



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# REFERENDUM (SCOTLAND) BILL COMMITTEE

Thursday 23 May 2013

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**REFERENDUM (SCOTLAND) BILL COMMITTEE  
14<sup>th</sup> 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)

**COMMITTEE SUBSTITUTES**

\*Richard Baker (North East Scotland) (Lab)

\*Alison Johnstone (Lothian) (Green)

\*Bill Kidd (Glasgow Anniesland) (SNP)

\*John Lamont (Ettrick, Roxburgh and Berwickshire) (Con)

\*Willie Rennie (Mid Scotland and Fife) (LD)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Peter Horne (Electoral Commission)

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

Ken Macdonald (Information Commissioner's Office)

John McCormick (Electoral Commission)

Andy O'Neill (Electoral Commission)

Andrew Scallan (Electoral Commission)

**CLERK TO THE COMMITTEE**

Andrew Mylne

**LOCATION**

Committee Room 1



## Scottish Parliament

### Referendum (Scotland) Bill Committee

*Thursday 23 May 2013*

[The Convener *opened the meeting at 09:16*]

### Scottish Independence Referendum Bill: Stage 1

**The Convener (Bruce Crawford):** Good morning. I remind everyone to switch off their mobile phones. We have received apologies from Stuart McMillan, and Bill Kidd is attending in his place.

This is the third of five meetings during which the committee will take oral evidence on the Scottish Independence Referendum Bill at stage 1. I give a warm welcome to our first panel of witnesses, who are all from the Electoral Commission—most of you have given evidence previously on the Scottish Independence Referendum (Franchise) Bill. I welcome John McCormick, electoral commissioner for Scotland; Andy O'Neill, head of office Scotland; Andrew Scallan, director of electoral administration; and Peter Horne, director of party and election finance. John McCormick will make a short opening statement.

**John McCormick (Electoral Commission):** Thank you, and I assure you that the statement is very short. We are delighted to be back at the committee and we appreciate the opportunity to provide evidence on the referendum bill.

As you know, we have been working with Scottish Government officials over many months on the plans for the referendum as they have been developed and we are pleased that many of our recommendations have been taken on board. Across the commission, we believe that this is a strong piece of legislation that—if it is enacted within the anticipated timetable—will provide us with the necessary foundation and the time to deliver a referendum that truly puts the voter first and puts the voter at the centre of the planning.

We are currently in discussion with the Government about a few areas. It is an on-going process, which is why we did not provide a written note in advance of this session. Of course, we are happy to discuss any aspect of the bill and we intend to make a written submission to the committee before your 6 June deadline.

**The Convener:** Thank you, Mr McCormick; that is helpful.

I have a general question about spending limits in the bill, which came from Electoral Commission advice. It would be helpful for the committee to understand the processes and considerations behind the limits that you suggested to the Government and which are now in the bill. In previous evidence, the spending limits were not necessarily challenged but questions were asked about them, so it would be helpful to hear from you on that point.

**John McCormick:** As a matter of principle, we were mindful of the Edinburgh agreement between the United Kingdom Government and the Scottish Government, which referred to the aim of establishing a level playing field and a fair referendum. From our experience of previous referendums, we have articulated a principle that there should be some relationship between the electoral performance of political parties and the funding that political parties would have during a referendum period. My colleague Mr Horne will go into the details on that.

**Peter Horne (Electoral Commission):** I will start from the principles from which we work, which the commission set out in 2010: spending limits for a referendum should enable campaigners to campaign and set out their arguments to the voters across the area where the referendum applies; limits should be in place to deter excessive spending; and the limits should not be so low that they encourage campaigns to distort the regulatory approach that is in place.

We recommended limits for lead campaigners and political parties. On lead campaigners, we recommended a limit of £1.5 million on either side, in addition to the other benefits that are available—free mailing, the opportunity to use public rooms and the opportunity for party-political broadcasts. We came to that value having considered what would be a reasonable expectation of campaigners' spend over a 16-week period. We took a bottom-up approach, considering the evidence that we had on expenditure in the past and the ceilings that should be in place.

We then considered the role for political parties. The approach that is set out in the Political Parties, Elections and Referendums Act 2000 implies that there should be a banding. We looked at the implications of a banding and found that there would be uneven distribution of funding on either side of the campaign. Therefore, rather than use the broad-brush banding approach, we looked specifically at share of the vote in the most recent appropriate election—the election to the Scottish Parliament. On that basis, we produced a roughly equivalent set of expenditure limits on both sides of the campaign, when we take together the lead campaigner and the political parties, as they are

currently aligned. We were mindful of the Edinburgh agreement, as John McCormick said, and our approach was to say, “In the context of seeking fairness and a level playing field, here is a ceiling that looks appropriate.”

Alongside that, in a free democracy there is clearly the opportunity for other organisations to make their voices heard. Any organisation or individual can participate, but when it comes to the point at which individuals or organisations are spending significant sums of money, there should be some controls and there should be transparency. Our view is that activity should be regulated above a limit of £10,000, with a spending limit of £150,000. We determined the value of £150,000 by considering what activities organisations might undertake, and what it would be reasonable and appropriate for them to do. The limit is a tenth of the limit for lead campaigners.

The total limit that is in place is a ceiling that is set for the political parties and the lead campaigners. The commission is not seeking to control the number of campaign organisations that are in place, so we cannot predict how much money will be spent or limit the total amount of money that will be spent on either side. In summary, we have taken a bottom-up approach, by saying that campaigns can spend up to a certain limit and setting out specific limits for the political parties and lead campaigners.

**The Convener:** In evidence that we have taken, it has been suggested that the £150,000 limit for other permitted participants is on the high side. How do you respond to that?

**Peter Horne:** We need to go back to the principle of not setting a limit so low as to distort campaigning groups’ behaviour. The referendum period is 16 weeks, and there are millions of voters out there with whom organisations might want to communicate. In our view, it was reasonable to set the limit at 10 per cent of that of the lead campaigners. In the context of the total expenditure, that is roughly 5 per cent of what will be available to the political parties and lead campaigners on either side. We had to strike a balance between allowing people to make their views heard but ensuring that they could not be a significant player in the debate without having appropriate electoral support behind them.

**Annabelle Ewing (Mid Scotland and Fife) (SNP):** Good morning, gentlemen. On the limit of £150,000 for other participants, concerns have been raised about the effectiveness or otherwise of the so-called common plan monitoring of that provision and the ability to weed out any intention to defeat the spirit of it. Can you comment on that issue?

**Peter Horne:** Is your question about the opportunities for us, as the Electoral Commission, to regulate and intervene if there are concerns about campaigning organisations?

**Annabelle Ewing:** With regard to the Electoral Commission’s role, concerns have been raised as to whether the provisions as they are currently drafted are sufficient to defeat dummy campaign attempts. What is your view on that?

**Peter Horne:** As Mr McCormick mentioned, we are pleased that the legislation will be in place well in advance of the regulated period, so there is an opportunity for the commission to prepare and produce guidance and to work with potential campaign organisations. Our approach will be, first, to set out the rules clearly and to help people to understand how we will enforce them. In the run-up to the regulated period, we will explain to people what they can and cannot do.

From our experience of regulating other electoral events, we know that we can work closely with organisations and help them to understand their responsibilities. In general, that helps them to comply, because the vast majority of organisations with which we deal are seeking to comply. However, if there was evidence in the course of the referendum—either through the work of our Edinburgh office or from any intelligence that we got—to suggest that campaigns were seeking to work together and breach the rules, we would have the appropriate powers to be able to act. We could take a range of sanctions, from fixed-penalty notices through to criminal sanctions, up to and including stop notices, if multiple organisations were seeking to work together.

For example, it would be entirely valid for a campaign to be set up that is based specifically in Edinburgh or Aberdeen. However, if a campaign was set up in Edinburgh or Aberdeen and it was funded—based on the facts of the case—by the same source, using the same materials and acting in the very same way, we would view those campaigns as working together. I am talking about a hypothetical case. The expenditure of the individual campaigns, if two or three campaigns were spending £145,000 each, would be counted together if the organisations were working together. The responsible individuals in each of those campaigns would be viewed as breaching the rules, because in effect they would have spent of the order of £450,000 against a limit of £150,000.

The Electoral Commission will make it clear in the run-up to the campaign that we will come down heavily on that sort of activity.

**Annabelle Ewing:** Will you explain what you mean by a stop notice?

With regard to your ability to impose sanctions, how quickly could you act? If people are acting in concert in breach of the provisions of the legislation, and they are already distributing and disseminating whatever it is they want to, the commission may come in and say, "You shouldn't have done that", but in a sense the damage will have already been done.

**Peter Horne:** We follow due process, which takes time, but we recognise that, in the context of a referendum, which is a one-time event, there are incentives for campaigners to do what they can before the event and take the consequences afterwards.

You asked me to explain the stop notice. We use the shorthand of describing a situation in which we know that someone plans to drive a series of double-decker buses with advertising on the side of them around every city and town over a number of evenings in the lead-up to the referendum. If they were spending significant sums of money, what would we do to stop that? We have the powers, working with the procurator fiscal, to issue a stop notice. We have not done that in the past, but we are preparing for the possibility that we might need to intervene. We would do so on the basis of facts, working with individuals in the procurator fiscal's office.

On what we are doing to prepare for that beforehand, we are working on the principle that, if people know that we have the powers available and that we are serious about using them, they are less likely to breach the rules. We will make it clear in the run-up to the regulated period that we have those powers and that we will use them if necessary. It is critically important to the commission that the referendum is fair and is seen to be fair, and we will work to achieve that.

09:30

**John McCormick:** This discussion underlines the point that Mr Horne made earlier. The issue of people working together is one of the factors that informed our decision to set the limit at £150,000 rather than at a lower level, as there would be little incentive in doing that. We always consider that issue before setting a limit for permitted participants.

**The Convener:** If we did not know about stop notices, we certainly do now.

**James Kelly (Rutherglen) (Lab):** You are probably aware that we examined the issue of permitted participants in taking evidence last week. One point that was raised related to the regulation of donations to permitted participant organisations. The current provision in the bill states that any donations of £7,500 or more must be reported within the designated reporting period.

It was suggested that the level might be reduced in order to ensure that those donations were strictly monitored, and that the process was open and transparent. Do you have a view on that?

**Peter Horne:** I am repeating myself, but the legislation for this poll is a significant improvement on previous legislation, in that there is transparency prior to the event. This referendum is the first for which reporting will be introduced for donations of more than £7,500 in the regulated period, so transparency has already been improved.

On the level of donation at which organisations must report, the first point is that, for any donation of more than £500, the organisation in question is responsible for checking that it is a permissible donation from an individual on the UK electoral register or from a UK-registered company.

On the level at which donations must then be reported to the Electoral Commission to be published, the level that has been set in PPERA is £7,500; that applies to all political parties on an on-going basis. Our approach currently mirrors that. It would be possible to reduce that level if there was a view that that would increase transparency. That would apply in particular to campaigners, but not to political parties because they are subject to the on-going regulation that requires them to report to the commission on a quarterly basis.

As a regulator, I obviously like to mandate transparency where I can. However, I know that those who go into campaigning wish to spend more of their time on campaigning than they do on complying with our rules, so there is a balance to be struck between how much we require organisations to report and our clear expectation that they will comply.

**John McCormick:** I emphasise that point. Because of the planning for the referendum, this will be the first time that we will have pre-poll reporting during the regulated period, which increases the level of transparency from that in any of the previous referendums that we have had.

**Stewart Maxwell (West Scotland) (SNP):** I return to the issue that Annabelle Ewing raised. We received evidence to suggest that there was a possibility that dummy or other organisations could be established. You have explained a little how you would identify those organisations and how they were operating, and how you would identify them as being the same as other organisations.

Could you explain that a bit further and provide a bit more clarity? What is to prevent a single individual from donating to the Glasgow says no and the Aberdeen says no campaigns, or the Glasgow says yes and the Aberdeen says yes

campaigns? If those two organisations are set up independently and do not use the same printed material but print their own material, and if they do different things and effectively run two separate campaigns—both on the same side—what is to prevent that from occurring? How would you identify that they are, in effect, two organisations working as one organisation?

**Peter Horne:** First, there is no limit on how much an individual can donate—

**Stewart Maxwell:** So one individual could donate to many different groups.

**Peter Horne:** One individual can donate as much as they want to the groups, although if it was more than £1.5 million, that would not give any benefit.

On the question about an individual donating to multiple groups with the intent that those groups would work together, that would clearly come back to the facts of the matter, but the limit of £150,000 is set because that was viewed as how much one would need to campaign across the whole of Scotland. If we found evidence that an individual was seeking to influence the referendum campaign by setting up multiple groups, we would act and intervene, on the evidence of the case. It is difficult for me to go into more detail because, as you will appreciate, it would depend on the facts of the case. However, if an individual was seeking to set up multiple organisations and was not only funding them, but controlling them in such a way that their activities were co-ordinated to avoid being duplicative, we would take action.

**Stewart Maxwell:** I see how that would operate if one person was in effect trying to control that. It would perhaps be difficult to spot, but one can see why you would be able to do so and take action against them. However, that is not really what I am asking about. If an organisation is established in one city and a different organisation is established by a different group of activists in another city, and then more groups are established in other cities, those are all separate groups of campaigners operating on the one side. They could be funded by one person or by multiple persons. If enough money is coming in on one side or the other, what is to prevent multiple organisations from being established across Scotland all with a limit of £150,000 and all operating on the same side?

**Peter Horne:** There is nothing to prevent that.

**Stewart Maxwell:** Nothing at all. How do you deal with that? How do you differentiate between that kind of activity and the kind of activity that you talked about?

**Peter Horne:** The split in the definition for us is that we would encourage a diversity of voices in the referendum campaign. It is up to those

organisations to choose how they raise funds. It would be a concern if any individual voice sought to have greater influence than the £150,000 limit by working together. Clearly, there is a slightly grey area as to what is egregious working together versus a discussion along the lines of, "We'll stick to Edinburgh and you stick to Glasgow," or a kind of nudge nudge, wink wink approach.

You asked how we would deal with that and intervene. We have a range of powers to encourage people to comply if we have a suspicion that something is happening. The first is a conversation with the regulator, which is not something that people necessarily enjoy. We could call people in during the referendum campaign, at which point we could take further action if necessary. There is not a limit on the number of groups. I cannot predict how many groups there will be during the referendum campaign, but I can say that, if organisations are seeking to work together and one seeks to make their £150,000 limit apply only to the centre of Edinburgh, one is working in Pentlands and another one is working in Oxfgangs, at that point, we would have real concerns and we would act.

**Stewart Maxwell:** In your opening statement, you said that your primary purpose in the recommendation on the funding mechanism was to try to provide balance and a roughly even playing field. How does that situation in which there are many organisations, each of which can spend the maximum of £150,000, go back to that principle? That might or might not happen, but one side or the other could easily outspend the other by an enormous amount of money.

**Peter Horne:** To clarify what I intended to say earlier, we started by referring to the principles that we set out in 2010, which were about effective campaigning and deterring excessive spending. We also looked at the Edinburgh agreement, which set out the principles of fairness and a level playing field. We have set a limit on what the lead campaigners, the political parties and individual campaigners can spend. It would be inappropriate for us to propose that we set a limit on the number of campaigning organisations. In practice, if we said that there could be five organisations on either side, what would happen when organisation number six comes along and says that it wants to register? There is a freedom of speech issue.

Another point is that the limit is £150,000 and, as I understand it, raising funds for campaigning is difficult. Multiple campaigns might register, but my view is that very few as a proportion will reach the limit of £150,000.

**John McCormick:** As the commission has made very clear, there is no control over the number of permitted participants and groups that can register and, as a result, this democratic

expression of people's wish to take sides in a referendum can lead to more participants on one side than on the other. Mr Maxwell makes a fair point; there can be an imbalance and it is not regulated.

**Annabel Goldie (West Scotland) (Con):** I was looking at something else, so I might have missed the context in which the comment was made but I believe that Mr Horne highlighted the example of two double-decker buses being driven around Edinburgh. Does the objection to the buses centre on who is funding them or what they are doing?

**Peter Horne:** I was trying to give an example of where it might be obvious that an organisation was spending over and above its £150,000 limit. Similarly, what action would we take if we were made aware that every Scottish newspaper had sold a cover sheet to a single organisation the weekend before the referendum and there was clear evidence that the cost was in excess of £150,000? I think that that would be a clear breach.

**John McCormick:** With regard to his double-decker bus example, Mr Horne mentioned Edinburgh rather than Scotland. I think that if a set of double-decker buses with the same message was going around every city and major town in Scotland, we would immediately be alerted to the possibility of collusion among independent city-based groups.

**Tavish Scott (Shetland Islands) (LD):** I have two brief supplementaries, the first of which is on Stewart Maxwell's line of questioning. I appreciate that this is a very hypothetical situation, but I want to get this straight. Is there no limit on the number of campaign organisations that could raise £150,000 and then spend it on either side of the campaign in Scotland?

**Peter Horne:** No.

**Tavish Scott:** Secondly, how many staff do you have to monitor all of this?

**Peter Horne:** We have a team of around 20 people, but we cover the political parties across Scotland, Northern Ireland, Wales and England. In the Scottish office we have a team led by Mr O'Neill that we are building up over time; I am not exactly sure of its numbers.

**John McCormick:** Be it this referendum or an election campaign, we have a process for the genuine on-going monitoring of events and activity in any campaign and everyone in the commission from the legal department through the finance department to all the officers is alert and keeping an eye out. I do not think that something as high profile as full-page newspaper advertisements or buses going round every city would miss our scrutiny.

**Andy O'Neill (Electoral Commission):** We should also remember that the yes and no campaigns police themselves and that we get regular information from various members of the public. We have a monitoring process that allows us to find out these things.

**Tavish Scott:** Given that this will be the most intensely political period in all our lives, I wonder whether you have enough people to do everything that you have described in your evidence this morning.

**Peter Horne:** I always feel encouraged when people suggest that I should have a bigger team. With the traditional links that the commission has built up over a decade in Edinburgh and Scotland in general, and the support that we will have from both sides of the campaign as they police their opponents, we will have a lot of information coming in, although it will be difficult to parse all that and check the concerns that are being expressed.

**Tavish Scott:** We will ask you that question in a year and a half's time, then.

**The Convener:** I think that I probably sent the commission such letters in the past.

If I remember correctly, Annabel Goldie will now ask about process issues.

**Annabel Goldie:** Witnesses in a previous evidence session raised the question of how the Electoral Commission can balance its obligation to raise public awareness and promote understanding of the question without compromising its impartiality. In the role that you are being called on to discharge, can you put factual information about the process out there without straying into the issues that are being raised by the respective sides of the constitutional debate?

**John McCormick:** As members will be aware, we tested the question through the winter months and published our report at the end of January. Although the researchers did not set out to ask this question, it was clear from people's responses—indeed, it was so significant that we mentioned it in the report—that they wanted more information on the big issues, such as the economy, the monarchy, defence, immigration and citizenship, before they voted.

Some people also raised the need to have information about the process of what would happen the day after referendum day. They expected that some of that information would come from the campaign groups, but they also wanted to get such information from a neutral source.

We are clear that, unlike the situation in previous referendums, the Edinburgh agreement

includes no detail about what would happen after the poll. It is clear that there will be no negotiations about the terms of independence before the referendum—we are very much aware of that. It is clear, too, that such issues will be debated by each of the campaigns and will be highlighted from now on. Therefore, we accept that it is not possible to produce genuinely neutral and authoritative information of the type that voters have expressed a desire for, but we believe that clarity on how the terms of independence will be decided would help voters to understand how the competing claims of the campaigns will be resolved. That seems to be possible, and both Governments have committed to work together to agree it.

We would like the information that is provided to clarify the process that would follow the referendum in the event of a yes outcome and in the event of a no outcome. That might include information on how negotiations would take place between the Governments, the timescales for those negotiations and so on. The more information that the Governments can agree on, the better we feel that would be for the voter. We are actively discussing that with the Governments at the moment.

09:45

**Annabel Goldie:** To clarify, what you have just given an explanation of is information about process. It is not a case of advancing an opinion about how marvellous defence would be in an independent Scotland, for example. The anxiety that some people have is about how to make that distinction: you have an obligation to explain the process without straying into substantive debate.

**John McCormick:** We are very clear about that and our role in providing impartial information on the process, as distinct from the campaigning arguments. We made it clear in our report that there was a clear demand from the people who were tested by the researchers for authoritative information about the campaigning arguments, but we accept that it is not our role to provide that information. We know that the voters expect the campaigning organisations to provide clarity during the campaign. Although there is a clear demand for that, we accept in our discussions with the Governments that what they will agree on is to do not with their negotiating stance or pre-negotiations, but with what will happen after the referendum. There is a demand for information on the process, the timeframe and so on.

**The Convener:** Rob Gibson has a supplementary.

**Rob Gibson (Caithness, Sutherland and Ross) (SNP):** We discussed awareness raising

during our consideration of the Scottish Independence Referendum (Franchise) Bill. In our report, we called on the Electoral Commission to have a detailed development plan so that we could see how it would deal with the complexities of the issues. Have you drawn up such a plan?

**John McCormick:** I will hand over to Mr O'Neill to answer that.

**Andy O'Neill:** The short answer is no. The long answer is that, with 16 months to go, we are still developing our plan. You mentioned the franchise bill. Since we last met, we have started mapping out whom we need to work with in the next 16 months. We have had meetings with educationists to look at registration and the messages that we send out with regard to 15 to 17-year-old voters in full-time education. We are beginning to talk to people in organisations such as NUS Scotland.

In a sense, we have started developing our key messages. As John McCormick mentioned, they will be about process, registration, postal voting and proxy voting, the date and how to fill in the ballot paper. We will also work towards issuing a booklet to households towards the date of the referendum. The content of all of that is still subject to discussion and development.

To answer your question, we have not developed a plan, but when we do, we will be happy to provide a note on it to the committee or to come and talk to you about it.

**Rob Gibson:** Do you expect that to be done within the timescale for our consideration of the bill—in other words, by November?

**Andy O'Neill:** The situation is developing. We can come back and tell you where we have got to. Hand on heart, I would not have thought that we would have completed the plan by November of this year.

**John McCormick:** The first stage of our plan will be under way by then. During the annual register to vote canvass, there will be a specific campaign for young people to encourage them to vote and get themselves on the young voters register. The annual canvass takes place from October onwards. Before that, the first part of our campaign that will be visible on the ground will be the part that is directed at young voters to remind them that they have a vote in the referendum and to tell them how to register.

At the beginning of this week, we started briefing agencies about what we expect from them in terms of development plans. We are at the early stages of the process, but there is on-going work, as Mr O'Neill said.

**The Convener:** On the back of Mr Gibson's question, it is appropriate for me to remind committee members that we will still be able to

take evidence from the Electoral Commission on the bill after it is passed—it will probably be enacted by October or November—because we have responsibility for implementation issues as well. Therefore, if we want, we could have further evidence-taking sessions later on.

**Rob Gibson:** I want to follow up on what Andy O'Neill said about people with whom the commission has been in touch. We expect those to include counting officers and electoral registration officers, but I think that he also mentioned people in education. Are you working with Education Scotland? The booklet that you intend to use for households will have to be tested in some way, given that the information will be for 16 and 17-year-olds as well as for 70-year-olds. What plans do you have for that?

**Andy O'Neill:** The booklet will be tested for all voters to which it is directed, but specifically for 15 to 17-year-olds. On the education question, we are working with the Association of Directors of Education in Scotland, Education Scotland, School Leaders Scotland and the Society of Local Authority Chief Executives and Senior Managers. We are trying to work together in partnership to ensure that people who are in full-time education get the correct messages around registration and suchlike. There is a desire to ensure that people understand in an impartial way the issues around the referendum and how to participate. Of course, it is not just young people who are in formal education, so we will work with others as well.

**John McCormick:** With regard to a question that was raised the last time that we were with the committee, I point out that we are in contact with Colleges Scotland and Universities Scotland about working with them on the registration of students for the referendum, which will happen at a time when they might be leaving home to go to college or university.

**Andy O'Neill:** There will not simply be a booklet for young people; there will be targeted campaigns through social media, for example, which is more relevant to younger people. We will do similar work for servicemen and other groups. There will be an overarching television and radio advertising campaign, a leaflet and a helpline. There will be targeted campaigns to ensure that certain sectors get the correct messages in a way that is the most appropriate for them.

**Annabelle Ewing:** Mr McCormick made a point a moment ago about the Electoral Commission's clear recommendation that both the Scottish Government and the UK Government should have discussions about process issues following the result of the referendum, whatever it may be. That clear recommendation was in the report that the Electoral Commission produced at the end of January. I note that Mr McCormick said that the

recommendation followed the expression of a clear demand. However, I am not quite clear whether I heard Mr McCormick say that both Governments had signed up to having discussions. The reality of the current position is that although the Scottish Government is keen to so proceed and has requested such discussions, the UK Government thus far has refused point-blank to enter into them. Did I hear Mr McCormick say that the UK Government had signed up to that recommendation?

**John McCormick:** The Edinburgh agreement committed both Governments to work together. We have discussed with the Governments the demand from voters to know what will happen the day after the referendum, whatever its result. Those discussions are continuing. We hope that something will come from that work that will be informative for voters and that will appear in our booklet. The information in the booklet will be tested, and we will decide what goes into the final version on the basis of that testing and evaluation.

Before the end of the year, the commission will publish a preparedness report in which we will draw attention to the different agencies, including ourselves, and say whether we are ready for the next stage of the referendum process, which will run from the end of the year through to next September. I am optimistic—but then I usually am.

**Annabelle Ewing:** Thank you for clarifying that point.

**James Kelly:** We took some evidence on the referendum in Wales a few weeks ago. Professor Wyn Jones, who gave evidence, was very critical of the Electoral Commission's role in that referendum, in particular with regard to the report that the commission produced after the referendum. He said that it was an "exercise in self-justification". What is your reaction to that comment? Also, what have you learned from the Welsh experience and how the report on the Welsh referendum was handled? How has that helped to inform your approach to the Scottish referendum?

**John McCormick:** I will pass over to Mr O'Neill in a moment but I was surprised by that comment because Professor Wyn Jones has in other forums been very positive about certain aspects of what the commission did. We published two reports after the Welsh referendum. We published a report in July 2011 on what had happened. Then, in October 2011, because the Welsh and AV referendums were very close together, we published a detailed lessons learned report. In that report we covered what we thought should happen, recommendations and what we had learned from the referendum process itself, so there were two different reports.

I stress that we are very much aware that in a referendum report, to some extent we are reporting on ourselves, but our reports are based on externally verified data relating to public opinion poll tracking during the campaign, public opinion poll tracking after the vote as to how people felt about the experience of voting—whether they were happy with the process and so on—and data that comes from the counting officers throughout the country. Externally verified independent data forms the basis—the spine—of our reports.

We have been known to be fairly critical of ourselves in some of our reports, so I was quite surprised and a bit disappointed by some of the things that Professor Wyn Jones said. In relation to a couple of his specific points, I point out that we could only publish information that we were given and that was volunteered to us. We sought information but not everybody that we sought it from provided it to us, which was a bit of a disappointment to us. However, we believe that our reports are robust. They have to survive line-by-line scrutiny by the commissioners, who ensure that they are robust, independent and based on the right kind of data—as you would expect from a public regulator such as the commission.

Andy O'Neill might want to say something—

**James Kelly:** Mr O'Neill may be about to cover this point, but what lessons were learned from the Welsh referendum that can inform the experience in Scotland?

**John McCormick:** Before I hand over to Mr O'Neill, I note one issue that we learned about from both the Welsh and AV referendums, which was the need for proper planning—not rushing from royal assent to polling day in a matter of a few weeks, which was not an ideal approach to a referendum. A proper timetable and proper planning are needed, and there is also a need to work through the process timeously so that everybody is aware of the issues at stake and there can be proper public information campaigns. That is what has been learned for this referendum. Those are the headline issues, to which Mr O'Neill will add.

**Andy O'Neill:** John McCormick said what I would have said. Professor Wyn Jones failed to express the fact that we were always clear that our Welsh report would be not a lessons learned report but a what happened report. We saved the recommendations for the report that came after the parliamentary voting system referendum because of the context of another referendum occurring immediately thereafter. Some of the recommendations that were in the parliamentary voting system report, in particular on gaming—the idea that one side refused to apply for designation to stop the other side getting it for some perceived

advantage—was certainly a recommendation that came out of Wales and was reported later.

I re-emphasise the point that we do not self-report—or rather, we do that only to a degree, because a lot of our reports are based on evidence that we get from external sources. The research evaluation, the returns from the candidates and agents, the public opinion tracking that we run afterwards and the tracking of public awareness research are all taken in and then regurgitated in our reports. We publish the complete evidence that we use to inform our reports on our website at the same time as we publish the report.

10:00

Professor Wyn Jones said that he had garnered a lot of criticism, but he did not give you any firm evidence of that criticism. If we had received such evidence, we could have included it in our report. If you read our reports, you will find evidence of instances where we have done stuff that we were not happy with, which we reported on and from which we then learned lessons. To say that we are self-justifying is a bit harsh.

**James Kelly:** Can you give an example of an occasion when you have examined an approach that you have taken that you have felt has been wrong and from which you have learned lessons?

**Peter Horne:** I will give some specifics from the lessons that we have learned, not just from the Welsh referendum but from other activities that we have been involved in that have come through to our recommendations on the party and election finance side. First, I referred earlier to pre-poll reporting, so that voters can have transparency around who is funding the campaigns. Mr McCormick spoke about not rushing between the date on which legislation is put in place and the regulated period, so that we can put guidance in place in time to enable campaigners to understand and comply with the rules.

We considered the issue of designation. The Electoral Commission has a role in designating lead campaigners. Prior to the present referendum campaign, either we had to designate the lead campaigners on both sides or we did not designate any lead campaigner. In the context of the referendum for Scotland, we took the lessons learned from Wales, where we were not able to designate, and the board considered and made the recommendation that it would be possible to designate a single lead campaigner on one side and not on the other in the event that there were no applicants on one side.

Those are the specific lessons that we have learned. There are clearly other points that could be picked out beyond that, but those are some of

the examples on the party and election finance side.

**Stewart Maxwell:** The Law Society of Scotland raised a question about section 24, which is headed “Report on the conduct of the referendum” and which says:

“the Electoral Commission must ... lay before the Scottish Parliament a report ... as soon as reasonably practicable after the referendum”.

The Law Society questioned whether that was feasible, given the three-month and six-month time limits for providing the commission with returns on referendum expenses. Is there a problem there? The Law Society thought that there may well be.

**John McCormick:** We do not think that there is a problem. On the referendums that took place in March and May last year, we presented our first reports about what happened in July, and our considered report, with issues arising and recommendations to Parliament, came out in October. We think that that reflects reasonable timetables, with time to consider and time to set out the issues. I do not think that we are concerned about the timetable.

**Andy O'Neill:** A report on the conduct of a referendum is a report on the conduct of a referendum—it covers the public awareness aspects, the work of the chief counting officer and so on.

We have been in discussions with the Scottish Government about issues around reporting separately on our investigating and sanctioning powers, referring to the compliance end. That is more difficult—we have to get the campaign returns in after three or six months, so we could not do a report “as soon as reasonably practical” in that case. The fix for that is that we are allowed to report on that aspect later. As I say, we are discussing the matter with the Scottish Government.

**Stewart Maxwell:** So, there would not be one single report covering all those aspects; there would be separate reports, dealing with the different bits.

**John McCormick:** Yes, there could be. That is what we did in 2011. We are open to doing that. It depends on how the current discussions with the Government on reporting go, but we are open to having separate-stage or two-stage reporting or one omnibus report. It is more likely to be two-stage reporting.

**Stewart Maxwell:** Any long delay in a later report dealing with the issues that Mr O'Neill has just covered would be rather problematic, given that those issues could be critical in determining the public's view as to how accurate, reasonable and fair the whole process was.

**John McCormick:** I agree. We could make a quick report based on the facts of what happened, which would presumably reflect whether people were happy with the outcome of the referendum and the process. A considered report takes a bit longer. We are addressing those issues with the Government at the moment, and we feel fairly confident that we can provide the right kind of scrutiny of the referendum in timeous reports that would be satisfactory, but we are not at the end of those discussions yet.

**Stewart Maxwell:** When do you think that those discussions will conclude?

**Andy O'Neill:** Fairly soon.

**John McCormick:** We are not anticipating any difficulty. We understand the spirit of Mr Maxwell's question, and we have no wish to delay unnecessarily or to be leisurely about this. We understand the importance of quick and timeous reporting, and we are working through the details to ensure that we can fulfil exactly the spirit of his question.

**Andy O'Neill:** You have to remember that, if the yes and no campaigns spend more than £0.5 million, they have six months in which to deliver their campaign returns to us, so a lot of the issues might not emerge until we get that information. We are tied into a timeframe by the legislation that allows better together and yes Scotland—or whoever is conducting the yes and no campaigns—to supply those returns.

**The Convener:** Annabelle Ewing has a question.

**Annabelle Ewing:** I would like to go back to expenses and the regulated period. Can the witnesses comment on the length of the period, which is 16 weeks? We have heard some evidence to the effect that the period should be longer, and I would like some information as to how that timeframe came about.

**Peter Horne:** In previous referendums, under PPERA, there has been a minimum of 10 weeks, and the limits have sat at around 11 to 12 weeks. Sixteen weeks is the period that applies to a range of elections that take place in Scotland—the Scottish Parliament elections, European elections and UK parliamentary elections. The UK general election has a limit of one year in advance.

There is an interlinked relationship between the amount of money that people are allowed to spend and the period of time that is set, so if you were to unpick one you would probably have to unpick the other. Our view was that 16 weeks was a sufficient period of time for people to build up to a campaign and put their arguments to voters.

We are exploring with the Scottish Government the opportunity—which arises specifically because

of how well prepared the poll is—to pull the designation timetable for lead campaigners forward. As the bill is currently drafted, the designation timetable starts when the regulated period starts, so although the starting gun sort of goes at the end of May, there is a four-week period for campaign organisations to apply to become designated as lead campaigners, so the campaign period is actually compressed into 10 or 11 weeks, rather than 16 weeks.

Bringing the designation timetable forward would allow us to have the lead campaigns in place before the start of the 16-week period, so that the 16-week period would be, in effect, the full period. On the question of making the period longer, I reflect a concern about whether the point at which the bill is passed and becomes an act is the point at which we start being able to explain to campaigners what they can and cannot do. I feel that it is fair to give people time to understand that before we present them with the rules that will apply to them.

To me, the 16-week period strikes the right balance. It will be a long campaign. I know that activity is going on at present, but in those critical last few months, regulations will kick in and people will be clearer about the rules that are set for them.

**Annabelle Ewing:** You expressed a slight concern about an extension in relation to the need for all parties to understand the rules of the process and so forth. I presume that that concern would not apply to the same extent if there was a slight, but not excessive, extension beyond 16 weeks.

**Peter Horne:** It is possible that there could be a period of 17 or 18 weeks—a shift is possible there. However, the limit of £1.5 million for lead campaigns essentially comes down to a few pence per voter per week. As we extend the regulated period, we start to push that and make it tighter, so the ceiling becomes lower. When we made the recommendations in the early part of this year, the recommendation was that we should say that there is a set amount of money for a set period. If we were to change the set period, we would open up that discussion again. There was agreement on both sides of the house on that one, so I am comfortable with the length of the period. I can see that there are arguments for extending it, but I am not convinced by them.

**John McCormick:** The commission's board—the 10 commissioners—considered earlier this year whether, given that the bill will receive royal assent in such good time before referendum day, there was a strong case for recommending a longer period. A 16-week regulated period was one of the recommendations that we made in our report following the referendums in March and

May 2011. We were pleased that, in the bill, the Scottish Government has accepted that recommendation—we wish it to be accepted wherever there are referendums.

I stress two points. First, as Mr Horne said, we could agree with the Scottish Government that the bill should be amended with regard to the process of designation. At present, the bill allows a maximum of four weeks for people to come forward and be interrogated to see whether they meet the criteria. In this case, we already know that there are two well-established organisations and there is much speculation that they may put themselves forward for the lead designation process. I would not like to presume anything, convener, but if there is agreement that we should bring the designation period forward, it will preserve the purity, as it were, of the regulated period of 16 weeks, and we will have the additional four weeks, which will overlap with the regulated period for the European elections.

Secondly, we are aware that the better together and yes Scotland campaigns have agreed to volunteer information on their donations. We are pleased and encouraged by that. There will be a period of voluntary publication of donations that they have received in the months up to the regulated period. That gives us encouragement as well.

**Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab):** Good morning. I have some questions about the purdah provisions in the bill. I understand that they are largely based on PPERA, but we have had evidence from one organisation suggesting that, although that is the case, one area that has not been taken from PPERA is the need for compliance by grant-funded non-public bodies. Will you comment on that?

**Peter Horne:** I am happy to do that. My colleagues might want to add more detail.

The rules under PPERA are rather broad and, in the commission's view, given examples of previous electoral events, they are not as specific as they could be. As we discussed earlier, this will be an intensely important discussion about the nature of democracy in Scotland, but there will also be a requirement for on-going Government and public administration, and a line needs to be drawn at some point. It was a commission recommendation that the prohibition period should apply only to ministers, parts of the Scottish Administration, the Scottish Parliamentary Corporate Body and the Scottish public authorities to whom it applies.

There are difficulties around what action could be taken to enforce the purdah period. Could a public body take that action? In our view, and in our experience of previous campaigns, the court of

public opinion is the most effective way of trying those organisations that breach the purdah period.

10:15

**Patricia Ferguson:** Okay. I am still not 100 per cent clear why that particular distinction was made. If that rule applies in other election circumstances, why will it not apply in the referendum?

**Peter Horne:** The experience of past referendums and electoral campaigns is that the PPERA rules are so broad that entirely valid activity that was undertaken by organisations could be seen as being covered by the clauses in PPERA.

On the change in this case, it is clear that, in communicating to voters, we wish there to be opportunities for education authorities, for example, to offer advice on how to vote—on the process, as opposed to how to make one's choice. The clauses in PPERA would have covered such things. The recommendation in this case is particularly to cover action on behalf of political activities.

**Patricia Ferguson:** What would you consider to be public bodies? Most people would think of a local authority and, by extension, its education department to be a public body.

**John McCormick:** Is the question about whether the recommendation that we are discussing is too narrow or are you concerned about the change whereby the use of PPERA has been modified for the bill?

**Patricia Ferguson:** I was interested in why it has been changed. Mr Horne has explained that but, in explaining it, he mentioned the fact that we would want the provisions not to debar schools and education authorities from being able to give out information to young voters. I wonder whether the court of public opinion might think of an education authority, which is part of a local authority, as being a public body in some way. What is the distinction between the organisations that are covered and those that are not?

**John McCormick:** In defining a public body, I would not like to make a generalised statement that may not be pinpoint accurate. We have a note about the matter and some background information on it. It is probably best if we clarify it for the committee in writing, if that is acceptable.

**Patricia Ferguson:** That would certainly be helpful.

It has been suggested to us that you may not have enough sanctions or opportunities to ensure compliance with the purdah rules. Do you have a view on that?

**John McCormick:** We are realistic about the 28-day period. Mr Horne talked about the sanction of public opinion and public discussion. Uniquely in this referendum, we have the Scottish Government on one side of the argument and the UK Government on the other side, so the monitoring and scrutiny will be quite intense. The implicit point behind Ms Ferguson's question is valid. It is a 28-day period, and during the referendum campaign there will be active public scrutiny of whether each side is obeying the rules.

**The Convener:** On the issue of the two different Governments, we took evidence last week from Professor Mullen, who said:

"it would be more appropriate if, for both Governments, the purdah period was on a statutory footing."—[*Official Report, Referendum (Scotland) Bill Committee*, 16 May 2013; c 411.]

Have you had any discussions with the UK Government about its being able effectively to make it a level playing field?

**Peter Horne:** It is worth stating that the Electoral Commission does not have a role under PPERA in regulating any breaches of the 28-day period, nor does it have a role under the bill as drafted. I read with interest last week's evidence, but we have not had discussions with the UK Government about making that a statutory issue for that Government.

**John McCormick:** I remember that the last time we were here, in a slightly different context, I said that it would be presumptuous for the Electoral Commission, as a regulator, to comment publicly on the conduct of the Government or the Parliament. That is why we believe that public scrutiny is the best test in this regard. As Mr Horne said, it is quite difficult to envisage our being given a role in scrutinising that.

**The Convener:** Some members have supplementary questions.

**Patrick Harvie (Glasgow) (Green):** Good morning, Mr McCormick. Mr Horne talked about the "court of public opinion" being the main sanction here. If there is a statutory basis for purdah for one Government but not for the other, surely there is a danger that one Government or the other will be at an advantage in the public debate if there is an alleged breach of the undertaking on the one hand or the statute on the other.

**John McCormick:** Your point is perhaps valid, but we do not anticipate breaches. We will not go into the campaign thinking that there will be a breach during the 28-day period. There is a tradition of Governments accepting and observing the 28-day rule. I suppose you might say that that view comes from the sunny, optimistic side of my personality. However, we cannot have a role in

monitoring or scrutinising the 28-day rule. We do not have that role and I cannot see us fulfilling it in any realistic sense.

**Patrick Harvie:** I am an optimist as well, but given the tone of the debate, it might be a realistic possibility that, even if there are no intentional breaches of purdah, there might be allegations or suggestions of breaches. Would it not be cleaner for the same basis to apply to both Governments, either on a statutory basis or, if that proves impossible, through an undertaking for both Governments rather than just one?

**Peter Horne:** We referred earlier to the Edinburgh agreement. It sets out the UK Government's principal approach, which mirrors the PPERA approach as far as it applies to the UK Government. There are a significant number of undertakings in the Edinburgh agreement—no least that both Governments will respect the outcome of the referendum—which are not set out on a statutory basis. I noted the discussion between the distinguished lawyers who were in front of the committee last week, who did not have an answer to the question. Not being a lawyer and having no claim to be distinguished, I will say that I do not know.

Mr Neill would like to add something.

**The Convener:** Are you distinguished, Andy? [*Laughter.*]

**Andy O'Neill:** I would never be so bold as to say that.

To answer Mr Harvie's question, in paragraph 29 of the Edinburgh agreement, the UK Government committed to living under the same PPERA rules as the Scottish Government. That commitment is already there in writing.

**Patrick Harvie:** Another difference between the referendum and elections that have a purdah period is that, during elections, the Parliament is dissolved and members of the Scottish Parliament—or members of Parliament, in the case of Westminster—no longer exist. Assuming that all MSPs choose to stand again at the next Scottish Parliament election, none of us will be able to present ourselves as MSPs for that election; we can present ourselves only as candidates. That is partly about avoiding giving an advantage based on incumbency and ensuring that all candidates have the same status, but it also prevents MSPs—or MPs, in the case of Westminster—from using public funds to campaign for their own policies or positions on matters of public debate.

That will not be the case in the referendum purdah period; it will apply to the Governments, but the Parliaments will still be sitting. Is there anything to prevent parliamentary offices and

resources from being used to promote positions in the referendum or to campaign for a particular outcome?

**John McCormick:** Andy O'Neill and Peter Horne are competing to come in.

**Peter Horne:** The expenditure that is regulated during the campaign period is that on broadcasts, advertising and so on. I have my list here. Anything that looks and tastes like campaigning is campaigning, and that will be regulated. If individuals who have access to public funds used those, I presume that, first, it would be a breach of the controls over how they may spend such funds, and secondly it would be a breach under PPERA rules, which are that public funds are not permissible donations. The rules would be broken in relation to who the money was sourced from, and the law would be broken in relation to the spending of money from public funds on political campaigning.

**Andy O'Neill:** To add to what Peter Horne said, I note that MSPs are governed by the rules or standards that govern them internally as MSPs, so they will not be able to use public money to campaign. An example off the top of my head is that of the newsletters that you send to your constituents. There are clear rules about what you can and cannot include in them, and those rules will continue for the referendum. However, the direct or proper answer would come from the parliamentary authorities.

**Patrick Harvie:** Those rules do not prevent us from advocating a position or from using staff who are paid for from public resources to issue press releases that relate to issues under public debate. Clearly, that would relate to the choices that are before Scotland and the policies and positions that people are setting out across the divide.

**Andy O'Neill:** Again, you would need to look to your own rules and the parliamentary authorities for the answer.

**Tavish Scott:** I have a number of questions on this area because I am concerned by the narrowness of the focus that you have described in relation to public bodies. Are you saying that it will be permissible for all the Scottish public agencies, quangos and Government-funded public bodies of any kind whatsoever to take a line and that that will not be scrutinised other than in the "court of public opinion"?

**Peter Horne:** First, the Electoral Commission does not have a role in scrutinising that aspect of the legislation.

**Tavish Scott:** Who does? No one?

**Peter Horne:** If an individual or organisation wishes to complain about it, I believe that there are two routes for them. First, there is the

challenge among the press—we are talking about a debate as to providing information. Secondly, if people wish to seek action and complain, they can do so.

**Tavish Scott:** But, in effect, the whole weight of Government in the period that you described—the regulated period starting 16 weeks before the date of the referendum—could be used by all the agencies to campaign for independence.

**Linda Fabiani (East Kilbride) (SNP):** Or against.

**Peter Horne:** In the event, we are working with both the Scottish Government and the UK Government on this because, as we have said, it is not our role. We are looking at ensuring that there will be a contact individual. I am not sure whether we have finalised who that will be within the Scottish Government administration, but we already have the name of the team in the UK Government Cabinet Office to which people will make complaints if, in their view, an Administration is breaching the rules.

**Tavish Scott:** So, in your view, Government announcements can continue to be made all the way up until purdah starts 28 days prior to the referendum, and that will just be fine.

**Peter Horne:** Yes.

**Tavish Scott:** You do not see any difference between this once-in-a-lifetime referendum and a run-of-the-mill general election where we all understand the rules of the game. There is a difference.

**Peter Horne:** As we described earlier, we view individual referendum polls as distinct activities. The difficulty in this referendum is that, up to the point of the poll, there will be on-going Government activity at both the Scottish Government and UK Government levels. The challenge is how we get a balance. I agree that there should be a point when there is quiet and no intervention. However, to state that the Governments in both Scotland and England cannot undertake public activity in a period beyond the 28-day period would be very difficult to do.

**Tavish Scott:** Why?

**Linda Fabiani:** Because they have got stuff to do.

**Tavish Scott:** Can I ask the witness? Would it be all right if I asked the witnesses, rather than being interrupted by the nationalists?

**Linda Fabiani:** Oh!

**Tavish Scott:** Touchy, aren't they?

**The Convener:** Can we keep the conversation between Tavish Scott and the witnesses at the moment? Others can come in later.

**John McCormick:** I recognise that concern has been expressed on the issue. The Electoral Commission regards it as a matter for Governments to regulate and ensure that the 28-day period is respected. However, I recognise the concern about it and the question about clarification of the position of public bodies, which is why we would like to write to you, convener, with a considered view on that.

10:30

**Tavish Scott:** Thinking about public bodies, let us say hypothetically that the SCVO—a voluntary organisation that is funded by the Government—takes a view on independence and comes down on one side or the other. Do you have a view on whether that is admissible, or whether that would pull that organisation into your ambit and regulations?

**John McCormick:** The STUC, did you say?

**Tavish Scott:** The Scottish Trades Union Congress is not funded by the Scottish Government, but lots of organisations are directly funded by the Scottish Government and we can take any of them as the example.

**Peter Horne:** If an organisation is making a statement of its position, that is reasonable. If an organisation is using funds to advocate a position and it is spending above the limit of £10,000, at that point it becomes a regulated campaigner.

**Tavish Scott:** Thank you for that—but did you say that it is fine for the organisation to state its position?

**Peter Horne:** It is not the role of the Electoral Commission to examine the stated positions of a range of organisations—

**Tavish Scott:** Despite the fact that they are funded by the Government, whether it is the UK Government or the Scottish Government.

**Peter Horne:** It is not our role to determine what people do or do not say. Our role is to consider where people are spending money and whether or not the sources of that money are permissible. If organisations become participants—they would need to become regulated campaigners—we will regulate them at that point.

If public bodies seek to campaign using public funds, it brings up the issue around political campaigning that we see in any election. It is not acceptable for them to use public funds—that is not a permissible source of funding. As to whether an individual body could make a single statement, I do not believe that that would be regulated.

**Tavish Scott:** Thank you—you have clarified the matter for me. It is a free-for-all, as far as I can see. I am grateful for the clarity.

**Stewart Maxwell:** I return to your earlier comments about permissible use of public resources by MPs and MSPs. Clearly, if they were campaigning using public resources, that would be a breach. If an MP, for instance, wrote to constituents with a survey and asked the referendum question,

“Should Scotland be an independent country?”—

yes or no—using parliamentary resources, would that be a breach?

**Peter Horne:** I am not sure—

**Andy O’Neill:** That is a question that would need to be addressed to the House of Commons authorities. We do not have the detail of the rules with us.

**Stewart Maxwell:** I thought that you said that using public resources to campaign in the referendum would not be permissible.

**Peter Horne:** I will follow up on the point that I made earlier.

Across the UK, in the National Assembly for Wales, the Northern Ireland Assembly and the Scottish Parliament, elected representatives receive funds through which they can administer their constituency business. There are restrictions on how they can use those funds. I am not the responsible accounting officer who sets the restrictions for those funds. You would need to check the restrictions with regard to what you receive and how you can use it.

**Stewart Maxwell:** I thought that you were very clear earlier on the fact that it would be a breach if somebody carried out that behaviour. You now seem not to be sure.

**Peter Horne:** There is clearly an area in which elected representatives will be continuing to work with their constituency, dealing with complaints and questions on an on-going basis. That is normal activity.

There is a point where that moves to activity that is clearly campaigning activity. That dividing line is already set out in the rules and regulations. I am not an expert on what those are for the Scottish Parliament, but they are already in place for elected representatives up and down the country. A breach of those rules would be dealt with by the authorities as appropriate.

**Stewart Maxwell:** Let us leave the Scottish referendum for a second. For the Welsh referendum, would it have been a breach if a Welsh MP had used his office resources, such as paper and postage, to write to people and ask

them their opinion by asking them to answer the question in that referendum?

**Peter Horne:** I was not working for the commission at the time of the Welsh referendum.

**Andy O’Neill:** For an AM, it would have been a matter for the Welsh Assembly.

**John McCormick:** The regulatory role and the detail would be for the Assembly authorities.

**Andy O’Neill:** In a sense, you need to follow the money. You need to consider where the resource that is used for the action comes from and what the rules are on the use of that money. If it is clearly Scottish Parliament money and it is clear that it cannot be used for the activity in question, the member will be in breach of the rules. If the MSP, AM or whoever is funded by some other resource—as long as it is permissible—and not by public money, it will be clear. It depends on the instance that you are talking about.

**The Convener:** I will allow one more question on this area, and then we really must move on because there are other things that we need to look at. I think that Linda Fabiani has a question.

**Linda Fabiani:** I do, but I want to clarify something first because I think that we are getting a bit jumbled up here. Different organisations have different remits and different responsibilities, and we have to be clear about that. If colleagues are concerned about what MSPs can do, I suggest that they read the rules that already exist, and I presume that the same would apply for MPs at Westminster. Sorry—there is muttering in my ear. We have to be clear about who is responsible for what, and we can check that out.

I know what the Scottish Parliament responsibilities are in relation to the use of allowances—they are very clear—but I am unaware of what Westminster MPs work to. There is clearly concern round the table about who can do what. It might be worth while to find out what rules Westminster MPs work to. Ours are already there to be seen and they are clear.

I return to the evidence that we have taken previously on the purdah period and paragraph 29 of the Edinburgh agreement. It is worth while to state again that the Law Society said to us:

“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.]*

The Law Society seems to have flagged up a potential concern about the purdah period and whether it will be a level playing field. It is also worth recognising that, when asked, Professor Mullen reckoned that it would be straightforward for the UK Government to put something in

legislation to match the Scottish Government's legislation on purdah. He said:

"It is a matter of political will."—[*Official Report, Referendum (Scotland) Bill Committee*; 16 May 2013; c 413.]

It may well be worth while, convener, for the committee to have a simple, straightforward check sheet of what the playing fields are for elected members, elected members who become part of Governments and the Governments themselves—applying to both Governments.

**The Convener:** Do the witnesses wish to comment on that?

**John McCormick:** We are aware of the commitment that the UK Government has made in the Edinburgh agreement and the points that Mr Harvie and Ms Fabiani have made about the difference between a non-statutory agreement and the law. If there is concern about that, the committee may wish to raise it with the UK Government, or it could be raised between the Scottish Government and the UK Government.

We understand the commitment in the Edinburgh agreement to be a very public commitment to adhere to the rules. In other aspects of the referendum, a number of things have to be taken on trust. The Prime Minister gave a clear public commitment when he was in Edinburgh but, if there is real concern about the difference in status between the two Parliaments, it may be something that could be clarified further.

**The Convener:** We have three other areas to get through, so we need to make some progress. Annabel Goldie has some questions on the declaration of the result.

**Annabel Goldie:** Last week, some ambiguity emerged about the facility for declaring local results. The convener wrote to the Deputy First Minister to seek clarification. I do not know whether our witnesses have seen the letter from the Deputy First Minister.

**John McCormick:** We have.

**Annabel Goldie:** It is interesting. The Deputy First Minister seems to indicate that there has been a slight change of position and there is a desire to allow the facility for local results to be declared. However, there still seems to be uncertainty about when that can happen.

The policy memorandum states, at paragraph 53, that counting officers are to provide the chief counting officer

"with the certified results, information"

and all the rest of it

"as soon as they are available."

It continues:

"The CCO will then authorise the counting officer to announce the local result."

However, that is not what the bill says.

In paragraph 35 of schedule 3, while the obligation on the local counting officer is clear—they have to gather all the information and give it to the chief counting officer—there is no definition of when the chief counting officer is to authorise the local counting officer to declare the local result. The chief counting officer seems to have unfettered discretion on timing. Are you satisfied with that?

**John McCormick:** I will ask Mr Scallan to comment on this, but my reading of the Deputy First Minister's letter would clarify the point if translated into the legislation. Otherwise, we would be putting certain strictures on the process, and I am not quite sure what I would be dissatisfied about.

The big issue for us in the Electoral Commission was that we thought, in the nature of things, that it would not be possible—or practical—to hold back all the local results until the national result. The chief counting officer, working with the counting officers, will agree a process by which local results will be declared timeously, as soon as they are ready and have been verified. Having satisfied that, I did not seek any further precision than that. Mr Scallan might have other views.

**Andrew Scallan (Electoral Commission):** The Deputy First Minister's letter made clear our understanding. However, you have raised a point, and we will go back and look again at the legislation.

The purpose of the stages of the referendum is the need for certainty at a local level. The law says that each counting officer will make a count and check back with the chief counting officer to ensure that there is hardly any difference between the verified ballot papers, the for and against ballot papers and the spoiled ballot papers. When the chief counting officer is satisfied with the mathematics that have gone on in each local counting area, they will say, "I'm now accepting it as chief counting officer." That is the stage at which the declaration should be made locally.

I think—

**Annabel Goldie:** Do you accept—

**Andrew Scallan:** We will go back and check the detail of the legislation.

**Annabel Goldie:** I am sorry for interrupting. Do you accept that the bill as drafted, if literally interpreted, means that the chief counting officer could authorise the local counting officers to publish the results two minutes before the chief counting officer publishes the national result?

**Andrew Scallan:** It may well do; I would need to go away and look at it.

Recognising what goes on in the various count locations, the idea is that, although it will not be made obvious to everybody what has happened at any particular count, for those who are tallying up what is going on elsewhere the result will be very clear.

Let me take my answer a bit further. The certification of the result by the chief counting officer will come some time after the result is known. There is the formal process in which the chief counting officer says, "This is the final result." However, unless the result is very close, what has happened will become obvious at some stage during the day or night—depending on when the count takes place.

The purpose of the local count is absolute certainty. If the chief counting officer is satisfied with the count, they will authorise the local counting officer to declare it locally. If past practice happens again, that will take place fairly quickly. If the chief counting officer is satisfied that, within any particular local authority area, the count is concluded, there is no need to do anything else.

**Annabel Goldie:** So you are working on the understanding that, all things being equal, each local result will be published once the counting officer has ticked all the boxes required by the chief counting officer. There should not be any impediment to the timeous publication of the local result. That is your understanding and the basis on which you would like the process to work.

**Andrew Scallan:** Yes.

**John McCormick:** And we expect the spirit of that, as contained in the Deputy First Minister's letter, to be translated into the legislation.

**The Convener:** As there are no more questions on that issue, Rob Gibson has a question about the ballot paper.

**Rob Gibson:** The committee has received a number of submissions urging that the bill should be amended so that the question on the ballot paper is set out in Gaelic as well as in English. Do you have any views on that issue?

**John McCormick:** As the committee knows, we tested the question that we were given by the Government, which was in English. During that process, we tested the question with groups of Gaelic speakers in different parts of Scotland to ensure that there were no ambiguities for anyone whose first language was Gaelic and whose second language was English. We have not tested a Gaelic question.

Our public information campaigns and information that will be available in polling places

on how to vote and what to do will be available in Gaelic as well as in many other languages. However, we have not been asked to consider a question in the Gaelic language. If we were, we would strongly recommend that it be tested separately from the English language question.

10:45

**Rob Gibson:** Andy O'Neill told us during evidence on the Scottish Independence Referendum (Franchise) Bill that we have used the languages to which Mr McCormick has just referred, and he imagined that they would be used in future. Do you have examples of how those languages are used in promoting awareness and in the polling place?

**Andy O'Neill:** In the past, we have provided template posters and information leaflets, which can be displayed in polling stations and polling places in a number of languages, including Gaelic. It would be for Mary Pitcaithly, the chief counting officer, to guide or direct her counting officers to use those posters as appropriate. Such material can be made available, and we will work with Mrs Pitcaithly to provide the resources in the context of the event.

**Rob Gibson:** So it would be down to the electoral managers to decide where they would be used.

**Andy O'Neill:** Yes. They know where various communities are; certain languages would be redundant in certain places.

**John McCormick:** It would be a matter for the chief counting officer, as convener of the Electoral Management Board for Scotland, whether to issue a direction, to advise, or to take local advice on the matter. As Mr O'Neill said, we would provide the basis for that, and it is up to the EMB to decide.

**The Convener:** Patricia Ferguson has a question on civil penalties.

**Patricia Ferguson:** I understand that the Electoral Commission will have the power to impose sanctions in certain circumstances, but those circumstances and the rules that cover them are not in the bill and will be set out at a later stage in a statutory instrument. Are you aware of the reason for that, and do you have a view on whether that is the most appropriate way to proceed?

**Peter Horne:** We used only to have criminal sanctions, but we now have an established approach in which we have civil sanctions in place, and we have implemented our enforcement policy on that for a number of years. I note that the current draft of the bill suggests that we should consult on our approach to sanctions and set it out. Our view is that, although the Scottish

referendum has its own facets, we should continue to be consistent with the lessons that we have learned from the past, which will inform our approach.

**Patricia Ferguson:** Is it coming at a later stage because you are consulting on the issue?

**Peter Horne:** Yes.

**John McCormick:** It is the same legislation, so it has the same impact.

**The Convener:** We have come to the end of that session. I am grateful to the witnesses for coming along to give evidence, for being so clear on most of the areas that we have addressed, and for their promise to come back to us on one specific point.

10:48

*Meeting suspended.*

10:55

*On resuming—*

**The Convener:** We begin our next session of evidence taking this morning. We have with us Dr Ken Macdonald, who is the assistant commissioner for Scotland and Northern Ireland from the Information Commissioner's Office.

I pass on apologies from the STUC—unfortunately, because of a late illness, its representative could not attend today. However, it has said that, if we cannot find another slot, it is happy to provide fuller written evidence to us in due course.

I welcome Dr Macdonald—you have appeared before us previously, and I am glad that you are here again. I understand that you do not wish to make an opening statement, so we will go straight to questions. The first question comes from Bill Kidd.

**Bill Kidd (Glasgow Anniesland) (SNP):** Good morning, Dr Macdonald. In the past, the commissioner has given guidance to parties and campaigners. Is there a way in which you can intervene if particular activities of parties or campaigners cause concern during the campaign?

**Ken Macdonald (Information Commissioner's Office):** Yes. As you say, we have given guidance before, and we have taken enforcement action at general elections against political parties that have breached what is known as PECR—the Privacy and Electronic Communications (EC Directive) Regulations 2003—which is an additional piece of legislation that we use. PECR covers telephone marketing, spam texting and so forth.

When we have taken action at elections in the past, we did not have the same amount of powers that we do now. We were limited in what we could do, which was mostly just to tell people to stop.

For the past couple of years, we have had the option of imposing civil monitoring penalties when the regulations have been significantly breached. In the past six months, we have started issuing such penalties. For example—although this relates to a completely different sector—we fined a telephone marketing company in Cumbernauld £90,000 for continually breaching regulations.

To date, we have written to the chief executives of the two main campaign organisations, Better Together and Yes Scotland, to remind them of their obligations. We have included our guide—which is also on our website—to political campaigning with regard to the application of data protection legislation and PECR.

In the past, we have worked with our colleagues in the Electoral Commission to ensure that they provided guidance when they communicated with political parties, and we will do the same on this occasion.

**Bill Kidd:** You have said that you will monitor the activities of permitted participants and designated organisations during the campaign. Will that ensure compliance with data protection principles? Does the bill give you the powers to do that?

**Ken Macdonald:** We already have the powers through our own founding legislation. The Data Protection Act 1998 is a framework that sits alongside and works together with other pieces of legislation. We will monitor and pick up intelligence ourselves, and we will get complaints from members of the public who think that the legislation may have been breached.

**Bill Kidd:** Do you perceive that there are any data protection concerns arising from the bill as it is currently drafted?

**Ken Macdonald:** I do not immediately see that there are, certainly with regard to canvassing or the promotion of any particular side's view, because those areas are covered separately under the part of the 1998 act that relates to direct marketing and written correspondence. The main legislation that covers the marketing side is PECR, which is being implemented more strongly.

11:00

**Bill Kidd:** That is extremely useful. You said that you can impose a penalty of up to £90,000 on a company and that you have done so in the past. How many breaches have to occur before such a penalty is incurred?

**Ken Macdonald:** In the case that I mentioned, there were a significant number of breaches. I cannot tell you the precise figure, but the information is on our website. The number of breaches must be significant, but we must be sure that the complaints are genuine. People had received quite distressing phone calls from that particular company, and that influenced our decision.

I should say that the level of fine is not based simply on the volume of complaints that we receive. We also take into consideration the organisation's assets, so we have to undertake a balancing act.

**Tavish Scott:** Dr Macdonald, I want to understand your role with regard to the point that Bill Kidd just made. If people are getting fed up with telephone calls that they receive during the campaign, is it the case that you are not the person to whom they would go—or would they be able to pursue a data protection issue with you?

**Ken Macdonald:** That would be our role. People would report complaints to us through our website, by phoning or emailing us or by contacting directly our head office in Wilmslow, just south of Manchester, from where we run our investigations. In situations in which there is a clear Scottish dimension to any enforcement action, I would be called in to give my views and some background information, and to help to determine what type of action we should take.

**Tavish Scott:** In your professional experience, do people understand that your office is the point of contact? You made wider points to Bill Kidd about campaigns in other walks of professional life, but do people understand that they should contact your office with such concerns?

**Ken Macdonald:** People are often signposted to us; they do not automatically think, "We'll contact the ICO." They may go to trading standards or to citizens advice bureaux, and they are directed to us.

**Tavish Scott:** Is it the role of both campaigns and the designated organisations to ensure that they are part of that signposting, and that people who have any concerns are able to obtain your assistance?

**Ken Macdonald:** That could be done in certain literature and when the campaigns are collecting information. However, the Electoral Commission and our office should work together to draw our role to the public's attention.

**Tavish Scott:** Is that happening? Is it part of your work?

**Ken Macdonald:** We have not started it this time round, but we have done it in the past for general elections.

**Patricia Ferguson:** Good morning, Dr Macdonald. You will recall—and I am sure that you are well aware—that the committee has been concerned to ensure that the provisions in the franchise bill, which we dealt previously with, do not in any way infringe the rights of young people, particularly as they are going to be included in the electoral register at a much earlier age than usual. Does your consideration of this bill suggest to you that it also makes a point of ensuring that young people are adequately protected and that their rights to privacy and so on are not infringed in any way?

**Ken Macdonald:** Yes, although the issue of protecting children relates much more to the franchise bill than to this bill. It comes into play, for example, in relation to the fact that there is a single register, which is also mentioned in this bill. There are also protections for anonymous franchisees when they get their polling card. Those provisions appear to be quite reasonable and they appear to fit in with the data protection legislation.

When I previously gave evidence on the franchise bill, I raised the issue of including a provision for the destruction of the register. I am pleased to see that there are clearly defined purposes for the register and offences that apply if the register is used for any other purpose. That will be regulated by the Electoral Commission, but in some situations we may be brought in, too, and we can work together with our colleagues in the commission.

**Annabelle Ewing:** Good morning, Dr Macdonald. In your view, considering the campaign rules on reporting on campaign expenditure in particular, are there any protection and privacy issues that arise?

**Ken Macdonald:** I have not picked any up per se; I have focused very much on the handling of personal data in the register. We expect transparency from donors and some protection for the smaller individual. It is clear that, the bigger the donation, the more reasonable it is to expect the public to be told who is making the contribution.

That is perfectly fine under the data protection legislation, but donors and recipients of expenditure should be made aware that there are requirements on the disclosure of information on who has given the money and where it has been spent, just as there are for MSPs in their day-to-day working lives.

**Annabelle Ewing:** Just to clarify, there is nothing that leaps off the page as a concern in that area.

**Ken Macdonald:** No.

**The Convener:** I see that no one else has any questions for the commissioner. Annabelle Ewing raised the specific issue of expenditure, but I have a more general question. From your perspective, Dr Macdonald, are there any data issues at all arising from the bill of which we need to be aware?

**Ken Macdonald:** As I said, there are issues that I have previously raised or addressed, such as the use and destruction of the register and the security of the anonymous registrants. There is nothing about which I have a major concern, and I am pleased that, in this bill and in the franchise bill, data protection has been taken very seriously.

**The Convener:** In that case, I thank you very much for giving evidence. The session has been short but very helpful.

Before I close the meeting, I remind colleagues that at our next meeting, which is scheduled for Thursday 30 May, we will hear from Yes Scotland and Better Together. The committee will then hold a round-table evidence session with the Federation of Small Businesses, the Equality and Human Rights Commission Scotland, the Scottish Council for Voluntary Organisations, Inclusion Scotland, the Scottish Youth Parliament and Professor Aileen McHarg. Next week's meeting will begin at the same time of 9.15.

I also remind members that the deadline for lodging amendments to the franchise bill is noon on Monday 3 June.

*Meeting closed at 11:07.*



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