OFFICIAL REPORT
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Finance and Constitution Committee

Wednesday 4 December 2019

Session 5

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Pàrlamaid na h-Alba

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FINANCE AND CONSTITUTION COMMITTEE
28th 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)
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 4 December 2019

[The Convener opened the meeting at 10:00]

Referendums (Scotland) Bill: Stage 2

The Convener (Bruce Crawford): Good morning. Welcome to the 28th meeting in 2019 of the Finance and Constitution Committee. I remind members to at least set their mobile phones to a mode that will not interfere with proceedings.

The only business on our agenda today is continuation of our scrutiny of the Referendums (Scotland) Bill at stage 2.

I welcome Michael Russell, the Cabinet Secretary for Government Business and Constitutional Relations, and his officials.

Schedule 6—Offences

The Convener: Amendment 85, in the name of Patrick Harvie, is grouped with amendments 86 to 89.

Patrick Harvie (Glasgow) (Green): Good morning. I am still slightly out of breath from running down the Royal Mile. This group is about false statements, and I wish that it could apply to ScotRail timetables. However, that might be out of scope, so I will stick to the issue of referendums.

While my Surface struggles to life, I remind members of what is said in section 106 of the Representation of the People Act 1983, although I am sure that you are all aware of it. That is the part of the legislation that makes it an offence, during an election, to make false statements about a candidate. It has not been used hugely often, but it has been used in the past, even to the point of overturning an election result and forcing a constituency election to be rerun.

There is no equivalent in relation to referendums, and that is the issue that I seek to address through the amendments in this group. There is nothing in legislation that imposes consequences on people who make false statements in relation to referendum campaigns or related issues, or to the process of conducting those referendum campaigns.

Across the political spectrum, we are all conscious of the way in which our democracy is being affected by the prevalence of deliberate falsehoods in campaigning. Indeed, the United Kingdom Parliament's Digital, Culture, Media and Sport Committee has considered the issue and published information about the extent of the interference, social media platforms have begun to change their policies with regard to what kind of advertising they will carry and the mainstream media has begun to conduct more fact checking and to be more vociferous about exposing deliberate falsehoods.

Adam Tomkins (Glasgow) (Con): As I understand it, section 106 of the 1983 act applies to constituency election campaigns, not to national media campaigns—I am not sure whether I am right about that, but that is my recollection. The examples that you use concern national media campaigning rather than the kinds of things that candidates might say about one another in a constituency, so they would not be captured, even in the context of elections, by any of the offences that are legislated for in that section of the 1983 act. The analogy between what section 106 of the 1983 act does and what amendment 85 does is an inexact one.

Patrick Harvie: That is fair. What I am doing is examining what section 106 of the 1983 act is intended to achieve and applying it in a broader way in relation to referendums—I believe that it should also be applied in a broader way to elections.

Amendment 85 does not apply only to statements that are made by candidates; it creates an offence that can be committed by anyone, including national political campaigns that make statements about candidates. It broadens the position to cover objectively false statements, not merely expressions of contestable opinion, in relation to the issues and the process and conduct of a referendum. I think that that approach should be taken in relation to elections as well, albeit that this bill is about referendums.

I draw members' attention to the fact that just in recent days, for example, an entirely concocted tweet emerged purporting to be in the name of Jeremy Corbyn in response to the London bridge attack. It claimed that, as his first reaction to those events, he stated:

"A man was murdered by British Police in Broad daylight".

That was entirely untrue. If Jeremy Corbyn were to identify the originator of it, he could say that it was defamatory—defamatory or libellous, I suppose—but it does not engage any aspect of electoral law.

If something similar were to happen during a referendum, again, there is a lack of any legislation to deal with it. It has happened during referendums. There were many legitimate,

contestable claims made in the 2016 EU referendum, but to state that

"Turkey is joining the EU"

was an objectively false statement. To say that

"The EU blocks our ability to speak out and protect polar bears"

was an objectively false statement. I am sure that members are familiar with others, so I do not need to go into huge detail.

With this group of amendments, I have sought to create the possibility that a criminal offence would be committed when objectively false statements are made about the conduct of the poll. For example, in a future referendum in Scotland using the new electoral franchise—assuming that the Scottish Elections (Franchise and Representation) Bill also passes—if someone was to go around saying, "English people aren't allowed to vote in this election," and using that claim as a voter suppression technique, they would fall foul of this offence. If they were to say, "Young people—16 and 17-year-olds—aren't allowed to vote in this referendum," they would be making an objectively false claim as a voter suppression technique, and they would fall foul of the offence.

The offence would also address matters connected to the question on which the referendum is being held. Again, the offence would not apply to legitimate expressions of opinion or contestable claims, such as, "I think this would be good—or bad—for our economy." It would be for the court to determine whether objectively false claims had been made. That is set out in amendment 85, and amendments 86 and 87 deal with the consequences.

I think that it is legitimate to say, as amendment 87 does, that if such claims are made by

"a permitted participant"

or

"a designated organisation",

as opposed to an individual, the criminal consequences should be higher. I would group amendments 85, 86 and 87 together as one aspect of the offence.

Amendments 88 and 89 then deal with the political consequences: they are an optional extra, if you like, following the creation of the offence, and concern challenges to the validity of the results. Again, I remind members that a constituency election can be overturned if such substantial claims are found to have been made.

Amendment 88 allows for a period in which a petition can be brought to the Court of Session

"to declare the result of the referendum not to be valid".

It would be for the court to determine whether

"a sufficient number of persons have been convicted of, or charged with, the corrupt practice of making a false campaign statement"

and whether

"the nature of the offences"

are adequate to justify a ruling. That ruling could involve prohibiting ministers from taking action to implement the result of the referendum, or imposing conditions. I have made it clear that such a prohibition would not prohibit ministers from taking preparatory action—for example, negotiating with another party as to how the result would be implemented, or, indeed, drafting and introducing legislation. It would be the irrevocable action, the ultimate implementation, that would have to wait until that process had been dealt with.

Amendments 88 and 89 would give members of the public and campaigners the ability, to some extent, to go to court and say that a referendum has been so brutally interfered with by fake news or false claims as to render its results invalid.

It is perfectly clear, as I think we all know, that if the 2016 referendum had been regulated at the same level as an election, the result would already have been overturned. It would not have withstood the same scrutiny as an election result and would not have been regarded as having the same legitimacy, given the practices that we all know took place in relation not only to existing criminal offences but to the deliberate falsehoods that were expressed during the referendum campaign. If we are going to have more referendums in Scotland in the future—and it is an "if"—we should hold them to a high standard, which should include a provision that is equivalent to the offence of making false statements in relation to an election.

I move amendment 85.

Murdo Fraser (Mid Scotland and Fife) (Con): I thank Patrick Harvie for lodging his amendments and opening up a debate on an interesting topic, which involves the whole issue of false statements in referendums and indeed the question of sanctions. In last week's debate at stage 2, when we considered sanctions for a breach of the rules, I raised a concern that levying substantial fines long after the event would not be a sufficient deterrent. The campaign groups affected might, by that point, have been wound up or might have no resources, so it is hard to see what impact such sanctions would have. Patrick Harvie takes a much more robust approach in his amendments, which would create a new criminal offence for those who make false statements. I note from amendment 87 that those who are found guilty of such an offence could spend up to four years in jail.

It might be worth putting the matter in some context. Let us reflect on some of the statements that were made in the 2014 referendum. Members might remember that we were told that the finances of an independent Scotland would be robust and that, because the oil price would be more than $100 a barrel, they would be in balance. We were told that if we voted no in 2014, the national health service in Scotland would be privatised—it is clear that that statement was false and untrue. Of course, we were told in 2014 that the referendum would be a once-in-a-generation vote—or indeed a "once in a lifetime" vote, as the current First Minister had it. That statement has clearly turned out not to be true.

If Patrick Harvie is proposing that those who were responsible for making those statements, including the current First Minister and the Cabinet Secretary for Government Business and Constitution—and perhaps Mr Harvie himself—should be hauled before the courts and accused of a criminal offence, I would have a certain enthusiasm for that view. [*Laughter*.]

Patrick Harvie: I will see you in court.

Murdo Fraser: Indeed, if it would be helpful to the authorities in addressing those issues, I could make a citizen's arrest. I simply highlight the concerns around that particular approach. What is a demonstrably false statement? Such matters are, in effect, subjective rather than objective. Although I might regard a statement as false, Mr Harvie may take the opposite view.

Although Patrick Harvie's approach is very attractive, and I would love to see the guilty men and women prosecuted for their statements in 2014, I just cannot see how it would work in practice. The problem is amendment 85's proposed new subparagraph 11A(5), which provides for a defence if a person can show that they

"had reasonable grounds for believing, and did believe, the statement to be true."

I cannot see, from a legal perspective, how that defence would work. A court would be asked to look into somebody's mind and see whether they actually believed a statement at the point at which they made it. How a court could be expected to do that is, from a legal perspective, utterly beyond me.

That brings us to the contestability of subjective statements that are part of the political debate as opposed to objective statements that can be tested and would meet the required level for a criminal conviction. For that reason, although I admire Patrick Harvie for lodging his amendments and he makes some important points, I cannot understand how such a provision would be legally enforceable.

10:15

Alex Rowley (Mid Scotland and Fife) (Lab): I have similar difficulties with amendment 85. In principle, it raises an issue that we need to look at, because we are seeing more and more lies and downright lies. A good example of that is the lie about what Corbyn said about the London bridge attack.

Murdo Fraser says that the national health service would be under threat if there were an independence referendum, but the health service is under threat now. Who is right and who is wrong? That is the difficulty with implementing Patrick Harvie's proposed approach.

I would be grateful if Patrick Harvie could pick up on that point, because I think that he is right, in principle, to say that something needs to be done and we cannot continue as we are. The situation is damaging our democracy. We are seeing more and more of the kind of political campaigning that takes place in the United States, and people just do not know what to believe.

Fake news is undermining our democracy, and I agree with the principle behind amendment 85. However, like Murdo Fraser, I have difficulty seeing how the approach could be implemented, given the legalities.

Adam Tomkins: Like Alex Rowley and Murdo Fraser, I am very sympathetic to the intention behind the amendments in this group, which is to clean up political campaigning and inject a sorely needed requirement for truth into our political campaign statements.

Let me reflect a little on the reasons why we do not already have such rules in the context of elections. The intervention that I made on Mr Harvie was not a point of legal pedantry—that is unusual, for me—but an important point of principle. The Representation of the People Act 1983 is a codification statute: it codifies a number of elements of electoral rules, many of which date back to the 19th century. In the 19th century, of course, constituency campaigning mattered much more than national media campaigning. It was therefore understandable that the focus of electoral rules in the 19th and early 20th century was on constituency campaigns rather than national media campaigns.

There is no analogy to be made between constituency campaigns in an election and a national referendum campaign. Section 106 of the 1983 act makes it an offence to make false statements about candidates.

We all know that constituency campaigns still matter; we also know that they do not matter as much as they used to and that national media

campaigns matter a great deal, whether we are talking about broadcast, print or social media.

We need to reflect on why the old rules about constituency campaigns have not been translated into rules that make it an offence to make a false statement in a national media campaign. I think that the reason is not lethargy but a sense that to convert a political argument about the truth of a claim about the future of the NHS into a legal argument for a court of law that would have the power to invalidate not merely a constituency election but an entire national result would be to make a huge change to the nature of our electoral law and indeed our democratic politics. I do not think that such a change would be at all desirable, notwithstanding the ambition that Mr Harvie and I share to inject a greater degree of truth into politics.

I think that we should proceed incrementally, rather than through any other means. I would want an organisation such as the Law Commission or the Scottish Law Commission to take a long, hard look at our existing electoral rules, to see whether the rules that apply to constituencies should apply to national campaigns, and then to learn the lessons for referendums from that exercise.

Notwithstanding that I applaud and share Mr Harvie's intentions, it would not be prudent to lift what are, in essence, 19th century rules about constituency campaigning into 21st century referendum campaigning, without much more careful evidence taking and deliberation on the consequences—intended and unintended—than any of us is capable of. I have grave hesitations about going down the proposed route.

The Cabinet Secretary for Government Business and Constitutional Relations (Michael Russell): I welcome Patrick Harvie's amendments; I cannot support them, but they raise an exceptionally important point. In lodging his amendments, Mr Harvie is starting the process of what I think will have to be a profound change in how we run elections and referenda. However, these particular amendments do not take us into the position that we need to be in. I especially welcome the comments that were made by Alex Rowley and Adam Tomkins, which addressed the issue in a very serious and sensible way.

Just as the norms of our constitution have been, the norms of our politics are in the process of being trampled on, in a fairly contemptuous way, by the current UK Government. It is not alone in acting in that way, but it is a particular offender. There is a lack of the element of self-policing that we would expect, given the norms of politics whereby people usually endeavour to tell the truth. Although what they have said might be open to interpretation and disagreement, there would usually be at least an intention to be truthful. Just like the norms that apply to the operation of our constitution, which we have recently seen being broken down by, for example, the prorogation of the Westminster Parliament, such matters are normally self-policed and the media usually play a role in policing them. Therefore both of those elements have broken down, to a greater or lesser extent. If we were to seek to draw a historical parallel, we could point to what we might term the wild west period of elections in the 18th and early 19th centuries, when almost anything went.

Therefore there needs to be a re-examination of how elections and referenda are conducted, which should consider the concept of truthfulness, people's ability to judge matters in the current extraordinary landscape, in which a wall of information is constantly available, and guidance on picking out from that wall what is true and what is false. We need to think about this very important issue, but we are not yet in a position where we could come to a conclusion on it. I agree with Adam Tomkins that someone—possibly the Scottish Law Commission, but other bodies might be appropriate—needs to look at it very carefully indeed.

We are not totally without defence. The point that has been made about the Corbyn tweet is interesting. However, if it is defamatory—and I do not think that we are in any doubt that it is—the issue there will be to find out who posted it and to act on it according to the existing law. Some of the things that we have been talking about doing—such as the process of imprints—and about how the Electoral Commission operates should help with that to some degree.

However, regulating the truthfulness of campaign statements cannot be done effectively at this stage—and, regrettably, it cannot be done by Patrick Harvie's amendments. A number of witnesses have said that the Electoral Commission would not be the appropriate body to assess such truthfulness, and they were right. The approach that amendment 85 takes is different, in seeking to render the making of false campaign statements an offence and ensuring that there would be penalties for it. However, the likely outcome of such an approach would be a severe curtailment of the freedom of speech.

Amendments 85, 86 and 87 would impose heavy penalties on individuals. That would have a stifling effect on debate, because it would inevitably reduce the willingness of individuals and groups to participate in it. Therefore such an approach would probably undermine rather than improve the information that was available to voters.

There is also a more philosophical element to truth. We might ask which body should decide what is true. In amendment 85, the definition of

what would be an offence is very broad. It mentions

"matters connected to the question on which the referendum is being held"

and

"the consequences of a particular outcome".

Such matters would not be easily interpreted as statements of fact. A candidate's personality and the way in which they conduct themselves are much clearer matters for interpretation.

We can point to statements that we know were factually incorrect, such as the earlier example about Turkey, which was used by, among other people, the Prime Minister himself. However, making our courts the arbiter of such truth during an election campaign would be exceptionally difficult. Many of us would anticipate that that would produce a flurry of court action in the midst of an election campaign, which would have a very disruptive effect on anything that we understand to be the election process. I do not think that there would be any restraint in using such an approach—or in complaining about such matters—and we might then enter into a very difficult position

It is also likely that that approach would have such a pronounced effect on the drafting of proposals that it might make them incompatible with the right to freedom of expression that is covered by article 10 of the European convention on human rights. That is regrettable, because I am sympathetic to doing something—but not to doing in it in this way.

In addition, amendments 88 and 89 would put in place a process to allow the result of a referendum to be challenged. Again, I do not think that the underpinning principles are wrong; it is right that problems with campaigns should be identified and dealt with as soon as possible, rather than being resolved months later. That is why the bill includes penalties for breaching campaign rules and gives additional powers to the Electoral Commission. The way in which the amendments have been drafted would be immensely disruptive and, as Adam Tomkins has indicated, they would make it almost impossible to get a result from a referendum and to implement it.

I cannot support any of the amendments in the group. If the committee were to agree to them, the amendments would need to be substantially and radically amended at stage 3 if there was to be any prospect of them doing anything other than—unintentionally, I believe—wrecking the process of having a referendum.

However, Patrick Harvie has produced something that is very important, and I hope that it will lead to a number of committee members thinking about how we can take the issue further, who should be examining the process closely and what the outcome should be in terms of electoral law. I will certainly be thinking about that.

Patrick Harvie: I thank members who have taken part in the debate and who have recognised that the subject will need to be addressed in one way or another. In its stage 1 report, the committee did not agree with the views that had been expressed by some that the Electoral Commission should be an arbiter of truth, and I entirely understand why we did not agree with that. However, at some point, we will need to decide how deliberate falsehoods will be challenged. If they are not challenged by an independent body such as the commission, it seems to me that using the courts is the most obvious alternative route. I lodged my amendments to begin that debate and to flesh out how that could be achieved, because it is clear that it is not being achieved currently.

In my opening remarks, I mentioned defamation law as a potential route, and the cabinet secretary also mentioned that. Defamation law is there for an individual who feels aggrieved about the way in which they have been misrepresented or about statements that have been made about them. Given the political consequences, it would clearly not be an adequate response for a politician to take action under defamation law during an election or referendum campaign; that would only draw more attention to the claim that was made about them. The political consequences of that could serve only to advance the false claim that has been made. There would be no ability to overturn or call into question the result of the democratic exercise that had been interfered with. Defamation law is there for the individual, but it does not achieve the necessary political consequences.

Adam Tomkins quite rightly asked us to consider why long-standing laws that relate to a time when constituency campaigns were more the core and focus of the democratic experience have not, over time, been applied to national campaigns. I suspect that the answer is that there is an element of the frog being slowly boiled. I ask members to make a comparison with the current election, for example, in which those rules are not applied at national level, just as they would not be applied at national level in a referendum.

We all had a bit of a laugh around the claims about Jo Swinson and the squirrels, didn't we? That was all a bit of fun. Those were false claims—fake news, if we want to use that phrase. If the squirrel lovers of Jo Swinson's East Dunbartonshire constituency had been so offended and taken in by those claims that the result in that constituency election had been

affected, Jo Swinson would have had some degree of call to the courts.

10:30

If the same claims were made during the leaders debate about Nicola Sturgeon, who is the leader of a political party that is contesting that national election but not a constituency candidate in that election, there would be no similar ability to appeal to the courts for a political consequence. That is a gap. It is not a deliberate choice not to apply constituency rules at a national level but a gap that has opened up and, given the importance of national campaigns in both elections and referendums, it needs to be filled.

This is not about confusing subjective and objective questions. Although defamation is not an adequate response to this kind of situation, there is evidence that the courts are well capable of telling the difference between an objective and a subjective claim. For example, a forecast about oil prices or economic consequences is never a true or untrue statement at the time that it is made, in simplistic terms. A forecast is a forecast; it involves a degree of modelling and evidence but also guesswork and it will always be seen in those terms.

Very briefly, I do not think that amendment 85 would involve a breach of the ECHR. I am very committed to the ECHR and the principle of human rights, but part of that principle is that none of them is absolute. They all require to be balanced against one another and applied in a proportionate manner. The intention of legislation in the area is to prevent bad behaviour and its existence in relation to constituency campaigns has, broadly speaking, prevented bad behaviour rather than resulting in a slew of cases before the courts; it has rarely had to be enforced. If we had it in relation to national campaigns for referendums or elections, I think that it would also have that effect of preventing bad behaviour.

I welcome the fact that Adam Tomkins and the minister have both suggested that a body such as the Scottish Law Commission might consider the matter further. For the time being, I seek permission to withdraw amendment 85. I will consider whether there is another way to bring the debate to the chamber at stage 3. Whether or not we make a change to the bill at this point, I think that Parliament as a whole needs to debate the issues in more depth in the future.

Amendment 85, by agreement, withdrawn.

Amendments 86 and 87 not moved.

Schedule 6 agreed to.

Section 36 agreed to.

Section 37—Power to modify this Act

The Convener: Amendment 70, in the name of Adam Tomkins, is grouped with amendments 71 to 73.

Adam Tomkins: The amendments in the group apply to section 37, which contains the power that the Scottish ministers will have, if the bill is enacted, to make regulations that modify legislation

"as they consider necessary or expedient".

The breadth of section 37 was one of the issues about which witnesses were most critical when they gave evidence at stage 1.

The purpose of section 37 is to ensure that this framework legislation for future referendums is sufficiently "dynamic"—the word that the minister has used many times—and flexible. The committee took a nuanced position on section 37 in its stage 1 report by supporting its objective to provide for dynamic legislation for referendums in the future, while welcoming what was and, I hope, is still the cabinet secretary's openness to considering amendments that would limit use of that power while still meeting the policy objective.

Amendments 70 and 71, which are in my name, are designed to deliver exactly that—to maintain the policy objective of section 37, but limit the use of the ministerial power to modify enactments in two ways. First, amendment 70 would remove the words "or expedient" from section 37(1). Secondly, amendment 71 seeks to leave out the phrase "(or proposed modification)". Section 37(1) would therefore read:

"The Scottish Ministers may by regulations make such modifications of this Act as they consider necessary ... in consequence of or in connection with any modification"

—but not "proposed modifications"—

"of any other enactment".

Those are the two elements of the overbreadth—if I can put it that way—of section 37 that attracted most criticism from witnesses, including Dr Alan Renwick of University College London's constitution unit. In his written submission to the committee, he stated that the inclusion of

"the words 'or proposed modification' would seem to offer Ministers a mechanism for making almost any change without the need for primary legislation."

That would be an extraordinary power for this or any Parliament to give ministers, so it needs to be curtailed without undercutting the stated purpose of section 37. I hope that that explains amendments 70 and 71.

I will not speak to amendment 72, in the name of the minister—I will let the minister speak to it.

Amendment 73, which is also in my name, is a procedural amendment that would mean that regulation that might be made under section 37 would be subject to super-affirmative procedure, rather than merely affirmative procedure. It simply seeks to protect Parliament and to prevent its legislation from being unilaterally changed by ministers without appropriate parliamentary scrutiny. That would add a procedural safeguard to the substantive curtailments of ministerial discretion that amendments 70 and 71 seek to apply.

I move amendment 70.

Michael Russell: I think that Mr Tomkins and I are pretty close to agreement on the changes that need to be made in section 37; we are now fine tuning the detail of those changes. I have accepted—as I did when I gave my initial evidence—that we need to reassure people about section 37. The amendments will adjust the delegated power in section 37 and preserve the dynamic nature of the legislation, while providing a bulwark against the possibility of the legislation being misused, which was one of the committee's concerns.

I welcome amendment 71, which is in the name of Adam Tomkins. It will remove the option of introducing modifications based on proposed modifications for other elections or referendums. Having heard the evidence from stakeholders who expressed concern that the power as drafted could be used to amend the framework by the back door, I had decided to lodge an amendment, but that was not required. I therefore support amendment 71 and encourage the committee to do the same.

I cannot support amendments 70 and 73. Amendment 70 would remove the option of Scottish ministers introducing, for Parliament's approval, amendments that would, in ministers' view, improve the referendum process, although they might not be strictly necessary. One example is the amendment to make Easter Monday a dies non, which we have already discussed and included in the bill. If ministers wanted in the future to make such an amendment using the section 37 powers, with the idea of taking a proportionate approach to a comparatively minor matter, they would wish to have the power to make modifications that are "expedient".

Standardising the dies non across polls is sensible and would reduce the risk of confusion, but it is not beyond doubt that its being described as necessary could be challenged. I am sure that counting officers and electoral registration officers could deal with different processes for different polls, but that would increase the risk of inadvertent errors. Under the amendments the power will be constrained, but if we were to delete the words that Mr Tomkins suggests we delete, that would make it more difficult to use the framework in a sensible way.

Amendment 73 would introduce requirements for any draft regulations under section 37 to be the subject of consultation and to be accompanied by an explanatory document. I will not support that amendment—not because I am against what it seeks to do, but because it is not necessary. The first part of the amendment deals with consulting on draft regulations. As, I am sure, the committee appreciates, consultation of stakeholders on proposed amendments related to elections is a given. The Scottish Government routinely consults on proposed secondary legislation concerning elections—for example, the secondary legislation that is needed for local government elections and Scottish Parliament elections.

I sympathise with the suggestion that an element of statutory consultation should be required, as we discussed at stage 1. That is why I have lodged amendment 72, which will require Scottish ministers to consult the Electoral Commission on use of the section 37 power. That will fulfil the requirements in Adam Tomkins's amendment 73, and go further. As we have heard, the Electoral Commission is a valued source of independent expert advice. The commission is well placed to comment on any proposed use of the power, and to help to ensure that proposals are as appropriate as possible.

Patrick Harvie: I am little unclear, cabinet secretary. If there is time for the Government to consult the Electoral Commission, then surely there is also time for the wider consultation that amendment 73 would require? Would not it be reasonable to suggest that regulations being the subject of such wider consultation might, to an extent, allay the concerns that have motivated amendment 70, and allow amendments or adjustments that are expedient, but not necessary, to attract greater confidence in them?

Michael Russell: I do not disagree with Patrick Harvie. Therefore, a criticism of my amendment 72 might be that it should be drawn more widely in order that other bodies will also be consulted. I would be prepared to consider that. However, the normal practice is to consult the Electoral Commission on such issues; that exists in other legislation. If Patrick Harvie is suggesting that we should consider an amendment like amendment 72 at stage 3 in order to widen the process out to wider consultation—if that is what Mr Tomkins seeks to achieve—I am willing to consider that.

Proposed new subsection (4)(b) in amendment 73, however, includes a requirement that regulations that are laid before Parliament be accompanied by an explanatory document. That change is unnecessary; it is already practice that

draft regulations be accompanied by a policy note. That addresses the matter of amendment 73.

Amendment 72 addresses the committee's objections in a proportionate way. However, if members feel that amendment 72 requires to be slightly widened to include other bodies, I will be happy to consider how we might do that.

Patrick Harvie: All the amendments in the group are reasonable. I welcome the cabinet secretary's willingness to consider for stage 3 an amendment that would widen the consultation. That, I hope, at least holds open the possibility that at stage 3 we can meet Adam Tomkins's intentions. Although I will support the Government's position, I would like the cabinet secretary and Adam Tomkins to see whether it is possible to work together to achieve something that is agreeable and broadens the consultation.

The Convener: Nobody else wishes to comment, so I invite Adam Tomkins to wind up, and to press or seek to withdraw amendment 70.

Adam Tomkins: I am grateful to the cabinet secretary and Patrick Harvie for their remarks. My concern about Mr Russell's amendment 72 is that it would impose on Scottish ministers a duty to consult the Electoral Commission, but would not confer on the Scottish Parliament the right to see the advice of the Electoral Commission before voting on any statutory instrument that might be made under section 37.

Michael Russell: I am happy to include that in consideration for stage 3.

Adam Tomkins: I was going to go on to say that, if that could be included for consideration at stage 3, that would certainly meet my concerns.

Given the nature, tone and substance of the cabinet secretary's comments, I am happy not to press amendment 70. I will press amendment 71 and but not amendment 73, subject to those considerations and the fine tuning that the cabinet secretary described being revisited in time for stage 3.

Amendment 70, by agreement, withdrawn.

Amendment 71 moved—[Adam Tomkins]—and agreed to.

Amendment 72 moved—[Michael Russell]—and agreed to.

Amendment 73 not moved.

Section 37, as amended, agreed to.

Section 38 agreed to.

Section 39—Restriction on legal challenge to referendum result

10:45

The Convener: Amendment 110, in the name of Jackie Baillie, is in a group on its own.

Jackie Baillie (Dumbarton) (Lab): Amendment 110 is my final amendment about timescales. I have been persistent. I am clearly an eternal optimist, and I live in the vain hope that the Scottish Government might even agree with me on this one.

The amendment proposes that the period in which a challenge may be launched to the result of the referendum via judicial review should be eight weeks, rather than the six-week period that is set out in the bill. That increased period for reflection and discussion before legal proceedings are engaged in would be helpful. It is always better to allow time for deliberation before something as substantial as a judicial review is asked for, and the proposal is consistent with the theme that has surrounded the majority of my amendments, which has been about ensuring that there is more time for the process.

I move amendment 110.

John Mason (Glasgow Shettleston) (SNP): Will the member give way?

Jackie Baillie: I have finished. You were too slow, Mr Mason.

The Convener: You can still contribute at this point if you wish, Mr Mason.

John Mason: I just wanted to ask Jackie Baillie—maybe she would like to intervene on me—whether she could tell us a little more about her reasons for proposing a period of eight weeks rather than six, seven or nine weeks. Does she have a particular reason for proposing eight weeks? I am wondering whether she is going to intervene before I finish.

The Convener: Jackie Baillie will have a chance to wind up, so she will be able to answer your question then if she wishes to do so.

Do any other members wish to contribute to the debate?

Patrick Harvie: I have resisted Jackie Baillie's other amendments on timings, but I am more open to amendment 110 than I have been to the others. The practical barriers to initiating a judicial review are significant, especially for those who do not come with financial resources, and there is perhaps a reasonable case for adding a little more time to allow those barriers to be overcome. However, I am also open to hearing what the cabinet secretary has to say.

The Convener: We will hear from him right now.

Michael Russell: Convener, persistence pays off in the end. Not only do I thank Jackie Baillie for lodging amendment 110 but, having listened to her points—and notwithstanding the fact that I am intrigued by John Mason's view that there is a mystical element to the number eight that Jackie Baillie knows about but nobody else does—I think that hers is a defensible position. Patrick Harvie made a sensible point, too. Making a challenge is a big step for people to take, and I think that they should be given a slightly longer period to do so, so I am happy to accept the amendment.

The Convener: I call Jackie Baillie to wind up and press or withdraw her amendment.

Jackie Baillie: Convener, I will quit while I am ahead. I press amendment 110.

Amendment 110 agreed to.

Section 39, as amended, agreed to.

After section 39

Amendment 88 not moved.

The Convener: Amendment 74, in the name of Adam Tomkins, is in a group on its own.

Adam Tomkins: Amendment 74 provides that the Scottish ministers, Scottish public authorities, the Scottish Parliament and members of the Scottish Parliament

"must respect and, so far as is consistent with their functions, implement decisions made by the referendum."

The amendment is designed to start relatively late in the legislative process a debate that I wish we had started much earlier, which is to think a bit more carefully about what the relationship is between decision making by referendum and our ordinary processes of parliamentary politics.

Speaking for myself, I think that we have made a bit of a mess of this in the United Kingdom. We have had resort to constitutional referendums for a variety of reasons, which we can argue about, that are probably subjective rather than objective truths, and we do not always know what to do with them after they have happened. In other words, the relationship that we have in Britain and in Scotland between parliamentary democracy and popular or direct democracy is unhelpfully untidy. I do not think that it is doing the political process any favours, and I think that it is doing it some harm.

Amendment 74 is designed not to tie up all those loose ends—I do not think that any amendment could do that—but at least to tie up some of them, and to try to legislate for what the relationship ought to be between, on the one hand, Government and Parliament and, on the other, decisions made by referendums.

The other element of the role of referendums in our democracy, which I think that this bill might usefully have addressed but has not, is the question whether referendums are binding or merely advisory, and, if they are binding, on whom they are binding and what is the nature of the bond—is it a legally enforceable bond, or is it a political commitment or what have you? Amendment 74 seeks to address that issue by moving beyond it and saying that referendums decide things and that, although the decisions that referendums make are not necessarily legally binding, there is a legal and constitutional obligation on those who hold public office to seek to implement those decisions, within their powers.

I am not sure that I am going to press the amendment. However, it is more than a mere probing amendment. It is designed to elicit a debate, or at least a response from the Government, on what we want the relationship between parliamentary democracy and popular democracy to be in Scotland and on why we want to legislate on referendums without addressing that broader fundamental question. It is also designed to get a response to the question of what we mean when we say that a referendum is merely advisory or, contrariwise, is somehow binding. Those are elemental questions about the role of the referendum in modern Scottish politics. It would have been helpful to have had those questions addressed earlier in the process, but at least we are able to address them now.

I move amendment 74.

John Mason: Will the member take an intervention?

Adam Tomkins: I have finished.

The Convener: You can make your point now, Mr Mason.

John Mason: I did not want to interrupt Mr Tomkins too early; my apologies for being too late.

I am intrigued by what Mr Tomkins is saying. I understand a bit about implementing decisions, and I think that it is good that we are having this discussion because, as I understand it, all referenda have been advisory until now, both in Scotland and the UK, although people have committed to accept—

Adam Tomkins: Apart from the alternative vote referendum, which was binding.

John Mason: Thank you for that clarification.

I am interested in what the member means by "respect". Does that mean "obey"? I think that I respect the result of every election. I was defeated in 2010 and respected that result. However, I

immediately began campaigning to win the next election that I would stand in. Does respecting the results mean not campaigning against the result? Perhaps Mr Tomkins can answer that when he sums up.

Patrick Harvie: Adam Tomkins rightly says that we need a deeper debate about the relationship between parliamentary democracy, direct democracy, and deliberative and participative democracy, and it is useful that we have the opportunity to discuss that today. As was the case with the issue that I addressed in my amendments in the first group today, I doubt that this discussion will be the last word on the matter, and I think that it will require further reflection.

Mr Tomkins is right to acknowledge that the UK has made some serious errors in the way in which it has used referendums in recent years. However, I do not think that amendment 74 deals with the issue in the right way. The idea that we would move from a position of saying that referendums are advisory to a position in which we simply prohibit advisory referendums—that seems to me to be what the amendment would do, as it would require the implementation of the result rather than the consideration of the result by political decision makers who could decide what to do with that advice—seems to go way too far.

There is no timescale involved, so it seems to me that, if we pass the amendment, members of the Scottish Parliament for all time and in all sessions would be bound by the result of a referendum that had taken place however many years previously. Such an approach would limit the ability of the people of Scotland to choose, in future elections, representatives who disagreed with the result of a previously conducted referendum.

We recognise that there is a difference between pre-legislative and post-legislative referendums, which is not properly dealt with by amendment 74, and has not been properly dealt with in the debate that we have had. Amendment 74 asks us to confront some important questions, but I do not think that it resolves those questions. Perhaps we will need further debate on the matter; at the moment we are not in a position in which we can agree to an amendment that deals with the issues.

Michael Russell: I thank Adam Tomkins for lodging amendment 74. The amendment has prompted a useful discussion, which is related to the wider discussion of how the constitution works in these islands, where there are different Parliaments and different traditions of sovereignty—that is an issue in this context.

The current Tory party manifesto contains a commitment to a constitution, democracy and rights commission of some sort. I have to say that I expect the worst from such a commission, but if any good were to come from it, that might involve consideration of issues such as the proper place of referenda and how they operate in our different traditions.

As we saw in the 2016 referendum, the result of a referendum is not always clear cut, so there needs to be space for further discussion. Further discussion has taken place in Parliament. The Brexit example shows that the Parliament needs to have space to decide how to move forward on a decision that was, at the very least, contested—we have discussed the nature of the campaign, and of course the proposal was rejected in Scotland and Northern Ireland.

If we apply the approach in amendment 74 retrospectively and ask what the situation would have been if there had been a requirement in the UK to observe the outcome of the 2016 referendum without further debate, we simply do not know the answer, but it would have changed the process and it might have changed the outcome. For example, what would have happened if there had been requirements for how and when to leave? Would the European Union Referendum Bill have been passed in such circumstances? I remind people that, in June 2015, David Lidington, who at the time was Minister for Europe and the minister responsible for the bill, said, quite clearly:

> "The referendum is advisory, as was the case for both the 1975 referendum on Europe and the Scottish independence vote last year."—[*Official Report*, *House of Commons*, 16 June 2015; Vol 597, c 231.]

That was an assurance to the House of Commons that the referendum was advisory.

I accept Adam Tomkins's point about the AV referendum, which is an anomaly that we should consider.

Referendums might in future be initiated by a citizens assembly. In that regard, the Irish experience is interesting and germane. There is no automatic assumption written into the process that recommendations from referenda will be implemented; there is no automatic right in that regard. Even the celebrated referendum on the constitutional ban on abortion came from a process of moving towards a position, through a committee of the Dáil Éireann, which eventually decided that holding a referendum was the right thing to do—in a country in which referenda are much more used than is the case here.

A citizens assembly could bring forward proposals for referenda on a wide range of topics, on which the Parliament might well have split views across party or other lines. An unclear legal requirement to implement the result without further discussion or consensus in the Parliament would

not be the best approach to follow for people who are elected to represent their constituents, perhaps on those very issues.

I cannot support amendment 74. It raises concerns that we need to consider. Indeed, the bill has raised a number of such concerns. It is important to find a way for any referendum to lead to a consensual outcome—something that has proved to be very difficult in the political traditions to which we belong—but seeking to bind members and the Parliament is not the solution.

I say again that the debate about the place of referendums in the constitutional structure and how they apply in different democratic and constitutional traditions is important and should continue. I ask Adam Tomkins not to press amendment 74, but I certainly want debate and discussion about how referendums are used to continue.

11:00

Adam Tomkins: I thank John Mason, the minister and Mr Harvie for their thoughtful questions and comments. The debate is worth having and, although I have already indicated that I do not intend to press amendment 74, I would like to take a few minutes to respond to the points that have been raised. First, John Mason asked what is meant by "respect". There is no intention to create any legally enforceable duty. It would not be a question for the court to determine whether a minister or a member of the Scottish Parliament has or has not respected the referendum outcome.

Amendment 74 is an attempt to prevent referendums from becoming what the Canadians once called "neverendums", where the question that has been put to people is somehow not determinative of the referendum outcome. Referendums are about making decisions, even if those decisions do not formally or legally bind Parliaments absolutely.

John Mason: Would time come into it in some way? Does the member think that an outcome would be binding for a certain amount of time and then it would no longer be binding after that?

Adam Tomkins: To be honest, I had not considered that interesting question, which Mr Harvie also raised. For how long, if at all, should candidates in future elections to this or any other Parliament be bound by referendum decisions that were taken at some point in the past? I have not given that question sufficient thought and it would need to be thought through before my idea was taken further forward.

In response to the other major point that Patrick Harvie made, I have no intention of prohibiting advisory referendums or of turning them into binding or mandatory referendums. If that is the intention that is conveyed by the wording of the amendment, the wording is unfortunate. I am simply attempting to bring some clarity to what is currently unhelpfully murky.

As I said, the lack of clarity about the issue is doing harm to our political process. What is the relationship between our ordinary processes of parliamentary democracy and the extraordinary event of holding a referendum? The fact that we do not know the answer to that question is doing us harm.

Patrick Harvie: Is it not fair to say that a great amount of the murkiness and lack of clarity is not the result of legislation or referendum rules but the result of the politics of a recent but substantial referendum, in which the Brexiteers do not agree what "leaving" or Brexit means and what implementing the result in 2016 means? Given that the Brexiteers do not agree, how can anybody—Government, Parliament or anyone else—be bound to respect something that the winning side cannot even define?

Adam Tomkins: I know that there is an election on, but I have been trying not to make politics out of the issue. The criticisms that can be made of the 2016 referendum can also be made of the 2014 referendum. During the 2014 independence referendum campaign, the First Minister of Scotland said that it was a once-in-a-lifetime event and a once-in-a-lifetime opportunity.

Michael Russell: Will the member give way?

Adam Tomkins: Not at the moment. Everything that the First Minister has said and done since 2014 has undermined those claims, which she made on the record several times in 2013 and 2014. That is just one example, but there are many.

Michael Russell: Will the member give way on that point?

Adam Tomkins: Let us not get into trading examples and counterexamples.

The point is made that there is a lack of clarity between what is decided in referendums and what the implications of those decisions are for our ordinary processes of parliamentary politics. It is unfortunate that, while deliberating on a bill on referendums, we have not had a fuller and franker exchange of views about how we, as MSPs, understand the relationship between parliamentary politics and the extraordinary things that are referendums.

I have already said that I do not intend to press amendment 74. I am grateful to all the members who contributed to the debate.

Amendment 74, by agreement, withdrawn.

Amendment 89 not moved.

The Convener: Amendment 111, in the name of Jackie Baillie, is in a group on its own.

Jackie Baillie: Given what happened with my previous amendment, I hope that I am on a roll. The cabinet secretary is shaking his head.

I am conscious that this is the last amendment today, and I do not wish to delay the committee unduly, but amendment 111 covers an area of current debate. It is fair to say that anyone objectively considering the outcome of the 2016 EU referendum will probably use terms such as "chaos" and "uncertainty".

All of us voted based on myriad reasons. Some were influenced by slogans on the sides of buses that were patently untrue. There was no detailed prospectus of what leaving the EU would mean, what it would do to our economy and jobs, what it would mean for trade deals or what the terms would be. We have, as has been referred to in discussing other amendments, subsequently seen politicians unable to agree, the UK Parliament unable to steer a way through and a deal that is neither widely welcomed nor widely understood. In all those circumstances, it is not surprising that there is a call for a people's vote or a confirmatory vote.

Constitutional change is usually substantial and far reaching, so when constitutional change is made as a result of negotiation between Governments and politicians with potentially competing interests, we should put the deal they come up with back to the people for a confirmatory vote.

I am delighted to note the support of the First Minister and, indeed, the cabinet secretary, for a people's vote following the EU referendum, and I agree with their view. My argument is simple: we need a consistent position for all referenda on constitutional issues.

John Mason: Will the member give way?

Jackie Baillie: I am on my last sentence. I am sure that the member will contribute to the debate.

In my view, we need a second, confirmatory vote on any plan that is negotiated.

I move amendment 111.

John Mason: I get the point that, in some cases, we might want a confirmatory referendum, but I question whether we would want to have one in every case. I am particularly thinking of 1997, when we had a clear vote in favour of setting up of this Parliament and for taxation powers.

At the moment, we face a certain amount of voter fatigue. The public is not very enthusiastic about this general election, let alone quite a few others. If we had gone back to the public in 1997 and said, "You made a clear decision, we are implementing it and now we want you to have yet another vote", I wonder how much enthusiasm there would have been for that.

Alex Rowley: I think that the experience of the 2016 referendum supports this amendment. We still do not know what the outcome will be. Even with Boris Johnson's deal, it will still take years to negotiate. We might yet still crash out in a year's time, or in June next year. Because the outcome of the 2014 referendum was no, we did not have a period of negotiation, but when a negotiation is required, only once we have had the negotiations will we know what the deal is.

The Government has introduced the bill in the hope that it can hold an independence referendum next year. If it were to win that referendum, there would have to be—as we now know happened with the Brexit vote—a period of negotiation before the people of Scotland would know what they had actually voted for and what the deal was. Given the experience of the 2016 vote, it makes sense that, once we know what the deal is, we can either confirm that that is what we want or say, "Actually, we were better off where we were". That is why, on the basis of the experience of the 2016 referendum, this is the right amendment.

John Mason: Is the member arguing that if the details were known before the referendum, as might have been the case in 1997, we would not need a confirmatory vote, but that if the details were not known, as in 2016, we would? If so, we would need a confirmatory vote only in some cases.

Alex Rowley: This bill is about a referendum that the Government wants to hold next year. At that point, we will not know what deal we would get with the rest of the United Kingdom, or whether we will be able to get back into Europe and the consequences of that. I am sure that Mike Russell and I would argue about whether there would be a hard border, although there would be a hard border down the Irish Sea with the Brexit deal.

You would be putting faith in a question without knowing what the outcome would be. It makes sense to me that, once the negotiation has been done and the deal is on the table, the deal is put back to the people and they are told that that is the best deal that we have been able to get.

I am not sure that before 2016 many people understood the complexities of the negotiations and where we would get to. The difficulties and complexities would be exactly the same if the

Scottish people voted for independence, and, at the end of the day, that deal might look quite different from what people thought they were going to get. In those circumstances, it seems sensible to put that back to the people and ask, "Is that what you wanted?"

Patrick Harvie: Alex Rowley says that the experience of the 2016 referendum supports this amendment. He is absolutely right in that, but it is perhaps the strongest example of the adage that hard cases make bad law. I think it undeniable that the 2016 referendum process resulted in an utter mess, but that does not mean that we are incapable of having referendums that result in clarity.

There are several problems with amendment 111. First, what does "a constitutional matter" mean? If, for example, the Scottish Government, perhaps working with a citizens assembly or through wider public consultation, were to produce a bill for a new electoral system for the Scottish Parliament, and that system had been worked out in detail and was well understood—it might be politically contested, but it was clear and specific—would such a change in the electoral system or to the number of members in the Scottish Parliament require a confirmatory vote? To require such a vote when the proposed legislation is clear, specific and well understood would be redundant.

There is a political question about what losers' consent means. John Mason mentioned the devolution referendum that created this Parliament. There were two devolution referendums at that point. One resulted in a very clear outcome in Scotland; the other resulted in an incredibly narrow outcome in Wales. However, the winners in Wales did not say, "Count the votes. You lost. Suck it up." That is not what losers' consent means. The side that won reached out to those who were on the losing side to try to understand their concerns and account for those in how they implemented the result. That is how losers' consent is earned.

It is clear that, had the UK Government taken a similar approach following the 2016 referendum, we would already be outside the EU and still inside the single market in a moderate compromise. I would dislike that, but it would have achieved losers' consent and some clarity. I might not be happy about this, but the case for a confirmatory vote simply would not exist politically. The question about a confirmatory vote arises only because of the mess and confusion with the EU referendum and not because of a referendum in and of itself, so I do not support amendment 111. However, I consistently support the call to put back the question of the current EU crisis to the people to give them a chance to cancel it altogether.

Tom Arthur: I briefly echo Patrick Harvie and John Mason's comments: to cite the experience of the 2016 referendum and what followed as justification for a confirmatory referendum is to learn the wrong lessons from that experience.

11:15

The mess of Brexit was ultimately a consequence of two factors: first, the lack of a detailed prospectus and the lack of significant time for debate and public engagement beforehand; and, secondly, what followed with regard to implementation by the UK Government, which was characterised by a toxic mix of hubris and incompetence. It would have been perfectly feasible for the UK to leave the European Union in March last year as originally scheduled, but that would have required a different approach from the UK Government, engagement with the devolved Governments and a recognition of the closeness of the result.

There are also issues about the definition of "constitutional matter". Patrick Harvie's suggested scenario illustrates that, if there has already been exhaustive debate about and agreement and consensus reached on having a referendum, having another one would be redundant; it would not be required. For those reasons, I am unable to support amendment 111.

Michael Russell: I am sorry to disappoint Jackie Baillie—my support for her amendments was short lived.

The intention is for the bill to set a framework that can provide for future referendums across Scotland. On that basis, it does not seek to prescribe different referendum processes for particular subject matters. Indeed, the committee has specifically rejected that approach. There has been debate and discussion at stage 1 and stage 2 about whether that is possible. I agree with the committee's conclusion that it is not possible or desirable to do so. To lodge such an amendment at the very end of the process brings back a principle that we had rejected at the start of the process.

There is nothing in the bill that prevents the framework that it would establish being used again on related questions—as ever, that would be a decision for the Parliament, and the Parliament could therefore choose to do so.

Automatic second referenda are not required. There are circumstances in which that would be blindingly obvious. John Mason gave the example of a referendum result in respect of which there is a massive majority. If there was a majority for a proposition of 70 or 80 per cent, it is very doubtful that we would wish to go through the process again.

The flexibility of the process would allow a second referendum, if it was required; for example, if the information that was provided to voters was flawed, as was the case with the EU referendum, as Tom Arthur indicated. In that case, as Alex Rowley said, people had a false prospectus and found themselves making a decision that many of them now question.

A second referendum might be required if circumstances have changed and things are no longer as they were. The commitment to a once-in-a-generation referendum was always qualified by the change of circumstances, and, boy, has there been a change of circumstances with Brexit. Another example would be if circumstances relating to manifesto commitments arise. A party might make a commitment that, if certain actions are taken, such as being dragged out of the European Union against our will, a second referendum will be required.

Given that the amendment conflicts with what the committee has already decided, and that the requirement for a confirmatory referendum as laid out in the amendment would apply in all circumstances—which it should not—I ask Jackie Baillie not to press the amendment.

Jackie Baillie: I intend to press amendment 111, but I will reflect on some of the comments from the cabinet secretary and the committee members. If the amendment falls, I will consider bringing it back in a different form at stage 3. I always understood that imitation was the sincerest form of flattery, and given the First Minister and the cabinet secretary's comments about holding a confirmatory people's vote, I thought that the amendment would receive support, and I am disappointed that it has not.

It is slightly hypocritical making the argument that a second confirmatory referendum is required in the case of leaving the EU, while insisting that a major constitutional change to Scotland's status in the UK—which is a much longer-established union—would not require one.

I understand John Mason's comments about the enthusiasm for the 1997 referendum and the outcome—it did command considerable support across the parties and across the country, but we can say that with the benefit of reflection.

It is not about planning only for the worst-case or best-case scenarios. Major constitutional issues require consent that is based on what change would mean, rather than on a vague notion such as, as we saw in the EU referendum, taking back control. That was arrant nonsense at the time and it remains arrant nonsense now.

A referendum on constitutional change has far-reaching consequences, and the matter should be put back to the people. I would much rather run the risk of voter fatigue on substantial issues of constitutional change than I would make a change that would harm the country without consent.

I press amendment 111.

The Convener: The question is, that amendment 111 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.

Amendment 111 disagreed to.

Adam Tomkins: Can we have a confirmatory vote on that? [*Laughter*.]

The Convener: Let me think about that for a moment. The answer is no.

Section 40 agreed to.

Schedule 7—Interpretation

Amendment 75 moved—[Michael Russell]—and agreed to.

Schedule 7, as amended, agreed to.

Sections 41 and 42 agreed to.

Long title agreed to.

The Convener: That brings to an end stage 2 consideration of the bill. The bill, which will be reprinted as amended, will be published at 8.30 am tomorrow. I understand from a motion in today's business bulletin that stage 3 is set for Thursday 19 December. The deadline for lodging amendments is noon on Thursday 12 December, which is an interesting date for that.

I thank the cabinet secretary and members for their participation during stage 2. The next meeting of the Finance and Constitution Committee will be on Wednesday 18 December.

Meeting closed at 11:22.

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