OFFICIAL REPORT
AITHISG OIFIGEIL

# Finance and Constitution Committee

**Wednesday 27 November 2019**

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

# Wednesday 27 November 2019

CONTENTS



## FINANCE AND CONSTITUTION COMMITTEE
**27th Meeting 2019, Session 5**

**CONVENER**

*Bruce Crawford (Stirling) (SNP)

**DEPUTY CONVENER**

*Adam Tomkins (Glasgow) (Con)

**COMMITTEE MEMBERS**

*Tom Arthur (Renfrewshire South) (SNP)
*Neil Bibby (West Scotland) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Angela Constance (Almond Valley) (SNP)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Patrick Harvie (Glasgow) (Green)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)
*John Mason (Glasgow Shettleston) (SNP)
*Alex Rowley (Mid Scotland and Fife) (Lab)

*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Jackie Baillie (Dumbarton) (Lab)
James Kelly (Glasgow) (Lab)
Michael Russell (Cabinet Secretary for Government Business and Constitutional Relations)

**CLERK TO THE COMMITTEE**

James Johnston

**LOCATION**

The David Livingstone Room (CR6)

# Scottish Parliament

## Finance and Constitution Committee

*Wednesday 27 November 2019*

*[The Convener opened the meeting at 09:01]*

## Referendums (Scotland) Bill: Stage 2

**The Convener (Bruce Crawford):** Good morning and welcome to the 27th meeting in 2019 of the Finance and Constitution Committee. I remind members to switch off their mobiles, or at least to put them on silent, so that they do not disturb the proceedings.

Agenda item 1, which is the only business on today's agenda, is to deal with stage 2 of the Referendums (Scotland) Bill. I welcome to the meeting Michael Russell, the Cabinet Secretary for Government Business and Constitutional Relations, and his officials. I also welcome non-members of the committee to the meeting.

Members will be aware that we have a considerable number of groupings to consider and amendments to get through. I am mindful of the need to ensure that there is sufficient time to allow consideration of all the amendments, including those in the later groupings. Therefore, I ask members and the cabinet secretary to keep their contributions as concise as possible.

### Section 1—Power to provide for referendums

**The Convener:** Amendment 76, in the name of Adam Tomkins, is grouped with amendments 77, 1 to 3, 78, 18, 23, 29, 42, 49 and 61.

**Adam Tomkins (Glasgow) (Con):** Good morning, everyone. The first group of amendments concerns the power in section 1 of the bill to provide for referendums. Section 1 as drafted is extraordinary, because it allows for referendums to be called either by the authority of an act of this Parliament, which would be by primary legislation, or by ministerial order or regulation, which would be by secondary legislation.

There is no equivalent power in the Political Parties, Elections and Referendums Act 2000, which is the United Kingdom's referendums legislation. The stage 1 evidence that the committee took from Dr Alan Renwick of the constitution unit at University College London was that there is no well-functioning parliamentary democracy that gives ministers blanket authority to call a referendum by secondary legislation.

The committee unanimously recommended that section 1 be amended so that at least constitutional referendums must require primary legislation and that all other referendums ordinarily require primary legislation.

I will speak not only to amendment 76, which is the lead amendment in this group, but principally to amendment 1.

Amendment 1 omits section 1 from the bill, replacing it with a provision that would mean that any referendum to which this legislation applies would need to be triggered by an act of the Scottish Parliament. I note that the cabinet secretary now supports that amendment, which I very much welcome.

Amendment 1 would mean that the bill would be identical to the equivalent UK legislation, PPERA, in that any referendum held on a devolved matter in Scotland to which this legislation applies would require an act of the Scottish Parliament to establish it. That is the clearest and simplest solution to the problem that section 1 as introduced poses. As I said, I very much welcome the Scottish Government's apparent support for it.

Amendments 76 and 77 are alternatives to amendment 1, in the event that the committee does not accept amendment 1.

Amendment 76 would mean that any referendum on a constitutional matter would require an act of the Scottish Parliament. Amendment 77 would mean that any referendum on a moral issue would also require an act of the Scottish Parliament. In other words, no constitutional referendum and no referendum on a moral issue could be called by ministerial order or regulation.

I do not intend to move those amendments, if committee members indicate that amendment 1 is likely to be accepted. Amendments 76 and 77 are lesser alternatives to amendment 1, and are not designed to be moved in addition to amendment 1 if that amendment is agreed to.

I briefly turn to the other amendments in the group, which are all consequential on amendment 1. Amendments 2 and 3 are rival amendments to section 2. The cabinet secretary proposes to leave out section 2 entirely. I think that the understanding—he will be able to speak for himself in a moment, so he will correct me if I am wrong—is that section 2 becomes unnecessary or otiose if amendment 1 is accepted. I would happily support amendment 3.

My amendment to section 2 simply omits from it the provision that would enable regulations under the provision to modify any enactment. The

committee took evidence from the Law Society of Scotland that that aspect of section 2 as introduced is too broad and gives ministers too much power to amend primary legislation by secondary legislation, which is always something that we should be alive to. Again, however, I will not move amendment 2 if it is clear that the cabinet secretary will move amendment 3 and the committee will support it. I prefer amendment 3, which leaves out the entirety of section 2, to amendment 2, which leaves out only three words of it.

As I said, all the other amendments in the group are consequential on amendment 1. Except for amendment 78, which is in my name, they are all in the name of the cabinet secretary. We will support his amendments. Amendment 78 is on one further aspect of the bill that requires to be amended in the event that the ministerial power to trigger referendums by regulations is removed from section 1. It simply omits the words "(including this Act)" from section 3(1)(a). That means that the provisions in section 3 on referendum questions would apply where

"provision is made by or under an Act of the Scottish Parliament for the holding of a referendum".

We do not need the words "(including this Act)" in that sentence, because no referendum is to be held under this legislation. The bill does not contain provision for the holding of any referendums, so those words are not needed. The section would be neater, cleaner and more accurate if we were simply to omit those words; that is the force of amendment 78.

I repeat that we would be happy to support all the other amendments in this group in the name of the cabinet secretary.

I move amendment 76.

**The Cabinet Secretary for Government Business and Constitutional Relations (Michael Russell):** It is always my approach to a bill—members of the committee know this, because we have been in this position before—to seek to enhance it and to reach agreement on issues that have been raised in the committee report. That has lain behind all the approaches that I have taken to amendments today, as I hope will become clear.

I hope that, at the end of stage 2, we can have a clear agreement on the bill and—irrespective of whether people want to support or oppose it—it is clear that we have sorted out the issues that have been raised at stage 1.

I still believe that this bill offers a different approach to arranging referendums, and elements of it will survive this process. It provides a framework on to which the specific arrangements for referenda would be bolted, which is different from the PPERA approach.

Some committee members prefer the PPERA approach, so I am trying to find a way to ensure that the objections that were raised at stage 1, in evidence and by the committee, can be addressed. That is the background to where I find myself this morning.

The committee heard evidence on whether referendums should be triggered by primary or secondary legislation and on the circumstances under which those approaches would be appropriate. Your stage 1 report recommended

"that the Bill be amended so that referendums on constitutional issues must require primary legislation and that all other referendums will ordinarily require primary legislation."

It further recommended that, if the Government wished

"to identify specific criteria for other referendums",

we should provide for that.

As I set out in the stage 1 debate, I have accepted the argument that most referendums should be triggered by primary legislation. I have gone on to consider whether there are circumstances in which a referendum could be provided for by secondary legislation, subject to some form of super-affirmative procedure. I provided evidence to the committee when I spoke to and was questioned by it on these matters. Those circumstances apply in New Zealand, for example. Having taken account of the evidence and of the view of the committee, however, I have come to the conclusion that it would be best not to stand upon that issue, and to find a way to address the objections of the committee.

Adam Tomkins has lodged amendment 1, which would produce the effect of ensuring that all referendums are undertaken by primary legislation. I intended to lodge my own amendment to make the same change, but I was slightly tardy in that matter, so I have put my name to Mr Tomkins's amendment, I support it and I would encourage the committee to support it.

Mr Tomkins has indicated that amendments 76 and 77 are alternatives to that approach. As I have accepted amendment 1, which is a better approach, I do not think that there is any need to proceed with amendments 76 and 77, and I am grateful to Mr Tomkins for having made that clear in what he has said. Those two amendments do not address the recommendation of the Delegated Powers and Law Reform Committee that the procedure for secondary legislation should be adjusted, so I think that we should simply park those and accept that amendment 1 represents the right way to do things.

I have lodged consequential amendments 23, 29, 42, 49 and 61, which make the necessary consequential adjustments to the bill to accommodate the changes to section 1. Those amendments would essentially provide the full job, if added to section 1.

Mr Tomkins referred to amendment 78 as a change to section 3 as a consequence of amendment 1. I support that amendment and encourage committee members to do so. In addition, Mr Tomkins lodged amendment 2 to make changes to section 2, removing the power to amend enactments. I have been more radical than Mr Tomkins in this matter: amendment 3 in my name would remove section 2 altogether. If section 1 provides for a bill in all cases, any necessary adjustments to the provisions in the framework could be made in a subsequent bill, as is common. That is a more straightforward approach than would apply under section 2.

Amendment 18 removes what would be a superfluous reference to section 2 if amendment 3 is accepted.

**Patrick Harvie (Glasgow) (Green):** We have debated the question of whether specific legislation should always be required for referendums in the future, and I was willing, with an open mind, to allow the cabinet secretary to come back to us if he wanted to set out criteria that would allow for secondary legislation to be adequate. I was never really convinced that the need was there.

It seems to me that we could have a referendum on an issue that was so big that it transcended the parliamentary process, or on so contentious an issue that it would not be appropriate for Parliament to deal with it. It has always struck me as difficult to envisage a situation where an issue would meet those tests and yet be so simple that it did not require the detailed scrutiny that full legislation would offer.

I am glad that a compromise or agreement has been reached and that the cabinet secretary has agreed that the change can be made. Even if that was not the case, I would not be agreeing to amendments 76 or 77 from Adam Tomkins, if they were moved. If a minor matter was constitutional, I would not see that as being particularly key to the test of whether primary legislation was necessary.

As for moral issues, as we have discussed at the committee previously, I do not see it as being easily possible to have a clear definition of what constitutes a "moral issue". All too often in politics, we regard things as moral issues when they affect marginalised people, rather than examining the moral content of the arguments.

Women's reproductive rights are often seen as moral issues; men's reproductive rights never are. Family law for people in same-sex relationships is often seen as a moral issue; family law for people in mixed-sex relationships never is. I will not agree to amendment 77 on a point of principle; legislation that would separate out what are seen as moral issues in politics from what are not seen as moral issues would be a fundamental mistake.

09:15

**Adam Tomkins:** I welcome the cabinet secretary's support for amendment 1. In light of that, and in the expectation that the committee will vote for amendment 1, I will seek to withdraw amendment 76.

*Amendment 76, by agreement, withdrawn.*

*Amendment 77 not moved.*

*Amendment 1 moved—[Adam Tomkins]—and agreed to.*

*Section 1, as amended, agreed to.*

**Section 2—Application of this Act**

*Amendment 2 not moved.*

*Amendment 3 moved—[Michael Russell]—and agreed to.*

**Section 3—Referendum questions**

*Amendment 78 moved—[Adam Tomkins]—and agreed to.*

**The Convener:** Amendment 79, in the name of Adam Tomkins, is grouped with amendments 90 to 92.

**Adam Tomkins:** The second fairly significant area of contention that is generated by the bill is to do with the Electoral Commission's role in testing the intelligibility of questions, in particular the provision in section 3(7), which bypasses that function of the Electoral Commission for what are, in essence, repeat referendums.

The committee took strong evidence on the matter at stage 1, including from the Electoral Commission, which said:

"The Commission firmly recommends that it must be required to provide views and advice to the Scottish Parliament on the wording of any referendum question ... regardless of whether we have previously published our views on the proposed wording."

I do not think that anyone apart from the cabinet secretary demurred from that evidence from the Electoral Commission. When the committee reached its conclusions on the matter, we unanimously recommended

"that the Cabinet Secretary recognises the weight of evidence ... in favour of the Electoral Commission testing a previously used referendum question and must come to an

agreement, based on this evidence, with the Electoral Commission, prior to Stage 2."

It is unfortunate that the evidence that is before us for stage 2 indicates that no such agreement has been reached. The cabinet secretary wrote to the convener last week about the matter and said only that the Electoral Commission "is aware of" the amendments in his name in this group; he did not say that the Electoral Commission had agreed to them. Indeed, the Electoral Commission said, in its briefing for stage 2:

"The Electoral Commission's primary concern is that Parliament is able to access the Commission's independent advice on the intelligibility of a proposed referendum question at any point it requests it, regardless of whether a question has been asked within that parliamentary session."

That is the Electoral Commission's view; it is as strong and unambiguous as it was at stage 1.

It seems to me that the committee has three options available to it at stage 2. The first is not to amend the relevant provisions in section 3 and for those to go on to stage 3 unamended, so that the Electoral Commission will effectively be bypassed with regard to any referendum question that has previously been used. That is what will happen if we do not amend those provisions today.

The second option is to accept the cabinet secretary's amendments, which do not have—at least, we have not been told that they have—the agreement of the Electoral Commission. The cabinet secretary is shaking his head. I am happy to take an intervention from him.

**Michael Russell:** On page 2, the Electoral Commission's briefing says:

"The Commission had a constructive meeting with the Cabinet Secretary to discuss Amendments 90, 91 and 92 relating to the Commission's role in any question assessment. We are continuing to discuss the finer detail with officials to ensure that the final legislation reflects the principle outlined above."

I do not think that that is anything other than an accurate assessment of where we are. It does not indicate a rejection of my amendments, which is what you are implying.

**Adam Tomkins:** I welcome the fact that there has clearly been constructive engagement between your office and the Electoral Commission. I wish it were otherwise, but unfortunately the evidence that we have in front of us today does not allow us to reach the conclusion that that constructive engagement, welcome as it has been, has led to an agreement between you and the Electoral Commission, which is what the committee unanimously called for in our stage 1 report. We unanimously said that there must be "an agreement" between the Government and the Electoral Commission about the Electoral Commission's role with regard to the testing of referendum questions, where those questions have previously been used. We have no evidence that there is such an agreement. All that we have been told is that the Electoral Commission is "aware"—that is the word that you used in your letter to the convener last week—of your view.

I repeat what the Electoral Commission said, which is that its

"primary concern is that Parliament is able to access the Commission's independent advice on the intelligibility of a proposed referendum question at any point it requests it, regardless of whether a question has been asked within that parliamentary session."

The amendments in this group in the name of the cabinet secretary do not give effect to that concern. They do not give effect to the strong, unambiguous and clear view of the Electoral Commission that any referendum question must be tested for its intelligibility by the Electoral Commission, irrespective of whether that referendum question has been used before.

The only amendment in the group that gives effect to the force of the Electoral Commission's evidence at stage 1 and now, and to the committee's unanimous recommendation in our stage 1 report, is my amendment 79. Amendment 79 would clarify that, for the avoidance of doubt, the Electoral Commission's statutory functions as an independent scrutineer of the intelligibility of referendum questions must apply even if a referendum question has already been used. The amendment gives effect to the overwhelming force of the evidence that we received at stage 1, and to the views of the Electoral Commission at stages 1 and 2. The issue can always be revisited at stage 3, but my amendment is the only course available to the committee today that gives effect to our unanimous recommendation at paragraph 72 of our stage 1 report.

For that reason, I urge members to support amendment 79 and to reject amendments 90 to 92 in the name of the cabinet secretary. As I said, I welcome the constructive engagement between Mr Russell's office and the Electoral Commission, but I regret the fact that that engagement has not yet led to an agreement between the Government and the Electoral Commission about the issue.

I move amendment 79.

**Michael Russell:** We have heard from Adam Tomkins about why he believes that my amendments should be rejected and his amendment should be accepted. I have the opposite point of view, for which I will make the case.

Amendment 79 would make an inelegant change to section 3(7) to prevent any reuse of already-tested referendum questions. That is illogical and impractical, and amendment 79 is a

curious way to achieve the aims that Adam Tomkins set out. Even in drafting terms, amendment 79 does not fulfil his objectives.

Question testing has been at the heart of the debate on the bill. I have heard the evidence that has been presented on the subject and the arguments that have been put forward by this committee and the Delegated Powers and Law Reform Committee. However, there is other evidence, which I have brought to the committee, not least of which is the absolutely clear evidence that exists in the poll by Progress Scotland, which shows how well understood the question is, and the fact that the question has been used so regularly. There is a strong case for saying that a question should have a shelf life, which should be determined at least in part by the way in which it continues to be used.

The committee recommended in its stage 1 report that I consider the evidence and come to an agreement with the Electoral Commission. I have taken that very seriously. I have met and spoken to the commission, and there have been frequent debates and discussions between officials and the commission. I met the commission last week and wrote to the committee to provide an update on progress on the matter. We continue to have constructive discussions, and amendments 90 to 92 are not abstract in that regard; rather, they are concrete examples of a discussion that has moved far along the line.

Taken together, my amendments would mean that a referendum question on which the Electoral Commission had previously reported would have a limited life. Indeed, in the case of the question that was cast in 2014, it would have already expired. A decision about whether a question could be reused would be for the Parliament to make and would require the input of the Electoral Commission. That would mean that a question would be available for reuse and, although the matter would be initiated by the Scottish ministers, it would be decided by the Parliament. That is the right way to move forward.

Before lodging any motion to reuse a question, ministers would have to consult the Electoral Commission. At the same time as lodging the motion, we would have to give details of our consultation with the Electoral Commission and set out why the commission thought that the extended validity period should or should not apply. If the Parliament refused to agree to the question, that would be the end of the matter.

**Adam Tomkins:** I am grateful to the minister for the clarity of his remarks.

It might well be that there are some things about referendums that we do not yet do well in the United Kingdom. However, one of the things that we do well is the three-way relationship between ministers, the Electoral Commission and the Parliament that legislates to authorise or trigger a particular referendum.

The roles of each are clear and distinct. It is the role of ministers to propose referendum questions. It is the role of the independent statutory Electoral Commission to test the intelligibility of a proposed referendum question to ensure that the interests of voters are paramount and there is no inadvertent confusion in the proposed question. The commission's function is to represent and put first the interests of voters. It is the function of Parliament—whether that is the UK Parliament or, under the bill, this Parliament—to legislate accordingly.

That is all that I am asking for. The cabinet secretary's proposal is very close to that, but it is not quite that. What is the cabinet secretary's reason for wanting to pull back from that clearly established and well-functioning three-way relationship?

**Michael Russell:** I will disagree with your definition, using the words of the Electoral Commission. When giving evidence to the committee at stage 1, the Electoral Commission made it clear that it saw its role as advising rather than binding Government. It said that it was

"reluctant to step into a space that is for members, for Parliament and for political viewpoints."—[*Official Report, Finance and Constitution Committee*, 18 September 2019; c 43.]

I am proposing exactly that: that the final decision will lie with the members of the Parliament. The Electoral Commission will advise, and its view will be heard.

09:30

The commission has not rejected that position. There is on-going discussion, as the commission has indicated to the committee. It has said that it is discussing

"the finer detail with officials to ensure that the final legislation reflects the principle outlined above."

Therefore, the discussion will continue and it may well bear fruit at stage 3. To refuse to accept that progress actually goes against what the Electoral Commission is saying about its role. In my view, the proposal exactly reflects that role, because it would bring in the commission to advise but give the final decision to members, which is exactly how it should be.

I will conclude, as the convener is looking anxious about the time. I believe that amendments 90 to 92 meet exactly the requirements of the committee and that they should be accepted—

**Adam Tomkins:** On a point of information, convener.

**The Convener:** You will have an opportunity to make the point when you wind up.

**Michael Russell:** As I said, I believe that the amendments meet exactly the requirements of the committee. I am asking the committee to support the amendments with the proviso that, if there is further change following the discussions with the Electoral Commission, I am happy to come back to the issue at stage 3. The commission says that the discussion has not concluded, so I am happy to come back at stage 3 once the discussion has concluded. The amendments are a major concession from the Scottish Government and I think that they should be recognised as such.

**John Mason (Glasgow Shettleston) (SNP):** I disagree with Adam Tomkins's comments about there being only one course available to the committee. That is obviously a political statement, and the reality is that several courses are open to us.

We said in our stage 1 report that the cabinet secretary

"must come to an agreement ... prior to Stage 2."

It is disappointing that that has not happened—I accept that the Government and the commission have moved a considerable way in that direction, but they have not quite got to a conclusion. How do we react to that? We have at least a couple of choices as to which amendments we accept, so I fundamentally do not accept the argument that only one course that is consistent with our report is available to the committee.

We do not want the Electoral Commission to be able to dictate to Parliament—the word "bind" was used. That would be going rather too far in respecting the commission's position.

**Adam Tomkins:** Will the member take an intervention on that point?

**John Mason:** Yes.

**Adam Tomkins:** There is no amendment on the table that would allow the Electoral Commission to bind Parliament. The Electoral Commission's role under PPERA is to independently test the intelligibility of referendum questions, and that would be its role under my amendment 79. It will then be for the Parliament to decide whether to accept or reject the Electoral Commission's advice. The idea that the Electoral Commission would be able to bind Parliament is not accurate.

**John Mason:** That is exactly my point—the Electoral Commission should not be able to bind Parliament, but the suggestion with amendment 79 is, almost, that we try to get to a position where it would be able to do so.

**Adam Tomkins:** No.

**John Mason:** Well, that appears to be the case.

Amendments 90 to 92 would put a time limit on how often a referendum question has to be assessed, which is a reasonable compromise. It is a fairly subjective area and is not black and white; we are talking about opinion and judgment. On that basis, I am positive about the compromise of having the time limits, with the proviso that, following the Electoral Commission's discussion of the finer details with officials, the provision could be further amended at stage 3.

**Alex Rowley (Mid Scotland and Fife) (Lab):** The cabinet secretary has failed to reach agreement with the Electoral Commission. I still do not know why he is so insistent on this point and has not been able to find a way of bringing people together—he has clearly failed to do that. Therefore, I will support amendment 79, in the name of Adam Tomkins.

Let us see whether we can get agreement by stage 3. It is not about compromise; it is about getting the best way forward that is built on best practice, and the evidence is overwhelmingly against what the cabinet secretary and the Government propose. Members can use their votes to force through the proposal, but that will not be a good start on an agenda that the cabinet secretary claims is about trying to bring people together. I will certainly vote against the minister's amendments 90 to 92 and support Adam Tomkins's amendment 79.

**Patrick Harvie:** I am sorry that the tone of the debate so far has been needlessly confrontational. Adam Tomkins said that what the cabinet secretary is offering is very nearly but not quite what Mr Tomkins believes is necessary, and the cabinet secretary said that his amendments represent substantial progress but not the last word and that the matter could be returned to at stage 3. I think that there is perhaps a bit of performative oppositionalism here and that, actually, people are moving together towards something that should be recognised as acceptable.

The two big and contentious issues are the use of primary or secondary legislation and question testing, but the discussion about question testing has changed because of the amendments that we have just agreed to on primary and secondary legislation. Any referendum that takes place within the framework of the bill will be subject to primary legislation that is amendable in Parliament, so Parliament will be entirely capable of saying, if it chooses to do so, that the Government of the day is trying to pull a fast one and get around question testing. In such a case, Parliament would be able

to amend the relevant referendum bill to ensure that question testing happens.

The Electoral Commission's primary concern is

"that Parliament is able to access the Commission's independent advice on the intelligibility of a proposed referendum question at any point it requests it".

It seems to me that, regardless of the amendments in the current group, we are already in that position because of the amendments that we have agreed to on the use of primary legislation for future referendums. The cabinet secretary's amendments 90 to 92 go further in providing Parliament with the additional safeguard or reassurance that we and subsequent Parliaments will be able to make the relevant decisions at the time when we or they wish.

If there is scope for the cabinet secretary to come back and discuss further refinements at stage 3, that will be positive as well, but I think that we are much closer on the matter than some people seem to be presenting.

**Murdo Fraser (Mid Scotland and Fife) (Con):** When the committee produced its stage 1 report, it unanimously resolved that the Scottish Government and the Electoral Commission must come to an agreement on the testing of previously used questions. Although I recognise that there has been progress, movement and discussions, it is clear from what the cabinet secretary has said that, at this moment, an agreement has not been reached. No doubt, he will correct me if that is an incorrect interpretation, but I think that that is where we are. Discussions have happened and progress has been made, but the Scottish Government and the Electoral Commission have not actually reached an agreement, so the committee's strong and unanimous recommendation at stage 1 has not been met.

I therefore think that the kindest thing that we can say about amendments 90 to 92 is that they are premature. They put the cart before the horse, because we do not at this point have an agreement with the Electoral Commission. For the cabinet secretary to have lodged his amendments, which state what he wants the position to be, at a time when there is no agreement with the Electoral Commission is to push the boat out too far.

There is a simple way of dealing with the matter. There is still an opportunity, because there will be another round of amendments at stage 3. In a spirit of openness and compromise, I recommend to the cabinet secretary that he does not press his amendments 90 to 92. As and when agreement is reached with the Electoral Commission, if that occurs, it and the cabinet secretary will tell us what the agreement is, and amendments can be lodged at stage 3 to seek to implement the agreement.

The cabinet secretary's amendments 90 to 92 simply represent the cabinet secretary's view on the way forward. For them to be agreed to at a time when no agreement has been reached would be inappropriate and would not meet the spirit or, indeed, the letter of what the committee resolved at stage 1.

**Angela Constance (Almond Valley) (SNP):** Later in stage 2, when we come to group 17, we will debate the pros and cons of placing a duty on ministers to follow the advice of the Electoral Commission.

On the amendments that are before us now, there are two important factors. One is how we move matters forward; another is how we protect the role of the Parliament. The tenor of the earlier debate, at least, confirms my fears that amendment 79 is about taking a step backward as opposed to forward. Amendments 90 to 92 represent a serious attempt by the cabinet secretary to take matters forward, in line with the committee's aspirations as set out in our stage 1 report.

Of course, there continues to be the opportunity for dialogue in advance of stage 3. I think that the committee can take heart from the correspondence from the Electoral Commission, in which the commission said:

"We are continuing to discuss the finer detail with officials to ensure that the final legislation reflects the principle outlined above."

Amendments 90 to 92 provide substantial reassurance. For example, amendment 92 provides that

"the Scottish Ministers must consult the Electoral Commission."

The bottom line for me is that the matter should ultimately rest with our Parliament, not with ministers or unelected bodies, as the Electoral Commission itself acknowledges.

**Gordon MacDonald (Edinburgh Pentlands) (SNP):** A key policy in the Labour Party manifesto for the forthcoming election is the holding of a referendum on the Brexit deal within six months. Given the timescales that are involved in that regard, and given that we are always told that the United Kingdom Parliament is sovereign, does not that suggest that, as the cabinet secretary said, it will be for members of the UK Parliament to decide whether a test will be involved and whether the question that was used in 2016 will be used again? Will an uneven playing field be created in relation to how questions are used in referenda across the UK?

**Alexander Burnett (Aberdeenshire West) (Con):** I heard what Patrick Harvie said. Given the amendment to section 1, the Parliament could add

a role for the Electoral Commission in analysing the question. Does he agree that the reverse could occur and the Electoral Commission's role could be removed under section 1, if that was the wish? Would not the de facto inclusion of the Electoral Commission be more satisfactory?

**Patrick Harvie:** It is clear to all of us that legislation can always be amended. This Parliament cannot pass legislation that is unamendable by a subsequent Parliament. If the bill is passed and becomes an act, a future bill that is introduced to set up a referendum could amend the act in any direction.

I hope that we never have a Parliament that seeks to abolish or unreasonably restrict the role of impartial bodies. During the stage 1 debate, I publicly urged the Government to be a bit more relaxed about the role of the Electoral Commission. However, it is a simple matter of fact that any subsequent bill could amend the bill that we are discussing today.

**Alexander Burnett:** I agree with you; I just wonder why you do not agree that including the Electoral Commission would be a better starting point.

**Adam Tomkins:** I thank all members and the cabinet secretary for their contributions to the debate on this group of amendments. No group is unimportant, but this group is on one of the most important issues that the bill raises.

Referendums decide things. Referendums decide big things—things that matter and change the entire nation. Surely, we all agree that the ground rules for setting up referendums must be unimpeachable. The First Minister referred to the 2014 referendum as the gold standard, and the Edinburgh agreement, which the First Minister signed, was an important part of that. There is a lingering suspicion that seeking to bypass or minimise the independent statutory function of the Electoral Commission is rigging the rules of a future referendum.

09:45

As I said in my intervention, there is a very clear three-way relationship, which has been mischaracterised by Mr Mason and Ms Constance today, which is that ministers propose referendum questions, the Electoral Commission independently tests the intelligibility of those questions and Parliament then decides. That should happen for every referendum in the United Kingdom or in any part of the United Kingdom, and that would be the effect of amendment 79. There is nothing in amendment 79 that seeks to bind this or any future Parliament to accepting the recommendations of the Electoral Commission. The Electoral Commission advises. My point, cabinet secretary, is that the Electoral Commission should be able to give that advice with regard to each and every referendum that we hold, irrespective of whether we have previously held a referendum on that question.

**Michael Russell:** I want to take up Mr Fraser's point with Mr Tomkins. If my amendments are—as Mr Fraser says—premature, is amendment 79 not also premature? Mr Tomkins's argument is that I have not reached agreement, and my argument is that I have made progress on reaching agreement, which is reflected in my amendment. Amendment 79 does not reflect any progress at all having been made. Indeed, it is contrary to what the Electoral Commission's report says about continuing to discuss the finer detail. Does Mr Tomkins accept that his amendment 79 is premature and should be withdrawn, following the argument made by Mr Fraser?

**Adam Tomkins:** No, I do not. I am coming to that point.

The evidence that we received from the Electoral Commission at stage 1 was clear and unambiguous: the Electoral Commission's role as an independent scrutineer of the intelligibility of referendum questions must be protected and employed for every referendum that is held in the United Kingdom or in any part of the United Kingdom. That is the force of my amendment: amendment 79 would require that the Electoral Commission's role in respect of the intelligibility of questions and question testing be maintained for every referendum. That is the advice and evidence that we were given by the Electoral Commission. Except for the cabinet secretary, no one gave evidence to the committee that contradicted or countermanded that advice at all.

Amendment 79 is not premature; it seeks to give full effect to the full weight of the evidence that we received at stage 1. In our stage 1 report, we unanimously concluded, on the basis of all of that evidence, that the cabinet secretary must come to an agreement with the Electoral Commission prior to stage 2—not prior to royal assent or stage 3. Notwithstanding the fact that we all welcome the constructive engagement that the cabinet secretary has had with the Electoral Commission, that agreement has not been reached.

I am afraid that amendments 90 to 92, in the name of Mr Russell, are both inappropriate and premature. The only course available to the committee today that gives effect to what the committee unanimously recommended at stage 1 is to accept amendment 79 and reject the other amendments in the group.

**John Mason:** Is the member arguing that time is not a factor at all and that it does not matter

whether a question was asked a day ago, a year ago, 10 years ago or 100 years ago?

**Adam Tomkins:** Yes, I am, because I think it is preposterous to imagine that we would hold a referendum on a question the day after we had held a referendum on the same question. No matter how important the issues are, referendums will not be held on them according to that sort of timescale. That is a fanciful and rather ludicrous example.

Referendums are held in the United Kingdom on important matters of constitutional change. They might be held on other issues, but, as Patrick Harvie said, it is difficult to conceive of an issue that is important enough to be decided by referendum that is also somehow not important.

It is elementary that, when we hold referendums, they should be held to the highest possible standard. A key element of that gold standard is that ministers propose referendum questions, the Electoral Commission independently tests the intelligibility of those questions—putting the interests of voters first—and Parliament then decides whether to accept or reject the independent advice of the Electoral Commission. All that my amendment 79 seeks to do is to ensure that any future referendum on any subject—whether that is Scottish independence or anything else—under the authority of the bill meets that gold standard.

Amendments 90 to 92, in the name of the cabinet secretary, do not reach that gold standard—they fall short of it. For that reason, the amendments should be rejected.

**The Convener:** The question is, that amendment 79 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)
Tomkins, Adam (Glasgow) (Con)

**Against**

Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

**The Convener:** The result of the division is: For 5, Against 6, Abstentions 0.

*Amendment 79 disagreed to.*

*Amendment 90 moved—[Michael Russell].*

**The Convener:** The question is, that amendment 90 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

**Against**

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)
Tomkins, Adam (Glasgow) (Con)

**The Convener:** The result of the division is: For 6, Against 5, Abstentions 0.

*Amendment 90 agreed to.*

*Amendment 91 moved—[Michael Russell].*

**The Convener:** The question is, that amendment 91 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

**Against**

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)
Tomkins, Adam (Glasgow) (Con)

**The Convener:** The result of the division is: For 6, Against 5, Abstentions 0.

*Amendment 91 agreed to.*

*Amendment 92 moved—[Michael Russell].*

**The Convener:** The question is, that amendment 92 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

**Against**

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)
Tomkins, Adam (Glasgow) (Con)

**The Convener:** The result of the division is: For 6, Against 5, Abstentions 0.

*Amendment 92 agreed to.*

**The Convener:** The question is, that section 3, as amended, be agreed to. Are we agreed?

**Members:** No.

**The Convener:** Conservative members' opposition is noted.

*Section 3, as amended, agreed to.*

**After section 3**

**The Convener:** Amendment 4, in the name of Adam Tomkins, is grouped with amendments 4A and 75.

**Adam Tomkins:** On page 11 of the Electoral Commission's September 2016 report on the 2016 EU referendum, recommendation 3 states:

"the starting assumption for Governments and legislatures should be that referendums are"—

I am sorry, convener, but I am looking at the wrong section. I should be speaking to amendment 4 on the minimum regulated period.

**The Convener:** That is correct. It is okay—take your time.

**Adam Tomkins:** Right, let me start that again.

I do not think that the cabinet secretary and I are going to disagree on this issue because the force of my amendment 4 and the force of his amendment 75 are broadly similar and are two different means of achieving the same ends. The bill should be amended in one way or another to ensure that the minimum regulated period for any referendum that is held under the authority of the legislation is 10 weeks.

As introduced, the bill had no minimum regulated period. The committee took evidence that there should be a minimum period and that best practice appeared to be that a minimum of 10 weeks should be adopted. I am happy to be corrected but, as I understand it, the force of amendment 75 and the force of amendment 4 are two different legislative means of seeking the same result. I am not going to die in a ditch over whether the means in amendment 4 or the means in amendment 75 should be adopted. Amendment 75, which simply defines a referendum period in the schedule of definitions is probably more elegant and neater than the alternative, so I would be happy not to press amendment 4 if the cabinet secretary wishes to move amendment 75, unless he thinks that there is some material difference between the amendments that I have overlooked in my sleepiness.

Jackie Baillie has lodged an amendment to my amendment that would make the minimum regulated period 12 weeks rather than 10. The selection of any period of time is, I suppose, arbitrary, but my question for Jackie Baillie is why it should be 12 weeks when the evidence that the committee took was that 10 weeks is the minimum that is required. There was no discussion of a 12-week period during our evidence taking but there was quite a lot of discussion of a 10-week period. There are recent unfortunate exceptions to this but, by and large, this committee seeks to follow the evidence, and the evidence is that the minimum regulated period should be 10 weeks, so I would stick with that and not extend to 12 weeks. Again, that is not a ditch in which I propose to die.

I move amendment 4.

**Jackie Baillie (Dumbarton) (Lab):** Let me add to the outbreak of consensus, because there is broad support for the principle that the length of the regulated referendum period should be set out in the bill. I am, however, conscious that, if Adam Tomkins withdraws amendment 4, amendment 4A has nothing on which to hook itself, so I am slightly disappointed that he is prepared to cave for the cabinet secretary's form of words when his is clearly far superior.

That said, I was challenged to say why I am seeking a period of 12 weeks. In previous debates on amendments, Adam Tomkins has said that these are momentous decisions that could be taken in future referenda. Notwithstanding the evidence that the committee took from expert witnesses about what goes on elsewhere, we have now had experience of two referenda in a short period of time. Because of the significance of the decisions, a minimum period at 10 weeks is perhaps slightly too short a time. I would rather err on the side of caution and give the maximum possible time for such a debate, as well as allowing for the normal functioning of local government and the Scottish Government.

**John Mason:** Will the member take an intervention?

**Jackie Baillie:** I am just about to finish, but please go ahead, Mr Mason.

**John Mason:** I am still not clear why it should be 12 weeks rather than, say, 14, 16 or 20.

**Jackie Baillie:** I think that 12 weeks is better than 10. I have said that I base that on the experience that we have had of two referenda. We need to allow a minimum period with sufficient time for the democratic process to be thorough, so 10 weeks is just a bit too short.

I move amendment 4A.

**Michael Russell:** I simply confirm that I believe that 10 weeks is correct. The committee welcomed the Scottish Government's openness to considering a minimum regulated period when it reported. The 10-week period was the view of stakeholders, and it seemed to be an appropriate period. Therefore, I think that 10 is the right number. There is no great harm in 12—and I think that Jackie Baillie has lodged an amendment that would provide for a 14-week period in other circumstances; the number keeps growing. Stakeholder opinion on 10 weeks was unanimous, as far as I recall.

It would be for the Parliament to decide on a longer or shorter referendum period for a particular referendum if referendums were being held under primary legislation. However, the framework position—and I go back to the point that this is a framework bill—would be what is supported.

10:00

As for the elegance or otherwise of the solutions, I simply argue that amendment 75 will have the same practical effect as amendment 4 but fits with the nature of other amendments, including those on removal of powers in sections 1 and 2, which we have considered. Amendment 75 fits with how the bill is drafted and cross-refers. In the circumstances, I ask Adam Tomkins not to press amendment 4—that will have an unfortunate but necessary effect on amendment 4A. Amendment 75 will produce a result.

**Patrick Harvie:** I am pleased that there is agreement on putting the figure in the bill and I agree that amendment 75 is the neater way of doing it.

In deciding what the figure should be, there is an important balance to strike. There should be a minimum period, to ensure that the referendum is held in a fair, legitimate and trustworthy way, but there is a danger of extending the period too much. Some referendums are time sensitive. I am pleased that so far in this country we have not gone down the route that some jurisdictions have taken and held referendums on budgetary matters, such as tax rates—some countries have done that; I hope that we do not do so. However, if a Government was elected that considered it legitimate to hold a referendum on a national tax rate before a budget came into effect, there would be a clear time limit by which the referendum would have to be achieved. Extending the timescale would therefore be a risk in relation to some referendums that we might want to hold.

I recognise Jackie Baillie's point about comparing the two, big, controversial and highly contentious referendums that happened in recent years, but I think that the contrast between them is not to do with the short regulated period. In the case of the 2014 referendum, we had, in effect, three years of deep political debate, because everyone knew that the referendum was coming. The shallowness of the 2016 referendum was not about the short number of weeks in the run-up to the referendum day but about the conduct of the political campaigns and the absence of consequences similar to the consequences for people who are dishonest in election campaigns—we will come to that issue when we consider a later group of amendments.

I see no case for a 12-week period and I am happy that agreement has been reached on putting a 10-week period, for which we heard clear evidence, into the bill.

**Adam Tomkins:** I have nothing further to say. The Electoral Commission is pushing for 10 weeks, not 12, and has welcomed amendment 75, in the cabinet secretary's name, which specifies a minimum 10-week referendum period.

I am happy to support amendment 75. The cabinet secretary has twice suggested that my impeccable drafting was inelegant—

**Michael Russell:** And I'm not finished yet.

**Adam Tomkins:** That hurts, but the cabinet secretary can apologise later. I think that amendment 75 provides an elegant solution and I am happy to support it.

**Jackie Baillie:** Given the debate, I am happy not to press amendment 4A, albeit that it was elegantly written.

*Amendments 4A and 4, by agreement, withdrawn.*

**The Convener:** Amendment 93 is in a group on its own.

**James Kelly (Glasgow) (Lab):** I am pleased to return to the committee that I recently served on to speak to my amendments. Amendment 93 seeks to ensure that for a result to be valid in a referendum, there must have been a 50 per cent turnout. In considering the amendment, it is important to look at the background to the Referendums (Scotland) Bill. When the bill was published, the Government was enthusiastic in pointing out that the bill related not just to independence referenda but to referenda in general. Amendment 93 should therefore not be seen, as some have tried to misrepresent it, as an attempt to meddle in a future independence referendum. Clearly, in any future independence referendum turnout would exceed 50 per cent, and it is disingenuous to suggest otherwise.

Referendums on moral issues have been referred to, while Patrick Harvie just talked about a

referendum on a national tax rate ahead of a budget. In either case, it would be important that the referendum result was not contested. If turnout was less than 50 per cent, the result would lack credibility and would be contested. Amendment 93 seeks to avoid that and to ensure that, for any result to be valid, the turnout must be 50 per cent.

Amendment 93 should be considered alongside other amendments, which I will move later, on increasing the length of polling time available, on the possibility of Saturday voting and on increasing the information that is available to voters. All those amendments seek to push up voter turnout and thereby lend democratic credibility to the result.

Any referendum outcome must be seen as the settled will of the Scottish people. That comes into question if less than half the population voted. I urge members to support amendment 93, as it adds credibility and validity to the outcome of any future referendum.

I move amendment 93.

**Patrick Harvie:** Like others, I am sure, I welcome James Kelly back to the committee.

I hope that we would all want turnout to be high, whether in referendums or elections. I think that we would all want a politically engaged population who see voting as something important to do. At the same time, though, I fundamentally respect people's right to abstain in a referendum—to say, "A plague on all your houses," whether it is political parties or campaign groups—and not have their vote counted. The effect of amendment 93 would be that abstentions are in effect counted as votes against change. The amendment is rather like the suggestions that have been made elsewhere for a two-thirds majority. It would give an in-built advantage to anyone arguing against political or social change in a referendum campaign, as against those in favour of change. On that basis, it would breach the principle that everybody's vote should count for the same.

I commend James Kelly on one point, though, which is the courage that he has shown by coming to the committee and moving amendment 93, as someone who believes that a 50 per cent turnout is the gold standard of legitimacy but who was first elected to the Scottish Parliament on a 48.5 per cent turnout. That would pose me no problems, but I am sure that it is slightly embarrassing for James Kelly, so I am grateful for his efforts to overcome that.

**Angela Constance:** By lodging amendment 93, Mr Kelly has succeeded in triggering an entire nation back to 1979. It is like the ghost of Christmas past, I am afraid. Dr Alan Renwick told the committee:

> "Turnout thresholds are clearly undesirable and a bad idea because they encourage people who are in danger of losing to suppress turnout in order to invalidate the vote."

He went on to say:

> "use of an electorate threshold was discredited by the 1979 experience, so you would be a brave politician to recommend introducing one in Scotland."—[*Official Report, Finance and Constitution Committee*, 4 September 2019; c 27.]

I think that we can indeed agree that Mr Kelly is brave.

I stick to my previous publicly made comments on the issue. In the context of a referendum on Scotland's constitutional future, I very much think that this is a wrecking amendment. It is a wolf in sheep's clothing. It is anti-democratic for some of the reasons that Patrick Harvie has outlined, because it assumes that not voting equates to support for the status quo. I am vehemently opposed to the amendment.

**Gordon MacDonald:** This morning, we have discussed how referendums are always about important issues that tend to engage voters. If we look at the history of referenda throughout the UK—from the Northern Ireland border poll in 1973 and the European Union membership referendum in 1975 right up to the Scottish independence referendum in 2014 and the EU membership referendum in 2016—there has been no minimum turnout requirement.

I accept that, as Patrick Harvie and Angela Constance have said, such an approach discourages voter turnout. We have to remember that, in the devolution referendum in 1979, the dead were in effect recorded as voting no. We do not want to return to that situation.

**Tom Arthur:** I, too, oppose the amendment, for all the reasons that have been shared by colleagues. Principally, I oppose it because it incentivises a campaign to encourage people not to vote. In an age when our democratic institutions and values are under attack, we should not be seeking to encourage that.

**Michael Russell:** That previous point is an important one: a turnout threshold incentivises people not to vote. Not voting is seen as a political action, so it discourages participation. I find it inconsistent that Mr Kelly has made such a proposal, given that he has lodged amendments that encourage participation by increasing the polling hours.

The 1979 referendum did not follow the exact same procedure, but it raised a series of anomalies, including people who could not return to where they lived in order to vote because of ferry difficulties. I know that that was the case, because I lived in the Western Isles at the time. There were problems with people who had—

sometimes by mistake—more than one address. A range of difficulties presented.

The committee has received no evidence at all to support the idea that any threshold other than a simple majority should be followed. Therefore, although amendment 93 is a worthy attempt, it is a misguided one. I ask Mr Kelly not to press amendment 93. If he does, I urge the committee to reject it.

**James Kelly:** I will press amendment 93. Ultimately, the test on the amendment is whether it would enhance the process of any future referendum. Again using Mr Harvie's example again of a referendum on financial powers ahead of a budget, I put it to you that, if the turnout was below 50 per cent, it would be contested, and it would be difficult for the Government—

**Adam Tomkins:** Given what he has just said, why does Mr Kelly think that all three independent reports into the use of referendums that the committee has looked at have unanimously and strongly concluded against threshold or turnout requirements? The House of Lords Constitution Committee, the independent commission on referendums and the Venice commission have all recommended against seeking to rig the rules of referendums by fiddling with either turnout or threshold requirements. Given that overwhelming evidence, why does Mr Kelly alone seem to think that doing that would enhance rather than inhibit democracy?

**James Kelly:** It is not a question of rigging the rules; it is a question of ensuring that any outcome has democratic credibility.

As I was saying, if a budgetary proposal is taken to the country and fewer than half the people participate in that referendum, that result, when it is returned, will be contested; it will not be credible. Like other members, I want to ensure that there is voter participation, with turnouts in excess of 50 per cent, so that the outcomes of referendums are credible.

10:15

I seem to have ruffled the feathers of some Scottish National Party members, given their comments about the 1979 referendum. I completely reject Angela Constance's suggestion that amendment 93 is a wrecking amendment. If there were to be an independence referendum in future, surely no one disputes that turnout would be in excess of 50 per cent. Let us face it: people would turn out in droves to reject the proposition that we should enter into an arrangement whereby we would have a £12 billion deficit every year.

**John Mason:** Do you accept that, if one side was winning by 49 per cent to 40 per cent, there would be an incentive for the side that might lose not to vote, which would, in effect, give that side 40 per cent plus 11 per cent—that is, 51 per cent—and it would then win? The intention of getting more people to vote is a good one—that is great; we all accept that. However, in practice do you not accept that we could end up with an undemocratic result?

**James Kelly:** It is nonsense to suggest that people would go round saying, "Let's not vote in this referendum." We are all politicians who care keenly about the democratic process, as do a lot of people in the country. That is the spirit in which people would take part in campaigns.

Ultimately, I am seeking to ensure that the outcomes of referendums are credible. I ask members to support amendment 93.

**The Convener:** The question is, that amendment 93 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Bibby, Neil (West Scotland) (Lab)
Rowley, Alex (Mid Scotland and Fife) (Lab)

**Against**

Arthur, Tom (Renfrewshire South) (SNP)
Burnett, Alexander (Aberdeenshire West) (Con)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Tomkins, Adam (Glasgow) (Con)

**The Convener:** The result of the division is: For 2, Against 9, Abstentions 0.

*Amendment 93 disagreed to.*

**The Convener:** Amendment 94, in the name of Neil Findlay, is grouped with amendment 95. I understand that Alex Rowley will speak to and move amendment 94.

**Alex Rowley:** Convener, Neil Findlay sends his apologies for being unable to attend the meeting.

Amendment 94 would create a category of referendum, the citizen initiative referendum, which could be initiated from below, in an attempt to bridge the democratic gap.

For many ordinary people, the Scottish Parliament has for much of its existence seemed cut off from the concerns of their daily lives. It is important that we address that. By complementing the on-going work of the petitions system, we can help to reverse the trend towards a little more than 45 per cent of the population exercising their democratic right.

The threshold for initiating a citizen initiative referendum would be 300,000 signatures. That is a substantial threshold, but we are unapologetic about that; any issue that leads to a referendum, with all the time and expense that that involves, must be important to a large number of Scottish people. Even if the 300,000-signatures threshold is not met, we expect there to be an increase in democratic participation as citizens come together to campaign on causes that matter to them. The Scottish Government has consistently said that it embraces such participation.

We appreciate that there might be concerns about such a novel proposal but we want to revitalise our democracy and bold steps are needed if we are to do so.

I move amendment 94.

**Jackie Baillie:** Amendment 95 builds on amendment 94, which sets out arrangements for a citizen initiative referendum—a novel approach, which is designed to bridge the democratic deficit. I have sought to provide an appropriate timescale for such a referendum, which is a minimum regulated period of 14 weeks.

On balance, I think that more time would be needed for such a referendum than would be needed for a Government-initiated referendum. There would need to be sufficient time for a proposition to be well understood and for proposals to be properly scrutinised and discussed. Hence my choice of 14 weeks.

**Patrick Harvie:** I am pleased that we have the opportunity to discuss amendment 94.

I certainly would not want to be thought of as being hostile to the idea of citizen initiative referendums. Greens have always argued that representative democracy is part of our democratic process and should be augmented and added to by participative and deliberative processes. For that reason, we championed participatory budgeting. We also championed a public petitions systems when Parliament was being established, and we urged councils around the country to adopt public petitions systems—I think that most have now done so. We are pleased that there is now an approach to the use of citizens assemblies at local and national level. The citizens assembly of Scotland is currently considering broad constitutional questions and later there will be a citizens assembly on climate.

All those things are innovations that I welcome. However, I suspect that we are not quite ready for amendment 94. I would very much welcome the view of the current citizens assembly on whether a citizens initiative should be able to trigger a referendum. It would be more appropriate to hear the views of citizens assembly participants on whether such an approach would be a positive innovation, in the context of participative and deliberative processes, than it would be for the committee to decide that now.

In the absence of clear evidence on the issue being taken at stage 1 of the bill, it would be premature for us to make a decision on it. However, I would very much welcome a debate on the question, whether at stage 3 or through the citizens assembly, if that body wants to consider a proposal along the lines that are set out in amendment 94.

On amendment 95, I am not convinced that there is a case for extending the minimum regulated period in the way that Jackie Baillie suggests, but it will not be relevant if the committee does not support amendment 94.

**Adam Tomkins:** I agree with quite a lot of what Patrick Harvie said. A missed opportunity in the bill, so far, has been that we have not thought carefully or deeply about the relationship between democracy by referendum, parliamentary democracy and other citizen initiatives, including citizens assemblies. It is unfortunate that the bill has not given us the opportunity to think through some of those issues a little more carefully and deeply.

Amendment 94 is bonkers. It is a really strange and extremely dangerous amendment, which is fantastically ill conceived. For example, it says:

"A referendum held under this section is advisory",

as if other referendums might somehow be different, without explaining what "advisory" means. It also gets wholly wrong the role of the Electoral Commission, which we have debated this morning. It says:

"It is for the Electoral Commission to specify the wording of the question or questions in a referendum held under this section."

We have already seen that that is not what the Electoral Commission is for; the Electoral Commission's role is to give advice about the intelligibility of referendum questions, not to specify or bind.

The fundamental flaw in amendment 94 is that it would lock Scotland into an independence neverendum. It is unfortunate, but I am happy to concede that there will always be 300,000 people in Scotland who think that Scotland should be an independent country—although many more will take the correct view. [*Laughter*.] The proposed approach in amendment 94 would enable 300,000 cybernats—or 300,000 nationalist campaigners—to petition the Electoral Commission for an independence referendum, and the amendment provides that once that number of signatures has been obtained,

"a referendum is to be held."

We would have a permanent independence referendum under amendment 94, which was moved by Alex Rowley but lodged in the name of Jeremy Corbyn's left-hand man in Scotland, Neil Findlay, and which shows how weak the Labour Party is when it comes to protecting the union.

Amendment 94 is a Labour amendment that would lock Scotland into a permanent independence neverendum. For that reason, as well as its manifest inadequacies in the detail of its inelegant drafting, we will oppose it.

**Michael Russell:** I oppose amendment 94, but not for the reason that Mr Tomkins has just outlined. I am not an extremist in any sense; I do not veer between the extremes of wanting a perpetual referendum and the position of the acting leader of the Scottish Tories, Jackson Carlaw—I am not sure that he is acting the role very well—who apparently said this week that there should not be another referendum until 2054, when I will be 101. There will be seven Scottish Parliament elections between now and then. That is clearly a ludicrous proposition.

**Adam Tomkins:** I agree—it is too soon. [*Laughter*.]

**Michael Russell:** I hope that the *Official Report* has captured Mr Tomkins's belief that a referendum in 2054 would be too soon. That says something about democracy.

I would not use the word "inelegant" to describe amendment 94. It has simply not been thought through—it is threadbare. It would allow any voter to initiate a referendum by starting a petition that goes on to collect 300,000 signatures. Why has the figure of 300,000 been chosen? The Scottish people are well known for their sense of humour. I note that Boaty McBoatface received 124,109 votes. With the low threshold that has been proposed, it is clear that the mechanism proposed by amendment 94 could be used for a variety of purposes.

The amendment lacks any detail on who would be entitled to add their signature to such a petition. Would that ability apply only to those who were over 16 or 18, or would people of any age have it? Would they have to be resident in Scotland, or could anyone in the world add their name to the petition?

On top of that, there is the issue of whether, given what the Electoral Commission is for, it would wish to take on the roles that are specified in amendment 94. No consideration is given to the matters of the accuracy of the signatures or the eligibility of people to sign such a petition. The amendment is completely threadbare and absolutely out of place.

Amendment 94 also fails to recognise that, if an individual citizen wants to use a petition to initiate a referendum, a route to do so already exists. I have some sympathy with Mr Harvie's position—that route could be improved on. I am not absolutely against initiative referenda. People can petition the Scottish Parliament and, if they collect sufficient signatures, action can be, and is, taken. The petitions system allows individuals to directly affect Government policy. I cite as evidence of that Gillian Martin's Seat Belts on School Transport (Scotland) Bill, which she introduced in February 2017 and which received royal assent in December of that year; it was directly related to the petitions process. There is a way for an individual to try to change Government policy through existing procedures. Can it be improved? Of course. Would amendment 94 improve it? Absolutely not.

If amendment 94 is a serious amendment, it should not have been lodged in the terms in which it has been lodged. On top of the practical defects that I have outlined, there is also the question of who would pay for such a referendum, how the Parliament would react and what the limits of the process would be. I agree that there should be a debate on the subject, but accepting amendment 94 is not the way to have that debate, and I urge the committee to reject it.

**The Convener:** I invite Alex Rowley to wind up on amendment 94.

**Alex Rowley:** Neil Findlay will be disappointed that he was not able to engage in today's discussion. Amendment 94 is more of a probing amendment that was lodged in an attempt to widen the discussion on such matters.

If people knew that the Referendums (Scotland) Bill was going through Parliament, I am sure that many of them would think, "What on earth?", because the referendums that we have had have caused utter chaos and divided our country. A wider discussion needs to take place about how we engage with people. There are politicians who believe that politics is for politicians, except when they want people's votes.

Although Neil Findlay's amendment 94 has been criticised, he has sought to raise the wider issue of how we build on democracy and stop people being turned off. The most common comment that I get on the doorsteps at the moment is, "We only see you when you want our votes." The way that we do politics in this country is changing.

10:30

The Scottish Government has felt the need to introduce a referendum framework bill.

I do not intend to press amendment 94, but Neil Findlay was right to flag up that we have to look at how we engage people and make politics more relevant to their lives.

*Amendment 94, by agreement, withdrawn.*

**The Convener:** Amendment 95, in the name of Jackie Baillie, was debated with amendment 94. Jackie Baillie to move or not move.

**Jackie Baillie:** Given that I have lost amendment 94, which was the hook, I will not move amendment 95, convener.

*Amendment 95 not moved.*

*Sections 4 to 6 agreed to.*

### Schedule 1—Further provision about voting in the referendum

**The Convener:** Following the next group of amendments, I intend to have a short comfort break. Amendment 5, in the name of the cabinet secretary, is about referendums administration in general and is grouped with amendments 6 to 17, 19 to 22, 24 to 26, 43, 50, 64 and 65.

**Michael Russell:** This group has 24 technical amendments that were requested by the Electoral Commission and the wider electoral community. I do not believe that the items are controversial, but of course they need to be considered seriously.

The first sub-group relates to granting emergency proxies, and is covered by amendments 5 to 7. As introduced, the bill provides for voters to apply for emergency proxies when circumstances that arise after the deadline for usual absent vote applications mean that the voter cannot attend the polling station on the day of poll. That is to ensure that voters are not disadvantaged due to medical, employment or other situations beyond their control.

Electoral registration officers have suggested that the current rules do not make adequate provision for some medical emergencies. A voter who suffers a medical emergency near to the deadline for applying for absent votes may be undergoing treatment or otherwise incapacitated for a sufficient length of time that they cannot apply to be an absent voter before that deadline. Although voting is important, applying for a proxy vote might not be the first thing that someone would think of when coping with a serious medical event.

On that basis, I have lodged amendments that would give electoral registration officers the power to grant an emergency proxy to voters in such circumstances. When applying for this proxy, voters will need to provide information about the medical event and why it meant that they could not apply for a proxy before the usual deadline. The change will ensure that voters are not unfairly prevented from voting because a serious medical event happens at a particular point in the electoral timetable.

Amendments 8, 15, 19, 25, 26, 43, 50 and 64 all relate to the status of Easter Monday in the administrative timetable. Electoral administrators have asked that Easter Monday should be added to the list of days that do not count for the administrative timetable for the poll at a referendum. Those days are normally referred to as “dies non”.

The other dies non are Saturdays and Sundays, Christmas Eve and Christmas Day, bank holidays in Scotland and any day which is appointed for public thanksgiving or mourning. Electoral administrators are concerned that having a different set of dies non from those that apply at other devolved elections could possibly lead to voter confusion and have suggested that a standardised approach would be more appropriate. The Government has accepted that argument and we are lodging the amendments that will standardise the dies non across devolved elections and referendums.

Amendment 9 was requested by electoral registration officers and removes the power for the chief counting officer to prescribe the form of the application to register to vote. The power to prescribe a bespoke registration form for the 2014 independence referendum was needed because it was open to 16 and 17-year-olds to register for a vote at that specific referendum. Normally when someone completes an application to register form, they are automatically registered for all elections at which they are eligible to vote. However in 2014, 16 and 17-year-olds did not have the vote at any other election and therefore an application form was required that specifically referred to them being allowed to register only for the independence referendum.

That power allowed the chief counting officer to prescribe that form and to require electoral registration officers to use it. Because the Government has now extended voting to 16 and 17-year-olds at all devolved elections—which I would like to see for all elections in the UK—there is no need for a separate bespoke form. The normal online and paper registration forms make appropriate references to 16 and 17-year-olds being able to vote at Scottish Parliament and local government elections, and therefore at any referendum. There is no need for the chief counting officer to prescribe the registration form for future referendums, and this amendment removes that unnecessary and sometimes confusing provision.

Amendments 11 and 24 were requested by the Electoral Commission and will require the chief

counting officer to consult with the Electoral Commission before issuing directions to counting officers or electoral registration officers.

As it stands, the bill does not require consultation with the Electoral Commission. However, consulting with the Electoral Commission before issuing directions is already current practice at local government elections and is the proposed procedure for Scottish Parliament elections set out in the Scottish Elections (Reform) Bill. Even without the amendments, it is likely that the chief counting officer would informally consult with the Electoral Commission, as happened at the 2014 referendum. However, the amendments will formalise the practice that was used at the 2014 referendum and will ensure that consultation with the Electoral Commission is always conducted in future polls in the same manner, thus creating a high standard of administration and consistency. Consulting with the Electoral Commission ensures that directions have been externally reviewed, and the amendments will increase trust in the way that the referendum is run.

Amendments 10, 16, 17, 20, 21 and 22 allow for electoral registration officers to provide counting officers with two interim updates of the electoral register in the run-up to the close of registration, which is 12 days before the date of the referendum. Those changes will bring referendums into line with devolved elections, when the provision of interim updates is normal practice. The amendments have the support of electoral registration officers. Interim updates assist counting officers to issue poll cards and postal ballot packs to newly registered voters, or those who have changed their method of voting, as early as practicable.

Amendments 12, 13 and 14 have been lodged at the request of electoral registration officers. Currently, paragraph 16(4) of schedule 1 to the bill allows for electoral registration officers to appoint deputes for the purposes of the bill. However, we have received representation from EROs that that differs from normal practice at elections, when local authorities approve depute electoral registration officers. They are concerned that there might be a difference in what deputes are approved to do, which might cause administrative difficulties. In line with that representation, we are now proposing that the bill be amended so that local authorities rather than EROs will be responsible for approving deputes. That will mirror the equivalent provision for deputes at other devolved elections.

Amendment 65—I am coming to a conclusion, convener—will allow the code of practice for electoral observers at local government elections to apply at referendums that are held in Scotland. That change has also been requested by the Electoral Commission.

The Scottish Government is also seeking to extend the same code to Scottish Parliament elections through another bill that is currently before the Parliament. The code of practice for observers at Scottish local government elections is already in place and was laid before the Parliament by the Electoral Commission in December 2018. The code of practice explains how to become an observer and what is expected of an observer, and it provides guidance for electoral officials on working with observers. It is written generically in a way that applies to observation at any electoral event and is not specific to a particular election. The code functions well for other elections and referendums. Applying the existing code of practice to referendums under the legislation that we are discussing today will avoid the Electoral Commission having to prepare a separate code.

I hope that those explanations are helpful.

I move amendment 5.

**Adam Tomkins:** I have a question about amendment 24. I want to ensure that I have understood it properly. It says:

"Before giving a direction to a registration officer, the Chief Counting Officer must consult the Electoral Commission."

However, I do not understand what those directions are. Am I correct in thinking that those directions are not given to counting officers at the count, so there is no sense that anything will be slowed down in the process of counting votes, and that the directions are given by the chief counting officer to counting officers well in advance of the count? I just want to be clear that the amendment will not inadvertently slow down the process of counting votes.

**Michael Russell:** It will not. There is a power of direction for the chief counting officer. It exists in, for example, local government elections. However, it is a power of direction in terms of the conduct of the election; it is not a specific power of direction at a polling place.

**Patrick Harvie:** The amendments in this group are, for the most part, uncontroversial improvements. However, I am still a little unclear about the rationale for adding Easter Monday in amendment 8 and those that follow it.

It seems to me that it would be consistent for the minister to bring an amendment with a long list of lots of different religious festivals, or not to include religious festivals. Christmas is, clearly, more than a religious festival, as it is something that is celebrated by secular society at large, not only by people who are religious. It seems to me that we

would be consistent either if we included religious festivals of all kinds, as well as public holidays and secular events, or if we had a much more limited list. It is unclear to me why regularity is best achieved by adding Easter Monday to everything rather than removing it from everything. Unless there is a slightly clearer rationale for that, I will record an abstention on amendment 8 and allow the others to go through if it passes.

**Michael Russell:** I am seeking consistency with the established list. It is open to a member to seek to amend the established list in other legislation. However, at the request of the registration officers, who seek consistency with the established list, I have lodged that amendment. Easter Monday is on that list, because it remains a holiday.

I doubt that I have convinced the member on this matter, and I note his position.

*Amendment 5 agreed to.*

*Amendments 6 and 7 moved—[Michael Russell]—and agreed to.*

*Amendment 8 moved—[Michael Russell].*

**The Convener:** The question is, that amendment 8 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Arthur, Tom (Renfrewshire South) (SNP)
Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Tomkins, Adam (Glasgow) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)

**Abstentions**

Harvie, Patrick (Glasgow) (Green)

**The Convener:** The result of the division is: For 10, Against 0, Abstentions 1.

*Amendment 8 agreed to.*

*Amendments 9 to 22 moved—[Michael Russell]—and agreed to.*

*Schedule 1, as amended, agreed to.*

**The Convener:** We will now suspend the meeting for a five-minute break.

10:42

*Meeting suspended.*

10:49

*On resuming—*

**Section 7—Chief Counting Officer**

*Amendment 23 moved—[Michael Russell]—and agreed to.*

*Section 7, as amended, agreed to.*

*Section 8 agreed to.*

**Section 9—Functions of the Chief Counting Officer and other counting officers**

*Amendment 24 moved—[Michael Russell]—and agreed to.*

*Section 9, as amended, agreed to.*

*Sections 10 to 12 agreed to.*

**Schedule 2—Conduct rules**

*Amendment 25 moved—[Michael Russell]—and agreed to.*

**The Convener:** We come to the group on day and time of poll. Amendment 80, in the name of Adam Tomkins, is grouped with amendments 96 to 98.

**Adam Tomkins:** Amendment 80, in my name, would ensure that the date of any referendum that was held under this bill would not be the same day on which any other election or poll was scheduled to be held throughout Scotland. The amendment would give effect to a recommendation of the Electoral Commission and to the force of evidence that the committee heard at stage 1.

Our committee adviser told us in our stage 1 inquiry:

"Research shows that holding electoral events simultaneously can lead to lower quality electoral processes."

The Association of Electoral Administrators endorsed that view and said that

"having more than one type of event on the same day adds to the pressures and difficulties in relation to resources."—[*Official Report*, *Finance and Constitution Committee*,18 September 2019; c 19.]

On the basis of that and other like evidence, the committee concluded that, given that referendums are most likely to be called solely on significant issues of major public interest, they should be stand-alone events. That is in the interests of those who run electoral events, such as electoral administrators, and of voters. The Electoral Commission is quite clear about that point. It said in its report on the 2016 EU referendum, which was published in September 2016, that

"the starting assumption for Governments and legislatures should be that referendums are not normally held on the same day as other significant or scheduled polls. In

particular, referendums on significant constitutional questions, where political parties and other campaigners are likely to be working more closely together, should never be held on the same day as other scheduled polls."

My amendment seeks to give force to the principle that referendums, which—let us face it—are likely under this bill to be held on significant constitutional issues, if they are held at all, should not be held on the same day as other polls.

The cabinet secretary may argue that the word "normally" should appear in the amendment. It does not do so for the obvious reason that, in all our interaction on the bill, I have been consistent in asking the cabinet secretary to give me examples of issues other than Scottish independence that he imagines that the bill will be used for, and he has not given me any. I do not think that this bill—

**Tom Arthur:** Will the member take an intervention?

**Adam Tomkins:** I will in a second. I do not think that it is realistic to expect that we will have referendums on budgets or reproductive rights or anything else under the bill. We are talking about a bill that is designed to pave the way for an independence referendum, and that should not be held—well, it should not be held full stop, but it should certainly not be held on the same day as any other poll in Scotland, whether a referendum or an election.

**Tom Arthur:** I want to understand the implications of Adam Tomkins's amendment. If a referendum was legislated for in this Parliament and, subsequent to that, an electoral event took place simultaneously as a consequence of a UK Government action, such as a general election or a UK-wide referendum, what would happen? He used the example of 2011 when the alternative vote referendum took place on the same day as the Scottish parliamentary election.

**Adam Tomkins:** That experience was an unhappy one and it should not be repeated. If this Parliament were to legislate to the effect that no referendum should be held on the same day as another significant electoral event, the UK Government would want to take that very seriously. Absent that, there is nothing to stop the UK Government holding a general election on the same day as a referendum.

My amendment would not guarantee that we could not have a repeat of 2011, but it points in that direction and should therefore be adopted.

On the other amendments in the group, in the name of James Kelly, I am agnostic about changing 7 am to 6 am and changing 10 pm to 11 pm, but I am certainly not agnostic about changing polling day to a Saturday. In the light of the extraordinary intervention by the Chief Rabbi yesterday in the general election campaign, what consultation has James Kelly undertaken with the Jewish community in Scotland about whether holding a referendum on Shabbat is something that the Jewish community would feel relaxed about?

It seems to be yet another very unfortunate sign that the rights of the Jewish community are being wilfully overlooked by what used to be one of the major parties of the United Kingdom. Polling is held on a Thursday in this country for a good reason—it is not a religious day in any of the major religions in the United Kingdom. Friday voting would cause significant complications for the Muslim community, Saturday voting would cause significant complications for the Jewish community, as it is Shabbat, and Sunday would cause significant complications for practising Christians. I am not opposed to and have an open mind about changing the polling day, but I would want to see that there had been substantial consultation with religious minorities, particularly in the current context of the extraordinary intervention by the Chief Rabbi yesterday.

I urge the committee to reject amendment 96, in James Kelly's name, and to support my amendment 80.

I move amendment 80.

**James Kelly:** I am pleased to speak to amendments 96 to 98. Amendment 96 is a probing amendment, and I will explain shortly why I lodged it. However, I certainly want to move amendments 97 and 98.

There is a duty on us all to seek to increase voter turnout. Thursday is always seen as the traditional polling day, but I think it is worth examining the possibility of weekend polling days. Amendment 96 prescribes a Saturday, but a Sunday could also be looked at. Moving to a day on which not as many people are at work would give a greater opportunity for people to participate. People who work on a Thursday might also have caring or childcare responsibilities that potentially restrict them in getting to the polling station. I am interested in probing whether having voting on alternative days might increase voter turnout.

With regard to the hours, I think that we should move from a 15-hour voting day to a 17-hour voting day. Increasingly, people are leading more flexible lives and have more demands on their time; therefore it makes more sense for the polls to open at 6 am and close at 11 pm. It does not seem that long ago that council elections were constrained to an 8 am start and a 9 pm finish, and the move to a 7 am start and a 10 pm finish has increased voter turnout in those elections.

I ask members to take those points on board when considering my amendments.

**John Mason:** My main argument, especially against James Kelly's amendments, is that the committee has not taken evidence on them and, as Adam Tomkins indicated, some of the changes could be quite controversial and impact sections of the community. Frankly, we have not looked at the issues in any detail whatever. It would be very unfortunate to accept amendments at stage 2 when we did not consider those issues at stage 1. I feel quite strongly about that aspect of the parliamentary process—it is even worse if such amendments appear at stage 3 without any evidence having been taken.

In my opinion, to have amendments appear at stage 2, when we have not looked at those issues at stage 1, undermines the whole bill process.

11:00

I have some sympathy with the idea of voting not being fixed to Thursdays. What is so magical about Thursdays? Many schools need to close, particularly in Glasgow, which is hugely disruptive to parents, teachers and children, so there is a lot to be said for Thursday being a bad day for voting. However, there are problems with other days, too. Some countries have voting over several days, so another option would be to have voting over three days or a week, but we have not taken evidence on that.

In relation to the hours of voting, there are polling places in my constituency to which fewer than 100 people turn up over 15 hours in a day. Those polling places would be even quieter if they were open for 17 hours. One of the answers for people who cannot go to vote, including the staff at polling places, is to give them a postal vote. We have to look at the issue in conjunction with whether we can have postal votes or other forms of voting, rather than just extending the hours for which polling places are open. We do not know whether staff will be able to get to polling places if there is a 17-hour polling day.

For all those reasons, particularly the fact that we have not taken evidence on the matter, I suggest that we reject the amendments in the group.

**Patrick Harvie:** It would have been sensible to have consulted properly before lodging amendment 96. I am quite open to the idea, in principle, of multiday voting, which John Mason mentioned. Although it is an interesting principle, there would be significant practical implications, including the cost of running the poll and the volunteer time. We all know that a vibrant election relies on a lot of volunteer effort from campaigners and people in political parties, and we should not take that for granted.

I am not convinced that we should change the bill, at this point, to go for voting on a different day or for multiday polling. I am not aware of there being a desperate demand for polling stations to be open from 6 am and until 11 pm to deal with rushes at those times, so I am not convinced that there is a need to extend the times that polling stations are open.

On amendment 80, in the name of Adam Tomkins, I think that we all agree that referendums should be stand-alone events. Not only should a referendum not take place on the same day as another electoral event; the two events should probably be separated by a reasonable period.

I do not share Adam Tomkins's confidence that we can simply rely on the goodwill of the UK Government to respect a poll date that has been set for a referendum and to not call an election in the same period. Just recently, the 2017 snap election was called right in the middle of the Scottish local election campaign. The respect for the need to separate electoral events has simply not been shown to exist, so I do not think that we can rely on it. If we were to agree to amendment 80 and were to subsequently pass legislation that set the date of a referendum, but a UK snap election were called in the middle of the campaign, I worry that it would be our referendum process that would be subject to court action. I worry that there would be a challenge to the legitimacy of holding the referendum during a UK election that had subsequently been scheduled.

I very much worry that we are being asked to bind ourselves to something over which we do not have control. Even though electoral events should stand alone, I am not convinced that amendment 80 is a reasonable way of achieving that.

**Tom Arthur:** On amendment 96, which concerns polling day being on a Saturday, I share Adam Tomkins's concerns about the apparent lack of consultation. As someone who grew up in East Renfrewshire and who represents part of it, I am particularly conscious that polling day being on a Saturday could create a barrier to voting among certain communities, particularly the Jewish community, and that it could prevent people who are politically engaged and involved across all parties from participating in election day activities. That is another potential barrier.

There would have to be detailed consideration, engagement and consultation before that measure could be taken any further.

On amendments 97 and 98, I have not sensed any particular demand for people to be able to come to polling stations before 7 am or after 10 pm. I note that there is no reference to when a count should take place. If a count were to take place on a Sunday, following a Saturday

referendum, there would be implications for the Western Isles in particular. Again, I have the sense that amendment 96 was drafted without fully considering all our communities across Scotland. There is also the issue of the count being delayed by a further hour if polling continues until 11 pm, which means that staff at the count and Police Scotland staff would face delays in concluding their day's work. For those reasons, I am unable to support James Kelly's amendments 96 to 98.

**Alex Rowley:** I take on board the point that Patrick Harvie made about amendment 80. However, I think that the principle of the amendment is right and I am happy to support it.

James Kelly said that amendment 96 is a probing amendment. I think that is right. I go to mass on a Sunday morning, but if there was voting on a Sunday, that would not prevent me from going to mass and voting.

The irony is that the bill is really about holding a Scottish independence referendum. As we know, the independence referendum had one of the highest turnouts, certainly in my lifetime. However, when we are talking about referendums and elections, we need to think about why turnout is generally poor across Scotland. That is the point that James Kelly is probing with the amendments. It is the same for elections, by-elections and council elections. In Hong Kong last week, there was a 70-odd per cent turnout for local authority elections—although that is because of the current difficulties there. There are genuine issues.

I am happy to support amendment 80 in the name of Adam Tomkins. Given that James Kelly's amendments 96 to 98 are probing amendments, I hope that he will decide not to move them today.

**Alexander Burnett:** I think that Adam Tomkins's objection to amendment 96 on religious grounds is sufficient, but I also support John Mason's criticism that there has not been enough consultation. I repeat some of the comments made by Tom Arthur on James Kelly's amendments 96 to 98 in respect of two aspects: polling station staff and the problems that would arise if hours were extended, particularly for small, rural polling stations, which, as I know, already struggle to get staff; and the impact on the timing of the count of changing the day of voting, particularly where the staff are predominantly council employees who could end up working Saturday night and Sunday.

**Michael Russell:** I will split the amendments into two sets. On amendment 80, I agree that there should not be a conflict of dates and I am happy to look for a solution to that issue. However, amendment 80 does not provide such a solution; rather, as Mr Tomkins said, it gives the "force", but not the answer. What would happen if, after a referendum date were chosen, an unscheduled election was set for the same date? The current UK Tory Government specialises in unscheduled elections. The amendment does not answer the question how that issue would be resolved. If Mr Tomkins decided to withdraw amendment 80, I would be happy to discuss with him how we could find a solution to the problem in the bill, rather than just postulating what the problem is and saying that there should be a different outcome but not what that proper outcome is.

I take the issue seriously and I want to achieve a result, but amendment 80 will not produce the result that we need. However, we have time to address that at stage 3.

Mr Kelly's amendments are of a different quality. First, I will address Alex Rowley's point about turnout. Turnout is a product of engagement. There is no doubt about that—that is what takes place. It is engagement with politics that produces turnout, rather than the arrangements for voting, although clearly if the arrangements create barriers, they should be changed. There is no evidence that Thursday polling is a barrier for voters—people have been going to the polls on a Thursday for more than 80 years. There is no indication that there is something about a Thursday that prevents people turning out and that moving to a Saturday would help people to do so.

Amendment 96 is not a probing amendment; it is a restricting amendment. There is in fact no requirement in the bill—or in any other Scottish electoral legislation—for polling day to be a Thursday. It can be varied. The bill before us is the framework bill, so if you are going to introduce another bill, do not tie the framework down to something for which there is no evidence. You can bring in a bill with a specification for a particular day—that is perfectly possible to do. Amendment 96 is therefore not necessary.

I share the concern that an amendment could be introduced that has considerable implications for one community, just as having polling on a Friday would have implications for another community and having it on a Sunday would have implications for at least part of another community. That should have been thought about. Amendment 96 is the wrong amendment, done in the wrong way, and it should not be proceeded with.

We should then consider what effect polling hours have. All of us who are working politicians—if those two words can go together—know that the pressure lies at different times of the day, not at the opening or closing of the poll. In my experience, the time between 7 am and 8 am is the quietest time, and by half past 9 things have significantly quietened down. If we could add an extra hour in the middle of the day—which is

probably not a concept that we could work with—we would be able to do something, but there would not be an effect from extending the hours as proposed, which would increase the cost, but for a very minor arrangement.

There are arguments to say that we should have multiple-day polling. We had multiple-day polling at one stage in these islands, and it would be possible to consider that, but the solution is not to extend in that way. The bill includes provision to cover people who are in a queue at the polling station at 10 pm. If there is any difficulty at the end of the day, that is already taken care of. If someone is at the polling station before 10 pm and they still wish to cast their vote, they can do so. There is no cut-off moment.

I am happy for the Government to consider, with Mr Tomkins, the issue that he raises in amendment 80. The amendment does not provide what we need, but we might be able to provide it. As for the other amendments, one of them is thoughtless and wrong, and another does not produce the effect that it is apparently meant to produce, so I would not support it.

**Adam Tomkins:** I am trying to think how one might elegantly draft a provision that could provide an additional hour in the middle of a polling day. That would be something of a challenge between now and stage 3. I hear the force of the criticisms that have been levelled at the effect—but not the intention—of amendment 80. Amendment 80 was lodged in good faith to seek to give effect to an important recommendation of the Electoral Commission, which was endorsed by the committee in its stage 1 report, that referendums should be stand-alone events and should not be confused with other electoral events. However, I hear the force of the criticisms and I am happy to seek to work with the cabinet secretary and indeed others between now and stage 3 to see if we can achieve that result through better means. I will therefore seek to withdraw amendment 80 with the expectation that we will revisit the issue, in one form or another, at stage 3. I have nothing further to say about the other amendments in the group.

*Amendment 80, by agreement, withdrawn.*

*Amendments 96 to 98 not moved.*

*Amendment 26 moved—[Michael Russell]—and agreed to.*

*Schedule 2, as amended, agreed to.*

*Section 13 agreed to.*

### Schedule 3—Campaign rules

**The Convener:** Amendment 99, in the name of Alex Rowley, is grouped with amendments 100 to 103.

**Alex Rowley:** My intention is to withdraw my amendments.

**The Convener:** You do not want to speak to them—you are saying that you will not move them.

**Alex Rowley:** No, I will not move them.

*Amendments 99 and 100 not moved.*

11:15

**Jackie Baillie:** I continue my fixation on timing, convener. The purpose of amendment 101 is straightforward: it specifies that the "application period" for campaigners should be set at eight weeks instead of the four-week period that is currently in the bill. Committee members will, I hope, have spotted a theme to my amendments—it is all about giving plenty of time for the process, because I do not believe that democracy should be rushed. Amendment 101 allows more time for campaigners to register. A referendum will, undoubtedly, be about serious matters. In my view, the process should not be rushed.

I move amendment 101.

**James Kelly:** Amendment 102 seeks to allow the granting of £100,000 to designated organisations, subject to any conditions that are set out by the Electoral Commission. The amendment seeks to ensure that any organisation that is so designated has proper access to a campaign.

Some campaign organisations are not as well funded as others and might not have a proper voice or platform in a campaign without that funding. Amendment 102 seeks to give voice to all views in any referendum campaign and ensure that organisations are able to communicate their views to voters.

**Gordon MacDonald:** I am not convinced that amendment 102 is required. The bill already allows for the normal level of support for participating organisations—they get campaign broadcasts, free use of rooms for public meetings and free mailings to every single voter. The cost of the free mailings alone during the Scottish independence referendum was £1.6 million. I think that that is adequate support.

We are talking about important issues that will engage voters, and I would imagine that any side in a referendum that has engaged voters would have no problems raising the necessary funds for campaigning.

**Patrick Harvie:** I am not sure that Jackie Baillie is going to convince me on any of her amendments—I am sorry about that, Jackie.

The application period for a permitted participant to apply to become a designated body seems to

be such a minor aspect of the process that I do not see a great need to extend it. Allowing a month for established organisations to go through the application process seems entirely adequate to me. I am not aware of any problems in the past that have been caused by there not being sufficient time for that.

On amendment 102, the Green Party supports the public funding of our democratic process. We think that it would be far better to have a modest and capped level of public funding of the democratic process than to have the super-rich in our society donate large amounts of money, either as individuals or as businesses, to political parties or campaign bodies. People should have an equal vote. The countries that are, in my view, more successful pluralistic, multiparty democracies have some degree of public funding, which is absent in Scotland and the United Kingdom.

That said, if James Kelly has a chance to wind up—I do not know whether he will—I would ask him to explain what discussions he has had with interested bodies. I would like to explore why an amendment containing the proposed level of funding has been lodged at this stage, and whether he proposes that the same approach should be taken in relation to elections as well as referendums. I do not know whether he is able to intervene or has to wait for his chance to wind up.

**The Convener:** James Kelly is fully entitled to intervene, but he will have no winding-up opportunity.

**James Kelly:** In that case, to help the discussion, may I intervene?

**Patrick Harvie:** I would be grateful.

**James Kelly:** Patrick Harvie mentioned campaigns being funded by rich people and organisations. Disaffected people and groups do not have the same facility.

My experience as a campaigner leads me to believe that it is important that designated organisations in any referendum should receive an appropriate level of funding. I would be open to discussing what that level of funding should be and to considering the general issue of funding around elections.

**Patrick Harvie:** I am grateful to James Kelly for that intervention. My instinct would be to be willing to discuss alternative approaches to the issue ahead of stage 3. I do not know whether there is any chance that the proposal would get majority support, but if we were to do something along the lines that have been suggested, we should involve permitted participants, not just designated organisations. I think that we should consider the idea in future, instead of agreeing to amendment 102.

**Michael Russell:** Amendment 101 would double the period of time for organisations to apply for designation. Whatever one's view of the referendum in 2014, the time limit that is set out in the bill operated well in 2014. There was no evidence of stakeholders requesting the change that Jackie Baillie has proposed. I do not think that there is a case for change, and I ask the committee to reject amendment 101.

At stage 1, the committee rejected the suggestion that the bill be amended to include a provision on public funding of campaign groups, as there was not enough evidence to support that change. I am not inherently against the idea. I agree with Patrick Harvie that supporting democracy is an important thing to do, and the more money—dark money, in particular—pours into democracy, the more we should be concerned. Later, we will have the opportunity to consider the maximum level of fines that the Electoral Commission can impose.

There has been no indication that James Kelly has taken any evidence on what the level of funding should be. That being the case, I do not think that the proposal has been thought out or thought through, and it goes against the committee's report. Therefore, I think that the balance is against supporting amendment 102 at this stage.

*Amendment 101, by agreement, withdrawn.*

*Amendment 102 not moved.*

**The Convener:** Amendment 27, in the name of the cabinet secretary, is grouped with amendment 28.

**Michael Russell:** In its stage 1 report, the committee supported the Electoral Commission's recommendation that the reasonable costs of producing campaign material in accessible formats for people with disabilities should not be included within spending limits. In line with the Scottish Government's aim of encouraging people with disabilities to participate in elections and referendums, as well as other political activity, I am delighted to accept that recommendation.

Amendment 27 exempts any costs that might arise from making reasonable adjustments so that a disabled person can undertake their role, in a paid or voluntary capacity, from counting towards a campaign organisation's expenditure limit. Similarly, it exempts costs associated with providing campaign materials or supporting campaigning in ways that are more accessible to people with disabilities. An example might be providing a British Sign Language translator when talking to a group of voters that includes people whose first or preferred language is BSL.

The intention is to encourage campaign organisations to involve disabled people in their campaigning and to make that campaigning more accessible to people with disabilities without those organisations having to be concerned about exceeding the campaign expenditure limit.

Amendment 28 exempts reasonable costs associated with providing security for the protection of people who attend rallies or other public events in connection with a referendum. It, too, flows from a recommendation of the Electoral Commission.

Although protection of the public is a police matter, the police cannot be everywhere at once. During a referendum campaign, multiple events take place in a short timescale, and that can stretch the resources that are available. The intention is not to allow campaigners to employ security staff to stifle legitimate opposition, but to ensure that opposition does not endanger the safety of those who are taking part. In line with that, when a campaign organisation wants to make use of the proposed exemption, the expenditure will have to be reasonable. The Electoral Commission has oversight of campaign expenditure.

I hope that the committee will agree that our proposal is a measured response to threats of violence at political events and that the safety of the public should not be affected by campaign expenditure limits.

Amendments 27 and 28 represent positive ways of ensuring that referendums that are held under the proposed framework—I stress that it is a framework—are inclusive as well as safe, and I commend them to the committee.

I move amendment 27.

**John Mason:** I have a minor point. I very much welcome the theme of this debate and where we are trying to go with it; I just wonder whether there is any opportunity for abuse. I might produce material in a larger font, with the intention of making it available to partially sighted people, but that could be abused, in that everybody else could read it as well and it could be a way of getting around the limits. Will there be a way of controlling any such potential abuse?

**The Convener:** I will let the cabinet secretary deal with that in his summing up.

**Adam Tomkins:** I warmly welcome amendment 27 and have no questions or comments about it.

Amendment 28 puzzles me a little and I want to make sure that I have fully understood it, so I have a few questions. First, where is this coming from? Is it something that the Electoral Commission or Police Scotland suggested? I may be wrong, but I do not recall taking any evidence on it.

Secondly, cabinet secretary, the purpose and effect notes that you very kindly shared with the committee—for which we thank you—say that amendment 28 would mean that the cost of providing reasonable additional security, over and above what is provided by the police, will not count as referendum expenditure. They go on to say:

"The organisers will still have to fund the cost of the security arrangements but that cost will not count towards their expenditure limit".

How do we know that that would always be the case? What guarantees are there that the bill for additional security costs would be footed by campaigners or organisations, rather than by the taxpayer or the police? If that is guaranteed somewhere in law, where is it, and how does amendment 28 tie in with it? I want to make sure that the dots have been appropriately joined.

**Michael Russell:** The answer to both those points lies in the word "reasonable" in amendments 27 and 28. Amendment 27 talks about

"reasonable expenses incurred that are reasonably attributable to individuals' disability".

There is a judgment to be made about this: I am sure that, as in Mr Mason's example, if there were an attempt to be unreasonable, that would be a matter for the commission.

Amendment 28 talks about

"reasonable expenses incurred in providing for the protection of persons".

As I understand it, the issue arises from the commission's recommendation concerning the 2016 referendum, when there were, of course, issues of security and violence. There is no intention that the cost would be met by the public; this is about costs that the campaign meets and then has to declare. It is about the limits of those costs, and the word "reasonable" applies. I hope that that addresses both points.

**The Convener:** Okay: that was an opportunity for clarity, rather than a winding-up speech.

**Patrick Harvie:** I welcome both amendments. Amendment 27 says that the costs of providing material in Braille or of providing sign language interpreters at campaign events will not be covered as part of the calculation of referendum expenses. Was the same consideration given to the translation of material into minority languages that do not relate to disability? Given that, as I hope, we are looking to extend the franchise on the basis of residency rather than nationality, there will be parts of the country with large numbers of people who are entitled to vote but whose first language is not English. Is that already covered somewhere? Has the Government considered

dealing with the issue in the same way as translation for the purposes of disability?

**Michael Russell:** I do not think that it is covered elsewhere, and it is a good point. I can immediately think of circumstances in which the bulk of the material in some constituencies might not need to be translated, and therefore there would be an offsetting cost in relation to material that is not produced. I am happy to look at the issue, but it has not been considered so far.

**The Convener:** No one else wants to contribute. Do you want to wind up, cabinet secretary?

**Michael Russell:** No.

*Amendment 27 agreed to.*

11:30

*Amendment 28 moved—[Michael Russell].*

**The Convener:** The question is, that amendment 28 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Arthur, Tom (Renfrewshire South) (SNP)
Bibby, Neil (West Scotland) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

**Abstentions**

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

**The Convener:** The result of the division is: For 8, Against 0, Abstentions 3.

*Amendment 28 agreed to.*

*Amendment 103 not moved.*

*Amendment 29 moved—[Michael Russell]—and agreed to.*

**The Convener:** Amendment 104, in the name of Jackie Baillie, is grouped with amendment 105.

**Jackie Baillie:** This time, I want to shorten the timescales available. The purpose of the amendments is very straightforward. Amendment 104 specifies that returns that require an auditor's report must be submitted to the Electoral Commission within three months of the day on which the referendum took place. The bill provides for a period of six months, which I believe is too long. Amendment 105 specifies that returns that do not require an auditor's report should be submitted within one month, rather than three months, which is the period that is currently in the bill.

I have suggested those periods because financial probity in any election or referendum is essential, and minds need to be focused on making financial returns as soon as possible. Unfortunately, we have seen various investigations into misconduct—I am thinking of the vote leave campaign—and it is very important that there is a swift and stringent process to examine electoral spending. It is equally important that we make sure that we retain trust in the referendum outcome, and financial probity is a key part of that process.

I move amendment 104.

**Michael Russell:** As I explained to the committee in my response to the stage 1 report, the Scottish Government shares the Electoral Commission's views and has discussed post-poll reporting arrangements with the commission. There are a number of shared concerns—which Jackie Baillie has expressed—and matters to be considered in developing the proposal.

However, the practicality of shortening the timescale for returning audited accounts is an issue. The Scottish Government has agreed with the commission that the issue should be considered further, including by consulting political parties that have experience of making such returns, with a view to developing the best measures to elicit the practicality of the commission's proposals. Once those further considerations are complete, I expect that the commission will recommend that legislation be amended to reflect the proposals that are agreed with the political parties.

I therefore ask Jackie Baillie not to press amendment 104 or move amendment 105, on the grounds that the Scottish Government and the Electoral Commission are already working on the issue and that it would not be proper or sensible to pre-empt the outcome of those discussions with parties that know how audited accounts are presently prepared.

The intention of the amendments is admirable: the commission, the Scottish Government and Jackie Baillie are as one on the matter. However, there is not yet enough agreement with the political parties to allow the provisions to be fully enacted.

**Jackie Baillie:** On the basis of the cabinet secretary's comments, I am happy not to press amendment 104 or move amendment 105. However, I assume from his contribution that the discussions will be completed by stage 3. [*Interruption*.] Perhaps not. Could the cabinet secretary intervene to tell me what timescale would be appropriate?

**Michael Russell:** We have no indication yet that the political parties are in a position to agree the matter. We have the small matter of an on-going general election at the moment, so it is not at the top of political parties' minds. As far as we can see, the bill will not be amended in such a way at stage 3. I think that it would be possible to introduce such a provision in another form in another bill, and we will try to do so, but it cannot be done before stage 3.

**Jackie Baillie:** I am happy to withdraw amendment 104 now, but I want to engage in further discussion with the cabinet secretary about what assurances there are and what timescales will apply.

*Amendment 104, by agreement, withdrawn.*

*Amendment 105 not moved.*

**The Convener:** The next group is on offences and penalties. Amendment 30, in the name of the cabinet secretary, is grouped with amendments 31, 37, 44, 45, 51, 52, 58 to 60, 62 and 63.

**Michael Russell:** The amendments make two main changes. First, they change the criminal procedure and, accordingly, the maximum penalties that are attached to certain campaign offences, so that they are no longer restricted to being triable using summary procedure but can also be prosecuted using solemn procedure. Secondly, they increase the maximum monetary penalty that the Electoral Commission can impose from £10,000 to £500,000.

I will explain the rationale for the criminal procedure changes. Currently, a number of campaign offences are triable only by summary procedure, subject to a low maximum penalty of a fine not exceeding level 5 on the standard scale. The Electoral Commission has requested that the criminal procedure that is attached to some of those campaign offences should be changed from summary only to "either way", to potentially allow a jury trial, with a consequential increase in the associated maximum penalties that are available. The commission is concerned about potential abuses from bodies and from individuals who have significant financial resources.

The changes would apply to: failure to deliver a spending return to the commission; failure to comply with an investigation requirement; failure to supply information to a relevant person; printing or publishing referendum material without details of a printer or publisher; and failure to deliver donation, regulated loan or related transaction reports to the commission.

Part of the concern is that committing an initial offence deliberately may avoid a more serious offence from being detected. For example, failure to make an expenditure return could mask that an organisation had overspent its expenditure limit. Currently, the initial offence has a smaller penalty, so it would be open to a campaigner to avoid the higher penalty by not making a return and risking a relatively small fine. I agree with the Electoral Commission that campaigners should not be allowed to evade discovery of a more serious offence, and the amendments are therefore intended to make committing the evasion offences subject to the higher maximum penalties. That will remove the incentive to avoid making returns or providing information to avoid a higher penalty and generally mean that campaigners take the regime more seriously.

The second change around offences, which was requested by the Electoral Commission, is an increase in the maximum civil monetary penalty that it could impose from £10,000 to £500,000. When I gave evidence to the committee at stage 1, I indicated that I was content to accept the Electoral Commission's recommendation. Subsequently, the committee's stage 1 report invited us to respond to the commission's evidence.

The current position is that the Electoral Commission has powers to impose monetary penalties in relation to campaign offences; the level of maximum penalty varies depending on the criminal procedure that also applies to the offence. The commission has expressed concerns that the current level of fines that are available to it is not a sufficient deterrent. It was concerned that a £10,000 penalty might be seen as "the cost of doing business" to gain an advantage at a referendum. The commission has suggested that a maximum fine of £500,000 would deter breaches of the campaign rules, and has recommended that that change be made.

Amendment 60 would accordingly increase the maximum monetary penalty that the Electoral Commission can impose from £10,000 to £500,000 for campaign offences that could be tried before a jury. Although that is a significant increase, it is commensurate with the penalties that are available to comparable regulators, such as the UK Information Commissioner's Office. For avoidance of doubt, if agreed, that increase will apply to those offences that I am proposing will move from being tried only by summary procedure to being triable "either way".

It is important that I make it clear that the commission's enforcement policy means that it will continue to take a proportionate approach to the increase. However, the change will provide a deterrent to those campaigners who may consider overstepping the mark. We will never know, but would the vote leave campaign have been more careful to stick to the rules during the EU

referendum campaign if, instead of a penalty of £61,000, there had been a penalty of £1.5 million?

My aim is to ensure that campaigners stay within the rules; if they overstep them, though, they must be punished accordingly. I think that this increase in the maximum penalty that the commission can apply for campaign offences represents a step change in deterrence and will help to encourage fair campaigning.

I move amendment 30.

**Patrick Harvie:** I put on record my support for the amendments in this group. The current situation in relation to the level of consequences for those who break the rules is clearly deeply inadequate. Even if we do not see heavy penalties of this kind being applied, if they act as a deterrent, that would be extremely welcome.

We have all seen the misbehaviour that took place during the 2016 EU referendum. We all know that, if that had been an election, it would have been declared illegitimate. There are profound questions about the democratic legitimacy of the outcome given the behaviour of the leave campaigns—plural—and if there is any chance that a more substantial approach to the consequences could prevent such corrupt practices from happening again, we should all welcome it.

**Murdo Fraser:** I do not object to the amendments and I appreciate that they follow up recommendations made by the Electoral Commission. However, I reiterate a point that I made when the committee took evidence on the matter, which is that, given that such fines are often levied long after the event, the campaign groups involved may have spent all their money or even have been wound up entirely, I struggle to see how it presents a potential deterrent. On the example given by the cabinet secretary, whether the vote leave campaign would have had any resources after the referendum to pay a fine of £1.5 million is a moot point. I am not entirely sure how fining people large sums that they cannot pay, long after the event has occurred, represents a deterrent. The cabinet secretary might have a view on that.

Although I entirely sympathise with what he is trying to achieve and do not disagree with the intent behind the amendments, I am not sure how practical they will be.

**Michael Russell:** It is a strange approach to the law to say that we should not have penalties because we doubt that people could pay them. We are talking about very serious offences and the penalty should reflect the seriousness of the offence. That is a principle worth supporting. I have no more to add to the points that I have already made. The committee should unanimously endorse the amendments, if it can.

*Amendment 30 agreed to*

*Amendment 31 moved—[Michael Russell]—and agreed to.*

**The Convener:** Amendment 81, in the name of Adam Tomkins, is grouped with amendments 32, 33, 34 and 82.

**Adam Tomkins:** Amendments 81 and 82 are concerned with what is informally known as the purdah period for referendums. Amendment 81 extends the period governed by purdah rules in relation to publications, principally by Government, to the whole of the referendum period, which we have all agreed would be 10 weeks—it extends the purdah period from 28 days to 10 weeks. The amendment is supported by the Electoral Commission in its stage 2 briefing and is consistent with the evidence that we took at stage 1. Our adviser advised us that there was widespread concern that the 28-day period was too short.

Alan Renwick from the constitution unit at UCL said that, given that campaigns begin well before the purdah period, the rules do not prevent potentially influential Government interventions in a campaign. The Electoral Commission has long been of the view that purdah should apply during the whole of any referendum period. That view has now been adopted by the cross-party Public Administration and Constitutional Affairs Committee in the House of Commons, which has followed the Electoral Commission in recommending that purdah be extended to the full referendum period. That view was also supported by the independent commission on referendums.

There is quite a lot of cross-party evidence and evidence from independent sources, such as the constitution unit's independent commission on referendums, that these are appropriate steps to take. For those reasons, I commend amendments 81 and 82 to the committee. I will also support amendments 32, 33 and 34 in the name of the cabinet secretary.

I move amendment 81.

11:45

**Michael Russell:** Let me start by addressing amendments 81 and 82 together. The issue was looked at in some detail during the passage of the legislation on the EU referendum, but in a different way. The UK Tory Government tried to restrict even the 28-day period to allow it to undertake certain actions; I am not proposing to do that. The UK Government was defeated on that matter, because people believed 28 days to be a reasonable period for the strict purdah rules to

apply to an active Government. I take that position, too, so I ask members to reject amendments 81 and 82.

Ministers, civil servants and public bodies understand the 28-day period. Extending restrictions to apply for the full referendum period, without at least narrowing them, would significantly inhibit the Government and others from conducting normal day-to-day business. An example is the schedule of statistical publications. The UK Statistics Authority requires that statistics be published on certain dates, without ministerial intervention. Amendments 81 and 82 would restrict that.

The length of the pre-poll period was discussed during stage 1 evidence sessions, and there were differing views. The committee acknowledged that uncertainty by deciding not to recommend an extended pre-poll period. A 28-day period—with one addition, to which I will come in a moment—is an acceptable compromise.

Some referendums, such as the 2016 EU referendum and the 2014 independence referendum, have involved wide-ranging arguments that have cut across a vast number of policy areas. Restrictions in all those areas for a 10-week period would cause significant issues in relation to the normal work of ministers and public bodies.

There is a difficulty in finding the right balance. Administrative restrictions are already in place for some actions. For example, members of the Scottish Parliament will know that there is a longer period than four weeks in which there are restrictions on issuing newsletters and information to constituents. I expect that that is exactly what would happen in any referendum, through regulations that the Scottish Parliament makes.

The "Fifth Report of the Committee on Standards in Public Life" acknowledges that it is very difficult, if not impossible, for the Government of the day

"to offer purely objective and factual information"

for that length of time. Governments should certainly remain neutral, but setting a 10-week regulated period does much more than that: it inhibits and stops Government actions. Even those who have pressed for longer restrictions have argued that those should apply to a narrower range of materials and that some public bodies should perhaps be exempt. However, Mr Tomkins's amendment 81 would not allow for that. It is a wide-ranging amendment that would damage the process of Government business. There are other ways in which voluntary restrictions have already been put in place and are working in such circumstances.

However, there is the possibility of further restrictions and exemptions. In its submission in response to the committee's call for evidence, the Scottish Parliamentary Corporate Body suggested that the exemption for publications in the normal course of parliamentary business should be brought up to date and future proofed. The corporate body's concern was that the bill refers only to the Scottish Parliament's official website and does not mention other parliamentary websites, such as Scottish Parliament TV or official Facebook and YouTube sites, nor does it mention social media use, such as the Parliament's Twitter account. The committee supported the corporate body's proposed changes to bring the exemptions up to date, and we lodged amendment 32 to allow that to happen. The amendment will exempt from the pre-poll restrictions all material that is published on all official Parliament websites and online platforms that are controlled by the corporate body. We discussed the proposed amendment with the corporate body, and I am content that amendment 32 addresses its concerns.

In its stage 1 report, the committee recommended that electoral registration officers should also be exempt from restrictions on central and local government publishing promotional material. Given that recommendation, I have lodged an amendment to exempt electoral registration officers from the pre-poll publication restrictions that are set out in schedule 3. Paragraph 27 of schedule 3 to the bill sets out the restrictions on the publication of promotional material by central and local government in the 28 days before the poll. It includes a list of bodies that are exempted from the restrictions, including the designated campaign umbrella organisations, the Electoral Commission and the chief counting officer or any other counting officer, but it does not include electoral registration officers. The 28-day period before the poll includes a number of deadlines for important processes, so electoral registration officers should, in the interest of voters, be able to publish appropriate information.

I ask the committee to accept amendments 33 and 34, which are complemented by amendment 66, which we will discuss later. I ask the committee to reject amendments 81 and 82, because they would make it, in essence, impossible for normal public business to be carried out.

**Patrick Harvie:** Adam Tomkins's proposal, if it were agreed, would result in an unreasonably broad, extended purdah period. Paragraph 27(1)(d) of schedule 3, for example, states that the restriction covers material that

"is designed to encourage voting in the referendum",

and paragraph 27(2)(c) includes public authorities that we expect to have a role in political education and in encouraging voter turnout, particularly among young people, as we debated with regard to elsewhere in the bill. Adam Tomkins's proposal would, potentially, lead to an extended period in which that voter education activity, and not just the business of Government, would be restricted. As such, the amendments from Adam Tomkins go too far in that regard, and I will not support them.

**The Convener:** As nobody else wishes to contribute, I call on Adam Tomkins to wind up, and to press or withdraw amendment 81.

**Adam Tomkins:** We all accept that there should be a period of purdah; that is, a period in which Government cannot use its ordinary resources and in which—as Mr Russell referred to—the ordinary business of Government is interfered with in the interests of voters and of voter confidence in the impartiality and accuracy of the process. The argument is about how long that period of interference should last. Should it last for only the last four weeks of a campaign or for the last ten weeks of a campaign?

When trying to reach a conclusion on such an issue, the right thing to do is not to put the interests of Government first, which is the force of what Mr Russell said. The right thing to do is to put the interests of voters first. The organisation that we have in the United Kingdom that represents the interests of voters is the Electoral Commission. It says that there are significant issues of voter confidence, specifically in referendum campaigns, where

"referendum campaigners ... must work within statutory spending limits"

for the whole of the regulated period, but where

"government and public authorities may spend potentially significant amounts of public money"

throughout that period, other than in the last four weeks. It is for that reason—of maintaining voter confidence—that the Electoral Commission has recommended that the purdah rules should apply during the whole of the referendum period, and not only for the last four weeks. I accept that that will be inconvenient for Government ministers. However, when one weighs the inconvenience to Government ministers against the interests of voter confidence in a referendum on what is likely to be a very important subject—otherwise, why would it be put to a referendum—I know where I would prefer the balance to come down.

My amendment gives effect—simply, straightforwardly and without unnecessary complication—to a recommendation of the Electoral Commission that has been endorsed nationally and internationally by both parliamentary committees and international commissions that have considered best practice with regard to referendums. For that reason, I will press amendment 81.

**The Convener:** The question is, that amendment 81 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)
Tomkins, Adam (Glasgow) (Con)

**Against**

Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

**The Convener:** The result of the division is: For 5, Against 6, Abstentions 0.

*Amendment 81 disagreed to.*

*Amendments 32 to 34 moved—[Michael Russell]—and agreed to.*

*Amendment 82 not moved.*

**The Convener:** Amendment 83, in the name of Patrick Harvie, is grouped with amendments 35, 36, 84 and 38.

**Patrick Harvie:** Amendment 83 is on the part of schedule 3 that is about publication by anybody, not just public bodies or Government. We discussed it at stage 1, and we heard a range of views in evidence that were centred around the fact that our current arrangements are not adequate for the digital age that we live in. However, those views have probably not alighted on an absolute solution.

I do not imagine, and I certainly do not hope, that whatever happens with the amendments that we are discussing today, this will be the final word on the issue. We will need to continue to revisit the subject of how we regulate campaigning in the online space in relation to electoral law and referendums.

The fact that we sometimes discussed the subject using the shorthand title of "digital imprints" symbolises that we are still thinking about this form of regulation in the way that we did when campaigning was done with physical leaflets. They still exist, and we all still expect them to have an imprint on them. Campaign information that goes through people's letterboxes or is handed to people on the streets is expected to be transparent about who has published it. That transparency is not there in relation to a great deal

of online campaigning. Online campaigning blurs the distinction between what comes from campaign bodies and what is merely public discussion and debate.

Public discussion, particularly on social media, is part of that blurred space. It is publication. It is not the equivalent of folk chatting to their mates around the water cooler or in the pub. It is publication and it can reach significant numbers of people. Publication on social media by an individual whose own follower base on that platform is not massive can still be boosted by others and achieve a substantial degree of reach. It can be as powerful a campaign tool as a funded, paid-for, commercial publication from a campaign body or others. I think, therefore, that the requirements for transparency still exist. They need to be applied differently in relation to individuals who are using social media purely as individuals, but they need to be applied in some way.

I have therefore lodged an amendment that is different to the cabinet secretary's proposal. I will explain first why I do not support the cabinet secretary's amendment 35, which would simply exempt from the requirement to provide transparency information material that

"expresses the individual's personal opinion"

and

"is published on the individual's own behalf on a non-commercial basis."

I fear that that would exempt campaigning material that is being used by organised, well-funded campaigners. Even if it is not published by them, they are using it in an organic sense. If it published by an individual but used by an organisation, it is in that grey area. I fear that amendment 35 would, therefore, go too far and exempt too much.

I have suggested an additional category of online publication, including material that is communicated by social media accounts that are controlled by individuals who are campaigners, either by being members of or donors to permitted participant or designated organisation bodies. Effectively, if people who are part of an organised campaign are using social media to campaign, there is a reasonable expectation that they should do the same thing in providing information about who they are and who is publishing material as they would if they were putting out flyers around their community. People do not always obey the law when they are printing such material, but they are supposed to, and so we should have that same level of requirement.

My amendment would not apply to individuals who are unconnected with campaign bodies and are merely using social media to discuss the issues. That will require some consideration in future. My amendment would not cover individuals who are using social media or online publication purely to discuss the issues, but it would apply to those who are connected to campaign bodies and publishing on social media. It would also apply to those who set up stand-alone campaign websites, for example, that are not part of a social media platform.

I will move my amendment in the hope that, whatever happens with any of the amendments in the group, we will continue to be open to debating, refining and improving the way in which we regulate campaigning in the online space. I do not think that any of us—the Government or myself—would claim that the bill in front of us can be the final word on the issue.

I move amendment 83.

12:00

**Michael Russell:** Patrick Harvie has set out his case well, and I very much respect where he is coming from. I think that we both accept that this is a difficult area that we are all trying to get right; it is an issue that every democracy is having to deal with. We are moving into unknown territory and trying to ensure that we continue to regulate electoral activities in the best and most even-handed way possible, while recognising that new problems are occurring every day.

I turn first to the Government amendments 35, 36 and 38, which relate to the requirement that referendum material must have an imprint to show who is promoting and publishing it. The committee, in its stage 1 report, recommended

"that the Scottish Government gives careful consideration to ... recommendations of the Electoral Commission in relation to the scope of the imprint requirement".

The Scottish Government's policy on online materials has always been intended to cover campaign material rather than individual views, which is an important distinction. I think that all parties recognise that it is important for democratic debate that voters are able to express and discuss their viewpoints on the issues that a referendum raises, and that campaign materials are clearly labelled and identifiable. Our discussions with the Electoral Commission have been about how best to achieve that.

We have been working closely with the Electoral Commission for some time with the aim of ensuring that an individual who is not working on behalf of a campaigning organisation and who is not paying commercially to promote their message will be able to share their views online freely without having to add an imprint. Together, we have looked at how other Governments have dealt with and responded to similar issues, with a

particular focus on the Canadian provisions on the exemption of personal views.

Amendment 35 is the result of our deliberations. It will exempt from the requirement to include an imprint any material that

"expresses the individual's personal opinion, and ... is published on the individual's own behalf on a non-commercial basis."

The amendment will ensure that an individual who is discussing their individual views with friends or strangers online does not have to add an imprint. However, an individual who decides to pass on campaign literature relating to the referendum, unless that material is being used to illustrate a particular point of view, must add an imprint, as they will have moved—

**Patrick Harvie:** Can the cabinet secretary confirm precisely what he means in his last point about passing on material that has been produced by a campaign body? If, for example, a graphic was produced by a campaign body and was passed on without an imprint, and an individual chose to post a tweet, for example, that included their own personal opinion in the text and the graphic from a campaign body, it seems that that would be exempted, because the publication is the tweet. The publication would be expressing

"the individual's personal opinion"

and it would be

"published on the individual's own behalf on a non-commercial basis."

It seems that that would open up a route for a campaign body that wishes to hide the true origin of its publications to allow others to promote and boost its material without any kind of transparency information being attached.

**Michael Russell:** It should not do so, but if we were to err in the other direction and say that nobody could pass on a piece of campaign material on which they wished to comment—as people do on social media—without in actual fact saying that they are part of that campaign or identifying themselves as such, that would be going very far into the restriction of individual liberty. This is going to be a fluid area, but I think that we would want to err on the side of individuals being able to express their opinion and to illustrate that opinion, which is part of the common parlance and grammar of social media.

The imprint would have to be added if the individual was part of a campaign organisation. Similarly, any individual who is sponsored or supported by an organisation will not be allowed to publish material without an imprint, due to that sponsorship. There is a slight parallel with advertising rules in the way that people move from being individuals to influencers. Drawing that line is difficult, but it is drawn in the commercial sphere.

In addition, any individual who is also a registered campaigner, or who spent money to create campaign materials, will be required to include an imprint.

The Electoral Commission is broadly content that the proposed amendments will provide clarity on who will be required to provide an imprint and will address concerns about unregulated campaigning. We continue to discuss that with the commission, Mr Harvie and others, and we might refine the provisions at stage 3.

As part of those changes, my amendment 36 removes the "reasonably practicable" exemption that is currently in the bill. The committee's stage 1 report supported the recommendation of the Electoral Commission that the bill be amended to remove the words,

"unless it is not reasonably practical to include the details",

from the requirement to include an imprint. The Electoral Commission had expressed concerns that if the "reasonably practicable" exception were retained, that would hamper its work with social media companies on technical solutions to online imprints. Social media companies might use such an exemption as a defence for not providing technical solutions. I am happy to accept the recommendation and have lodged amendment 35—the "personal opinion" exemption—and amendment 36, which would remove the "reasonably practicable" exemption.

Amendment 38 simply makes clear that the use of the term "address", which is required to be provided in the imprint, means a physical postal address and not an email address. That is the position taken for printed material at other elections and in the 2014 referendum for online materials.

**Patrick Harvie:** On the point about postal addresses, will the cabinet secretary confirm that that does not necessarily mean the individual's domestic residential address and that it could be the postal address of an organisation that they are involved with?

**Michael Russell:** It must be an address that is accessible and available, and contacting which would be the equivalent of contacting the individual. That is a slight grey area.

At the request of the Electoral Commission, I lodged amendment 38, which clarifies that a postal address is required. That will identify those who are involved by linking them to a physical location, rather than to an email address, which would mean that they could be anywhere in the world.

Taken together, amendments 35, 36 and 38 will strengthen the rules on online campaigning. However, I am well aware that it is an evolving area. Although I share Mr Harvie's concerns, I have difficulties with his amendments 83 and 84. I offer to continue to work with him to get the amendments to a place in which I feel that it is safe to support them.

As amendments 83 and 84 capture social media material, redesigned versions could possibly work alongside the Government amendments that apply to a wider range of non-printed material. It might be possible to capture material from all registered permitted participants and relevant donors to those campaigns. However, there are legal difficulties around applying controls to any registered party member and any party donor, as proposed paragraph (7B)(b) of amendment 84 would do. The Scotland Act 1998 reserves the registration and funding of political parties, which is a difficulty. I am happy to commit to discuss with Mr Harvie how we might move on to achieve a legally operable series of amendments.

I add that the Scottish Government's proposed change to make the offence of not providing an imprint triable by solemn procedure with a jury, with an attendant increase in the penalties that are attached to the offence, taken together with the increased civil sanction powers of the Electoral Commission, should significantly add to the deterrent for campaigners who breach imprint rules, without deterring individuals from participating. That is the balance that must be struck.

The measures are important. I ask Patrick Harvie not to press his amendments, and I hope that we can find a better solution by stage 3 for what he wants to achieve. I commend amendments 35, 36 and 38 to the committee.

**Patrick Harvie:** I realise that I should have noted amendment 36 in my opening remarks. I welcome the Government's decision to lodge an amendment to remove the "reasonably practicable" exemption. If the Government had not done so, I would have, because the committee agreed to it. Therefore, I am grateful that the cabinet secretary lodged amendment 36.

I do not want to go over ground that we have already touched on, but one of the issues that the cabinet secretary's remarks did not quite engage with is how we can distinguish those who are active campaigners but also publish on social media in their capacity as individuals. Where is the line between the individual and their identity as a campaigner? For example, there would be a grey area if a wealthy individual personally funded a campaign body but used their individual social media accounts to target social media posts using information that they gained through being a campaigner. I fear that the Government's approach would exempt publication that was carried out in that way, whereas a common-sense approach—if we could achieve it—would regulate such publication.

I will not pretend that any of us have our approaches to the issue in a state of perfection, but I will press amendment 83, just to gauge the level of support—if any—that exists for it. Even if it is voted down, I hope that the Government will still be willing to discuss with me alternative approaches at stage 3.

**The Convener:** The question is, that amendment 83 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Bibby, Neil (West Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Rowley, Alex (Mid Scotland and Fife) (Lab)

**Against**

Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

**Abstentions**

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

**The Convener:** The result of the division is: For 3, Against 5, Abstentions 3.

*Amendment 83 not agreed to.*

*Amendment 35 moved—[Michael Russell].*

**The Convener:** The question is, that amendment 35 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Arthur, Tom (Renfrewshire South) (SNP)
Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Tomkins, Adam (Glasgow) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)

**Abstentions**

Harvie, Patrick (Glasgow) (Green)

**The Convener:** The result of the division is: For 10, Against 1, Abstentions 0.

*Amendment 35 agreed to.*

*Amendment 36 moved—[Michael Russell]—and agreed to.*

*Amendment 84 not moved.*

*Amendments 37 and 38 moved—[Michael Russell]—and agreed to.*

**The Convener:** I propose that we take a five-minute break.

12:12

*Meeting suspended.*

12:21

*On resuming—*

**The Convener:** Amendment 39, in the name of the cabinet secretary, is grouped with amendments 40, 41 and 46 to 48.

**Michael Russell:** I am conscious of the time, so I shall be as brief as I can.

The committee asked the Scottish Government to explain in more detail why the proposed reporting requirements for referendums are different from the requirements in general elections, for which weekly reports are required. I have looked at the matter and talked to the Electoral Commission about it. We have agreed that a move to weekly reporting could be to the detriment of smaller campaigners. Imposing the weekly reporting requirements that apply to political parties would add an additional burden for smaller campaigners. Political parties and most third-party campaigners are used to having to report weekly, but some campaigners may not be used to it.

Having heard the commission's concerns and its advice that the four-week reporting periods at the 2014 referendum worked well, I am not convinced that moving to a weekly reporting period for donations and regulated transactions would be in the best interests of an inclusive referendum. I am therefore not proposing to introduce a weekly reporting requirement.

However, with the move to a default referendum period of 10 weeks, as proposed and agreed earlier, a move to more frequent reporting is needed. The amendments require that, where the 10-week referendum period applies, it should be split into three reporting periods: the first would start on the first day of the referendum period and end after two weeks; a second period, of four weeks, would run; and a final four-week period would run. That timing would work for a default 10-week referendum period. If the period were to be changed by legislation providing for a particular referendum, revised reporting periods would be required as a consequential amendment, but the principle would apply with four-week periods as the default.

I move amendment 39.

*Amendment 39 agreed to.*

*Amendments 40 to 52 moved—[Michael Russell]—and agreed to.*

*Schedule 3, as amended, agreed to.*

*Section 14 agreed to.*

### Schedule 4—Campaign rules: investigatory powers of the Electoral Commission

**The Convener:** Amendment 53, in the name of the cabinet secretary, is grouped with amendments 54 to 57.

**Michael Russell:** There was concern that the bill's provisions limit the Electoral Commission's initial monitoring powers to gather information. The commission asked that its power to obtain information outside an investigation be strengthened to enable it to deal with more compliance issues in real time ahead of a referendum, which would strengthen compliance with, and trust in, the campaign rules.

The commission is currently able to monitor activity by issuing disclosure notices, but it cannot require information from other persons unless it uses its warrant powers. The threshold for that is that there are reasonable grounds to suspect that a specific campaign offence has been committed. That restricts the commission's ability to respond rapidly to emerging situations and provide appropriate and timely advice and interventions. It will be in everyone's interest if potential compliance issues can be addressed at an early stage.

As well as requesting a broadening of the categories of organisation or individual, the commission expressed concern that the scope of the disclosure order power is confined to material about spending and does not cover the full range of situations, such as situations that relate to imprints. Amendment 57 will therefore expand the subjects on which monitoring can be undertaken to include material that is "reasonably required" of a wider range of persons, in relation to a wider range of the commission's campaign enforcement responsibilities.

It is necessary to take a proportionate approach that gives the Electoral Commission flexibility to respond. I have therefore lodged amendments that will allow disclosure notices to be given to individuals or bodies who are not registered as permitted participants under the campaign rules if the commission has reasonable grounds for believing that they should be permitted participants. The aim is to allow the commission to

investigate when it appears to the commission that an individual or body is incurring referendum expenses that take it above the expenses limit.

Amendment 56 will help the commission to identify individuals or bodies who have made a declaration as a permitted participant, where there are questions about whether they are qualifying individuals or bodies—for instance, if they are not based in the UK. The amendment will also help the commission to identify individuals or bodies in relation to whom there is reasonable belief that they have received a "relevant donation" or entered into a "regulated transaction" under the campaign rules when they were not entitled to do so, and individuals or bodies who supply services or goods to campaigners, including those who might have published, printed or promoted material subject to the imprint rules, which require identity and address to be shown—that will allow the commission to confirm who has requested and benefited from the services or goods.

The amendments in the group significantly strengthen the Electoral Commission's powers to gather information that could lead to a formal investigation and ensure that investigations can be carried out timeously.

I move amendment 53.

*Amendment 53 agreed to.*

*Amendments 54 to 59 moved—[Michael Russell]—and agreed to.*

*Schedule 4, as amended, agreed to.*

**Schedule 5—Campaign rules: civil sanctions**

*Amendments 60 and 61 moved—[Michael Russell]—and agreed to.*

*Schedule 5, as amended, agreed to.*

*Section 15 agreed to.*

**Section 16—Campaign rules: general offences**

*Amendments 62 and 63 moved—[Michael Russell]—and agreed to.*

*Section 16, as amended, agreed to.*

*Sections 17 and 18 agreed to.*

**Section 19—Referendum agents**

*Amendment 64 moved—[Michael Russell]—and agreed to.*

*Section 19, as amended, agreed to.*

*Sections 20 to 23 agreed to.*

**Section 24—Code of practice on attendance of observers**

*Amendment 65 moved—[Michael Russell]—and agreed to.*

*Section 24, as amended, agreed to.*

**Section 25—Information for voters**

**The Convener:** Amendment 106, in the name of James Kelly, is grouped with amendment 66.

**James Kelly:** I will be brief, because I realise that we are pressed for time.

Amendment 106 seeks to increase voter awareness and turnout. It does that through empowering public authorities to do all that they can to support voter registration, to increase voter awareness of voting methods and to take any other relevant action.

Amendment 66 is in a similar vein. It empowers registration officers to take appropriate steps to increase voter awareness and turnout. I support both amendments.

I move amendment 106.

12:30

**Gordon MacDonald:** I have lodged amendment 66 to ensure that electoral registration officers are clear about their role in promoting participation in the run-up to a referendum. We took evidence at stage 1 calling for that aspect to be clarified. We want as many people as possible to engage in any future referendums, no matter what the topic is.

During stage 1, we spoke about increasing registration numbers and turnout among young people and other groups that are statistically less likely to engage in politics in order that they exercise their right to vote. I have commented on the importance of reaching those groups to ensure that everyone can make their voices heard. By making it clear that EROs have a specific duty to promote participation, my intention is to help encourage more people from such groups to register to vote and engage with politics.

**Patrick Harvie:** I welcome both amendments. We should all try to ensure that public bodies take steps to encourage voter participation and understanding of any referendums that take place. It may be that the Government considers that amendment 106 is too broad. However, I think that it is reasonable, given that it begins with the wording:

"Each ... public authority must take such steps as it considers appropriate".

There will be some public authorities for which minimal activity would be appropriate, which is reasonable. However, amendment 106 gets closer to ensuring that, for example, local authorities in their educational functions take on the

responsibility for increasing voter turnout and participation in referendums.

In 2014, we saw excellent practice and very poor practice. In any future referendum, we would all want best practice to spread everywhere, and amendment 106 makes it more likely that we will achieve that.

**Alex Rowley:** I am in favour of amendments 106 and 66. As Patrick Harvie said, there is good practice in local authorities to encourage voter registration. However, that good practice is not necessarily shared across the country. Even in the past few weeks in Edinburgh, I have noticed a lot of advertising on lamp posts telling people to sign up to vote. That is good practice, but we need to encourage more of it. I support both amendments.

**Michael Russell:** I encourage members to support amendment 66. It is important that electoral registration officers' clear role is recognised and built on, so that they are empowered to do the job that needs to be done—and I do not disagree that the job needs to be done.

I am happy to discuss with Mr Kelly how to focus amendment 106 on where responsibility lies. Counting officers, the Electoral Commission and local authorities already have an obligation to promote registration and participation. Mr Rowley has indicated that some are doing very well and some are not doing as well. We need to focus on that activity. However, the amendment as drafted is far too wide. It lays an obligation on others, including Caledonian MacBrayne, the National Galleries of Scotland and the Royal Botanic Garden Edinburgh. Whatever the definition is, those would not necessarily be the right bodies on which to lay that obligation.

I have listened to Mr Harvie. I am very happy to take the issue away and work with Mr Kelly to focus the amendment—

**Adam Tomkins:** Will the member take an intervention?

**Michael Russell:** If I have to, yes.

**Adam Tomkins:** I want to confirm that I have understood the force of the cabinet secretary's objection to the breadth of amendment 106, which provides that a

"Scottish public authority must take such steps as it considers appropriate".

The cabinet secretary cited a number of bodies. None of us thinks that it would be appropriate for CalMac Ferries to spend a great deal of its resource promoting voter registration, although the occasional poster on a ferry probably would not do any harm. I do not understand the point being made that the amendment as drafted is overly broad.

**Michael Russell:** I do not think that those bodies need to consider the matter. The issue is about who should consider it and who should work on it. Those bodies do not need to consider it, but other bodies do, and I am absolutely in favour of their considering it. In any case, there are obligations on the relevant public authorities.

I am saying, very reasonably, that, if Mr Kelly withdraws amendment 106, I will work with him to get the proposal into a form that can be included in the bill at stage 3, so that we can focus attention on the right bodies.

**James Kelly:** I thank members for their constructive comments. Patrick Harvie and Alex Rowley made good points about the importance of getting consistent practice across the country, which is what my amendment seeks to achieve.

On balance, I would prefer to press the amendment and seek to include it in the bill today. Because it says, "where appropriate", it is worded in such a way as to allow public authorities not to take action in cases in which it is deemed inappropriate to do so. Therefore, the amendment is legitimate.

**The Convener:** The question is, that amendment 106 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Rowley, Alex (Mid Scotland and Fife) (Lab)
Tomkins, Adam (Glasgow) (Con)

**Against**

Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

**The Convener:** The result of the division is: For 6, Against 5, Abstentions 0.

*Amendment 106 agreed to.*

*Section 25, as amended, agreed to.*

*Section 26 agreed to.*

### Section 27—Advice

**The Convener:** Amendment 107, in the name of James Kelly, is in a group on its own.

**James Kelly:** Having listened carefully to the debate that took place earlier, I am not going to move amendment 107. The starting position for

the bill was that the Government sought to impose the wording from the 2014 independence referendum on any future referendum and sideline the Electoral Commission. However, I understand that the cabinet secretary has read the committee's report and listened to the recommendations, and I note that discussions with the Electoral Commission are on-going. It seems to me that work is still in progress in that regard and that a resolution has not been reached that gives adequate weight to the Electoral Commission's role. However, I am prepared to allow those discussions to continue ahead of stage 3, and I reserve the right to bring back the amendment at that point.

*Amendment 107 not moved.*

*Section 27 agreed to.*

### Section 28—Encouraging participation

*Amendment 66 moved—[Gordon MacDonald]—and agreed to.*

*Section 28, as amended, agreed to.*

### Section 29—Report on the conduct of the referendum

**The Convener:** Amendment 108, in the name of James Kelly, is grouped with amendment 109.

**James Kelly:** The amendments seek to ensure that, when the report on the conduct of a referendum is prepared, appropriate weight is given to the role of the Commission for Equality and Human Rights. That body has a key role to play in ensuring that all groups in society can participate in elections and it is important that that role is respected. It should be consulted and regard should be given to its findings when the report on the conduct of a referendum takes place.

I move amendment 108.

**Patrick Harvie:** I am open to the amendments. However, I ask James Kelly to explain, when he winds up, why he feels that only the Commission for Equality and Human Rights should be included in the amendment rather than, for example, the Children and Young People's Commissioner or other bodies that represent specific groups. The ethos behind the amendments is good, and I would like us to include something along those lines in the bill, but I am unclear why the amendments refer only to that particular body.

**Michael Russell:** The point that Mr Harvie makes is the key one. I understand that the Electoral Commission is more than willing to consult many bodies, and, indeed, does so. However, I do not think that anyone would be in favour of prescribing that it should consult with only the Commission for Equality and Human Rights, or even that that body should be preferred in relation to other bodies.

If the Electoral Commission is to be encouraged to consult with more bodies, rather than make a prescription here and now, we should have that discussion with the Electoral Commission, and it could make a decision at that point. I understand that it has not said that it is in favour of the proposal. However, I am not against it consulting with people—quite the reverse; I want it to consult with as many people as possible.

**Alex Rowley:** Do you agree that there should be something in the bill that requires the Electoral Commission to consult as widely as possible?

**Michael Russell:** I would have no objection if Mr Kelly had included in his amendment something that said that the Electoral Commission is expected or required to consult a range of bodies. However, as Mr Harvie correctly pointed out, there is a range of other bodies apart from the one that has been specified. Further, the Electoral Commission already consults those bodies. It makes the point that it wants its reports to be comprehensive but not overwhelming, which is why it does not want to spend a lot of time consulting lots of people and quoting them in the reports.

I am happy to have an amendment that says that the Electoral Commission should consult widely, but that already happens—the Electoral Commission assures us that it does that.

**James Kelly:** I have listened to the contributions, and I think that Patrick Harvie makes relevant points with regard to other bodies. The key point is that the Electoral Commission must give regard to consulting appropriately, and I think that that should be in the bill. I take the point that the wording needs to be correct in that regard. Therefore, I will not press amendment 108, but I will reconsider the issue before stage 3.

*Amendment 108, by agreement, withdrawn.*

*Amendment 109 not moved.*

*Section 29 agreed to.*

### Section 30—Reimbursement of Commission's costs

**The Convener:** Members will be glad to know that the next group will be the final one this morning, as we might get into a long debate in relation to the next area.

Amendment 67, in the name of Angela Constance, is grouped with amendments 68 and 69.

**Angela Constance:** Colleagues will recall that, in our stage 1 report, the committee supported the

SPCB's recommendation that the bill should be amended to provide for SPCB funding of the Electoral Commission's expenditure to be in line with the corporate body's duty in relation to the other independent bodies' funds. Amendments 67 to 69 have been lodged to address that point.

Amendment 67 ensures that it is clear that the Electoral Commission can be reimbursed only for expenditure that is properly incurred, and that reimbursement for expenditure that does not relate to its functions under the legislation can be refused.

Amendment 68 clearly limits the amount that the Electoral Commission can be reimbursed to the estimate that has been previously agreed by the SPCB. That ensures that the Electoral Commission and the SPCB know the maximum amount that the Electoral Commission has to spend on its functions under the legislation. However, as I am sure colleagues will appreciate, estimating costs is not always an exact science, and unexpected costs can arise. Therefore, the amendment allows the SPCB to reimburse expenditure by the Electoral Commission that exceeds its agreed estimate, should it deem that appropriate. The SPCB will, of course, be able to draw down funds to cover the Electoral Commission's expenditure in the same way as for its other expenditure.

Amendment 69 is consequential on amendment 68, and ensures that the cost of the Electoral Commission's activities under the legislation will not be met from funds that are provided by the Speaker's Committee of the United Kingdom Parliament.

As I understand it, the on-going funding arrangements between the SPCB and the Electoral Commission are the subject of further discussion in connection with the Scottish Elections (Reform) Bill, and it might therefore be useful or appropriate, depending on what the Parliament approves with regard to that bill, to amend those arrangements at some point in the future. I am assured that the Scottish Government would look to do that using the powers in section 37 of the bill that we are discussing today.

I move amendment 67.

**Michael Russell:** I thank the SPCB and Angela Constance for raising the issue. The Scottish Government is committed to funding the cost of referendums that are held under the bill. We have engaged with the SPCB and the Electoral Commission to agree how that and day-to-day expenditure that is associated with devolved elections should be taken forward. I understand that the proposed approach has the support of the SPCB and the Electoral Commission.

As Angela Constance has mentioned, the Scottish Government might have to use section 37 of the bill after the Scottish Elections (Reform) Bill has been passed. That depends on the funding arrangements for the Electoral Commission that are contained in that bill, which are still subject to the final agreement of the Parliament.

As all those who are concerned are content with the suggestions, I urge the committee to support the amendments.

*Amendment 67 agreed to.*

*Amendments 68 and 69 moved—[Angela Constance]—and agreed to.*

*Section 30, as amended, agreed to.*

*Sections 31 to 35 agreed to.*

**The Convener:** As we will not complete consideration of the bill today, the committee will continue consideration of the bill at its next meeting, which will be on 4 December.

I thank members and the cabinet secretary for their participation.

*Meeting closed at 12:46.*

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