



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

REFERENDUM (SCOTLAND) BILL COMMITTEE

Thursday 8 November 2012

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REFERENDUM (SCOTLAND) BILL COMMITTEE

3rd Meeting 2012, Session 4

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*James Kelly (Rutherglen) (Lab)

COMMITTEE MEMBERS

*Annabelle Ewing (Mid Scotland and Fife) (SNP)

*Linda Fabiani (East Kilbride) (SNP)

*Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab)

*Rob Gibson (Caithness, Sutherland and Ross) (SNP)

*Annabel Goldie (West Scotland) (Con)

*Patrick Harvie (Glasgow) (Green)

Stewart Maxwell (West Scotland) (SNP)

*Stuart McMillan (West Scotland) (SNP)

*Tavish Scott (Shetland Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bill Kidd (Glasgow Anniesland) (SNP) (Committee Substitute)

Professor Aileen McHarg (University of Strathclyde)

Michael Moore MP (Secretary of State for Scotland)

Alan Trench (University College London)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 1

Scottish Parliament

Referendum (Scotland) Bill Committee

Thursday 8 November 2012

[The Convener *opened the meeting at 09:45*]

Interests

The Convener (Bruce Crawford): Good morning, folks, and welcome to the third meeting of the Referendum (Scotland) Bill Committee. I ask anyone who has a mobile phone switched on to switch it off so that we do not have any unnecessary interruptions.

Stewart Maxwell has sent his apologies and Bill Kidd is attending in his place. I welcome Bill to his first meeting of the committee. I am sure that it will not be his last, as we will be looking at these issues for some time.

I invite Bill Kidd to declare any interests that he has.

Bill Kidd (Glasgow Anniesland) (SNP): I have no specific relevant interests to declare at this point.

The Convener: Okay.

Subordinate Legislation

Scotland Act 1998 (Modification of Schedule 5) Order 2013 [Draft]

09:45

The Convener: Item 2 is our oral evidence-taking session. As a preliminary, I mention to the committee that the Subordinate Legislation Committee considered the draft order earlier this week, on Tuesday. It had no points to raise and its report has now been published.

I warmly welcome our first panel of witnesses to the Scottish Parliament and to our deliberations. With us are Professor Aileen McHarg, professor of public law at the University of Strathclyde, and Alan Trench from the constitution unit at University College London and the University of Edinburgh.

Do you want to make some short opening remarks or are you happy to go straight to questions?

Alan Trench (University College London): We are happy to go straight to questions.

The Convener: James Kelly will ask the first question.

James Kelly (Rutherglen) (Lab): Welcome to the committee. Thank you for coming along to give evidence. I would like to start by exploring your views on the document that precedes the section 30 order, which is known as the Edinburgh agreement. What is your understanding of the legal standing of that document?

Professor Aileen McHarg (University of Strathclyde): Its legal standing has been the subject of discussion. My view is that it has no legal standing. The view of the United Kingdom Government, at least, is that it is not intended to create legal relations, and I imagine that that is the Scottish Government's view as well. I believe that it appears on its website with other concordats and memoranda of understanding, and they are generally stated not to be legally binding.

There is a slight doubt, but only a slight one. An argument has been put forward that the other concordats could create legitimate expectations that would be legally enforceable, but in my view that is a tenuous argument. I cannot foresee a situation in which a court would uphold a substantive legitimate expectation based on the memorandum of agreement.

Alan Trench: I agree largely, but not entirely. It is certainly the case that the document is intended not to create legal relations. That is the case generally for intergovernmental agreements and memoranda. The overarching memorandum of

understanding, in its various editions since 1999, has always stated loudly and clearly, “This document does not create any legal relations between the parties.” That is equally true around the world, where similar agreements between various levels or orders of Government are designed not to be binding in law but to be binding politically and in honour.

It would be quite difficult for the courts to engage. However, I am slightly less certain than Professor McHarg that the courts would not find a legitimate expectation in this case. If the Scottish Parliament was to pass legislation that was materially at variance with the provisions of the agreement, that might start to raise an issue in which a legitimate expectation could become involved. That takes one into a yet further and thorny difficulty, because the agreement is between two Governments, not between the legislatures. There is a further question about the extent to which the agreement can bind the Scottish Parliament rather than the Scottish Government, which signed it.

James Kelly: To drill down on a specific point that has been discussed, is there any legal legitimacy for advancing the position—as the First Minister, the Deputy First Minister and the Lord Advocate have done—that the Edinburgh agreement is a legitimate trigger to authorise the release of legal advice on, for example, membership of the European Union post the independence referendum?

Alan Trench: I am rather sceptical about the effect of the agreement in relation to that because, in a sense, the agreement changes nothing. It does not alter any legal position, which will change only once the section 30 order is made. That will bring the holding of a referendum in the way that is provided for in the order within the legislative powers of this Parliament. That is a meaningful change in the powers of the Scottish Parliament and, therefore, the Scottish Government’s responsibilities in relation to that. I cannot see that the agreement itself meaningfully acts as a change in circumstance.

The Convener: The Lord Advocate answered a question about that in the Parliament yesterday. He said:

“the Edinburgh agreement, in laying out an agreed route to independence, provided the basis upon which specific legal advice could be sought. Further, up until that point, it was possible that the referendum could be the subject of court proceedings, with all the uncertainty that that entails. It was possible that the court would rule that this Parliament did not have the power to hold a referendum, in which case the issue would be academic. Following the signing of the Edinburgh agreement, there will be a lawful referendum, so that uncertainty has been removed.”—[*Official Report*, 7 November 2012; c 13131.]

Alan Trench: No, there is an undertaking that uncertainty will be removed. Uncertainty has not yet been removed, because there is no section 30 order, so the Parliament does not yet have the powers.

Professor McHarg: What Alan Trench said is absolutely right. The passing of the section 30 order will make the legal difference.

I say this with some trepidation, because I have not given the matter a great deal of specific thought, but I would have thought that, as a more general proposition, the taking of legal advice on whether something can be done must be different from any other kind of act, because a prior stage in deciding whether one has the power to do something is seeking advice on the issue. Therefore, it seems a somewhat strange argument—I am not saying that it is necessarily wrong—to say that it was impossible to seek legal advice until this point.

Annabelle Ewing (Mid Scotland and Fife) (SNP): Good morning. It is great to see you both here. I have a question for both of you on the last sentence of paragraph 30 of the Edinburgh agreement, which says:

“The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.”

I ask you both to comment on what that means.

Alan Trench: I appear to have drawn the short straw in answering first. I think that it means everything and nothing. However, it is potentially the most important provision in the agreement, because it says in black and white what one would hope to be the case in a more general sense, which is that there is a commitment to mutual co-operation and mutual respect. One of my great concerns about the whole referendum process is the question of what will happen afterwards. It is inevitable that, in a referendum such as the section 30 order and the agreement provide for, one side will win and one will lose. A large number of Scots will have voted for the side that loses. A commitment that both Governments will work together to ensure that there is a proper outcome and a proper process for the referendum, and whatever may happen thereafter, seems to me to be very important.

Professor McHarg: I agree with that. The agreement does not say very much other than what is already in the memoranda of understanding. As Alan Trench said, it can be read in two ways.

We could have a yes vote, in which case there is a commitment to continue negotiating but nothing more than that, so as not to renege on any sense that the outcome of a referendum is

politically binding. Equally, if there is a no vote, there is a commitment that the necessary interaction between the two levels of Government will continue in a good spirit.

Annabel Goldie (West Scotland) (Con): Good morning. My question is for Mr Trench. I thank you for the memorandum that you submitted to the committee. I am interested in teasing out what you say in paragraph 8, in which you discuss the role of the Electoral Commission, which is mentioned in the intergovernmental agreement but not in the section 30 order. I am anxious to establish what you mean when you state that, although

“it would be open to the Parliament to pass a bill that was not in compliance with what the UK and Scottish Governments have agreed, doing so would raise numerous risks.”

You state that the way to avoid those risks is to involve the Electoral Commission. I want to clarify what the risks are. Is one risk the threat that the result of the referendum could be placed in question and subject to challenge?

Alan Trench: There are two sets of risks. One set is broadly legal or constitutional, and the other is more broadly political. The legal and constitutional risks take us back to the point at which we started, which is the question whether there is a legitimate expectation created by the Edinburgh agreement that the referendum will proceed in certain ways, in particular with regard to the involvement of the Electoral Commission, which is now incorporated in the agreement if not in the section 30 order. That is clearly an issue of considerable importance to the UK Government and to the Conservative, Lib Dem and Labour parties. People from those parties have expressed the importance of the involvement of the Electoral Commission, which they would view as a fair ring-holder and regulator of the referendum.

The political consequence would be that the respect in which the result of the referendum is held after it has taken place might be undermined, as the referendum would not be seen by a substantial proportion of the population as having been fair. Fairness—and the perception of fairness—becomes central to the respect that the losing side as well as the winning side will have for the outcome.

Annabel Goldie: I am grateful for that, Mr Trench. Is it your proposition that the insurance policy against such unfortunate outcomes would be the involvement of the Electoral Commission?

Alan Trench: That would appear to be—

Annabel Goldie: That would avoid handbags at dawn.

Alan Trench: I would not put it as bluntly as to say that it is either the Electoral Commission or

handbags at dawn, but the Electoral Commission's involvement acts as a powerful guarantor to many on the pro-union side that the referendum's outcome can be respected and that the process that leads to the referendum, up to and including polling day, is fair.

Annabel Goldie: I infer from what you are saying that there is no pick-and-mix with the Electoral Commission: it is either involved or it is not.

10:00

Alan Trench: That pretty much has to be the position. Let us go back a stage. In 2010, the Scottish Government produced its draft referendum bill consultation paper, which proposed the creation of an ad hoc regulatory commission. The point was used to criticise the Scottish Government's referendum plans at the time.

Given that the paper was based on the inherent powers of the Scottish Parliament to call an independence referendum, with no section 30 order, there was no power to engage with the Electoral Commission, as far as I could see—or rather, the Electoral Commission would have had no power to engage with a referendum that was called in those circumstances. There would have been a legal problem with involving the Electoral Commission under that approach to holding the referendum. That is why the section 30 order solves a significant problem.

The question that was proposed in February 2010 was, in my view, exceptionally cumbersome and unwieldy and would have failed any measure of intelligibility that was imposed by any regulator, whether it was the proposed Scottish referendum commission or the Electoral Commission. It is perhaps brave to second-guess—or first-guess—what a commission might say, but it was hard to see how the question would pass an intelligibility test. Even I struggled to understand what exactly it was asking me to agree to, because the wording was made so convoluted in an attempt to bring the question within the powers of the Scottish Parliament.

If there is a section 30 order, you can ask a real question, not a question that dodges around the main concerns. You are then able to ask the Electoral Commission to give advice on that. The advice about intelligibility will be a key element in ensuring that the outcome can be seen as fair.

Professor McHarg: I agree that there is a need for an independent guarantor of the fairness of the process. Whether it has to be the Electoral Commission is a slightly different issue. I see two sets of arguments for making it the Electoral Commission rather than an ad hoc body. The first

argument is that we have a body that does this, so why would we go to the trouble of inventing a new one? The second argument is the question of trust: given that we have a body that is capable of doing this, why would we not want to use it?

I am not sure about Alan Trench's argument about legality. If we assume that the Scottish Parliament had the inherent power to call a referendum—that is a debatable question—I do not see why it could not have empowered the Electoral Commission to act. I do not see that the fact that the Electoral Commission is established by UK legislation necessarily precludes the conferring of additional functions on it. That might require further debate—anyway, it is an irrelevant question.

Alan Trench: Yes, the question becomes irrelevant.

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab): Mr Trench, in your submission to the committee you said, in paragraph 7:

“The main way by which clarity, fairness and decisiveness will be established—other than by the vote itself—is through the involvement of the Electoral Commission in regulating the referendum and advising on the referendum question.”

Are you content that the section 30 order allows the Electoral Commission to fulfil that role, as it stands?

Alan Trench: I think so. The Electoral Commission is able to fulfil that role. Of course, the order does not mention the Electoral Commission, but the agreement does, which is why we discussed the relationship between the two and why it has a particular, concrete point.

Patricia Ferguson: Does the Electoral Management Board for Scotland have a role in the process? Should it have a role?

Alan Trench: I have not thought enough about that, so I must duck the question at this point, I am afraid.

The Convener: Unless Professor McHarg wants to come in on that point, I will bring in Tavish Scott.

Tavish Scott (Shetland Islands) (LD): Mr Trench, you talked about “involving” the Electoral Commission. What do you mean by “involving”? Would the commission's advice be binding? Would it be guidance that the Parliament would have to accept?

Alan Trench: There is the question of who takes the advice, which will vary. Advice will go partly to the Parliament and partly to the Scottish Government—

Tavish Scott: I am talking about the Parliament, not the Government.

Alan Trench: The implication of where we are is that, in relation to the independence referendum, the Electoral Commission should play the same role that it played in relation to referendums in England on whether to have elected mayors, the 2004 referendum on regional government in north-east England and—perhaps most usefully—the referendum in Wales in March last year on extending the legislative powers of the National Assembly for Wales.

There were problems with how the Welsh referendum worked and there is scope for an argument about the extent of the commission's blame for that. The commission thinks that it did as good a job as could be done in the circumstances, which were certainly unfavourable, given the nature of the referendum issue and the fact that no organisation wished to run a no campaign, which meant that the commission could not designate a campaigning body on either side.

Tavish Scott: We have an agreement that states that the Electoral Commission will be responsible, so the rest is academic. I am interested in this: will the guidance that it produces for Parliament—we are not the Government—be binding on us? Should it be binding on us? Should we treat it as other places have? Other places have never once gone against the commission's advice.

Alan Trench: The commission falls into the category of a body that gives advice rather than provides a direction, but its advice is sufficiently authoritative that it should normally be followed, and one would expect it to be followed.

Tavish Scott: Indeed. You cannot envisage circumstances in which Parliament would not follow that advice.

Alan Trench: If we got to the point where Parliament did not follow the advice, that would raise serious problems for the referendum's conduct and for respect for the outcome.

The Convener: Has the UK Government—not the UK Parliament—ever not taken the Electoral Commission's advice?

Alan Trench: Not as far as I know. I will use the example that I know best, which is the Welsh referendum. The Secretary of State for Wales proposed a referendum question, then the commission went away and did its work to formulate an alternative question, which was quite different from the secretary of state's. The secretary of state adopted the commission's question immediately after it was published.

The Convener: The agreement is clear—if I am clear about it—that the UK Government and the Scottish Government accept that the Electoral Commission will be involved in the question, the

testing issues and the general guidelines for the referendum, but the Electoral Management Board for Scotland will be responsible for delivering the mechanics of the referendum on the ground.

Alan Trench: The Electoral Commission would never undertake to conduct the mechanics of a referendum; that is always delegated to local electoral mechanisms, whatever they may be, such as returning officers and so forth in England and Wales. Scotland has a rather more considered approach, following the problems with the 2007 election and the Gould report.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): Following the legitimate expectations that the Edinburgh agreement has raised, does that agreement ensure that the section 30 order will be clear, decisive and beyond successful legal challenge?

Professor McHarg: I think so. I have seen it suggested that a section 30 order could be challenged as being ultra vires under the Scotland Act 1998. It is a piece of delegated legislation, so it is in principle open to judicial review. However, what is the ground on which it could be challenged? The argument that has been run is that, somehow, we should read into the 1998 act an implied restriction on the ability to devolve any question about the constitution or the union in particular. That does not appear in the act, and the political reality is that no court would run with that argument. The courts have been given a free pass from a difficult legal issue, and I cannot see them not gratefully taking that.

A challenge would not stand a chance, which does not mean that somebody might not try. They might try, but I would not give them any chances of success.

Alan Trench: I agree. I find it inconceivable that someone would bring a legal challenge to this sort of order, particularly given that the order is the very mechanism by which the protected enactments and reserved matters in schedules 4 and 5 to the Scotland Act 1998 can be varied. Also, for the order to have been made, it will have been approved by the House of Commons, the House of Lords and the Scottish Parliament—there can be no clearer and more emphatic an endorsement by elected institutions than that. The courts are rightly reluctant to challenge instruments that have had that level of endorsement by elected bodies.

The Convener: We will remain on the specifics of the order. Linda Fabiani has a question on that.

Linda Fabiani (East Kilbride) (SNP): Patricia Ferguson and I are interested in the transfer of powers on broadcasting and free mailshots that the order allows for the referendum. Will the situation be clear enough for the Scottish

Parliament to properly discuss and come to good decisions on issues such as election expenditure, broadcasting and mailshots and content that goes through people's doors?

Alan Trench: It appears to me to be clear. Do you have any specific concern?

Linda Fabiani: As a non-legal bod, I hear folk like yourselves going on about the legalities, but then I read other parts of the order and wonder whether there is anything in the transfer of powers to allow decisions on broadcasting and mailshots, which are part of the democracy around the referendum. Is there anything to prevent the Parliament from deciding what it believes to be best?

Alan Trench: Yes, if you were to decide that there should be no mailshots and no broadcasting.

Professor McHarg: That is right. There are two potential approaches. The problem is that communications and postal services are reserved matters. As with the general exception to the reservation of the union, there could have been a general exception to the reservation of communications and postal services, in which case it would have been up to the Scottish Parliament to devise the rules. However, the approach that has been taken is a very specific application of the relevant sections of the Political Parties, Elections and Referendums Act 2000. Therefore, I do not think that there is any scope for deviation from that by the Scottish Parliament. You just have to accept that.

Alan Trench: That is really rather a good thing. There was a particular problem in the Welsh context because of the absence of designated yes and no campaigns, which meant that the level of publicity that was given to the referendum was negligible. I think that the turnout was about 35 per cent, which in the circumstances was quite good, given the very limited publicity for the referendum.

The Convener: Patrick Harvie is interested in the order and in some things that it contains and does not contain.

Patrick Harvie (Glasgow) (Green): Good morning. Already during the discussion, members and witnesses have talked about "the question". Does it matter that, in article 3 of the order, the word "question" is not used and it talks only about "two responses" being allowable? In a later article, the order uses the term "question". Does that make a difference? One provision seems to imply that two alternative statements could be offered; the other seems to imply that a question must be asked.

Professor McHarg: You are getting at the possibility that the question could be something like, "Do you want independence or do you want

further devolution?" Is that what you are concerned about?

Patrick Harvie: The order states that only "two responses" are allowable; it does not specify that one of those must be for the status quo. It also does not seem to me to specify the level of independence that might be talked about. For example, one question could be: "Should Scotland have independence over domestic legislation, taxes and benefits?"

Professor McHarg: Article 3 of the order states that the exception to the reservation is

"a referendum on the independence of Scotland".

Patrick Harvie: Yes, but that could mean several things. Already, the Government seems to be proposing independence except in relation to the head of state, the currency and the Bank of England.

10:15

Professor McHarg: Article 3 could mean several things, but there are some things that it clearly does not mean. A referendum that did not ask a question that had anything to do with independence would not fall under section 30, although there would be a question about whether, in any case, that is something that the Parliament would have the power to do.

The question whether one of the answers has to be "No" is a much trickier one. I do not think that that is a reasonable reading of the order, but I see where you are coming from. That is as much as I am willing to say.

Alan Trench: I suspect that the difference in the framing of article 3, which talks about a ballot paper that gives a choice between "two responses", and article 4, which refers to "the question", is a result of the language that is used in the Political Parties, Elections and Referendums Act 2000. I do not know that that is the case—I would have to check—but I suspect that it is. An attempt has probably been made to ensure that article 4, which will modify and apply provisions of what is uncomfortably known as PPERA, works in this context. That is a drafting point that is ever so slightly uncomfortable, but it is necessary to make the thing work, given the framework in which it operates.

As I said at paragraph 12—and, to a degree, paragraph 13—of my memorandum, the criteria that the order requires of the referendum ballot are such that it must offer only two options, which could be framed as statements, such as, "I agree that Scotland should have X," and "I do not agree that Scotland should have X"; or "I agree that Scotland should have Y," and "I do not agree that Scotland should have Y." One of the options—let

us say, X—must be independence rather than something else. In principle, I suppose that it would be possible to have a referendum in which X was independence and Y was some form of enhanced devolution, without there being a status quo option, but I think that that would cause quite serious problems in at least two, and possibly more, respects. One problem would be to do with the intelligibility of the referendum question. As I noted, the criteria that the Electoral Commission uses in assessing intelligibility are not simply to do with the ability to understand the wording; they are also to do with the ability to understand the propositions behind the wording, and the neutrality of that. I think that "neutrality" would normally mean having a yes option and a no option, rather than two "yes and" options.

The other problem that would be thrown up by that approach would be the issue of who would be campaigning on each side. That could trigger difficulties with having designated campaign organisations, which are important for broadcasting and mailshots, which takes us back to the problem that arose in Wales.

Patrick Harvie: I understand that. It just seems to me that although there is political agreement between the two Governments that what is required is what would commonly be called a straightforward "Up or down, yes or no, in or out, independence or the status quo?" referendum, the section 30 order does not specify that.

Professor McHarg: We talked about whether the agreement has any legal status. One way in which it could have legal influence would be as an aid to interpretation. The clear analogy is with the Belfast agreement, which has been used as an aid to interpretation of the Northern Ireland Act 1998. There is a close parallel.

I am firmer on this issue. If the matter were to come before a court, I think that there would—looking at the background of the agreement—be a strong argument for saying that the reasonable interpretation of the intended meaning was a yes/no option on independence, whatever "independence" means.

The Convener: We will have the drafter of the order before us soon; it is a reasonable question to ask the drafter.

Patricia Ferguson has a question in this area, too.

Alan Trench: If I could add one small point—

The Convener: I am sorry, but we need to move on; I am conscious of the time.

Patricia Ferguson: I am sorry, but without wishing to become too esoteric about it all, I just wonder whether any significance or difficulty is

presented by the fact that paragraph 6 of the memorandum states that

“The Order enables the Scottish Parliament to legislate for a referendum with one question on independence”,

whereas article 3 of the draft order states that

“There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses.”

In terms of intelligibility, it would be perhaps smarter if the two more closely reflected one another.

Alan Trench: That is possibly so.

The further point that I was going to make in response to Mr Harvie’s question is that there is a tension between the various objectives that the two Governments have set for the referendum. On the one hand, there is the objective that a referendum be made in Scotland, so there is a need to enable maximum discretion to this Parliament to decide the referendum process, the question and so forth.

On the other hand, there is the objective of ensuring in particular the fairness part of the “legal, clear, fair and decisive” criteria that have been set out by the UK Government, which entails the involvement of the Electoral Commission. It seems to me that the package reaches an effective compromise between those two positions: it ensures that a referendum can be made in Scotland while being subject to overarching procedures and mechanisms that will assure its fairness on all sides.

The Convener: I am conscious of the time, so I ask Tavish Scott—I see that Stuart McMillan also has a question—to move us on to a new area.

Tavish Scott: I am intrigued to find out the perspective of our witnesses. Do you believe that the passing of the section 30 order by the Parliaments here and in London, will change in any way the investigations that Scottish Government officials—civil servants—can undertake into reserved matters?

Professor McHarg: In any statute, there are expressed powers, and there are implied powers; there are implied powers to do that which is necessary to facilitate the achievement of the expressed object. If it is necessary for civil servants in the Scottish Government to undertake such investigations, I think that there is a case for saying that they have the implied powers to do so.

Tavish Scott: Do they have the implied powers now or will that be the case only when the section 30 order is passed?

Professor McHarg: That takes us into the question about the effect of the section 30 order.

Is the section 30 order to confer power, or is it to confirm power?

Tavish Scott: The logic, therefore, would be that the Scottish Government officials would have those powers once the section 30 order is passed.

Professor McHarg: If the order’s effect is to confer power, then that would be the case. However, it seems to me an excessively legalistic approach to say, “You cannot do things in preparation for something that you think will happen and that you as a Government want to happen.”

We have to distinguish between two questions. First, are these kinds of issues likely to come before a court? Unfortunately, the answer is possibly yes, because there are people who have interests in bringing these issues before courts.

Tavish Scott: That is life.

Professor McHarg: The second question is this: how will the courts respond? Judges are not stupid—well, not all of them, anyway—and they do not want to get embroiled in political questions if they can avoid it. Judges do not want to be accused of throwing spanners in the works. On the whole, when you get to issues of great political sensitivity, the courts will back off, particularly if all you are talking about is a technical objection such as “You’ve done this slightly too early” or “You’ve done this by slightly the wrong process.” I just cannot see a court striking down decisions in that kind of context.

In the Robinson case that I mentioned earlier, in which the Belfast agreement was used as an aid to the interpretation of the Northern Ireland Act 1998, there was quite a significant departure from the wording of the Northern Ireland Act in order to maintain a political process. I do not think that it is very realistic to expect successful judicial challenges to any of this stuff.

The Convener: We will move on to a question from Stuart McMillan and then from James Kelly.

Alan Trench: Do you want me to comment on Mr Scott’s question?

Tavish Scott: I would quite like to hear Mr Trench on that.

The Convener: I am sorry.

Alan Trench: I will be brief. I would use a set of reasons that would be different from Professor McHarg’s in arguing to reach broadly the same conclusion. The Scottish Government has always had extensive implied powers to deal with a variety of issues that affect and touch on reserved matters, indirectly if not directly. The international development support for Malawi in particular, which was started under the previous Labour-Lib Dem coalition Government, is an example of the

extent to which there has always been give in the settlement. I incline to the view that the order will be a conferring rather than a confirming order, and that there has nonetheless been a power to do what has been done so far and that that power is increased—slightly, not hugely—by the extent to which the referendum becomes within the legislative competence of the Scottish Parliament.

Stuart McMillan (West Scotland) (SNP): I want to pose a brief question for the millions of people in Scotland who are not legally trained. We have heard a lot this morning, but for the sake of clarity, I say that the Scottish Parliament cannot amend the proposal; we can either pass or reject it. That being the case, is the section 30 order fit for the Parliament to pass?

Alan Trench: Yes. It does what it says on the tin.

Professor McHarg: What is the alternative?

The Convener: Okay. I do not think that we will go down that road at this stage.

James Kelly: I have a question for Mr Trench. In your paper, you put forward the point of view that the section 30 order is required because the Scottish Parliament would not otherwise have the legislative competence to hold a legally binding referendum. The draft order includes an end date for holding the poll—it must be held by 31 December 2014. Is it your view that, if the referendum does not take place by that date and the Parliament tried to hold it after 31 December 2014, it would be acting outwith its legislative competence?

Alan Trench: Yes—quite straightforwardly.

Annabelle Ewing: I read Professor McHarg's blog, which dealt with that point inter alia, and I think that she took a slightly different view of the current scenario.

Professor McHarg: Yes. My view is that the current legal situation is arguable. There is a case for saying that the Parliament already has the power to hold a referendum, but it is not an open-and-shut case. Logically, the passing of a section 30 order makes no difference to that situation, although, in practice, it might do. If I were arguing on the other side, I would say, "Look at what happened for the 2014 referendum. The Scottish Government conceded that it needed a section 30 order." Purely from the point of view of the apparent weight of arguments, I think that the passing of a section 30 order makes a difference.

On the logic of the situation, I think that there remains a case for saying that the Parliament still has the power to hold a referendum.

Tavish Scott: We cannot let that lie.

Patricia Ferguson: That brings up a whole raft of questions, convener.

The Convener: We can spend a couple of minutes on the matter. I have many questions about it, too.

Patricia Ferguson: Would a referendum in the circumstances that have been described be legally binding?

Professor McHarg: It depends on who you are talking about binding. Basically, you are talking about binding the United Kingdom Government. It is clear that the Scottish Parliament cannot, under the section 30 order or any other circumstances, enact a referendum that actually binds the UK Parliament. It could purport to do so, but it could not actually do so.

Alan Trench: There is simply no way that any pre-legislative referendum can be binding. Post-legislative referendums can be, as in Wales in 2011 or here in 1979, as the statute that calls the referendum can declare that certain things will follow the outcome, but there is simply no way that that can be done in this instance.

Patricia Ferguson: So the referendum would be advisory.

Alan Trench: Any referendum will be advisory. In my view—although others disagree with me—that does not bear on the issue of whether it is within legislative competence. In my view, if the pith and substance of the referendum relate to a reserved matter, it would be outwith legislative competence here.

The Convener: I thank the witnesses very much for giving evidence. I am very grateful to them.

We will have a five-minute break before we see the Secretary of State for Scotland.

10:30

Meeting suspended.

10:35

On resuming—

The Convener: I start the second part of this morning's evidence session by giving a warm welcome—following the signing of the historic Edinburgh agreement—to Michael Moore MP, the Secretary of State for Scotland; Laura Crawford, head of constitutional policy at the Scotland Office; and Chris Flatt, deputy director of the corporate and constitution division at the Scotland Office.

Do you wish to make an opening statement, secretary of state?

Michael Moore MP (Secretary of State for Scotland): I welcome the opportunity to be here. I am happy to put on the record my personal thanks to you, convener, for all the work that you did in your previous role to help us to get to the stage that we are at today. In an awful lot of their discussions, the UK Government and the Scottish Government are seen as being in conflict. However, I pay tribute to the fact that, when you were in your previous role, we worked constructively together. What we have reached here is in no small part due to your work.

The Convener: I am grateful for and humbled by that. I thoroughly enjoyed working with you in that regard.

Today, however, we are in a different place and in a slightly different mode. [*Laughter.*] That said, we will open the meeting to questions.

James Kelly: Welcome to the committee, secretary of state, and thank you for coming along to give evidence.

You will be aware that there has been some discussion about the legal standing of the document known as the Edinburgh agreement. Do you accept that it is a political agreement and that it has no legal standing?

Michael Moore: If I may make a small preamble to my response, Mr Kelly, I will say that we need to recognise the historic nature of the agreement. Scotland's two Governments worked through the differences that we had about the way in which we should make our way to a legal, fair and decisive referendum. The proposition has now been presented to both Parliaments that there will be a referendum on a single question on independence. Alongside that, the normal rules and approach to guiding and monitoring the referendum process will be in place, through the use of the Electoral Commission.

What we have set out, in the draft order and in the detail of the agreement between the two Governments, is an important way forward, which I think gives strong political underpinnings to the referendum that is now to take place.

The agreement has the same standing as other agreements between Governments. Both now need to be seen to honour what is in that agreement.

James Kelly: I repeat my question. Do you accept that the Edinburgh agreement is a political agreement that has no legal standing?

Michael Moore: The legal standing—the formal part of this—is the section 30 order. What is beside it is an agreement between the two Governments. I would not undermine it, if I might suggest, by calling it a political agreement. It is very important that it is an agreement between the

two Governments, setting out how we want to see the referendum process carried out.

James Kelly: I will put it another way. Do you accept that the section 30 order is the legal part of the process by which—

Michael Moore: It is the legal transfer of powers from the United Kingdom Parliament to this Parliament.

James Kelly: And that is the logical conclusion of the discussion that you had. However, the agreement itself is not legally binding. With regard to, for example, the First Minister's claims that he had not been able to authorise the release of advice on EU membership after the referendum, it is not legitimate to claim that the agreement gives the green light for such a process.

Michael Moore: The First Minister, the Deputy First Minister and indeed any Scottish Government minister can make their case on that and answer any related questions, but I am absolutely clear that the agreement that sits alongside the order sets out no more than the process for the referendum. I do not accept that, without it, you could not have investigated issues around the central parts of independence, namely membership of the EU or other international bodies. I heard the Deputy First Minister say that in the chamber a couple of weeks ago. The document is straightforward and says what it does in very clear language; it sets out the process that the two Governments have agreed and that is what we will now focus on.

The Convener: Would it not be reasonable, however, to say that before the agreement there was no certainty that a referendum would take place? Does the agreement, and therefore the certainty that a referendum will take place—provided, of course, that the Parliament agrees to the order—not establish a different framework?

Michael Moore: I hate to disagree with you, convener, so quickly after we established harmony at the beginning of the session. However, I seem to recall that you, the First Minister and other prominent members of the Government made a strong case from the other side of the argument: that a referendum would take place come what may. As you know, we on our side were very keen for the referendum to take place and were from the outset constructive and engaged in the way in which we went about all that. The agreement that we reached and signed in Edinburgh three weeks ago was the culmination of all that work.

The fact that you and others have been party to draft bills on a referendum and various white papers on what independence, the future of Scotland and so on might look like suggests to me that a lot of work had already been going on and that no one was waiting for a starting gun like this

agreement to be fired before any of the substantive work could be done. I am afraid that I do not accept that the agreement is the starting point for all the work that can go ahead. It is good that that is now happening, but it is not happening just because of the agreement.

The Convener: If I go further with this conversation, I am in danger of turning myself back into a Government minister. I am conscious of the fact that I am the committee convener, but I think that I might yet come back with some points on what you have just said. I hope that Linda Fabiani can—

Michael Moore: —read your mind and ask the question instead.

The Convener: Indeed.

Linda Fabiani: In a similar vein, what trigger will the UK Government use to start seeking legal advice in relation to the rest of the UK following independence?

Michael Moore: We have already set out the fact that we have taken legal advice on certain matters relating in particular to the EU. The Advocate General for Scotland, who is one of the UK Government's three law officers, has made a public speech on this very issue in which he said that the most likely outcome is that the rest of the UK will continue to be the member state within the EU. Recognising the uncertainty on this matter, we are continuing to do work on the membership of international bodies, and the Advocate General has put together a forum of eminent academics and legal minds that has gathered once and which will meet again in a few weeks' time to discuss all these issues. If I may say so, there is a contrast between our approach, in which we are looking at the issue seriously, comparing what outside experts are saying, deciding where we think the balance of probabilities lies and continuing to work on the uncertainties, and the Scottish Government's approach, in which it has simply asserted the fact that Scotland would continue to be in the EU and other bodies without having looked to base such an assertion on internal or external advice.

Linda Fabiani: When did you seek that legal advice? Will you publish it?

Michael Moore: We referred to the fact that legal advice existed back in August. We do not publish that advice, but the opinions that ministers express in public are based on that and other sources of information. We can point to the fact that we have that advice and have taken the trouble to get it and I look forward to seeing what happens when the Scottish Government does the same.

10:45

Linda Fabiani: So you use other sources of information as well.

Michael Moore: I think that that is what I just said to you.

The Convener: Annabelle Ewing has a question on that general area.

Annabelle Ewing: Yes. Good morning, secretary of state. I take this opportunity to congratulate you on what is an historic agreement in the form of the Edinburgh agreement between the UK and Scottish Governments following the detailed negotiations. It is the historic nature of the agreement that leads on to many other important matters.

My question is on the last sentence of paragraph 30 of the Edinburgh agreement. I will read it out again for the benefit of our audience.

"The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom."

What do you take that to mean?

Michael Moore: That is a straightforward piece of plain English that does exactly what it says. It is not some kind of Aladdin's lamp whereby, when you rub the surface, a genie appears and you get three wishes to get rid of all the awkward consequences that we would need to work through were we to vote here in Scotland to become independent. For example, it does not say that somehow, in the case of the European Union, we would not have to negotiate both our entry and the terms and conditions of that. What it says is that the rest of the UK and Scotland would work together co-operatively and constructively, and that is entirely right and proper.

Annabelle Ewing: I note that you say that the provision embodies mutual co-operation—and perhaps, I could go on to say, mutual respect. In that regard, in our previous evidence session this morning, Alan Trench commented that the sentence is potentially the most important provision in the Edinburgh agreement. Do you share his view?

Michael Moore: I was not following Mr Trench's evidence this morning. I apologise for my delinquency in that respect. I promise to make myself familiar with it, but let me not judge it now, with all proper respect to your summary of what he said.

I simply repeat what I have already offered the committee. It is a straightforward sentence in a straightforward paragraph. I do not think that anybody could possibly be in favour of the opposite of what it says. At one level, it is just

straightforward stuff, but it is good to have it in the agreement. The Prime Minister and I, and the First Minister and the Deputy First Minister, were keen to show the people of Scotland and people across the UK that we had done this in the spirit of the working relationships that we already have—which I mentioned to the convener earlier—and that we will, of course, respect the outcome and work together to work through it.

However, that is not the same as saying that the rest of the UK and Scotland would have exactly the same interests, that all the difficulties would disappear as a result of that, or that Scotland would not have some serious challenges in working through the terms and conditions of its membership of international bodies. I am happy for a moment to put to the side the issue of whether Scotland would automatically be a member. As I have said, I do not think that that is the case. However, at the very least, we would have to work through what our terms and conditions would be for our farming communities, our fishermen and financial regulation, and what contributions we would make to the European Union and the like. Those would all be serious negotiations. Even if you only call them discussions, I think that they would represent big hurdles. Of course it would all be done co-operatively, but very different interests would be at stake.

Tavish Scott: Secretary of state, on the European Commission—sorry, I mean the Electoral Commission. Let me try to help my nationalist colleagues by not mentioning Europe. Can we deal with the role of the Electoral Commission? What does the UK Government understand by way of the role that the European Commission—[*Laughter.*] I am obsessed by Europe. What role will the Electoral Commission play in respect of the referendum? In particular, what involvement will it have, and will the guidance that it produces be binding politically, morally or in any other way on this Parliament in respect of its role?

Michael Moore: I think that we can tell that the annual fisheries negotiations are approaching.

The Electoral Commission is an important body that has, over the past decade or so, established proper authority and credibility for its role in elections and, particularly, referenda. It tests the question and sets such things as campaign finance limits. The body has always, rightly, had complete independence from Government, and Parliaments have always had the power to disregard its recommendations if they so choose. However, it is telling that at no stage since its existence has that been done with regard to referenda. On every occasion on which the Electoral Commission has offered advice on the

referendum question or on campaign finance, that advice has been accepted.

I was very pleased when the Scottish Government said that it would seek to use the Electoral Commission rather than create a new body to oversee the referendum. I was further pleased that, in the agreement, it set out a commitment to follow exactly the same approach to the rules and regulations and the Electoral Commission's role as the UK Government and our predecessors have followed. The commission has great moral authority and established credibility. For that reason, I think that it would be extraordinary if serious recommendations made by the commission were disregarded.

Tavish Scott: I will not ask you to give away anything about the private discussions between the two Governments, but do you envisage circumstances in which the advice that the Electoral Commission gives to this Parliament will be discounted in any way?

Michael Moore: I hope that that would not happen. It is a serious issue that goes right to the heart of whether the people of Scotland trust in the process that will be entered into. I am confident that the Parliament will look at the proposals robustly when the Scottish Government produces them in its bill in the spring, as it plans to do. I am also confident that the Electoral Commission will do its job properly and professionally. It is very important that the same approach is adopted to the Electoral Commission in this referendum as has been adopted to it in relation to previous referenda elsewhere in the UK. To do otherwise would risk breaking the trust of the Scottish people and would create an unfairness about the arrangements that would cause unnecessary difficulties.

Annabel Goldie: Since the signing of the Edinburgh agreement, brickbats have been flying around, particularly on the question of the existence or non-existence of advice on the EU. Although there might be some minor cases of concussion on the Scottish Government benches, the real victim of it all has been public trust and confidence. That concerns me, as the process must invite the trust and confidence of the public. Is the role of the Electoral Commission, with its independence and objectivity, an important way of restoring public confidence in the process?

Michael Moore: Good morning. There could be no stronger signal of the Scottish Government's intent than its asking the Electoral Commission for advice, reflecting on that advice and then following it. In the current, sometimes febrile atmosphere in the build-up to the referendum, we should dismiss or put to the side any questions about process. After all, Scotland's two Governments have spent a lot of time, over the past 18 months, working

through the difficult issues so that we can create a process that has the confidence of our Parliaments—which we hope we will secure—and, more important, the confidence of the Scottish people.

The Convener: At no stage have I been aware of the Scottish Government saying that it would in any way be involved in a process in which it would not take the advice of the Electoral Commission.

Michael Moore: I agree absolutely. I also respect the fact that the Deputy First Minister has acknowledged that, because the two campaigns did not exist when our respective consultations got under way, campaign financing will have to be consulted on. I welcome all that involvement.

I have simply set out what has been the well established practice elsewhere in the UK and why that is so important to this process. I believe that this Parliament will robustly interrogate that process, and I am confident that you and others will ensure that we have a fair process that has credibility and enjoys the trust of people across the country.

The Convener: The bill, when it is introduced, will include a suggested question following discussion with the Electoral Commission. When we get to that process, I suppose that it is legitimate for this committee to consider those issues also.

Michael Moore: That is a very important part of the process. Clearly—and understandably—that was central to the case that the Scottish Government made through the discussions, which first took place in the public arena rather than face to face, but then, over time, were taken through initially by you and then by the Deputy First Minister. However, we also said that “made in Scotland” is absolutely fundamental and that this Parliament should be central to that process. I believe that this Parliament will scrutinise those proposals properly. I also expect that this Parliament will support the role and the independence of the Electoral Commission and follow its advice.

The Convener: Rob Gibson, you had a general question on the section 30 order. Do you want to put the same question to the secretary of state?

Rob Gibson: It is probably a good idea to do that. We are talking here about a series of linked activities: there was a proposal for a bill on an independence referendum; assertions were made about the process; and the Edinburgh agreement has come in and provided a legitimate expectation that it will guarantee things. Does the Edinburgh agreement ensure that the section 30 order will be clear, decisive and beyond successful legal challenge?

Michael Moore: I believe that the section 30 order establishes that fact. Subject to approval by this Parliament and by the UK Parliament, the order will establish that there will be a referendum on independence—with a single question or ballot—that will take place before the end of 2014.

Rob Gibson: Do you also understand that, as we move into the process of the actual referendum bill, certainty will become possible for outstanding questions on the way forward, given that we will have moved from proposals, through assertions and, following the Edinburgh agreement, into the order to allow the referendum to happen? Will the bill provide certainty about the opinions that people have on international relations et cetera?

Michael Moore: Actually, if I understand it correctly—unless I have totally got it wrong about the intentions of the bill—the bill will, rightly, put in place the detail of how the referendum ballot will be determined, but it will not contain provisions saying, “And this is what will happen to Scotland afterwards, should we vote yes.” I think that it would be dangerous to make a link between this—the agreement, the order and the bill that will flow from it in due course—and any suggestion that that then means that all complications about international relations and membership of bodies such as the EU will just fly off.

Rob Gibson: But these are linked steps. We are moving from proposals to certainties, and the white paper and the discussion that takes place around it that leads to the referendum bill will be part of that process, so we should have greater clarity at that point.

Michael Moore: I am sorry to disagree with you in such a clear-cut way. I agree with you all the way up to the point where the bill that is presented here becomes an act of this Parliament and therefore will establish the question and all the relevant rules that go with that to establish the referendum. We are all in agreement about that and we are in a very happy place to do that, so let us get on with it.

The substantive issues about what would happen to Scotland were we to become independent are right at the heart of the debate that will follow—which we are already getting into—but are nothing to do with this process here. The agreement and the bill that will come from it are all about the process of the referendum, nothing more.

Patrick Harvie: Good morning. I would like to ask about the constraint that the UK Government has insisted upon around the number of questions—which you described a few moments ago as a single question.

Proposed new paragraph 5A(4) of schedule 5 to the Scotland Act 1998, which article 3 of the draft section 30 order would insert, says:

“There must be only one ballot paper ... and the ballot paper must give the voter a choice between only two responses.”

Is it your understanding that that implies that the choice must be framed, in everyday language, as a question, or could there be two alternative statements, with either of which the voter might agree?

11:00

Michael Moore: The precise form of the ballot paper will be discussed by the Scottish Government and put initially to the Electoral Commission and, then, to the Parliament, but the simple, straightforward issue is that the draft order provides for a single question to determine independence, not other issues.

Patrick Harvie: I can see that the intention is to have the referendum address a single issue, but it does not need to be framed as a question with a yes or no answer. Is that correct?

Michael Moore: It will be for the Scottish Government to introduce its proposal, but the draft order talks about

“a referendum on the independence of Scotland from the rest of the United Kingdom”,

which is pretty clear cut. That is the basis on which we have come to an agreement, which is now placed in that legal instrument.

Patrick Harvie: Why did you not decide that the draft order should specify that one of the two responses allowable must be to retain the status quo?

Michael Moore: There is a difference between the formality of the ballot paper and the politics that go alongside it. The ballot paper will determine the central issue, which is whether Scotland should stay part of the United Kingdom or become a separate country, however that is framed—various formulations have been kicked around and I am sure that more will be kicked around before the process is finished.

The politics of the matter, which we all recognise, go back to the historic election that took place 18 months ago, which I am happy—*[Laughter.]* Well, I once again put on record the fact that it was historic that the Scottish National Party secured a majority in this Parliament.

Patrick Harvie: The SNP loves hearing that.

Michael Moore: Yes, I have said it to the First Minister a number of times; he likes it too.

Central to that result was the manifesto commitment to hold a referendum on independence, not on anything else. We are in the happy position of helping the SNP to overcome a hurdle involving the Parliament’s powers so that it may honour its mandate. I am delighted to be in a position to do that because the issue needs to be resolved. Let us get it sorted.

There is a separate and powerful debate about the powers of the Parliament within the United Kingdom. If I might speak for a moment not as a Government minister but as a Liberal Democrat politician, my party in Scotland, under Willie Rennie’s leadership, has just established a home rule commission that will make proposals for further powers. We are engaged in that debate and I hope that other parties will join us, but the central issue that we have been invited to consider and must now resolve is that of independence. The draft section 30 order delivers the ability to do that; the agreement sets out how we will do it.

Patrick Harvie: I understand the point that you are making about the difference between the political context and the legal one. I also understand your political position. Mine is that I regret that some voters might feel that they are not being asked a question that they would like to be asked but, rather, the questions that the politicians—none of whom, including me, represents the third option—

Michael Moore: May I address that point?

Patrick Harvie: If I may continue, we are at the point where this Parliament needs to decide whether it is comfortable with the agreement that the two Governments have reached. I have no stake in either Government, but the Parliament must decide if it is comfortable with the agreement. I am unclear about why we are considering a draft order that does not specify what we would call, in everyday terms, a straightforward up or down, yes or no question.

Independence comes in degrees. The Scottish Government proposes independence except in relation to the head of state, the currency and the Bank of England. Is it not legally possible for the Government to offer in the draft order two different levels of independence, rather than full independence and the status quo?

Michael Moore: I invite you to reflect on what you have just said: “two different levels of independence”—this is quickly disappearing into Alice in Wonderland territory.

We as politicians and legislators in our respective Parliaments understand what the central issue is that we are trying to resolve. With the Scottish Government and our respective lawyers, we have pored over the formulation of the words to ensure that we are able to resolve it. That

is what the draft section 30 order proposes, and the agreement shows how we want that to be carried forward.

I respect your different position on more powers and independence, and there is an entirely fair and legitimate argument that can be had. However that is for Scotland's highways and byways over the next few years. We cannot put the two propositions alongside each other and treat them as if they are alternatives because one is about going our own separate way and the other is about continuing in the United Kingdom, which is obviously my preference.

Patrick Harvie: Obviously, I want to be offered the opportunity of full-fat independence, which includes addressing some of those issues around the head of state and the currency. However, there are people who suggest that there should be something else. What is your response to John Curtice's proposal, which offers those other levels? He suggested that there should be one question asking whether or not Scotland should be part of the United Kingdom, followed by a second question asking whether, if Scotland votes no to removing itself from the UK, we should have a further level of devolution. Why did the UK Government find that an unacceptable formulation to resolve the practical questions of clarity?

Michael Moore: I have a lot of respect for Professor Curtice, so it is with some trepidation that I take issue with that approach. My view, which I have held throughout the discussions that we had over the months before the serious negotiations began, was that it was just ludicrous to put the two propositions on the ballot paper and suggest that more devolution was a consolation prize that you could only get access to if you first rejected independence. The idea—my party leader calls it "Rennie's riddle"—that if 52 per cent were in favour of independence, but 75 per cent were in favour of more powers, the 52 per cent would trump the 75 per cent in an Alice in Wonderland way was completely offensive to anybody with a democratic bone in their body. I thought that that was ridiculous.

Professor Curtice offers a variation on a theme, but he does not get away from the fundamental point that those two things cannot be mixed up on the ballot paper. We are dealing with independence—we must get right to the heart of what it is the SNP and others want independence to be and deal with those arguments, full fat or otherwise. Separate to that, I am confident, once Scotland has decided to reject independence, that of course we will deliver on further powers. My party has actively engaged in that debate, and others will actively engage in it, too.

Annabel Goldie: I have noticed a little technical lacuna. Paragraph 6 of the memorandum of agreement states:

"The Order enables the Scottish Parliament to legislate for a referendum with one question on independence."

However, article 3 of the draft order states:

"There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses."

The word "independence" is not mentioned.

I seek reassurance that your understanding is that the ballot paper will ask the people of Scotland to respond to the issue of independence, and that they will not be asked, for example, to approve a large statue of the First Minister in Waverley station.

Michael Moore: I would love to see the Electoral Commission's response to the question: "Do you think that a statue of the First Minister should be put up in Waverley station?" I do not know whether that would fit with the order.

The first part of article 3 refers to the independence of Scotland. We looked at that carefully and we are absolutely satisfied that that is what this is about. I am sure that that will be the view that everyone else will take, and that the Electoral Commission will interpret it in that way.

An important point that is worth stating is that it will be for the Scottish Parliament to determine what is included in the bill. This Parliament will still scrutinise and determine what happens once the question—after it has gone to the Electoral Commission—comes to the Parliament for approval, as happens at Westminster.

Stuart McMillan: Good morning, secretary of state. I asked the previous panel a question that I posed for the millions of non-legally trained Scots who are following what is going on. Is the section 30 order fit for the Parliament to pass? Are you confident that the House of Lords will pass it?

Michael Moore: The answer to your first question is yes. On your second, of course I would never be presumptuous about their lordships, but I hope that they will support the order. My colleague Jim Wallace will argue for that in due course, and ahead of that I will take the process through the House of Commons. Through the agreement, the two Governments are now committed to promoting the section 30 order with a view to getting it passed. We want that to happen. It will be scrutinised in the three different places, and rightly so.

Stuart McMillan: Thank you.

Patricia Ferguson: Good morning, secretary of state. The section 30 order mentions the referendum taking place before 31 December

2014. In the event that that did not happen, where would the Scottish Government stand? If it decided that it wanted to have a referendum in, say, February 2015 instead, would the section 30 order still apply?

Michael Moore: No.

Patricia Ferguson: So separate negotiations would be required in the event of such a proposal.

Michael Moore: The section 30 order would cease to have effect and a new section 30 order would need to be brought forward. However, it is clear from what the First Minister, the Deputy First Minister and every Scottish Government minister whom I have heard speak on the subject have said that there will be a referendum and it will be in the autumn of 2014. Happily, we have been able to agree that backstop date, and I do not see any problems.

Patricia Ferguson: Thank you.

Linda Fabiani: I have a quick question about broadcasting. I note that, in the order, there is a transfer of powers to allow mailshots, broadcasts and general democracy around the referendum. Are you confident from the discussions that you had during the negotiations that we have a good enough framework to allow the Parliament to agree appropriate ways forward for local democracy in relation to broadcasts, mailshots and so on?

Michael Moore: What we have replicated in the order is the power to allow campaign broadcasts from the designated campaigns to take place. Without that power, the broadcasters could not have been required to do them. That is a constructive part of the process. Rightly, neither the Scottish Government nor we are in charge of broadcasting neutrality and impartiality. The BBC trust and the Office of Communications have those responsibilities. As we acknowledge in the agreement, our view is that they should exercise their judgment in the same way that they would for any other electoral contest anywhere in the UK.

The Convener: I have one final question. When do you think it will become clear from the parties that support the union what is on offer to Scotland on additional powers?

Michael Moore: You are tempting me into new territory, but I am happy to spend another 20 minutes talking about that if you wish. We, as the Liberal Democrats, have set out a whole new paper on it. I will make sure that you get a copy. You should be careful what you wish for. We hear that the Labour Party is engaged in these discussions, too.

What people will look at, if I may say so, is the record of the parties in delivering, first, the Scottish Parliament and, secondly, the additional powers

for that Parliament that the Scotland Act 2012 delivered this year. We are on a journey that is about further powers and devolution. I cannot speak for all parties in Scotland, of course, or for other interests, but that is a lively debate and I want to see it happen.

When we created the Parliament under the Scotland Bill 1998, my vote for that was one of the proudest that I have cast so far at Westminster. We gave extra powers through the process that was agreed by this Parliament earlier this year. In each case, there was a big set of arguments in Scotland; parties set out their views, others contributed their thoughts and various stushies took place. We then got together—without the SNP, I regret to remind you, which did not want to participate in those discussions—and reached common ground and consensus. On the back of that consensus, in the case of both the convention and the Calman commission, we as the parties took the proposition to the electorate in the election.

That was a process that took in one case many years and in the other a shorter period. I think that we will go through the same process again. That is already under way, with the ideas being talked about. I am confident that the process will accelerate over time and that people will be able to see that more powers will come and that the rights and capabilities of this Parliament will be further enhanced.

11:15

The Convener: Will it be clear before we get to the referendum in the autumn of 2014?

Michael Moore: We are working very hard on that. It is an organic process, and as a Government minister it is not for me to dictate that process—that is for all the parties to do. This would be the wrong moment for the SNP to start arguing about more devolution, but you can contribute to the debate if you wish.

The Convener: Thank you for that, but I am just not clear what it is about yet.

Michael Moore: I can sit here as a Liberal Democrat and say, very happily, “We’re in the game. We’re getting ideas and we welcome others joining in.” We are confident that throughout Scotland people will be part of that debate. However, what we are all focused on at the moment is ensuring that we nail the issue of independence and get that resolved, and get on with implementing the Scotland Act 2012. As the convener knows better than most here, the 2012 act contains a lot of detail and the process of implementation will continue over the next few years.

The Convener: Yes, but we are still not clear exactly what will be on offer to the people of Scotland before we get to the autumn of 2014.

Michael Moore: Are you inviting me to respond?

The Convener: Of course.

Michael Moore: That is the convener's prerogative. I am clear that we will put forward proposals based on our home rule commission. I look forward to others bringing forward their proposals.

Tavish Scott: In keeping with what has become a more spirited discussion, do you agree that it would be very helpful for the people of Scotland to know whether it is, as Patrick Harvie rightly puts it, full-fat or semi-skimmed independence that we will be dealing with in the referendum?

Michael Moore: That is the stuff of the next two years of argument. Bring it on.

The Convener: Ah, you see, that is the difference. The Scottish Government has always said that, in the autumn of 2013, there will be a white paper and the people of Scotland will be absolutely clear about what is on offer.

Michael Moore: I absolutely look forward to that.

The Convener: We are having a debate and I am supposed to be asking you questions.

I finish by saying that I still do not have the clarity that I was seeking about what will be on offer.

Are there any other questions?

Michael Moore: May I respond?

The Convener: You have been so nice to me in the past—I cannot say no now, can I?

Michael Moore: I will moderate what I really want to say to this extent: my general suggestion would be that the SNP might get on with defining what independence is and what it is about—and let us have the debate about that—rather than worrying about everything else. We are well capable of looking after ourselves and bringing forward our ideas. We are already doing it as a party; others will do that, too.

The Convener: I am not going to give you the last word. I look forward to the union parties coming together and providing that clarity so that everyone knows what we are talking about and everything is visible and transparent. Thank you very much.

Meeting closed at 11:17.

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