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Pàrlamaid na h-Alba

Official Report

REFERENDUM (SCOTLAND) BILL COMMITTEE

Thursday 16 May 2013

Session 4

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REFERENDUM (SCOTLAND) BILL COMMITTEE
13th 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:

Gordon Blair (Society of Local Authority Lawyers and Administrators in Scotland)
Brian Byrne (Scottish Assessors Association)
Professor Tom Mullen (University of Glasgow)
Mary Pitcaithly (Electoral Management Board for Scotland)
Professor Neil Walker (University of Edinburgh)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Referendum (Scotland) Bill Committee

Thursday 16 May 2013

[The Convener *opened the meeting at 09:31*]

Scottish Independence Referendum Bill: Stage 1

The Convener (Bruce Crawford): Good morning, colleagues. I formally remind people to switch off their phones. We have received no apologies. I welcome everyone to the Referendum (Scotland) Bill Committee. This is the second of five meetings during which the committee will take evidence on the Scottish Independence Referendum Bill at stage 1.

I warmly welcome our first panel of witnesses, who are electoral professionals and so are directly involved in implementing provisions of the bill. All the witnesses have appeared before the committee previously to give evidence on the Scottish Independence Referendum (Franchise) Bill. I welcome Mary Pitcaithly, convener of the Electoral Management Board for Scotland; Gordon Blair, chair of the elections working group in the Society of Local Authority Lawyers and Administrators in Scotland; Brian Byrne, chair of the electoral registration committee in the Scottish Assessors Association; and Kate Crawford, chair of the Scotland and Northern Ireland branch of the Association of Electoral Administrators.

I understand that none of the witnesses wishes to make an opening statement, so I will kick off with a couple of questions on the paper that the EMB has kindly submitted to us. I was glad to see that the opening and closing paragraphs emphasise that there has been significant engagement and early consultation with the Scottish Government in the development of the bill. However, the submission raises some interesting issues, and I want to ask Mary Pitcaithly about a couple of them.

The first issue relates directly to a potential change in the bill. What you have said seems eminently sensible, but I want to explore it a bit more. You state:

> "a timetable with key milestones as is used in elections legislation is a major omission and should be inserted into the Bill."

Will you tell us a bit more about that? Has that happened in previous legislation and if not, why not? Why would it be an advantage to introduce a timetable in the bill?

Mary Pitcaithly (Electoral Management Board for Scotland): My understanding is that a timetable has been included in previous legislation, and it is helpful for administrators if we have a common understanding of all the dates and times. For example, the Parliamentary Voting System and Constituencies Act 2011 contained a timetable of that nature. I do not know why there is no timetable in the bill—I am sure that it was just an oversight—but we can work on that. It would be helpful for us if a timetable was added to the bill.

The Convener: Will you expand on why it is helpful? It seems obvious to me, but I want to get that on the record.

Mary Pitcaithly: I suppose that it is just because we need to ensure that everybody has a clear understanding of all the dates. If a timetable is not added to the bill, the EMB will issue something so that all the returning officers and district returning officers have an understanding of the dates, but it would be more helpful to have that information in the bill. I do not know whether Gordon Blair wants to add to that.

Gordon Blair (Society of Local Authority Lawyers and Administrators in Scotland): A timetable gives an overview. It takes people straight to the detail in the pertinent legislation, aids understanding of the legislation and minimises the time taken to apply it. It also aids the implementation of regulations. A timetable is cosmetic, though, and nothing to do with the content of the law; it will not change the rules, but it is a useful and practical tool.

The Convener: So a timetable could be included in the bill, or the Government could insert a requirement for the Electoral Management Board to issue guidance on a timetable.

Mary Pitcaithly: Yes.

Gordon Blair: It would not be a timetable for absolutely everything. It would be equivalent to the timetable for the parliamentary election rules under the Representation of the People Act 1983, for example, or, as Mary Pitcaithly said, the timetable for the 2011 alternative vote referendum legislation.

The Convener: The second issue that I want to explore is more about clarity and is not directly related to the bill. On the declaration of results, the EMB's written submission states:

> "liaison arrangements between the CCO and COs for the count need to be the subject of consultation, with clarity on the appropriate sequencing of local and national declarations."

Can someone extrapolate on that and explain the thinking behind it?

Mary Pitcaithly: We are thinking about the need for us to be absolutely clear about how we

will declare the final result and about all the steps that will be taken from the point when the first result is available at a local level to the point when we have the national result. There will have to be discussions between the chief counting officer and the various counting officers around the country about the process for doing that. The board has set up a workstream in anticipation of that being our responsibility. We will do some detailed work on what systems we will use to collect and collate the results and on how we will advise the public, who will be glued to their television screens and interested in the process. We will ensure that people are clear about how everything will happen.

We used a particular system for the AV referendum in 2011. The question is whether we will use something similar to that or another system that is on the market, or whether we can devise something ourselves that will allow us to be absolutely clear about the transferring of information from counting officers to the CCO.

The Convener: But I am right in assuming that that would not require a change in the bill.

Mary Pitcaithly: Yes.

The Convener: It can be done through the Electoral Management Board.

Mary Pitcaithly: Absolutely.

James Kelly (Rutherglen) (Lab): I thank the witnesses for coming along this morning. I want to discuss some issues around the organisation of the poll, but particularly applications for postal and proxy voting and the receipt and counting of such votes. It is clear that the referendum will have a much higher turnout, so the volume of postal and proxy votes will be much greater than that for previous elections. What particular issues need to be taken on board and focused on around postal and proxy voting applications, their receipt and the counting of such votes?

Gordon Blair: There are two implications. One, which is on the registration side, is about applying for a postal vote; the second, which is on the counting officer side, relates to the issuing of postal votes, returning them and processing them, which includes absent vote identifier checking. Perhaps one of my colleagues can expand on that.

Brian Byrne (Scottish Assessors Association): The postal voting mechanism proposed in the bill is fairly traditional, but there will be some changes in the postal voting mechanism for the European Parliament elections. It might therefore be worth looking at whether those changes can be incorporated in the bill. The early issuing of postal votes will happen for the first time at the European elections. If the bill retains the traditional system, we will have to change back to it, which is more or less just about the issuing of postal votes and not about early issuing.

James Kelly: I am not really aware of the changes for the European elections. What are they?

Brian Byrne: There is a possibility of issuing to the standing list a little earlier rather than waiting until the last possible date. That will also need a mechanism for cancelling a postal vote if a person is no longer registered. So it is not quite straightforward, but it is being introduced for the European elections. I understand that Government officials are looking at it, because it is worth considering.

James Kelly: Would that require legislative change?

Brian Byrne: Yes, a change in the legislation would be needed.

James Kelly: We need to keep on top of that as the bill goes through the parliamentary process.

Brian Byrne: There is also a minor—

The Convener: I am sorry to interrupt, but has the legislation on the regulation of the European Parliament elections already gone through the appropriate parliamentary process at Westminster?

Mary Pitcaithly: No. We have only just got the draft regulations, as they were published just a few days ago. We are picking these things up as we go along.

The Convener: What is the timescale for those regulations to go through Westminster and how does it compare with the timescale for the bill?

Brian Byrne: It will be July, I think.

The Convener: Okay. Thank you.

Brian Byrne: A slightly related issue is that the fact that there is only one cut-off date for applications for absent votes in the bill is, I think, an error. That would mean that the cut-off date for proxy votes and postal votes would be the same, which would be unusual. We assume that that is an error. The respective cut-off dates are usually a week apart.

James Kelly: We will pick up on that.

When it comes to organisation in the polling station on polling day, given that a much higher turnout is expected, there will be a lot more people moving through the polling station. The board's submission comments on managing the number of people in the polling station. What are the issues there?

Mary Pitcaithly: One of the board's key principles is that there should be no barriers to people who want to vote. We need to ensure that the polling station is welcoming to people and is not cluttered, that there are no queues and that the route to the ballot box is obvious. One of our key principles is that people should be able to vote easily when they take the trouble to turn up at a polling place. We need to ensure that, as well as running efficiently, polling stations do not present any barriers to anyone who wants to vote. The normal staffing levels might be enough, or we might look at augmenting staffing levels in our polling stations. We will have to consider such matters nearer the time.

In relation to the 2011 alternative vote referendum, the Electoral Commission gave fairly detailed guidance on the point at which a third member of the polling staff would be introduced. For example, under that guidance, there would be a presiding officer and two polling clerks in a polling station with more than 1,000 voters. Off the top of my head, I think that that was the rule, although I am not sure. That is the sort of issue that the board might consider in relation to the referendum.

James Kelly: I am sure that my colleagues round the table will agree that one of the things that the various campaigns will be interested in is the rules on campaign representatives—or people who are not part of the official campaigns, but who are interested participants—standing outside or inside polling stations. What will the rules be for managing that?

Gordon Blair: In my experience, the main area of contention is display of political material in the polling place—in other words, in the building and school playground, if the polling station is in a school—and in the place where the booths for voting are. Detailed rules and guidance are issued at each election, which usually come from the Electoral Commission, but I am sure that the chief counting officer will have guidance on that as well. The management and enforcement of that on polling day is part of the training of presiding officers at every poll. There should be no political material in the polling place. That is one issue.

You referred to the suggestion in our submission that the presiding officer should have the power to control the number of voters in the polling station, as opposed to the wider polling place. That is because the number of persons who will be entitled to be in the polling station will be much bigger than would be the case at an election. There might have to be an increase in the number of polling stations because of the higher turnout that is anticipated—some people have mentioned a turnout of 80 per cent, but the committee probably has a better idea than we do of the likely turnout. At that level, we would need to increase the number of polling stations. That would reduce the available space in buildings, which would mean that we might have to control the number of people in the polling station. Those are the two main issues on control.

09:45

James Kelly: What about the entrance to the station, which is where political parties and campaigns tend to congregate? We need to ensure that voters can enter without undue interruption. Given all the interest, has consideration been given to the situation immediately outside the polling station?

Gordon Blair: In the past, the Electoral Commission has issued very good guidance for polls, which we expect to adapt for the purpose of this poll. By "adapt", I mean top and tail it—the principles will remain the same, as a poll is a poll, in essence. Detailed guidance will again be available for presiding officers consistently across Scotland. The issue will then be about giving the presiding officers confidence through their training to be able to enforce that guidance.

Mary Pitcaithly: I emphasise that we do not send presiding officers to the polling day unprepared. We have available very good training modules for all counting officers. Training is mandatory; we make it essential that anyone who is going to work in a polling station attends that training. We have beefed that up quite a lot in recent years. Something that used to be fairly perfunctory is now quite detailed and can last a couple of hours. People sometimes have quizzes to answer. They are asked randomly to give answers to questions and deal with incidents that they might encounter on the day. We try to do as much as we can so that people feel well prepared.

Inevitably on polling day, the phone rings and a presiding officer says, "I'm having a bit of difficulty here, and people aren't doing as they're told—could you come and have a word?" Alternatively, people who are being asked to move away from the front door complain about the fact that they are being asked to move. It is one of those no-win situations. We manage such issues. Undoubtedly, little incidents will happen all over the place, but the board's interest is in ensuring that a consistent approach is taken across the country. A single set of guidance is usually most helpful in that respect.

The Convener: A number of members want to ask supplementaries. When I ask you whether you want to ask a question, please confirm that it is a supplementary; otherwise, I will need to come back to you. Linda Fabiani indicated first.

Linda Fabiani (East Kilbride) (SNP): It is a supplementary. Following James Kelly's question,

I am interested in the different language that is being used and what you are suggesting that we do. The written submission says that the PO should be given power, which suggests to me that you are looking for the bill to be changed, so that there is something in legislation. However, in the discussion, we have been talking about guidance. Will you clarify exactly what you are asking the committee to consider? In addition, what is the precedent? What is already there? Much as we folk who horde round polling stations should know all these things, perhaps we are sometimes the cause of presiding officers phoning you.

Gordon Blair: The bill would need to be changed to provide the presiding officer with the power to control, which is not in legislation for elections. The reason why we suggest that is that, under the bill, people who have never before had the right to attend elections will be entitled to be in polling stations. That is the difference that we are picking up on when we suggest that such a power should be included in the bill. That is a legislative change.

The other matter, which Mary Pitcaithly talked about, is guidance. The bill is fine on that, as the chief counting officer will have powers to issue guidance or direction if required. Before guidance is pushed out the door, there will no doubt be consultation on it, not just with practitioners, but with political parties, if it has a political element.

Linda Fabiani: That clarifies the issue.

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab): I have a brief question about the expected increase in turnout. It might be a bit obvious, but I think that it is worth asking anyway. Are discussions going on about the possible need to expand the number of polling stations from the normal number? Some countries might have a tradition of queuing up for the polls, but that is not a tradition in this country, and I would hate for people to walk away and not cast their vote just because it was a bit more difficult.

Mary Pitcaithly: We share that concern. There is absolutely no way that we would want to hear any stories about people having to queue or getting fed up and leaving. That would not be acceptable. We will look carefully at the projected turnout figures when we make our final decision on how many polling stations to have.

We have a concern about space. It would be better to open up another room in a school or to use a different place, rather than to have too many polling stations crushed into one place. We have a rule of thumb on how many voters would normally use a station, which is based very much on what we expect turnout to be. Those matters are under consideration.

The other side of the matter is that, were there to be a significant increase in the uptake of postal voting—it is rising all the time—that would suggest fewer people using the polling station on the day. However, that might be balanced by a higher turnout than at recent elections.

Stuart McMillan (West Scotland) (SNP): My question follows on from the point that was made about space. I can think of at least one polling station where, by the time the booths and staff are in place, even if there are only three or four people in the room, they are bumping into one another. Will the guidance that you have mentioned suggest that individual polling stations must be a minimum size?

Mary Pitcaithly: I do not think that we have considered how many square metres or whatever a station should be. However, there is guidance on how a well laid out polling station should look, how to control people coming in, and how they should get their paper and put it into the ballot box without having to zigzag around the room or without potentially getting confused about which box to put the paper in, for example. I expect returning and counting officers to be clear that they should not just cram another station into a room that is potentially not big enough for that.

Gordon Blair: For planning purposes, we will have to estimate the percentage turnout. For the sake of argument, let us take it to be 80 per cent. We should then review in each area our polling places and the number of stations. After that, we will need to look at each of the buildings that we think will be under pressure for space, and see whether we can use other rooms in the building, as Mary Pitcaithly said. If that is not possible, we will consider whether to increase the numbers of staff. If there is no other alternative, a route to solving the matter might be to use the additional staff to steward people into the station and while they are queuing at the door or in some corridor or wherever. Polling places and stations come in all shapes and sizes—

Stuart McMillan: They are not all in the public sector.

Mary Pitcaithly: Absolutely not. A concern is about having the right number of polling stations and identifying whether they are in the right place to suit voters. We keep that under constant review. For example, I planned for a 70 per cent turnout in the last election. In the end, I did not get that—I am an optimist at heart—but it was a bit risky to plan for anything less than that. I would not want members to think that, just because turnout is normally about 50 per cent, there would be issues if it turned out to be 80 per cent. I imagine that most of us plan for between 70 and 80 per cent turnout. There will not be a huge difference in our planning for the referendum, but we absolutely

want to avoid the issues that the committee has raised.

The Convener: Before I bring in Stewart Maxwell, I want to dig a bit deeper on that. You must go through a process in making the assessment on turnout. What factors do you use? How soon before an election do you make that assessment?

Mary Pitcaithly: The returning officers make that assessment for themselves because, as you will be aware, turnout can vary significantly. Where there is traditionally a high turnout, the turnout might be even higher. Where there is traditionally a low turnout, the turnout might also go up significantly. I imagine that we will base our planning on what we read in the press, what we hear and what we anticipate the level of interest will be. There is no scientific way of doing that at this stage. Much can change in the next 15 or 16 months.

Gordon Blair: We engage with the political parties and candidates—obviously, there will be no candidates this time—in briefing sessions before the poll. For a May poll, we usually kick off those sessions in January, so we will wind back that timescale for the September poll next year. We get feedback from the political parties on whether we have enough polling stations in different locations and what turnout they expect. That is part of the information gathering that will inform us at the end of the day.

The Convener: I ask Stewart Maxwell and Rob Gibson to make their supplementaries quite tight, as I want to explore other aspects.

Stewart Maxwell (West Scotland) (SNP): I have two brief supplementaries, if the convener does not mind.

First, not that long ago, we had turnouts with percentages in the high 70s and 80s, and we managed those perfectly. I live in an area where turnout was in the high 70s—it was 79 per cent—and I do not remember that causing big queues or particular problems. I presume that the lessons from the past have not been lost.

Mary Pitcaithly: Absolutely not.

Stewart Maxwell: I just wanted to make that point.

Secondly, in response to James Kelly's earlier question, you mentioned guidance on the display of political material. Will you lay out what is defined as political material?

Mary Pitcaithly: The guidance is clear on, for example, what types of rosettes people can wear in and around the polling station and whether they can display the name of the candidate or party or political colours or whatever. The guidance is an attempt to achieve consistency, because at one stage everyone probably had slightly different rules. This time round, there will be no candidates, so any rosettes that people might wear will probably say either "Yes" or "No", which should be a bit simpler.

Stewart Maxwell: I am not so concerned about that but, not so many years ago, in an area where I was working, there was a challenge not about rosettes, badges or names but about newspapers lying around inside a polling station.

Mary Pitcaithly: That issue was brought to my attention once as well. In a very quiet polling station, the PO had decided to read the newspaper and laid it down when someone came in, but that meant that people could see the banner headline. Our training for polling staff is now clear that they should not leave newspapers lying around and they should be careful about anyone else who might lay something down, apparently quite casually. The polling staff are supposed to go round the polling place to ensure that that does not happen. We are clear about that.

The Convener: I will allow Rob Gibson a last question on this before I come to Annabel Goldie.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): Obviously, if there is talk of having more polling places, people in communities will need to know where they should vote, and there needs to be some consistency on that. Between next year's European elections and the referendum, I take it that there will be no change in polling places, given the disruption that can be caused to the voting figures. People may be notified of the polling place on their card, but they might not have more information than that. Do you have any tally of the change in the number of polling places? Do you expect that other venues will be used? Those are important points, I think.

Mary Pitcaithly: I have not yet done any work to establish whether particular returning officers anticipate having two separate sets of polling schemes, if you like. I would not have thought that that will happen, but you are right that it is likely that there will be a difference in the turnout. If the tradition in European elections is maintained, the turnout for the European elections will be relatively low. Those take place a short time before the referendum vote, so we will need to look at that issue carefully. We need to make every effort and take every opportunity to ensure that people understand where they should vote. Where there is a difference between the two sets of elections, we will need to highlight that.

Rob Gibson: How do you highlight that? Is there a general regulation about that?

10:00

Gordon Blair: There are two issues. The polling places are designated by the local authority, but the issue that we have just been talking about is the number of polling stations within the designated polling place. The number of stations is determined by the counting officer or returning officer. Those are two different things.

Under the Electoral Registration and Administration Act 2013, there will be a mandatory review of polling places for Westminster parliamentary polling districts and polling places. That review kicks off from 1 October this year. We are beginning to look at whether councils might take decisions on polling places, not just under that review but for all the forthcoming back-to-back polls—the European elections, the independence referendum and, the following year, the United Kingdom Parliament general election. The last thing that we want to do is to chop and change the polling places. The review process involves public consultation. Once the polling places are designated, every elector whose polling place has changed will be notified through the registration officer's staff at the behest of the returning officer.

Mary Pitcaithly: I suppose that it is possible that, when people turn up for the European elections, there might be only one polling station in the classroom that is always used, whereas an additional classroom or hall might be used in September. Therefore, additional signage and stewarding, which Gordon Blair mentioned, might be required to ensure that people do not leave and go elsewhere because they do not see their address in the normal polling station.

The Convener: How would the PO enforce the additional powers that are being sought for them? How would that differ from an individual just using the force of personality in those circumstances?

Gordon Blair: The answer to that question is the same as the answer to the question of how the presiding officers would enforce the power, which they have always had, to remove people who are causing a disturbance. Basically, a presiding officer asks them to leave and, if they refuse to leave, the PO asks the returning officer for assistance. If the situation escalates, police assistance is asked for.

The Convener: So a process is already in place.

Annabel Goldie (West Scotland) (Con): On the declaration of the results, I am still a bit unclear about what section 6 actually means. Under section 6(3)(b), it is clear that a counting officer

"must not make the certification or any public announcement of the result of the count until authorised to do so by the Chief Counting Officer."

Does that imply that the chief counting officer has the discretion to allow local announcements?

Section 6(4) makes it clear that

"The Chief Counting Officer must ... certify ... the total number of ballot papers counted, ... the total number of votes cast in favour of each answer to the referendum question, and ... the total number of rejected ballot papers",

but it says nothing about the chief counting officer publishing the result. Does that mean that it could remain a big secret?

Mary Pitcaithly: If the chief counting officer could say, "I have certified the vote, but I am not going to tell you," that would be a real power.

Annabel Goldie: Yes, the chief counting officer might say, "I have written out my certificate, and you will never know." I am just curious, as that seems a bit of an anomaly.

Mary Pitcaithly: It could well be. That had not occurred to me, to be honest. The bill refers elsewhere to a public announcement, but that would be by the counting officers locally once they had received the authority for that.

Let me see whether there is anything about that over the page.

Annabel Goldie: Will the chief counting officer have the discretion to allow local results?

Mary Pitcaithly: There were very similar provisions for the AV referendum, for which the results were announced locally. The overall result was an aggregation of all that.

Annabel Goldie: Do you expect that to happen under the bill?

The Convener: On page 66 of the bill, in schedule 3, the declaration of the results is dealt with separately. Do the witnesses have that page in front of them?

Mary Pitcaithly: Yes.

The Convener: Subparagraphs (1) to (3) of paragraph 35 describe the process. I hope that that helps.

Mary Pitcaithly: Yes, that is okay.

The Convener: Does Annabel Goldie want to look at that and come back to the issue later?

Annabel Goldie: That perhaps clarifies the obligation on the chief counting officer, but it does not make clear whether we expect local results to be declared. We need to clarify that.

Gordon Blair: The bill does not require a local declaration. If that were desired, it would need to go in. The bill requires the chief counting officer to certify to the local counting officer that she is happy with that local count. It will then be fed into

the national result and there will be a national declaration.

At some point, we local counting officers will need to ascertain that what we certify to the chief counting officer will not be challenged locally. That is where the guidance from the chief counting officer on how we go about that will come in. It is clear that the bill is designed for a national result to be declared first before any local ones.

The Convener: That is different from the evidence that we took during our consideration of the Scottish Referendum (Franchise) Bill. If my memory serves me correctly, officials told us clearly that what you describe was the original intent, but they intended to change the Scottish Independence Referendum Bill to allow for local results, which could not be contained anyway because of the modern media.

We need to get clarification on paragraph 35(2) of schedule 3, which says:

"When authorised to do so by the Chief Counting Officer, the counting officer must ... make a declaration of the matters certified under section 6(2)(b)".

If I understand it rightly, section 6(2)(b) refers to local decision making.

Mary Pitcaithly: Yes.

Annabel Goldie: The public announcement.

The Convener: Locally.

Annabelle Ewing (Mid Scotland and Fife) (SNP): Paragraph 53 of the policy memorandum says:

"The Bill requires counting officers to provide the CCO with the certified results, information on rejected ballot papers and other information as soon as they are available. The CCO will then authorise the counting officer to announce the local result. When the CCO is in receipt of all certified local results, a national declaration will take place."

That is certainly the policy intention.

The Convener: I think that that is what the paragraph that I just read out from schedule 3 refers to.

Annabel Goldie: I think that there is an ambiguity.

The Convener: We should note that point and write to the Government now to get clarification on it.

Patrick Harvie (Glasgow) (Green): I apologise to you, convener, and to the witnesses for being a few minutes late for the meeting. I could blame ScotRail or the Minister for Transport and Veterans personally—obviously, that is my preference.

Rob Gibson: Good morning! [*Laughter*.]

The Convener: I see that you got out of your bed on the right side, Patrick.

Patrick Harvie: In an election, before we get to the local declaration of a result, the campaigners for one candidate or another have the opportunity to challenge for a recount if they think that the result is close and that it might not tally with what they expected from their canvass returns. The bill provides for recounts, but I am not clear on what grounds a challenge for a recount might be brought. Even if the result is close in one area, that will not necessarily affect the outcome of the overall referendum. How is that power expected to be used before local declarations are made?

Mary Pitcaithly: The discretion as to whether to have a recount is vested entirely in the counting officer. As you say, there would normally be discussion with the candidates and their agents before such a decision was taken. One of the candidates could request a recount but, ultimately, the decision would rest with the returning officer. Under the bill, it would rest with the counting officer.

I expect the board to issue guidance to counting officers on the matter. Clear guidance was issued about the potential for recounts in the most recent set of elections, particularly in relation to e-counting—you might remember that specific guidance was given on that—so it is the sort of issue in which the board would be interested and on which it would expect to issue guidance that would help counting officers in the exercise of their discretion.

Patrick Harvie: The issue is, of course, that a local result that has to be recounted will affect a local outcome, because of the votes that are being recounted, whereas the referendum's outcome will not be based only on those votes. For example, in Glasgow, one of the local ward results was declared, councillors were put in place and then a ballot box that had not been included was found, so there had to be another count to include those results some weeks later, which meant that an elected councillor was unsure whether his position was in doubt. What will be the process for deciding how relevant something is to the referendum's outcome?

Mary Pitcaithly: We have to be clear about such issues beforehand, because anything can happen. It could look as though there is a runaway result in one side's favour, only for the position to change as the count goes on. We have to treat each count as a discrete count in deciding whether it is accurate, accepted and certified as accurate.

All sorts of processes to double check and triple check results would be gone through before any announcement was made and any contact was made with the CCO. For example, the verification

reports are much more important elements of the process than they ever used to be, in my experience. People are now familiar with asking for information about the verification figures, which allows them to see quickly whether the figures tally by the time that we get to the split of the papers as well. The verification tells us how many valid papers have been counted. When the papers are split into the yes, no and rejected, the figures should add up. That is a simple check that people are now quite used to making.

The Convener: Stewart Maxwell will raise a different issue.

Stewart Maxwell: It is, I hope, a small point—just a clarification. In your submission, you refer to attendance at the count, which is covered in rule 29(2) in schedule 3, which is on page 62. Rule 29(2) says:

"The counting officer must publish notice of the time and place at which the counting officer will begin to count the votes."

You have suggested a change to that rule to make it read:

"The counting officer must give notice to observers attending the count of the time and place at which the counting officer will begin to count the votes."

Why have you suggested that?

Mary Pitcaithly: Only certain people are allowed to attend the count, so it is appropriate that they should get notice of it. Obviously, the public will be interested in the count but, generally, the public are not entitled to just turn up and attend a count. A public notice could lead people to think that they could just turn up.

Stewart Maxwell: Clearly a lot of people—not just those who are turning up as observers—will be interested. The media and a number of individuals and outlets will be interested in when the count starts and how long it is likely to take and so on. Would your suggested change restrict that information and prevent other individuals apart from the registered observers from knowing that information?

Mary Pitcaithly: No. Apart from the registered observers, the media are the other main group that will observe what is happening. We will be in close contact with the media about what the arrangements are. Our view is that a public notice would lead people to believe that they could just turn up at the count and walk in without any accreditation or without fulfilling any of the requirements.

Stewart Maxwell: Rule 29(2) does not say that it is a public notice—the word "public" does not appear.

Mary Pitcaithly: It says that the counting officer "must publish notice".

Stewart Maxwell: The position depends on how "publish" is defined.

Gordon Blair: The point in the submission is that, for every other poll, there is no publishing of a notice. The requirement is for the returning officer or the counting officer to give formal notice of the date, time and place of the count to those who are entitled to attend. The public are not entitled to attend.

What we tell the public—just for information—about when or where the count will take place is another matter entirely. However, we do not think that it would be a good idea to publish a notice, which means "to issue to the public" according to the dictionary definition of the word "publish".

Mary Pitcaithly: I suppose that we are talking about the difference between giving notification and publishing a notice.

Gordon Blair: We are saying that, if something was good for previous polls, why not have the same approach for this poll? That is where the suggestion comes from—it is no more than that.

Stewart Maxwell: We will have to follow that up. At least that clarifies what the point is.

The Convener: As nobody has any other points to make on that issue, Rob Gibson wishes to raise another matter.

Rob Gibson: It is just a small issue. The submission mentions the need for

"An index or contents page for the conduct rules",

which you say was included in the Parliamentary Voting System and Constituencies Act 2011. You suggest having an index in the bill. I suppose that that is a bit like your suggestion to have a timetable in the bill—you are suggesting that we do the work, rather than you.

10:15

Gordon Blair: That is the standard approach for all other electoral legislation. A quick reference just aids understanding.

Rob Gibson: So we need to make an amendment—okay.

Annabelle Ewing: In your submission, you talk about disregarding days of public thanksgiving or mourning. I am sure that those are defined terms but, for the benefit of the *Official Report*, will you explain how a day of public thanksgiving is defined? I am not particularly familiar with that term.

Brian Byrne: A day of public thanksgiving or mourning has to be passed by a Parliament. If it is,

in effect, a day off work for people, it should not be counted as part of the timetable. That is our concern. Saturdays, Sundays and public holidays are not counted.

Annabelle Ewing: I was going to come on to the general principle. A Parliament will agree that there should be a holiday on a day of public thanksgiving, but are there any examples of that? What kind of thing constitutes public thanksgiving?

Brian Byrne: It is a matter of royal proclamation. There was one example last year—the Queen's diamond jubilee.

Gordon Blair: The computation of time for our purposes of conducting the poll treats days of public thanksgiving or mourning as exempt days, so we are just talking about consistency of approach. When fixing the timetable, an easy trap to fall into is to miss a day that is not supposed to be counted. That can be crucial. The point is just about consistency.

Annabelle Ewing: I appreciate the point. In my previous life as a practising solicitor, counting the days was an important part of the case file. Does the Scottish Parliament have the power to announce a day of public thanksgiving?

Mary Pitcaithly: I think that it is done by royal proclamation.

Annabelle Ewing: Given the precedent, your position is that the express provision of a disregard for such days is the norm and should be included.

Mary Pitcaithly: Yes.

The Convener: That helps to explain the situation.

Stuart McMillan: I have a brief point on schedule 1 and the form of the ballot paper. You suggest that the official mark should be on the front rather than on the back because of the time that it would take to turn each paper over. Is that the main issue with the official mark on the ballot paper?

Mary Pitcaithly: Yes, that is the only issue that we have with it.

Gordon Blair: The norm is for ballot papers to have the official mark on the front, because it is more easily spotted. One of the things that must be checked to ensure a good vote at the count is that the official mark is present. That prevents bogus papers from being slipped in by somebody. Having the official mark on the front makes the check easier—that is where we are coming from.

Rob Gibson: I have a supplementary question on the response to Annabelle Ewing. If we publish a timetable in the bill and a day of public thanksgiving or mourning is announced, could that interrupt the timetable as it is set out in the bill?

The Convener: That is a good point.

Gordon Blair: The answer is no, because the timetable that we envisage in our submission is the timetable that appears in legislation for other polls. It is not actual dates, but the formula that determines each step in the timetable, and that formula takes account of whether there are any days of public thanksgiving or mourning. It is the formula that should be in the timetable. Good examples of that are in the 2011 act, which enabled the AV referendum, and the parliamentary election rules in schedule 1 to the Representation of the People Act 1983.

James Kelly: During the 1997 referendum period, there was the death of Princess Diana and a very public funeral. What would be the implications of something like that happening, which we had not planned for?

Gordon Blair: Off the top of my head, I think that the only implication for the conduct of the poll is that there would presumably be a day or days of public mourning, which would become exempt. That would affect the timetable. If that was not in the timetable as a formula, the poll would continue, because the timetable would not take cognisance of such an event.

The Convener: Would the potential length of such a period and having a formula have no impacts on other statutory requirements on the time at which things need to be done before the poll?

Mary Pitcaithly: No—if dates were going to be missed because of this, it would not be possible to do that. It would impact only on things that still had to be done. It could not be applied retrospectively. I am not explaining that very well.

Stewart Maxwell: For absolute clarity, if such an event occurred, not a week, a fortnight or three weeks in advance of the poll but right in front of the poll—if the days of public mourning or thanksgiving included the day of the poll—what would happen?

Brian Byrne: I am pretty sure that there is a mechanism in the bill for that.

Stewart Maxwell: What is it?

Brian Byrne: The mechanism is that Parliament would decide whether to postpone the poll.

Stewart Maxwell: So the Scottish Parliament would decide whether to postpone the poll.

Brian Byrne: Yes, I am pretty sure that that provision is in the bill.

The Convener: I am glad that we have drawn the matter out. We will need to discuss the issue with the Government. That takes us back to a question that I asked before: is it best to put a timetable in statute or is it best for the Government to put in statute a requirement for the Electoral Management Board to produce a timetable, which would provide more flexibility? We need to think about that in respect of where we are going to end up. If the witnesses wish to consider that point and come back with further thoughts about it, that would be helpful.

Annabel Goldie: I have a wee technical question. At page 45 of the bill, paragraph 53 of schedule 2 makes provision about the destruction of copies of the polling list and appears to create an absolute offence if anybody hangs on to their copy of that document beyond a year. Is that a normal provision?

Mary Pitcaithly: I think that that is the same as what appeared in the Political Parties, Elections and Referendums Act 2000, but I would have to check that.

Annabel Goldie: I am surprised that that is to be an absolute offence. I guess that most political parties—never mind the designated bodies—are not too aware of that provision. I was just curious—before we all get locked up.

The Convener: Perhaps the witnesses could get back to us with their views on that issue, which we need to consider.

I thank the witnesses very much for coming along and being prepared to deal with the issues in such detail. Part of our job is to go into that detail, to ensure that everything goes as smoothly as it can. We are very grateful to you.

10:23

Meeting suspended.

10:28

On resuming—

The Convener: I reconvene the meeting for the next evidence session, and I warmly welcome the second panel of witnesses. We have with us today two distinguished legal academics: Professor Neil Walker, who is the regius professor of law at the University of Edinburgh, and Professor Tom Mullen, who is a professor of law at the University of Glasgow.

I understand that neither of you wishes to make an opening statement on the bill, so we will crack on and go straight to questions.

Annabelle Ewing: Good morning, gentlemen. I am looking at section 31 of the bill, "Restriction on legal challenge to referendum result", and at the paper that Professor Mullen has helpfully provided. I would like to hear your comments on the provisions in section 31 as it is currently drafted, and then I will go on to the issues that Professor Mullen has raised.

Professor Tom Mullen (University of Glasgow): As I am sure you understand, the provision appears to place a restriction on the availability of judicial review, so that a petition for judicial review has to be brought within the six-week period that the bill specifies. It is similar to a number of provisions that appear in compulsory purchase and planning legislation, for example, which allow for an equivalent judicial review within a fixed time limit. In those acts of Parliament, the period is six weeks.

Finality is obviously important in this matter. A lot of things proceed on the assumption that the decision is correct, and it would not be in the public interest to try to unpick all those things six months or a year later.

Professor Neil Walker (University of Edinburgh): I entirely agree with that. I do not want to anticipate what might be said later, but I do not think that the provision is intended to be a general ouster clause, which would exclude all other forms of judicial review. Even if it was intended as such, I do not think that it would necessarily have that effect. To reiterate what Tom Mullen said, time is of the essence and the security of the result is very important.

The provision may raise other issues. For example, it might be slightly awkward with regard to the time periods for the return of the documentation of expenses and so on, which would clearly be relevant to the probity of the referendum. That period can be as long as three or six months, if I recall correctly, whereas the statutory judicial review period is six weeks. Perhaps we can deal with that issue later.

Annabelle Ewing: On the issue of timing, we heard last week from the dean of the Faculty of Advocates, who thought that a period of six weeks was out of kilter and that it should be three months. However, in your paper, Professor Mullen, and in what you have said this morning, you cite precedent for six weeks as the time period. Can you clarify that?

Professor Mullen: I think that the dean was referring to different legislation in which a three-month period is used. The six-week period has been copied, as it were, from planning and compulsory purchase legislation. I suppose that the question for the committee is what the most appropriate time limit would be, first in the interests of finality and secondly—to pick up Neil Walker's point—because we would not want the

period to be too short as necessary information might not be available within the six-week period.

Professor Walker: I agree with that. I think that the dean was also referring to other draft legislation, for which the idea was that the time period would move towards a general limit of three months. That may be more appropriate in other cases but, to reiterate the point, time is of the essence in this particular context.

Annabelle Ewing: Thank you for that. I will move on to Tom Mullen's paper, which I assume Professor Walker has had time to look at, and the wider issue of challenge.

As a lawyer, I would have thought that any bill is potentially subject to challenge on a whole series of grounds. A piece of legislation sits within the legal system of the country, so that point is axiomatic. Why is this bill any different? It sits within the legal system of the country. Yes, people can potentially challenge things and there are remedies—indeed, there are quite speedy remedies, such as taking it up as a devolution matter or going straight to the Supreme Court. It seems that the difficulty that is being raised perhaps does not reflect the reality on the ground.

Your paper is very interesting, Professor Mullen; perhaps you would care to comment on that.

Professor Mullen: The bill imposes a time limit; it does not try to prevent people absolutely from challenging any particular decision that relates to the referendum.

The background to that approach is that, at the moment, there is no time limit for judicial review in Scotland. However, there is a time limit in England and, as Neil Walker has suggested, there is a proposal to impose a three-month time limit in Scotland. Moreover, although there is no time limit, the background principle is that undue delay might lead the court to refuse the petition. As I have said, the reason for the time limit is the desire for finality and to ensure that everyone knows the outcome of the referendum. Apart from that time limit, there seems to be no restriction on the grounds of judicial review that could be used to attack any decision.

Professor Walker: It is probably also worth pointing out that not only is there no restriction on the grounds for a challenge but the time restriction seems to relate specifically to proceedings for questioning the number of ballot papers counted or votes cast.

One could imagine the possibility of, say, the referendum being questioned. It is an outlandish possibility but it might not necessarily have anything to do with the numbers of ballot papers counted or votes cast; instead, it might have something to do with gross breaches of the expenditure guidelines, for example, that would not have an effect on the votes cast but might lead people to question the probity of the overall process. In such a situation, which as I have said is pretty outlandish, one would not necessarily be restricted to the six-week limit.

Annabelle Ewing: Professor Walker described the possibility as outlandish, and that was indeed my conclusion when I read the paper.

Professor Walker: I was not saying that my colleague was being outlandish—perish the thought.

Annabelle Ewing: Of course not. I would not dare say that to Professor Mullen, whom I have known for many years.

I have to say that, when I read section 31, I did not feel that it excludes any other remedies at law. Surely it cannot do that—well, I guess that legislation can seek to do anything, but it might be quite difficult to exclude legal remedies. Should the bill contain a provision to that effect?

Professor Walker: Not necessarily. You said that legislation cannot exclude other legal remedies, but that leads us into very technical questions about what is possible.

It is possible to have a so-called ouster clause that excludes the courts except in very particular circumstances. We then get into very abstract constitutional debates about the effectiveness of ouster clauses, because judges are notoriously jealous about retaining their own jurisdiction over such questions and even something that purports to limit or oust the court's jurisdiction will not necessarily succeed.

That said, I do not think that that is what the draftsmen are trying to do in this case. I think that they are simply trying to say, "Look—there's a time limit for certain types of challenges to the referendum's probity."

Professor Mullen: I should add that my submission was not intended to be a criticism of the bill; I simply wanted to point out the legal implications of its drafting against the background framework of judicial review in order to make things clear. It had been indicated in advance that the committee was interested in the question of judicial review.

Annabelle Ewing: Two other points struck me about Professor Mullen's paper, the first of which is the clarification:

> "Election petitions under the Representation of the People Act 1983 are available only to challenge the election of a candidate and not the outcome of a general election."

The second point of interest is the conclusion that, even in the unlikely event of a challenge on

wider probity grounds, the likelihood of a successful challenge on the basis of an irregularity at one polling place affecting the overall outcome is "remote". Do either of you wish to pick up on those points?

Professor Walker: A very interesting aspect of my colleague's submission is on the fundamental difference from the Representation of the People Act 1983. As you have suggested, that act deals with a general election that is made up of 600 or so local elections and, as a result, there is the intermediate sanction of questioning the result of any of those local elections. However, in the case of the referendum, you have to go straight to the nuclear option of questioning the result in general.

You cannot question the result of any particular part of the referendum. There may be criminal offences and other legal processes, but your hands are tied on the remedies that are available. You can either question the result of the referendum as a whole, which is a very big question to ask, or go down the more technical path of the various criminal offences. There is no intermediate path.

That is why it is worth pausing and reflecting on whether, and the extent to which, there could be any ground for challenge other than simply on the computation of the votes, for example. I agree with my colleague that that seems very unlikely.

Annabelle Ewing: Professor Mullen, do you have anything to add to what your paper says?

Professor Mullen: I have nothing more to add.

The Convener: I want to be clear that you are not suggesting any changes to the bill in that regard in the paper and the evidence that we have heard from you.

Professor Walker: No. I think that the provision is well drafted.

The Convener: The other area was explored earlier, as well. You are not suggesting any changes to the bill in that area either.

Professor Mullen: What was the other area?

The Convener: Section 31.

Professor Mullen: No.

The Convener: So you are content with the way in which the bill is drafted.

Professor Mullen: Yes.

Professor Walker: Yes.

Patrick Harvie: Professor Mullen's paper discusses other possible grounds for challenge that would not be covered by the six-week limit. It mentions Watkins v Woolas. The allegation was that Phil Woolas made false statements about another candidate, and I think that that was found to be the case.

Given the conduct of the political debate about Scottish independence, it is not so outlandish to suggest that noses might be sufficiently out of joint that a similar complaint could be made. Obviously, there is a balance between legitimate cut and thrust in political debate and illegitimate or challengeable false statements. Is there anything that we ought to do to better clarify that balance and to try to close down the possibility of such a challenge being brought?

Professor Mullen: I think that that would be tricky. It is clear that other bits of law might be relevant. If a defamatory statement was made about an individual, the defamation could be challenged, but that would take time.

Patrick Harvie: I was more meaning about the referendum itself. Making a false statement about a candidate in an election is to make a statement about the issue that the election concerns—who should be elected. Making a false statement about the issue that the referendum concerns is to make a statement about independence or remaining in the United Kingdom as a future path for Scotland.

Professor Mullen: It would be difficult to have a regulatory solution for that. That would perhaps involve something such as the Electoral Commission saying that campaigners in this or that campaign had said something outrageous and untrue. That would be a great innovation in our electoral arrangements and would be highly contentious.

The risk that people will make outrageous statements simply has to be combated by non-legal means. The other side has to fight back and put its point of view. If there is such a thing as a neutral person out there, they might contribute. I think that any attempt to regulate the distinction between legitimate debate and unfair and false statements is not feasible.

Patrick Harvie: I also want to ask about legal challenges in relation to purdah. Will we come on to that issue later on?

The Convener: We can come back to it.

Patrick Harvie: I will come back with a separate question.

Professor Walker: I entirely agree with Tom Mullen on the first question. That aspect of the referendum campaign is incredibly difficult to regulate. Indeed, I cannot imagine how it would be regulated; it must be part of the cut and thrust of debate. You could regulate it pre-emptively, but who would do that? Who would basically go into the ring, separate the parties and say, "You're not allowed to say this"? If anyone did that, their neutrality would be compromised. Another option

would be to do it after the fact through the judiciary, although the judiciary would, rightly, be incredibly loth to be second guessing.

Patrick Harvie: Or you would at least time limit it in the same way that other grounds for challenge have been time limited.

Professor Walker: Whether the issue is time limited or not, it is the sort of question that judges would see as being effectively non-justiciable.

Patrick Harvie: That is not what happened in the Woolas case.

Professor Walker: Yes, in that particular case. You are right—there is a possibility at the margins that it could be justiciable. However, I cannot imagine it happening with the referendum.

10:45

The Convener: There are a number of supplementary questions on this issue.

Stewart Maxwell: Professor Mullen, you mentioned the six-week deadline, which you thought was taken from planning law. In your paper, you talk about the AV referendum and the Government of Wales Act 2006 as examples in which the six weeks has been used. Does the fact that the Scottish Government is effectively following those precedents, and taking the same or a similar route to previous electoral legislation, not severely limit the possibility of the risk of a challenge to the result?

Professor Mullen: The longer the limit is, the more likely that there will be challenges. The likelihood is that, if there is a serious upset about the conduct of the campaign or the count, it will emerge right away. I do not think that the fact that the Government is following another statute precedent will make too much difference to the likelihood of a challenge.

Stewart Maxwell: In your view, would the severity of the problems that might arise be so obvious that six weeks is sufficient timescale to allow people to make such a challenge?

Professor Mullen: I think so, especially bearing in mind that it is six weeks to get a case into court. The case will not be heard straight away, so someone will have a bit of time to do the necessary investigation beyond the original investigation.

Professor Walker: I agree.

Stewart Maxwell: Thank you.

Tavish Scott (Shetland Islands) (LD): In 2000, Bush v Gore was determined by the United States Supreme Court. I am sure that you are about to tell me that the same cannot happen here. A court will not determine this referendum.

Professor Walker: It is highly unlikely. You have the provisions in section 31, so obviously it is a technical possibility. In Bush v Gore, however, there was a whole range of circumstances that are highly unlikely to be replicated—I was going to say that that includes the fact that it was a very close vote, but I should not say that.

Tavish Scott: You should not say that.

Professor Walker: But it was an incredibly close vote—and we should think about the American system. It was a close vote in which a significant and telling percentage of the electoral college depended on whether a few more votes were valid in Texas. We do not have that; we have a basic aggregative mechanism in which we add everything up. That is one set of circumstances that makes it very unlikely that the same would happen here. Also, the US Supreme Court saw itself as having a much broader judicial review function than would be the case in this context.

Tavish Scott: That is perfectly helpful.

From the answer that you gave to the convener earlier, I take it that you consider the six-week period to be appropriate.

Professor Walker: Yes.

Professor Mullen: Yes.

Tavish Scott: Thank you.

Patricia Ferguson: I had read your paper with interest, Professor Mullen, but I had not planned to ask you a question about it. However, given Patrick Harvie's and Tavish Scott's questions, I would like to clarify for the record the issue of who might bring a challenge.

I realise that Professor Mullen's paper helpfully suggests that

"The person raising the petition must have sufficient interest in the matter to which the application for judicial review relates".

In the previous paragraph, there is some clarification about particular cases that have occurred. Forgive me if I do not know the detail of Walton v the Scottish ministers—I will now have to look it up because I am intrigued by it. Will you explain what an interest would be deemed to be?

Professor Mullen: In the past, there was a definite difference between Scotland and England on this front. The broad effect is that, for quite a few years, it has been possible in England for pressure groups such as Greenpeace or Friends of the Earth to represent the public interest. They cannot say that their members are more affected than anyone else, but they can deal with issues that affect everybody, such as environmental problems.

Cases have been brought in England on that basis, but it has been difficult to bring such cases in Scotland, because the definition of the interest involved had to refer to something more personal for whoever brought the case. However, the recent cases that I referred to in my paper have said, in effect, that the law in Scotland has to change to allow people to represent the public interest.

Perhaps somebody who is neither a member of a designated organisation nor a campaigner but who has some sort of public interest role might suggest that something has gone wrong with the referendum. The likelihood of that is slim, though, because of the practical issue of funding the litigation. It is the political organisations that will have the money to pay the lawyers to bring a case and to risk having awards of expenses made against them if they lose.

I thought that it was important to make the point that there could be a public interest role, but it is probably unlikely that anyone would take it up.

Professor Walker: I agree that it is unlikely in practice. However, this is precisely the kind of situation, legislation or case for which we need public interest litigation or the possibility of public interest litigation. We can say that everyone has a stake or an interest in it and that people should have a right to engage with that interest, regardless of whether they can prove that it is a distinctive interest or a deeper interest than anyone else's.

The general thrust of case law towards taking a more liberal approach in that respect is a good thing, and it is not a bad thing that it raises the possibility of public interest litigation. I agree with Professor Mullen that, practically speaking and given everything else, it is very unlikely that a challenge would come from that quarter. Who can tell, though?

Patricia Ferguson: I was intrigued by something that Professor Mullen alluded to in his answer. Are you suggesting that a member of the public with some sort of standing would potentially be able to take forward such a case but that one of the campaigning organisations involved could not do so because it would be seen as acting in its own interest rather than in the public interest?

Professor Mullen: No. The public interest is, in effect, an add-on to having a personal interest, and the campaigns already have sufficient personal interest.

Patricia Ferguson: Right. That is fine. Thank you very much for that.

The Convener: As I have done for previous matters and as Tavish Scott just did, I ask you to clarify whether you are suggesting that the bill should be amended.

Professor Walker: No.

Professor Mullen: No.

The Convener: Okay.

James Kelly: I want to talk about the issue of spending limits, particularly in relation to anyone who is a "permitted participant".

The Electoral Commission has set out the limits, certainly in relation to designated organisations and political parties, to ensure that there is a level playing field. I wonder whether there is a potential loophole in relation to permitted participants, who are allowed to spend up to £150,000. Is that an opportunity for a designated organisation or a political party that has reached its spending limit to look for a "permitted participant" as an outlet for surplus funding? Is that a loophole? How can that be regulated and controlled?

Professor Walker: I noted that the committee had a discussion last week about top-down models versus bottom-up models. On the one hand, there is value in having as precise a level playing field as possible; on the other hand, there is an argument for saying that there are so many voices in the referendum debate and that they do not necessarily divide into two obvious camps. In the final analysis, they do, but there are many voices. One of the ways in which they are reflected is by having a spending category for those outwith the designated organisations and political parties.

I think that there is a bit of a trade-off between those two ideals or goals. I like the approach that is taken in the bill, which allows for other permitted participants. I accept that, if you provide for other permitted participants and funding of up to £150,000, somebody sitting with a calculator might say that a little bit more money and a bit more oxygen of publicity has gone into one side than has gone into the other. However, by the same token, the approach allows people who do not want the debate to be dominated by the political parties or the designated organisations, or who do not like the way in which the debate is being dominated by those parties, to say, "Okay. Here's another perspective. Here's another agenda in the referendum debate." I think, on balance, that that is a good thing and that the bill strikes a good balance.

Professor Mullen: I agree.

James Kelly: I understand what you say about people who do not see themselves as attached to either of the official campaigns or any of the political parties, but what about someone who tries to use the provisions to take funding from the designated campaigns or the political parties and use it as a channel to support a political objective? How do you ensure that permitted participants are

genuine permitted participants who are looking to have their voice heard in the debate as opposed to front organisations for the other groupings?

Professor Walker: It is a very difficult area of law. We cannot deny that there is a lot of regulation in the schedules precisely to deal with such circumstances. It looks for linkages between source and expenditure and it creates all sorts of offences if those things are hidden. I know that none of that is perfect, but often what you are talking about are not clandestine front organisations but ideological fellow travellers who are close in their objectives.

What can we do about it if we have people who are quite close ideologically but who nevertheless see themselves as representing a different strain of opinion? I return to my original point that I would not necessarily want to stop that, although I can see that there are difficulties.

Professor Mullen: One way of trying to combat that might be political. The rules on donation reporting might be helpful. Under paragraph 41 of schedule 4, permitted participants have to make a report on donations four weeks into the campaign, eight weeks in, 12 weeks in and then about a week before the poll. That will show who is giving donations. If it was thought that organisation A is really organisation B wearing a different hat, the donation trail might help to substantiate the case.

There is a separate question about whether the disclosure level is low enough at £7,500, but you will maybe want to come back to that.

The Convener: On the issues that James Kelly has raised about permitted participants, is your argument that the schedules have enough safeguards in them—or safeguards that are as good as we can get in the circumstances—to ensure that abuse will not happen, or do you think that there are any ways in which the schedules could be improved?

Professor Mullen: There is a case for lowering the trigger for reporting a donation to below £7,500. Under paragraph 41 as currently drafted, quite a lot of substantial donations of several thousand pounds would not have to be disclosed.

The Convener: Okay. That is helpful.

Patrick Harvie: There has already been some controversy about the need for expenditure limits and rules on donations way before the spending limits and the rules kick in. There may be more of that to come. Some of it relates to self-imposed rules that the two campaign groups have adopted, which differ from one another. I think that each has a valid case that its self-imposed rules are the right rules.

Do you think that there is a case for ensuring that limits on expenditure come in earlier or for trying to get the two campaign groups to reach a shared position on the rules for donations early on, so that we avoid such differences of opinion?

11:00

Professor Walker: The question of earlier rules is a real minefield. The referendum period is 16 weeks. This is one of those situations in which, when you look at it initially, you think that the idea of specifying how the referendum should be regulated that the bill takes on might be inappropriate, because most referendums deal with more specific issues, such as AV, in which there is less public investment and of which there is less public knowledge. Such referendums are more likely to involve a short, sharp campaign, to which having a short, sharp period of regulation of finances might be suited.

That is clearly not the case with the independence referendum. It deals with a fundamental issue, which people know about and have views on. It is an issue that has been bubbling under in Scottish politics for many years. Comparing the independence referendum with the AV referendum is like comparing apples with oranges. That said, if we were to go the whole hog and say that the way in which we should deal with that is to regulate from day 1, there would be all sorts of problems with that. It would be a minefield from the point of view of the claims and counter-claims that would constantly be made.

To some extent, I already think that the referendum debate is not necessarily enhanced by all the legalisms that are associated with it, and that would be made worse if there was regulation from day 1. I also think that, in effect, the process would probably be uncontrollable. Members of the committee know this better than I do, because they are politicians, but at present the subtext to everything is the referendum debate and the issue of independence. I think that we would be better leaving things as they are, although a period of 16 weeks is perhaps a bit too short.

Patrick Harvie: Given that the two main campaign organisations have agreed self-imposed rules about where to accept donations from, is there a case for ensuring that those rules agree, so that the same rules apply to both sides?

The Convener: Do you want to be an arbitrator, Professor Walker?

Professor Walker: I might argue that that forms part of the political cut and thrust as well—that has certainly been the case. Those who have more self-disciplined rules start with an advantage. Such matters have been well publicised. I think that it is better just to leave things that way. I do not know whether my colleague agrees.

Professor Mullen: More or less. It is probably better to leave things roughly where they are, on the understanding that, of course, there will be a significant amount of expenditure before the regulated period starts—that is inevitable. There are a lot of potential difficulties with extending the period.

Professor Walker: There are a million different opinions on this, but I think that most people round the table would agree that, for something as important as the Scottish independence referendum, it is better to have a longer period. I know that there is a lot of disagreement about how long a longer period should be, but it should be a significantly longer period, given the significance of the issues involved. It would be simply impractical to regulate from day zero.

Patrick Harvie: Given the importance of the issue, some would argue that we should do everything that we can to reduce the power of millionaires in the debate, but that takes us into a whole other area.

The Convener: Before you go any further, Stuart McMillan has a supplementary question.

Stuart McMillan: It is just a brief one. If the 16-week period was to be extended, would that introduce an element of confusion regarding the European Parliament elections, which will also take place next year?

Professor Walker: Yes, probably. That would be a complication. You are right.

Stuart McMillan: They are due to take place at that time.

Professor Walker: Yes.

Stuart McMillan: Okay.

Professor Walker: All else being equal, 16 weeks might not be the ideal period, but the practicalities are that we have a timetable in Scottish politics and we have the European elections as well.

Can I go back to the point about millionaires?

Patrick Harvie: Please do.

Professor Walker: It relates to a broader question about the possibility of public financing of the referendum. I can imagine situations in which one might be extremely concerned about the asymmetry of resources between the two sides and one might want to do certain things such as provide public funding as a way to resolve that. I might be naive, but I do not think that we are in that situation. There may be different levels of money on either side of the debate, but there is still a significant amount of money on either side and there is a significant opportunity for all sides to get their opinions and views across. I do not see this as a situation in which millionaires can buy the result—I just do not see it in those terms.

However, we have to look at issues one by one, and I can imagine that there are circumstances in which that might not be the case.

Patrick Harvie: Given the way in which the issue is sometimes reported in the press, I am always amused to read how much money the Green Party will get to spend on the referendum. My instinct would always be to reduce the amount of money that is spent, rather than bring everyone up to a higher level.

There was some discussion at last week's committee meeting about the length of purdah. There is also the question of the different status that purdah will have for Scottish and UK Government ministers. We have a provision in the bill that can only apply to the Scottish ministers. I have been reminded that, although that legislative purdah period is not in place for UK ministers, it is included in the agreement between the two Governments.

It comes back to the question about potential legal challenges after the fact. If, in the run-up to the referendum, we had a public exchange of views and a bit of cut and thrust between the two Governments, each taking a position on an issue, which some might regard as a breach of the protocol of purdah, the UK ministers would be guilty of breaching politeness but the Scottish ministers would be guilty of breaking the law. Is that an area in which legal challenges could be brought? Does it leave us with a problem, in that legal challenges could only be brought against the Scottish ministers even though, in essence, the two Governments would have committed the same offence?

Professor Mullen: There is an argument that the Edinburgh agreement could be used as the basis of a legal challenge. Paragraph 29 of the Edinburgh agreement refers to the custom of ministers refraining and the provision in section 125 of PPERA, stating:

"The UK Government has committed to act according to the same PPERA-based rules during the 28-day period."

It is not clear cut, but there is the basis for an argument that someone could bring a petition for judicial review to enforce what might be called the promise in paragraph 29 of the Edinburgh agreement.

Patrick Harvie: Saying that it is not clear cut implies that any challenge against UK ministers would first have to get over the hurdle of demonstrating that the Edinburgh agreement was a basis—

Professor Mullen: —was enforceable.

Patrick Harvie: —whereas a challenge to the Scottish ministers could be very clear.

Professor Mullen: That is right. The person would have to convince the court that the Edinburgh agreement was in some sense enforceable—

Patrick Harvie: —and had the same status.

Professor Mullen: Yes. It does not contain a statement that it is not legally binding, which agreements sometimes do. They can contain statements that they are binding in honour only and are not a contract. There is no such statement in this case, so that obstacle is not there.

The legal concept used would be that of legitimate expectation—namely, that the apparent promise in the agreement created a legitimate expectation, which ought to be enforceable. An argument could therefore be made that would found a judicial review. However, it would be more appropriate if, for both Governments, the purdah period was on a statutory footing. The Scottish Government might enter discussions with the UK Government about it promoting legislation, so that there was an equivalent statutory obligation on the UK Government.

Patrick Harvie: The alternative would be that the purdah period would be a matter of agreement between the two Governments and it would not have a legislative basis at all.

Professor Walker: Yes.

Professor Mullen: Yes, that is an alternative approach.

Patrick Harvie: On the more general question of alleged breaches of purdah protocol and grounds for challenge, given that—as in the Phil Woolas case that I mentioned earlier—making false statements about another candidate can become a successful ground for challenging the outcome of a parliamentary constituency election, do either of you have a view about whether such a breach would be seen as a challenge on the outcome?

Professor Mullen: That is distinguishable from the basic question. If action by one of the two Governments seems to be in breach of the purdah, we could have someone going to court saying, "Here is an illegal act." The court might be willing to say, "Yes, we think that it is an illegal act", but it might do no more than declare that. Therefore, the petitioner always has to say what remedy they seek—is it simply a declaration that something illegal has been done, or is it more than that? If the petitioner said, "This is an illegal act and therefore the referendum outcome is invalid", that would be a much more dramatic statement.

Patrick Harvie: Could it clearly be seen as an illegal act, though, that was intended to affect the outcome of the referendum?

Professor Mullen: Yes.

Professor Walker: Yes, it could be seen as that. To follow up on what Professor Mullen said, the court would make a hypothetical calculation about whether the action had had a decisive effect. If it did not think so, it would not opt for the nuclear remedy.

Patrick Harvie: That would be a problem only if we were already reeling from a 51:49 outcome.

Professor Walker: Perhaps, yes.

Professor Mullen: Bearing in mind that litigation might be brought a few days before the outcome, the fact of the litigation might create reputational damage for one side or the other, so it could be significant beyond its actual legal outcome.

Tavish Scott: Gentlemen, if you accept Patrick Harvie's sensible suggestion that the two Governments should agree how to handle purdah and the way in which both Governments would keep to those terms, that presumably opens up the question of the length of purdah. Do you have a view on that?

Professor Walker: It is 28 days at the moment.

Professor Mullen: That is another tricky question. The argument that we want to try to stop improper influence on the outcome suggests a longer period. However, there are a variety of practical objections to a long period, because everything that the two Governments have done could be picked over and arguments produced as to why an action was a breach of neutrality. That might impede, for example, the making of policy statements. One Government might make such a statement and the other side might say, "That policy statement is a disguised attempt to influence the outcome of the referendum, because you said this, this and this." That is a practical reason for keeping purdah short.

I do not have a definitive view on how long the period of purdah should be. That is perhaps a good question to put to ministers. They could say in more detail what the practical obstacles are to having a longer period, so that the committee can satisfy itself that 28 days is the right period.

Tavish Scott: Governments will always say that they want flexibility and freedom to do things. I have been a Government minister and that is what one does.

Professor Mullen: That is true. One can at least amass a number of concrete difficulties that would arise, since there are some.

Professor Walker: It is also true that, compared with most situations like this, there is a kind of equality of arms. Provided that both parties are held to the purdah limits, both sides are in a position to manipulate, so to speak. It is often the case in such situations that only one party is in a position of government and can therefore do that kind of thing.

Tavish Scott: I take your point but, to test it properly, we would need to ask both Governments what would be the practical objections to a longer period of agreed purdah. That would be the fair question to ask.

Professor Walker: Yes.

Tavish Scott: That is helpful.

11:15

Linda Fabiani: The bill's policy memorandum makes it clear that the 28-day period has been chosen because that is the period that PPERA applies to UK elections and referendums. That is what was endorsed in the Edinburgh agreement.

I am interested in what our professors said about the Edinburgh agreement in relation to how purdah applies to both sides. It very much reflects what Michael Clancy from the Law Society of Scotland said to us last week. He said:

"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."—[*Official Report*, *Referendum (Scotland) Bill Committee*, 9 May 2013; c 345.]

I suppose that we are doing some of that here, but the real issue is to flesh that out with the UK Government. Would it be fairly straightforward for the UK Government to put something in legislation to match the Scottish Government's legislation on purdah?

Professor Mullen: Yes. In short, it would be straightforward. It is a matter of political will.

Professor Walker: Yes. Not everything that it wants to do is straightforward, but that would be relatively straightforward.

Linda Fabiani: That would probably save a lot of the arguments and negotiations that there might well be on enforcing a gentleman's agreement.

Professor Walker: I underline what Professor Mullen said. The gentleman's agreement is pretty strong. First, there is an argument for saying that it is a kind of law or a quasi-law. Secondly, there is a very strong sense that it is an undertaking made by a public body, which gives rise to legitimate expectations. Therefore, we could say that having such UK legislation would be an unnecessary additional hurdle. The other approach would be to follow Patrick Harvie's suggestion, which I had not thought of, to equalise down rather than up and to simply take out the reference in the referendum bill.

The Convener: First, let us get the issue of "a kind of law" sorted out. That is the first time that I have heard a description of "a kind of law." Either it is a law or it is not.

Professor Mullen: We can give you four days on that issue. [*Laughter*.]

The Convener: It is either a statute or it is not, I should say. Although the Edinburgh agreement might be used as a mechanism that someone could employ to take another individual into legal process, what are the chances of that being successful?

Professor Walker: The chances turn much more on the substantive question of whether they can show that there has been a breach of purdah. There is a very good chance that we can get over the threshold of saying that there is a binding commitment.

The Convener: That is helpful. That was a fascinating evidence session. I am grateful to both of you for coming and giving us evidence today. Thank you very much.

Our next meeting is scheduled for Thursday 23 May, when the committee will take evidence from the Electoral Commission, the Information Commissioner's Office and the Scottish Trades Union Congress. Members should be aware that we will begin slightly earlier at 9.15. Please make sure that you arrive 10 minutes before the start time so that we can decide what questions we will ask. I also remind members that, following Tuesday's stage 1 debate on the Scottish Independence Referendum (Franchise) Bill, members may lodge amendments. The deadline for lodging amendments is noon on Monday 3 June.

Meeting closed at 11:18.

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