



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

REFERENDUM (SCOTLAND) BILL COMMITTEE

Thursday 13 June 2013

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REFERENDUM (SCOTLAND) BILL COMMITTEE

17th 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:

Graham Fisher (Scottish Government)

Nicola Sturgeon (Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 1

Scottish Parliament

Referendum (Scotland) Bill Committee

Thursday 13 June 2013

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Bruce Crawford): Good morning, colleagues, and welcome to the 17th meeting in 2013 of the Referendum (Scotland) Bill Committee. The first item on the agenda is to decide whether to take in private at next week's meeting our review of all the evidence that we have received on the bill to give a steer to the clerks and help us put together our stage 1 report. Do we agree to take that in private?

Members *indicated agreement.*

Scottish Independence Referendum Bill: Stage 1

10:01

The Convener: We move to the second and main item on today's agenda. I warmly welcome the Deputy First Minister, Nicola Sturgeon, who is supported by three Government officials: Steve Sadler, head of the elections team; Helen Clifford, the bill team leader; and Graham Fisher from the Scottish Government's legal directorate.

Do you wish to make an opening statement, Deputy First Minister?

The Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities (Nicola Sturgeon): I suppose that I should provide some context, convener.

As everyone knows, the Edinburgh agreement confirmed that the referendum should be legislated for in the Scottish Parliament. The Scottish Independence Referendum Bill contains the Government's proposals for the running and regulating of the referendum in a way that will command the confidence of the Parliament, both sides of the campaign and the wider Scottish public. I must stress that the bill's contents have been informed by a successful consultation that attracted a very large number of responses as well as independent expert advice.

The bill sets out the referendum's date, the wording of the question, the rules and spending limits for campaign funding, and the detailed rules for the conduct of the referendum itself. As the committee will be aware—and as is accepted practice—the Government proposed a form of words for the question that the Electoral Commission tested and reported back on, and we have accepted its recommended changes. Similarly, we have accepted its recommendations on spending limits, and they are reflected in the bill.

As for the conduct of the referendum, the bill mirrors as far as possible the standard arrangements for elections and referendums in Scotland and the United Kingdom because we want the referendum to be run in a way that is as familiar to people as possible. We have worked very closely with the Electoral Management Board for Scotland, the Electoral Commission, electoral registration officers and others to ensure that the arrangements are fit for purpose, to incorporate lessons from recent polls and to ensure that we are thinking through all the practicalities. I know that the committee has taken evidence from the board and the commission, both of which have

stated in broad terms that the legislation is indeed fit for purpose.

The commission has suggested some possible amendments to the bill—on the provision of guidance to counting officers and the deadline for proxy votes, for example—and we are continuing discussions with the commission and other electoral professionals on the small number of such technical issues that remain. The commission has also suggested that all permitted participants should have access to the polling list, which would include details of people on the young voters register, but as the committee will be aware from our previous discussions we are trying to strike a balance between putting young voters on an equal footing with other voters and safeguarding their details. I know that the committee was genuinely supportive of such an approach at stage 1 of the Scottish Independence Referendum (Franchise) Bill.

One other item that might come up in discussion is the concern expressed by the commission about campaigners' access to registers for the purpose of checking donations. All campaigners will have access to the information that they need to comply with donation controls and they are entitled to a copy of the local government registers for Scotland. As people on the young voters register are not permitted to donate more than £500, the issue does not arise in that respect. However, we cannot legislate for the sharing of other registers in operation either in Scotland or in the rest of the UK, although I point out that even if a donor is not on the local government register there are other ways of checking their eligibility as a donor.

In conclusion, the committee has received a wide range of evidence, most of which is broadly supportive of the bill. A number of issues have been raised on which we will consider lodging amendments at stage 2, and discussions are ongoing on a number of mainly technical points that we might well touch on this morning. However, for the purposes of stage 1, I hope that the committee agrees that the bill provides a sound basis for delivering a fair and transparent referendum that commands the confidence that I mentioned earlier.

The Convener: Thank you, Deputy First Minister. A number of my colleagues want to raise questions about the purdah period. I ask Linda Fabiani to kick off on that, and then I will take a number of supplementaries on the subject.

Linda Fabiani (East Kilbride) (SNP): I am happy to do that.

We heard evidence from the Law Society of Scotland and from academics on the purdah period for the Scottish Government for which the bill will legislate. Concern was expressed that there will be no similar legislation to cover the

United Kingdom Government, although the view was given that it would be fairly easy for that to be implemented. Deputy First Minister, what is your opinion about the relationship between Westminster and Holyrood through the Edinburgh agreement and so on? How confident are you that the purdah period that will apply here will be matched by the UK Government?

Nicola Sturgeon: That issue was discussed in the negotiation leading up to the Edinburgh agreement. As the committee will be aware, we cannot legislate here to subject the UK Government to the purdah period that applies to the Scottish Government and Scottish public authorities. However, we think that it is right that that period applies to the Scottish Government, which is why it is included in the bill.

The UK Government agreed to include a provision in the Edinburgh agreement to make clear its intention voluntarily to submit to the same rules. I have no reason to question its good faith on that. I fully expect the UK Government to honour that commitment in full, and I have no reason to expect that it will not do so.

It is not for me to say what the committee will want to comment on, but the committee might want to ask the UK Government about how it will ensure that the provision is complied with. Members should be in no doubt that I would be very concerned if it turned out that the provision in the Edinburgh agreement was not complied with, although I have no reason to expect that that will be the case.

The 28-day period is appropriate and is in line with existing electoral law. I do not think that the period should be any longer. Clearly, we have to strike a balance between fairness in the referendum period and allowing the Government of the day to get on with the business of being the Government. We have struck the right balance for the Scottish Government, and I certainly hope and expect that the UK Government will honour the commitments that it has given in the Edinburgh agreement.

Linda Fabiani: Below that level, we had a discussion a couple of weeks ago about the limits of what can be sent out using parliamentary resources in periods running up to elections or a referendum. I should probably say that, as a member of the Scottish Parliamentary Corporate Body, I was party to the discussion on the rules that apply to parliamentarians in Holyrood. Has there been any discussion at ministerial level about how the Parliaments will deal with the issue? Although I was not present during the discussion a couple of weeks ago, I understand that both the yes and no campaigns said clearly that there should be a level playing field in that regard.

Nicola Sturgeon: I absolutely appreciate the intention and concern that lie behind the question. Fundamentally, that is not a matter for ministers and the Scottish Government; it is for the parliamentary authorities here in the Scottish Parliament and in the Westminster Parliament to decide on the appropriate rules for conduct of elected members during that period.

I know from experience that it is dangerous for a minister here to try to speak on behalf of the SPCB. However, I absolutely agree with Linda Fabiani that there should be a level playing field, and I hope that the parliamentary authorities in both Parliaments will take reasonable and appropriate steps to ensure that that is the case.

A general point that applies to my previous answer and to this one is that there will be public scrutiny of the way in which politicians conduct themselves during the referendum. The public would take a very dim view of any politician on either side—I make it clear that I am not casting aspersions on anybody—who was in any way seen to be abusing a public office or taxpayers' money.

I therefore hope that there will almost be a self-regulating pressure on politicians but, equally, I hope that the Parliaments—I am pretty sure that the Scottish Parliament will do this and I hope that the UK Parliament will, too—will ensure that MPs and MSPs and other folk who are in Parliament operate appropriately during the period.

Linda Fabiani: Thank you.

Patrick Harvie (Glasgow) (Green): The bill mentions the Scottish Parliamentary Corporate Body. Does the Government have a view legally as to what the impact of that provision, as it is currently drafted, would be on the conduct of parliamentary business, particularly if Parliament decided to conduct its summer recess on the usual timescale, which covers July and August? Such an approach would mean that there would be two or three weeks of parliamentary business after recess that are during purdah. What impact would there be if we passed the bill as it stands and had a normally timed recess?

Nicola Sturgeon: As Patrick Harvie indicated, paragraph 25 of schedule 4 to the bill specifically includes the corporate body as a body to which—to use the terminology—the purdah restrictions apply. That would mean that the corporate body would not be able to publish anything covered by the restrictions in paragraph 25(1) of schedule 4.

Taken at its widest interpretation, the description of relevant material could preclude the publication of an enormous amount of material that relates to the business of governing Scotland. That is why, as I said in response to Linda Fabiani, we think that the 28-day period is the right balance. To

have a longer period would risk getting in the way of the business of normal government.

I will constrain my remarks to some degree, because it is absolutely a matter for Parliament to decide the dates of recess. However, I will be frank: I think that for Parliament to sit in the purdah period would undoubtedly mean that we would sit with enormous constraints on what the Parliament and the Government could do. I am sure that the parliamentary authorities will take due account of that.

Patrick Harvie: I think that discussions are taking place about what to do about summer recess. I am not asking you as Deputy First Minister to say what Parliament should do about its recess; I am asking you what impact the bill would have if Parliament was to make those decisions.

One option is to have the normal recess. That would impact on Parliament's ability to conduct its business in early September, and it would also leave ministers open to the accusation—a lot of this is about perception—that even to answer questions and make statements in the chamber on the issues of the referendum would breach purdah.

If we moved recess forward so that it began later and ended later, there would surely be the prospect—which other Opposition parties, whether pro or anti-independence, should also be concerned about—that we would not have the opportunity before purdah begins to hold ministers to account in the chamber for statements that they made during recess.

Nicola Sturgeon: I sort of agree with both those statements. I am not trying to dodge the question; I just do not want to intrude on to ground that is properly for the Parliament and not the Government—it is important that I keep the distinction. However, there is undoubtedly a way to find a solution to the recess arrangements next year that takes account of both those concerns.

Given the way that the purdah provisions are drafted—and members should bear in mind that they are in line with how things would operate under normal electoral law; we have not drafted them differently—if Parliament was sitting in the purdah period it would be difficult to imagine how a normal First Minister's question time, for example, would proceed in a way that is consistent with the law. It is for Parliament to decide on and come to a reasonable solution, and I am sure that the solution is there to be found.

Patrick Harvie: If the committee were to consider any changes to the schedule on publications and purdah, either in light of decisions that Parliament might make about recess or any other issues, is it your understanding—following

negotiations with the UK Government—that the UK Government will adopt whatever purdah arrangements the bill imposes on the Scottish Government, or will that need to be renegotiated?

Nicola Sturgeon: Inevitably we are getting into speculative territory here. The Edinburgh agreement included a provision that we would apply the Political Parties, Elections and Referendums Act 2000 approach to purdah and that the UK Government would agree to sign up to that. If we were to have something significantly different, we would need to discuss with colleagues in the UK Government what that meant to the interpretation of the Edinburgh agreement.

We will look as a Government carefully at any amendments that are lodged. Once I see the detail of amendments at stages 2 and 3, I will be more able to give you my view on what I think that they would mean for the Edinburgh agreement.

Patrick Harvie: Thank you.

10:15

The Convener: Annabel Goldie has questions in this area as well.

Annabel Goldie (West Scotland) (Con): On the whole purdah regime, is a broadcast ministerial opinion published material under paragraph 25?

Nicola Sturgeon: Sorry, can you repeat that?

Annabel Goldie: If a minister is giving an interview and happens to say something quite inadvertently that portrays independence in a glowing and rosy light, is that considered to be published material under the bill?

Nicola Sturgeon: Published material does not refer only to written publications; it has a broader application than that. The example that you give could be published material if the person was speaking as a Government minister in the course of Government business.

Annabel Goldie: During that 28-day period.

Nicola Sturgeon: The bill says that:

“publish means make available to the public at large, or any section of the public, in whatever form and by whatever means”—

in the relevant period, which is the 28 days.

That applies to things that ministers say or do as ministers. During an election campaign, when we are in purdah, ministers, as politicians, will be free to campaign for a particular campaign. The bill covers things that we would be doing in our capacity as Government ministers.

Annabel Goldie: As I read the section, it seems that the publication part is linked to the material

bit. I can understand an embargo that prevents the Scottish Government from sending out documentation or material—everyone understands that—but I am not quite clear about the example of a Scottish Government minister giving an interview. You would not have material per se, but the minister would be giving a view, which would be broadcast to the nation at large.

Nicola Sturgeon: I imagine that we will be doing many such interviews in the 28-day period as politicians and members of one campaign or another, but we will not do them as Government ministers. For example, a minister, with the full support of the civil service, might go on a ministerial visit to announce something during the 28-day period. There might be no written publication but, if they said something that could be seen to have an impact on the referendum or be associated with the issues in the referendum, they would fall foul of the purdah protocol. If I, as deputy leader of the Scottish National Party, appeared on “Question Time” or a similar programme during the 28-day period, I would not fall foul of purdah because I would not be appearing as a Government minister or using the resources of Government.

It is important to stress that, although the situation is different in the sense that we are dealing with a referendum rather than an election, the same rules apply during elections. During the period of purdah before the 2011 election, I was restricted in what I could do as a Government minister. I was not restricted in my ability to go around the country campaigning for the return of an SNP Government, but I could not use the resources of the civil service to do that—not that the civil service would ever have countenanced that—because it would have fallen foul of the purdah rules. Although we are talking about the issue in the context of a referendum, we and members of previous Governments all have experience of operating within these rules in previous elections. It is not a new concept.

Annabel Goldie: Thank you, Deputy First Minister.

My next question, which is on a separate issue, is perhaps more for Mr Fisher. If, after the referendum, somebody who has the deep pockets to fund a judicial review considers that there has been a breach of the purdah protocol and that it could have influenced the outcome, is judicial review a competent avenue available to them to pursue?

Graham Fisher (Scottish Government): Certainly in relation to a breach of the purdah provisions, judicial review is available as a potential sanction. I know that some questions have been raised around that.

Annabel Goldie: What would the judicial review application be? Would it be that the purdah protocol was breached and that that was terrible and everyone had been very naughty, or would it be that the purdah protocol had been breached and that that was appalling and the referendum result should be set aside? What would be the remedy?

Graham Fisher: That would depend on what remedies were sought at the time of the judicial review being brought. You have heard evidence from some parties, including Professor Mullen, along the lines that a court might be reluctant to set aside the overall result of the referendum, but it would depend on the challenge. There are particular restrictions about some legal challenges in relation to the number of votes counted and the way in which judicial review would apply in that respect, but otherwise the position is broadly as I have described it.

Annabel Goldie: I am just trying to test the worth of the sanction if there is a breach. Is there a meaningful sanction? I guess that the only meaningful sanction after the outcome is public attitude.

Nicola Sturgeon: I do not want to appear to be glib, nor do I want to predict behaviour during the campaign, but I am pretty sure that, if a minister of either Government was to breach the purdah rules in the 28-day period, those on the other side would jump up and down to the extent that there would be publicity in the media about it. I am not saying that that is the only restriction. The provision is in law because we want to ensure that there is an appropriate restriction, but the public price of breaching the purdah rules operates as a constraint as well.

I stress that we are not talking about a new concept. We are talking about rules that apply to every Government in every election, so the Government and the civil service are well used to dealing with purdah periods.

Annabel Goldie: Okay. Thank you.

The Convener: Linda Fabiani has a supplementary question.

Linda Fabiani: It is on that point, and it relates to the questions that I asked earlier. Who will be deemed to be regulating the purdah period as it goes on? How will it be regulated other than through the self-regulation that you mentioned? We have talked about sanctions and the potential for judicial review, but that applies only to the Scottish Government because that is where the legislation lies. We come back to the potential for quick legislation—Professor Mullen said that it would be quick, as did the Law Society of Scotland—that puts the UK Government on the

same footing as the Scottish Government in those terms.

Nicola Sturgeon: If the committee felt that it wanted to recommend that, I am sure that the UK Government would respond to you on it. Obviously, I am not here to speak for the UK Government, but I understand the point that you are making, which is why were anxious to achieve—and we did achieve—the commitment in the Edinburgh agreement. As I said earlier, I have no reason to believe that there is bad faith. It is clearly open to the committee to recommend that there should be something stronger, but it is not in the Scottish Government's gift to legislate in a way that covers the UK Government.

Stuart McMillan (West Scotland) (SNP): I remind colleagues that that issue was raised a couple of weeks ago when Blair McDougall from the no campaign was in front of the committee. He stressed more than once the importance of the court of public opinion, particularly on the issue of purdah.

My question is about a letter that we received from Chloe Smith MP, Minister for Political and Constitutional Reform, regarding last year's agreement. One paragraph in the letter is extremely interesting. It states:

"In this Bill the Scottish Government are able to include a power to make modifications to electoral law for the purposes of the referendum, to replicate or make separate provisions if they consider it necessary."

Given that a UK Government minister has suggested that, would it be worth while for the bill to be amended so that it incorporates a requirement for Westminster MPs to comply with the purdah period in Scotland?

Nicola Sturgeon: I do not have the Chloe Smith letter in front of me, but I have seen a copy of it. I think that she was referring to our ability within our competence to amend the bill to deal with the issue of the children of service personnel. We do not have the power, either under the Edinburgh agreement or elsewhere, to legislate to subject a UK Government to a purdah period for the purposes of the referendum, so it would not be possible to do that in the bill.

Stuart McMillan: Okay. Thank you.

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab): The section that deals with restrictions on the publication of promotional material by central Government, local government and so on mentions Scottish ministers, the SPCB and other public authorities. What is promotional material considered to be in that context?

Nicola Sturgeon: Promotional material would include, for example, a brochure sent out by the Government telling people that, if they voted a

certain way, it would make education, health or whatever better in Scotland. The definitions are in paragraph 25(1) of schedule 4, although it talks about things that are published rather than defining promotional material.

The meaning is clear. The Government could not do anything, as the Government, during that purdah period to try to influence the referendum result in any way. Those are rules that apply during elections; they are not new rules.

Patricia Ferguson: I am very well aware of that, and have also fought two elections under those rules as a Government minister. However, I would just say that the business of government goes on during the purdah period. There is a difference between the kind of thing that you cannot do under purdah as a minister and the kind of thing that you continue to do. I wonder whether the drafters used the word “promotional” in that context deliberately to make that differentiation.

Nicola Sturgeon: The wording is standard; it is not a different drafting for the purposes of the bill.

Paragraph 25(1) of schedule 4 says that an item will be considered to be promotional material if it:

- “(a) provides general information about the referendum,
- (b) deals with any of the issues raised by the referendum question,
- (c) puts any arguments for or against any outcome, or
- (d) is designed to encourage voting at the referendum.”

You know as well as I do that those are normal rules. The distinction lies in the fact that, given the nature of the referendum and of the issue at the heart of the referendum, that definition would be restrictive of much of what Government would do in its day-to-day business.

Tavish Scott (Shetland Islands) (LD): Presumably you would accept that, although those might be normal rules—the adequacy of which we might have some doubts about—the basic principle is that the referendum is not just like a general election; it represents a cataclysmic event in the future of all our lives.

Nicola Sturgeon: Was that you asking me a question?

Tavish Scott: Yes.

Nicola Sturgeon: I think that it is the biggest opportunity that Scotland has had in 300 years, yes.

Tavish Scott: It is rather different from a normal general election.

Nicola Sturgeon: Of course it is different from a general election—

Tavish Scott: Thank you; that is all that I was asking.

Nigel Smith said in his written submission:

“Leaving the Bill as it stands means both governments will be regulated for the first three months of the referendum not by this Bill but ministerial codes and public outcry.”

Do you agree with that evidence?

Nicola Sturgeon: Could you expand a bit? I am not entirely sure what he was referring to.

Tavish Scott: I will read the quote again. Talking about the regulated period, Mr Smith says:

“Leaving the Bill as it stands means both governments will be regulated for the first three months of the referendum not by this Bill but ministerial codes and public outcry.”

Nicola Sturgeon: Governments are regulated during the purdah period.

Tavish Scott: I am terribly sorry—he is describing the full regulated period from May onwards, not the purdah period.

Nicola Sturgeon: The regulated period refers to designated campaigning organisations and permitted participants. It relates to the rules around donations and campaign expenses. It does not specifically regulate the Government. Governments are regulated under the section that we have just spoken about. That is what governs what is colloquially known as the purdah period.

Tavish Scott: I completely accept that. So, you agree that Nigel Smith’s evidence is right.

Nicola Sturgeon: I am sorry, Mr Scott. I am not quite sure that I follow what point you are making.

Tavish Scott: I am not making any points; I am simply reading out the evidence that has been provided to this committee by Nigel Smith. It says:

“Leaving the Bill as it stands means both governments will be regulated for the first three months of the referendum not by this Bill but ministerial codes and public outcry.”

By “both governments”, he means your Government and the UK Government.

Nicola Sturgeon: The restriction on Government is for the 28-day purdah period, which is in line with normal practice.

10:30

Tavish Scott: Okay. Mr Smith also says, in his written evidence to the committee, that

“Despite Ministerial codes of conduct, the government can easily plan its business, lean on public bodies and tax payer funded clients, and use the profile of office with its routine attendance of media to its own advantage in the first three months of any referendum it calls.”

Do you accept that evidence?

Nicola Sturgeon: I can speak only for the Scottish Government, and the Scottish Government would not behave in that way. I cannot speak for the UK Government, but I hope that it would not behave in that way either.

Tavish Scott: Can you clarify what is meant by “public authority” in paragraph 25(2)(c) of schedule 4? The bill refers to

“any Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998).”

What kind of public body would be covered under that description?

Nicola Sturgeon: I can make available to the committee a list of the public bodies that would be covered. I will not read it out, as it stretches to more than two pages. The issue is that we could not cover public bodies that have wholly reserved functions, so the legislation talks about public bodies that have devolved or mixed functions. I will make available to the committee the list of Scottish public authorities that have mixed functions or no reserved functions. As the list covers at least two pages, I probably should not read it into the *Official Report*.

Tavish Scott: I fully accept that. Thank you. Can you clarify the role that agencies of Government and all the public agencies that the Scottish Government funds will have during the regulated period next year?

Nicola Sturgeon: If a Scottish public authority has mixed functions or no reserved functions, it will be subject to the same rules that are applied to the Government and the Scottish Parliamentary Corporate Body, which we have been talking about.

Tavish Scott: What will those rules be—not for the purdah period, but for the full regulated period?

Nicola Sturgeon: The restrictions on the publication of information or the promotional activity that we have been talking about will apply for the 28-day period—they will not apply in the 16-week regulated period. I stress that that is normal electoral practice.

Tavish Scott: I am grateful for that clear answer. So, there is no restriction on those bodies’ activities in the full regulated period.

Nicola Sturgeon: I am not sure what Tavish Scott is trying to say. I do not know whether he is suggesting that the Scottish Legal Aid Board, the Scottish Information Commissioner, the Scottish Police Services Authority or the Scottish Public Services Ombudsman is going to behave inappropriately during the regulated period so that we would require them to be covered differently

from what is normal electoral practice. If that is what he is alleging, perhaps he should be explicit about it.

Tavish Scott: Perhaps you should stop putting words in my mouth. I just asked you a question—that is all that I was doing.

Nicola Sturgeon: I am answering the question.

Tavish Scott: You are not.

Nicola Sturgeon: The purdah period is 28 days. The regulated period applies to the campaign designated organisations—to permitted participants—and it covers things such as donations and expenses. As politicians, we are all well versed in what it covers. The 28-day regulated purdah period looks to put additional restrictions on the Government and public authorities, as is normal electoral practice.

Tavish Scott: So the Government’s view is that in the regulated period—not the purdah period; I accept the Deputy First Minister’s evidence on the purdah period—the normal operations of Government, which cover all the public agencies, will continue. At the moment, that is seen as what will happen during that period in every possible context.

Nicola Sturgeon: Yes, but public authorities behave appropriately at all times. As I said in response to Linda Fabiani, we should not have a purdah period that extends too long, because that would interfere over an extended period with the normal running of Government. However, that does not mean that, outside that 28-day period, public authorities do not have restrictions on how they behave. They are public authorities—at any time, there are restrictions on how they behave. At any time, on any day of the week and in any week of the year, I as a minister cannot use the resources of the civil service to do certain things that are party political. Public authorities do not operate in a political way, and they will not do so during the regulated period any more than they do now. I hope that nobody would question the integrity of the organisations that are on the list.

Tavish Scott: I presume, therefore, that you do not accept the suggestion made by Nigel Smith, who said in his written evidence:

“Both governments should issue White papers and statements then cease to take part in the referendum—as governments—exactly as was done in 1975 EEC referendum.”

I stress the word “Both” in that submission.

Nicola Sturgeon: I hesitate to comment on what happened in the 1975 European Economic Community referendum, since I was not even at primary school then, but I do not agree with that. Governments already operate within constraints. There are things that it is appropriate for

Governments to do and there are things that it is not appropriate for Governments to do at any time, and those rules should apply as normal. The idea that next month, or next January, the UK Government, let alone the Scottish Government, would not be able to participate in the referendum debate, within those due constraints, is taking it too far.

Tavish Scott: I accept your opinion, and it is perfectly fair that you should put that on the record. In the context of that answer, what are the rules and sanctions that might apply to a public body that overstepped the mark during the regulated period next summer? What are the rules that a citizen of Scotland might adopt?

Nicola Sturgeon: In terms of judicial review? I will not read out the whole list, but allow me to read out some of the organisations—

Tavish Scott: I just asked for the rules, not for the list.

Nicola Sturgeon: I will come on to your question, but it is important for those who might read the *Official Report* of this meeting to know the names of some of the organisations that we are talking about. They include the Additional Support Needs Tribunals for Scotland, the Judicial Appointments Board for Scotland, the Mental Health Tribunal for Scotland, the Mental Welfare Commission for Scotland, the Office of the Scottish Charity Regulator, and the Parole Board for Scotland. Those are the kind of organisations that we are talking about. I would be the first person to say that it is absolutely essential that the rules for the referendum are beyond reproach, but surely nobody is seriously suggesting that organisations such as those would be out there campaigning for either side in the referendum; frankly, that stretches credibility.

The main sanction for public authorities that breach the rules of behaviour would be judicial review. I am pretty sure that there would also be public outrage if organisations such as those on the list were to participate in any way on one side or other of the referendum campaign, just as there would be public outrage if such organisations were to become involved in an election campaign.

Tavish Scott: Thank you.

The Convener: Stewart Maxwell and Annabel Goldie have brief supplementaries.

Stewart Maxwell (West Scotland) (SNP): As we have been taken into the realms of fantasy, I shall carry on in that vein. Is it the case that the Scottish Government has negotiated with the UK Government that the same rules would apply not only for the regulated period but for the purdah period? You mentioned the purdah period and the Edinburgh agreement earlier. I presume that all

public bodies that carry out reserved functions would be under exactly the same rules during the regulated period as would public bodies that carry out devolved functions.

Nicola Sturgeon: There are no specific restrictions that apply during the regulated period beyond the normal restrictions that apply to public bodies. On the purdah period, paragraph 29 of the Edinburgh agreement states:

“The Scottish Government will set out details of restricted behaviour for Scottish Ministers and devolved public bodies in the Referendum Bill to be introduced into the Scottish Parliament. These details will be based on the restrictions set out in PPERA. The UK Government has committed to act according to the same PPERA-based rules during the 28 day period.”

Stewart Maxwell: In other words, during the regulated period, whether a public body is dealing with reserved, mixed or devolved issues, it would be exactly the same.

Nicola Sturgeon: Exactly the same.

Stewart Maxwell: Thank you.

Annabel Goldie: My question follows on from the line of interrogation that Tavish Scott was pursuing in relation to the public bodies, not just in the purdah period but during the referendum period itself.

I am aware that the referendum is different from a normal Scottish parliamentary or general election in that the field of choice is narrow; people will be asked to make one of two choices. I am more concerned about somebody who is involved with a public body being drawn in inadvertently to a comment or statement. To be fair, anybody who holds party-political views is usually pretty scrupulous about how they conduct themselves if they happen to be members of those public organisations, but does the Scottish Government propose simply to write a general letter of guidance to those public organisations—of which the Deputy First Minister obviously has an exceedingly long list—pointing out what would be inappropriate during that sensitive period?

Nicola Sturgeon: The Government will provide guidance on what public bodies should comply with during that period. Once the bill has been passed, we propose to prepare that guidance, which would happen during any purdah period. The committee will have the opportunity, if it so desires, to scrutinise and make suggestions about that guidance. I am happy to provide a draft of it to the committee at the appropriate time.

The Convener: It would be helpful for the committee to see a copy of the guidance when it is ready to be sent to the various bodies—obviously that will be some time down the road. That may make people feel a bit more assured about what is going on.

James Kelly (Rutherglen) (Lab): Deputy First Minister, you will be aware that we had some discussions in our evidence sessions about permitted participants. Concerns were raised that the role of permitted participant could be used to channel surplus funds from campaign organisations in order, in effect, to top up the limits. Are you confident that the provisions in the bill and the associated regulations are competent enough to close any loopholes with regard to people trying to abuse the permitted participant role?

Nicola Sturgeon: It is for the Electoral Commission to govern all the permitted participant arrangements. We accepted the Electoral Commission's recommendations on the spending limit for permitted participants that are not one of the designated organisations. As you will appreciate, our original view was that the spending limit for permitted participants should have been much lower than it now is. That may or may not have reduced or obviated the concern that you are talking about. However, we took the view that it was right to follow the Electoral Commission's recommendations.

As I said, it is for the Electoral Commission to govern the arrangements. Individuals and organisations have to go through a process in order to declare that they are permitted participants. The Electoral Commission has to publish a list of organisations and individuals that have the designation of permitted participant, so there is a degree of public scrutiny around that. I am satisfied that the legislation goes as far as legislation can go to ensure that that system is above board.

On the other side of that debate, we want people to participate in the referendum. The vast majority of people will participate without ever registering as a permitted participant, but the whole concept of having permitted participants is to allow people—if they are not part of a political party or a designated organisation—to participate and to spend money in support of their participation. I am not here to speak for any campaign or political party, but I am a bit sceptical about whether, in reality, campaigns or parties will have surplus funds.

James Kelly: We heard evidence from the Yes Scotland group to the effect that it has quite a loose arrangement—it would work with organisations such as women for independence and business for independence, but those organisations would not formally be part of the Yes Scotland group and they would come under the permitted participants umbrella. Do you have a concern that that could undermine the level playing field that you talked about earlier?

Nicola Sturgeon: Absolutely not. You describe that as “a loose arrangement”; I would describe it as an arrangement that is entirely in line with the legislative framework.

I saw the evidence from the yes campaign and from the no campaign. I apologise if I misquote—I do not have the evidence in front of me—but I think that the no campaign said that it would not have separate groups and that everybody would be part of the designated campaign. To be honest, I do not know whether that would ever actually be the case. If the UK Independence Party, for example, wanted to campaign in the referendum, would it be part of the no campaign's official organisation or would it be separate?

The rules allow for permitted participants. Rules are set down for how that should work. If any group on either side wants to spend more than the required amount, it has to register as a permitted participant.

James Kelly: Are you considering any amendments in that area? One issue that was raised in evidence was that the trigger for a permitted participant is £10,000. Would you consider reducing that amount? Do you think that it is appropriate that there should be more guidance about the role of permitted participants?

10:45

Nicola Sturgeon: I am not considering amendments on that at the moment, and I will explain why. I should caveat that comment by saying that I will consider suggestions that this committee in particular makes for amendments, so if the committee were to suggest amendments in this area, I would of course give them due consideration. The bill's provisions around the issue are in line with the Electoral Commission's recommendations. In terms of guidance around permitted participants, that would be for the Electoral Commission and not for the Government.

As I said, it is no secret that the Scottish Government originally wanted spending limits for permitted participants that were much lower than those in the bill. However, many people, including those in other parties, said that the Government must comply with Electoral Commission recommendations. That is what we have done and that is what is reflected in the bill. I am not planning amendments to that at this stage but, as I said, I will always consider suggestions.

James Kelly: Bearing in mind some of the controversy around this area, can you give some assurance that there is not a conflict of interest between your role as cabinet secretary taking the legislation through the Parliament and your role as a member of the Yes Scotland advisory board?

Nicola Sturgeon: Yes, I can give an absolute assurance around that.

The Convener: Patrick Harvie?

Patrick Harvie: I am sorry, convener; I just wanted to put something on the record. With regard to James Kelly's previous question, the evidence that we heard from the yes Scotland campaign two weeks ago suggested that the other groups with which it works may or may not choose to register as permitted participants, but that it was not for Yes Scotland to make that determination and that it anticipated that some of those organisations may not spend money during the regulated period at the level that would require them to register.

The Convener: We will move on to another area. Rob Gibson is next.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): Thank you, convener, and good morning, Deputy First Minister.

How can we be sure that voters will get the information that they need to make an informed decision in the referendum? What influences should the Electoral Commission and the yes and no campaigns have?

Nicola Sturgeon: I think that there is a very clear distinction there. The Electoral Commission has a responsibility to provide information that will advise people how to register to vote and how to vote, but it will not—nor should it—in any way, shape or form stray into providing information that puts the case for one side of the referendum debate or the other, or even for both sides. It is not the Electoral Commission's role to get into the issues and the arguments behind the debate. That is very much for the two campaigns, and I am pretty sure that both will be working very hard to ensure that they provide the electorate with the information that people need to make their decision.

Rob Gibson: We have been informed by the Electoral Commission that it has a developed plan on which it will come back to us, but do you think that people should have in their hands at an early stage the information that the Electoral Commission is working up about the process?

Nicola Sturgeon: I think that the Electoral Commission said in evidence to the committee that it will have a public awareness campaign. It would be wrong of me to say too much about what I think the Electoral Commission could or could not, or should or should not, do given that it has an independent role in raising awareness. However, I fully expect it to take appropriate steps at as early a stage as is appropriate to raise awareness. Again, I do not speak for the Electoral Commission, but I am sure that it would be very

happy to have further engagement with the committee as those plans progress.

Rob Gibson: We had evidence from Blair McDougall in response to the suggestion in a letter that in a previous referendum the yes case and the no case had been put side by side on neutral material from the Electoral Commission—or whatever its equivalent was in the past. However, the process now, of course, involves the use of freepost. Do you think that those approaches are mutually exclusive?

Nicola Sturgeon: I am not sure exactly what you meant by your question—or rather your quoting of Blair McDougall's evidence about the Electoral Commission putting the yes and no campaigns side by side. It will not do that.

Rob Gibson: No, indeed. However, the yes and no campaigns could provide material that could be distributed along with the Electoral Commission's own material. Might that be a possibility?

Nicola Sturgeon: The Electoral Commission would have to discuss that directly with the yes and no campaigns.

On your other point, the legislation provides for a free mailshot from both the campaigns either to every household or to every elector. It is obviously for the campaigns to decide, within the normal rules of propriety around election addresses, what they put in those publications.

Going back to your first point, I repeat that if the yes and no campaigns were of that particular view they would have to discuss the matter with the Electoral Commission.

Rob Gibson: Thank you.

The Convener: Patricia Ferguson will now ask about access issues.

Patricia Ferguson: My question is as much for clarification as anything else. Some of the organisations with which we discussed the bill in round-table session highlighted issues with regard to partially sighted or blind people or people with literacy problems. We noted that the bill mentions

"blindness or other physical disability, or ... inability to read".

Does the reference to

"blindness or other physical disability"

cover people who might be partially sighted?

Nicola Sturgeon: It can do. Without referring to the appropriate section, I know that the bill already provides for a large version of the ballot paper to be made available in a way that assists people, or for people in certain circumstances to have assistance in voting. Given the comments that have been made, I am very open to any

suggestions that the committee or other organisations might wish to make for stage 2 amendments to clarify that it would be appropriate for special arrangements to be put in place to allow people with a disability of any description to vote.

Patricia Ferguson: The point is that as things stand in the bill the presiding officer has to require the voter to declare. I suspect that most presiding officers would just take someone's word but there might be occasions when someone will ask to see a certificate indicating that a person is blind, and people who are partially sighted might not be able to provide that sort of proof. As you suggest, it might be interesting to pursue the matter at stage 2.

It has been suggested that an easy-read formulation could be put together without too much difficulty to allow those with literacy problems to take part in the referendum without having to declare, and I think that such an approach would be of benefit, if it could be managed. Do you have a view on that?

Nicola Sturgeon: I do not have a fixed view on that, because I have not considered it in detail. However, I am happy to do so.

On your first point, you are right to say that presiding officers have discretion in deciding whether someone needs special arrangements. I am more than happy to have a discussion at that level to get a better assessment of whether the existing arrangements, which are replicated in the bill, are sufficient, or whether the issue needs to be defined more. I am genuinely open-minded on the blind and partially sighted issue and on whether people with literacy issues or disabilities other than blindness need special arrangements. I undertake to discuss the matter at Government level. I also undertake to consider any suggestions that the committee might wish to make, based on its own discussions on the matter.

Patricia Ferguson: That is very helpful.

Annabelle Ewing (Mid Scotland and Fife) (SNP): Good morning, Deputy First Minister.

Having read through the correspondence that the committee has received from you and the UK Cabinet Office about 16 and 17-year-old children of soldiers who are on the register by virtue of the service declaration, I note that there is a lack of data in that respect, because the Ministry of Defence does not collect that information. I also note that there have been discussions and that, with regard to the actual numbers involved, your letter points out:

"The likely range is therefore zero to low hundreds of individuals, with the number likely to be towards the lower end of this range."

Nonetheless, I ask you to undertake to pursue further discussions with the relevant bodies—in particular, the registration officers and officials—to examine the issue in more depth to determine what can be done, taking into account reality and practical constraints. It would be helpful if you could give the committee that undertaking today and undertake to report back, perhaps in early September, on those discussions.

Nicola Sturgeon: I am happy to give that undertaking. In fact, we have already started those discussions. As the note that I sent to the committee makes clear, although we cannot be definite because of the lack of data, we believe that the numbers will be low. On the other hand, I accept that there is an issue of principle, which is why we have undertaken to determine whether there is a legislative solution that we can implement through the bill. That would give us more time, rather than try to do it through the Scottish Independence Referendum (Franchise) Bill.

Annabelle Ewing: Thank you. That answers that question.

The Convener: That takes us to questions on turnout from Stewart Maxwell.

Stewart Maxwell: My question is, I hope, fairly straightforward, Deputy First Minister. We have had some evidence about the issues surrounding turnout and how individual areas will cope with a particularly enlarged turnout. Many people expect that turnout will be greater than it has been for normal elections in recent years.

Will you outline for us any planning that has already been undertaken to deal with a potential increase in turnout?

Nicola Sturgeon: At official level, we are already talking with the Electoral Management Board for Scotland and the chief accounting officer to ensure that, as each area of the country plans for the holding of the referendum, it ensures that it is sufficiently resourced to deal with turnouts that may be higher than in a normal election.

Normal practice is that counting officers and returning officers plan for a turnout in the region of 70 to 80 per cent. I do not know what the turnout in the referendum will be, but it is reasonable for us to hope that it will be even higher than that. A key part of the discussions and planning of those who are responsible for the conduct of the vote on the day will be to ensure that they are adequately resourced to deal with turnouts at the higher end of expectations.

Stewart Maxwell: Do the same discussions and planning apply to how the count will be undertaken?

Nicola Sturgeon: Yes. I know that you did not ask this, but I should say that, at the moment, the planning is based on an overnight count, not a next-day count.

Stewart Maxwell: I am glad to hear it.

Nicola Sturgeon: So am I.

The Convener: Patrick Harvie wants to raise an issue about section 31, which concerns restrictions to legal challenges.

Patrick Harvie: Annabel Goldie touched on this earlier when we talked about whether alleged breaches of purdah might be the basis for a legal challenge.

Why does the time limit that has been set for legal challenges apply only to challenges about the counting of the number of votes cast? Why was it decided that a time limit should apply to challenges on that ground but not to challenges on other grounds? Does a time limit exist elsewhere for other challenges?

Nicola Sturgeon: I will answer part of your question very briefly and then hand over to the lawyer on my left to give a bit more detail.

As I understand it, the provision mirrors those set for the alternative vote referendum; we have taken standard practice there. I will let Graham Fisher expand on that and perhaps add something at the end.

Graham Fisher: The Deputy First Minister has essentially given the answer to the question. The time limit is a detailed restriction in relation to the counting of the votes cast and only applies to challenges brought on that ground. It restricts the period to six weeks. Generally there is no fixed time limit for judicial review; the restriction in the bill adds one in the interests of certainty about that particular, and important, aspect of running the referendum.

Patrick Harvie: If a challenge was brought on the ground that the Electoral Commission had not fulfilled its functions, information was incorrect or the ballot paper was misleading—or on any other ground—would there be no time limit at all?

Graham Fisher: There is no general time limit on judicial review proceedings. Whether any such challenge would be likely to be successful, which would depend on the particular case, is another question. A challenge to the number of ballot papers counted or votes cast will be caught by the rule. Otherwise, it will just fall to the general position, which will depend on the merits of any such challenge. The committee has already heard some evidence about whether such a challenge would be likely to be successful.

11:00

Nicola Sturgeon: Again, without giving any commitments, I would be happy for us to consider whether any more definition around that would be appropriate. We would always want to strike a balance between restrictions in the bill and not fettering the normal right of access to judicial review. However, if the committee wants me to give the matter more consideration, I will happily do so. Given that we have replicated something in the bill that applied in a previous referendum, it is reasonable to consider whether the provision is as tightly drawn as it should be.

Patrick Harvie: Thank you.

Stuart McMillan: A couple of weeks ago, we had representatives in from the yes campaign and the no campaign. Both campaigns indicated that they will apply to become the designated organisation for their respective side and that they would like that to happen as soon as possible. That being the case, will you consider bringing forward a timetable for such applications?

Nicola Sturgeon: I hope that I am not saying anything controversial when I say that we pretty much know the designated organisations on both sides. I am sympathetic to their raising the issue of why they have to wait until the start of the regulated period to be formally designated as the lead organisations. I know that the Electoral Commission is quite open-minded on that, too. However, we need to discuss the practicalities, any unintended consequences and any relationship with other pieces of legislation. In principle, though, I am sympathetic. We might bring forward suggestions about that at a later stage in the bill process.

Stuart McMillan: Okay. That is helpful.

While the bill has been going through Parliament, some questions have been raised—certainly outside Parliament—about the costs of the referendum. Are you satisfied that the costs associated with the referendum will be what the Government has indicated, or do you anticipate that there will be an increase?

Nicola Sturgeon: We are satisfied that what we laid out in the financial memorandum encapsulates the costs of running the referendum. In the 2010 draft referendum bill, we estimated the costs at around £10 million. No breakdown of the costs was given at the time. The estimates in the financial memorandum take account of the Electoral Commission's experience in overseeing the AV referendum, so we are able to be much more accurate about the commission's likely costs.

One other important change, which flows from our commitment to follow PPERA as far as

possible, relates to the mailshot. We originally envisaged that both campaigns would get a free mailshot to every household, but PPERA makes it possible for them to have a free mailshot to every elector. We have included that in the bill, which has an implication for the cost estimate.

As you can see from the financial memorandum, the costs of running the referendum are still under £10 million—I think that it is about £8.6 million. The other £4.7 million, which takes it up to £13.3 million—if my arithmetic is correct—deals with the Electoral Commission's costs and the free mailshots. I am confident in the figures that we have put forward. The Finance Committee has taken evidence and has said that it does not intend to give any further consideration to the financial memorandum.

Stuart McMillan: That is helpful. Thank you.

Patricia Ferguson: PPERA gives the Electoral Commission responsibility for accrediting and drawing up a code of practice for individuals or organisations who may be observers to an election in the UK. However, the bill as it stands does not incorporate that code of practice. Does the Government intend to amend the bill to cover that? I think that there will be a great deal of interest internationally in the process of the referendum and it would be useful if the code of practice could be enshrined, in the normal way, in the legislation.

Nicola Sturgeon: It is certainly our intention that the Electoral Commission will have that function, for the reasons that you outline. As part of our discussions on that, we are discussing it with the Electoral Commission. I am happy to consider whether we need to amend the bill to make the position absolutely clear.

Patricia Ferguson: I think that you need to make it clear, so it would be good if you amended the bill.

Nicola Sturgeon: I get your point, but you will have to allow me to consider it. I might absolutely agree with you, but I want to take the time to consider it properly.

The Convener: We received written evidence from the Scottish Council for Voluntary Organisations about the need for a funded community-based information campaign. Have you seen that evidence?

Nicola Sturgeon: I have not seen that particular piece of evidence.

The Convener: You might want to consider it and come back to us.

Nicola Sturgeon: Yes.

Rob Gibson: The Electoral Commission recommends that

“the UK and Scottish Governments should clarify what process will follow the referendum in sufficient detail to inform people what will happen if most voters vote ‘Yes’ and what will happen if most voters vote ‘No’.”

What discussions have you had with the UK Government about what will follow the vote?

Nicola Sturgeon: There is on-going discussion between my officials and counterparts in the UK Government about what a statement of that nature might look like. I thought that the Electoral Commission's recommendation in that regard was sensible. Just as we were right to accept the commission's recommendations on spending and the wording of the question, there is a duty on both Governments to accept this recommendation. That discussion has not yet concluded, but I am happy to report back to the committee when it has reached a conclusion.

The Convener: In correspondence from Better Together, there was a suggestion that

“the two governments are in correspondence on the issue of providing the Commission with agreed wording on the basics of what happens after the referendum”

and on promoting understanding of the question.

Nicola Sturgeon: That is the discussion that I have just referred to. I am sorry, but I do not know what the no campaign was referring to in its evidence to the committee. However, the discussion that I am talking about is the one that I have just spoken about in response to Rob Gibson.

The Convener: As there are no more questions, I thank the Deputy First Minister and her officials for attending and for giving us useful evidence for the purposes of our report.

Our next meeting is scheduled for Thursday 20 June, when the committee will review the evidence that has been taken on the Scottish Independence Referendum Bill. We have agreed that that will take place in private. I suggest that, as part of that process, we write to the Electoral Commission for its view on the issue that has been raised today, and by Better Together, about including short statements from the yes and no campaigns in an information leaflet. We might be able to get something back in time to inform our decision making.

I remind members that they may now lodge stage 3 amendments for the Scottish Independence Referendum (Franchise) Bill and that the Parliament has agreed that stage 3 will be held on Thursday 27 June, so the deadline for lodging amendments is 4.30 pm on Friday 21 June.

Linda Fabiani: When will we have the comparative information relating to Westminster and Holyrood rules?

The Convener: That will be circulated before the next meeting.

Linda Fabiani: Good.

The Convener: I now formally close the meeting.

Meeting closed at 11:08.

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e-format first available
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Revised e-format available
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