referendum. Part of the argument that I have tried to put forward, with examples, is that there are other principles in the UK constitution that we can maybe try to draw from to argue that that situation—the lack of clarity and certainty and the gap in the legal system—is no longer appropriate.

For a while, the situation may have been beneficial. Some people have argued that the vagueness was beneficial because it could have worked both ways. However, particularly after the Supreme Court's decision that the Scottish Parliament does not have competence to legislate in this way, there is an argument for clarity—with negotiation and some sort of framework—on the circumstances in which, through a pre-agreed procedure, a referendum could take place. That would fill the gap.

09:15

Comparative examples may not be very helpful, because it is a unique Scottish problem that we have the gap, but there are strong arguments based on the principle of democracy. The Supreme Court reference highlights that an independence referendum, even if it was advisory, would condition the legitimacy of the union and the exercise of parliamentary sovereignty. However, a similar argument could be made that subsequent elections to the Scottish Parliament in which pro-independence, pro-referendum parties have gained majority support of Scottish citizens also need to be taken into account as part of the broader constitutional framework. We also need to think about devolution—the idea of multilevel government—and the protection of minorities.

There are principles within the constitution on which we can draw to build an argument that we need some kind of legal framework or legal procedure to somehow fill the gap.

Keith Brown: Before I come to other panel members, I have another question. There seems to be no prospect of what you described—of Westminster saying that there have been continual elections that have produced pro-independence or pro-referendum majorities and recognising that that has any consequence at all. Do you see any political consequences from continuing to see ever-more emphatic statements of support in elections for pro-independence or pro-referendum parties? What could be the political consequences of that, if any, for the UK establishment?

Dr Casanas Adam: There definitely are political consequences. This raises an interesting dynamic of the functioning of the UK political constitution, because the legitimacy and the continuity of the union are eroded if we see a clash between the will of the Scottish people, as expressed through

elections, and the responses from the UK Parliament and the UK Government. I think that there would be such an impact. The response is also political, which feeds into legal mechanisms.

That is the interplay. I think that such a situation will have and should have an impact, which then affects the future of the union.

Keith Brown: I am sorry for referring to Professor Blick as Professor Rodger earlier—that was a name that came up on the screen. I am interested in your view on those two questions.

Professor Blick: There is no need to apologise. To look at the question in other ways, if we are expecting or asking the UK Government and Parliament to, in effect, hand over the control that they now have over when a decision is made that could lead to a territory leaving the UK, that is quite a high expectation. It might be the right thing to do, but it is probably quite unlikely to expect that from the UK Government and Parliament. My understanding from reading the evidence that others have submitted to the committee and from my knowledge—I am not an expert in this area—is that that would be a pretty unusual arrangement internationally.

In the UK, if such a mechanism were to be provided for Scotland, it would raise questions for other parts of the UK. I think that people in Wales would look at it and might then say, “Can we have that, please?” As we all know, we have arrangements in place for Northern Ireland. My understanding is that, from an international point of view, they go quite a long way in allowing Northern Ireland to control its constitutional future, although the power to call a referendum remains with the secretary of state. As has already been discussed in evidence to the committee, the conditions under which the secretary of state calls a referendum are not very clearly defined.

If we were to put in place an arrangement for Scotland that went a lot further in defining when such a referendum could be called, that would be quite interesting from the Northern Ireland perspective, because there might be unevenness there. I do not know what the answer to all those things is, but we must see that this would take place in a wider context that, from the UK perspective, would be looked at very carefully before anything happened.

Keith Brown: If I understood you correctly, the first part of your answer was about a high bar—I think that you were talking about transferring, possibly to the Scottish Parliament, the power to decide or having an agreed mechanism. Given the possibility of increasingly emphatic wins for pro-independence or pro-referendum parties in Scotland, given what may well happen in Wales shortly and given what is due to happen at some

point in Northern Ireland, do you see the UK Government continuing to present such a bar in the future? Will it continue to refuse to countenance granting that high bar? If you do not see that, what would change the position?

Professor Blick: That is where politics may come back in. I was rereading David Cameron's autobiography before this evidence session. He is pretty clear that his agreement to hold the referendum in Scotland was a political decision. He recognised that there had been an election in Scotland that the Scottish National Party had won, but he talked about his desire to wrong foot his opponents—he was not entirely convinced that the SNP wanted a referendum at all—and he thought that he would win it. Those were the politics then, and that was Cameron's decision.

As it turned out, perhaps Cameron's decision was riskier than he thought. Interestingly, he made the decision on the night of the alternative vote referendum. You can see why, at that point in Cameron's career, referendums looked like a good way of dealing with problems, and why he then agreed to two more referendums. The Scottish one did not go as well as he would have hoped, and the other destroyed his premiership.

The context is that politics can change. Now referendums perhaps look like a riskier proposition to a politician, but the politics can change again. It is not my job to predict election results or tell politicians how to be politicians, but we do not know what will happen at the next referendum. We do not know what the parliamentary arithmetic will look like in the House of Commons after the next election and who exactly could hold balances of power in certain situations.

Lots of things could come into play, but the politics will still be there. I remain of the view that the UK level of our system would be very reluctant to do anything that would in effect hand over the control that the Supreme Court decided that it has to allow a referendum to happen. We can come on to discuss this, but whether that could be done in a way that was fully justiciable in the context of the UK constitution is another question again. I still think that there would be a reluctance; we come back to the politics, but politics can change.

Professor Renwick: To go back to Mr Brown's original question, I think that there is a problem in current arrangements. It is accepted that this is a decision to be made by the people of Scotland, but there is no mechanism for ensuring that the people of Scotland have an opportunity to make that decision. I agree very much with what Nicola McEwen said—in many circumstances at least, the mechanisms of politics will function to create opportunities, but there is no guarantee that those mechanisms will operate to push a Westminster Government to agree to a referendum, even in

circumstances when it is very clear that there is strong support in Scotland for a referendum and for independence.

If the Government in Westminster is one that wants support from Scotland and to some degree depends on that, I presume that that Government will care about what people in Scotland think. However, it is quite possible to imagine a Government in Westminster that does not have significant support from Scotland and is not particularly bothered about what people in Scotland think. Given the acceptance of the principle that Scotland's constitutional future is for the people of Scotland to decide, that disjuncture seems to me a problem. I agree very much with what Elisenda Casanas Adam said on that.

On whether there is any route to the development of such a mechanism, I do not entirely agree with what Andrew Blick said. There are circumstances in which one could imagine that a UK Government would wish to clarify the position. For example, if the UK Government faced a demand from the Scottish Parliament for a referendum that it felt was strong enough that it could not simply dismiss it but not so strong that it felt that it had to accept it, I can well imagine that the Government might want to negotiate around establishing some clarity on what the circumstances would be.

Such a mechanism would not necessarily simply be that the UK Government turned the authority over to the Scottish Parliament. Like Andrew Blick, I would be amazed if the UK Government and Parliament did that, but it is not impossible for the UK authorities to give some indication, as exists in the Belfast or Good Friday agreement, that in certain circumstances a referendum would be allowed. In those circumstances, a UK Government would negotiate a mechanism that ensured that it did not need to concede a reference in that moment. It would not concede a mechanism that made it easy for a referendum to take place.

Keith Brown: This will be my second-last question—feel free to respond quite briefly, if you think that that is appropriate. I do not want to put words in the mouths of witnesses but, in last week's evidence session, we heard essentially that the act of union was pretty much a dead letter—it is irrelevant to the discussion—yet some of the written evidence suggests that it has a bit more standing than that and that, if there was a successful vote for independence, the act would need to be repealed.

Of course, the idea that there should be a right to self-determination in part rests on the idea, rightly or wrongly, that Scotland and England voluntarily—I would question whether it was voluntary at all—entered into this act of union

between two parties, so each party should have the right to end that and have a process for achieving that.

What standing does the act of union have in the debate? I ask that with the view that this will come down to the UK Government putting its finger in the air and deciding what it wants to do—that seems to be how much of the constitution works in this country. What standing does the act of union have? I will go back to Nicola McEwen.

Professor McEwen: I do not have anything to add to what you heard from the three eminent constitutional lawyers.

Dr Casanas Adam: I agree with the comments that were made by the panel of my three constitutional lawyer colleagues. I will add that the main issue is that the idea is not legally enforceable, so the courts have not accepted it, but it provides an overarching framework that is relevant. The Scotland Act 1998 is our frame of reference now, but it is very much about the Scottish Parliament and its competencies. The act of union helps to provide the broader framework that this is a union state, and there are some legal principles and references out there that help to inform the Scotland Act 1998, even if they are not legally enforceable. We cannot go in law to those principles and bring them before the courts to say that Scotland should be able to hold a referendum; they are in the background, but they are still constitutionally relevant in that sense.

Keith Brown: As he is on the screen, I will go to Professor Renwick.

Professor Renwick: I have nothing further to add beyond what the lawyers said previously.

Professor Blick: I am happy to leave it to the lawyers, too.

Neil Bibby (West Scotland) (Lab): Good morning. Mr Brown mentioned earlier the political consequences for the UK. I want to ask about political consequences for the UK Government and for the Scottish Government—or for the party that leads the Scottish Government. Whether there are consequences may be questionable, as Professor McEwen says in her written submission that only one in five Scots rank the constitution in their top three priorities.

To what extent are we seeing or will we see political consequences for the SNP? Since 2016, we have seen the Scottish Government and First Ministers and leaders of the SNP not saying, “We want a referendum,” but going so far as to say, “There is going to be a referendum; we will have a referendum,” and that has not materialised. To what extent has that undermined trust and support for the case that the governing party will call a referendum? There have been attempts to lead

supporters up the hill, only for them to be disappointed in the statements that have been made by leading members of the nationalist movement.

09:30

Professor McEwen: I do not think that there is any evidence to suggest any drop-off in support for the SNP because of the things that you suggest. At the moment, support for independence is higher than support for the SNP and that was not the case a while back. I am not aware of there being any evidence to suggest that the diminution in trust in the Scottish Government that we have seen has anything to do with the scenario that you just painted. I do not see that at all.

Neil Bibby: To some extent, the SNP’s domestic record on public services is probably the main reason why we have seen support for the SNP dip over recent years, but there is a sense that, to maintain itself in power, the SNP needs to dangle the independence referendum carrot. So far we have had, for example, John Swinney saying that, at the next election, an SNP majority will deliver another independence referendum. He has even excluded the Scottish Greens from that mandate; it is purely the SNP now. To what extent are there political consequences for the SNP in looking like it wants to preserve itself in power, rather than push the case for independence?

Professor McEwen: That is possible but, again, we are not seeing the evidence of that. That relates a little bit to the questions that Mr Brown posed, in that the tests that we have had so far have been parliamentary majorities for pro-independence parties but not for the Government—or not since 2011. The assumption is that the precedent—I do not think that it is a precedent necessarily—is the decision that was taken after the 2011 election in the face of a single-party majority Government, which in the Westminster political culture usually means something in terms of a mandate. I guess that the case being made is that, in a repeat of that particular scenario, there would be a stronger claim. We will not know whether that is the case or not until and unless we have that result.

The political risks on both sides, particularly that of rejecting a claim, become higher in the context of such a majority Government, particularly if it is matched by a clearer majority among the people of Scotland, consistently expressed—which we do not have now. The risks also increase with time. The further you get from the 2014 referendum, the trickier it is politically to say that the decision has already been made. The passage of time affects that as well. I know the point that you are asking about and, ultimately, we will see whether that

carries a risk in the election, but there is certainly no evidence at the moment that that is the case.

Neil Bibby: I think that, to some extent, those in the nationalist movement are using things such as these inquiries as a distraction from building the case for independence, to be perfectly honest. John Swinney has said again that he will get a majority and will deliver independence, which is similar to what he has said in the past. I do not think that the SNP will get a majority at the next election, so I do not think that we will cross that bridge, but John Swinney has said he has got a “secret plan” to deliver independence after the referendum. I do not think that he has any plan, but I am happy to open it up to the panel if they want to tell me what they think John Swinney’s secret plan is.

Professor McEwen: I do not think that any of us will be privy to any secret plans or otherwise that the First Minister has.

Neil Bibby: Do you have any idea what it could be?

Professor McEwen: My assumption would be that the plan would be to make the same claim as was made in 2011, after the SNP secured a majority, and to hope that the Prime Minister of the day would make the same judgment as Mr Cameron did. There is no guarantee that that would be the case.

Neil Bibby: My understanding is that Mr Swinney has already said publicly that, if the Westminster Government does not agree to a referendum, he has a secret plan to deliver it.

Professor McEwen: I do not know what that would be.

Neil Bibby: Does anyone else on the panel have any idea of what that secret plan could possibly be?

Professor Blick: If we did know, we could not tell you. [*Laughter.*]

Neil Bibby: Sure. I think that he does not have one.

Dr Casanas Adam: Could I intervene briefly—not on the secret plan, sorry; I do not know anything about that—to comment on the discussion? I am a lawyer, so I cannot say much about political consequences, but I think that my comment is relevant to the discussion and speaks to the different reasons for clarifying a mechanism that could enable a referendum to go ahead. The reasons may not be only on the pro-independence, pro-referendum side because there is also an argument for saying, “Let us reach an agreement on this, let us clarify the mechanism,” and that means that it is agreed and it is taken out of the political space.

I think that the point that you were making is that we have an on-going debate focused on procedures. It is not about the case for independence, but about how we can hold an independence referendum under the constitutional framework. We have had the Scottish Government trying all the different potential avenues that could make it legal, like trying to get an agreement on a section 30 order, then going to the Supreme Court and getting clarification on the competence question. That debate, about how can we trigger a referendum or how can we push a mechanism that enables us to go ahead, is on-going. There is also an argument on the other side to say, “Clarifying this removes it, let us move on, let us talk about something else, the case for independence or not independence, or let us focus on other issues.”

Neil Bibby: I assume that you will agree that the European Union referendum showed that people need to know exactly what they are voting for. There were issues post the EU referendum and protracted discussions and negotiations about what that meant in practice. What do other panel members think of that?

Professor McEwen: You cannot ever know exactly what you are voting for. If we are to assume that a referendum would be a test of the popular will, unless there were two referendums—that is one option—the referendum necessarily would take place before the negotiated settlement. I agree with you on the example of the Brexit referendum where there was really no proposition at all and I think that that is because it was a device used by the Government of the day to resolve a political argument within its own party rather than a proposition that it had. We should expect referendums to come with proposals that are plausible, can be defended and be subject to scrutiny, but we cannot ever know exactly what we are voting for, before the negotiations take place.

The Convener: Professor Blick and Professor Renwick want to come in.

Professor Blick: I agree with what Professor McEwen said. We may come back to the two referendums question, which is interesting in itself. This kind of referendum can be contrasted with, say, the AV referendum in 2011, where we had an act of Parliament that had already been passed and that set out what the AV system would be like, how it would work and provided that if there was a yes vote in the referendum, the act would come into force at the time of the next election. We do not know exactly what that would have meant politically, but we knew what would happen.

You can contrast that very clearly with this kind of referendum, where there will be another party involved—the remaining UK—that will want to negotiate. You cannot avoid the fact that things will happen after the referendum—if it is a first

referendum, after the first referendum—that we cannot predict in advance. There is no way round that. Admittedly, in the EU referendum, more could have been done to give ideas of what might happen, but what will happen is unknowable.

If you are expecting to be able to tell people in advance of the Scottish independence referendum exactly what an independent Scotland will be like, you are setting an impossibly high bar to meet. I know that Professor Renwick has done a lot of work on this. You should try to communicate as much information and educate voters as well as you can in advance of a referendum, but you just cannot tell them with certainty what would be the outcome of negotiations. That is hopefully to reinforce what Professor McEwen said.

Professor Renwick: I agree with all that. You can do a lot during a referendum campaign to improve the quality of information and discussion. I mentioned the possibility of using citizens assemblies or other similar kinds of deliberative processes during the course of or in the run-up to a referendum campaign to facilitate that. Professor McEwen and Professor Blick are absolutely right that this is a case where aspects of what the change option would be cannot be clear on the ballot paper at the stage of a referendum.

I would seriously think about two-referendum processes, which have been briefly alluded to. The idea is that you first have a referendum on the principle of whether people want to go for independence. Then you have a period of negotiation and working out the details. At the end of that process, you have a second referendum to confirm whether people wish to go ahead with independence. You can raise all sorts of questions and doubts about how that would work tactically and how it would play out, and it is important to work through those questions, but that kind of process should be given serious consideration.

I will also quickly go back to what Dr Casanas Adam said about the difficulty with the current arrangements. Questions to do with the process of independence and of independence itself are constantly on the table and that can get in the way, as Mr Bibby was suggesting, of day-to-day policy making. That is a concern, and I will add one point to what has been said previously. If you have mechanisms that establish when a referendum can take place, you can also establish a minimum period between referendums.

For the Belfast Good Friday agreement and the Northern Ireland Act 1998, that period is set at seven years, which is intended to ensure that you do not just have a constant run of referendums. To me, that is quite a short period between referendums, given just how momentous they are on these sorts of issues. There has also, of course, been lots of talk about leaving it for a

generation between referendums. That sounds like a rather long period to me, but a UK Government thinking about whether it wants to establish mechanisms on this might well think that it would be useful to establish some minimum time periods in order to be able to manage debate around this issue a little bit more.

The Convener: George, do you have a supplementary on this point?

George Adam (Paisley) (SNP): No, I have hundreds of questions.

The Convener: Okay. I will go back to Neil Bibby.

Neil Bibby: Professor Renwick, I appreciate your helpful evidence on Northern Ireland and the Belfast agreement. The situation in Northern Ireland obviously has a very different historical context to it and it is wrong to think that the situation there is the same as it is in Scotland. We need to take cognisance of that, despite there obviously being arrangements there.

Professor Renwick: I totally agree with that and, in many respects, I would not attempt to follow the arrangements in Northern Ireland. They are absolutely a product of very particular circumstances, but, in some respects, they can be a useful source of thinking about what options may be available.

Neil Bibby: Yes. Thank you.

Professor McEwen: Going back to your question, Mr Bibby, about this potentially being a distraction used politically, the obvious response to that would be, as Dr Casanas Adam and Professor Renwick suggested, to devise a mechanism. The only way that the issue becomes depoliticised, however, is if that is done by consensus. If a mechanism were devised by the UK Government alone, it would probably be unlikely to take the issue away from the political arena. I agree with you that the process issues can be a distraction. For those who support independence, there is a lot of work to be done on the question of substance, rather than on the process issues, but I can see things being even more contested were a mechanism to be unilaterally devised by the UK Government and the UK Parliament.

09:45

Dr Casanas Adam: I agree that there is a very different context and very different circumstances in Northern Ireland. However, Scotland has its own context and circumstances and we have the very strong precedent of the 2014 referendum, which is recognised comparatively as a paradigmatic example of a sub-state referendum and negotiation and deliberation. That also acts as

a very strong precedent for current debates in Scotland on this matter.

Jamie Halcro Johnston (Highlands and Islands) (Con): I want to follow up some of those questions. I thought that it was unfair of Neil Bibby to ask the panel about the SNP's secret plan. We have here Keith Brown, the deputy leader of the SNP. I am sure that he knows it—he can tell us at some point.

Nicola McEwen, I will come to you first, and others can come in if they want to. Neil Bibby talked about the failure to deliver. It is now 11 years since the referendum and this inquiry has been brought forward only in the last few months of this parliamentary session. We have talked about the politics of independence referendums. Do you think that, over the past few years, the SNP has been more interested in talking about independence than in delivering it and that that has been an increasing concern for some in the nationalist movement?

Professor McEwen: I think that is a matter of political debate rather than academic expertise.

Jamie Halcro Johnston: I think that we have established that the legal right to call an independence referendum is with the UK Government. This is all about politics, political debate and political will. If you have an essentially self-appointed—although understandably so—main party looking to deliver independence but not being fully committed to delivering what it has been talking about, that obviously impacts on the political debate.

Professor McEwen: I reiterate the comments that other members of the panel have made. If we understand the United Kingdom to be a voluntary union, it is legitimate to pose a question about the circumstances in which the decision to remain or to do something else would be exercised. That is not an unreasonable question to ask. I will leave the other parts of your question to politics.

Jamie Halcro Johnston: Okay. I have some other brief questions for Dr Casanas Adam. You talked about Scotland having the right or the need to trigger a referendum—I am trying to remember exactly the words; I wrote them down somewhere, but I am not sure that I can find them in my scribbled notes. I think you said that it was right that there is an opportunity to trigger a referendum.

I come from Orkney. I do not know how much you know about the constitutional position of Orkney, but we were not always part of Scotland. We were part of Norway and we were—depending on how you present it—either annexed or given away by Norway. We were also the most strongly unionist part of Scotland. We have heard talk about Orkney having a different position—

something more akin to an overseas territory—and Shetland is looking at more autonomy, too. Do you think that those parts of Scotland that value being part of the UK more than others or might seek another constitutional future and which have a distinct heritage should have a right to self-determination?

Dr Casanas Adam: I do not know that I would talk about a right to self-determination per se. The way that we have to put these territorial and sovereignty issues, both for Scotland within the union and for Orkney and Shetland, is through dialogue, social bonds and negotiation.

I have suggested that one of the principles in resolving these issues should be the protection of minorities, including minorities or minority territories that result from any change that is made.

This has not come up much in the discussion so far, although it came up in the previous evidence session, but it is also important to consider the connection between internal management of territorial diversity and national pluralism, and independence. There is a debate about the different ways of articulating relationships between parts of the territory, or nations, and the centre and within different nations or parts of the territory—within the sub-unit itself. Creative mechanisms can be used. Intermediate options and solutions can be designed that are tailored to specific territories.

I do not think that anything should be off the table. The important things are to negotiate in good faith and tailor the organisation of government in accordance with majorities while also considering any relevant minorities.

Jamie Halcro Johnston: From a purely moral perspective, is the right of, say, Orkney and Shetland, to self-determination any weaker or stronger than that of Scotland? Scotland is a very diverse country; the regions have very different backgrounds—Gaelic, Viking or Norse, et cetera. Do you think that the moral argument is any stronger or weaker for Orkney and Shetland?

Dr Casanas Adam: I would say that the argument is strong, but I do not know if it is stronger or weaker. I am not so much of an expert on those territories because my focus has been on Scotland and Catalonia, but there is a strong argument for the protection of internal units and minorities.

Professor McEwen: Dr Casanas Adam and I were part of a group that explored a code of conduct or a code of good practice for thinking about self-determination claims. Within that, there are lots of interesting points about values and principles. There are two parts to that in the case of Orkney and Shetland, or any other part of

Scotland that might consider itself a nation and want to express self-determination.

One is whether, in the context of triggering independence, you would need to consider geography. Would you want to have an additional qualification to requiring 50 per cent plus 1 in favour—or would it be okay if that 50 per cent plus 1 was entirely in the central belt? I think that requiring a majority in all the regions is too high a threshold, but there is a reasonable case for trying to ensure that there is consent and legitimacy throughout Scotland, given the diversity.

Ultimately it would depend on what was in the constitution of an independent Scotland. One assumes that the constitution would have to say something about how it saw its case for territorial integrity. Would it follow many of the constitutions of the world and remain silent on the issue of secession and just hope that it does not come up, would it prohibit secession, as many do, or would it have a mechanism for it, as very few, but some, do? Those are the sorts of things that you might think about. There would have to be some sort of process or convention at the point of developing a constitution for an independent Scotland that wrestled with some of those issues.

Any Government in any territory, whether the United Kingdom Government in managing the whole of the UK or a Government of an independent Scotland, would have to take into account the territorial diversity within the country and, as Dr Casanas Adam said, find ways to recognise and value the diversity within it and to give voice and expression to that, whether through self-government or some other means.

Jamie Halcro Johnston: The late Jo Grimond did quite a lot of work on this previously. Given that the UK Government has recognised that there is a difference with Orkney and Shetland because of their backgrounds, do you not think that a decision on their self-determination should be made at the same time? For example, if there were to be another independence referendum, should that option be there for them?

Professor McEwen: I do not think so, because it would potentially be contradictory. If people were voting on whether Scotland should be an independent country, they would need to have a sense of what Scotland is. If that Scotland might be something else—if the boundaries were to be simultaneously redrawn—that would blur the question. I think it would happen sequentially; if you were to have that determined at some point, it would be a matter for an independent Scotland.

Jamie Halcro Johnston: That causes the same problems that we have talked about. I am trying to remember who it was who talked about a confirmatory referendum. You would want to know

as far as possible what leaving the UK would mean for Scotland. It could mean a whole load of political and financial issues. It could mean parts of Scotland leaving in the future. I understand that you will never have that certainty, but would it not be more suitable to have such a referendum at the same time so that people could vote and say, “We think Scotland may be smaller than it is now”?

Professor McEwen: I do not think so, for the reasons that I have given, but other members of the panel might have a different view. I also do not favour a confirmatory referendum because, given everything I know about intergovernmental relations, I find it hard to imagine a scenario where you would have meaningful negotiations on independence taking place when it is all still to play for in a confirmatory referendum.

I am more sympathetic to having some element of deliberation in advance of a referendum or during a campaign—some way to ensure that it is not just a geographically concentrated majority that decides for the rest. There must be some sort of consideration of the different perceptions, interests and preferences.

The Convener: Professor Renwick, I think that you wanted to come in.

Professor Renwick: Sorry, I was just waiting—*[Inaudible.]*—said there about confirmatory referendums but I will not—*[Inaudible.]*

The Convener: We are losing the sound a bit, sorry. It is breaking in and out now. Do you want to repeat what you said?

Professor Renwick: I am so sorry. To respond to Mr Halcro Johnston’s question, clearly there are matters of principle and then there is how those principles apply to particular groups of people. There are matters of principle around the appropriate rights of self-determination that groups should have and then there is the question whether a particular group has the same sorts of claim as another group.

I grew up in Wick, so I share a sense of the Nordic heritage and the difference from the rest of Scotland. However, I think it would be pretty hard to suggest that there is a sense of national identity or a sense of political identity demanding separateness in Orkney, Shetland and the other bits of Scotland with Norse heritage, that is commensurate with the sense of national identity for Scotland as a whole. It is very hard to make that kind of claim for that particular group, but the underlying principles are the same principles as would apply for any group.

Jamie Halcro Johnston: I have one other brief question. We started off this conversation by talking about the settled will, we then talked about the need for broad agreement, and we then went

on to talk about the idea of a stable majority. We have covered a whole load of different ideas of what would perhaps constitute public support for independence or for another referendum. One of the difficulties is that, although independence can be polled on—and there are arguments at the moment about whether it is fairly close between yes and no, or between leave and remain, depending on how you frame the question—it is not a priority for the Scottish people. In polls about the top issues, we see that it is well down the list, at number 7, 8 or 9.

In identifying support for independence, is it important to consider not only how somebody would vote in a referendum, should there be one, but also where it is in the people's priorities? I ask for responses from Professor Renwick, first, then Professor Blick and then the panel members in the room.

10:00

Professor Renwick: I do not have a strong view on that. It is an interesting question. It is a point that would need to be thought about carefully if any specific mechanism were to be introduced. It is clearly not part of the mechanism in the Belfast Good Friday agreement, but, as has already been pointed out, we should not necessarily follow the Belfast Good Friday agreement. I can see a case for including it, but I would want to think about it a little bit further before expressing a clear view.

Professor Blick: On whether the issue should be a top priority for voters before a referendum is called, I wonder how many referendums would ever have been called in the UK had that been the case. Certainly, if you look at the evidence on the European Union referendum, EU membership became a major issue for the public only after it was apparent that the referendum was going to be held. In other words, the public were rightly thinking that it was important because there was a referendum coming up.

I just do not see how what you suggest would work. How would you assess issues such as that there may be a smaller group of people to whom it is important? How would you weigh those things up? I think that it would be difficult to do. I can see some difficulties. I agree that the issue is significant, but the problem with referendums generally is that we just do not know how important these things are.

Historically, at least in the UK, referendums have often been called mainly because of high politics. There is some relationship with public opinion and, obviously, in the end, the public get a vote on the matter, but why a referendum has been held at a particular time and in a particular way has been left to high politics and has been

decided in a very ad hoc way. Today, we are talking about the possibility of moving to a framework, which I think would be great if we could get it. However, there are lots of issues and reasons why it has been difficult to get to, which is why I think it will still be difficult to get to, although that does not mean that we should not try.

Dr Casanas Adam: Sorry—I have just kind of blanked. I was thinking and then I got lost. Perhaps Professor McEwen could come in next.

Professor McEwen: To answer the question, no, I do not think so. Although I included that chart in the evidence, there is quite a bit of controversy in political science literature about those sorts of questions and how to interpret them, not least because there is an implicit assumption that these things are discrete, and they are not. You might have a view about the importance of the economy and think that the constitution in some way relates to that, but it is very difficult to pick that up using the blunt tool of opinion polls, so I would not make that a criterion. One assumes that if, in the context of an election, a party puts forward a manifesto and a campaign that foreground the issue, that may be seen as sufficient to show the importance that voters attach to it.

Jamie Halcro Johnston: Do you want to come back in, Dr Casanas Adam?

Dr Casanas Adam: Apologies. I got completely lost in my train of thought.

The salience of the issue for citizens is important, and, in setting it out, maybe we need to distinguish between the framework and the process. Perhaps the fact that it is not a very salient issue right now means that it is a good time to discuss it, because you can have more of a pause for debate. I think that Nicola McEwen mentioned that in her evidence. The problem with debates about process is that, when it is a very salient issue, it becomes hard to sit down and work out the conditions and the process. There is a distinction to be drawn between drafting the process and the framework, and this is a good time to discuss it.

Obviously, any process and any framework would then require the trigger conditions, and one would imagine that the trigger conditions would somehow need it to be a salient issue—there would need to be some sort of requirement. There would then be a meeting of the requirements of the process that had been negotiated in, hopefully, a calm and consensual way.

There are risks for both sides in holding a referendum. You could imagine that the unionist side might be suggesting that the referendum be held at a time when the issue is not salient, because, if there is a second referendum with a second no vote, arguably that closes the issue for

a while. So, there are risks for both sides. There is the setting of the process, but, when the trigger conditions are—or are not—met, there are also the interests of both sides in the process.

Jamie Halcro Johnston: I admire your hope that it could happen in a calm manner. Thank you very much.

Patrick Harvie (Glasgow) (Green): Good morning to our witnesses.

First, I will just briefly reassure Mr Halcro Johnston that, if there is a genuine and sincere secessionist movement arising in Orkney or in Shetland or in both, if the goal is to establish how it would assert itself today, while that sovereignty lies at Westminster, I fully support that—that is exactly what we are trying to achieve for the whole of Scotland. If the goal is to assess how it would assert itself in the context of an independent Scottish constitution, I would support a constitution that gives the right of a serious and genuine movement such as that to test public opinion. I think that the answers that we are looking for in this inquiry are exactly the answers that you were seeking.

I wonder whether I could come back to the phrase “settled will”. It seems to me that we should be dismissing this just as a piece of political rhetoric, in the same way that some of our witnesses suggested we should in relation to the phrase “once in a generation”. These are political phrases used in debate rather than points of principle. That is partly because, as some have argued, settled will is hard to define; it is partly because it is not the precedent.

Even in the 1997 devolution referendum, I do not think that anyone was really rock-solid sure whether the tax-varying power would be supported by the overwhelming majority of the people of Scotland. The AV referendum, certainly, was not about establishing the settled will; it was a wheeze to offer people a voting system that nobody really wanted in order to protect the existing one. The EU referendum in no way represented an attempt to define the settled will. It was a very open question and since then it has given rise to a majority for rejoining in many opinion polls. Therefore, should we not dismiss this idea of settled will and the associated argument that Adam Tomkins gave us in an earlier session that we should only ever use referendums to establish what we all already know?

The final aspect of this is that, in the question of Scottish independence—where we all accept that a referendum would have to be agreed by two different Governments, presumably wanting two different outcomes—saying that it is about establishing the settled will is almost a recipe for paralysis, because you will never have a position

where both Governments are 100 per cent confident that they represent the settled will. Should we not forget this phrase altogether?

The question is for whoever would like to jump in. I am looking at the people in the room, and I am looking at the screen.

Professor McEwen: I certainly do not think that it should be a precondition, not least because we do not know what it means. It does not help us to identify any mechanisms because the question would then be posed, “How do you define and measure the settled will?” The phrase came from John Smith prior to the idea of there ever being a referendum on devolution and a Scottish Parliament.

I suppose that, at that time, the case was being made that there was enough evidence to suggest that the people of Scotland wanted a Parliament. The referendum, as you might recall, was controversial at the time. With hindsight, I think that it has given democratic legitimacy and underpinning to this Parliament. To an extent, I think that I agree with you in terms of a triggering mechanism.

I think that Professor Adam Tomkins was perhaps also making the point that it might inform political choice about how to proceed and how to secure the consent not just of those who are on the side that advocates for the change but of those who might find themselves on the losing side of that argument, were independence to succeed.

I sometimes wonder—it is an interesting thought experiment—what would have happened if, in 2014, we had a 50.1 per cent yes vote. As far as we are aware, that would have been sufficient to trigger independence negotiations, but I am fairly certain that those negotiations would have been an awful lot harder to conduct in that scenario than in one where the majority was a little bit clearer.

Dr Casanas Adam: I would agree with everything that Nicola McEwen said. I agree that the meaning of “settled will” is unclear and that requiring it as the trigger condition for a referendum—the fact that we have some kind of supermajority or something—I also think is problematic, partly because it completely departs from 2014. As I said, internationally, the 2014 referendum is recognised as an example of best practice, so we have our own internal model of best practice. Anything that departs from that would need some kind of deliberation and justification because, if not, it is problematic.

I agree with the point that you made, and I think that it relates to what Professor Adam Tomkins was talking about in the earlier evidence session. I think that maybe what he meant is that this would be the kind of situation where it might be impossible for the UK Government not to provide a

framework and for the Westminster Parliament not to legislate if a high level of support for independence came across in the polls.

However, that is not the situation that we are in now. The questions we are looking at now are slightly different, but I think that they are just as important because there are people who have consistently come out and voted in favour of pro-independence parties, so we still have that democratic tension, it is just a slightly different one.

A similar situation arose in Catalonia, leading up to the controversial Catalan referendum, and we all know what happened there. However, there was a very interesting debate, because there was not a very clear majority support for independence, but there was a very high majority support for a referendum. A number of people wanted a referendum for different reasons. There were those who wanted independence, but there were those who just wanted to put an end to the debate. That created a different kind of democratic tension, because although maybe there was not a majority in favour, there was a sustained majority in favour of a referendum and the system needed to respond to that somehow.

Patrick Harvie: Do the online witnesses want to jump in at this point?

The Convener: I think that Andrew Blick wants in.

Professor Blick: It is probably a good idea to get away from the “settled will” terminology. It comes back to my point about the reluctance of the centre to hand over legal power. It would be quite difficult to define legally, if that is what we are looking to do. After all, we thought that we had the Sewel convention written into law. Then we found out that it is written into law, but the Miller case told us that the Supreme Court did not want to make it justiciable. There is that issue of defining “settled will” and just generally getting it agreed, or even, below legal definition, getting agreement about what it means. Who knows? It could be like the five tests for joining the euro or something like that.

Beyond that, however, that does not get us away from the point that this is a really important decision that would have to be taken seriously, so there is that issue. Then we come back to the point about the unknowability of the precise nature of what it would mean, so we have the combination of knowing that it is a really important decision, but not knowing exactly what it is going to mean.

If we look at other referendums, in a sense, it is an asymmetrical referendum, a bit like the EU referendum, in that one side wins. If remain wins—if we want to call it remain—basically, things carry

on as they were. If leave wins, you have a huge change that might be very difficult or impossible to ever reverse.

All those things mean that we need to think very seriously about those issues when we approach the referendum and we cannot get away from all those issues. That does not mean that it should not happen. However, I think that the actual settled will concept is not necessarily that helpful. It could lead to an argument about terminology and not actually come up with a legally enforceable instrument, if that is what we are looking for.

10:15

Professor Renwick: I largely agree with what has been said. I was slightly surprised, to be honest, that at the committee meeting two weeks ago, there was no pushback on what Professor Tomkins said, because it seems very clear that settled will is not the precedent. The precedent is that a simple majority is sufficient.

That means, I think, that there should certainly not be a supermajority requirement in any referendum, which I know is sometimes discussed. It is also sometimes suggested that supermajority requirements are quite common in referendums. That is not at all the case. The only country in Europe that has a supermajority requirement in referendums is Lithuania, on some very specific questions around the independence of Lithuania and Lithuania as a democracy, so there certainly should not be a supermajority requirement.

I think that the element of settled will that is defensible as a criterion to be considered here is the stability of the majority for a particular position. It is not unreasonable to suppose that, for such a momentous change, it would be appropriate to ensure that the majority in favour of that change is a stable majority. You can achieve that by having a multistage process of decision making. I mentioned in my written submission, for example, the process for a constitutional amendment in Denmark, where it is necessary to have a vote in Parliament, then a general election, then another vote in Parliament, and then a referendum in order to get a change through.

You could also consider embedding stability in the mechanism if you had a mechanism for triggering a referendum. You could have a requirement that there should be evidence of a sufficient level of support for independence that extended over a defined length of time. Those elements of the notion of settled will are defensible.

However, fundamentally, if the majority want Scotland to be independent, Scotland should

become independent, and there should be a mechanism that allows that to take place.

Patrick Harvie: That answer comes on to the second point that I want to explore, which is the principle that the people of Scotland have the right to decide and that Scotland can become independent if the people of Scotland so decide. That is not ancient history. It has been agreed by all political parties elected to the Scottish Parliament, by both Governments and it has been made explicit in the Smith commission report. The people of Scotland have been given that right but are being told that, although they have it, they may not exercise it and they will not be given any means by which to exercise it. If an individual is told that they have the right to vote but that no polling places will be opened and no ballot papers printed, then the right is meaningless.

I have previously explored whether the political dysfunction around creating a means for people to exercise that right could be broken by some kind of element of direct democracy or participative or deliberative process. I appreciate Professor Renwick's evidence that there might be more value to formal processes such as citizens assemblies in informing a referendum debate than in triggering a referendum. I appreciate that. I know that I am asking this slightly out of desperation, but is there any way that the witnesses can think of to enable the people of Scotland to break the deadlock? That need not necessarily be a formal process that triggers a referendum, but could you define how to answer the question of how, if the people of Scotland have that right, they may exercise it?

The Convener: Professor McEwen.

Professor McEwen: I think that Professor Renwick wants to come in first.

The Convener: Sorry, I missed that. Professor Renwick, please come in.

Professor Renwick: I will come in very briefly, because I discussed this in my written evidence, where I look at three possible mechanisms by which this could be done: a referendum on whether to have a referendum; a petition of some kind in order to trigger a referendum; or some kind of deliberative process, such as a citizens assembly. I suggested that a referendum on whether to have a referendum sounds a little bit crazy, and I think it probably is, so I would not do that. Going to the third mechanism, as you said, Mr Harvie, I struggle to see how a citizens assembly could be useful at this stage, because fundamentally the question is whether we should or should not do X. It is a binary question on which most people have very entrenched views—

Patrick Harvie: Forgive me for jumping in, but I framed the question as I did in order to stress that

it is not so much about deciding whether a referendum should be triggered, as forcing an answer—which is absent from the UK Government at the moment—to the question of how the right to choose, the right to decide, might be exercised.

Professor Renwick: That would go back, most plausibly, I would have thought, to the idea of a petition process, which is a mechanism whereby you can test the strength of feeling on a particular issue. As I said in my written evidence, I would be very wary of a process that allowed a petition to lead directly to a referendum, partly because the threshold needed would be very, very high, and it just seems very problematic, but partly also because it is important to have moments of deliberativeness and for a Parliament, for example, to be able to debate. Potentially, though, you could have a petition that led to a requirement for, presumably, the UK Parliament to consider the issue. The danger with such requirements always is how you get the UK Parliament to genuinely consider the issue, rather than just have a bit of a tokenistic debate. It is difficult to make that work, I think.

In principle, I kind of agree with you. I think that you are exactly right in the way in which you set up the question, but I struggle to see a mechanism. If others on the panel can see a mechanism, then perhaps there is something in it.

Patrick Harvie: Does anyone have the secret plan?

The Convener: Does anyone else want to come in?

Dr Casanas Adam: I am afraid that I do not have a secret plan, but I have a comment. I completely agree, because this is about the people.

In a way, the citizens of Scotland are sort of pushing this by coming out in Scottish Parliament elections and voting for pro-independence parties. Sometimes, the importance of that is not recognised enough.

Professor McEwen was talking about the code of practice that we both worked on, which says that, if you cannot have a referendum, another way of taking account of the views of the citizens, of the people, is through subsequent elections. We have that and it is clear; sometimes, it is underestimated. People sometimes say that we do not know why people are voting for those parties—that is the criticism that is made; perhaps people are just happy about the way that those parties are governing and it is not really about independence. That is the counter-argument that is always put forward, which is why people say that you need a referendum, because that gives you a clear yes or no answer on a specific question. People say that, with elections, you never know. However, I would

say that the importance of the election results is sometimes underestimated in this context.

I was just thinking about something—it is not the magic solution. Perhaps citizens assemblies or some deliberative processes involving citizens could be organised. They could talk about different avenues to take and which avenues to take—it has already come up that there are different avenues to follow. Should there be one referendum or two? They could talk about options and perhaps broaden out the debate to increase support and visibility and to keep it in the public sphere. Perhaps different kinds of questions could be opened to build momentum.

Thinking about what citizens can do, however, coming out in elections and voting is the clearest way of making their views heard. That should be taken into consideration and I am not sure that it fully is.

Patrick Harvie: I think that it should be as well, but it has not been so far.

Professor McEwen: When requests have been made, successive Prime Ministers have never responded, “No.” The response has been, “Now is not the time.” That is interesting because it links back to an implicit acceptance of the principle that the union is voluntary and that Scotland or another constituent territory can leave it.

I have a bit more sympathy than Professor Renwick for deliberative processes. He and I both served on the stewarding group of the citizens assembly of Scotland, which sort of tried to get to this, but with questions that were way too vague, I think. If we were to do something like that again, I would recommend being much more precise about the ask.

A deliberative process could not break the deadlock, in the sense that the legal authority rests with the Westminster Parliament and that is what we know. Perhaps, if a consensual view emerged from a citizens forum of some kind, not just from a pro-independence party, and from a process of learning, negotiation and compromise, it would be a little bit harder to ignore all the other contributing factors. Of course, “Now is not the time,” becomes weaker the further from 2014 you go.

Patrick Harvie: Thank you.

The Convener: I feel that I must make the case for Cornish independence. As we have talked about other parts of the UK, we should recognise that ask too.

It is getting really messy. You made a point about the possibility of having an element of regional legitimacy to referendums and looking at it area by area. In the EU referendum, of course, there was a definite difference between Scotland

and the rest of the UK, but we still pulled out. Yet we now have a differentiated relationship between Northern Ireland and the EU. It seems that, over time, devolution is stretching the capability of Westminster by convention to do these things. Is there any merit in revisiting a constitution for the UK? I do not know whether anyone wants to come in on that point.

Dr Casanas Adam: That is a very interesting point. I do not think that rewriting the constitution would solve any of these problems. What it would do is open them all up for discussion as to what we put in the constitution. So, I do not know whether writing a constitution per se would be the solution.

I think that I mentioned before that independence is obviously connected to devolution, the devolved state and how that works with the union. It does not directly map on because we have parliamentary sovereignty. All those questions are connected and thinking about them as connected is maybe a way of making the issue less black or white. There may be debates about a federal UK. What could a federal UK look like? How could we give Scotland more voice, more recognition? How could we also recognise other territories, such as Shetland and Orkney? What status would they have? There is an argument that you could have a referendum on a ballot that has independence, an improved model of devolution, and an intermediate federal system. That makes matters less black and white and is another way to try to resolve some of the issues. It is an interesting point.

Obviously, that would open up a whole other set of complexities and difficulties, because it would not only be the territorial question. The moment you write a constitution you must address a whole other set of questions. It is complex, but there is an argument that, if this is a problem, if the model is not working, if there are too many problems, we should think about how we can really make it work. How can we make it better? If we set it out in a constitution, then we can see: the people of Scotland, Shetland and Orkney can choose. Everybody can come out and vote. Do they want this new proposal, or do they prefer independence? It is a way of giving people a voice and also trying to address the issues.

10:30

Professor Blick: In the past, I have supported having a written constitution for the UK and I still support having one. I am aware that there are lots of arguments against one. Some of them are strawperson arguments and some of them are legitimate, but it would be the clearest means by which to come up with justiciable rules that would apply to the UK Parliament and the UK

Government. If you wanted to come up with a mechanism that was above the whole system and was a means by which a referendum could be triggered, in theory, a written constitution is a way, possibly the only way, that you could do that in law. That does not mean that it is simple, but it would address that issue.

Trying to sell it to the whole UK that we need a written constitution to resolve an issue about Scotland would not be my way of doing it. I recognise that the issue is really serious, but I wonder about the politics of that. If there were going to be a constitution, it would be internationally unusual, as the committee has already heard, to have some kind of clause in it that allowed bits of the UK to leave and that set out the means by which they could do so. You would be opening up the questions that have already been mentioned. Can Cornwall leave? Can Wales leave? Can Yorkshire leave? Can England leave? It would raise all kinds of questions.

Northern Ireland would be complex. We would not be able to do something that differed from what is in the Belfast Good Friday agreement. While I agree with a written constitution, and I can see that, legally, it could deal with some of what we are talking about, I think that it would also open up a range of complexities. My view is that a written constitution, at least at first, should be a minimalist written constitution and the mechanism for a referendum might be something that could perhaps come later, but not in the first tranche. So, we would be talking about a rather longer time frame on that.

I agree that a background to everything that we are talking about in this inquiry is that the UK does not have a written constitution. That is one of the reasons—not the only reason—why it is difficult for us to conceive of a mechanism that is without the control of the UK Parliament, because we have the doctrine of parliamentary sovereignty.

Keith Brown: In 1979, I tried to be a proxy for my mother's vote in the referendum that year, but, at 17, I was too young to do that. I am just thinking about all the different conditions that have been applied. Can any of the witnesses say what is so different about Scotland?

In 1979, we had the 40 per cent rule, which was unheard of, whereby the votes of the dead counted for the status quo. We have talked about confirmatory referenda and, although I see some merit in the final shape of an independent Scotland being subject to a vote, the idea of having to say again that we want the same thing is not something that I could see happening anywhere but Scotland.

The idea has been raised that different parts of Scotland—I know that this has not been advanced by the witnesses, but it certainly was by Jamie Halcro Johnston—could vote differently at the same time. It is funny, because I did not recall such voices during the Brexit referendum, when every part of Scotland voted to stay in the EU and we were utterly disregarded. That idea did not count at that point.

Also, if this is merely a distraction, and the SNP is not serious about it, call its bluff—go for it; have the referendum. That is the best way you can kill it off.

Why is it always that we come up with these strange mechanisms or different conditions? Compare that to the Brexit referendum, when there was no white paper, no background, no conditions attached—and, on the point about a 50.1 per cent result, in the case of the Brexit referendum, the result was 52 per cent to 48 per cent but nobody is questioning its legitimacy; it was a simple majority. Why is it that such conditions seem to be talked about or brought into the equation only when we talk about Scotland? Is it simply because the Brexit referendum was one that, for his own reasons, the Prime Minister of the UK wanted and the independence referendum is a referendum that the UK does not want, or is there something specific about Scotland, which we cannot quite discern, that makes it subject to all these conditions?

Neil Bibby: That was a speech.

Keith Brown: Unlike yours, Neil, which was pure—[*Laughter.*]

The Convener: Dr Casanas Adam.

Dr Casanas Adam: I do not think that it is specific to Scotland. Obviously, it is very common now and I think that it may be particularly relevant in Scotland after the Brexit referendum, because of a lot of the problems that arose out of that referendum. However, as I flagged in my written submission, when we carried out a report for Catalonia to try to break the deadlock between Catalonia and Spain, although a lot of the options that we considered there were located within the Spanish framework, we considered a very similar thing: should we have an initial, trigger referendum, to see whether people wanted independence; a referendum at the end, once it had been agreed; or the option of two referendums.

This comes out of discussions about referendums more generally. I think that it is agreed that, in a way, they are imperfect. Elections cover a range of different issues, so you are never sure why people are voting for a certain party. Referendums are more black and white questions on one issue, but people say that sometimes they

are imperfect because, if you are asking about a very big issue, such as a big constitutional question, and the required result is just 50 per cent plus 1, it might generate instability if there is a change of mood shortly after. People highlight some of the issues. What if there is a very low participation, for example—should the side that ends up winning be considered the outcome? The issues that people raise with referendums as decision-making instruments lead to these kinds of considerations when experts start deciding what the best process is.

I do not think that it is a matter that is just for Scotland, but it is also important that any solution that is adopted should be a specific Scottish one. I have already said—Stephen Tierney talked about this in the previous session—that the 2014 referendum on independence is internationally recognised as an excellent exercise of self-determination and deliberation, and I think that it would have been decisive had it not been for Brexit, which changed the circumstances. If not, I think that we would be having very different conversations now, or we would have been. In the Scottish case, we have that precedent, and any departure from that as to the trigger, requirements or circumstances would need to be negotiated, and it would need to be justified, because we have that precedent, and it worked.

Keith Brown: This is my last question. We have an off-the-shelf agreed solution as to how this should be conducted, but it will not be agreed to by the UK Government. You made the point earlier that it is at times of relative calm that you can perhaps have more chance of an agreement. Also, I think that you very helpfully mentioned the extent to which, if you want to see a referendum, broadening it out and having a more discursive approach to it could be beneficial. Patrick Harvie and I are involved in the early stages of setting up a convention to that effect.

However, if the UK Government continues to say no up until the election, and if the election returns the majority that I certainly would hope for, there is very little chance at of getting any agreement at that stage. I can see the UK Government coming straight back and saying, “Let’s discuss the ground rules again.” The chance will have gone. It will be very similar to 2014, when it promised all sorts of things, such as enshrining the Sewel convention in law, putting the Scottish Parliament on a firm footing and making it a stronger Parliament. The exact reverse happened afterwards. Would you agree that there is very little prospect after the election of getting the kind of calm that you say is necessary to ensure agreement and it would be straight into a binary approach again?

Dr Casanas Adam: Obviously, I am a legal expert, so I would rather not go into the more political dimensions. Nicola McEwen might be better placed to discuss it. However, thinking about the on-going refusal at the level of the UK Government, I think that it is important to maintain the pressure, the momentum, the discussion and the request. Something that came up in the previous committee session was the idea of international recognition and legitimacy. That is very important. We saw in the Catalan case that, because they really pushed ahead at the end and pushed against the legality, maybe that did not fully follow, but before that, they had a degree of international recognition about what they were doing and were building momentum. That is also important, because it results in pressure on the UK and the UK authorities if there is on-going momentum and pressure, and there is no response. We have the principle of parliamentary sovereignty, but core principles of the UK constitution are also the principle of democracy and the principle of the union. Those are also important points that come in.

Professor Renwick: On the written constitution question, I would say that, in principle, it would be desirable for the UK to have a written constitution. However, the process of getting there would be like the process of negotiating Brexit times 10 and the benefits of having a written constitution would not be sufficiently great to justify that kind of process. It is important to clarify specific points, such as, preferably, when a referendum on Scottish independence could and would take place, but I would not try to write a complete written constitution.

On Mr Brown’s question about why Scotland is being treated differently, I agree with Elisenda Casanas Adam’s answer, in that I do not think that Scotland is being treated differently. One point here is that, as was very clear from the evidence in the previous session, the degree to which the principle of Scotland’s right of self-determination is recognised in UK constitutional practice is quite unusual.

Regarding the particular form of referendums, I have looked at referendums a great deal—a little bit before the Brexit referendum and a great deal since the Brexit referendum. In the Brexit referendum, we saw that having a momentous decision made on the basis of one national vote, without really thinking very carefully about the procedures around that vote and without ensuring that there is some stability in the view expressed in that vote, is inadequate and does not lead to losers’ consent, which is the term that was used in the session two weeks ago.

You suggested, Mr Brown, that the Brexit vote is accepted as legitimate—yes, but with great

reluctance. Millions of people signed a petition in the wake of that vote protesting that it was an illegitimate outcome. Many people would still argue that it was an illegitimate outcome, even if they accepted it. An independent Scotland does not want to start in those sorts of circumstances.

I can go back a little bit again to Northern Ireland, though I completely accept what Mr Bibby said about the fact that the cases are very different. There is a lot of thinking in parts of the nationalist movement in Northern Ireland and in the Republic of Ireland about the circumstances in which people would want a united Ireland to develop and a lot of concern that, if a united Ireland emerged in circumstances of great division and conflict, that would be a very poor start.

These kinds of issues arise in many different contexts. How can a decision-making process be designed that allows the democratic will of the people of Scotland to be expressed but allows that will to be developed and informed, so that people think about things seriously, and allows some confidence that it is a decision that will stick and that people will remain confident about? That is an important thing to try to do, and I guess that all the evidence that we have been discussing in these sessions has been oriented towards thinking about how you can achieve that.

Professor McEwen: I agree with a lot of that. It is important that the referendum, should there be one, is perceived as fair on all sides of the debate. The 2014 referendum was perceived in that way. Given that that is how referendums have been conducted in the United Kingdom, a departure from that would probably be perceived as unfair. The 1979 referendum was perceived as unfair, given the threshold that was imposed at that time.

10:45

However, it is important that there is a deliberative process in advance of a referendum, so that we can be as sure as possible that the decision is as informed as possible and reflected upon, and is a decision that, as Alan Renwick said, would stick and would be stable. There is no right and perfect way to do this, but the perception of legitimacy from all sides of the debate is crucial and important to remember. We saw this with Brexit, and it would be even more the case with an independence referendum: the referendum is the first step in a very long process of negotiating and transitioning to an independent Scotland. If you want to ensure that people come with you on that journey, the perception of the legitimacy of the process that led to it is all the more important.

Keith Brown: I do not disagree about ensuring that a referendum is fair and I accept the points about the process leading up to it. However, there

is little point in doing that unless you are going to have a referendum, and that is the point that we are stuck at.

On Professor Renwick's point, empirically the evidence does not support his statement that Scotland is not being treated differently. It was treated differently in 1979, and even in 1997, as asking a second question was a very different mechanism in a referendum. Secondly, we are treating Scotland differently just now by talking about maybe having a coincidental referendum for part of Scotland at the same time, or imposing something like the settled will or a supermajority, or all these different conditions that would apply—none of that was involved in the Brexit referendum. It is fine to say that we should learn from the mess that was the Brexit referendum, but the point that I was trying to make was about the way in which the state is perceived to treat different parts of the UK differently.

However, I am very grateful to the panel for the answers that they have given.

Professor Blick: On the point about whether Scotland is treated differently, and if so why, the threshold was applied to Wales as well in 1979; it is just that Wales voted no by the majority of those voting anyway, so the threshold did not kick in. However, the answer to that again is politics, which is the point that I made earlier. The threshold requirement was inserted because of divisions within the then governing Labour Party over whether it wanted devolution or the referendum itself to happen. The way in which referendums have been different subsequently, and whether we hold a referendum on a particular thing, is again to do with the ad hoc way in which we have handled referendums in the UK up to now and, unless something changes, will continue to handle them. That is why the politics is so important.

Often, the pattern has been that referendums have much to do with the internal politics of whichever party or coalition of parties is in power at a given time. The likelihood is that a future Scottish independence referendum will be determined by politics, particularly the internal politics of whichever party or parties are in power, and we must be aware of that. There are many different circumstances in which a referendum could happen. There could be political circumstances in which it is seen that there is very large support for independence, both sides accept that the game is up—this may sound like a very optimistic kind of version—and it is all amicable. You could have two referendums, a first referendum in which there is a large majority, and then a negotiation period in which the rest of the UK accepts that this is what is going to happen, negotiations are cordial and then it is confirmed by

a second referendum. I can see how that could make a two-referendum option attractive.

There could be a completely different situation in which a referendum is wrung out of the teeth of a Government somehow and it is all very bad natured, and there is a very narrow result one way or the other. Then maybe, if there are two referendums, there is a negotiation period in which the remaining UK Government wants to be seen to be as tough as possible. There are many ways in which it could happen. Whenever we think about mechanisms or how things might play out, we need to be aware of that. The politics of the time will play a huge role in whether the referendum happens and in the way in which it plays out. Although it is right, and I am pleased, that the committee is looking at mechanisms, and it would be great to get a clearer mechanism because the lack of a mechanism is a problem, we must appreciate that the politics is still going to be in there.

The Convener: Thank you. Mr Halcro Johnston

Jamie Halcro Johnston: I was going to ask the panel, as a final point, whether they think that any political party or Government that was serious about independence, serious about being honest with the public, would publish any secret plans that it has for independence and referendums ahead of an election, which they are asking people to vote on, but I feel that I might be getting slightly into the politics there, so, unless you particularly disagree or have a point on that, I would be happy to leave it there.

George Adam: The plan is that you all know about the secret plan.

Jamie Halcro Johnston: You have talked about the secret plan. I am sure that Keith Brown knows what it is.

The Convener: I will not press the panel to respond to that one. Thank you all for your contributions this morning. It has been a most interesting session. We now move into private session.

10:51

Meeting continued in private until 11:06.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: sp.info@parliament.scot



The Scottish Parliament
Pàrlamaid na h-Alba