OFFICIAL REPORT
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Standards, Procedures and Public Appointments Committee

Thursday 28 March 2024

Session 6

The Scottish Parliament
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CONTENTS

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE
8th Meeting 2024, Session 6

CONVENER

*Martin Whitfield (South Scotland) (Lab)

DEPUTY CONVENER

*Ivan McKee (Glasgow Provan) (SNP)

COMMITTEE MEMBERS

*Jackie Dunbar (Aberdeen Donside) (SNP)
*Stephen Kerr (Central Scotland) (Con)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Dame Susan Bruce (Electoral Commission Scotland)
Louise Edwards (Electoral Commission Scotland)
Professor Ailsa Henderson (Boundaries Scotland)
Andy O'Neill (Electoral Commission Scotland)
Colin Wilson (Boundaries Scotland)

CLERK TO THE COMMITTEE

Catherine Fergusson

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Standards, Procedures and Public Appointments Committee

Thursday 28 March 2024

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Martin Whitfield): Good morning. I welcome everyone to the eighth meeting in 2024 of the Standards, Procedure and Public Appointments Committee. I have received no apologies this morning.

Our first agenda item is a decision on taking business in private. Do members agree to take in private item 3, which is consideration of the evidence that we will hear from two panels on the Scottish Elections (Representation and Reform) Bill at stage 1?

Members *indicated agreement.*

Scottish Elections (Representation and Reform) Bill: Stage 1

09:30

The Convener: Our second agenda item is to welcome the first panel, which is Ailsa Henderson, who we can still call the new commissioner for Boundaries Scotland—welcome to your first appearance before us—and Colin Wilson, electoral boundaries review manager for Boundaries Scotland.

I will kick off with some questions. I am content for both of you to answer questions if you have contributions to make, or indeed for only one person to answer, if that is easier.

My first question is about the proposal in the bill to move the deadline for the review of aspects of local authority elections from 31 December 2028 to 30 April 3031. [*Interruption.*]

The Convener: Yes—2031. It would an incredible wait if it was 3031.

Professor Ailsa Henderson (Boundaries Scotland): That would be a long review.

The Convener: I can imagine some councillors being content with that.

The first question is, can you explain why that change is being proposed? The more important question is, do you envisage any unintended consequences as a result of the change, given that the proposed new date is but a year away from when local authority elections will take place? There is some concern about that narrowness of time, leading up to the election date, if there are any problems following final decisions.

Professor Henderson: I will go first, then Colin Wilson can come in if he thinks that I have missed anything. Thank you very much for the question, and thanks for the invitation to be here today.

On the logic of that change, the electoral cycle for local elections has moved from every four years to every five years. The elections were to have been 2021, 2025 and 2029, and our original date of 2028 was to be one year before that 2029 election. Now that we are in five-year terms, the elections will be 2022, 2027 and 2032, so the 2031 date is one year before the 2032 election. In that respect, we are not any closer to the election than we would have been otherwise; we are just adjusting to the fact that we are moving from four-year terms to five-year terms.

There are two other benefits of moving from 2028 to 2031. One is that we avoid having a live review during the 2027 local elections. It would be

very confusing for people if we were asking them to vote in one set of wards while suggesting that those wards were possibly problematic and were about to change. The other benefit is that moving from 2028 to 2031 means we that we will not have a review that is done on much older electorate data and then put into action for the 2032 election. That means that the review will be conducted on more recent information and will therefore be fairer.

There are issues to be aware of, though. One is that when we inherited the Holyrood reviews, we informed ministers and colleagues in the Scottish Government elections team that our intention was to move to a series of rolling reviews rather than reviewing all 32 local authorities at once. The islands reviews were to be our first set of rolling reviews. We used that as an opportunity to engage with community councils—that was not just the statutory commitment to engage with councils first, but to go below the level of the council and engage with community councils. That was challenging—it was during a pandemic and lot of that engagement took place online—but rolling reviews allow us a deeper amount of engagement with the public and organisations in council areas.

The only hiccup about moving to 2031 is that we will be commencing a review in 2028, at exactly the time when the Boundaries Scotland and Boundary Commission for Scotland secretariat is supposed to be commencing a Westminster constituency boundary review. There is not a problem with the dates as such, but if the approvals process remains uncertain, we feel that we cannot really begin with rolling reviews and get started from the moment that we are done with the Holyrood reviews in May 2025. If we can get started sooner, managing the workload will absolutely not be a problem.

The other thing to note is that if we are to undertake a review in 2028 that is due in 2031 while the other commission is simultaneously conducting a Westminster review, one commission will be undertaking a review using old wards at a time when the other is trying to change the wards. It is a similar, if less severe, issue than having a live review during the 2027 local elections, but it is something to be aware of. Is there anything that you want to add, Colin?

Colin Wilson (Boundaries Scotland): No. You have covered it.

The Convener: If the problem that you have identified was a risk register, it would be amber rather than red. It is a risk that you are aware of and you feel that it is manageable.

Professor Henderson: Yes. We know that it is absolutely manageable because we have done it before. We had the same situation during the most recent Westminster review because we were undertaking the islands reviews at the same time. We were also changing the ward structure in six local authorities and we were having to use the old wards as the building blocks.

Sometimes we were able to argue that we should use something that looked closer to the new wards, because the logic for moving the ward was also the logic for moving the constituency boundary. I am talking across two commissions here, but that is because I sit on both.

The Convener: I certainly cannot solve one of those commission problems for you, I am afraid. The election bill that we are looking at today would be an opportunity if there was a better system, but you are confident that you are aware of the challenges and the suggestion that is being made is probably the best that is available to you.

Professor Henderson: Absolutely. I would think so. One way of putting it is that it solves more problems than it creates.

The Convener: My final question in relation to this part of the bill is, working back from the deadline of 30 April 2031, do you have sufficient time to be confident that you can hit the deadline and complete the review by then?

Professor Henderson: Absolutely, yes. We work to a series of different timelines, but if we are thinking about now until 2031, there is more than enough time to undertake a review of local authority areas.

The Convener: I am grateful for that confidence. Stephen Kerr, I think you have a question.

Stephen Kerr (Central Scotland) (Con): Yes, it is just a quick question. You have made what seems like a very pragmatic suggestion about rolling reviews, but you also said that you suggested that to Scottish ministers and they clearly have not embraced it. Do you know why that idea, in your professional point of view, was not accepted by Scottish ministers?

Professor Henderson: Are you talking about the move to automaticity?

Stephen Kerr: No, the rolling reviews. You suggested—

Professor Henderson: Oh, no—they are happy with the rolling reviews.

Stephen Kerr: They are happy with it?

Professor Henderson: Yes, they are absolutely happy with that. They have no objections to it at all. It is just that, after the fifth review, some of our proposals were rejected, and then after the islands review, some others were rejected. We then went to the Deputy First Minister at the time and said

that, until the approvals process is clarified, it does not make sense for us to continue to generate proposals. We would be fulfilling our statutory duties and doing the job appropriately, but those proposals could be rejected for questionable reasons. Until the approval process is started, we are not keen to get started early on reviews.

Stephen Kerr: So were the proposals that you took to the Deputy First Minister rejected because ministers wanted further clarity on the approval process, or were they rejected for other reasons?

Professor Henderson: No. There are two things going on here. After the fifth review, the minister at the time rejected the boundary proposals, and then after the islands review, two of the six local authority boundary reviews were rejected.

The elections team and the minister were well aware that we were planning on moving to a system of rolling reviews, and they were entirely on board with our doing that. The hiccup in doing so is that, until the approvals process is sorted, it does not make sense for us to throw new proposals into a flawed process.

Stephen Kerr: That makes perfect sense to me.

Will you detail where the 15-year cycles for all the boundary reviews fall? We have just had a Westminster boundary review, and I think that you said that there will be another Westminster one in 2028.

Professor Henderson: Yes.

Stephen Kerr: Will you describe that? I am certainly interested in that, because I cannot get my head round it.

Professor Henderson: Are you asking about when they would align?

Stephen Kerr: Yes. When would the work begin on the 15-year review of Westminster? You said that that would be 2028.

Professor Henderson: Both reviews will begin in 2028.

Stephen Kerr: That is five years after the previous one, so it is a 10-year process. Will you describe the timescales?

Professor Henderson: Sure. There are multiples of electoral terms. We are moving to a system in which we would be completing a review before the third such term for local authority elections, but they are on slightly different timescales.

Stephen Kerr: How long does—

Professor Henderson: How long does the review take? Is that your question?

Stephen Kerr: Yes. When do you begin prior to the deadline to complete it?

Colin Wilson: It is roughly about two years.

Professor Henderson: Two years.

Stephen Kerr: Two years.

Colin Wilson: Roughly.

Stephen Kerr: Why is the Westminster one starting in 2028?

Colin Wilson: Because it reports in 2031. It will start in late 2028.

Stephen Kerr: Right. Is that a 15-year review as well?

Colin Wilson: At the moment, the Westminster review is every eight years.

Stephen Kerr: Oh—it is eight years. That explains it.

Colin Wilson: It is a wee bit confusing. It was every five years, but it is every eight years currently.

Stephen Kerr: The Westminster review cycle is every eight years. It is 15 years for Scotland, and that is for local government areas and in relation to Scottish Parliament elections. Is that right?

Professor Henderson: Yes—that is the proposal.

Stephen Kerr: That is the proposal. Right.

Professor Henderson: The Westminster one is slightly out of kilter because there were two abortive attempts at reviews but, with the move to automaticity, they should be on schedule now.

Stephen Kerr: That is because of the proposal to have 600 MPs.

Professor Henderson: Yes.

The Convener: The issue covers your dual roles. Your Boundary Commission for Scotland Commissioner role relates to Westminster elections, which is distinct from your other role as chair of Boundaries Scotland, which has responsibility for the Scottish local authorities and the Scottish Parliament elections.

Professor Henderson: The secretariat covers all three types of boundaries. Boundaries Scotland just covers local and Holyrood elections.

The Convener: Your difficulty is that what you have overlapping timetables for reviews that have different starting dates for various reasons. The bill seeks to rectify the change to the terms of office in local government from four years to five years.

Professor Henderson: Yes.

The Convener: On your massive calendar on the wall, you have the review dates highlighted, and you are confident that you can deliver the work to the proposed new timetable, which goes up to 2031.

Professor Henderson: Yes, absolutely.

The Convener: Perfect. There we go.

Stephen, can I pass over to Ivan, or do you want to continue?

Stephen Kerr: It was three electoral cycles—

Professor Henderson: Yes.

The Convener: Yes, effectively.

Stephen Kerr: —and it will stay three. My questions might not have been very clear, but that is very clear now.

Professor Henderson: It always was three, but it was four times three before and now it is five times three.

Stephen Kerr: Yes, that it makes perfect sense. That is the clarity that I wanted.

The Convener: Come on, then, Ivan—let us see whether we can get into muddier waters. [*Laughter.*]

Ivan McKee (Glasgow Provan) (SNP): I will do my best.

Stephen Kerr: Some decent questions, now! [*Laughter.*]

Ivan McKee: Maybe not.

My questions are about the process that you go through in order to decide what the boundaries should be. You can explain that for the record if you want, but I assume that it is all laid out in statute, guidance and so on.

Clearly, population drift, how you adjust for it and the limits within which you take account of that with regard to the numbers on the electoral roll, is an issue.

Do you take other factors into account, and, if so, how? One factor could be community, however you define it. Stability might be another factor, because clearly the relationships between an elected member and their constituents in local groups, schools and wherever else are built up over time and are important. Therefore, constantly making significant changes to boundaries would probably be unhelpful for everyone.

Another factor might be alignment with local government wards, in particular. For example, one ward being spread across three or four constituencies—or vice versa—would not be optimal.

Will you give me a sense of what the requirement is as laid out in statute, and in terms of your rules and guidance? How do you ensure that those issues are taken due account of in the process?

09:45

Professor Henderson: The rules say that we must have regard to local government boundaries, that we have to devise boundaries that are as close to the electoral quota as practicable, that we are allowed to deviate from that if we believe that special geographic circumstances are at play and that, when we do all that, we have to have regard to any disruption that might be caused and to the breaking of local ties, which is different from joining two, possibly different, communities into a single constituency. The legislation specifies that we should have regard to the breaking of local ties, so separation of communities is a bigger problem than merging two disparate areas.

Those are the rules. I will start with the first rule with regard to local authorities. The very first thing that the secretariat does is devise groupings of local authorities and work out—

Ivan McKee: Just for clarity, when you say "local authorities", are you referring to local authority boundaries or local authority ward boundaries?

Professor Henderson: I mean local authorities' external administrative boundaries.

Ivan McKee: So not the ward boundaries. I understand.

Professor Henderson: We work out the theoretical entitlement for each local authority, in terms of the theoretical entitlement to a constituency, then we merge them to try to manage the task by grouping together approximate areas, because we know that when we devise constituency boundaries it has a knock-on effect on neighbouring areas. We have an initial grouping that we use to begin to devise possible constituency boundaries. In doing that, we devise the electoral quota and use it to calculate the theoretical entitlement. When we devise the draft constituencies, we make a note of possible deviation from parity.

We use the Venice Commission's guide in respect of 10 per cent being best practice and 15 per cent being used in exceptional circumstances—we have that in the back of our minds—but we also deviate from that and take special geographic circumstances into account. For example, although there are some protected constituencies in Scotland, when we are looking at other island areas or at rural and remote parts of the mainland, we also consider whether those

satisfy special geographic circumstances in some way.

Because we look at other boundaries at the same time—ward boundaries, community council boundaries and, sometimes, school catchment boundaries—we get a sense of what the communities are. We then put those out to consultation. Often, in responses to the consultation, attention is less on mathematical representation—the electoral quota aspect—and more on organic representation. Therefore, people will tell us, "You've drawn a line through the middle of the community. That doesn't quite work." We use that information to redraw boundaries and go back out to consultation.

The other thing that I would mention is that we are not obliged to use that initial grouping of constituencies. Therefore, in that process and in others, we have changed the grouping of local authority areas when we have thought that a better solution is possible with a different grouping. We shift as we go, basically.

Ivan McKee: Therefore, it is a multifactor problem and you are trying to balance that as best you can.

Professor Henderson: We are trying—yes.

Ivan McKee: You say in your submission that there have been instances—I have obviously not been in Parliament for all of that period—when Parliament and ministers have rejected your proposals. Is it possible to identify which factors Parliament and ministers have been most upset about with regard to your conclusions, and what has caused members to be less than happy? Have they felt that you have ignored certain aspects?

Professor Henderson: Yes. I can absolutely talk you through what we understand to be the reasons. With regard to the fifth statutory reviews of electoral arrangements, the clearest example was probably the rejection of the proposals for Dundee. In part, that was because residents in Broughty Ferry did not wish to be joined in a ward with residents in the east end of Dundee. That was an instance of merging two disparate communities, rather than the issue being breaking of local ties. We felt that, under the statutory rules within which we work, that should not be a reason for rejection. However, it was in the hands of the minister, and the change was rejected.

Some other changes were rejected because it was known that legislation on islands was coming, so we were told that there was no point doing a review of the islands as we were going to re-review them, and to press "pause" on that. I think that that example is in another category. The situation with the islands review was completely different. The matter was no longer in the hands of the minister, but was in the hands of Parliament, but I think that the committee that was tasked with reviewing it ignored the rules within which we work, although it praised our efforts and process.

Five of the six councils that had been asked to report to that committee praised the way that we undertook that work. One was not happy with how we did it, but told us from the beginning that it would not engage with us but would engage in political lobbying because the rules allowed that. That council also did not respond during the statutory consultation period when we consult councils.

During the evaluation of our proposals, no list of criteria was ever published by which that committee would evaluate our work. The committee questioned the importance of parity. That is up for debate, but parity is in the legislation and we absolutely have to pay attention to it. We also feel that that committee introduced a new criterion for evaluating proposals; it seemed to suggest that councils should have a veto over our proposals, but that is nowhere in the legislation. Not only is it not in the legislation, but international best practice precludes people who are going to be elected according to boundaries from having a veto over those boundaries.

We were very disappointed with how the process worked. On the back of that, we wrote to the Deputy First Minister of the time and said that if we were going to continue to do such reviews, we needed the approvals process to be sorted, because we could not fulfil our duties. We said, "You say that we've fulfilled our duties, but you're chucking out the recommendations, because you have invited people in who are arguing for the wards that they represent and do not want them to be changed." That does not seem to be right.

Ivan McKee: I have two more brief questions, which you might or might not want to answer. The first is about the current process. You do the calculation for parity based on the electoral roll. Clearly, as elected members, we represent not only people who are on the electoral roll but everyone in the constituency. Might use of population data rather than the electoral roll be a more effective way of calculating the numbers?

Professor Henderson: My first answer is that we work within the rules that we are given. If the rules that we are given said that we should do that, we will absolutely work within them.

If you are asking me whether there is a gap, the answer is yes—there is a gap. The gaps between the number of names on the register and the number of souls in a location are not even throughout Scotland. With our "review of local government wards" hat on, when we undertook the fifth reviews we were well aware that there

were gaps. That is why we changed the methodology for banding councils. We grouped certain councils together, and we identified theoretical quotas for each of them. Rather than using two measures of population distribution, we used one of population distribution and we used the Scottish index of multiple deprivation—SIMD—which is not a measure just of poverty, as some people think, but is also a measure of access to services. We used that because we knew that there was a gap between the number of names on the register and the number of people in the ward. We have baked that into the design of the wards in how we banded councils, but there is a limit to what we can do when we are working within the rules.

Ivan McKee: That is very helpful. Thank you for clarifying that.

Technology is clearly moving on apace. I assume that you use tools for number crunching. Has any thought been given to use of—I dread to say it—artificial intelligence to analyse all the possible options and to do some optimisation, in order to give you a bit of a head start? Reviewing boundaries is, at one level, a very big and complicated mathematical problem, when we take into account all the factors that you mentioned.

Professor Henderson: That is a good question. We have an annual meeting of all the boundary commissions in the United Kingdom every year. This year, we hosted it in early December and we talked about that. The challenge is that the rules are framed to maximise flexibility—the phraseology is, "as nearly as may be," in the case of the local wards, or "as is practicable". In order to get a computer to do the work, you would need to tell the computer that one rule was worth 10 per cent and another was worth 20 per cent, or that there could be a margin of a certain amount. We cannot reduce things to that level.

Moreover, people living in different parts of Scotland want different things. In some cases—I am talking about local reviews, not Holyrood ones—you might get communities or populations on islands that want a ward of their own in the belief that it would be better for them to be grouped with other islands, because they have similar interests. At the same time, though, the electorate on another island might want to be connected to the mainland because that is where people believe the patterns in employment, travel and so on apply. I think that a computer would do a terrible job of taking those things into account.

We are very much just responding to what the public say when they write in, which is, "You can do better, and here's how." However, as Colin Wilson is the person doing the mapping, he might have an answer for you. Should AI do your job, Colin?

Colin Wilson: No—definitely not. [*Laughter.*] Just for clarity, are you asking whether AI could help me to do my job?

Professor Henderson: Yes—I am sorry. I was not suggesting that it would replace you.

Colin Wilson: We are aware of technologies that we could use. We have not explored them yet, although I know that other UK commissions have.

Ivan McKee: Thank you.

The Convener: The penultimate area that we want to look at is automaticity. Clearly, this vehicle—the bill that we are looking at—could have automaticity written into it. Can you explain briefly why best practice from around the world suggests that automaticity in boundary reviews is desirable? Secondly, does the bill represent a missed opportunity in that respect?

Professor Henderson: To answer the second question first, I say that I absolutely think that that is a real missed opportunity.

The reason for the focus on automaticity in international best practice is that it is concerned with fairness, and that concern surfaces in two ways. First, there is concern about mathematical fairness, attention to parity and avoidance of malapportionment—that is, drawing deliberately unequal wards or, indeed, allowing wards to become unequal over time, which would be passive malapportionment.

In a Scottish context, the rejection of boundary reviews means that we are facing passive malapportionment at the moment, because solutions that were equal at the time of the fourth reviews are equal no longer. The most striking example of that is in the Highland Council area, which has among the top underrepresented and overrepresented wards in Scotland.

International best practice is concerned with fairness not only in terms of mathematical representation, but in terms of independence. People who are elected under constituency or ward boundaries should not have a say in designing those boundaries. Some systems do not require that attention be paid to that sort of thing, because they use national list proportional representation, in which either there are no electoral boundaries or the electoral boundaries are connected to the constituent units of a federation, with just the number of seats changing.

With areas that have electoral systems such as first past the post and mixed-member proportional representation, you can identify a number of different approval processes, one of which is automaticity. Therefore, you can actually distinguish between those on which a boundary commission retains the final say and those on which it does not.

As well as automaticity, there is a return form through which, after some questioning, the recommendations of the boundary reviews are sent back to the commission, which then has the final say. Sometimes, there might be a culture of presumed acceptance, in which a boundary commission does not have the final say in a formal sense, but everyone agrees not to touch the recommendations of it, as an independent commission. That is the case in Ireland. Sometimes, recommendations are sent on to an augmented commission, as is the case in Australia.

Automaticity is seen as important, because it partly protects the perceived legitimacy of the electoral process. Boundaries Scotland, along with the Electoral Commission and the Electoral Management Board for Scotland, is concerned with making sure that elections are run freely and fairly, and with preserving a sense of democratic legitimacy. Concerns arise when people start questioning—or, I should say, rejecting; questioning is something that we welcome—the recommendations of a body that has undertaken its statutory responsibilities. That, I think, takes us into an unfortunate situation.

10:00

The issue is not just the actual interference and the damage that it does to electoral legitimacy; the perception of interference itself is also profoundly damaging to the reputation of Scottish democracy. Another reason for having automaticity is that it protects politicians themselves from falling victim to partisan lobbying from all sides. There are a number of reasons, therefore, why international best practice is moving in that direction.

Of course, it is not just international best practice that is focusing on that; it is now the rule in House of Commons boundary reviews, and the explanatory notes for that particular legislation do a really good job of explaining why people believe it to be a step in the right direction. Similarly, the new legislation in the Welsh Senedd also represents a move towards a system of automaticity, with the explanatory notes outlining the reasoning behind it. Moreover, when the House of Lords reviewed the House of Commons legislation, it published its own report on why it thinks automaticity is the way to go.

We do not think that it is a good idea just because others say that it is; we think that it is a good idea for the same reasons as everyone else believes that it is a good idea. It is particularly critical, given our past experiences in Scotland.

The Convener: Automaticity would not change the Boundary Commission's process for amending boundaries, because there would still be local engagement and feedback loops. It would just come in with the final recommendations and relate to whether they can be blocked, perhaps—as you suggested earlier—by people who have reasons for doing so, rather than as a result of the existing process. Even if automaticity existed, there would still be a level of protection if—of course, this would not happen—the Boundary Commission itself were to stray from the statutory requirements. There would still be a process for holding the commission to account for any errors that it made. It would not make you the all-powerful unquestionable decision makers in this situation.

Professor Henderson: No. In every system in which boundary commissions retain the final say—and, I should add, in systems where they do not—attention is paid to process. In fact, where boundary recommendations are more routinely rejected, that happens only on procedural grounds. We would really be out at the margins if recommendations were to be rejected on substantive rather than procedural grounds. So, attention is always paid to that.

Moreover, with automatic systems, a commission is able to correct errors. If, for example, late in the day it has caught that it has drawn a line in the wrong place, allowance can be made for that.

You are absolutely right that automaticity need not change the process. That is not to say, though, that the process could not be improved. If you look at the Welsh legislation, in particular, you will see that the explanatory notes are clear that a move to automaticity means that it must be made absolutely certain that the commission is independent. The rules have been strengthened with regard to who can sit on the commission to ensure that it is recognised as being truly independent, and that vested interests are not present on it.

Sometimes there can be statutory recognition of the commission's independence. There is a kind of conventional recognition of that in Scotland, but it is not written down in legislation. I also think that there is room to lengthen the consultation periods, which, at four weeks in Scotland, are quite short. At Westminster, there are primary and secondary consultations, then another review after that. For local authorities, the consultation periods were eight, then 12, weeks. A four-week period is quite short, so there could be opportunities for enhanced engagement in that respect, too.

The Convener: That was very helpful. Thank you.

I am conscious of the time. If there is anything that, in our foolishness, we have not asked you or if there is anything else about the bill that you

would like to point to, I am more than happy to give you a chance to consider that and to correspond with the committee on it. I also hope that, if we have additional questions, you will not mind our writing to you for more evidence. Finally, I say to Colin Wilson that, if he has any fears over AI, he should not worry.

I thank Ailsa Henderson and Colin Wilson for their attendance this morning, and I suspend the meeting to allow a changeover of witnesses.

10:04

Meeting suspended.

10:06

On resuming—

The Convener: We come to our second panel as we take evidence on the Scottish Elections (Representation and Reform) Bill at stage 1. Dame Susan Bruce is the electoral commissioner for Scotland, Andy O'Neill is head of the Electoral Commission Scotland, and Louise Edwards is the commission's director of regulation and digital transformation. I welcome you all to the meeting.

I think that you wish to make a few opening remarks, Dame Susan.

Dame Susan Bruce (Electoral Commission Scotland): Thank you, convener. We welcome the opportunity to give evidence today. The Scottish Elections (Representation and Reform) Bill builds on proposals that were set out in the 2023 consultation on electoral reform and will deliver some positive changes that have been discussed previously. Those include providing legal status for the Electoral Management Board for Scotland; reducing some aspects of regulatory divergence between reserved and devolved elections and hence giving clarity, particularly to electors; and disqualifying people who have been found guilty of harassing those involved in the electoral process, which I know the committee is keenly interested in.

Increasing the Electoral Commission's accountability to the Scottish Parliament is an important thing for us, as is the requirement for us to publish a separate five-year plan. We are keen that we should account to this Parliament for things that are specific to Scotland.

The bill, if enacted, will add to the already complex array of legislation that is in place for elections, and we will continue to seek to work with the Scottish Government to pursue a programme of work to consolidate that legislation. We will work to develop guidance to assist those involved in the electoral process, in line with recommendations from the UK's law commissions, with which you will be familiar.

The implementation of changes will need to be carefully planned to ensure that we and those in the electoral community have sufficient time to implement them to avoid the risk of increased complexity at the time of poll. We would encourage any legislation to be put in place sufficiently early. There is a well established path of our pleading for a period of six months to be allowed ahead of any electoral event, to allow administrators to get their plans in place.

Thank you once again for having us here. I will cut my remarks there, as I know that you are tight for time.

The Convener: My first question is about that tried-and-tested period of six months. Substantial amendments and changes are proposed in the bill. Are you confident that six months is still a sufficient period for developing an understanding, so that people who stand for election, those who support them and the people who will exercise their democratic right and vote will understand the changes?

Dame Susan Bruce: We would say that six months should be the minimum, and anything longer than that would be extremely helpful. I say that as the returning officer who halted the count in 2007. Hands up—that was me. We were dealing with a lot of new processes then. We would say that six months should be the hard minimum, and anything longer than that would be a great advantage to administrators in their planning.

The Convener: That is helpful. I will immediately delve into one of those areas, regarding the proposal on notional expenditure. It appears to have a substantial amount of support but, if it is pursued, how much work will be required from you to ensure that candidates—which I say first out of respect—and, potentially, agents and campaigners, are clear? This is an area where the playing field will be changed considerably.

Louise Edwards (Electoral Commission Scotland): You are right, in that the proposal will change the playing field. We know from the 2021 Scottish Parliament elections that quite a lot of money is bound up in notional spending. Around half of the reported spending by either constituency candidates or regional independent candidates was notional spending, and it came to more than £1.5 million.

That said, the concept of notional spending and what it does for transparency is well understood, and the importance of it—given the figures that I have just quoted—is well understood, too. We would be able to use the basis of our guidance for UK-based elections to help candidates, agents and parties to understand the provisions, too. It would be important to give everybody as much

clarity as possible, and not just on what the law says, but with a real understanding of practice and examples. To that end, we would welcome the opportunity to produce a code of practice to support people.

We have mentioned timing. It would take additional time to consult properly and to get the right examples, so that we end up with something that is actually useful for people. We would look to do quite a lot of consultation so that we get the right code of practice in place, which would help to embed the new rules.

The Convener: Do you have any views about the length of time that it would take to produce a useful code of practice?

Louise Edwards: We have a code of practice that we produced a little while ago but that, for various reasons, was not taken forward. We would look to update it to cover the notional spending provisions, narrowing things down to that particular area. There might also be some updating of examples to deal with trends in campaigning, which have obviously changed since 2020.

It would take some months to do that work properly, ensuring that we consulted all the right people. In that respect, six months would not give us a lot of time, and we would probably require at least 10 to 12 months to do a really good job on that.

The Convener: Is that before the roll-out of the code of practice to those whom it would affect?

Louise Edwards: Yes.

The Convener: That is helpful.

The second area that I wish to examine is the reduction from £10,000 to £700 for overseas campaigns for devolved elections. One of the purposes that has been highlighted is to send an incredibly strong message as to interference. There have been great concerns this week about interference in elections through data breaches that have happened. Before we get into that aspect, will such a provision ever be enforceable?

Louise Edwards: That is a good question. There are a couple of things that make it challenging. One is simply that £700 is quite a small amount of money, and it will be hard for any regulator or law enforcement body to track an amount of money that small.

The main area that would need to be carefully thought about is how the provision will be enforced on overseas campaigners. As a UK-based regulator, we would not be able to go beyond the borders of the UK, and Police Scotland would obviously be in a similar position. There are things that we can do, such as calling out examples or seeking to engage with Governments or electoral commissions outside the UK, but strict enforcement is very challenging.

That said, it is a big piece of symbolism and it sends a signal. Broadly speaking, people who are in the regime of political finance in the UK want to comply. The problem is that the actors who are outside that regime—the ones who might not want to comply—are the ones against whom it will be almost impossible to enforce.

10:15

The Convener: I want to press you on the symbolism point. I am more than happy for you to say that this is outwith your remit, but is it the purpose of primary legislation to send that signal?

Louise Edwards: That is outside our remit. However, I would say that, although the equivalent provisions in the Elections Act 2022 are a severe restriction on overseas campaigning, they are not a ban, and that element needs to be considered in the symbolism.

The Convener: Do you want to add anything, Dame Susan?

Dame Susan Bruce: No.

The Convener: Particularly on the symbolism point, is the purpose of primary legislation to send symbolic statements with regard to the security and safety of elections and democracy?

Dame Susan Bruce: I think that it is, but we have to be in a position to implement something meaningfully as a result of the legislation in order to give reassurance about the integrity of the process.

The Convener: I come to my—not the—final question. Do you have any concerns about the ministers' ability to add to the list of third-party campaigners without consulting the commission? Would you benefit from being part of that discussion?

Louise Edwards: The provisions in the bill have an additional safeguard in comparison to those at the UK level, in that the minister would need to consult us before removing a campaign entity, which is important. For us, it comes down to ensuring that the decision is taken on the basis of clear evidence and facts. I will not sit here and say that the minister would not be able to make that decision, but there is a perception point—we are the registrar for political parties and for campaigners; being able to advise on those areas is well within our competence and might well help to avoid that perception.

The Convener: This is a slightly silly question, because, when there is a difference in process, there is always a risk, but is there a risk of there

being too great a difference in process between devolved and reserved elections, or would it be manageable if a consultation existed?

Louise Edwards: It is manageable, but there is a risk of confusion and inadvertent non-compliance as a result. The number of third-party campaigners—people who want to get involved in elections, to influence people's votes and to make their point—rather than political parties, is increasing. We have seen that in Scottish parliamentary elections and at UK level. That is really good, because it is hugely important for voters to hear a wide range of voices, with lots of diversity, but we need to ensure that there is no inadvertent chilling effect from making the law too complicated for them.

From our point of view, it is manageable, but it would be interesting to talk to some of the campaign groups, particularly those that operate across parts of the UK, to ensure that they would be able to operate within that.

The Convener: That is helpful. I now pass over to—I am not sure who I am passing over to.

Stephen Kerr: Me.

The Convener: Thank you, Stephen, for that guidance.

Stephen Kerr: What is your understanding of the reasons for having a slightly different approach to the list of third-party campaigners in Scotland compared with the approach in England and Wales, or indeed the UK?

Louise Edwards: Ultimately, it is a choice for Parliament whether it wants to have different provisions in place. Our role would simply be that, whatever you decide to do, we will work to implement and manage that. It is a classic example of the point that, where there is divergence, there is generally a good reason for that and we will seek to manage it. Where we can help campaigners to not have unnecessary barriers to their work, that is positive.

Stephen Kerr: Can you see any reason—I struggle to see one—as to why there should be divergence?

Louise Edwards: It is not immediately apparent.

Stephen Kerr: I have similar questions on the code of practice. Again, we seem to be doing something different to the UK as a whole and to England and Wales. What is the apparent advantage of changing that?

Louise Edwards: You would need to look at whether there were any Scotland-specific reasons or examples that could be in a code of practice that would help to ensure that we were supporting campaigners in Scotland to do things that they want to do here. Therefore, there is some rationale to making sure that we are considering that from a specific Scottish perspective. However, again, it comes down to ensuring that we seek to be as consistent as possible.

We did a lot of work with the code of practice for third-party campaigners that applies at reserved elections to ensure that we were engaging specifically with a wide range of campaigners and giving them not just the clarity on the law that they needed but the examples that they needed. Were that to be introduced in Scotland, we would want to do that on a Scottish level to ensure that we were picking up any differences and giving campaigners the best tools to be able to campaign.

Stephen Kerr: From the point of view of the Electoral Commission, where you see the whole picture, are there specific issues in Scotland that would require us to do something differently to other parts of the United Kingdom?

Louise Edwards: At this point, we have not looked at how third parties operate in Scotland, so I cannot answer that, I am afraid.

Stephen Kerr: Okay. Does anyone else on the panel have a view on that question?

Dame Susan Bruce: There is room in the arrangements for devolved nations to have such flexibility as they deem appropriate. As Louise Edwards said, as we look more deeply into the issues around third-party campaigners, we might see something more. However, how they want to diverge is really a choice for the devolved legislatures.

Stephen Kerr: I am very much in favour of doing things differently in different parts of the United Kingdom, provided that there is a substantial reason that allows us to understand why that is necessary. That reason is what I was trying to get at.

How will the code of conduct be put together? Setting aside the differences in the process, what will that consist of and how would it be enforced, given the discussion that you had with the convener in relation to how difficult the whole area of enforcement is.

Louise Edwards: A lot will depend on exactly how it is set out in legislation but, at a high level, I can talk you through what we have done at UK level and it will be similar to that. When we produced the code of conduct at UK level, we first came up with a draft, based on the legislation and our interpretation of it. We then went out to a wide range of campaigners. The thing about third-party campaigners is that they come from many wide perspectives. Some are very political in their entire purpose, and some just want to campaign in an

election and support their beneficiaries—if they are a charity—in doing so. There are also trade unionists and others who campaign.

We ran consultation meetings across the UK. In the Scottish scenario, we would not just do them here in Edinburgh, for example. We would go out and try to understand what campaigners who work on a regional basis in Scotland might be doing. That process led to two things: a revised draft and an incredibly useful bank of examples, which we spent a lot of time working up to ensure that we were being as helpful as possible with the examples that we used.

That draft went out to formal consultation. The proposals here are slightly different from those for the UK, where we had to consult with the Speaker's Committee on the Electoral Commission. Here, the proposal is that we would consult with the Parliament as a whole. That is absolutely fine—we do not have a problem with that—but it will add 40 days to the process. We will then take that away, come back with a final version and lay it before the Parliament for approval.

It is a fairly steady consultation process but, for us, the key difference was getting to really understand how people campaign on the ground and build that into the examples that are banked.

Stephen Kerr: Can you give us some of those examples? You said that there were clear examples.

Louise Edwards: You are testing my memory.

Stephen Kerr: The range of third parties that want a say in a campaign is vast, so how on earth is that manageable?

Louise Edwards: A lot of that was about working with other bodies such as regulators or umbrella bodies. For charities, for example, we did a lot of work with the Charity Commission for England and Wales. Obviously, we would look to work with the Office of the Scottish Charity Regulator here. We did joint editorials and joint blogs to try to really understand what they were doing.

For others, it was a question of having specific consultation meetings to try to get examples. Charities, for example, are trying to balance charity and electoral law. They can absolutely campaign in elections, but they have to be careful about all the legal framework, so we had a lot of examples about how to judge whether something is being put out to encourage people to vote in a certain way, as opposed to being put out to further a cause but without a call to action to vote.

We know that third parties find some specific areas of the legislation a little challenging, such as working out whether something is joint spending between one or more campaigners. The best example of joint campaigning is when you have a clear agreement in place to do it. If you are simply endorsing another person's campaign, that is not joint campaigning. If you have joint plans to spend, even if you have not written them down, that is joint campaigning. There are all sorts of examples to work through.

Stephen Kerr: Is the defining thing that you are actively campaigning to tell people to vote for somebody, as opposed to campaigning to say to people, as happens in Scotland, "Do not vote for this person"?

Louise Edwards: We need to work through different tests. One is about the genuine purpose of the campaigning. Is the purpose a call to action to vote one way or not vote another way for a party or a group of candidates? That is a very clear test. There are also tests around whether you are putting your material out to the public or putting it out to your membership, which is different. We need to work through different tests to see whether something is regulated spending. It is complicated. A lot of electoral law is complicated, so we try to work through the various tests that we need to consider.

Stephen Kerr: Under the UK legislation, the secretary of state—I do not know which one—is responsible for adding names to the register. Based on what you are saying, are politicians in public office the best people to make those judgments?

Louise Edwards: The secretary of state can add categories of campaigners to the register.

Stephen Kerr: Oh—it is categories.

Louise Edwards: Yes.

Stephen Kerr: But in Scotland, it will be the actual campaign groups.

Louise Edwards: I think that it is the same here—it is categories. We are the registrar for third-party campaigners. We look at whether the notification that is given to us by a campaigner meets the legal test. It is not an application process.

Stephen Kerr: Right.

Louise Edwards: They simply notify us that they intend to spend over the threshold, and then we check that notification to make sure that they are eligible to be on the register, and then we put them on the register. It is not a choice.

Stephen Kerr: That is very helpful. I appreciate your answers.

Digital imprints are quite a difficult area in terms of enforcement, are they not? Are we simply putting into primary legislation something that will

ultimately be very difficult to enforce? Police Scotland has expressed concerns about any enforcement regime that is associated with the bill, given the nature of social media and so forth. How do you see the matter?

Louise Edwards: You have to think about where there will likely be a need to enforce the legislation. We saw in Scotland in 2021 that the majority of people who want to campaign want to comply. Even before there was a digital imprints regime, many parties and campaigners used them anyway. The consistent approach of people actually having to do it has been really helpful: it means that we can talk to social media companies and tell people how to do it. We think that that will add an awful lot of transparency, because it provides a base level of knowledge about whom an advert or campaign material is from.

Stephen Kerr: How can that be enforced, though?

Louise Edwards: Within the UK, it would obviously be enforced as normal, so it is not too challenging from that perspective, but two things will cause challenges for us. One is—again—the overseas angle. We live in a very globalised society. You do not have to be in the UK to put an ad on Facebook, for example. That said, organisations such as Facebook have brought in verification procedures to try to get around that and ensure that it is clear that people are UK-based before they can put up political ads, but it is difficult if an organisation is outside the UK. In that situation, we would go back to what I said previously—we could call it out and talk to the relevant electoral commission outside the UK.

The other challenge in enforcement of the digital imprints regime is volume. We do not yet know what the volume f them will be, but we will have to see that the regime is enforced at the next election, which is likely to be a UK Parliament general election. We will have to look at what sort of volume we get.

I believe that I am echoing Police Scotland in saying that although there is a provision that we will produce guidance to support enforcement, which I am happy with, we are not happy with the idea that we will write guidance for the police as well.

Stephen Kerr: Right—and that is what the Government has asked for.

Louise Edwards: Yes. I support the police, but we, as a civil regulator, should not be writing guidance for Police Scotland. We made the same point at UK level, but the provision went through and we had to work very closely with the National Police Chiefs Council to address that. However, we are a civil regulator and should not be telling the police how to do their job.

Stephen Kerr: Who, then, should help the police with that?

Louise Edwards: That is a discussion to have with the police. All that I know is that it is not a role for a civil regulator.

10:30

Stephen Kerr: Right. That is a definite and clear answer. I think that I have probably covered what I wanted to cover.

Louise Edwards: That is fine.

The Convener: Thank you, Stephen.

Stephen Kerr: You have covered the matter pretty well, convener.

The Convener: I was going to say that the meeting has covered it admirably.

Ivan—we come to you.

Ivan McKee: Thank you convener. Good morning, witnesses.

My question is about the provisions for postponement of elections in emergency situations. We have obviously had the Covid experience, which brought the matter into sharp focus. I want to hear your perspective on the need for, and desirability of, a provision to postpone elections, when that should happen and what issues it might raise for voters, campaigners or others.

Louise Edwards: That is an interesting question. We already know that, if an event occurs locally, an RO has the capacity to delay or postpone an element of the process—if there is a huge snowstorm or whatever locally, for example. We also had the benefit of the Coronavirus Act 2020, which helped us all to prepare for the impact of matters that might have arisen because of coronavirus when we did not know what to anticipate at the outset.

It is important to have measures in place to allow for postponement of elections, but clarity is needed on scale. In our view, an event would have to be fairly substantial, and public safety would perhaps need to be at the heart of consideration.

A short postponement would be difficult for administrators, campaigners, candidates and electors. If something so serious happened that an entire election had to be postponed, that would be nationwide and a minimum postponement time of four weeks would probably be necessary for halting then rearranging the process.

The logistics of rearranging an election are enormous, even in respect of simple things such as venues, count staff and all the other things that one would expect. Time would be needed to give

clarity to the electorate, candidates and agents about the new arrangements.

We believe that having some kind of backstop provision in the legislation would be helpful. It would be difficult to give an exclusive list of the circumstances in which that would be used, but I imagine that something of grave importance on a nationwide basis that would put public safety at risk would be the kind of thing that might trigger postponement of an election. We understand that, were such postponements to take place, it would be necessary to consult, but a postponement would probably be for a longer time rather than a shorter time.

Ivan McKee: Thank you. That is helpful. Who should make that call? Should there be wording that specifies what would need to pertain relating to public safety or whatever? What are your thoughts on that?

You also said that a longer postponement would be more helpful and effective than a shorter one, but there are other issues to consider. We have heard evidence about what would happen to postal votes, the electoral register and the timescale. A range of things would get worse with a longer postponement. What is your reflection on that?

Louise Edwards: If a postponement was shorter, we would probably look to freeze the register at that point in time. If it was longer, for whatever reason, we would probably have to reopen the register so that anybody who would become eligible to vote would be entitled and able to vote at the time.

On who would take that decision, we would hope that the Government or the Parliament of the time would consult the EMB and the Electoral Commission to discuss the impact of the postponement and the practical arrangements that would surround it, and come to a sensible conclusion on that.

Anything less than four weeks would be chaotic at the point of delivery. Anything longer than that would give administrators and electors more time to get their house in order—to rebook venues and so forth. This is quite hypothetical at the moment; things would crystallise if an event were to happen. One imagines that something fairly seismic would have to happen—a pandemic, a war or something of that nature. Andy O'Neill might want to add to that.

Andy O'Neill (Electoral Commission Scotland): The recent experience was in autumn 2020, when we got together to think through the implications of the Coronavirus lockdowns, which led to the Scottish General Election (Coronavirus) Act 2021. I suppose that the principle questions for that discussion were whether electors could vote safely, whether administrators could administrate the process safely, and whether campaigners could get their message across. In the end, we got to a set of circumstances in which they could, and special things were put in place.

However, the process before the decision whether to postpone is made is quite important. We accept that backstop provisions for postponement are needed because stuff happens sometimes, as we have seen. However, on the provisions, we are keen that, whoever the decision maker is—the Presiding Officer, the convener of the EMB or whoever—they have to consult the various people involved. We think that the people who are named in the bill are the right people to be consulted, although you might choose also to consult other people, depending on what is happening.

We are also keen that the decision maker should have to make known their decisions and the reasons for them, and to publish them for clarity and transparency. That should be the case when the decision is to postpone, but it should also be the case if the decision is not to postpone. We think that it is necessary, when the decision maker has gone through the process of thinking about it, for them to say why they have decided not to postpone.

It is really interesting to consider what would be done in different circumstances. I was talking to colleagues last week who were discussing whether to freeze the register, reprint postal votes and so on. All that stuff in a decision on whether to postpone or not postpone sits in a context that none of us is yet aware of, because, obviously, we cannot tell the future. However, it would be interesting—we are very keen to do this—to get together with the EMB, the Scottish Assessors Association and the Scottish Government and go through likely scenarios so that we could leave a document on the shelf for people in the future so that they do not have to go through the process again.

In the autumn of 2022, when Graeme Dey brought everyone together, including the leaders of the political groups and the parties—which I thought was really helpful because it built consensus—we were starting from scratch. It would help to have something that sets the parameters of discussion; you could add a starter agenda, I suppose.

Ivan McKee: That is useful. Is there a requirement to specify rules on that, whether in the bill or in guidance, or is it sufficient to have on the shelf a manual that people might or might not refer to? I am thinking through a scenario in which difficult decisions would need to be made that might end up having a political slant—around postal votes that had already been cast, or on

what would happen if somebody had spent most of their money and somebody else had spent hardly any because they were going to spend it in the second half of the campaign, for example. Would the counter be reset? Is there a need to nail that stuff down at this stage, so that people would not spend a lot of time having a big bun fight, if such a scenario were to transpire.

Andy O'Neill: It is difficult to nail anything down when you do not know the context in which you are working. Last week, colleagues were talking about the administrative impact of postponement. Of course, there are campaigners; it all depends on, for example, whether the postponement is short or long, how far through the campaign period we are when an election is postponed and whether people had spent all their money. There could be a six-month postponement, for example.

The committee has to begin to think about all those things. I do not know whether Louise Edwards wants to add anything. It is difficult to tie the future down when you do not know what that future is.

Louise Edwards: The issue is based on principles, almost. One principle that you might want to enshrine is sensitivity to political angles on decisions that are made. One approach might be to set down principles and the areas to be considered, with the detail being worked out according to context.

As director of regulation, I say that it is also important to think about the campaign context, and the ability of voters to hear messages and make a choice when they go to the polling station.

Ivan McKee: To reflect on that, I say that legislation is often, unfortunately, about trying to guess what is going to happen. That is the business that we are in.

Finally, do you have any thoughts on the impact on campaigners of possible postponement scenarios?

Louise Edwards: You are asking us easy questions today, aren't you?

Ivan McKee: Absolutely.

Louise Edwards: You would need to think about how scenarios would impact on spending limits—in particular, on the lower limits that are in place for candidates. That would depend on the length of the postponement, to be honest.

It also needs to be considered whether—and how—you would put people back into the situation that they would have been in if the postponement had not happened, or whether the decision would simply be that because postponement has happened you will just increase the spending limit and it will be what it is from there. That would be a principled decision that the Parliament would need to take. The latter would be easier; the former would be a challenge and I am not quite sure how it would work in practice. However, as has been mentioned, at the point of making such a decision it will be really important to seek appropriate advice and input from campaigners about the impact on them.

Annie Wells (Glasgow) (Con): Good morning, and thank you for coming in.

I will move on to election pilots, if you do not mind. Are the requirements in the legislation on consultation and reporting for those okay?

Andy O'Neill: We welcome the proposal to extend who can suggest pilots and such like. That is a good idea. However—it might well be an omission—the list of consultees on a proposal for a pilot does not include the commission, and it should. We have existed for more than 20 years, we have a lot of experience in dealing with pilots in England, we had four pilots in the early noughties in Scotland—all of them postal—and we helped the then Scottish Executive to develop the Scottish Local Government (Elections) Act 2022.

It is important that the commission be consulted on pilots because we would look at the issue from the point of view of whether the pilot would deliver anything that was meaningfully beneficial to voters, administrators and campaigners, and we would comment on whether the design of the pilot was likely to be capable of being evaluated and, therefore, of having benefit derived from it.

Annie Wells: Thank you very much for that.

Is it clear in the bill that an election pilot could include a pilot on electoral registration, or should that be made unambiguous?

Andy O'Neill: We suggest the latter.

Annie Wells: I have one last question. You have done research on funding and grant aspects. How can any funding that is available for democratic engagement be best—or better—used?

Andy O'Neill: That is an interesting question, and we welcome the suggestion on a fund; in fact, we, too, are looking at the establishment of a fund

The process to go through is to look at the research, of which we hold quite a lot, then have a discussion with us—we can advise Government, because we are Government advisers, after all—then come up with proposals that might add benefit, which relates to my earlier points.

Given that the Scottish Government is developing grant funding and that we are also doing so, we want to ensure that we are not duplicating its work or standing on someone's toes.

10:45

Annie Wells: That is perfect. Thank you.

The Convener: Dame Susan, I want to go back to something that you touched on in your opening comments, which is your relationship with Parliament and the reporting that is being proposed. You have clearly shown the benefits of that reporting model, but are there any challenges?

If it assists you in answering, I would just say that the area that I am poking at is the following: you sit as an independent commissioner, as is right, but the final decision on the plans would be made by you rather than by Parliament. Do you see any challenge in what we might call a conflict of interest—or a conflict of desire—regarding the proposed change, between the Parliament on one side and your independence and role as commissioner on the other?

Dame Susan Bruce: I emphasise that we welcome the opportunity to account more widely to Parliament. It is really important to the commission that it covers the whole of the UK, but we want to be seen as responsive to the devolved nations and, in this case, to Scotland.

I do not think that there is a conflict of interest between our producing a five-year plan and our making recommendations. We know that, in meetings such as this, you will hold us to account for our thinking and will explore why we have brought forward what we have.

Prior to the production of any plan, and in line with our respective roles, we have a healthy dialogue with officials here. If we think that there are areas that might be of great concern for you, or for us, we have an opportunity to discuss them, tear them apart and tease them out. We will still come to the Parliament with our best advice, guidance and opinion.

The Convener: Can I clarify something? When you say “officials”, do you mean Scottish Government officials or Parliament officials?

Dame Susan Bruce: I mean Scottish Government officials.

The Convener: It is just for the record.

Dame Susan Bruce: I am sorry.

The Convener: That is fine.

Dame Susan Bruce: It is important for us to be able to bring the separate five-year plan to this assembly—incidentally, I am not using the word “assembly” in historic terms—so that we can demonstrate our understanding of Scotland’s needs, interpret the flexibility that Scotland wants for itself and look at how we will respond to that as a regulator. All of that falls within the context of our wider remit.

I think that that is a healthy and positive thing. It is really important that we are seen to be open and transparent and that we are held to account by this Parliament.

Andy O’Neill: The provisions in the bill are slightly different to the consultation process on funding and the five-year plan in the Speaker's Committee on the Electoral Commission and the Llywydd's committee. That is part of devolution and perfectly fine by us.

The proposal is that we give the five-year plan to the Scottish Parliamentary Corporate Body, which will give us back some comments, if it so chooses. The corporate body might well ask you to comment, too, and we hope that it will. If they do not like the plan, they will tell us so. The difference is that the corporate body will not be able to change it, as can happen in Wales or in the UK Parliament. That is also perfectly fine by us. If we choose not to take on the SPCB’s comments, we will have to justify that decision, which we think is only right, proper and transparent. Essentially, we are quite content with what has been proposed.

The Convener: That was helpful. We could have a long discussion about the relationship between the corporate body and Parliament, but we will leave that for another venue.

Stephen Kerr: I would like to hear a response about the consultation on the bill, in the light of the fact that 60 per cent of those who responded were opposed to the Scottish Parliament having increased oversight of the Electoral Commission, due to concerns about the commission’s independence. Can you explain, in a few sentences, how you will continue to demonstrate your robustness as an independent body, given that members of the public who responded to the bill consultation were concerned that too much Parliament would equate to political interference?

Dame Susan Bruce: It is important to distinguish between our accountability through that mechanism and our accountability through, for example, the strategy and policy statement. A lot of concern has been expressed more broadly than in Scotland about whether the SPS would affect the Electoral Commission’s independence.

We will continue to be independent of thought and sensitive to what is happening in the Scottish context. When we design our five-year plan, we will tune in to the issues that we know that we will face as a regulator and that the electoral community at large is facing in Scotland. It is important that, within that, we say that we are a regulator, that we are independent and that we will maintain that independent voice, but that we still

expect to have discussions such as this one and to be questioned on the reasons for our position on anything. I think that we can continue to demonstrate our independence while respecting the role of Parliament in holding us to account in that way.

The Convener: I want to ask about the Electoral Management Board and the change in its structure that the bill proposes. What work are you involved in with the Scottish Government and the EMB on that? What is your focus in respect of the proposed changes to the EMB?

Dame Susan Bruce: I will start, before passing over to Andy O'Neill.

We welcome the measures that will enable the EMB to have a legal persona. You will know the history of the EMB. It started off as a voluntary body; the Society of Local Authority Chief Executives and Senior Managers had a working group on elections, and it turned into the Electoral Management Board. Initially, it operated on a voluntary basis, and it was then recognised in statute in 2011.

At the moment, it is a voluntary arrangement. Those who sit on the EMB represent the wide range of interests in the electoral world—electoral registration officers, ROs and so on—but they do it as an adjunct to their jobs. Having a legal persona will enable the EMB to enter into contracts. Let us consider the example of e-counting. Is it appropriate for those who are independent of Government and Parliament to be responsible for the procurement of things such as e-counting machinery and all the rest of it?

I think that it is good for the EMB to have a legal persona. There probably needs to be further discussion about its voluntary nature and how it is funded. At the moment, it is put together through an act of co-operation, but it plays a crucial part in the delivery of elections as a result of all the parties working together co-operatively. The convener has the power of direction, which is helpful, but the crucial thing is that the EMB should, like the Electoral Commission, continue to be seen as independent of Parliament and Government.

The Convener: Once the correct legal entity has been identified, do you think that, given that the funding will come from the Scottish Government, there is a risk of some perception of political interference, which, as we have heard today, does not exist in relation to your role as electoral commissioner, because of the structures that give strength to your independence? Could the proposed change to the structure of the EMB put at risk its independence, which at the moment relates to its voluntary nature and the fact that the work of those involved is all done in addition to their jobs? The very diverse nature of the people who form the EMB is a source of strength when it comes to its independence.

Dame Susan Bruce: That is a question that could be asked. If there is a paymaster somewhere, the people who receive that funding will be accountable to them. It is important that, as the legal persona of the EMB and the accountability arrangements that sit around it are developed, there is overt acknowledgement of the fact that the EMB must remain independent. In addition to such an acknowledgement, behaviours and measures need to be implemented that ensure that the EMB remains independent and can therefore provide the best advice and take action to ensure the continued integrity of the electoral process.

Andy, do you want to add anything?

Andy O'Neill: Sue Bruce is quite correct. The question is: to whom is the Electoral Management Board accountable and where and how will it get its money? We are in discussions with the Scottish Government and the EMB on both of those points. Interestingly, the EMB has similarities with the Electoral Commission, so there is an argument that the EMB could account to the Parliament or to the Scottish Parliamentary Corporate Body, as do the various office bearers that are funded in the way in which we are funded. Other models are also being looked at. The convener is right that we must guard against the perception of the EMB losing its independence.

The Convener: It would certainly be helpful if you could keep us updated on that.

Andy O'Neill: We will.

Jackie Dunbar (Aberdeen Donside) (SNP): I thank the witnesses for coming along. I would like to ask a couple of questions about disqualification orders. In your view, would such orders be enough to deter unacceptable behaviour, or should any other steps be taken to ensure that there is a safe environment for everyone—not just politicians—during political debate?

Louise Edwards: We support disqualification orders as a first step. Anything that encourages proper debate while ensuring the safety of everyone involved in the electoral process, including candidates and electoral officers, is hugely important. The introduction of a disqualification offence might cause some people to think twice before they enter into abuse and intimidation, but it will not have that effect on others, because they might have no intention of standing for election at any point. If that is not in their game plan, the introduction of disqualification orders will make no difference.

Our research on the abuse and intimidation of candidates at recent elections in Scotland and the rest of the UK, particularly in Northern Ireland, has been eye-openingly horrific. After the Scottish local elections in 2022, we found that something like 44 per cent of candidates had experienced some kind of abuse or intimidation—44 per cent might be a minority, but it is a pretty big minority. It is apparent that there is more of an impact on people who identify as female, with our research showing that they have a bigger sense of fear and a bigger problem with the abuse and intimidation that they experience.

That has two main implications. The first is that those people will not put themselves forward as candidates in the first place; they will self-censor. That will be a silent problem, because we will not see that in any statistics. The second implication is that they will feel that they have to change their behaviour in order to deal with threats and intimidation. It absolutely should not be the case that potential victims should be the people to change their behaviour.

Coming back to disqualification orders, I think that it is vital that we take that first step, but a broader piece of work needs to be done—in combination not only with the Scottish Parliament but with Police Scotland, the Crown Office and Procurator Fiscal Service, regulators such as the Electoral Commission, and political parties—to try to understand and address the drivers behind what everyone involved in the electoral process is experiencing. I would flag that a lot of different organisations are looking at that. For example, a recent report by the Jo Cox civility commission made some really important recommendations to a range of bodies about addressing the abuse and intimidation of candidates. I really welcome that report, and the Electoral Commission has endorsed it, because its recommendations are really important.

Jackie Dunbar: If I am reading the bill right, it looks as though someone could stand as a candidate in a Scottish Parliament election even if they had a disqualification order, but they would not be able to take their seat. Do you have a view on that? What would be the electoral consequence of someone being returned but being unable to take their seat?

Louise Edwards: This is a choice for the Parliament. If someone has been convicted of harassing or abusing people involved in the electoral process and you are going to disqualify them, you will be sending a very clear signal and, indeed, stopping them from taking part in certain aspects of the democratic process. Actually, it is for the Parliament to decide exactly how far it goes in preventing people from getting involved in the democratic process if they have been convicted of such offences.

I do not think that we can tell the Parliament how far to go with that, other than to say that it is important that whatever happens has a real impact. That is why I say that these are first-step provisions. They will have an impact, but a lot more needs to be done.

11:00

Jackie Dunbar: So, what if the bill is not strengthened and someone is elected to a seat, having been allowed to put their name forward, but they cannot take it up, because of a disqualification order? What would the consequences be?

Louise Edwards: It is likely that the election would have to be rerun. However, it would be odd to allow somebody who cannot take up a seat to stand as a candidate in the first place. I would also be worried about the impact on the people who are standing against somebody convicted of abusing or harassing people involved in the democratic process. That might well lead to quite reasonable changes in behaviour that would have an impact on the election.

Jackie Dunbar: My final question is on MSPs or councillors who appear on the sex offenders register. What are your views on the disqualification rules in that respect? I am not sure whether it falls within your remit, but what happens if someone is elected and then, halfway through a session or term, is put on the sex offenders register? Should the consequences be the same?

Louise Edwards: As I have said, it is ultimately for the Parliament to decide who can stand as a candidate and how far somebody who is on the register can get through the process before a decision is taken that they should not be doing this. However, I would note that both the Welsh and UK Parliaments have recently legislated in that area with regard to local authorities. It is important that we send a signal about what we expect of candidates who get involved in our democratic processes, although I do not want to say that there should be some sort of fit and proper person test, as that has a different meaning.

Jackie Dunbar: I know that councillors have to go through the protecting vulnerable groups process at the beginning of their terms. That is why I asked the question. A councillor might have their PVG, but what if they are put on the sex offenders register after that?

Louise Edwards: It will come down to how Parliament wants to frame the legislation. However, MSPs are office holders so, much as we

have seen in all the Parliaments of the UK, there have to be different ways of getting around the fact that somebody is an office holder if they want to step down from that role. That is a difficult thing to overcome in this scenario, which is why, to my mind, prevention is the best way forward. It is about understanding how the earlier steps in the process can be made as robust as possible, because ultimately, nobody, aside from the electorate, can sack an office holder.

The Convener: Is there value in applying the same test to elected positions in Scotland, irrespective of whether those are elections to local authorities or to the Scottish Parliament? Is there an advantage to the same rules applying to all, or are there reasons to apply a different approach because of where an institution sits in the hierarchy?

Louise Edwards: I am not sure that I know enough to comment on that, other than to say that consistency is key.

The Convener: An element of much of the evidence that we have heard today is that it benefits democracy to have consistency, transparency and understanding at all levels.

Do you have any views on the proposal to allow foreign nationals with limited leave to remain to stand for elections? I raise that because of our earlier discussion about the reduction in overseas expenditure.

Louise Edwards: I have a similar answer, in that, ultimately, because who is eligible to stand for candidacy is so important, that is something that Parliament will need to decide.

I think that we would say, though—this comes down to the point about timing—that we need to ensure that everyone, particularly parties and campaigners, can familiarise themselves with the law if it changes. Parties are the ones that go out to find candidates, so they must have time to understand any changes that come in.

Our role would not necessarily be to get stuck into candidate selection, as that is very much for the parties to do. However, we would be able to provide support with raising awareness of candidacy rights, both directly to parties and through partners that we work with that might be able to reach particular communities, such as JustRight Scotland and the Scottish Refugee Council. We think that we would have a role to support that if there is a change to the law.

The Convener: That should be sooner rather than later—I read that between the lines on all this.

We have reached that marvellous mop-up moment in the meeting. The bill covers a huge variety of issues, some of which we have not had a chance to go into. Before I ask about those other little bits for the quick-fire thoughts round, is there anything in the bill that you would like to mention?

Dame Susan Bruce: No.

Louise Edwards: No.

Andy O'Neill: No.

The Convener: Let me do the quick-fire round then, but with the proviso that, if you would like time to consider the issues that I raise, I am more than happy for you to write to us about them. I will just mention issues that are of concern.

The first issue is overseas voters. You might have thoughts on the voter registration and identification period, because there is a difference between Scotland and the UK on that. Another issue is voter ID—that is an ever-popular issue to talk about. Other issues are dual mandates and recall. It is going to get good, this.

Given the events of this week, one issue that I would like to hear your thoughts on is the security of elections. Data protection breaches and AI have been discussed in that regard. It has been asserted that the data breach of the electoral records will not be a problem. Where does the confidence to make that statement come from?

Louise Edwards: On the data breach, we were the victim of a cyberattack. We are sorry that that happened.

The Convener: Absolutely—that is not what I was asking.

Louise Edwards: It is not that the breach is not a problem. However, we have an electoral system that is primarily paper based and the breach related to reference copies of the registers. We can say with confidence that the breach will not have impacted anybody's ability to vote. It will not have affected their registration, or anything in that regard, because the data that was accessed were copies. That is the main thing that we have been saying, and we are confident about that because of the way in which the system works.

The Convener: Let me pose something to you on that. Again, if you want time to consider my point and come back later, I am more than happy for you to do so. My understanding is that the information that was accessed would enable someone who is not the registered voter to apply for a postal vote. If they took the opportunity to redirect that voter's post—although I am not sure why anyone would go to the lengths of doing that—it is possible that a postal vote would be issued to another address. It would be only when the registered voter walked into a polling station to exercise their right to vote that they would be informed that they had been issued a postal vote and that it had been submitted.

Louise Edwards: The data that was on the reference copies includes a person's name, address and email address, which is not far from the information that you can find in the public domain anyway. However, let me check the exact provisions on that and then write to you.

The Convener: That would be very helpful, because I am deeply concerned about that. Information existing on the public record in one place in physical form is less concerning than someone holding a mass of such data in a different place.

Louise Edwards: That is a fair point.

The Convener: Would you like to comment on any of the other areas, Andy O'Neill?

Louise Edwards: Can I just cover security—

The Convener: Please do. My apologies.

Louise Edwards: I will keep it quick—do not worry.

In relation to the security of elections, it is important to say that there are very high levels of confidence in how elections are run in the UK. We also need to remember that, of the thousands of people who campaign or who stand as candidates, the overwhelming majority do so because they want to help their society.

Security is an important issue. I am aware, for example, that the National Cyber Security Centre is doing a lot of work in advance of the UK general election to give parties and candidates cybersecurity advice in relation to personal devices and party systems. That is really important.

To touch briefly on AI, that election will not run without AI, which is ingrained in all the systems that we use—every election is dependent on it to some extent. However, if we are talking about the ability of generative AI to create misinformation, which has been a topic of consideration for some years in UK politics, we must remember that voters are used to looking at material with a critical eye and asking, "Am I going to let this influence my vote or not?" That is a really important safeguard in the system.

That might not be the only safeguard, but, currently, no legislation exists on the use of AI in campaigning and no legal framework covers the contents of campaigning. Given that that is situation, we need to tell people how we can support them to look at things with a critical eye—not cynical, but critical. That is what we need to focus on at the moment.

The Convener: Do we know authoritatively that voters can apply that critical assessment to what is put in front of them?

Louise Edwards: I do not know whether any research has been done on that, but we do a lot of work on democratic education to encourage people at a young age to use critical analysis. That really is not new—people have probably taken a critical eye all the way back to Athenian democracy. We can take some comfort and confidence from that, which is not to be confused with complacency.

The Convener: That is helpful. Andy, do you want to come in?

Andy O'Neill: I will try to answer quickly on some of the points that you have raised. On recall, we would say that it is a matter for the Scottish Parliament to decide whether it wants to have such a process. We have recently reported on a number of recall processes. The reports are on our website and we would be happy to share them with you. We have made a number of suggestions that would, in our view, make the current sets of rules more workable. You would have to consider the question of list MSPs, as the current UK recall process is for a constituency-based Parliament. We would be happy to share our expertise on that if you wanted it.

On the dual mandate issue, again, that is down to the Scottish Parliament—I sound like a broken record. If you wanted to act in that regard, we could advise you and provide guidance. You would need the align the timing to ensure that candidates, agents and parties are aware of that.

My understanding is that we are not getting voter ID for devolved elections, but you never know. We are spending a lot of time on making people aware of the need for voter ID at UK parliamentary general elections in Scotland, and also for any election petition that might come along—we have had one. The type of ID is crucial, too, because a lot of people are not aware of the fact that they already have the ID—they just do not know which it is—so we spend a lot of time on that.

People are able to apply for a free voter authority certificate. If you are voting in the elections on 2 May in England and Wales, the deadline for doing so is coming. In fact, it might be today—sorry, it is not today; it is five days before the event.

Finally, we do not have overseas electors for devolved elections, so it would be a whole set of different circumstances if we did.

The Convener: Do you have confidence that, when the decisions in principle are made by those who should make them, you could facilitate the landing of those provisions?

Andy O'Neill: Yes, and we are happy to help you in that regard.

The Convener: You are happy to assist—you are a critical friend.

Oh, Stephen Kerr wants to come in. Go on—you have one minute.

11:15

Stephen Kerr: It will not even take a minute.

Given the degree of complexity in electoral law, have we missed a trick with the bill? Could we have done something far more fundamental to simplify the code for elections?

Dame Susan Bruce: That comes back to my introductory comment about whether there is unnecessary divergence from the UK and thinking about the reasons for that divergence. It is up to us to help with guidance and implementation of whatever is decided, but it is undoubtedly a complex world, which brings us back to the point about giving electoral administrators, candidates, agents and electors sufficient time to understand what the changes are and to get the measures in place effectively to ensure that the integrity of the election is intact.

Louise, do you have anything else?

Louise Edwards: No, that covers it.

The Convener: If anything comes to you once you have had the opportunity to consider what has been discussed today, please feel free to write to us. I hope that you will not mind reciprocating if we correspond with you later.

I thank Dame Susan Bruce, Louise Edwards and Andy O'Neill for their attendance today.

11:16

Meeting continued in private.

11:30

Meeting suspended until 15:12 and continued in private thereafter until 15:55.

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