OFFICIAL REPORT
AITHISG OIFIGEIL

Constitution, Europe, External Affairs and Culture Committee

Thursday 11 December 2025

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Session 6

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CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE
33rd 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 Ailsa Henderson (University of Edinburgh)
Professor André Lecours (University of Ottawa)
Richard Lochhead (Minister for Business and Employment)
Professor Aoife O'Donoghue (Queen's University Belfast)
Dr Lea Raible (University of Glasgow)
Professor Nikos Skoutaris (University of East Anglia)
Brian Whittle (South Scotland) (Con)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Constitution, Europe, External Affairs and Culture Committee

Thursday 11 December 2025

[The Convener opened the meeting at 08:32]

Decision on Taking Business in Private

The Convener (Clare Adamson): Good morning, and a warm welcome to the 33rd meeting in 2025 of the Constitution, Europe, External Affairs and Culture Committee. We have received apologies from Stephen Kerr. We welcome Brian Whittle, who is not a substitute but is joining us for the stage 2 proceedings.

The first agenda item is a decision on taking business in private. Does the committee agree to take in private at a future meeting our consideration of the stage 1 report on the Desecration of War Memorials (Scotland) Bill?

Members *indicated agreement.*

UEFA European Championship (Scotland) Bill: Stage 2

08:32

The Convener: The next agenda item is consideration of the UEFA European Championship (Scotland) Bill at stage 2. I welcome Richard Lochhead, Minister for Business and Employment, and his officials to the meeting.

We will move straight to the stage 2 proceedings.

The question is, that sections 1 and 2 be agreed. Are we all agreed?

Sections 1 and 2 agreed to.

Section 3—Exception for charity auctions

The Convener: Section 3 is on ticket touting. Amendment 3, in the name of Stephen Kerr, is grouped with amendment 4. I invite Jamie Halcro Johnston to move amendment 3 and speak to both the amendments in the group.

Jamie Halcro Johnston (Highlands and Islands) (Con): I will speak on behalf of Stephen Kerr to his amendments 3 and 4 in this first group on ticket touting. The amendments are modest, reasonable and entirely consistent with the committee's stage 1 findings, but they address two important weaknesses in the bill as introduced—proportionality in the treatment of community fundraising and the bill's limited ability to deal with online and cross-border touting.

Amendment 3 deals with proportionality. The bill exempts charities from touting offences, but it draws that line too narrowly. Across Scotland, community-controlled bodies, parent councils, community councils and schools routinely raffle or auction donated tickets to raise funds for pupils, local facilities and other causes. Those groups are not commercial enterprises, and they are certainly not touts. Their activities fall squarely into the category of legitimate, socially beneficial fundraising, but, as drafted, the bill would criminalise those activities if a school or community body sought to raise money by offering donated tickets. That cannot be what ministers intended.

Amendment 3 would therefore expand the exemption in a controlled and responsible way, recognising that community fundraising is not the target of that part of the bill.

At stage 1, the committee stressed that the bill must avoid overreach while still satisfying UEFA's requirements. This is a clear example of where a small adjustment would avoid an unnecessary and

unintended consequence without compromising the integrity of the touting ban.

Amendment 4 seeks to address a different concern: the territorial limits of the bill's enforcement. Much touting now takes place online and is routed through platforms and sellers that might be operating elsewhere in the United Kingdom or abroad, but the bill regulates only what takes place in Scotland. The evidence that we heard makes it clear that that creates a potential weakness in enforcement.

Amendment 4 would not prejudice the right solution, and nor would it impose obligations on other Governments; it would simply require the Scottish ministers to report formally on the steps that they have taken to secure intergovernmental co-operation, including with the United Kingdom Government, the Welsh Government and the Government of Ireland, and to report early enough for any gaps to be addressed before the championship period. If the Government is already engaging formally, it should have no difficulty in setting out that work transparently to the committee and to Parliament. If the Government is not doing that engagement, the need for amendment 4 is all the greater.

Both amendments are constructive and proportionate. They would ensure that the bill does what it is supposed to do, which is to prevent touting that exploits fans, without inadvertently criminalising schools or community groups and without leaving enforcement gaps that undermine the purpose of the legislation. I invite the minister to respond clearly on those points and to consider accepting the amendments.

I move amendment 3.

The Convener: As no other member wishes to speak, I invite the minister to speak to the amendments.

The Minister for Business and Employment (Richard Lochhead): In lodging amendment 3, Stephen Kerr seeks to widen the exceptions for ticket touting in a way that would risk increasing scope for exploitation by touts. The purpose of the touting offence in the bill is to prevent those who are looking to resell Euro 2028 tickets for their own gain from doing so. We must therefore seek to keep resale exemptions as tightly drawn as possible, to avoid creating easy loopholes that some may try to exploit.

The current provision in the bill ties the charity auction exemption to charity registers where they exist. That provides strong assurance that those who claim the exemption are indeed charitable in nature and that any funds raised will be used entirely for charitable purposes. It also provides a clear way—through the published register—for enforcement bodies to identify whether an organisation that is seeking to utilise the exemption is eligible to do so.

Assurances would not be as strong if the exemption was widened to include the bodies that are set out in amendment 3. For example, there is no central register for community-controlled bodies, which would make verification more challenging. Further, the legislation that defines community-controlled bodies—the Community Empowerment (Scotland) Act 2015—does not set out to regulate those bodies and their use of funds. It might therefore be difficult to establish that moneys that are raised from an auction are used solely for charitable purposes.

Many Scottish schools and community groups are already charities, or are associated with registered charities, and would therefore be able to benefit from the exemption as it stands. Of course, it is open to those that are not currently registered to consider whether they can do so—after all, they have until 2028 to do so. For example, we know that there are already more than 400 Scottish charities that are associated with publicly funded schools. Those include parent-teacher associations, parent councils, after-school clubs, extracurricular groups and uniform banks.

It would be untrue to say that local groups cannot register as charities. More than half of the charities that are registered in Scotland work in their local areas, and more than two fifths of them operate locally in a specific place, community or neighbourhood.

Jamie Halcro Johnston: On the point about registering, is there a concern that some organisations might fall foul of the provision because they are not aware that they have to register? What information will the Government provide on that? Will any advice or guidance be given to ensure that organisations fall within the law?

Richard Lochhead: I am happy to consider further how we advertise the charity exemption to alert organisations to the fact that they can take advantage of that. We can certainly give some thought to that but, as I have outlined, the legislation has to be tightly controlled.

It would also be untrue to say that small groups cannot register. More than one quarter of Scottish charities have an income of less than £5,000, and two thirds have no paid staff and are run by volunteers.

Amendment 3 would increase the risk that the exemption could be exploited by those who claimed to be raising funds for charitable purposes but who were, in fact, seeking a profit. The Scottish Parliament has previously legislated on charity regulation, in part to give us exactly the

assurance that we need in this case—that we can have confidence in how funds are raised and used.

Furthermore, section 3 includes conditions that, if satisfied, will enable charities that are based outwith Scotland to benefit from the exemption, thereby ensuring that there is no discrimination between Scottish charities and other charities. Amendment 3 does not include a mechanism to determine whether bodies that are equivalent to community councils, for example, should benefit from the exemption.

On amendment 4, we have a track record of producing bespoke legislation for major events in Scotland. We have done so again, with this bill, to meet UEFA's requirements, in accordance with UEFA's timetable and within the constraints on parliamentary time, given the 2026 election. We are in regular discussion with the Governments of other host nations to ensure a coherent approach. We understand that the Welsh Government and the Northern Ireland Executive have no plans to introduce primary legislation, the Republic of Ireland has existing legislation that prohibits ticket touting, and the UK Government has indicated that it is still working through how best to deliver UEFA's requirements.

I know that committee members will be interested in the UK Government's announcement last month that it intends to explore possible legislative solutions to prevent live event ticket touting more generally. We will continue to engage with the UK Government as its proposals to address that issue and those relating to dynamic pricing take shape.

However, it is not for the Scottish ministers to make announcements for other hosting Governments. As such, we cannot commit to providing a meaningful report to the Parliament within the timeline that is set out in amendment 4, nor would it be in our gift to remedy that. There is a possibility that the UK Government will legislate for its jurisdiction beyond the proposed timeline for reporting.

Instead, I propose that amendments 10 and 12, which are on "Review of Act" and which will be debated later, provide assurance that the Scottish Government will report to the Parliament on engagement with the other host nation Governments as part of reporting on the impact of the legislation.

Therefore, I encourage members to resist amendments 3 and 4.

The Convener: I invite Mr Halcro Johnston to wind up the debate and to press or withdraw amendment 3.

Jamie Halcro Johnston: As I said, I am speaking to the amendments on behalf of Stephen Kerr. Mr Kerr, Mr Whittle and I met the minister to discuss the issue, and I think that Mr Kerr would be happy to have further discussions. On that basis, I seek to withdraw amendment 3.

Amendment 3, by agreement, withdrawn.

The Convener: The question is, that schedule 1 be—[*Interruption*.] I am sorry—it has been a while since I have done this.

Section 3 agreed to.

Sections 4 and 5 agreed to.

Schedule 1 agreed to.

After section 5

Amendment 4 not moved.

Section 6 agreed to.

Schedule 2 agreed to

Sections 7 to 10 agreed to.

After section 10

The Convener: Amendment 5, in the name of Jamie Halcro Johnston, is grouped with amendment 11.

Jamie Halcro Johnston: Amendments 5 and 11, in my name, are on compensation for existing street traders. The amendments arise directly from the evidence that the committee took at stage 1, and they reflect a real concern among traders who operate lawfully and who will be significantly affected by the restrictions in the bill.

The bill requires Glasgow City Council to offer alternative trading arrangements to licensed traders who are displaced from the event zones. On paper, that sounds reasonable, but, in practice, as we have heard, the alternative sites might be well away from fan zones, the stadium and the busy routes where traders would normally expect to earn the bulk of their income. Being moved from a prime location to a low footfall site is not an alternative in any meaningful commercial sense. Indeed, for many traders, particularly small independent operators, it could mean losing the most lucrative trading days that they could have had in years.

08:45

It is important to be absolutely clear about this: these restrictions are not being imposed for reasons of public safety, because of the needs of the city or to support the local community. They are being imposed to meet UEFA's commercial requirements and to protect the exclusive rights of global sponsors. If the restrictions force small

Scottish traders off pitches that they have operated from for years, it should not be the Scottish taxpayer who bears the cost.

Therefore, amendment 5 would require ministers to make formal representation to UEFA, seeking funding for a compensation scheme that would reflect the genuine loss of revenue that traders might face. It also seeks to ensure that any scheme can operate only if UEFA funds not just the compensation itself but the full administrative costs of running it. That is essential, because we cannot have a situation in which public money is being quietly used to underwrite UEFA's commercial model.

Amendment 11 is a simple consequential amendment that would ensure that the regulation-making powers aligned with the scheme, should UEFA agree to fund it.

Traders are not asking for special treatment—they are asking for fairness. They are willing to adjust, and they recognise the importance of hosting major events. However, they should not be asked to absorb financial losses created solely to protect the interests of a large Euro organisation. The amendments provide a balanced and reasonable way of addressing that injustice, and I invite the minister to confirm whether the Government has already made any such representations to UEFA—and if not, why not—and to consider supporting the amendments.

I move amendment 5.

Patrick Harvie (Glasgow) (Green): I can understand why Jamie Halcro Johnston thinks that, in specific instances where traders have made a loss, that loss might be compensated, but I point out that there will also be significant circumstances in which traders gain additional opportunities. They might well be in other places, but there will be opportunities that would not have been there if the tournament had not been happening. Can he say, either in an intervention now or in his closing comments, whether it is his view that the Government ought to try to establish a situation in which there are no losses and no benefits—and if so, tell us how he intends to recoup the additional benefits that will be gained—or is he trying to suggest that losses should be compensated and benefits pocketed?

Jamie Halcro Johnston: Mr Harvie makes an important point. Obviously, there will be benefits to the city and to many businesses in the city, but our concern is with the specific sites that certain traders have been operating from for a considerable time. They will not benefit to the same extent—indeed, they might not benefit at all—if they lose those sites. Overall, there will, of course, be benefits to the city and to many businesses, but the concern is that certain traders might lose out because of the approach, despite all the tourists, visitors and football fans coming in.

Patrick Harvie: I am unclear about Jamie Halcro Johnston's thinking with regard to street traders being moved from one site to another, and how we can disaggregate the losses from the benefits and develop a compensation scheme that could not be taken advantage of pretty ruthlessly.

Keith Brown (Clackmannanshire and Dunblane) (SNP): Mr Halcro Johnston has been telling us about what traders are asking for, but what process has he followed to find that out? I would also just note the point that Neil Bibby, I think, made in an earlier evidence session that this is pretty much a take-it-or-leave-it kind of deal with UEFA. It calls the shots. If you really want to host the championships, do you not feel that these are pointless amendments?

Jamie Halcro Johnston: I will come back on that question at the end, convener.

The Convener: That is fine. I call the minister.

Richard Lochhead: It is important that small businesses, including street traders, can benefit from the opportunity of Scotland hosting Euro 2028. We want to make things as easy as possible for those affected by event zones, which is why the bill ensures that there will be guidance on the measures that will be put in place and that street traders who cannot trade where they normally would will be offered alternative arrangements. For example, the licensing authority may waive the application fee for a temporary licence at an alternative location for those whose current licence would normally allow them to trade in the event zones, but who, because of this legislation, will not be able to do so. The measures are consistent with the legislation that the Scottish Parliament passed for Scotland to meet the conditions of hosting Euro 2020 matches.

I understand that Glasgow City Council has provided the committee with reassurance on some of those points. It has indicated that the council's street trader web page makes potential applicants and licence holders aware of possible restrictions on trade that might come into force for the tournament.

However, compensation can only be paid when there is an actual loss. As this is a one-off tournament, the Euro 2028 matches at Hampden park will provide street traders with an opportunity that is over and above what they could expect in any other year. Street traders are also not prohibited from trading outright during the rest of the tournament. As I have stated, we are putting measures in place to support street traders to trade outwith the event zones.

We will continue to work with Glasgow Life, Glasgow City Council and other partners to involve local businesses and communities in the delivery of Euro 2028, but we agree with UEFA and UK & Ireland 2028 Ltd on the point that there is no loss to be compensated. There is therefore no basis upon which to make the kind of representations to UEFA that amendment 5 would require.

I thank Jamie Halcro Johnston for setting out his rationale for amendments 5 and 11, but I hope that he might now agree that they are not needed and that he will not press amendment 5 or move amendment 11. Should he not agree, I encourage members to resist the amendments.

Jamie Halcro Johnston: The minister said that there is no loss to be considered, but we do not know that. If a business is moved away from a city centre location to an alternative location, for example, that alternative location might not be as beneficial to that business as its existing location. An alternative site is not necessarily a site that will allow the business to do the same amount of business that it would have done, even if there are large numbers of people.

Given that some of the fan zones will have other competition in prime locations, I am afraid that I do not accept that the guarantees that the alternative locations—

George Adam (Paisley) (SNP): Will Mr Halcro Johnston take an intervention?

Jamie Halcro Johnston: Of course.

George Adam: I have a point of clarification. I know that everybody will laugh when I say that all roads lead to Paisley, but they do. St Mirren are in a cup final at Hampden on Sunday and a street trader has appeared out of nowhere and is doing reasonable trade both at a pitch in the town centre and, as he is quite mobile, at the games. Is it not the case that the entrepreneurial spirit of the individuals who are running these businesses means that they will find a way to sell their goods?

Jamie Halcro Johnston: I applaud Mr Adam for getting St Mirren into the conversation so early. His comment about the street trader is very much to the point. A mobile street trader can go where they think the business will be, but this is a restriction on being able to go where the business is.

George Adam: Glasgow will be the venue; it is not just Hampden park. That is the scenario. The venue is, effectively, all of Glasgow.

Jamie Halcro Johnston: I recognise that, but I am sure that Mr Adam will also accept that not every part of Glasgow will be as busy as others. That is our concern.

I will pick up on some of the other points. Mr Brown said that it is take it or leave it. That is the problem—it should not be. The point of our scrutiny of the bill is to make sure that we look out for people's interests. We all accept that the event will be fantastic and that it will bring many opportunities, but we also have to look at those who are impacted, if not losing out.

I appreciate all the points that have been made. As I said, I am happy to work with the minister and have further conversations on the point. We need to look at the issue in more detail and, if the minister is happy to meet me—

Richard Lochhead: Will the member take an intervention?

Jamie Halcro Johnston: Yes.

Richard Lochhead: I am happy to have further discussions to reassure Jamie Halcro Johnston. We have a range of concerns about setting a precedent that could apply to major events that Scotland holds in the future, and about how we define loss. I am arguing that there is no loss but, even if we were to accept that there could be some kind of loss, how would we define compensation? There is a range of issues that could set an unfortunate precedent and would lead to lots of complications. I am, however, happy to discuss those issues further with the member.

Amendment 5, by agreement, withdrawn.

Section 11 agreed to.

Section 12—Ban on advertising within event zones

The Convener: Amendment 6, in the name of George Adam, is grouped with amendments 7 and 1.

George Adam: I will be quite concise. At stage 1, a clear line was drawn—commercial activity can be restricted, but social or political activity should not be, even if commercial brands are involved. I am pleased that the Government agrees with that, and I thank the minister for engaging with me constructively on the matter. My amendments will protect fundamental rights by ensuring that the exemption for demonstrations cannot be stripped away later by regulations. There is also a need to deliver the bill's core purpose—safeguarding UEFA's commercial rights—which is what amendment 1 does, so I will support it.

I move amendment 6.

Richard Lochhead: I agree that we must protect our civil rights to protest, as the committee's stage 1 report says. That is why we ensured that such activity would not be caught by the bill's advertising offence. Amendments 6 and 7, in the name of George Adam, make that clear. I

welcome the amendments, which signal the special value that we place on protecting those rights, and I hope that members will support them.

In relation to my amendment 1, the bill is essential to meeting UEFA's commercial rights protections requirements to allow Scotland to host UEFA Euro 2028 in Glasgow. One of the requirements is that unauthorised advertising in designated areas must be an offence. The bill seeks to take a proportionate response to restricting outdoor advertising, and one of the ways in which it does that is by allowing existing advertising to remain in place as long as it is not in direct competition with one of the tournament's sponsors or commercial partners.

Such areas of competition are identified in a list of product categories at paragraph 5(3) of schedule 3 to the bill. At its core, the exemption for existing adverts is a provision that we negotiated with UEFA for Euro 2020, and the provision now needs to be updated so that we can continue to meet UEFA's hosting requirements. Engagement with UEFA since the bill's introduction has identified some additional categories that need to be included if the provision is to operate as intended. Amendment 1 will give effect to that by amending the list at paragraph 5(3) of schedule 3.

I ask the committee to support amendment 1 so that the bill can fulfil its primary function—meeting UEFA's hosting requirements—and, in so doing, enable Euro 2028 matches to be held in Scotland, with all the attendant benefits that will accrue from that.

Patrick Harvie: I welcome the fact that there is clear agreement across the committee and the Government on the need to draw a distinction between commercial activity and social or political expression. I welcome George Adam's amendments and the Government's support for them.

Keith Brown: I have a very quick comment. The previous amendments that we discussed, and the ones in this group, provide a way of finding the right line to be drawn. We might face the issue again, because the Government might make a bid to host the women's world cup in Scotland, and I do not know what restrictions we will face from FIFA in relation to Scotland's participation in the upcoming world cup. On the one hand, we are right to try to avoid precedents that we would find it hard to repeat. On the other hand, we need to find the right balance between people's rights and the imposition of whatever requirements are set by UEFA or FIFA. I support the amendments in the group.

The Convener: I invite Mr Adam to wind up the debate and to press or withdraw amendment 6.

George Adam: I have nothing to add. I press amendment 6.

Amendment 6 agreed to.

Amendment 7 moved—[George Adam]—and agreed to.

Section 12, as amended, agreed to.

Schedule 3—Advertising offence: exemptions for certain types of activity

Amendment 1 moved—[Richard Lochhead]—and agreed to.

Schedule 3, as amended, agreed to.

Sections 13 to 21 agreed to.

Section 22—Power to enter and search

09:00

The Convener: Amendment 8, in the name of Stephen Kerr, is grouped with amendments 9 and 2.

Jamie Halcro Johnston: I will speak to amendments in the group on enforcement powers, which include an amendment in Stephen Kerr's name and an amendment in my name.

Amendments 8 and 9 seek to bring proportion, clarity and essential safeguards to the bill's more intrusive and far-reaching powers. At stage 1, the committee heard repeated concerns about the breadth of the enforcement regime and its powers of entry, search, seizure, concealment and even destruction of property. Those concerns did not come from fringe voices; they were raised by legal experts, civil liberties organisations and those with practical enforcement experience. The message was clear: those powers might be justified in principle, but the bill, as drafted, lacked the necessary checks and balances to ensure their fair use in practice.

Amendment 8, lodged by Stephen Kerr, takes a straightforward and entirely reasonable step. It ensures that, when an enforcement officer enters premises, the occupier has the right to "request an explanation", "observe" what is being done and, where they believe entry to be "unlawful", to raise that concern with Glasgow City Council. The right to know why enforcement officers have entered your property and the right to witness the actions being taken are not dramatic interventions; they reflect basic principles of natural justice. Without such safeguards, the balance of power is tilted too far in favour of enforcement officials, who are acting on behalf of UEFA's commercial interests rather than the public interest.

Amendment 9, in my name, addresses one of the bill's more troubling aspects: the use of

reasonable force. As the bill is currently drafted, reasonable force to enter a property without a warrant can be used if

“the constable reasonably believes that there is a real and substantial risk that delay in seeking a warrant would defeat or prejudice the purpose of taking action”,

which is far too broad.

The use of reasonable force without a warrant should happen in only the most severe circumstances. My amendment therefore restricts the ability to enter a property without a warrant to when there is an

“immediate risk to public safety”,

which brings the power back into proportion and ensures that it is used only when it is genuinely necessary.

Amendments 8 and 9 do not impede the ability to enforce the bill effectively or weaken the protection that UEFA requires. They ensure that, when the state grants coercive authority to individuals who act on behalf of a commercial event, that authority is exercised transparently, accountably and proportionately. If ministers are confident that the enforcement regime is already balanced, they should be able to explain clearly why such basic safeguards are not acceptable. If they cannot do so, that is an argument for the amendments themselves. I invite the minister to respond to those points.

I move amendment 8.

Richard Lochhead: Amendment 2 is a technical amendment that defines the term “constable”. Linking it to the relevant existing definition in the Police and Fire Reform (Scotland) Act 2012 ensures absolute clarity on who can and who cannot use the powers that the bill makes available to constables. I hope that members will be able to support it.

I have listened carefully to Jamie Halcro Johnston, who set out why Stephen Kerr lodged amendment 8. The amendment would give certain rights to the occupier of a place entered or the person who gave permission for it to be entered. The bill already contains a number of safeguards on the use of enforcement powers, which are based on previous experience of major events and were developed with input from Police Scotland and Glasgow City Council. Government officials undertook that engagement to ensure that measures would be workable in practice.

However, Mr Kerr appears to seek further safeguards. Paragraphs (a) and (b) of the subsection that amendment 8 would insert into the bill would mean that the occupier of the premises would have to be informed of why the premises are being entered and searched, and it would allow the occupier to be present for the search. Recent engagement with Police Scotland has confirmed that such actions amount to good practice. Although it is not necessarily essential to place such a requirement in the bill, it is possible to do so.

However, we want to get views from Glasgow City Council before making any final decision on that, and I cannot support amendment 8 based on the proposed paragraph (c). There is a question whether it would be more appropriate for the proposed report of unlawful entry that is set out in paragraph (c) to be made to Glasgow City Council or to Police Scotland. It would not be appropriate to agree to the amendment while that question is in doubt. It could create a wrong expectation about what action might be taken if someone thinks that an unlawful entry has taken place. Moreover, Police Scotland and Glasgow City Council have existing mechanisms in place for making a complaint, if that is what is sought by the person who is subject to enforcement action.

I ask Jamie Halcro Johnston not to press amendment 8 on Stephen Kerr’s behalf, to allow more time for consultation with operational partners, especially Glasgow City Council, and to consider whether an amendment that covers the points that are raised in the proposed paragraphs (a) and (b) of amendment 8 might be possible at stage 3.

In response to Jamie Halcro Johnston’s amendment 9, it might help to explain the rationale behind the power to use reasonable force to enter a premises for the purpose of carrying out enforcement action. Enforcement officers must be able to take swift action to tackle offences under the bill, which allows a police constable, or an enforcement officer when authorised by a police constable, to use reasonable force in situations where the police constable

“reasonably believes that there is a real and substantial risk that delay in seeking a warrant would defeat or prejudice the purpose of taking action”.

If that power can be used only in situations in which there is an immediate risk to public safety, the ability of enforcement officers to take action, such as securing evidence before it can be destroyed or investigating crimes under the bill, would be severely harmed or restricted. That could undermine the entire bill’s core purpose.

It would be unworkable in practice to take enforcement action if amendment 9 were passed, and there is a risk that it would undermine confidence in the event. For those reasons, I cannot support amendment 9 and I ask members to resist it.

The Convener: Do any committee members wish to take part in the debate?

Patrick Harvie: It is perhaps a bit out of character for me to say that an amendment in Stephen Kerr's name seems reasonable but, on first reading, I did not see anything in amendment 8 that appeared particularly harmful. However, having thought about it a little more, the rights that it sets out could, in some circumstances, be problematic. For example, the right to observe searches might cause unnecessary disputes in situations in which an individual is being disruptive or posing a threat to others around them. The minister referred to the point about reporting entry to Glasgow City Council, and I am a bit worried that that would raise expectations that the council would always have the ability to do something about that. I am not entirely clear how that would be helpful, so I do not feel that amendment 8 should be supported.

For the reasons that the minister set out, I have problems with amendment 9 because of the risk of the opportunity that could be taken to destroy evidence.

Jamie Halcro Johnston: Just to respond to Mr Harvie's comments, I am sure that Stephen Kerr, wherever he is, will be as alarmed as you are by the near consensus. I take your points on board, and I am sure that Mr Kerr would, too. As has been the theme, I am sure that he would be happy to work further with the minister on the matter, because there does seem to be some agreement in that area.

I also recognise your concerns about my amendment 9. However, as such situations often involve commercial interest, the use of force has to be reasonable. I am not sure that that issue is covered in the bill, which is why, following consultation with others, I lodged that amendment. I am happy to include your point in conversations with the minister, if he is happy to have those conversations in relation to both of those amendments.

Amendment 8, by agreement, withdrawn.

Section 22 agreed to.

Section 23 agreed to.

Section 24—Use of reasonable force

Amendment 9 not moved.

Section 24 agreed to.

Sections 25 to 29 agreed to.

Schedule 4 agreed to.

Sections 30 to 34 agreed to.

After section 34

The Convener: Amendment 13, in the name of Brian Whittle, is grouped with amendments 10 and 12.

Brian Whittle (South Scotland) (Con): I thank the minister for his early and regular engagement on the bill. My concern arose from the wording in section 22 of the bill—"Power to enter and search"—and the wording around search and seizure of counterfeit goods or, as the bill describes them, "infringing articles". I raised that concern in a meeting with the minister to discuss the bill.

Although I do not oppose seizing or destroying illegal material, it is important to make clear the definitions in and interpretations of the legislation and the processes to prevent overreach and threats to legitimate traders. The bill makes it clear that ticket touting, trading or advertising in event zones at prohibited times are offences. However, many exceptions are written into the bill.

In addition, I acknowledge that UK law makes it illegal to produce and sell counterfeit goods, but that is not listed as an offence in the bill, which creates an uncertainty around whether it is a championship offence, as defined in the bill. For reference, a "Championship offence" is described in the bill as having the

"meaning given by section 18(1)(a)",

which is on "General enforcement powers". It says:

"An enforcement officer may take such reasonable steps as the officer considers necessary ... for the purpose of preventing or ending the commission of an offence under this Act (a 'Championship offence')".

Through amendment 13, I am trying to ensure that there is guidance on what constitutes such an offence and to give clarity to Police Scotland and councils on what they should act on and how they should do so.

I move amendment 13.

George Adam: I seem to be continually following Mr Whittle, but that is always the case. Even in his advanced years, he would still be way ahead of me.

The committee recommended that the Scottish Government work with Glasgow City Council to monitor and report on the bill's human rights impacts. Amendment 10 and the consequential amendment 12 would ensure that the Scottish Government reviews and reports on the act's provisions in a timely manner. They would also ensure that those who enforce the act are involved in that review and, importantly, they set a deadline for completion of that review. I hope that members will support amendments 10 and 12.

Richard Lochhead: Turning first to amendment 13, in Brian Whittle's name, the meaning of a championship offence is already given in the bill itself. Section 18(1)(a) of the bill sets out that "Championship offence" means an "offence under this Act". No further guidance should be required. In any case, it is not usual practice for the Scottish ministers to issue guidance about the meaning of new criminal offences. The Scottish Government, along with our partners, will seek to raise awareness of the bill and the offences under it, as is usual practice. Linked to that, there is already a duty for Glasgow City Council to issue guidance about trading and advertising in event zones to help businesses and the public to understand the relevant provisions.

Regarding enforcement action, it will be for Police Scotland and Glasgow City Council, as well as the Lord Advocate and the Crown Office and Procurator Fiscal Service, to consider how best to investigate, enforce and prosecute offences in the bill. Providing detailed guidance to those bodies on operational matters is not the Scottish Government's role, so I ask the committee to resist Brian Whittle's amendment 13.

Turning to amendments 10 and 12, in George Adam's name, we are already working closely with our delivery partners on the bill's provisions and how they will be evaluated. Given the committee's strong interest in the potential impacts of the bill's provisions, we are happy to support those amendments. We will continue to work closely with our delivery partners to report in a timely manner, and those amendments will underpin our undertaking to do so.

Brian Whittle: I have to say that there is ambiguity in the definition of a championship offence as it compares with UK law. It is incredibly important that such an offence is defined, so I will press amendment 13.

The Convener: The question is, that amendment 13 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

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

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Motherwell and Wishaw) (SNP)
Bibby, Neil (West Scotland) (Lab)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Harvie, Patrick (Glasgow) (Green)

The Convener: The result of the division is: For 1, Against 5, Abstentions 0.

Amendment 13 disagreed to.

09:15

Amendment 10 moved—[George Adam]—and agreed to.

Section 35 agreed to.

Section 36—Regulation-making powers

Amendment 11 not moved.

Section 36 agreed to.

Section 37—Interpretation

Amendment 2 moved—[Richard Lochhead]—and agreed to.

Section 37, as amended, agreed to.

Section 38 agreed to.

Section 39—Repeal

Amendment 12 moved—[George Adam]—and agreed to.

Section 39, as amended, agreed to.

Section 40 agreed to.

Long title agreed to.

The Convener: That ends our consideration of the bill at stage 2. We will pause to let the minister and his officials leave the room. I thank them very much for their attendance.

09:17

Meeting suspended.

09:36

On resuming—

Legal Mechanism for any Independence Referendum

The Convener: Good morning, again, and a warm welcome back to the meeting. Our next agenda item is continuation of our evidence taking on a legal mechanism for any independence referendum.

I hope that I get the witnesses' names right—please correct me if I am wrong. We are joined in the room by Professor Nikos Skoutaris, professor of European constitutional law, University of East Anglia; Dr Lea Raible, school of law, University of Glasgow; and Professor Ailsa Henderson, professor of political science, University of Edinburgh. We are joined online by Professor Aoife O'Donoghue, school of law, Queen's University Belfast, as well as, for the second week in a row, a guest from Canada—and I want to thank Professor André Lecours, professor of political studies, University of Ottawa, for his early rise. Thank you all for your written submissions, which have been very helpful in our deliberations.

We have heard in our evidence taking that, especially in the wake of the Supreme Court ruling, the Scottish Parliament does not have the competence to legislate for another independence referendum. Is there any merit in seeking to formally establish the circumstances in which a referendum could take place? Moreover, do you have any views on what that legal framework or procedure could look like, or what framework or procedure could be arrived at?

I will go from left to right, starting with Dr Raible.

Dr Lea Raible (University of Glasgow): The short answer is yes, I think that there is merit in establishing what a procedure would look like, because matters of process are really important, particularly when it comes to securing loser's consent and ensuring that the losing side is prepared to accept any result that comes out of a process. That is important not just after but before a referendum; after all, there are losing sides both before and after the process. They might, or might not, be the same, as the case may be, but they both exist nevertheless.

As I said in my written submission with regard to what I think any regulation should look like, evidence from international experience and public opinion—I am sure that my colleague Professor Henderson will say more about that—actually point to having a mechanism that establishes more autonomy for Scottish institutions than is currently the case. If there is a tight hold on questions of process by the parent state—the metropolitan state—of any entities that have some secessionist pressures within them, it seems to further instability rather than stability. That might seem a bit counterintuitive, but it is, in my view, quite conclusive.

Professor Nikos Skoutaris (University of East Anglia): To sum up the points made in the two previous evidence sessions, there is no doubt that Scotland has the right to self-determination, but it is not clear how it would exercise that right. It is clear in the sense that, if Westminster allows it to do so, it can, but it is very difficult to do it unilaterally, especially in the aftermath of the Supreme Court judgment.

On whether there is merit in proceduralising the right to secession, I have argued in favour of that in my work. Apart from the reasons that Dr Raible summed up, proceduralising the right to secession helps with avoidance of constant constitutional conflict when it is not clear when and how the right will be exercised. We tend to have situations whereby that becomes an open wound, with the sides fighting over the procedure all the time, so it is important to clarify the rules that can lead to the right being exercised.

Professor Ailsa Henderson (University of Edinburgh): The paper that I submitted focuses entirely on public opinion because it explores the understanding of losers' consent and the importance of process and procedure. We know that an accepted procedure that builds trust and confidence in the democratic process is important. It is important that any democratic event is perceived to be both free and fair. That is true for elections and referendums, but the binary and highly polarised nature of referendums means that process is all the more important.

When we study attitudes to process, we often look at attitudes to democratic satisfaction. Having looked at democratic satisfaction before and after referendums, one thing that we know is that the key determinant of losers' consent—democratic satisfaction and an acceptance of the result after the fact—is how people feel about the process. We also know that all that connects to a body of work that is being undertaken in Northern Ireland and Scotland about attitudes to process around referendums, and we think that it is incredibly important that we identify beforehand a process that is seen as mutually acceptable to all sides.

Professor André Lecours (University of Ottawa): I agree with everything that my colleagues have said. From an international perspective, the 2014 agreement between the Scottish and British Governments on the parameters of the referendum has been quite inspiring, in the sense that the context was that the British Government accepted as unproblematic that Scotland could have a referendum on

independence. The question now is what can be done in the absence of such consent. As has been said, that is completely unclear.

Coming from Canada, it would be remiss of me not to mention that, in 1980 and 1995, referendums on independence in Québec were held, not in the presence of opposition from the federal Government, but in the absence of any explicit acceptance of such a referendum. Both times, the federal Government implicitly accepted the legitimacy of an independence referendum by participating in the campaigns. I live in a federation where sovereignty is divided and power is constitutionally divided. However, it is certainly the position of all Québec political parties—not only those who support independence—that the Québec Government can exercise its right to self-determination independently of the position of the federal Government on that issue. It is a different constitutional context and a different type of state; I simply want to mention that that is the political situation and the political positioning here in Canada.

The Convener: Last but by no means least, we turn to Professor O'Donoghue.

Professor Aoife O'Donoghue (Queen's University Belfast): I also agree with everything that my colleagues have said. From an international legal perspective, the process has very minimal requirements: any process would have to facilitate a free and open decision-making process. That is not a risk with regard to Scotland, but it would be the only international legal requirement—that the process would be free, open and fully democratic.

With regards to Northern Ireland, there is obviously more detail on what must happen, but I think that it is a question of the degree of detail, which would not necessarily be there. For instance, with the United Kingdom, generally, Westminster has to act with rigorous impartiality when it comes to a referendum on Northern Ireland, so it cannot take sides in that discussion. I suggest that that is different from what happened in Scotland, as regards political parties taking positions from London.

09:45

There are also things to be thought about in relation to the duties to act in Northern Ireland. Professor Henderson mentioned public opinion, but we have had cases about what evidence the Secretary of State for Northern Ireland must take, and the courts were uneasy with giving a lot of detail on that. The evidence would probably be about elections mixed with opinion polls, but information on the amount and the degree—for example, whether there have to be five opinion polls or six and so on—is not there.

As all my colleagues have said, processes are really important, but there is an important question about how much detail you want and how much you want to put parameters around the ability to act. For instance, with regard to Northern Ireland, on whether there must be a referendum in the republic, politically, it is likely that there would be one but, legally, that is an open question. There is a question about the degree to which you want to write down every element, because specifying can lead to questions of judicial review, which has already happened in the McCord case in Northern Ireland, with regards to what evidence the secretary of state needs.

So, my answer is yes, but there is a question about how much detail you want to have written down.

The Convener: I have a follow-up question for Professor O'Donoghue. Professor Skoutaris mentioned the right to self-determination but, given the organisation of the UK, individual citizens in Northern Ireland have a completely different set of circumstances to get to a united Ireland or whatever compared to citizens in Scotland, and devolution is different again in Wales. Is there a danger that citizens are left with different rights across the UK?

Professor O'Donoghue: There is differentiation—devolution already does that. That is the big difference between the UK and Canada and Quebec, where there is a federal system, with divided forms of sovereignty. Devolution is based on the idea of differentiation. In the recent For Women Scotland case, the question was around equality. Northern Ireland has devolved control over equality, but Scotland does not. So there already is differentiation between what citizens can and cannot do.

International law does not really interest itself in domestic matters unless a violation of rights is going on, and self-determination is a collective right. I mentioned the McCord case, which was a judicial review that was based on the processes that the secretary of state would follow, and not on McCord's right to self-determination—that was not touched on at all. Self-determination is a collective right of a people, which from a legal perspective makes it more difficult to bring cases before a court because, for the people as an entity, having standing is much more difficult.

There is differentiation. Another difference is that it is recognised that Dublin and the Republic of Ireland have an interest in how Northern Ireland is run. Obviously, no other sovereign state has that kind of interest in Scotland.

There is differentiation and a difference in what is recognised as an ability to process the right of self-determination. It is recognised that the people of Scotland have a right to self-determination and have already exercised it in choosing internal self-determination in the form of devolution. However, on the next step, absolutely, there is a fundamental difference between Northern Ireland, Wales, Scotland and England.

The Convener: Does anyone else want to comment on that?

Professor Skoutaris: I will make one point. I completely agree with Professor O'Donoghue on how the internal right to self-determination is exercised. The UK is not the only place where there is differentiation in relation to how the right to self-determination is exercised. For example, in France, there is recognition of the right to self-determination with regard to New Caledonia, and there were referendums, but it does not apply to other nations and people. Therefore, it is not unprecedented. I am not saying that it is the best practice, but it is not unprecedented—it is not something that we do not see elsewhere in the world.

Keith Brown: Good morning. I thank witnesses for coming along and for their submissions.

I have two questions to begin with, but if I get a chance, I might come back in again. This is a follow-up to the convener's question. I am trying to draw out the extent to which the UK is different from other jurisdictions, not least in the way that it treats different parts of its devolved areas and—I do not know what they are called these days—its dominions.

I am struck that, before the referendum that we had in 2014, we were told that Scotland was going to be the most powerful devolved legislature in the world. I am also aware that, in December last year, the UK Government, by order in council, changed the constitution of the Turks and Caicos Islands to allow a law enacted by the legislature to make provision for holding a referendum on a matter of national importance. The second part of that order says:

> "The question of whether the Turks and Caicos Islands should seek any amendment to this Constitution that may result in their independence shall be deemed to be a matter of national importance."

So, the law gives the power to the Turks and Caicos Islands to hold a referendum and for it to have the effect of achieving independence.

On the other examples that we have just heard, I think that I am right in saying that, in Northern Ireland, the criteria for whether a referendum should be held seems to be whether there is likely to be support for a united Ireland. One of the things to be taken into account is whether the Secretary of State thinks that it is likely to be supported. The exact reverse seems to be the case in Scotland, because it was felt by the UK Government in 2014 that there would be no prospect of Scotland voting yes. Yesterday, we saw a poll again show majority support for independence. That seems to be the motivating factor for the UK deciding whether to support a referendum.

I would like to draw out how unusual and asymmetrical the UK is in the way that it decides these things, because that will eventually tell us whether the position is sustainable. I know that these things do not show a consistent pattern across the world, but the UK seems to be way out there in terms of the inconsistency of how it deals with such issues. Do witnesses have any comments on that?

Dr Raible: The fact that such entities are treated differently by the parent or metropolitan state is something that we see internationally as well. It depends on the political interests, political will and political constellations, so how those entities are treated is highly context-specific.

You have described the different situation with regard to the Turks and Caicos Islands. I am not familiar with that situation, so I would not want to say anything about that, but, if it is true that the Turks and Caicos Islands have a right to hold a referendum on the question of independence but Scottish institutions in the current constitutional set-up do not, that is a discrepancy. It is possible, of course, that in the longer run that may lead to a constitutional grievance, and to political grievances.

I will go back to the opening question, because that is exactly why seeking agreement on a process before the question of whether a referendum should be held is important. It reduces the amount of that grievance, in order to make some space to govern while opinions are formed, and for exchanging views on the details of the potential outcomes of any such question. What should Scottish life in the union look like? What should Scottish independence look like? If the process question is removed, there is more space to discuss potential outcomes. What you said in your question emphasises that looking for a process that is agreeable to everyone has many advantages.

Keith Brown: Do other members of the panel want to come in on that? I suppose that my question is: if all the parties agree that Scotland has a right to self-determination, and yet there is no route beyond one party being able to say, "No, it's not going to happen," how sustainable is that?

Professor Skoutaris: With regard to the point about the Turks and Caicos Islands, I refer to what

Professors Tomkins and McHarg said in the committee's first evidence session in the inquiry. They emphasised that we need to differentiate between former colonies and the case of Scotland.

On your main question, I think that it is true that the UK is a special case, but that is very much to do with the basic features of the constitution—it is a system of political constitutionalism, which means that the UK constitution can change with one vote in Westminster, with a majority of one.

That gives incredible flexibility, which is perhaps why it is arguably easy—I put that in quotation marks—for Scotland to get an independence referendum, whereas the Spanish regions would need a constitutional amendment. However, at the same time, precisely because we are talking about a system of political constitutionalism, if there is no willingness or co-operation from the centre, that leads to constitutional grievances. That is why I think that the inquiry that the committee is doing now is important—we need to clarify the rules regarding how the rights will be exercised.

Professor Henderson: From a public opinion perspective, the Scottish electorate is roughly divided into thirds: one third want a referendum as soon as possible, one third wish there never to be another, and one third are in the middle. On the issue of a mandate, the plurality position in the Scottish electorate is that it should be the Scottish Government's right to call. However, when we talk about when that referendum should happen, we have to distinguish between two issues. One is timing—that is, when a referendum should ideally take place—and the other is what should trigger the Scottish Government calling a possible referendum. When we ask about the trigger, 40 per cent of the electorate—this is by far the most popular option—say that it should be if there is clear and sustained evidence that independence is the preferred option. That is very similar to the situation with Northern Ireland and the Good Friday agreement. When we ask the public what that clear and sustained evidence would look like, around a third say that it should be just five polls showing 60 per cent support for independence, and another third say that it should be at least two years of opinion polls showing majority support for independence. Public opinion gives us guidance about how the public understand possible triggers for a referendum.

I have another point on process, which concerns the lesson that we can take from Quebec—André Lecours will be able to contribute far more on this than I can. The referendum result there in 1995 was very close, and support for independence remained very high afterwards, but then fell slowly. One interpretation of that is that external circumstances—economic conditions—changed, so people formed different opinions about independence. Another interpretation is that the entire procedural process in Canada—the Clarity Act, the discussions about process and the acknowledgement that, should there be a wish to have a referendum, there is at least a process by which to have one—might well have taken the sting out of support for independence.

It could well be that issues of process are important in and of themselves, but it is also the case that issues of process could well have an impact on how the wider electorate feels about constitutional change.

The Convener: I will bring in Professor O'Donoghue on that.

10:00

Professor O'Donoghue: I want to make two small points. One of them is about the way in which parliamentary sovereignty is sometimes framed in this process. There are questions about the UK constitution, and parliamentary sovereignty is unique in the sense that it is the ultimate authority in the UK constitution. However, devolution unsettles that position in some ways, because people have chosen devolution through a democratic process—referendums. Although there is some scepticism in the UK about referendums, given more recent history, the idea of an exercise that claims internal self-determination is very important, and it has a much longer history in relation to UK constitutional reforms. For example, Northern Ireland chose home rule, which was basically devolution, rather than joining what was then the Irish Free State, which, at that point, was a dominion.

The other point that I want to make relates to the first break-up of the United Kingdom, which was the creation of the Irish Free State. In that sense, it is important to consider the mix of different elements of law that were used. The process by which that happened was entirely unconstitutional, if we look at the UK constitution alone, and the parameters and core elements were very similar to those that exist now. However, you must also consider layers such as the international law requirements and Ireland's claim to self-determination, as well as recognition. It is important to note that, if Scotland decided that processes were not being put in place, resulting in more grievances, and made some sort of unilateral declaration, such moves fail or succeed on the basis of whether other states recognise that unilateral act of self-determination. That approach sometimes succeeds, but more often does not.

In relation to the sustainability of the UK denying recognition, the UK recognised Northern Ireland in 1921 following the creation of what was then the Irish Free State, which was a dominion at first but

then, over time, became entirely independent. Therefore, the UK is probably more familiar than a lot of other states are with processes for changing internal and external self-determination through political negotiation, international law and domestic law.

Keith Brown: When I studied parliamentary sovereignty, it was recognised—certainly by my lecturers—that the concept is mythical. For example, the idea that the UK Parliament could legislate to award Scotland the world cup next year is nonsense. It is bound by international agreements and all sorts of other limitations—at the time, it was bound by membership of the European Union, for example. However, the one thing that the UK Parliament did not seem to be bound by was public opinion or what the people actually thought, because it could exercise its power in the face of public opinion.

The precedent is that we agree on the principle of a referendum and then agree on the process, so it seems unlikely that we will be able to agree on the process beforehand in the way that Professor Henderson suggested we should. I still think that we are underestimating the extent to which the UK is unique in its irrationality and the fact that it has no basis or principles for dealing with different areas in relation to these issues.

In his written submission, Professor Skoutaris mentions the limitations on the Scottish Parliament following the Supreme Court's ruling, but he says that the Scottish Parliament could, within devolved competence, ask

"whether the people of Scotland support the Scottish Government entering negotiations with the UK Government for the issuing of a section 30 Order".

Despite the UK Government's intransigence, he gave that as an example of a way in which the matter could be advanced, which is quite interesting. Do the other witnesses have a view on that? Are there other possible ways in which to progress the issue?

I will bring in Professor Skoutaris first, given that I quoted him.

Professor Skoutaris: Thank you very much for referring to my written evidence. That part of my evidence relates to the discussion that the committee had in its first evidence session, mainly with Professor McHarg, and in its second evidence session, with Professor Renwick, on whether there is the possibility for a democratic trigger mechanism. Professor McHarg referred to work that has been done by people such as Dr Eustace on the problem of the union reservation. What does that mean? It means that, after the judgment of the Supreme Court, we are not sure whether the Scottish Parliament is allowed to do anything that would touch on the union between the UK and Scotland.

I tried to create a probable legal argument about what the Scottish Parliament could do to create a democratic trigger mechanism. I went back to the judgment of the Supreme Court, where the point is made that the Scottish Government can still engage in negotiations with the UK Government about section 30 of the Scotland Act 1998. Perhaps a democratic process could be created, whether that is a consultation, a petition—as Professor Renwick said—or, at the extreme end, even a referendum. Through that, the Scottish Government would be asking for authority from the Scottish people to engage in negotiation, which would not be about the union between England and Scotland, but about whether the Scottish Government has the power, authority and legitimacy to engage in negotiations to be given the right to organise a referendum. I am not 100 per cent sure that that argument would work in the Supreme Court, but, in my mind, it is as close as I can get to a democratic trigger mechanism that could work within the limits that are set by the judgment.

Dr Raible: I, too, read Professor Skoutaris's written submission with great interest. I agree with him that that would be basically the only legal avenue left—technically—after the Supreme Court's ruling, but I have some doubts, so I read the situation a little bit differently as to how it would be received. Negotiations are clearly possible, as the Supreme Court says and as has been repeatedly accepted by broadly everyone involved. However, on whether the Supreme Court would see the holding of a referendum on that as not pertaining to the union, if it were to look at it again, I am not sure. Negotiations are one thing, but holding a referendum, particularly in a political constitutionalist context, would have a very heavy political weight and might be perceived to be circumventing what the Supreme Court has said before. There is a worry that that would further entrench fronts. I might be wrong about that, but that would be a worry, and thought should be given to it before embarking on that avenue.

Keith Brown: I wonder how interventionist the UK Government—with the backing of the Supreme Court, if it happened—would become. What if it were to say in Scotland, "You're not going to have a referendum even to discuss section 30 with us"? Imagine if the state had intervened in the referendum that was held by Strathclyde Regional Council on water privatisation. There are consequences for continuing to prevent any discussion of these things. It is not a zero-sum game where it stops there—there are consequences. For example, if the Scottish Parliament, with the required majority, were to decide to cease its current session to force an

election based solely on independence, how far could the Supreme Court and the UK Government continue to go to prevent the question from being asked?

Dr Raible: I would not want to speculate on how far they would continue to go on that. The signal from the last ruling about this, which was the independence referendum reference, was that those are not legal arguments that the court is prepared to hear; instead, it referred to "political" processes. That is my reading of the situation. I would not want to speculate on how far they would go otherwise.

Professor Henderson: I can speak to the consequences in terms of public opinion. In addition to running the Scottish election study, I co-lead the state of the union survey. We run surveys in Scotland, Wales, Northern Ireland and England that look at attitudes to national identity and governance, and how people feel the union is running and how it should run.

We have observed an increasing level of what we would call ambivalent unionism within all four parts of the UK, not just Scotland. We ask people whether they prioritise the union as it is, whether they want independence for their own part or, if they do not want independence for their own part, whether, if one or more other parts of the UK decide to go their own way, their view is "So be it—I do not want to go but if somebody else goes, that is fine."

If, of those with a view, we add the proportion who want independence and the proportion who opt for ambivalent unionism, we get more than the majority of the electorate in all four parts of the UK. The first thing to note is that support for independence in Scotland is higher than it is anywhere else, but that does not mean that there is a considerable level of satisfaction with the union in other parts of the UK. There is an incredible level of ambivalence about it, as well as grievance, often about what appears to be inappropriate Scottish access to influence and resources.

We know that that is what is going on in public opinion, and it is coupled with what has been, at times, a muscular unionist approach from UK Governments of either partisan stripe of late, and they do not sit easily with each other. We have noted that, as measures of muscular unionism increase, levels of ambivalent unionism also increase. There is a direct relationship between how the UK talks about the union and whether it appears to be on transmit or receive about benefits of the union or problems with it, and the consequences of that across the UK, not just in Scotland.

Professor Lecours: Self-determination issues are almost completely about politics. The situation that you have in the UK would be almost unthinkable in Canada. If the federal Government of Canada was to try to prevent the Québec Government from holding any kind of self-determination referendum, there would be so much political pressure and such a political price to pay that the Government of Canada would not even think of going in that direction. In Canada and Québec, there is a natural political mechanism at work that translates into the Québec Government being able to hold a referendum on anything at any time.

The referendums in Québec have, of course, not been as clearly about independence as the 2014 Scottish referendum was, and that might account for some of the difference. The referendum in 1980 was especially interesting, because it was meant to be a two-stage referendum, akin to the process that one of my colleagues described in so far as the Québec Government first asked Québecers for a mandate to negotiate a new arrangement with Canada. If that question had been answered with a yes, I presume that, after subsequent negotiations, there would have been another vote. That was not the structure that was used in the 1995 referendum, but it was similarly on a question that could be interpreted as being about independence although it could also have been interpreted as being about other things.

The difference between the two countries is partly a result of different political situations and partly a result of the dynamics and the discourse that lie around the question that is asked.

Professor O'Donoghue: In order for international law to have any purchase in that narrative, if there was consistent denial that accelerated to a point at which questions about democracy were raised, it could become an international law issue. However, that bar is extremely high. Six or seven years ago, there was a discussion about Catalonia, because the Spanish Government had started arresting and imprisoning people when the referendum was held. The discussion was about whether the situation was reaching the level at which international law should start to take note and whether the right to self-determination was being oppressed. Scholars had mixed views on whether they thought that what was going on in Catalonia was reaching that level, and things have subsequently calmed down again.

10:15

For international law and the mechanisms to start to take note, there would have to be consistent denial, and it would have to start

reaching an extreme level, because when it comes to the actual laws that can be used, international law values territorial integrity over explicit external self-determination. Therefore, although international law could have something to say, things would have to get very serious indeed before it would do so.

Keith Brown: Thank you.

The Convener: On international courts, I remember taking evidence from Sir David Edward before the referendum in 2014. He said that there was no mechanism to take citizenship away from an individual and we talked about the circumstances. I think that Nicola Sturgeon said at the time that, unless there was a significant change in circumstance, there would not be another referendum but, of course, we have been taken out of the EU, and we have all lost our EU citizenship, unless we are lucky enough to have a grandparent or to be married to someone from the European Union.

We talk about international law, but is there not a human rights issue here? Things have happened to Scotland that were against the democratic will of the Scottish people, yet we still have a barrier to determining how we want to take things forward.

Professor O'Donoghue is nodding her head, so she can come in first.

Professor O'Donoghue: Self-determination is a collective right, not an individual right, so it is very difficult to use international legal mechanisms. That is quite intentional. It is not in the interests of states that are already recognised to allow mechanisms to occur.

There are instances where things have come before courts. The Kosovo opinion from the International Court of Justice is an example, but that was an advisory opinion—actually, it was not an advisory opinion; rather, it was a decision that was taken by another state. Until you are a state and recognised as such in international law, you are caught in a catch-22 situation, because you are trying to act like a state, but if you are not recognised as a state, you cannot do that yet.

The issue could be raised—you could go through the United Nations General Assembly and so on—but you would have to get quite a number of other states to come in on your side. An element of peer recognition is required in order for you to exercise that right of self-determination before a court.

On the human rights element of losing things such as citizenship, a number of cases were taken to the Court of Justice of the European Union on the loss of citizenship, which were all unsuccessful because EU citizenship was not equated, if you like. Citizenship is very much bound to domestic sovereignty and the ability of a state to decide who is and who is not a citizen. That is being very stretched at the moment, because many states are now going against what would have been agreed on as a right not to be made stateless, for instance.

It is very difficult. International law does not make it easy for people to take cases to any courts on the issue. International law is relatively weak and it is designed to be weak, because the states that exist have very little interest in helping parts of their territories break up and claim self-determination. The only area where international law was quite strong on this was around the decolonisation process following world war two, and even that is not fully sorted if we look at places such as Western Sahara or Palestine.

International law is not useful in lots of ways at an individual level or even a collective level in relation to trying to exercise those rights, unless things become really extreme, and I would say that that is unlikely to happen. Obviously, you cannot rule anything out, but the bar is set extremely high for getting to the point where international law would take note.

The Convener: Thank you. Does anyone else want to comment?

Dr Raible: To reiterate what my colleague has said, international law is not where I would look for help with that issue, for exactly the reasons that Professor O'Donoghue has outlined. Some cases from Catalonia were taken to the European Court of Human Rights and were also unsuccessful on human rights grounds. In those cases, the attitude of the central Government was much less permissive than it is in the UK. That gives an indication of how much the situation would need to change for any of this to become relevant at all.

Patrick Harvie: Good morning. In previous sessions in our inquiry, we have ended up in a conversation about whether particular ideas, such as the referendum being "once in a generation" and the settled will of the Scottish people, are merely political rhetoric or whether they have any substance as principles that can be relied on.

I want to explore that question in relation to the point that several of the witnesses today have made, that everyone accepts that it is the right of the people of Scotland to make a decision about their future. Several witnesses have mentioned that there is consensus on that, and that consensus was written down as recently as the Smith commission, when all five political parties that were involved, and both Governments, accepted that. Well, the commission phrased it by saying,

"nothing in this report prevents Scotland becoming an independent country in the future should the people of Scotland so choose",

which is a little more nuanced, but it clearly frames that right as sitting with the people of Scotland and not with anybody else.

Is that simply a piece of political rhetoric that just happens not to have been contested by the political parties that are prominent at the moment? Alternatively, does it have any status as a principle in the UK's unwritten constitution? Is it something that can be relied on in any sense? I am aware that I am asking that at a time when there is a genuine threat that a UK Government could be led by a far-right party, which we should be afraid of for many reasons, including because it was not involved in that process and would presumably argue that it cannot be bound by a principle that was agreed by other political parties.

Is there any sense in which the UK Government's acceptance of that principle has status and can be relied on, or is it as much rhetoric as talking about "once in a generation" is?

Professor Skoutaris: With regard to the two concepts that you discussed in the previous evidence sessions—settled will and once in a generation—I do not have much to add to what has been said. There is consensus that they are pretty much political posturing more than legal benchmarks.

I would distance myself a bit from the discussion that you had with regard to triggering a referendum when it is very clear what the result would be. I think that there was a discussion of that in one of the two previous evidence sessions. I understand from a political stability point of view that it is beneficial to have a referendum when there will not be huge cleavages in society. However, at the same time, the reason why we have referendums many times is precisely to decide on dividing matters.

On your question about whether the fact that everybody recognises that Scotland has a right to self-determination and that it lies with the Scottish people is political posturing and nothing more, I completely appreciate the frustration that might have been created by the fact that it is not very clear how Scotland could actually exercise that right after 2014 and especially after 2016. However, I do not think that it is only political posturing, precisely because we had an independence referendum in 2014. One should not underestimate the fact that Scotland had a choice in 2014. In a way, at a minimum, that creates a precedent that it is possible for Scotland to exercise self-determination.

Again, if one looks at it from a comparative point of view, there are not that many regions or nations within western democratic states that have been there. Québec is an important example, but we have referred to it too many times already, and we can see how difficult the question is when we look at the 2017 Catalonia referendum, or the Basque Country, or the Italian constitutional court case about certain regions in the north, or the German constitutional court on Bavaria. It is not for nothing that Scotland had the independence referendum. Despite the frustration, which I completely understand, we should understand the 2014 Scottish independence referendum as an important precedent for how Scotland might exercise the right to self-determination.

Patrick Harvie: Do any other witnesses want to comment on the extent to which the principle that Scotland has the right to make the decision could be relied on in circumstances in which a political party that disagrees with it comes to power in the UK?

Professor Lecours: I agree completely with what my colleague has just said. We cannot lose sight of the fact that there is substance when we look at things comparatively and see Catalonia, where that right is not acknowledged or recognised to exist by political actors, which has led to a completely different and much more difficult situation for supporters of secession. I do not think that it is purely political rhetoric. There is substance there, even if it still begs the question of how to operationalise such substance. I completely agree with that.

I want to say a bit about settled will, which is a bit of a peculiar Scottish expression from an external's point of view. I understand that it made a ton of sense during the march towards devolution, but, for a couple of reasons, it does not make a whole lot of sense when it comes to secession. First, it is a line often repeated in the secession literature that there has never been a secession from a modern, advanced, industrialised liberal democracy, although there was a partial exception in the secession of Norway from Sweden in 1905. That means that, in the absence of threats to their physical security, it is difficult to convince citizens of such states to support independence.

Secondly, and related, like Québec, Scotland is divided on self-determination. That means it is unlikely that there will ever be enough of a majority to be called a settled will on a question such as that of independence. At the end of the day, the Québec experience shows that, perhaps unfortunately, because independence referenda are important events, they are snapshots. As Professor Henderson said, support for independence in Québec has varied greatly. After the 1995 referendum, it varied in a way that nobody anticipated. It seemed to political actors

and observers that there was a trend towards ever-increasing support for independence, particularly among the youth, but that turned out to be not a trend at all. Support for independence decreased shortly after the 1995 referendum and it never regained the numbers that it showed at that time. After what is now almost 50 years of secessionist politics in Québec in one way or another, we have never seen the settled will, and I do not think that we ever will see it. I therefore think that it is unlikely to exist in Scotland on that question.

10:30

Professor O'Donoghue: I just want to make a few small points.

I agree with what has been said already, but what I would say about a change in political parties is that international law is not determinative. The right to self-determination is an international legal right, so it is not something that can be extinguished by a political party or a change of political parties. It is not within the gift of the UK Parliament to go back to the question of parliamentary sovereignty.

It is recognised within the UK constitutional order that self-determination is possible. Indeed, it has been exercised by all the devolved nations in varying ways—there was, for instance, a border poll in Northern Ireland in 1973. There are lots of such examples. I do not think that a change of governing political party can extinguish that right; it exists already. Of course, there might be a dramatic change in political circumstances, which might, in turn, change the ability to exercise that right as something that international law might intervene in. How that might unfold, though, is beyond my expertise.

Secondly, on the settled will issue, I would go back to the Northern Ireland example. There is a provision that, once a referendum is called, there can be another referendum seven years afterwards. That does not mean that you have to have a referendum every seven years, but it is a part of the UK constitution, set out in the Northern Ireland Act 1998, that there is an acceptance that there is no settled will, even if there has been a once-in-a-generation referendum. In any case, that phrase has no legal meaning or purchase. After all, what is a "generation"?

Therefore, the UK constitution says that, after seven years, a question can be asked again. It does not have to be asked again; it would be for the Secretary of State for Northern Ireland to make that decision. The political reality, though, is that, once there was a referendum in Northern Ireland, the political parties that want independence would probably start saying, "Right—we need to have this every seven years now."

On the idea of a settled will, therefore, there is already part of the UK constitutional order that sort of accepts that there is no such thing, for all the reasons my colleagues have already outlined. There is this idea that, after seven years, it would be possible to again ask people in Northern Ireland what they want.

Patrick Harvie: If we accept—and I hope that I am right about this—that we can continue to rely on the principle that Scotland has the right to decide, or that the people of Scotland have the right to do so, we are still left in the situation where, although we have the right to decide, we may not exercise it. That is the quandary that we find ourselves in.

I want to ask about an issue that I have explored with previous panels—to a mixed reaction, I have to say. If the Scottish Parliament's ability to make a decision is not accepted and the UK Parliament or Government is unwilling to make a decision, is there some other way in which the will of the people of Scotland—not necessarily to decide yes or no to independence, but to make it clear that they are ready to decide on the question of independence—can be expressed, whether through some formal deliberative or participative mechanism or in some informal way that is not directed by, or under the control of, formal political processes? Do any of you see any potential in that space for some form of expression of the will, or the readiness, of the people of Scotland, other than through decisions in one Parliament that is being told that it cannot decide and another Parliament that is unwilling to decide?

Professor Henderson: That is the focus of a considerable amount of work that is happening in Northern Ireland. They are not quite at the point of identifying a deliberative process that might be the end result, but they are using deliberative processes—citizen juries, citizen assemblies, small group discussions and so on—to identify what a mutually acceptable process might look like.

However, the context there is very different, because there is a reasonable expectation that a referendum might result at some point. They are trying to identify a research programme that will help them to plan the very best referendum that they can in the eventuality that it happens, and I think that we are in a slightly different situation in Scotland. Nevertheless, a considerable amount of research is coming out of John Garry's team at Queen's University Belfast, and I would encourage you to look at it.

Professor O'Donoghue: A number of projects are going on on the island of Ireland. Some of

them are led by academics and others by civil society groups, or civil society groups with academics. For example, feminist groups and women’s groups are working on various activities, as are cross-border rural women’s groups. A lot of grass-roots work is being done, particularly on bringing together groups that disagree.

Lots of interesting academic work is also being done on this, but I would also look to the less formal spaces in which these conversations are occurring. It is important to get people to think through the implications. One of the issues with the referendum in Scotland was the white paper, what it presented, its neutrality and what it meant. People need to feel that they are engaged in the process, including in constitution writing, which is slightly alien to the UK in the sense of writing everything down in one place, although obviously it has a documented constitution. That makes Northern Ireland slightly different in that we are dealing with another state that has a fully documented constitution.

People need to get involved in the political discussion about the type of state that they would like to have, including in legal drafting. I am in a law school, so I am obviously more familiar with and have been involved in that work. It is also about enabling and encouraging grass-roots organisations and civil society groups to have discussions about how they would go about thinking of themselves as an independent state.

It is also about getting people to think about losers’ consent and, if there was an independent Scotland, how they would like it to be and what links they would like to keep with Britain. For Northern Ireland, the interests that Dublin can now exercise in Northern Ireland would shift to London, so there is an acceptance that London would still be involved with Northern Ireland in the way that Dublin is currently involved with Northern Ireland.

It is about thinking through what people would actually like, from the formal processes to the encouragement of more ground-level discussions and engagement. There are other options that people could consider, such as further devolution, and they are extremely important.

Professor Skoutaris: I agree with what Professors O’Donoghue and Henderson have said. The problems that have been pointed to in the previous sessions are to do with the cumulative effect of the Supreme Court case law, especially in cases such as an independence referendum bill, the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill and the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. The way in which union preservation has been spelled out limits the constitutional space that the Scottish Parliament has to create a consultative or democratic process to test the issue of independence. Professor McHarg pointed to that problem in her evidence.

That is why, in my evidence, I tried to think about whether there is a way to circumvent that. I suggested moving the posts and, instead of asking about independence and the union, asking whether the Government has the authorisation of the people to engage in negotiations with the UK about allowing a referendum.

I appreciate what Dr Raible said, and I have the same concerns. I would not be 100 per cent sure that that would be a winning argument, but it is a possibility. I also accept that Westminster can pass a law tomorrow that says that the issue is outwith the competence of the Scottish Parliament—there is no doubt about that. However, given the strict limitations that the Supreme Court has set, other than the informal processes to which the previous speakers have pointed, what I propose in my written evidence is the only thing that came to mind.

Dr Raible: I agree with what has been said, but I would like to add a couple of points. First, there is a lot of merit in talking about these things formally and informally. Informal discussions are valuable because they stress that separatist desires, whether they are actualised in an independent state or not, are a process and not an event. Most often, that process takes a long time, particularly if it is non-violent. A lot of things need to be considered about the process of getting there and, if an agreement mechanism for a referendum is triggered, what happens after that. Those are valuable discussions to have.

The example that I mention in my written submission, of Switzerland and the secession of one canton from another canton within a federation, is a good analogy because it actually happened in a democratic way. It therefore gives an idea of all the steps that would be necessary if a referendum was to be held and it resulted in a yes vote for independence. Informal processes before a referendum is held are helpful in determining the process of triggering a referendum and in getting inspiration from the people about what would happen afterwards. That might change attitudes and help with democratic certainty and accountability, which is what is referred to in the scope of the inquiry.

Informal processes are therefore probably more important than legal certainty at this point. They would be really valuable.

The Convener: As there are no further questions from the committee, that concludes our questioning this morning. I thank you all for an interesting session and for all the work that you did prior to the meeting to send your briefings to the

committee. I wish you all a safe journey home and a rest, especially if you have got up in the middle of the night in Canada.

Meeting closed at 10:42.

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