OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 10 September 2019

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 10 September 2019

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DELEGATED POWERS AND LAW REFORM COMMITTEE

23rd Meeting 2019, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)
*Mary Fee (West Scotland) (Lab)
*Alison Harris (Central Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Penny Curtis (Scottish Government)
Michael Russell (Cabinet Secretary for Government Business and Constitutional Relations)
Rebecca Whyte (Scottish Government)

CLERK TO THE COMMITTEE

Andy Proudfoot

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 10 September 2019

[The Convener opened the meeting at 11:00]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome everyone to the 23rd meeting in 2019 of the Delegated Powers and Law Reform Committee. Item 1 is a proposal to take business in private. Do members agree to take items 6 and 7 in private?

Members *indicated agreement.*

European Union (Withdrawal) Act 2018: Instrument Procedure and Category

11:00

The Convener: Item 2 is consideration of Scottish statutory instruments that have been laid under the European Union (Withdrawal) Act 2018; we consider the scrutiny procedure under which the instruments were laid and the categorisation that the Scottish Government has applied.

Management of Extractive Waste (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/273)

The Convener: The Management of Extractive Waste (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019 were laid under the negative procedure and have been categorised as being of low significance. They make minor and technical changes to the Management of Extractive Waste (Scotland) Regulations 2010, to ensure that references in the regulations are up to date and that deficiencies that arise from the United Kingdom's withdrawal from the European Union are addressed.

Our advisers have indicated that the scrutiny procedure and categorisation could be appropriate. Are we content that the appropriate scrutiny procedure and categorisation have been applied to the regulations?

Members *indicated agreement.*

Town and Country Planning and Electricity Works (EU Exit) (Scotland) (Miscellaneous Amendments) Amendment Regulations 2019 (SSI 2019/274)

The Convener: The Town and Country Planning and Electricity Works (EU Exit) (Scotland) (Miscellaneous Amendments) Amendment Regulations 2019 were laid under the negative procedure and categorised as being of low significance. They amend the coming-into-force date of and make three minor amendments to the Town and Country Planning and Electricity Works (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019, to correct minor drafting errors that this committee identified.

Our advisers have indicated that the scrutiny procedure and categorisation could be appropriate. Are we happy with that?

Members *indicated agreement.*

Instruments subject to Negative Procedure

11:02

The Convener: Agenda item 3 is consideration of three negative instruments. No points have been raised on SSI 2019/271, or on SSI 2019/273 and SSI 2019/274, which we have just considered.

Environmental Protection (Cotton Buds) (Scotland) Regulations 2019 (SSI 2019/271)

Management of Extractive Waste (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/273)

Town and Country Planning and Electricity Works (EU Exit) (Scotland) (Miscellaneous Amendments) Amendment Regulations 2019 (SSI 2019/274)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Representation of the People Act 1983 Remedial (Scotland) Order 2019 (SSI 2019/261)

11:02

The Convener: We move on to item 4. We have before us Michael Russell, the Cabinet Secretary for Government Business and Constitutional Relations, who will give evidence on the Representation of the People Act 1983 Remedial (Scotland) Order 2019. He will give evidence later on the Referendums (Scotland) Bill. He is accompanied by three Government officials: Penny Curtis is head of the elections and freedom of information division; Iain Hockenhull is bill team leader in the elections team; and Ewan McCaig is a solicitor. I welcome you all.

I understand that the cabinet secretary wants to make some opening remarks.

The Cabinet Secretary for Government Business and Constitutional Relations (Michael Russell): Thank you, convener, and thank you for the opportunity to discuss the remedial order that we made under convention rights legislation and which enabled limited prisoner voting in the Shetland Islands by-election. I am grateful to you for your letter setting out a number of questions about the order and I am happy to address them.

I would like to put on record that I am sorry that I was unable to provide advance warning of our intention to make the order—as you know, I wrote to you on the day when the order was made, on 1 August, to give you information about it. The reason was, of course, the timescale and nature of the recess: the official notice of the by-election was given on 15 July, which meant that a very limited period was available in which to arrange for limited prisoner voting at the election. Given that the election registration deadline was midnight on Tuesday 13 August, it was imperative that we take action as quickly as possible, to allow qualifying prisoners to register. All consideration occurred during recess, which limited the scope for engagement.

With the Scottish Elections (Franchise and Representation) Bill already before Parliament, I decided to apply to the by-election the scheme under that bill to enfranchise prisoners serving sentences of 12 months or less. I have been very clear, as all my colleagues have, that the blanket ban on prisoner voting is not fit for purpose. That is also the legal situation with the European convention on human rights; the ban is not compliant or compatible with the ECHR as it applies to Scottish Parliament elections. In my view, under those circumstances, it was not

optional but essential to ensure ECHR compliance in relation to the by-election.

I would be very happy to go into the detail of that, why the decision was made and how it operated.

The Convener: Thanks very much for that. Is it your view that that was the only course of action that you could have taken?

Michael Russell: No. There were three possible courses of action, one of which was to do nothing. I say strongly that doing nothing would have put the Scottish Parliament and the election in breach of the convention and was completely unacceptable.

The second possible course of action was to have emergency legislation. Let me put it this way: members might not have been sympathetic if I wished to recall Parliament on or around 1 August in order to have an emergency bill.

The third option was to find some form of secondary legislation that we could undertake. Obviously, we could have worked under the Human Rights Act 1998, but it seemed to me—this is probably incontrovertible—that the convention mechanism was tailor made for the circumstances, in which a breach of the convention had to be rectified as a matter of urgency. That approach has been used in the Parliament before, in 2003, for a sexual offences issue. I thought that that was the right approach, and that is why we used the legislation. It is clear that we can debate whether it was the right approach, but I am not entirely sure that any of us would have been happy with a recall.

The Convener: You may well be right.

You referred to the letter that you sent to me and therefore the whole committee. I think that it arrived the day before the order came into force.

Michael Russell: Yes, it did. It was sent on 1 August, which was the day on which the order was signed.

The Convener: Was it not possible to have given us any more notice that this was coming?

Michael Russell: The issue during the recess was coming to the right decision and implementing it in a very short period of time. The date of the by-election was not ours or yours to give, and it was brought about very quickly. We had to decide on the right route and how to move forward on it, and we did not take that lightly. Once we had identified and decided on the right route, I thought that it was important to tell the committee that that had been done. We are talking about an act of Government; scrutiny follows thereafter. Normally—I am sure that we will come to this—there would be immediate scrutiny, but on this occasion it was not possible to have that.

The Convener: So it was not possible to give us any more time—not even a day or two.

Michael Russell: No. I think that we told you when we could tell you. We told you the day before the order came into effect. We thought that we had to use secondary legislation.

The Convener: Okay. All this really stems from the Hirst case, which involved the UK Government and looked at whether not allowing prisoners to vote was compatible with the ECHR. I presume that you are aware that the UK Government came to an agreement with Europe and that what you did in the remedial order is not the same as that agreement, which was that:

"a. prisoners on remand could vote;

b. prisoners committed to prison for contempt of court could vote;

c. prisoners committed to prison for default in paying fines could vote;

d. some prisoners released on temporary licence could vote;

e. prisoners released on home detention curfew could vote; and

f. prisoners would be notified of their disenfranchisement at the time of sentence."

The Committee of Ministers of the Council of Europe accepted that and said that that was enough to be compliant with the ECHR, but you appear to have gone beyond that agreement, despite the fact that we have a bill in front of the Parliament that has not been dealt with. Why did you go beyond that when it appears that you did not need to do so?

Michael Russell: I will put the issue in context. The UK's decision has not yet been tested—I understand that it is expected to be—and it is hardly proportionate to the nature of the crime; for example, people on temporary release can vote, even if their crimes are much more serious than anybody who would be enfranchised as a result of our proposals.

Taking the UK's approach is not a safe way to proceed and would inevitably result in challenges. My job must be to decide on the safest option. Our 12-month proposal is in the bill and that is why it is in the order; I did not go an inch or iota further than the proposal. It is interesting to note that the proposal in Wales is for sentences of four years. There is a range of views about the issues, which will be tested in the passage of the Scottish Elections (Franchise and Representation) Bill. I had to make a change for the by-election, and my view was that I had to mirror the Government's proposal for the bill—not go further, but not resile from it into areas that would be broadly unsafe.

The Convener: Did you need to go as far as you did? A year ago, the Committee of Ministers said that the UK proposals were

"an effective package to ensure compatibility with the Hirst judgment".

Could you not have left it at that?

Michael Russell: I obviously will not talk about legal advice, but the Committee of Minister's view may not be the same as that of the courts, particularly the European Court of Justice, when it is tested. The obligation on me was to find the safest way to make the order, without going further than proposals that I had already made. The bill that is before Parliament includes the 12-month proposal—that is not uncontroversial; some people in this room wish to go further—and mirroring the legislation struck me as the right and safest thing to do.

I also made sure that the order would be time limited, by the mechanism that was used, so that it will lapse. The consideration was to not pre-empt Parliament's decision, except in so far as to observe the convention because something had to be done for the Shetland by-election.

The Convener: Thank you. Other members want to come in, and we will start with Stuart McMillan.

Stuart McMillan (Greenock and Inverclyde) (SNP): As you have said, the bill is before Parliament. If there were to be another by-election before the bill has passed through its parliamentary process, would you introduce another remedial order?

Michael Russell: That would depend on its timing. I hope that there will not be another by-election and that we will have the opportunity to consider the bill and resolve what the mind of Parliament is on it. However, the law is entirely clear—we would have to do something, and the question would be the timing. I intend there to be full scrutiny in the normal time frame of any decision that we would take, but if another by-election were to take place in the recess, we may have to apply the same remedy. Given that there will not be another nine-week recess—as far as we know, unless Parliament is prorogued—before next summer, and that the bill will be through by then, it is likely that that will not be the case.

Stuart McMillan: If another remedial order were to be required in the future, what could the Scottish Government do differently to ensure parliamentary scrutiny of the exercise of the delegated power before that scrutiny became redundant?

Michael Russell: We have been clear that we welcome scrutiny. My letter to the committee said that I wanted to have this discussion and I responded to the convener's letter to me. We are not saying that we do not want scrutiny. The sheer mechanics are that if we have three options—do nothing; have emergency legislation; or do this—and we take this option, then clearly there is a process of scrutiny. The fact of the matter is that any order comes into effect in a timescale and the timescale of these orders is 60 days, which does not include recess periods.

I want scrutiny, which is why I welcome discussion in the committee. We would endeavour to avoid such circumstances where we can, but it was physically impossible to avoid this set of circumstances, given the timetable of the by-election, which is not in our gift or that of the committee, and the nature of the problem that we had to resolve.

11:15

Stuart McMillan: The timing for scrutiny was not helpful to anybody. If another by-election were to take place, but the timing of it was different—in other words, it did not take place during a recess—what other options would be available to you, if the bill had still not been passed?

Michael Russell: The options would be broadly the same, but as the bill is in process, one would hope that there would be enough time for it to be completed. The bill requires a supermajority, which is an issue. I would want the bill to be completed before any such question arose, and we would then judge it accordingly.

Mary Fee (West Scotland) (Lab): The by-election to which the order relates has passed. Why wait until the end of the 60-day period for observations before revoking the order?

Michael Russell: I have no option. The order has to run until it is revoked. I cannot do anything about that. It is just there. It is not doing any harm, but equally, I cannot revoke the order now—it has to run its 60-day period for comment.

Mary Fee: What regard is given to the comments that are made during that 60-day period?

Michael Russell: I will give regard to any comment that is received. I understand that we have received no comments as yet. If we receive comments, we will look at them.

It is difficult to think what those comments might be. The committee is probably rehearsing the key issues that might arise, but there might be other comments. I cannot imagine what they would be, but we will consider any comments, whatever they are. I am obliged to do so under the order.

Mary Fee: If you were in this situation again, would those comments feed into the process?

Michael Russell: Oh yes. If someone has a bright idea about how to avoid this situation—I cannot see it myself—I would welcome it. I welcome all bright ideas, although we have not had one yet.

Mary Fee: There is still time.

Michael Russell: Indeed.

The Convener: Out of interest, how many prisoners were affected by the order?

Michael Russell: I cannot tell you. It would be wrong to inquire into individual voters and we do not do so. Given those circumstances, I cannot answer the question. Our estimate was that up to five individuals might be eligible to vote, but we do not know whether they voted because that would clearly be the wrong thing to ask.

The Convener: Yes, and then you might be able to identify them.

Michael Russell: Exactly, so I do not know how many people were affected. It is very difficult to tell. The assessment of who is eligible to vote would relate to prisoners who have postcodes in the Shetland area. There could have been other prisoners who are normally resident in Shetland and who gave another address at the time of conviction. There might be some prisoners who gave a Shetland postcode and address, but who are not normally resident in Shetland. The estimate from the Scottish Prison Service was up to five people, but we do not know whether they voted.

Tom Arthur (Renfrewshire South) (SNP): Had we chosen to proceed by recalling Parliament to enact emergency legislation, would that legislation have been subject to the supermajority requirement?

Michael Russell: Yes.

Tom Arthur: So it would not have been a quick question of getting the Parliament quorate, but would have required enough members to meet the supermajority. Is that correct?

Michael Russell: Yes, I think that I am right in that. It is an alteration to the franchise, so it would have required a supermajority, which would have been an additional hurdle.

Tom Arthur: Is it correct that a supermajority is not a majority of members present, but is a supermajority of all members?

Penny Curtis (Scottish Government): Yes.

Michael Russell: Yes. All my officials are nodding, so there seems to be unanimity among us on this matter—we are beginning to look like a quiz team. A supermajority would have required all members to be present, which would have been difficult to achieve. Some people may have been sunning themselves on Lanzarote or on study tours of the Arctic. Wherever they were, it would have been difficult to recall everyone.

The Convener: Were you in either place, cabinet secretary?

Michael Russell: No.

The Convener: On that happy note, we will end this discussion.

11:19

Meeting suspended.

11:20

On resuming—

Referendums (Scotland) Bill: Stage 1

The Convener: Agenda item 5 is evidence on the Referendums (Scotland) Bill. We still have Michael Russell and Penny Curtis with us, plus a couple of new officials: Rebecca Whyte, bill team leader; and Graham Fisher, solicitor. Welcome.

The cabinet secretary will make an opening statement.

Michael Russell: I thank the committee for looking at the delegated powers that are created by the Referendums (Scotland) Bill. I know that the independence debate and the bill are potentially linked, but I start by recalling the purpose of the bill, which is to put in place a standing framework of referendum rules to apply to different referenda that are held across Scotland. From the responses to the committee's call for evidence, it is obvious that a wide range of bodies, administrators, legal commentators and academics all support the general principles of the bill, although they may not agree on the individual details. I make it clear at the outset that I am willing and happy to debate those individual details and that I do not regard them as set in stone. I have been in front of the committee in relation to previous bills, so members will know that my view is always that bills can be improved and developed, and I am sure that that will happen in this case.

As with all our work to update electoral law, our objective is to ensure that the bill reflects best practice and puts the interest of the voter first. Delegated powers are considered to be appropriate in a number of places in the bill to ensure that the framework is operative and to future proof the framework against wider changes in electoral law. In framing the provisions, the Government has been mindful of the need to strike an appropriate balance between the use of primary legislation and the use of delegated powers. Where the Government has decided that the policy objectives are most appropriately met through the use of delegated powers, we of course want to ensure that Parliament has the necessary evidence from and engagement with the Government to allow informed and constructive scrutiny of the proposals.

I am aware that the committee wrote to the Scottish Government with specific questions on a number of proposed delegated powers and that you have received a detailed response—members will have that in front of them. I hope that that has been helpful in the committee's considerations. I am keen to hear further from members to see where I can build on that and work with the committee and the Parliament in addressing on-going concerns.

However, I emphasise my overarching intention to ensure that the bill reflects best practice, is in the interests of voters and is helpful to electoral administrators. I continue to follow the evidence that is being provided to the Finance and Constitution Committee with great interest. I am open to alternative approaches to the bill where those would more effectively facilitate its aims. We are not precious about the details. I want to come up with the best solutions available.

In that spirit, I am happy to answer any questions that members have.

The Convener: Thanks for that.

On the idea that any future referendums would be dealt with by subordinate legislation, which is a completely new proposal, why have you chosen to go down that route?

Michael Russell: I read with interest the evidence on the issue that the Finance and Constitution Committee has recently taken, and I think that some people have missed exactly what we are doing in the bill, so it is important to stress that at the outset. We are not trying to replicate the Westminster legislation, which is 19 years old and which has served reasonably well. Our approach is different. The requirement for that is shown by the UK European Union Referendum Bill, which I think was 60 pages long—it was massive. It brought all the detail of the referendum to Parliament in a piece of primary legislation and plugged into a much smaller and, frankly, more vague piece of Westminster electoral legislation.

We are doing the opposite. We are providing a detailed framework for each and every referendum, were there to be a number of referenda. We would then bring the details of the individual referendum to plug into that framework. Those details are comparatively simple. They are the nature of the question, issues to do with the immediate campaign and, possibly, issues to do with the franchise. That is sort of the reverse of the Westminster approach.

I am entirely open to discussion as to whether the affirmative procedure, the super-affirmative procedure or primary legislation is required. However, that is on the understanding that we are trying to ensure that there is a standing set of arrangements or a framework for referenda, which will necessarily be detailed.

In recent times, we have also discovered that electoral law needs to be dynamic. What we have seen south of the border should persuade us that, for example, there needs to be a constant process of uprating and changing our franchise.

If we understand the bill in that way, our approach becomes clearer. The approach is not set in stone, but it is important to understand what we are trying to do.

The Convener: What do you mean by "dynamic"?

Michael Russell: I mean that it should be possible to incorporate change and best practice into the legislation without constantly returning to primary legislation.

When we have conversations with the Electoral Commission, it is clear that—rightly so—it is constantly reviewing not only how elections and referenda should be run but the regulations that exist.

At the moment, three—or possibly four—pieces of legislation that relate to elections are in front of the Parliament. I say "possibly four" because we have the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, which might relate to the issue, as well as three substantial pieces of legislation on elections: the Referendums (Scotland) Bill, the Scottish Elections (Franchise and Representation) Bill and a broader bill on the detail of elections. This committee will be involved in all of them.

It is important to find a way for best practice to continue to inform those bills—but not without scrutiny, because nobody says that there should not be scrutiny. We should find the process that best matches that ambition and the way in which we are approaching the issue.

The Convener: You are aware that the committee does not deal with policy matters, so we are keen to avoid any discussion about what the bill might be for. Let us say that it is for an independence referendum—it could be for any kind of referendum, but it could relate to an extremely important constitutional matter. You will have seen that there have been a number of submissions to the lead committee. I will read out some of the comments and you can respond to them on the record.

The Law Society of Scotland says:

"we have reservations about the use of subordinate legislation for the most important questions relating to the Constitution. Such issues require full and proper scrutiny which subordinate legislation does not provide."

That sums up what it is saying about the issue.

You will have seen the comments from Dr Alan Renwick. With regard to the regulation-making powers, he said:

"a. Ministers would be empowered to call a referendum on any subject within the competence of the Scottish Parliament via secondary legislation ...

b. Ministers' power to specify the referendum period ... would be very broad",

and

"c. Ministers would be given very wide powers to amend the Act by regulations".

He goes on to say that he cannot find any

"well-functioning parliamentary democracy that gives Ministers blanket authority to call a referendum by secondary legislation."

I did my own research—nor can I.

There are therefore concerns about using secondary legislation for a referendum, particularly if it relates to a constitutional matter. You said in your opening statement—you have said this previously, too—that you are flexible. You can appreciate where the concerns are coming from. Can you respond to them?

Michael Russell: I read the evidence. I have also seen the positive support for the bill. Alan Renwick said that the bill

"should be welcomed: its objective of creating a legislative framework for future referendums is sound, and would allow Scotland to meet international best practice."

Here, we are talking about the detail of how we go about doing so. For your committee, the detail is rightly about delegated powers.

At the weekend, I was at the same conference in Cambridge as Alan Renwick and I wanted to talk to him about the issue; unfortunately, I did not get the chance. If we had had a conversation about the nature of putting in place the framework and then adding to it, the question would have become one of the level of scrutiny for that addition. I accept that. In the committee, we are talking about the level of scrutiny for that. It might not be that there is a blanket level of scrutiny that applies in every circumstance. That is something that we should debate.

11:30

Let me take an example that is not necessarily constitutional. If we were to hold a referendum on an issue that was referred to the Scottish Parliament by a citizens assembly, would we have a different procedure for how that referendum operated? In New Zealand, a referendum can be held by post, and such referenda have included one on whether to sell off a minority stake in an airline. The New Zealand Government put that question to people in a referendum.

I am not saying that we will take either of those routes, but not all referenda are the same. I agree with Alan Renwick that there is no exact correspondence between legislatures, but we need to get the level of scrutiny right. For example, would it be possible to introduce into the bill the

idea that there should be different levels of scrutiny for different types of referenda that originate in different ways? Would the approach to scrutiny for a referendum under a section 30—such referenda can be on any subject—be of a different order from that for a referendum on the selling off of state assets?

I have put forward a proposal that should be debated. I do not think that we will wind down the level of scrutiny. The scope of the debate will be whether scrutiny should at the level of the affirmative or super-affirmative procedure or primary legislation. We should have that debate.

The Convener: Can that point be reflected in the bill?

Michael Russell: It is perfectly possible to reflect it in the bill, should Parliament wish to do so. If we say that we should not use secondary legislation and that primary legislation should always be used, we will set a pretty high bar for things that might not require that. We would then need to say how we would deal with that. I am very happy to have that discussion. There might be good ideas lying around in a lot of different places.

The Convener: Before I bring in other members, I want to pin down the issue. Clearly, there are different types of referendums. A referendum on how often people should have their bins emptied would be completely different from a referendum under a section 30 order. Could the bill reflect those differences? I think that you said yes, but it does not do so at the moment.

Michael Russell: I think that it does, in the sense that we are talking about exactly the same thing: a structure for holding referenda. Whether a referendum is about bin collections or is under a section 30 order, the basic legal structure is the same. We are talking about how the specific nature of a referendum, such as the question, is initiated and scrutinised. On one side, we have the idea of a referendum as a general principle and, on the other side, there is the specific nature of each referendum. I think that that is clear from the bill, because we are putting the framework together. I am happy to discuss whether we require variation in the way in which scrutiny takes place, according to the nature of the referendum.

Stuart McMillan: Has the Scottish Government received many requests to hold referendums, other than the calls for another referendum on Scotland's constitutional future?

Michael Russell: I am not aware that we have received many specific requests. I hear lots of people talking about holding referenda, but I am not aware of the Government having received a formal request for any. As I said to the convener—he has been doing his research, so he will know this, too—referenda are used in very different ways. There is sometimes an interesting interchange between referenda, citizens assemblies and direct democracy. Citizens assemblies in Oregon, I think, produce the basic A4 sheet that voters look at to see the arguments when they go into the booth to vote in a referendum.

Before I came to the meeting, I was absolutely determined that I was not going to give examples, because there will be reports that I want to hold various referenda—for the record, the convener said that he wants a referendum on bins being emptied, not me. I do not hold the view that referenda are discredited. People might want a referendum and, if they do, it is absolutely right that we have the structure in place to hold it.

Stuart McMillan: That is helpful. I posed the question to see whether receiving a number of requests had helped to shape your view of how the bill should be drafted.

Michael Russell: The bill has been shaped by many people and many voices, including those from the Electoral Commission and a range of stakeholders. The bill has not come from nowhere. We talk constantly to people from the Electoral Commission and to administrators—that is one of the jobs that Rebecca Whyte, Penny Curtis and I have. One of the things that I am often heartened by in my interaction with administrators in particular is the interest in constantly improving what we have so that it serves citizens.

Stuart McMillan: You mentioned the correspondence between the Scottish Government and the committee. In the Government's reply to the committee's written questions, you indicated that the need for certainty of timing requires referendums to be established by subordinate legislation. Will you expand further on the need for certainty of timing and why that could not be achieved with primary legislation, for example by using an expedited bill procedure?

Michael Russell: That relates to the basic point that I keep making, which I will go back to. The framework is there, so we know how it is going to operate. Then we have arrangements and circumstances for a specific question or referendum, which will alter. If the issue has been rehearsed again and again and people want to get on and make a decision, there is an opportunity to decide on the timescale and whether it is quick or slow. There is a difference between that and the technical timescale for the procedure of deciding on a lead organisation, or the extent to which the Electoral Commission is involved in the process. Those issues need to be tied down, but we can be flexible about their nature.

I go back to the New Zealand referendum on selling off state assets. Nobody would want that to go on for 10 weeks; people would want to say, "Here is the question. Send it out and see what the answer is—end of story." It is that flexibility for a particular referendum, plugged into the arrangements for every referendum, that makes the bill an important and fairly unique piece of legislation.

Stuart McMillan: Can you outline the expected timeframe for bringing forward a referendum after the Parliament has considered regulations under section 1?

Michael Russell: What is the recommendation?

Rebecca Whyte (Scottish Government): The Electoral Commission recommends a 10-week referendum period.

Michael Russell: I think that we would be flexible on that, as we would be on all matters. It would depend on what could be done and how it could be done. The primary movers would be the administrators—you would not hold a referendum unless you were certain that the administrators could deliver it in the time period that had been talked about. Elections are like that—the nature of an election is that there is a timetable, which can be truncated or expanded, but you would want to make sure that it could be delivered. That often depends on the time of year, for example.

The Convener: I will follow on from Stuart McMillan's questions on timing. If we always just use subordinate legislation, is there a risk that it could be used by a Government—any Government—to force or rush through something pretty substantial?

Michael Russell: The legislation will be scrutinised; I am in no sense arguing that there should be no scrutiny. The level of scrutiny is at issue, but it will be scrutinised. There is nothing in the bill that says that the Government can just say what will happen. A process of scrutiny will take place.

There is another important consideration. I would be very surprised indeed if there was not a very long period of discussion and debate for a controversial referendum subject. That has been the experience everywhere. If we call into evidence the referendum in Ireland on abortion, we see that it was the culmination of many years of discussion and debate. Of course, the citizens assembly process there unlocked the referendum and provided the opportunity for it. A parliamentary committee then looked at the recommendations of the citizens assembly and put in place the arrangements for a referendum, in the way that the Irish state does such things.

I therefore think that such matters are likely to be at the centre of public attention and scrutiny. A Government may attempt things, but whether it can get away with them is another question.

The Convener: Governments always attempt things.

Mary Fee: I will stay on the theme of scrutiny. You said in your opening remarks that the bill provides the legal framework for referendums, and you accepted that there could be a number of different types of referendum. The convener has helpfully suggested that we should have a referendum on bin collections.

The Convener: I think that we should.

Mary Fee: No. [*Laughter.*] That would sit at one end of the scale and a referendum on a constitutional issue would sit at the other. The cabinet secretary accepts that we would need different types of scrutiny and discussion for each type of referendum, depending on where they might sit on that broad scale. Should the bill therefore not be clearer about the type of consultation, discussion and scrutiny that should be attached to the different types of referendum that will sit in the legal framework?

Michael Russell: I have introduced that idea because I think that it would move us away from the position that we have taken in the original draft, in order to address some of the comment that has been made on it. That is an entirely reasonable proposition to make, and how it would work would be a question for debate at stage 2. I am saying that I am not in any way resistant to that idea. However, clear criteria would need to be applied, and thinking will be needed about what those criteria would be. Without dissing the idea of a referendum on bin collections, I say that that would have a different set of criteria. As I said, I am not in any sense resistant to the idea, but I would want a discussion about what it would look like.

Mary Fee: Currently, the bill is almost a one-size-fits-all piece of legislation.

Michael Russell: We are not trying to do that, and secondary legislation would be able to alter a range of things. The question is the level of scrutiny that takes place in deciding on such things. Should one size fit all? I entirely agree with Mary Fee that, if the argument is that it should not be one-size-fits-all legislation, we should move on to saying what it should look like and how it should apply. I have suggested that using section 30 orders and citizens assemblies could be options. There might be others.

Take, for example, end-of-life issues. How would we address those? They are, like the abortion question, a very different type of moral

question. Such issues might require very different views. In such circumstances, one might say that it is important to have primary legislation, because the very act of asking such questions would be controversial. Some people would believe that the questions should not be asked. Therefore, you might want to ask whether there is a category of matters to which conscience applies that would need to be thought through very carefully.

It is useful that we are having this discussion, because it fleshes out the huge differences on what appears to be a level playing field.

Mary Fee: If there are arguments against one size fits all, and there will be consultation that will feed into that argument, would Parliament play a full role at the beginning of that process?

Michael Russell: I would hope so. I would have thought that, if a framework is agreed—a framework for how a referendum is run and what governs it should be pretty non-controversial—the level of scrutiny on that will dictate the level of parliamentary involvement. There would be one level for affirmative procedure and another level for super-affirmative procedure. If primary legislation was used, we know what the process would be—there would be the debate on the bill's general principles, then the question of the detailed arrangements and then stage 3. That would dictate how Parliament would be involved. Crucially, Parliament would be involved at all levels of scrutiny. We are not talking about process that would not have parliamentary involvement. It would be active involvement, because we are not talking about use of negative procedure.

Mary Fee: You say that "Parliament would be involved". I am keen to hear more detail on what that would look like. Would there be full debates? Would instruments be laid?

Michael Russell: Affirmative, super-affirmative or primary legislation all have their own automatic involvement of, and scrutiny by, the Parliament. You know Parliament very well: it is not likely that any of that would happen without substantial debate in Parliament. If an issue were to get to the stage of there being a referendum—even if it were to be on bin collections—there would have been discussion. It might have started off with a members' business debate; perhaps there will have been an Opposition debate; or there might have been a Government reaction to a committee's report. All those things will take place. In the bill, we are talking about the level of scrutiny that would take place at the conclusion of that process—that is, when a referendum was recommended or proposed—and how that scrutiny would work.

Mary Fee: Section 1 provides for affirmative procedure to apply to the regulations. Are you prepared to change that to super-affirmative procedure, given the discussions that have taken place here, and those that are, I imagine, taking place in other committees?

11:45

Michael Russell: I have said that from the very beginning, in what I have said here today. The proposal is use of affirmative process, but I have indicated that I am very open to discussion on use of super-affirmative procedure or primary legislation. I have also said that my view is that criteria would need to be applied, and that we should discuss the concept of there being different types of referenda in the second part of the process. I am not indicating my resistance to anything; I am indicating that, if we are going to do that, we need to get our minds into what the criteria are and how they would apply.

Mary Fee: My final question is about a statutory consultation requirement, which can often provide a far more detailed level of scrutiny, as well as for far more feedback. Would you consider such a requirement in relation to the subject of the bill?

Michael Russell: That would depend on the level of scrutiny that was agreed. If the level of scrutiny were to have within it, as a legislative process has, an agreed level of consultation, then yes—of course I would consider that.

Mary Fee: Would the type of consultation depend on the type of referendum that the legislation applied to?

Michael Russell: Yes; one thing leads to another. We are not there, but if we were to follow that route, one would lead to the other. If the type of referendum is to dictate the type of scrutiny, the type of scrutiny will dictate the type of consultation and who is involved in that process. It is a fairly clear set of circumstances.

The Convener: I will summarise what has been said so far, before we move on. The cabinet secretary has said that he is open to discussion about there being different levels of scrutiny depending on the referendum issue.

Alison Harris has some questions.

Alison Harris (Central Scotland) (Con): Good morning. The bill provides that the Electoral Commission should be consulted before regulations are laid under section 1, but it does not provide that a draft of the proposed regulations be shared with the Electoral Commission in order to inform that consultation. Why does the Scottish Government not consider it necessary to consult the Electoral Commission on the specific text of the draft regulations?

Michael Russell: That is one of the areas in which the shorthand for what we do is perhaps lost on people. Drafts and the drafting of electoral law and legislation are done alongside and in conjunction with the Electoral Commission all the time. That is how it happens. That is the formal last stage; it is always done in consultation with the Electoral Commission, which would tell you exactly the same thing. Therefore, we are simply reflecting what happens in life. Those things will happen—they are bound to happen, and no electoral legislation would arrive without them happening.

Nonetheless, at the end of the day, there will also be a formal process. That is about taking a belt-and-braces approach, in which we say, "We have done all that—now let us have the formal discussion about it." It also makes the process much better because we can focus in on areas where there is disagreement.

Alison Harris: I will try to take that further. Given that we accept that the Electoral Commission is expert on such matters, would not it make sense that there should be no objections from the commission on any modifications?

Michael Russell: No—and the commission would not want that either. There is a question—this question will come up later—about whether we should always be bound by the Electoral Commission's rulings. The Electoral Commission does not wish to become political. The important thing is that the Government is absolutely transparent about what the Electoral Commission says. When there is a report from the Electoral Commission, the Government should—and will be obliged to—lay that report. It is then for members to decide whether the Electoral Commission's recommendations should be acted on. Because there is such close discussion, 99 times out of 100 we would not be in such a situation. It is important that if we were to get to that situation, there is, in the end, a decision by the parliamentarians who are elected to make such decisions. The Electoral Commission is not elected to make such decisions: neither it nor anybody else would want to put it in that position.

Alison Harris: In order that we can consider that slightly further, I will quote from evidence that was put in front of the Finance and Constitution Committee. The Law Society of Scotland takes the view that the approach

"precludes the Commission from scrutinising the question in the light of conditions as they are at the time the question is to be posed."

Michael Russell: That is a different question.

Alison Harris: You do not think that the two things could coincide?

Michael Russell: No. I am happy to address the specific question. Do you want me to do so?

Alison Harris: Well, let us go back to the first one. Am I correct in saying that you do not think that the Electoral Commission wants to be in that position?

Michael Russell: I do not think that anyone would want to be in the position of saying that the Electoral Commission should make the final decision on that and that no one else would have any say in it. The Parliament is passing the legislation, so it will make the decision. The recommendation of the Electoral Commission is absolutely essential and should be made public. The Government should be absolutely clear on whether it agrees or disagrees with it, but we should not be in a position where that is just a final say.

Alison Harris: Okay. I will go on to my next question—I am sorry that I am confusing the two things for you—unless the convener wishes to come in.

The Convener: I just want to query something with you, cabinet secretary. You said that a question is coming up on binding future Governments.

Michael Russell: My briefing talks about binding future Governments—that is what I was talking about. What did you think I was talking about?

The Convener: How can you know which questions are coming up?

Michael Russell: I am talking about the question in my briefing. What did you think I was saying?

The Convener: I have no idea—those were your words.

Michael Russell: I was referring to my briefing. That is where I am in my thinking about the bill. That is in the next section of the bill.

The Convener: Okay. We will carry on.

Alison Harris: Can you explain further the Scottish Government's position on the requirements to lay a report on the intelligibility of a question to be asked in a referendum? In particular, will you clarify why the Scottish ministers, rather than the Electoral Commission itself, have the role of laying a report on the intelligibility of the questions when the regulations under section 1 are used to propose a referendum?

Michael Russell: Let me be very clear: I am not against testing the questions. There has been some indication that I think that the questions should not be tested. That is not so. I think that

they should be tested. Convener, you said that you do not want to talk about individual examples such as independence, but I am going to have to do so on this occasion because that issue relates to the question.

There is a category of question that is extremely important, which is one that is not—to use the Law Society's words—an "old question" but a "current question". In my thinking—which I am happy to discuss—the question that was asked in 2014 remains a current question. It was approved in 2013 by the Electoral Commission. It is important to remember that the question as it is phrased now is not the one that the Scottish Government put in for testing. There was a change to it as a result of testing, which the Scottish Government accepted, and that was the question that was in the referendum. Until 2014, it was used in every opinion poll, and, since then, it has been used in more than 50 opinion polls on independence. I am told by those who know these things that it has not been used in only 11 months out of the past 40.

There are therefore issues of clarity and consistency. If a question is both current and in current usage, why would we change it? Doing so would be very confusing. That does not mean that, if a new referendum on another subject were to be recommended—for example, although I do not want to labour the point, on bins—there would not have to be testing of the question for that. There is no doubt about that. However, in this case there is a specific example of a current question that I think is both well understood and in common parlance.

Alison Harris: Okay. I understand what you are saying, and I do not necessarily disagree with it. However, as we all know, absolutely nothing stays the same, especially in politics. If the question was current in 2014 and, as you have told me, it is still current in 2019, I do not see how you can argue that it will therefore be a current question that will apply in 2025.

Michael Russell: I am arguing that it should apply not in 2025 but in 2020, which I think is the First Minister's chosen date. Nothing has changed in those circumstances. If there is a change in language or usage, of course, that should be considered. However, that question is still being used and is producing a result that is broadly consistent.

I find it difficult to understand why you would change the question. I do not want to complicate the matter unnecessarily for the committee or for myself. I am saying that, just as we have said that there are different categories of referenda, there are different categories of question. In this case, given that the question is current and is on a major constitutional issue, we would tangle with it with some reluctance.

Alison Harris: I am not suggesting that you should tangle with it; I am trying to get my head around why we are debating a referendum bill that is based on a current question. Surely, it would be more simple to follow the recommendations of the Electoral Commission and the Law Society and require that a question be assessed and that that assessment be put before Parliament, regardless of when the question was examined before.

Michael Russell: I disagree. I think that that would lead to endless repetition, and there is a clarity here that should be stuck with. We have a disagreement. If a question is still being used on a monthly basis, it is tautologous to say that we had better examine it again. If there is a new subject and a fresh question, of course, we would start afresh. There is no such thing as a question that would last forever. Equally, we have to define whether a question is current or not current, and there is a current question.

The Convener: Is Alison Harris's question not about whether you think the question is appropriate? Is it not better to put that to an independent body—the Electoral Commission, in this case—for it to make a ruling or recommendation? We all come at constitutional matters from different standpoints.

Michael Russell: Yes, but I do not think that that applies to every question; it applies to new questions, and this is not a new question—it is a current question that is still being asked. To repeat myself, it has been asked every month except for 11 out of the past—[*Interruption*.] I can see that you are as tired of that statistic as I am, convener, but that is the truth. I cannot see why we would suddenly decide, "We'd better brush this one down and have it tested again." It is still there. It is still being asked. It is current.

Alison Harris: What I am trying to say—I am obviously not explaining myself terribly well—is that I thought that the bill is not really about independence. I thought that it is a bill to cover everything from bins to the constitution. In the light of that, I really cannot understand why you are talking about clarity and consistency, saying that the same question would be asked. In my view, the question that was asked in 2014 is irrelevant to the bill. Surely, we should make the bill watertight going forward and have openness and honesty. I do not see why you do not want to go back to the Electoral Commission on this.

Michael Russell: I am not trying to be closed or dishonest. I am trying to make the point—as I did earlier—that there are different types of referendum. If there are different types of referendum, by definition, there are different types of question. We can have a question that is old, is out of use or is archaic and needs to be changed; we can have a question that is current; and we

can have a question that is new. I am making a series of definitions there, just as I am—with the agreement of the committee, I think—also indicating that there are different types of referendum. We can debate the issue, but I think that that is a logically consistent position.

Alison Harris: I thank you for your answer, but I stand by what I have said.

Mary Fee: Can I ask a tiny follow-up question? If the political make-up of this Parliament changed, would the Parliament still be tied to the wording of the question?

Michael Russell: Not necessarily. That Parliament could say that it wanted to test a different question, and it would be entitled to do so. I am saying that, if it did so, it would be going against a current question—a question that exists and continues to be used. I cannot bind anybody. A different Government might take a different view, but the view that I am taking is that there is a current question, which would apply no matter what.

Let us suppose that there had been a referendum in 2017 on something and a question had been asked in a certain way. Let us take the EU—I was trying to avoid the word "Brexit", but I have fallen into that trap. Let us suppose we took the question that was in the 2016 EU referendum and decided to rerun the referendum but not on the basis of whether people believed in a hard Brexit, a no-deal Brexit or no Brexit at all. In that situation, it would be reasonable to argue that, because the question had been asked in terms of leave and remain, and because it continued to be asked in opinion polls, if we wanted to do the same thing, we would ask the same question. That is a reasonable argument, although I am not saying that we will agree on it.

Alison Harris: So, where does it become—

The Convener: Let Mary Fee in.

Alison Harris: Sorry, Mary. On you go.

12:00

Mary Fee: If there is confidence that the question is in the current parlance, as you say, and is a current question, and if it was subject to the scrutiny of the Scottish Law Commission or the Electoral Commission or whoever, that body would more than likely say that the question was correct. Therefore, why not allow that scrutiny to take place?

Michael Russell: I would want to know what the alternatives were, and nobody has suggested a rational alternative. It is a current question that is in place, whereas, if there was a new referendum, there would be a number of suggestions. An example is what happened in 2013, when the Scottish Government put something to the commission, which came back with something better. There was an alternative.

There are different categories of questions, just as there are different categories of referendum. I am happy to have this discussion, but that remains my view.

Alison Harris: Could I ask one more question, convener?

The Convener: Hang on, Alison. I have to let Tom Arthur in, because he has been waiting patiently.

Tom Arthur: I have a brief question. Am I correct in presuming that, were a draft SSI or, indeed, a draft piece of primary legislation being considered, it would be perfectly acceptable for a committee to solicit evidence, if not a full-scale consultation, from the Electoral Commission, and the commission could offer a preliminary view in that regard?

Michael Russell: Yes.

Tom Arthur: Am I also correct in understanding that there is nothing to bar the Electoral Commission from offering its view, whether or not it is solicited?

Michael Russell: I entirely agree. However, the reality is that, in this instance, we have a question that exists and that is used, so it is strange to say that we should have another question. Of course, anyone can give their view on it. I am not trying to be difficult; my position just seems to be a rational one.

Alison Harris: Is it not fair to say that all referenda stand alone, so, with regard to the questions, there is no continuation of a referendum? The question is there and it stands, and then we move on to the next referendum. I do not understand why you want to use the same question or why you do not want the Electoral Commission or the Law Society to consider whether the question can be re-put.

Michael Russell: The Law Society has a view on the issue, but it is not a statutory body in that regard. The statutory body would be the Electoral Commission.

Alison Harris: Okay—I apologise.

Michael Russell: There is no tabula rasa. Nobody can say that the referendum never took place, particularly when the question is still being asked. That is my point. We cannot say that the referendum is entirely separate, because the question is being asked in opinion polls—it has not been asked in only 11 of the past 40 months. That is my point.

The Convener: You have made your point.

I have one final question, which follows on from what we have been talking about. Why does the Government believe that it is not appropriate to bind future Governments to making only those modifications that are recommended by the Electoral Commission?

Michael Russell: That relates to a fairly important constitutional point. In the end, Governments make decisions, and the Electoral Commission is not a Government. The commission should be treated with the greatest respect, and all its recommendations should be carefully listened to. In addition, those recommendations should be public, and the Parliament should be able to decide on them. However, in the end, there is a basic point about who makes the final decision and who is responsible for it. With electoral law, that is the Parliament and not an unelected body. That is a basic constitutional point that in no sense disses—if I may use that word in this context—the Electoral Commission. That is just how it is.

The Convener: That has exhausted the issues that we wanted to talk about. It was a useful session. Thank you for your flexibility, cabinet secretary.

Michael Russell: Can I just re-emphasise that point, convener? There are disagreements but, certainly on our part, there is a genuine attempt to see whether we can find a way to provide the bill with the right delegated powers and the right level of scrutiny. I am encouraged by the discussion, because I think that we can probably do it.

The Convener: That is our role.

Michael Russell: Thank you for carrying it out.

The Convener: I now move the meeting into private.

12:05

Meeting continued in private until 12:26.

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