The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

REFERENDUM (SCOTLAND) BILL COMMITTEE

Thursday 9 May 2013

Session 4

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REFERENDUM (SCOTLAND) BILL COMMITTEE
12th Meeting 2013, 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:

Michael Clancy (Law Society of Scotland)
Richard Keen (Faculty of Advocates)
John Lamont (Ettrick, Roxburgh and Berwickshire) (Con) (Committee Substitute)
William Norton (No to AV)
Willie Sullivan (Yes to Fairer Votes)
Professor Richard Wyn Jones (Cardiff University)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 1

Scottish Parliament

Referendum (Scotland) Bill Committee

Thursday 9 May 2013

[The Convener *opened the meeting at 09:32*]

Scottish Independence Referendum Bill

The Convener (Bruce Crawford): Good morning, colleagues. I open the 12th meeting of the Referendum (Scotland) Bill Committee in 2013.

We have had apologies from Patrick Harvie, but there will be no substitute from the Green Party for him. We have also had apologies from Annabel Goldie, and John Lamont is here from the Conservative Party. There are no other apologies.

This is the first of five meetings at which the committee will take evidence on the Scottish Independence Referendum Bill at stage 1.

I give a warm welcome to our first panel of witnesses, who are from the Law Society of Scotland and the Faculty of Advocates: from the Law Society Michael Clancy and Richard Keen and James Wolffe from the Faculty of Advocates.

I understand that none of them wishes to make an opening statement and that they are happy to move straight to questions.

James Kelly (Rutherglen) (Lab): Good morning. I thank the witnesses for coming along and sharing their time with us and for their written evidence.

I do not know whether the panel has had an opportunity to examine some of the submissions from the second panel of witnesses. We have had a submission from the no to AV campaign, which raises some concerns about the technical conduct of the referendum. As they relate to legal points, I will put them to this panel and see whether the witnesses have a view on them or, even, want to reflect on them and come back to the committee.

The first point relates to the deadline for appointing referendum agents, which is in section 16 of the bill. The no to AV campaign contends that it is too early and a deviation from the normal date under the Political Parties, Elections and Referendums Act 2000. The campaign flags up the point that a different approach is being adopted in the bill. Do the witnesses see any issues with that?

Michael Clancy (Law Society of Scotland): We have not looked at that provision in great detail. In fact, I do not think that we commented on it when we made our submission to the committee. Therefore, it would be beyond my remit to commit the constitutional law sub-committee of the society to a view on the matter, but I am happy to take it back and ask the sub-committee whether it has any views on it.

James Kelly: I do not know whether the practical way forward is to draw the attention of the Law Society to the comments of the no to AV campaign and ask it to reflect on those. We could ask it to feed back any relevant comments to us.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): My question relates to the fact that in the Scottish Independence Referendum (Franchise) Bill, there is a date when the act will be repealed but there is no such provision in the Scottish Independence Referendum Bill. I know that it is not your bill or your drafting, but do you think that there should be a date on which the act is repealed after the referendum has taken place?

Richard Keen (Faculty of Advocates): Perhaps I could clarify a point arising from the convener's introduction. I represent the Faculty of Advocates, not the Law Society of Scotland—

The Convener: Apologies.

Richard Keen: It is quite all right. I did not want to open up an internecine turf war with the Law Society, even though it makes a claim to be the leaders of the legal profession in Scotland. We can put that to one side as well—I know; it is terrible.

The Convener: Sorry I started that off earlier.

Richard Keen: Just to be clear, the faculty does not take a view on the constitutional question. Just as this committee is looking at the bill in the context of its operation, so the faculty is here for that purpose as well.

It seems to me that there is potentially a political dimension to John Lamont's question. I wonder whether it is therefore a matter that should be determined by this committee.

John Lamont: There was no particular political dimension to the question. I simply thought, from a tidying-up perspective—keeping the statute book clean—that if the franchise act is to be repealed, the same should apply to the referendum act. Are you aware of any reasons why that should not be the case, or would it be preferable, from a legal perspective, for it to be repealed?

Richard Keen: I can see no reason why it would require to be repealed, given that it determines a referendum on a specific date in

September 2014. Once that date has passed, the act is essentially functus anyway.

Michael Clancy: The terms of the section 30 order require the referendum to be concluded by 31 December 2014, so there is an extent to the competence anyway. If Mr Lamont is looking for a clean statute book, there may be other measures that he would want to start with rather than this one.

John Lamont: I agree.

Tavish Scott (Shetland Islands) (LD): Mr Clancy, in the Law Society's submission, in the final sentence of your observations on section 13, "Campaign rules: general offences", you say:

"These offences appear to be strict offences and there is no provision for a reasonable excuse defence".

Would you be so good as to explain that thinking?

Michael Clancy: Our criminal law committee looked at that. There is a provision in section 13 for various offences, but there does not appear to be any statutory defence. We thought that it might be appropriate for there to be a statutory defence of having a reasonable excuse. Section 13(1) says:

"A person commits an offence if—

(a) the person—

(i) alters, suppresses, conceals or destroys any document to which this subsection applies".

However, section 13(4) says:

"The office-holder commits an offence if—

(a) without reasonable excuse, the office-holder fails to supply the relevant person with that information".

Within the terms of that section, there is a distinction between those two types of offence. A reasonable excuse for altering, suppressing, concealing or destroying a document might be that it was destroyed inadvertently and not deliberately.

Richard Keen: We do not think so.

Michael Clancy: The faculty disagrees. Another internecine war is about to break out.

Richard Keen: Not at all.

We do not consider that those are strict offences, as is suggested by the Law Society. The offence occurs only if section 13(1)(b) is taken into account, because there is an "and" at the end of section 13(1)(a)(ii). A person must act

"with the intention of falsifying the document".

There must be intent.

As has been noted, under section 13(4)(a), a person has to act "without reasonable excuse". Still in section 13(4), under paragraph (b) the office-holder must "knowingly" supply the information. There has to be knowledge. Under section 13(5), a person commits an offence if they act

"with intent to deceive"—

so it is not an offence of strict liability; there has to be intention.

If we consider the further offences that are set out in schedule 4, subparagraph 26(10) of that schedule—on page 91 of my version of the bill—provides:

"It is a defence for a person charged with an offence under sub-paragraph (7) or (8) to show—

(a) that the offence arose from circumstances beyond the person's control, and

(b) that the person took all reasonable steps".

Schedule 7 sets out the further offences that are cross-referenced in section 13 and provides, at subparagraph 5(1)—on page 135—that there is an offence only if a person acts "without reasonable cause".

If we bring all those provisions together, it appears to us that these are not offences of strict liability at all. At every turn there is a provision about reasonable cause, knowing or intent. Therefore we do not consider that there is the additional requirement for a statutory defence to be introduced into the bill.

The Convener: Do you want to respond, Mr Clancy?

Michael Clancy: I take the dean's point. He has highlighted something that we identified at the start of our memorandum, which is that this is quite a complex bill.

Section 13(1)(b) provides that a person commits an offence if they act

"with the intention of falsifying the document or enabling any person to evade any of the provisions of schedules 4 to 6."

There is a distinction between falsifying a document, and suppressing, concealing or destroying a document. However, these are points of detail and I am perfectly happy to concede the dean's point that other provisions allow for defences. I was thinking particularly about destruction.

Tavish Scott: Perhaps I will try a different line of argument—given that that one got nowhere. I am interested in exploring to whom the potential offences apply. My reading of the bill is that they apply to campaigners on both sides of the campaign that will be initiated by the start of the control period on 30 May 2014. Is that the witnesses' understanding?

Michael Clancy: First, there are distinctions between offences that can be committed by office-

holders and offences that can be committed by other persons, but people will commit an offence only in what one might term qualified circumstances—so if they bring themselves within those circumstances, they will commit an offence. I agree with you that that is not limited to office-holders.

Tavish Scott: Thank you. In evidence that we received for this morning's meeting it was noted that

"there is a series of detailed rules which campaigners must follow ... and very extensive provisions for them to be investigated by the Electoral Commission and punished for breach"—

under the provisions to which you have been referring—and that those rules will apply to members of campaign organisations and people who are related to such organisations but not to ministers of the Crown or the Scottish ministers, in any sense. Are you familiar with the issue? There appears to be a rule for everyone who is involved with campaigns but no equivalent provision for ministers, who might be using money in a campaigning context.

Richard Keen: I am not sure whether I entirely follow the point. If a minister acts in a way that is prohibited by section 13, an offence will be committed. There is no exception because of his status as a minister. If he qualifies, within the terms of section 13, an offence will be committed.

Michael Clancy: I agree.

09:45

Tavish Scott: That is helpful.

I want to ask a more general question about section 30 and the broad range of provisions in the bill. Section 30 allows ministers to rewrite the bill's provisions. There is no final deadline and no limitation on that power. Has the faculty or the Law Society given any thought to the breadth of that provision in section 30?

Richard Keen: I shall immediately concede that we have not. However, we would be happy to look at it and make any written submissions thereon.

The Convener: Michael, I think that you commented on that.

Michael Clancy: We did comment on section 30. We suggested that there is no obligation to consult on any subordinate legislation that Scottish ministers might introduce under that provision. We think that such a consultation would be a useful method of fleshing out any objections or questions on the part of people who might be subject to the provision. There is therefore a need to insert something along those lines into the bill. However, in terms of the Henry VIII or James VI provision—

Tavish Scott: Choose your king.

Michael Clancy: Exactly. Such a provision is something that we see in statutes regularly. Although one might have jurisprudential objections to the employment of executive power in that way, there is a lot of precedent for it.

The Convener: Stewart Maxwell has a supplementary on that.

Stewart Maxwell (West Scotland) (SNP): I want to pursue the issue of section 30. Whatever your view of the "Power to make supplementary etc provision and modifications". I am glad that you have said that such a provision is not unusual. It has become routine, if I can use that term to describe it. Would you concede that, according to section 30(4), it is clear that if the power was used, the affirmative procedure would apply and therefore a parliamentary process would take place in relation to any proposed changes?

Michael Clancy: Yes. There is a parliamentary process.

Stewart Maxwell: Secondly, are you aware of any precedent in other bills for consultation on such a power?

Michael Clancy: I am not entirely sure, but I think that in the High Hedges (Scotland) Act 2013, there is a provision for consultation by ministers.

Stewart Maxwell: You seem to be struggling slightly to find—

Michael Clancy: I am not struggling; I am just being diffident. There is a provision in the High Hedges (Scotland) Act 2013, which was accepted by the minister because it is something that the Scottish Government has undertaken to do in any event—I think that that is what was said in the debate on the bill.

Stewart Maxwell: Yes, but I am not aware of a general provision that consultation should take place on secondary legislation in general but particularly on a power such as this.

Michael Clancy: We respond to many consultations on subordinate legislation throughout the year, so it is an ordinary course of event. Whether it is formally stated in an act of Parliament is another matter.

Stewart Maxwell: Thank you.

The Convener: Did Richard Keen want to comment on that?

Richard Keen: Only to say that there would have to be a positive vote of the Parliament on the issue. Nevertheless, there may be some substance in the suggestion about consultation. We have not taken a view on that, but we are happy to look at precedents.

Linda Fabiani (East Kilbride) (SNP): I have a couple of general questions, mainly for the Law Society. My first question is on the role of the Electoral Commission, which is detailed in many of your points. I would be interested in your view of the integrity of the Electoral Commission.

Michael Clancy: I have no view that I can advance on behalf of the Law Society. It is not something that we have specifically considered. On every occasion on which I have personally encountered the Electoral Commission, though, it has acted with utmost integrity.

Linda Fabiani: I have one other small question. On part 4, which relates to publications, your submission poses the question:

"Para 29 of the Edinburgh Agreement states that 'The UK Government has committed to act according to the same ... rules during the 28-day period.' Does this mean that the UK Government will follow purdah in the same way as the legislation sets out?"

Is that a veiled suggestion to the committee that it should check out this matter and try to get that commitment in writing from the UK Government? As we know, the section 30 agreement is very much based on mutual respect; it is, if you like, a gentleman's agreement.

Michael Clancy: But that provision is contained in the Edinburgh agreement and is also mentioned in the policy memorandum. Given that the agreement was signed by the Prime Minister and the First Minister, one can take it that people understand what's what. Nevertheless, I think that a distinction should be made between a statutory provision and something contained in an extra-statutory agreement that people might want to flesh out.

Linda Fabiani: Thank you very much.

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab): With regard to rule 40 in schedule 3, which relates to the orders for production of documents, can you flesh out the concern that you express in your submission about

"the rationale for allocating this jurisdiction to the Sheriff Principal"?

Michael Clancy: Our point is that there is a difference between this provision and that in the Parliamentary Voting System and Constituencies Act 2011 and we were simply asking why that was the case. I am sure that the Government has a perfectly good answer to that question.

Patricia Ferguson: I hope so.

You highlight a number of similar issues in your evidence, including the use of rooms or offices of public authorities, the people who have access to polling stations and so on. Quite a few of those details seem to be at odds with past precedent. Do you think that that is a result of—how shall I put it?—hasty drafting or are you concerned that it has happened for some other reason? I have to say that I see no reason why that should be the case other than hasty or not very good drafting, but do you have a view on the matter?

Michael Clancy: With all due respect to the draftsmen, this is actually quite a well-drafted bill. Indeed, as you will see from our submission, we had very little difficulty with the drafting. However, these questions about the use of rooms in the possession of Scottish public authorities arise from the fact that the Political Parties, Elections and Referendums Act 2000, which contains some of these provisions, applies only to UK Government-run referendums whereas the bill refers to a referendum run by the Scottish Government and has been tailored to Scottish conditions. In highlighting the reference to "any Scottish public authority" in the bill, I was pointing out that there are many such organisations and I doubt very much that, say, the Mental Welfare Commission for Scotland will want a ballot box sitting in its vestibule on 18 September. That said, such details give the bill a more distinctive flavour, as it were.

Patricia Ferguson: Thank you for highlighting a number of very interesting points that we will probably want to raise in evidence sessions with other witnesses.

Annabelle Ewing (Mid Scotland and Fife) (SNP): Good morning. First of all, I should declare that, like John Lamont, I am a member of the Law Society of Scotland. As you might remember, convener, I made that declaration at the very start of our first meeting.

The Law Society's submission states that section 21

"is important because it reflects Paragraph 3.1.D of the European Commission for Democracy through Law (Venice Commission) Code of Practice on Referendum (2009) which requires that authorities 'provide objective information' about the Referendum."

Is there anything in the bill that you foresee would preclude or make more difficult the provision of objective information, or do you feel that the Electoral Commission, as it has done in the past, will be able to provide objective information as required about the referendum, the referendum question and voting in the referendum?

Michael Clancy: I do not think that anything in the bill will of itself make that task more difficult. As Ms Ewing has pointed out, the Electoral Commission has a lot of skill in doing that. I am sure that it will be able to distil the issues that might be packaged in information for voters about the referendum, the referendum question and voting in the referendum. On section 21, I was simply reflecting on the fact that I had been

introduced to the European Commission for Democracy through Law's code of practice and that it contains provisions with which the bill accords. That is important, because handing over the duty on providing information tries to avoid any incidence of bias in the provision of information about the referendum, the question or voting.

Annabelle Ewing: Does the dean of the faculty wish to comment?

Richard Keen: The only additional comment that I would make is that it is clearly implicit in section 21 that the Electoral Commission will act objectively in discharging the function that is referred to. I also note that, under section 21, it "must" take those steps, so it cannot exercise discretion. That underlines the fact that the situation is more of a black and white one than one of judgment.

Annabelle Ewing: Section 31 sets forth the ways in which a legal challenge can be brought relating to the certification of the votes that are cast in the referendum. The Law Society suggests that the process, which is to be by way of judicial review, conforms with past precedent in referendum legislation. I ask both gentlemen to comment on that, just to get it into the oral record. Certainly, the Law Society's view is that the provision conforms with the general practice that one would expect.

Richard Keen: We would concur with that. The appropriate step to take would be to present a petition to the supervisory jurisdiction of the Court of Session by way of judicial review. The only additional comment that I would make is that it is not entirely clear why a period for applications of six weeks has been chosen. In England and Wales, the time limit for applications is up to a maximum of three months, although it might be less. The proposal in the draft courts reform (Scotland) bill is that the period should also be three months. It is therefore not immediately obvious why, for the purposes of the Scottish Independence Referendum Bill, a period of half that has been chosen. That is just an observation; it is not a criticism at all.

The Convener: That is useful for future evidence sessions.

Does anybody else have a question?

John Lamont: I just want to correct what was said earlier by pointing out that, actually, I am a member of the Law Society of England and Wales, not the Law Society of Scotland.

Linda Fabiani: Is it cheaper?

Michael Clancy: I point out that it is not about the cheapness; it is about the value that you get as a member of the institution.

The Convener: As members have no more questions, I have a general point, although I am not sure whether it fits into our witnesses' remit or the expertise that they bring to the table. On the expenditure that is allowed for the yes and no campaigns—for want of better words—we have received evidence that disputes the Electoral Commission's findings on the amounts available. The Electoral Commission has said that the no parties will get £1,431,000 and the yes parties will get £1,494,000, which on the face of it seems a reasonably level playing field. Do you have any views on that?

Richard Keen: We have no views on that at all.

Michael Clancy: Similarly, the Law Society has no views on that.

The Convener: I just wanted to make sure of that.

Is there anything else that you would like to draw to our attention that you think it would be useful for us to hear about? That could be something in the evidence that Michael Clancy has submitted to us or it could be any other evidence that you think we should consider for future evidence sessions so that we can scrutinise the bill properly.

Richard Keen: We have nothing to add at this time. We have noted that we will look at a number of further provisions. If we have anything of substance to contribute to the committee, we shall arrange to submit a written response on those points.

Michael Clancy: The Law Society has given you our written evidence. We hope that it will allow some questions to be asked of future witnesses. When we get to further stages of the bill, we will make representations as we ordinarily do with bills.

The Convener: I am grateful to you for coming and in particular for signalling the areas that we need to consider for future evidence sessions. I apologise to Mr Keen for putting him into the wrong camp at the beginning.

I suspend the meeting for about 10 minutes.

10:01

Meeting suspended.

10:13

On resuming—

The Convener: Welcome to the second evidence session on the Scottish Independence Referendum Bill. I give a particularly warm welcome to our witnesses: Professor Richard Wyn Jones, professor of Welsh politics and director of

the Wales governance centre at Cardiff University; William Norton, responsible person and referendum agent for the no to AV campaign; and Willie Sullivan, the former director of field operations for the yes to fairer votes campaign.

The theme of our second session is to draw on the witnesses' experiences of two previous referendums: on extending devolution in Wales; and on changing the voting system for United Kingdom Parliament elections from the first-past-the-post system to the alternative vote system. Both referendums were held in 2011.

I understand that all three witnesses want to make brief opening remarks.

Professor Richard Wyn Jones (Cardiff University): I should start with a confession. First, I have a cold, so my Ynys Môn accent might be a little more impenetrable than usual. Secondly, I am not an expert on electoral procedures per se. My colleagues on either side of me are much more knowledgeable than I am on that count. I have, however, written a book with a colleague, Roger Scully, on the Welsh referendum, looking at the politics and voting behaviour. Inevitably, procedural elements feature in that.

In many ways, the referendum that was held in Wales in March 2011 was deeply unsatisfactory. There was a very low turnout and the campaign teetered on the brink of farce at times. There are several reasons for that, but the most fundamental is that, in my view, the referendum was on an issue that should never have been put to the vote in that way. It was a choice between two different types of primary law-making powers, which was frankly a rather arcane issue that was extremely difficult to explain to the public, let alone mobilise them around. That makes it fundamentally different from what is going to happen in Scotland in September 2014. Nobody could claim that the Scottish referendum is on anything other than a fundamental constitutional issue.

There were problems with the framework under which the referendum in Wales was held. First, the timetable was incredibly compressed. One of the key features of the Welsh referendum is that there were no designated lead campaigns. The decision not to designate was taken on 28 January 2011 and the referendum happened on 3 March, so a fundamental decision about the shape of the referendum was made only a month out from it.

We also discovered that PPERA allows for gaming. The no side chose not to apply for official designation, knowing that the impact of that would be that the yes side would then not be allowed official designation. That was a levelling down of the playing field, in a sense, but an element of gaming was involved.

Because of that gaming, the spending limits were absurdly tight. The yes campaign was not a designated lead campaign; it was a permitted participant. It was allowed to spend only £100,000, and it costs around £200,000 to send one piece of mail to every household in Wales. So, the spending limits were absurdly low.

Even if public subventions had been allowed—this is a point that my colleague William Norton will make—it is not clear that the money would have been particularly useful. It would have arrived very late in the day and could have been used only for a very tightly controlled set of spending requirements. Even if the campaigns had been given public subventions, it is not clear that they would have been particularly useful.

It is also worth noting the limitations of the media framework, which might be more relevant. There were some Welsh-specific problems with the media framework. There is a clear tension between the media's need for two clearly defined homogenous sides—they can count the minutes for the two sides—and the fact that in politics it is rarely that simple. What happened with the no campaign was that it fractured in the last few weeks leading up to the referendum. It fractured ideologically between people who wanted to argue for abolishing the Assembly and people who wanted to argue for something called "real devolution", which was never defined. There was ideological as well as personal fall-out in the no campaign. In the event, the press did not cover that, but there is a real issue around how to deal with internal tensions within one or both sides in a campaign that requires two clearly defined sides. The Welsh case raises that issue.

I am not sure how much of this is directly relevant to the Scottish case, but one of my key concerns is that nobody has tried to learn any lessons from the Welsh experience. That is difficult with referendums anyway—they are one-off events and people disappear instantly. However, the Electoral Commission's report on the Welsh referendum was an exercise in self-justification—pure and simple. The commission made no real effort to think critically about its own role. I interviewed every key participant, and everyone was pretty critical of the Electoral Commission's role. I have seen no signs of internal lesson learning in the BBC in Wales, let alone signs that the BBC in Scotland has taken an interest in the case. My concern is whether any lessons were learned from what was in many ways an unsatisfactory experience.

I feel as though I have been trashing Wales this morning; the only positive thing that I can say about the referendum is that it had the right result, in the sense that it reflected what people in Wales thought about the issue on the ballot paper. I am

talking not just about the people who voted but about the people who did not vote—to the extent that we have any information about their views. Such things cannot be taken for granted in referendums.

William Norton (No to AV): I think that the committee has the note that my colleagues and I prepared, which sets out our reaction to the bill.

I want to pick up on a number of points that Professor Wyn Jones made. On the grant, I cannot say whether the Welsh no campaign made a tactical decision not to apply for designation. I suggest that a financial element might have been involved—I say that simply from our experience in the AV referendum a couple of months later. In theory, there was a grant—I think that we could have got £380,000—but the terms on which it was claimable meant that no one would ever get that amount, because it was a reimbursement. We would have had to spend money on certain items, such as computers, which would not be useful to the main elements of a designated campaign, which are the sending of a mailshot and the preparing of a television broadcast.

We knew that to send a mailshot to everyone in the UK and prepare a number of TV broadcasts would cost £1 million, which we did not have, and that we would have to commit to that expenditure, because with the referendum taking place at the start of May a certain lead-in time was needed to prepare 45 million leaflets. We had to commit to making that expenditure in March, before we were designated and at a time when we did not have sufficient donations to cover it. I do not want to be melodramatic, but in effect I bet my house on being able to raise the moneys. I feel quite compassionate towards my colleagues in Wales if they were not prepared to make that gamble.

If the grant rules were worded slightly differently and there was a lower proportionate amount, that would get over the problem of non-designation. What is needed in a referendum is two designated campaigns—one for each side—which can give a minimum amount of information, so that voters can make a fair and informed choice. The rules should help as much as possible in achieving that, and then the voters can make their own decisions.

Willie Sullivan (Yes to Fairer Votes): We all know how important it is to get this right, so I am grateful to the committee for asking me to come and share some of my learning with you. I have circulated a paper, which touches on the learning from the AV referendum.

There are two or three principles, which I think that the Government began to consider when it produced the bill, but which we should hold in mind when we consider the bill. First, no set of interests should have more power and money to influence the outcomes, to the benefit of their interests and at the expense of most others' interests. Transparency can help to achieve that. As far as possible, the public have to know what the participants are doing and how and why they are doing it.

There needs to be an element of challenge, not just between the campaigns but from the media and, in the widest sense possible, civil society. Assertions, claims and counterclaims should be open to challenge from outwith the campaigns. If that is to happen properly, there must be an application of ethics at various points in the process.

We should also acknowledge that referendums and elections are elite-driven undertakings—they are set up by elites—but there is a paradox in that, in order for them to be legitimate, they need popular support. We can see at the moment that representative democracy is, if not in crisis, at least in want of legitimacy. To address that, we can do one of two things: either we can be honest about the fact that the referendum is an elite thing that is really just seeking the population's endorsement of an elite settlement; or we can genuinely try to make it a process in which citizens can take part.

The Convener: Let me begin with a question to William Norton about the written submission from the no to AV campaign. Under the heading "High Level concerns for the fairness of the Referendum", the third bullet point refers to concerns about expenditure limits. Can you explain a little more about those concerns?

William Norton: When I was asked to come up here to provide evidence, I had a look at the bill. I was aware that the background to the discussion was that the Scottish Government wanted a referendum that was "built in Scotland"—I think that that was the phrase that was used. Most of the provisions in the bill simply carry over those that would have applied if the referendum had been fought under UK law—under the Political Parties, Elections and Referendums Act 2000. However, PPERA provides a formula that sets out spending limits for parties that is different from the one that is in the bill. My comments come simply from a comparison of what the two measures would produce.

The position under PPERA is that you can spend a certain amount that is related to your share of the vote. There is no guidance on what that would mean for Scotland, but obviously it must mean a share of the vote at the Scottish Parliament elections. Under the bill, in effect, there is a total pot for eligible spending by political parties, which is then divided between the parties depending on their share of the vote in Scotland.

That is a significant difference from the position that would apply under PPERA.

Under PPERA, the presumption is that anyone can involve themselves in a referendum on either side, and their spending limit will depend on who they are. For a normal campaigning body, the standard spending limit will apply, whereas a designated organisation can spend the most. A political party can spend somewhere in between the two, depending on its share of the vote. The approach in the bill appears to seek to cap total spending by the two sides, but it does not apply the logic of that all the way through by just having a global spending limit for both sides that is equal. That is a significant departure from PPERA. Personally, I am not convinced by the policy argument for that.

The Convener: Did you have a chance to read the document that was produced by the Electoral Commission on 30 January 2013, which went into some detail about why it came to that conclusion and recommendation?

William Norton: Having read that document, I am not convinced of the policy argument.

The Convener: The Edinburgh agreement pointed to the need for fairness and a "level playing field" in the campaign. In its submission to the Electoral Commission, the better together campaign also said that

"the way in which this referendum is run must not only be fair, but crucially must be seen to be fair."

The figures that the Electoral Commission produced, which were taken by the Scottish Government and put into the bill, will allow the no parties a spending limit of £1,431,000 and the yes parties a spending limit of £1,494,000. Under the example given in your submission, the no parties would be allowed £2,700,000 and the yes parties would be allowed only £1,650,000. That would be a 63 per cent advantage. Do you think that that would provide the level playing field that was sought in the Edinburgh agreement and, indeed, by the other campaign groups?

William Norton: You are overriding a general assumption that, in a free country, people are enabled to take part in an election as they so choose. In effect, you are imposing an external limit on people, depending on which side they wish to support.

For ease of reference, we can talk about it as either a bottom-up approach, which is what we have in PPERA, or a top-down approach. In the bill, we have a half top-down approach that applies only to political parties and the two main campaigns. I find that unconvincing.

10:30

The Convener: The question that I asked was not so much about the detail of one side of the argument or the other; it was about whether the figures that the Electoral Commission ended up with produce a fair and level playing field.

William Norton: They produce something that you can call a level playing field, but you are making certain assumptions. First of all, what happens if a party decides to change sides? Suppose that a party changes sides because of the brilliance of the yes campaign's arguments. You would then have a deliberately designed unlevel playing field.

Another example is what happened in the AV referendum. A major party might decide for its own internal reasons not to register on one side.

The Convener: I recognise that it is possible for a party to change sides but, in light of where we are, I find it difficult to imagine that that concept would be realised.

William Norton: I will give you another example. Let us look at the various parties on each side in the AV referendum. On the no side, we had the Conservatives and, I think, the Democratic Unionist Party in Northern Ireland. On the yes side, according to their official positions, we had the Liberal Democrats, the Scottish National Party, Plaid Cymru and the UK Independence Party, as well as the Social Democratic & Labour Party, Sinn Féin and the Alliance Party of Northern Ireland. There were various Green parties—I am not being dismissive; I am not sure whether all of them officially joined the yes side.

The Convener: They did not.

William Norton: In name, quite a few of them did.

If the formula approach had been used to equalise spending in that situation, we would have ended up with a global figure from both sides but, in the end, out of all the parties on the yes side, I think only the Liberal Democrats spent more than £10,000.

You are assuming that, just because somebody is included in the limit, they will spend it.

Willie Sullivan: The only party that spent was the Liberal Democrats. However, what the Electoral Commission proposed for the bill provides a more level playing field than PPERA did.

Professor Wyn Jones: If one side had a 60 per cent advantage over the other and it ended up being the losing side, there would be huge questions about the legitimacy of the process as a result.

I understand William Norton's point but, if you will forgive me for saying so, it is a little scholastic. In relation to the issue that is ahead of Scotland in September 2014, the proposal is roughly fair. The PPERA approach would give you something that would not look roughly fair to most people.

The Convener: I am not sure whether William Norton is aware of this but for the sake of accuracy I point out that the figures that he quotes for spending limits in paragraph 7.5 of his submission are not the ones that are in the bill. He might want to reflect on the accuracy of the numbers that he has used. There is not a huge difference, but there is a difference.

William Norton: It may be a rounding error, then. I am prepared to stand corrected on that.

The Convener: It is a wee bit more than that. I point it out just so that you are aware of it.

William Norton: Will you tell me which figure, so that I can check?

The Convener: Your numbers for expenditure by the Labour Party, the Conservatives and the Liberal Democrats are different from those that appear in the policy memorandum and the Electoral Commission's submission.

William Norton: I will not quibble over numbers.

The Convener: I raise it for the sake of accuracy.

Linda Fabiani: I have a quick question about paragraph 7.8 of your submission, Mr Norton. I have to say that I found the paragraph difficult. I could not get my head round the logic of it. You said just a moment ago that you thought that the Electoral Commission's proposal was half bottom-up, half top-down, but you say in paragraph 7.8 that it is

"an absolute 'top-down' limit".

William Norton: That is the logic of it, which is why I say that it is a halfway house.

There is a rule that says that the official yes campaign can spend a certain amount, that the official no campaign has a certain amount and that those limits are equal. We might consider that to be a top-down approach, which is extended to include political parties, which are assigned notionally to the yes side or the no side, so the top-down approach is continued.

Then we come to other groups that are completely unlimited as to whether they are on the yes side or the no side. Suppose, for example, that they were to join one side, on a sort of 2:1 break. Following the Electoral Commission's logic, would that not call that approach into question? If we are going to begin a top-down approach all the way through the political parties, the logic must be that, in order for the process to be seen to be fair—to make sure that the playing field is level—should we not continue on and say that there is a global limit for the yes side and a global limit for the no side?

There are practical problems. Let us say that, in the middle of the referendum campaign, some people—opticians for yes in Arbroath, say—suddenly decide that they are very concerned about the need to campaign for a yes vote among opticians. They decide to register with the Electoral Commission but are told, "I'm very sorry, but the spending limit has been reached: you can't join that side." That is why I say that a top-down approach is a significant change to the way in which politics is conducted in the United Kingdom, where people who want to campaign can register and campaign. If we have a global top-down limit, somebody, somewhere is going to be told, "You can't join the referendum campaign because we have reached the limit." In practical terms, if you are in the headquarters of the yes campaign, how do you know what opticians in Arbroath are getting up to? You cannot police that.

Linda Fabiani: I do not think that we would want to police that, Mr Norton.

William Norton: I think that you will find that somebody is legally responsible for campaigning limits.

Linda Fabiani: I am sorry; I was being flippant and I should not have been.

Professor Wyn Jones: William Norton touches on a real issue. In the Welsh case, the yes campaign stopped raising money in the last few weeks—that sounds a perverse thing to do in the run-up to a referendum, but it was worried about the incredibly tight spending limit as a result of non-designation. The yes campaign actually stopped raising money for fear of somebody out there doing something in its name of which it was unaware.

I have made my general view clear. There are some sticky issues—

Linda Fabiani: Hypothetically, there could be problems. I am interested in Willie Sullivan's view.

Willie Sullivan: I think that the bill is an improvement. Under PPERA, if somebody did something that the responsible person did not know about or could not reasonably know about, that could not be included in their expenses. I am not sure that that is such a big fear. There is a question about at which point an interest group registers to be a permitted participant in the referendum. If a professional body recommended a certain position to its members, I do not think that it would have to register as a permitted participant. In fact, as I said in my paper, the

problem with not having a spending limit is that that allows the process to be open to people who can raise the most money, which tends to favour people who have benefited from the status quo. I agree that there needs to be a public grant that can be used for campaigning. I agree with everything that has been said about that; it would be an additional improvement.

William Norton: The difference between us is what we mean by being seen to be fair. It is clearly within the competence of this Parliament to take the view that being seen to be fair means that you have a top-down limit on political parties—in other words, you distinguish political parties from other campaigners. I am looking at the question of what is fair from the point of view of someone who actually has to manage a campaign. How does the bill compare to what would have happened if the referendum had been fought under PPERA? However much we argue the pros and cons, the bill represents a major change from PPERA. Clearly, the Parliament can choose to do that. I do not have a dog in this fight.

The Convener: It is an interesting question. When we take evidence from the Electoral Commission, we will need to tease it out further. Paragraph 2.11 of the commission's report about its advice on campaign spending limits states that:

"In line with our principles, our advice is based on a 'bottom up' approach".

I do not want to get into an argument about semantics and whether it is right to say that the approach is bottom up or top down, but there is obviously a difference of opinion. We can tease that out later, but I think that we have gone as far as we can on the matter and I want to move on to other areas of questioning.

James Kelly: Mr Norton, I want to clarify a point in your submission to see whether I can follow the logic of the argument. In paragraph 7.5, you seem to be saying that, although there is a spending limit for designated campaigns and political parties, the rules for non-designated organisations are weak and, as an example, you refer to the sum of £150,000. Are you contending that, if one organisation can produce 20 such donations with a total of £3 million and another can produce 10 totalling £1.5 million, it could be argued that the way in which the bill is drafted will give rise to an inequality in campaign expenditure?

William Norton: You are effectively making my earlier point about how far we take the top-down approach. Even if you take a top-down approach to capping limits for the two official campaigns and equalising the spending for parties, you will still have an imbalance at the bottom with regard to non-party campaigners, who can be funded by as many donations as they can raise. Again, it is a question of how much you want to level the playing field.

The Convener: If I remember correctly, the Scottish Government proposed a lower figure than that and the Electoral Commission increased it.

I believe that Stuart McMillan has a supplementary question on this issue.

Stuart McMillan (West Scotland) (SNP): I actually have a number of questions that follow on from this line of questioning.

With regard to the level playing field that you mentioned, Mr Norton, the question must be: what price do you put on democracy? We have heard about the spending limits but we must remember that the economic situation is challenging not just in Scotland or the UK but globally. If, as you suggest, the spending limits are increased, might that not backfire on both sides? For example, the electorate might think, "Wait a minute—these are tough economic times but these politicians just want to spend pound after pound on campaigning." If we have a level playing field with certain limits, the public might be able to fully buy into either side's campaigns as well as realise that things are being done in an equitable way without too much money being spent.

William Norton: I think that I am right in saying that what the political parties spend does not come out of public funds, which means that they can spend a lot of money on themselves if they want to. Of course, that will be a judgment for the parties themselves. For example, for the AV referendum, the Conservative Party had a spending limit of £5 million and spent only £600,000; the Liberal Democrats' spending limit was not as high—I think that it was £3 million—and they spent a couple of hundred thousand pounds; and other parties would have had a spending limit of £500,000 or whatever and did not spend all of that. As I have said, what they spend their money on is a judgment for the parties themselves.

I understand your question: should we, in a time of austerity, have large spending limits? However, I am suspicious of the suggestion that a voter somewhere will trust the referendum result if the Liberal Democrats are limited to spending blob and will not trust it if the Liberal Democrats are entitled to spend two blob. You are obviously closer to your electorate than I am.

Stuart McMillan: Willie Sullivan has already commented on the issue of politicians, politics and the electorate. You have said that much of the money comes not from the public purse but from donations, which is right, but many people will not distinguish the difference. They will simply see designated organisations or political parties spending money.

10:45

The Convener: Do you have a question, Stuart?

Stuart McMillan: I wanted to get that point on the record. I do have a question, however.

Mr Norton, paragraph 7.9 of your paper refers to parties changing sides, and you commented on that earlier. I am sure that colleagues around the table supporting the other side of the campaign from me will probably dispute this point, and I would not imagine Labour, the Conservatives or the Liberal Democrats changing sides in the run-up to the referendum—although there are campaign groups that support independence within some of those parties—but do you realistically view that as something that might happen in the Scottish referendum?

William Norton: It is worth considering if you are devising a theory on the basis that something is going to happen. I defer to your experience in politics, but I would point out that not everything happens that everyone expects automatically to happen.

Stuart McMillan: But, in all fairness—

William Norton: I have an example from the AV referendum.

Stuart McMillan: I would not imagine that the Scottish Conservative and Unionist party would change its mind.

The Convener: Let William finish his answer, Stuart.

William Norton: In the AV referendum campaign, for example, one of the major parties of British politics, the Labour Party, did not officially adopt a stance on either side. That took out an entitlement to spend of about £3 million or whatever—I forget the exact amount—which would have been a significant amount within the party spending limits.

That occurrence would have significantly upset the formula if a formula like the one being applied in the Scottish Independence Referendum Bill had been applied to the AV referendum. Would that have produced an unbalanced result that would have led people to think that they could not trust the referendum because the spending limits were unbalanced?

The Convener: Let us move on.

Stewart Maxwell: I wish to return to a point that was raised earlier by Professor Jones. It is also covered in Mr Norton's evidence. It is at the second bullet point in your list of high-level concerns, Mr Norton, and it relates to the issue of designation. You go into the matter in your submission in some detail, over a couple of pages. Could you explain the logic behind your thinking? You believe that the "both-or-neither rule" that you describe should apply.

William Norton: The both-or-neither rule is the ultimate level playing field: either both sides have a designated organisation, or neither side has a designated organisation. I agree that it is far better to have a designated organisation from the point of view of getting the message out to the voters. However, there cannot be a designation on one side only as that would mean having an unlevel playing field by design.

There was a massive failure in the Welsh referendum, in that one side did not submit an application for designation. That led to a very unsatisfactory referendum result. I suspect that that happened mainly because those concerned could not afford to discharge the duties of designation.

With an AV referendum, a referendum on Scottish independence or a referendum on whether we should drive on the right or left-hand side of the road, we need people on both sides who can put a case, and we then let the voters make up their minds. It would be getting a bit Venezuelan to have one side that can send out leaflets and make television broadcasts and another side that cannot.

Stewart Maxwell: I would like to hear your opinion on that, Professor Jones.

Professor Wyn Jones: The problem, as we discovered through the PPERA experience in Wales, is that we get gaming. There was a clear case of gaming the system, and there is no doubt that finance was part of it. The no campaign was simply unable to raise funding because it had no activist support. The no campaign was aware that, if the ground campaign was essentially destroyed but a media campaign was retained, that would ensure—particularly given the importance of public broadcasting in the Welsh context—that there would be 50:50 coverage. The no campaign gamed the system.

William Norton and I clearly disagree on some of that, but the points that he made about the potential for gaming are important. People will game systems, and PPERA was not fit for purpose in the Welsh context. The other issues that have been raised about the £150,000, for example, are in essence issues about gaming. We have learned from the Welsh experience that PPERA is not fit for purpose.

The Convener: Before we turn to Willie Sullivan, let us be clear about your answer to Stewart Maxwell. Do you think that the bill that is before us takes the right approach?

Professor Wyn Jones: Yes. It is simply unacceptable that one side can take the other out of the game as happened in the Welsh context. However, there is an important addendum. William Norton makes a point about incentivising designation by allowing such an organisation to spend some money on the campaigning. I would want to do both: I would want to allow some of the money to be put into creating campaign materials, but ultimately we need some sanction to prevent people from gaming the system.

Willie Sullivan: In the lead-up to designation, we thought that it was sheer tactics on the part of the no campaign; because of the Welsh experience, there was a lot of rumour and gaming about whether it would register.

As William Norton said, there is a huge risk in registering because it involves committing millions of pounds to freepost mailings and stuff because of the timescale of the referendum. Therefore, we could have ended up spending millions of pounds on printing loads of leaflets that we would then have had to pulp if the no campaign had not registered, because we would not have been allowed to spend that money on the referendum campaign. I agree that, to remove that risk, there should be no impact on one campaign if the other campaign does not register. I do not think that we are in any danger of that happening in Scotland, but I would remove the potential for rumour generation and gaming.

I know that no public grants are proposed, but I also agree with William Norton about the incentive of a public grant that could be spent on campaigning, not just on administration.

Stewart Maxwell: Mr Norton, you have heard what the other two witnesses have said. It seems clear, from their evidence and from what I and, I am sure, others have read, that what happened in Wales was entirely tactical. I think that it is an entirely unrealistic scenario in the Scottish situation. However, surely you accept that enabling one side to block the other side, in effect, from campaigning in such a referendum is frankly ridiculous and cannot be allowed to happen. We cannot allow the process to be used as a tactic by one side or the other.

William Norton: All choices are bad in a situation in which one side does not apply for designation. Why have a designated organisation? So that it can be given access to freepost mailing, television broadcasts and public rooms. That is a sort of quasi-public duty, and I think that it sets a bad precedent if there can be an entitlement on one side and not the other.

Just to pick up on the point about—

Stewart Maxwell: Sorry—can I interrupt you for a second? The entitlement is for both sides, but one side may decide not to take it up. That is quite different from what you just said.

William Norton: I think that there is a genuine problem with broadcasters, for example. They will have a duty of impartiality, but can they discharge that duty if they make broadcasts for one side only? I do not know the answer to that. I throw that question over to the broadcasters.

If one side does not designate, all choices are bad. In the AV referendum, it was quite a fine judgment. Willie Sullivan says that there were rumours that we were not going to designate. There was a real possibility that we would not designate, and it was about the money rather than tactics. I cannot comment on the Welsh campaign. As I say, I bet my house on being able to raise the donations to pay for the mailshot.

The Convener: We will move on from that, Stewart.

Stewart Maxwell: Okay.

Tavish Scott: Can I ask a question on the same point?

The Convener: You can ask a question on the same point, or if you want to develop the debate in another area, please do.

Tavish Scott: First, on the same point, it is foggy of us to conflate the practice of what happened in Wales on AV and the principle. Mr Norton, in paragraph 6.7 of your submission, you categorise

"this as a High Level Concern because paragraph 5"—

of the bill currently in front of this Parliament—

"clearly creates the risk of an unfair referendum."

In the submission, you describe the principle and not the practice, but you have been dragged into talking about the practice that happened elsewhere.

William Norton: In the situation in question, all choices are bad. What is the worst outcome? Is it a referendum in which there are no designated campaigns? For the sake of argument, let us say that the yes campaign decides not to go in. We would then have a campaign in which the referendum would be defined by that fact: the single most practical point would be that one side was not competent enough to apply for designated status. Electorally, that would surely kill that side.

The alternative to having no designated campaigns is to go forward with broadcasters pumping out broadcasts for only one side and Royal Mail delivering leaflets for only one side. All choices are bad in those circumstances. As I said, I would be very surprised if that arose in practice in this referendum, but you are setting a precedent for other referendums.

Tavish Scott: Can I move to a different issue?

The Convener: Please do. I think that we have heard enough about that area.

Tavish Scott: In your evidence, Mr Norton, you discuss paragraph 25 of schedule 4, on control of ministers. I will try to paraphrase your argument; please correct me if I have got it wrong. You seem to argue two fundamental points. Scottish Government spend and the use of Government grant-funded bodies to promote independence is one aspect. Secondly, ministers—in this case, the Scottish ministers—are not subject to the same rules on activity, investigations and sanctions as other campaigners. Will you please talk us through those two issues?

William Norton: I would not quite go as far as that. I would look at it more historically. I have had experience of two referendums, in which the area covered by PPERA section 125—the so-called purdah—has been in point. As PPERA is set, it has been totally ineffective at doing what appears to be its purpose: controlling what ministers or taxpayer-funded bodies can do.

For your bill, you have taken a provision in PPERA and copied it word for word, and you have therefore carried over the weaknesses. In addition, one particular provision has been missed, and I am curious why. It will create a black hole, if you like, of unregulated activities that could happen. Whether they will happen—how realistic that is—I do not know, but it is worth asking that, if a provision in your bill is based on PPERA, why is something missing that was in the original?

Tavish Scott: Will you describe that black hole? What exactly is the provision omitted from this bill that is in the UK legislation that governs referenda?

William Norton: The basic provision says that, in the last 28 days of a referendum campaign, certain groups—for example, ministers and local authorities—cannot do anything to publicise or to encourage votes. The original legislation includes in that definition other organisations that are not public bodies but which are majority funded by the taxpayer, which are therefore regarded as quasi-public bodies for the last 28 days of the campaign. That final provision is missing from the bill.

Tavish Scott: Why do you think that that has been missed out?

William Norton: There are two possibilities. One is that there was a simple drafting mistake: they were copying it word for word, then they went and had a cup of tea and—

Tavish Scott: They just missed it out.

William Norton: That is a possibility. The other possibility is that someone has decided to take it out, which is more your end of the business than mine.

Tavish Scott: We can ask other witnesses about that.

What is the practical implication of leaving out that provision? Could all those Government-funded bodies spend money on promoting one course or another?

William Norton: In theory they could, yes. They would have to register at some point, depending on how much they had spent. The point is that there is a clear policy justification for a legal provision to stop certain entities or individuals campaigning.

Tavish Scott: Absolutely.

William Norton: It would not, for instance, stop a minister acting in a personal capacity in exactly the same way as there are rules on what can or cannot be done before an election. The same principles are carried over.

As I said, what you suggested is a possibility.

Tavish Scott: In paragraph 9.11 of your evidence, you describe detailed rules that campaigners have to follow, what might happen to them if the Electoral Commission finds them in breach of the rules and the sanctions that would apply under the law. Those do not apply to ministers, however. Is that something that needs to be addressed?

11:00

William Norton: It is a flaw that goes back to PPERA. There are fairly detailed rules on what campaigners can and cannot do. Mr Sullivan will testify that they are extremely onerous. However, in PPERA and the bill, only one provision catches the minister with his ministerial hat on, and it is the weakest provision in PPERA.

Tavish Scott: So the UK legislation is equally flawed and we will be enshrining the same flaw in this bill if we allow it to go through in its present form.

William Norton: Yes.

Tavish Scott: What is your recommendation? How could the bill be strengthened to achieve a level playing field?

William Norton: I invite Scotland to strike a great blow for democracy—

Stewart Maxwell: We intend to.

William Norton: Following a fair vote.

Tavish Scott: In bullet points in your evidence, you helpfully suggest improvements to the bill,

which is a welcome principle in evidence to any committee. You point out that

"A 28 day purdah period is too short."

How could the period in which the campaign operates be improved, bearing in mind that we will also have the Commonwealth games and a lot of other events—including celebrations of battles that took place a long time ago—that will all involve Government ministers?

William Norton: I am sure that they would not use those as excuses for pushing a line.

Tavish Scott: Surely not.

William Norton: I am horrified by that suggestion.

Since 2000, the period has been 28 days. Since about 2004, the Electoral Commission has been producing learned reports saying that 28 days is too short, and I have submitted evidence to various committees saying that it is too short. The Electoral Commission thinks that the period should start from the beginning of the referendum period, which will be 30 May, or whatever the date is in the bill. I would start the period from the date on which designation occurs—or does not occur.

In effect, designation is the date on which publicly recognised campaigners come into being. At that point, the drawbridge would be put up and we would say that public authorities, ministers and people who take public money must stop any relevant activities. However, that would not prevent people from doing things in a private capacity.

The Convener: I will draw in our other two witnesses on the same question in a moment, but first I have a question that follows on from that. Mr Norton's suggestion would apply to the Scottish ministers and Scottish quasi-autonomous bodies, but should the same rules apply to UK Government ministers? The problem for us would be how to make that happen through the bill.

Professor Wyn Jones: My view is a resounding yes—the same rules should apply. I do not know how to make that happen, though.

Willie Sullivan: There is a difficult balance to strike in these matters. On the one hand, we do not want state money to be used to push a particular viewpoint but, on the other hand, in places around the world where we are trying to create democracies the first thing that we want to do is to build civil society and allow it to take part in the political process. Most people would agree that that is a fundamental requirement of a functioning democracy. How do we get that balance right?

I am not criticising the no to AV campaign—it ran an effective campaign in the situation, incentivised by the way things were—but it wrote a letter to any charity organisation that seemed to be supporting the yes campaign to tell it that it was breaking the law. Whether or not organisations were breaking the law, the fact that they were scared of doing so meant that civil society kept out of politics. It is difficult to find a way to balance dealing with the misuse of state funds with including civil society and encouraging it to take part in political debate.

Professor Wyn Jones: To respond directly to Tavish Scott's points, purdah is a difficult issue because it makes government difficult. I therefore understand the concern, although other people have much more experience of the issue than I do. I simply reiterate the point that any provisions must surely apply at UK level as well as in Scotland, because neither Government is a neutral player in this particular fight.

Annabelle Ewing: I have one last point on the 28-day purdah period. In paragraph 103 of the policy memorandum to the bill, the Scottish Government states that, in having a 28-day period, it is following PPERA, which applies that period for UK elections and referendums. The Government adds that its approach was

"endorsed in the Edinburgh Agreement."

Mr Norton's paper raised the issue of grants, and the other two witnesses this morning have referred to it. Can the witnesses state their position on the issue and explain whether they are in favour of state subvention paid for by the taxpayer? If they are, can they explain why they think that the taxpayer should be asked to give their money to support a particular viewpoint? I would have thought that, particularly from the TaxPayers Alliance's point of view—I think that Mr Norton's colleague has links with that organisation—that would be a rather strange position to take.

William Norton: How much are you spending on the referendum?

Annabelle Ewing: Excuse me? Me, personally?

William Norton: How much is being spent on the referendum?

Annabelle Ewing: I think that I have been spending money all my life to get to this stage. However, the question was why the taxpayer should be asked to provide a subsidy for a particular point of view. That is my question to you, if you want to answer it. If you do not, then please just say so.

William Norton: I think that you are spending £12 million on the referendum. I have had a quick look through the financial memorandum to the bill and I believe that that is the figure. My suggestion is to give £150,000 to each side of the campaign. You can spend £12 million on having an ill-

informed referendum, or you can spend £12.3 million on having a first-class, world-class referendum—it is your call.

The Convener: Surely some of that £13 million is money that will be spent by the Electoral Commission on behalf of the state on public information.

William Norton: Ah! Will it?

The Convener: That is certainly the intent, as far as I understand it. Apologies for interrupting, because I should let Willie Sullivan and Richard Wyn Jones respond.

Willie Sullivan: I understand why it is difficult to give public money to things like this at this point, but there are a couple of good reasons for doing it. Perhaps the two sides do not need the money in this particular case, but an issue of precedent is involved as well. If there is a reasonably low spending limit, with a public grant in it, that means that the money to be raised to run a level-playing-field campaign between the two sides is not that large an amount; otherwise, as I said previously, a no-change position would have a huge advantage because it would be able to raise money from the vested interests of the status quo. That is a good reason for having a public grant.

We might think that giving public money to the campaigns would help to shed light on the issue, but some might argue that they just make the issue more difficult to understand and complicate it. As I said at the end of my paper, perhaps we should instead consider giving public money to a process of citizens' engagement and awareness raising.

Professor Wyn Jones: To respond to Annabelle Ewing's point, of course it is difficult to justify spending public money, particularly when it is on things that will be contentious and will offend many of those who will have to contribute to paying for the literature.

The experience in Wales—I acknowledge that it was a different system—was that there was money available to pay for stuff that people did not need to pay for. For example, you can borrow an office and get hold of a computer, but what you need to pay for is the leaflet to put in the envelope or filming a broadcast. However, that was all stuff that the campaigners could not spend money on. It meant that the money that was available was pointless, in a sense.

My own view, for what it is worth, echoes what Willie Sullivan said. The referendum in Wales cost £5 million or so in the end, but there were no free designations. A lot of public money was spent on a process, but it did not actually deliver information. The Electoral Commission circulated information, but it was so bland that it was extremely difficult for anyone to come to a judgment on the basis of it.

Annabelle Ewing: In relation to Mr Norton's point about the money that is provided to the Electoral Commission, that is for the commission's duties, which are quite clearly set forth. That is not the same issue as the one that we have been discussing. Professor Wyn Jones set out clearly the position on the provision of money beyond that to particular sides in the argument, which I would have thought is a slightly different issue.

James Kelly: I have a specific question for Professor Wyn Jones. You said in your initial statement that, as far as the Welsh experience was concerned, you were highly critical of the Electoral Commission and that you did not think that lessons had been learned from that. What lessons can be learned for the referendum in Scotland from the performance of the Electoral Commission in Wales? What must it take on board to get things right in Scotland?

Professor Wyn Jones: I will make two slightly different points. My first is about the commission's own report, which gives its reflection on the experience in Wales. I regard that report, which is available, as being purely an exercise in self-justification. Interestingly, it strikes a plaintive note when it says that the commission contacted people on both sides of the campaign, but no one on the yes side responded. However, eight weeks after the referendum, we had an election in Wales, so all the people who were involved in the yes campaign—we are talking about political professionals—were off fighting an election. Therefore, none of that experience is reflected in the commission's report. Frankly, I am not sure that the commission was particularly upset not to have received a response from those people.

My second point is that, when I interviewed people who were involved in the yes and the no campaigns, they made a lot of critical noise about the commission, particularly about how incredibly cautious and often opaque its responses to queries were. I see that there is some nodding going on. I am not in a position to know whether that was true—I am not, as I said at the outset, an expert on electoral procedure—but I received a lot of critical comments even though I did not canvass opinion specifically on the commission. There is nothing in the commission's own reports to suggest that it is ever anything other than jolly good.

I am sorry, but I cannot give you specifics. All that I can tell you is that there was general disquiet among the people to whom I spoke, none of which is reflected in the commission's report.

Linda Fabiani: I, too, want to ask about the Electoral Commission. The Law Society of

Scotland said—I am paraphrasing here, so I might be using the wrong phrase—that it had always found the Electoral Commission in Scotland to act with absolute integrity; I think that those were the words that it used. Therefore, I am a bit concerned by Mr Norton's high-level concern bullet point 1, which basically says that he does not trust the commission when it comes to neutrality. Could you expand on why that is the case?

William Norton: Certainly. You have given the commission a question that asks, "Should Scotland be an independent country?" You have given it the duty to increase understanding of what that question means. On the basis of my experience of the way in which the commission prepared brochures in the north-east referendum in 2004 and in the AV referendum in 2011, I do not see how it can discharge that duty in relation to that question. I am sure that Willie Sullivan will back up some of my comments.

In 2004, the commission put out a very bland document that dealt with two different referendums. One of them was on whether there should be a regional assembly in the north-east of England. In certain areas, there was to be a reorganisation of county councils. The commission's document basically said, "If you want to know more about the first question, contact the yes and no campaigns—here are their telephone numbers." The first that we knew about that was when people started telephoning us. It would have been nice to know in advance that 2 million of those documents were going out. That knocked out my telephone for two days, as the number that the commission gave was my private line. It also knocked out the yes campaign's telephone for two days; I think that the campaign had to have another phone line put in.

11:15

For the AV referendum, the commission was effectively given a very normative question and ducked it. One would think that there would be a simple mechanical explanation of how the voting works in AV, and the commission produced little diagrams that showed piles of votes moving around.

I had some criticisms of that document, and I suspect that Willie Sullivan had some different criticisms, and that was just a simple description of how two voting systems work. I will be staggered if the Electoral Commission is able to produce a document on understanding that question that does not lean to one side or the other in some way, which would lead everyone to start reaching for their lawyers.

If you want that question and that duty to be given to the Electoral Commission, you will create a massive headache for it. You will get a very bland document that says that people should telephone the two campaigns. The Electoral Commission is very good on some things, and it has got better over the years. It is good on things such as procedure, and telling people, "You need to sign this form and get it in to this person by this date." However, on anything that involves policy or that has a normative element, the commission will get back to you.

The Convener: Are you suggesting that, in the circumstances, we should just remove that power from the Electoral Commission?

William Norton: I have set out what the equivalent duty was in the other referendums: it was narrower. You probably do not need to worry about what you would do with the two designated campaigns—you cannot designate on both sides—but I would go for a narrower duty that is specific. How will the Electoral Commission get people to understand independence in a way that does not lean one way or the other?

It could do that if the question was, for example, "Should Scotland leave the United Kingdom?" That is a factual thing, and the commission could simply say, "You start off inside the United Kingdom and end up outside it, and we will not know all the terms but there will be negotiation." That would be difficult enough as it is, but the issue is about getting people to understand the question, "Should Scotland be an independent country?" It will be very difficult to do that without leaning one way or the other.

Linda Fabiani: Do you not think that people are smart and would understand the question?

William Norton: It is not a question of you, madam; it is a question of the Electoral Commission.

Linda Fabiani: It has been tested—we have had that discussion about the question.

Willie Sullivan: The objective is to try to inform the voters as far as possible so that they can make a decision. There is an assumption that there is some sort of objective truth when there is not. You have given the Electoral Commission an impossible job to try to put that case. Both sides in the AV referendum thought that the document was biased one way or another, and that is going to happen again.

I understand that the Electoral Commission is not going to do the same thing this time, but we need to make sure. I think that you are asking too much of the commission to undertake that duty.

As I suggested in my paper, there are other ways—which have been tested by academic research around the world—to get local communities to deliberate on and think about

issues without leading them in one direction or another, such as ethically trained facilitation. We would at least consider that as a way of getting real democratic innovation in this country.

The Convener: Does Professor Wyn Jones want to comment on that area before I go back to Linda Fabiani?

Professor Wyn Jones: No, I will not.

Linda Fabiani: What we have heard from everyone on that issue is interesting. We will be taking further evidence, but it is worth putting on record that there was a unanimous view in the Parliament that the Electoral Commission should fulfil that function when it comes.

Tavish Scott: No, I do not think that that is true at all.

Annabelle Ewing: Perhaps I can be helpful here. The Secretary of State for Scotland—

The Convener: Let us not get into an argument across the table—we are supposed to be asking the witnesses questions. Are there any other questions for the witnesses?

Rob Gibson (Caithness, Sutherland and Ross) (SNP): I am interested in hearing more from Richard Wyn Jones about the coverage of the Welsh referendum. You said that there were Welsh-specific issues in the media that required to be looked at. Could you expand on that?

Professor Wyn Jones: I mentioned two issues, one of which was the Welsh language. It was a struggle to find anybody who could articulate the no case in Welsh. At one point, broadcasters were seriously worried about how they could cover it. It would be rather strange to have a referendum on Wales without being able to cover it in the Welsh language. The BBC in particular found itself at least hovering over lines that it should not be crossing. In the event, it was the media that put the no campaign in touch with two campaigners, who became its Welsh-language spokesmen.

The no campaign was weak on the ground and lacked support. I spoke to reporters who said that they had to make multiple calls to the no side to ensure that there was something happening that they could film so that they could then show what the yes side was doing. I do not think that those examples are relevant to the referendum on Scottish independence—I certainly hope not. There were Welsh-specific elements that may be of interest but are probably not particularly relevant to Scotland.

Rob Gibson: But we have the BBC in Scotland and the BBC in London. I do not suppose that there was much coverage by the BBC in London of the Welsh referendum. However, there might well be with this one.

Professor Wyn Jones: To be fair, there was some coverage of the Welsh referendum—the BBC in London felt the need to cover it. However, if the choice between part 3 and part 4 of the Government of Wales Act 2006 was arcane for people in Wales, covering it in the so-called national media was even more difficult.

Rob Gibson: I have a question about awareness raising and the process relating to the Welsh referendum. You mentioned the Welsh-language element in that. I presume that the approach in Wales was to ensure that materials relating to the whole process, from awareness to the polling place, were available not only in English and Welsh but possibly in other languages.

Professor Wyn Jones: It would not happen in Wales these days without being in Welsh and English. There was the police commissioner example, but that is another story.

The Convener: As there are no further questions, I thank you for giving evidence, gentlemen—[*Interruption*.] Sorry, did you want to say something, Mr Norton?

William Norton: I just wanted to agree with the point about languages.

The Convener: If you want to submit something later, please free to do so. Having begun to conclude, I had better do so.

Thank you very much. I am grateful for your evidence this morning, which was very helpful. The next meeting is scheduled for Thursday 16 May, when the committee will take evidence from the Electoral Management Board for Scotland and Professors Tom Mullen and Neil Walker.

Meeting closed at 11:23.

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