House of COMMONS

Oral EVIDENCE

TAKEN BEFORE the

Scottish Affairs Committee

The Referendum on Separation for Scotland

Monday 27 February 2012

(Edinburgh)

PROFESSOR Alan Page, Professor Stephen Tierney and Aidan O'Neill QC

Evidence heard in Public Questions 186 - 257

Oral Evidence

Taken before the Scottish Affairs Committee

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Members present:

Mr Ian Davidson (Chair)

Jim McGovern

Mr Iain McKenzie

Lindsay Roy

Examination of Witnesses

Witnesses: **Professor Alan Page**, Professor of Public Law, University of Dundee, **Professor Stephen Tierney**, Professor of Constitutional Theory, School of Law, University of Edinburgh, and **Aidan O'Neill**, Queen's Counsel, gave evidence.

Q186 Chair: Could I welcome you all to the Court Room at the Merchants' Hall? We had hoped, I must say, to have this in the Scottish Parliament, but the Presiding Officer has apparently decided that it is not appropriate for Scottish MPs to meet in the Scottish Parliament, even though the rooms are empty at the moment, as we understand it, so we are here at additional public expense. It seems a bit petty to me, but nonetheless that is where we are.

I welcome you to this session on the referendum on separation for Scotland. We know that there are some broadcasters who are being intimidated, we understand, into referring to it as something else, but it is not a question of style guide. We did unanimously, as a Committee, agree that this was an inquiry into separation for Scotland, and that is the term that we are using. We are very glad that you have all come along to see us today. I wonder if I could start off by asking you all to introduce yourselves for the record, and to say who you are and your specific area of expertise. Can we start at this end with Professor Page?

Professor Page: Good afternoon. I am Alan Page. I am Professor of Public Law at the University of Dundee. Public law embraces constitutional law and, therefore, my specific area of expertise is constitutional law, the subject matter of this Committee's inquiry.

Aidan O'Neill: I am Aidan O'Neill QC. I am a member of the Scottish Bar and also the English Bar. I am a member of Matrix Chambers in London and Ampersand Stable in Edinburgh. I practise primarily in the areas of public law, human rights and EU law and have done a number of cases involving the Scotland Act.

Professor Tierney: I am Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh, and Director of the Edinburgh Centre for Constitutional Law. I have been teaching and researching in British public law for 17 years as a full-time academic.

Q187 Chair: 70 years, did you say?

Professor Tierney: 17. It feels like 70.

Q188 Chair: 17, right. That is a relief to me, I must confess. Could I start off by asking you, again maybe in the same order, how you believe the Scotland Act defines or limits the powers of the Scottish Parliament to legislate, and what reservations are relevant to holding a referendum on separation?

Professor Page: In my written submission, which I think you will all have-

Chair: Yes.

Professor Page-I address two questions. The first is: what powers does the Scottish Parliament have in relation to the holding of a referendum on independence? Secondly, assuming it does not have the power or its power is unclear, by what means and subject to what conditions might it be authorised to hold such a referendum?

As to the relevant provisions, which I think was your question, they are-I should know them off by heart-section 29(2)(b), which basically provides that the Scottish Parliament does not have a power to make laws that relate to reserved matters; schedule 5, paragraph 1, which includes among the list of reserved matters, crucially, the Union between the two kingdoms of Scotland and England; and section 29(3), which provides that whether or not a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined by reference to its purpose, having regard to, among other things, its effect in all the circumstances. I do not think there is any argument about it; that is the agreed legislative background to your inquiry, and to this question of whether or not the Scottish Parliament does have the power.

The burden of my written submission is that this question, as you would expect, is not a completely straightforward one. It is not simply a matter of saying, "Oh well, it relates to the Union, and

therefore they can’t do it". I do not think we would all be sitting here today, yourselves included, if it was as simple as that. It is a complicated question, but my conclusion, having thought about it, is that the Scottish Parliament does not have the power to hold a referendum on the question of independence; its stated fall-back position is that if it does not have the power to hold a referendum on independence, it has the power to hold a referendum on extending its powers with a view to securing independence.

I think the heart of the difficulty for the Scottish Government is this business of "relates to". It would have to demonstrate, and it would have to persuade a court, that the referendum, the legislation, was about something other than the Union between the two kingdoms. I have yet to be persuaded, listening attentively to all that has been said, or have yet to hear a convincing explanation of what this referendum would be about if it was not about the Union between the two kingdoms. That is the basis for my conclusion that it does not have the power.

I went on in my submission to argue, okay, forget all about that; the fact is that the Scottish Government did win an overwhelming political mandate at the last election to hold a referendum. That is political fact. The law has somehow to be adjusted to accommodate that fact. It has to be equipped with the power. How best can it be equipped with that power, subject to what conditions? My conclusion, as you will have read, is that it is a section 30 order, not because the House of Lords Constitution Committee argued-last week, I think-that this would somehow give the Scottish Parliament a say in the process. I think the Scottish Parliament has a say in the process regardless. The way I put it was that it is because it is the method best calculated to deliver, if you like, the coalition Government’s side of any agreement. In other words, there is no scope for anybody to amend the terms on which the power is given. I think that is the heart of the matter, so that is the burden of my submission. Thank you.

Q189 Chair: Mr O’Neill?

Aidan O'Neill: I, too, produced a written and, as you would expect, far-too-long point. In essence, I agree with what Professor Page has said: having looked at the matter, I think there can be little doubt that the Scottish Parliament, under the Scotland Act as presently set up, does not have the power to call, organise and pay for a referendum relating to the Union of the kingdoms of Scotland and England and/or relating to the Parliament of the United Kingdom, and independence clearly relates to both those matters. It seems to me that there are very strong arguments to say that without an amendment to the Scotland Act, as proposed under a section 30 order, any attempt at passing a law by the Scottish Parliament to allow for such a referendum, a referendum would be struck down by the courts as beyond the powers of the Parliament.

The interesting thing about the Scotland Act is that it has made what would normally be regarded as purely political questions into legal questions, and it has made the ultimate determinant of those issues the judges rather than the politicians. That is a situation that we are not wholly used to within the United Kingdom. It is more something that one can see happening in the United States, where the Supreme Court regularly intervenes on what we would regard as highly political questions, such as who won the election as between Al Gore and George Bush. The Scotland Act-like the American Constitution as it has developed, in a sense-has channelled political questions into becoming legal questions. In order to avoid that, the politicians have to get together and amend the legal framework if so advised, much as Professor Page has said.

Q190 Chair: Thanks. Professor Tierney?

Professor Tierney: There are two points that I would make in the context of the legal argument. The first is that the interpretation of section 29(3), which a lot of the arguments seem to turn on, is open to another interpretation. The second point that this whole issue raises is about the status of the Scotland Act itself and the status of the Scottish Parliament. The status of the Scottish Parliament has been touched upon in a number of cases by a number of judges in obiter comments, whereas this issue seems to me to force the issue very much to the forefront. What is the status of the Scottish Parliament? What is the purpose of the Scotland Act? This is something that is very much open to debate as we look at section 29. I think it is something that a court, were this ever-hopefully it would not-to come before a court, would have to reflect upon beyond simply looking at section 29, or at least as an aid to interpreting section 29.

On this first point about section 29(3), it is certainly clear that the Union is a reserved matter; there is no doubt about that in schedule 5. The Union is reserved, and it is also very clear that the Scottish Parliament has no power to pass legislation relating to a reserved matter. At a banal level, it would seem clear that a referendum on anything to do with a reserved matter would be unlawful, but it seems that can't be the final point of our discussion here; it is simply the start, because I think, as Professor Page pointed out in his written submission, almost any legislation of the Scottish Parliament could in some way be seen to relate to a reserved matter. I think we have to look a bit more carefully at this, and that revolves around this idea of purpose, first of all, and what is the purpose of legislation.

It seems to me the ultra vires argument runs as follows. Even with a Bill that purports to authorise the holding of a consultative or advisory referendum, the Scottish Government's aim ultimately is independence, and therefore that is the purpose of the legislation. Even if the Bill claims to be holding a referendum on an advisory basis, the purpose would still be independence because in the long run that is what they want to achieve. They hope to get a "yes" vote, and then politically the UK Government would have to negotiate independence. In other words, the effect in all the circumstances under section 29(3) would be independence. It seems to me there are quite a few leaps here, and there is also a flaw in this reasoning and, in particular, a failure to distinguish between the legal purpose of a Bill and the political purpose of a Bill. Certainly, the political purpose of the Scottish Government is independence, but I do not see that when we look to statutory interpretation we can elide the political aspiration of a particular Government or political party with the legal effect of what a Bill can actually do. I think that is the crucial thing we have to be looking for.

The intention of the Scottish Government in the draft Bill set out in January 2012 is to seek the views of the people of Scotland on a proposal about the way Scotland is governed. This makes it clear that the referendum is not intended to have any legal effect. In the event that there was a "yes" vote in such a referendum, that would clearly still have no legal effect, and the issue then would be whether the UK Government was willing to enter into negotiations consequent to that.

Secondly, even if we take the test to be political purpose rather than legal purpose-in other words, if we stretch section 29 and say that the courts can actually look for the political purpose behind legislation-how is that to be determined? I think that is a very difficult question. In the first place, the political purposes of Governments can be very hard to work out. They can be multifaceted, unclear and even self-contradictory.

Another thing about the purpose test is it has to be read with effect, so I think we have to think quite carefully about what the effect of this issue would be. It seems that for a court to look at the effect of a referendum from the time that the Bill is introduced relies on two extraneous factors. Even if we are saying that the effect ultimately would be independence, therefore it is ultra vires, that

depends on two extraneous factors. The first is the likelihood of a "yes" vote. Is the court supposed to assess whether or not people are likely to vote "yes" in the referendum? Secondly, it also seems to presuppose that the UK Government would be willing to negotiate the independence of Scotland. I do not see any legal compulsion within the Scotland Act or within the constitutional law of the United Kingdom that would require the UK Government to negotiate the independence of Scotland.

Are we to take the ultra vires argument to mean that a Bill on an advisory referendum would be ultra vires because the UK Government will facilitate, and in doing so act as an accessory to, the achievement of this illegal act? It seems to me that the logic of the ultra vires argument is that the Referendum Bill would be illegal, because it would effect independence, but it could only effect independence in the event that the UK Parliament was willing to pass legislation further to a referendum giving effect to independence. Since the UK Parliament is sovereign in these matters, the question then begged is: how could it be unlawful, since the UK Parliament has the power to give effect to Scottish independence?

That is the starting point for me on section 29. There are other points, but I have probably gone on at enough length. That is my context of section 29, and I think it at least raises some questions as to whether or not this "relates to" issue is as clear-cut as sometimes is presented.

Q191 Chair: Can I ask your colleagues for their observations on the novel and interesting perspective that you have given us? Professor Page first.

Professor Page: If I take these two quite separate points that I understand Professor Tierney to be making-that a distinction falls to be drawn between the legal purpose of the referendum legislation and its political purpose, and that what we are really concerned with here is its legal as opposed to its political purpose-I simply disagree. The crucial phrase-I do not want to sound terribly like a lawyer-is in section 29(3), which talks about its legal effect in all the circumstances. If I can quote from something that I have written but is not yet published, "The process of characterisation is not a technical, formalistic exercise confined to the strict legal operation of the impugned law. The court will look beyond the direct legal effects to inquire into the social or economic purposes that the statute is intending to achieve". The sort of legalistic arguments that lawyers are often accused of retreating into have, I think, no place in relation to this characterisation of the purpose of the legislation. I listened carefully to what Professor Tierney had to say, but I am still mystified as to this question of what exactly the purpose of the referendum legislation is, in his terms, if not to further the Scottish Government’s goal of achieving independence.

As to the second limb of the argument-that somehow the UK Government/Parliament would be complicit in the process of securing and achieving independence-I think that is, frankly, irrelevant. The question with which we are concerned at the moment is, "What are the powers of the Scottish Parliament under the Scotland Act as it stands?", not "What result may be achieved in the final analysis as a result of a referendum?".

If I can make a slightly separate point, I think one factor that commentators have not paid enough attention to is the circumstances of this referendum. Normally referendums are held by bodies that have the power to achieve something or actually to do whatever is the subject of the referendum. Shall we remain in the European Union? Shall we devolve powers to Scotland? Shall we devolve powers to Wales? Shall we have an alternative voting system? The Westminster Parliament can do all these things but, for whatever reason, it decides to consult, to have a referendum. Here we are faced with a completely different context. We are not talking about something that the Scottish Parliament has the power to do, namely achieve independence. What we are talking about, and it is the only method or mechanism that is open to it, is putting pressure on the UK Government with a

view to securing independence or possibly an extension to its powers. I think the circumstances are quite different, and if one focuses on the purpose of this referendum, I think it is very difficult to say that it does not feed through into, and is not ultimately related to, the question of the status of Scotland within the United Kingdom. That, I think, is my response to what we heard.

Q192 Chair: You apologised for perhaps sounding a bit legal. I would like to just reassure you all that we did not just pick you at random out of the phone book. You are here because you are lawyers, and it is specifically your legal expertise that we are seeking. As long as we understand what you are saying, be as legal as you like.

Professor Page: Well, I am trying to put it in terms that can be understood by people who are not lawyers.

Q193 Chair: Yes. I am grateful for that. Mr O'Neill, your comments on what Professor Tierney has said?

Aidan O'Neill: I listened with interest but, insofar as I could follow the argument, I am afraid I found it unconvincing. All it shows is that if two lawyers are disagreeing, then this is going to end up in court, which is, I would have thought, what nobody wants, particularly. If anything, the existence of a counter-argument-or the existence of any kind of argument, however strong or weak-just points to the political necessity for clarifying this matter in the manner proposed by a section 30 amendment. Frankly, if it were to go to court on the basis of the arguments that Professor Tierney has put forward, I do not think it would win, because one thing it ignores is: what was the intention of the UK Parliament in passing the Scotland Act? The issue of a referendum was discussed in the House of Commons for the Scotland Bill, and it was discussed in the House of Lords. When asked about the possibility of the Scottish Parliament engaging in a referendum on independence, Donald Dewar said,

It is clear that constitutional change-the political bones of the parliamentary system and any alteration to that system-is a reserved matter. That would obviously include any change or any preparations for change… A referendum that purported to pave the way for something that was ultra vires is itself ultra vires…It would not be competent for the Scottish Parliament to spend money on such a matter in these circumstances". That is what Parliament was told by the promoter of the Bill at the time and, therefore, it can be presumed that the courts will have regard to that under the principles of Pepper *v.* Hart, and say the UK Parliament certainly thought, when it was passing this reservation of the Union of the kingdoms of Scotland and England, that the Scottish Parliament would not have power. It would be slightly odd for the court to say, "But despite what you thought you were doing, in fact you have given far more power than you were ever intending to". That would be a major hurdle to Professor Tierney's argument having any possibility of success.

It also relies on a distinction between advisory and nonadvisory referendums, which I think is a non-distinction. All referendums are advisory, certainly within the context of the UK Parliament. It can't bind itself formally to what a referendum may say. While the Scottish Parliament certainly has the power to call referendums, as a matter of straightforward public law it can only do so within the context of seeking an opinion about the powers that it can exercise already. On, say, "Should we privatise water in Scotland or should we not?", you can see how there would be a referendum, and it could competently be called by the Scottish Parliament, but on "Should we have independence?" or "Do you agree that an independent Scotland would be a good thing?" or "Should we have more powers under the Scotland Act?", they are asking questions that they do not have any power to effect. That points to the idea that it will be challengeable, because they are asking a question on

something that is in itself ultra vires. As I say, the existence of the argument that Professor Tierney has put forward shows that lawyers will fight and this will go to court. I think that would be inadvisable, but I do not think the argument put forward would win.

Q194 Chair: Can I come back to you, Professor Tierney? I was there when all this was being argued, and I was quite clear, as a Member of Parliament voting on this Bill, what was intended. Then it went to the Scottish people for a referendum. I think 44% of the Scottish people voted in favour-that is not just of those who voted, but of the Scottish people-of the set of proposals advanced by Donald Dewar. I think that is twice as many Scottish people as voted for the SNP in their recent election success. If it comes back to a question of popular mandate, surely the intention of Parliament is clear and the intention of the Scottish people is clear. I have heard you before, and if you remember, you said that you thought there was an arguable case. I asked you whether or not having an arguable case meant that if you were paid, you would be prepared to argue it, in the best legalistic tradition. I did not actually get anything else from you. You did not indicate that you believed that the strength of this arguable case was sufficiently strong to overwhelm the other position. In terms of the strength of the two arguments, what is your view as to where the balance lies?

Professor Tierney: I firmed up my position in a blog submission with a number of other academic colleagues, in which we put forward a case that there is a plausible argument. Plausible is not fanciful. I think there is a genuinely logical, rational argument to be made that there is limited competence of the Scottish Parliament to hold a referendum on an advisory basis.

There are a couple of points I would follow up there. Professor Page said he could not see what the purpose of the Scottish Government could possibly be if it is not independence, but what I am trying to do is explain that the Scotland Bill, as put forward, is not the same purpose as the political purpose of a political party. The draft Bill, as published in January 2012, said that the purpose of this was to seek the views of the people of Scotland on a proposal about the way Scotland is governed. That is the purpose set out in the draft Bill for the referendum, so that is where the debate has to go. Are we looking at that as the legal purpose of the referendum, or are we going to look for other political purposes and weigh one up against another?

Aidan mentioned the notion that there is not a distinction between a binding and a nonbinding referendum within the UK context. I take the point that Westminster is sovereign, but I do not think it is the case that there is no such thing as a distinction between a binding and a non-binding referendum. The UK Parliament could pass a statute setting in train a referendum and providing in that statute that the result of that referendum would be legally binding. Of course, Westminster, after the referendum, could then pass another Act repealing the earlier Act, thereby not giving the referendum effect, but insofar as it did not do so, that referendum would have a binding effect. That is something I am arguing the Scottish Parliament has no power to do under the Scotland Act, and I think it is on that basis that there is an important distinction there. So I think there is a plausible case.

The second issue that I think we need to get on to are issues about the nature of the Scotland Act itself, as a constitutional statute and, to a large extent, as one that was ratified by referendum. There are debates now surrounding other cases that are beginning to define not just the Scotland Act, but the Northern Ireland Act, the Human Rights Act, and the European Communities Act as constitutional statutes, and that are beginning to hint at different modes of interpretation of those statutes, given their constitutional significance. We saw this in the Robinson *v.* Secretary of State for Northern Ireland case, where there was an argument for a more purposive approach to the Northern Ireland Act of 1998. Clearly, there has to be a distinction made between the Northern

Ireland Act and the Scotland Act, as Lord Reed made clear in the recent Imperial Tobacco case, but I think there is a case for saying that we do need to start to think more broadly about the nature of constitutionalism within the UK and the status of the Scotland Act.

Again, in the AXA case, there were references by Lord Hope to the significance of the Scotland Act, and to the notion that legislation of a democratic Parliament should only be struck down in the most exceptional circumstances. We have seen cases like Martin *v.* Miller, where a purposive approach was also taken to section 29(3), and again in that case arguably the court took quite a broad view of the legislation in order to read down powers to be within the powers of the Scottish Parliament. There is, I think, quite a lot of evidence here that we can't simply confine ourselves to traditional modes of interpretation of statute.

Q195 Lindsay Roy: Good afternoon, gents. Can I ask if any of the panel have had sight of the Scottish Government's legal advice on the referendum?

Aidan O'Neill: No, I have not.

Q196 Lindsay Roy: Why is that?

Aidan O'Neill: I don't know. Professor Tierney-

Professor Tierney: No, I am not aware of any.

Lindsay Roy: Have you any idea why that is the case?

Aidan O'Neill: I think there is a convention that they do not normally publish their legal advice.

Professor Tierney: I would imagine it is advice that has been taken in-house from the Government lawyers, and I would assume that that is not something that would normally be published.

Q197 Lindsay Roy: In the tradition of openness and transparency, should that not be in the public domain?

Aidan O'Neill: Well, lawyers are very chary about letting other people see their advice.

Lindsay Roy: They certainly are.

Aidan O'Neill: I do not think it is the custom in Westminster for the Law Officers routinely to publish their advice. Certainly, in some extreme circumstances it has been-in relation to the Iraq war, for example.

Professor Page: The Advocate-General, who sparked off this debate, was very careful to say that he was expressing the UK Government's view, rather than saying, "This is the advice that we have been given". The same convention, if you like, holds on both sides of the border.

Q198 Chair: Could I clarify a point? I do not think I entirely understand, Professor Tierney, this distinction between an advisory referendum and a referendum that is not advisory. The UK Government has said, as with the AV referendum, that they would abide by the result. In these circumstances, what is the distinction between an advisory referendum on separation and a legally binding referendum on separation?

Professor Tierney: The crucial distinction is between a legal obligation to abide by the result and a political commitment. What I am saying, crucially, is that if Westminster passed legislation to hold a referendum and provided in that legislation that that referendum would be binding, it would be binding as a matter of law as soon as the result was achieved, unless the UK Parliament passed legislation to repeal the earlier piece of legislation. That is more than simply a Government commitment, a political commitment, to abide by a result. What I am saying is the Scottish Parliament does not have that power. The Scottish Parliament does not have the power to pass legislation that would in effect make the outcome of a referendum in Scotland on independence or another reserved matter legally binding.

Q199 Chair: Do you accept that the clear intention of the legislation, as put forward by Donald Dewar, was that constitutional matters would be reserved to Westminster, and that it was not the intention to have opinion polls or advisory referendums being conducted by the Scottish Parliament?

Professor Tierney: I looked at the *Hansard* record at some length for a publication I produced about six or seven years ago, and I found it not entirely clear. Certainly, Donald Dewar did make the statement that Aidan referred to, but under questioning he seemed to draw back from that. There is another reference-I do not have it exactly to hand-in which he said that if the people expressed their views clearly, we would have to take account of that. I think at that point, Michael Ancram for the Conservatives said the water was getting murkier by the moment-I paraphrase. I think it was also at that point that the Conservative party introduced an amendment to the Scotland Bill suggesting that the Scotland Bill be amended to make very clear that the Scottish Parliament would not have the power to hold any kind of referendum, including an advisory one, on independence. That amendment was rejected by the Government.

Q200 Chair: Can you remember why it was rejected? If I remember correctly, it was rejected on the grounds that it was not necessary because it was absolutely and utterly explicit in terms of everything that was being proposed in the legislation and had been said by the Government and, therefore, the amendment was redundant.

Professor Tierney: That may have been the reason given. As I am submitting, I am not sure that that is absolutely clear from the Scotland Act. There were a number of politicians at the time in the House of Commons who took the view that holding an advisory referendum would be lawful. As *Hansard* records, the current Advocate-General took that position at the time.

Q201 Chair: To some extent, would you not recognise that they were there as members of the Opposition, and the role of the Opposition is to oppose and to probe? There is such a thing as probing amendments in order to clarify exactly what is meant by the Government, so that people, like lawyers, can say things without necessarily believing them.

Professor Tierney: I am sure that is the case. What I am saying is that the structure of the Scotland Act is such that things that are not expressly reserved are devolved. That is their starting point; I think everyone is agreed on that. There was an opportunity in what is a very vaguely drafted reservation in the Union to add some clarity on that very question, particularly when it was raised by more than one political party. As I say, it was also raised by many people who voted for the Bill on the basis that it was their intention that that power would be a power given to the Scottish Parliament. I do not think it is clear. I am aware of the quote that Aidan gave, and I think there was a quote from Lord Sewel when the Bill was introduced to the House of Lords, which gave very clearly his view that that power would not exist and that the Scottish Parliament would not have the power to hold an advisory referendum. I am aware of this; I just do not think it is as necessarily

clear-cut as is suggested. I think there is enough evidence in the *Hansard* record to suggest some doubt as to the Government's intention.

Q202 Mr McKenzie: Good afternoon, gentlemen. I have a few questions on the referendum Bill; some have expressed some points here. What do you think the purpose of the referendum Bill would be? Would it relate to the constitution or to the Union?

Professor Page: I think most definitely it would relate to the constitution and to the Union of the two kingdoms. "Do you agree that Scotland should become an independent country?"-what else does that relate to, if not the constitution and the Union between the two kingdoms? My view is definitely yes.

Aidan O'Neill: The specific wording of paragraph 1 of schedule 5 is, "The following aspects of the constitution are reserved matters". One of them is the Crown, including succession to the Crown, and then, secondly, the Union of the kingdoms of Scotland and England. Clearly, the intention, it seems to me, behind any notion of independence of Scotland or of separation is the dissolution of the 1707 Union, to which that is a reference.

The wording as to what is meant by "relate to" is set out in section 29(3). It says that something relates to a reserved matter that is to be determined by reference to the purpose of the provision, having regard, amongst other things, to its effect in all the circumstances. This is "how many angels can dance on a pin?" stuff. The reality is there is a really bad argument being put forward by Professor Tierney to say that the Scottish Parliament has power to do this. If I were a betting man, which I am not, I would not bet on that argument winning. If I really wanted a referendum to happen, I would make some kind of negotiations, such that appropriate amendments can be made to the Scotland Act under section 30. At some levels the legal argument, precisely because it is a legal argument, has become an irrelevant one. It is a matter for the politicians to deal with, unless you want these arguments to be rehearsed before the courts and for the judges to decide.

Q203 Chair: Could I be clear, though? I understand that. As I understand it, what you are saying to us is that if the Scottish Government or Parliament came forward with a proposal, it would end up in the courts, and goodness knows what might come out of that, but it is more likely than not that your position would prevail. Can I just clarify, though, if the United Kingdom Government decided to have a referendum on separation, would that necessarily end up in the courts?

Aidan O'Neill: I can see no way in which it would end up in the courts, because the UK Parliament is sovereign and there are no legal limitations on its power, in the way that the Scotland Act sets out clearly the legal limitations on its power. Even where the UK Government is legislating arguably within areas that have been devolved, power devolved is power retained. We do not have a federal structure in the United Kingdom. It is not that the UK Parliament has divested itself of any of its plenary powers. Under the constitution that we currently have, it has allowed the Scottish Parliament to act in certain areas. The fact that it does that by just reserving some aspects to itself does not mean to say that the non-reserved aspects have not themselves been retained within the power of the UK Parliament.

Q204 Chair: Professor Page, do you agree with that view?

Professor Page: I certainly agree with Aidan O'Neill's starting point. The objection to the UK point behind your question-would there be an objection were the UK Parliament to go ahead and legislate for a referendum on independence and say, "Here you are, folks, forget all that argument, here is the Bill authorising a referendum, let's go ahead"- would not be, as Aidan O'Neill rightly points out,

legal. There would be no legal objection to that whatsoever. The objection to it would be political. It is summed up in the phrase "a referendum that is made in Scotland", which is why, ultimately, I think we come back to Aidan's concluding point that the politicians have to sort this out.

Q205 Chair: I understand that. I would remind you that we are all Scottish here, and we have been elected by the people of Scotland as well, so there is not just one forum that represents Scottish opinion. We want to be absolutely clear: in terms of the bargaining, as it were, between the two sides, as I understand it, you are saying to us that any proposal from the Scottish Government, unless it is agreed with Westminster, would face legal challenge and years in court and all the rest of it-huge amounts of money for lawyers and stuff like that, none of which is desirable. On the other hand, if Westminster comes forward with a proposal for a referendum, that would not end up being blocked in court. There might be political issues, but it would not end up being a legal dispute and the referendum could then proceed.

Professor Page: Yes, it would not be legally objectionable, but I would not want to understate the significance of the political objections to that or the need for agreement. On the law, you are absolutely right.

Q206 Chair: I understand that. Today, in these two hours, we are trying to clarify the legal issues. We will come back to the politics with other people.

Professor Page: As a matter of law, there is no objection whatsoever.

Q207 Chair: Professor Tierney, you agree with that view?

Professor Tierney: Yes. My starting point is that under the Scotland Act there are some things that are reserved and some things that are devolved. My argument is simply that the Scottish Parliament may have the power to hold such a referendum. I think it is very clear that Westminster does. If we still accept the doctrine of Westminster supremacy, the Westminster Parliament can legislate on anything. It can legislate to hold a referendum in part of the UK, and it could hold a binding one as well.

Q208 Chair: Indeed, it could. That is right, but from your perspective, since you do have a considerably different perspective to the others, I want to be clear about whether or not you are agreed that, after a process of political haggling, if Westminster came forward with a view, supported or not as the case might be by either a minority or a majority of the Scottish Parliament, that it wanted to have a referendum, then that would not, in your view, face legal challenge, whereas under almost any circumstance a unilateral Scottish Government proposal for a referendum would face a legal challenge that would end up in court and could be interminable.

Professor Tierney: It certainly could face legal challenge. There would be a decision, depending on the stage of the Bill, for the Law Officers to make on whether or not they wanted to challenge it. Of course, even were such a Bill to be passed, it would be open to a citizen to bring a challenge at any point. The interest has widened considerably since the AXA case. There are various stages at which a referendum Bill or an Act could be challenged.

On the issue about UK statute, certainly there is one issue that I think would have to be considered, which is whether, by convention, the consent of the Scottish Parliament would be needed for such a Bill, given that it would affect devolved matters under the Sewel convention. If the UK Parliament were to legislate to hold its own referendum on Scotland, would that raise a Sewel issue?

Q209 Chair: What is your view?

Professor Tierney: I think it would. I think a referendum would seem to involve devolved matters.

Q210 Chair: You are saying that a referendum on separation to be held by a Westminster Parliament would require the agreement of the Scottish Parliament?

Professor Tierney: I think a referendum organised by Westminster affecting the powers of the Scotland Act, as I understand the Sewel convention, could conceivably fall under the terms of Sewel. I am not entirely sure about that, but I think there is at least a good argument to that effect. I would be interested to hear what the other people on the panel think.

Professor Page: To help Professor Tierney out, I would agree with that, and that is what I was referring to when I was talking about the political difficulties that would ensue were Westminster to try to go it alone on this. At the end of the day, you come back to the inescapable need for agreement between the two sides as to the best way forward.

Aidan O'Neill: I think that is right-it would fall within the Sewel convention-but a convention is a convention. Whether or not that is legally enforceable is again a debatable legal matter, in the sense that it is a convention rather than embodied in hard law. It is quite clear that there are what might be called soft legal commitments. There is a memorandum of understanding and there is a supplementary agreement between the United Kingdom Government and the various devolved authorities, so Sewel would be a live issue, but whether it is justiciable is another matter.

Q211 Mr McKenzie: On the competence of the referendum Bill and the nature of the wording of the question to be asked, in the last Parliament the SNP produced a draft question on whether the Scottish Parliament's powers should be extended to enable independence to be achieved. What would the panel think of that, within competence? Also, they now propose a question, "Do you agree that Scotland should become an independent country?" How does that sit within the competence range?

Professor Page: On the first of these questions, "Do you think the Scottish Parliament's powers should be extended to enable independence to be achieved?", which I think is the way it was put-that is the fall-back position-I have to say I think that is a distinction without substance. It is open to exactly the same objection as the direct question, and the purpose at the end of the day is, again, to secure the dissolution of the Union or to further Scottish independence. It is open to the same objections as the current legislation for precisely that reason. I could expand on that but-

Q212 Chair: No, I think that is okay. Mr O'Neill?

Aidan O'Neill: Yes, I agree. I think that the first question put forward-whether it should enter into negotiations with a view to enhancing powers-was an attempt to get round the clear issue of whether or not this related to the dissolution of the United Kingdom or not. I do not think, again, it would have stood up in court, not only because of the reservation of the Union of the kingdom of Scotland, but because paragraph 4 of schedule 4 to the Scotland Act says, "An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, this Act." Effectively, that is what they were being asked, given that the Scottish Parliament and Ministers have been set up under the Scotland Act. It would fall foul of that restriction as well. I have already expressed my view on the competence of any unilateral attempt at having an independence referendum, so whatever question is asked would not be lawful.

Professor Tierney: I would fall back on my point about the purpose being raised in accordance with the effect in all the circumstances. It would depend how the Bill was set up in terms of what the effect would be. If the effect is not to bring about by itself, unilaterally, independence, which would be unlawful, then the questions could well be valid under that format.

Q213 Chair: Let us be clear, though. You are saying that some questions could be valid and some questions might not be?

Professor Tierney: Yes. I think a referendum that was being held, which overtly had the clear intention lawfully to end the Union in the event of a yes vote, would be clearly beyond the powers of the Scotland Act.

Q214 Chair: Yes, but an advisory question to achieve exactly the same objective would be legal?

Professor Tierney: Well, as I say, we have to distinguish between political objective and legal objective.

Q215 Jim McGovern: Could I maybe introduce a modicum of levity to what is a very serious subject?

Professor Page: No objection to levity.

Jim McGovern: Professor Page said earlier that he did not want to sound too much like a lawyer, and you, Chair, pointed out that that is the reason we have asked you to come here. However, in law-well, it is a question of law-I have been criticised quite often, mainly in the Chamber of the House of Commons but also sometimes at public meetings and in the local press, for referring to the Administration of the Scottish Parliament as the Scottish Executive. We were present at the Scotland Bill debate in the Chamber of the House of Commons when the Secretary of State for Scotland pointed out that the Scotland Bill would allow the Scottish Executive to refer to themselves as the Scottish Government. I am asking for a legal opinion. Is there such an entity as the Scottish Government, or is it currently still the Scottish Executive? On the basis of that old adage that if you ask lawyers a question you will get four different opinions, I will stick with my Dundee companion, Professor Page. What is the legal view on that?

Professor Page: Well, I think as a matter of law it is still the Scottish Executive.

Jim McGovern: Thank you. That will do.

Chair: However-

Professor Page: If the Scotland Bill currently before Parliament is passed, it will become the Scottish Government. Until such time as that happens, if it happens, it remains the Scottish Executive. There is an interesting point there, which is that in 2007 the Scottish Executive, as then was, said, "We are the Scottish Government", and nobody protested.

Jim McGovern: I do regularly.

Professor Page: But there is a parallel between that, if you like, and, "Let’s hold a referendum on independence". The difficulty here is that people are objecting and they would object to the lengths of taking it to court.

Q216 Chair: Could I clarify one point about the question of the question, as it were? Does it make any difference whether or not it is a leading question, such as "Do you agree?" Do you agree that any question that begins, "Do you agree" is a loaded question? Does that make any difference at all to the legality of any of this, or is it simply the substance of the question? I can see Professor Tierney nodding, so let me ask you first.

Professor Tierney: I think it is an interesting issue. There is a bit of a black hole, as you are aware, surrounding the referendum, given that we do not exactly know what the role of the Electoral Commission would be. There is a statute passed by Westminster, the Political Parties, Elections and Referendums Act 2000, which gives a role for the Electoral Commission to review questions-I think it is section 104-for their intelligibility. If it was a UK referendum, the question would go to the Electoral Commission and they would review it for its intelligibility, and they would take a view as to whether or not it is sufficiently intelligible and fair across a range of criteria. In due course, depending on what role the Electoral Commission has in the referendum, this is something that would go to the Electoral Commission. It would be for them to decide if they think this is fair or not. The general point is that we do have a system in the UK whereby we have an independent body that can review referendum questions for their intelligibility. I think it is very important that any question for this referendum would be reviewed by an independent body on those criteria.

Q217 Chair: That is very welcome and I think we are of the view similarly that we do not want to have any referendum on separation rigged by having loaded questions, but that is not, to be fair, exactly the point I wanted to clarify. What I was trying to clarify is whether, in all the points you were raising, you were saying that the legality of any referendum being held by the Scottish Government or Scottish Executive would be affected quite substantially by the wording of the question.

Professor Tierney: The legality of the question is a separate issue from the legality of holding a referendum itself. I think we have to separate that. We disagree on whether the Scottish Parliament has the power to hold any kind of referendum. I think we would agree that were that to go ahead, or even if there is a section 30 agreement, the question as a separate issue still has to be reviewed for its legality. The question is a separate issue from the referendum itself, so I am separating that off. In terms of the wording, we could have a debate about whether that wording is fair or not, but I think it is a separate issue from the trigger issue: can we have a referendum? The second issue is there are a whole bunch of rules once that issue has been decided about the nature of the question.

Q218 Chair: Can I ask your colleagues about that? The joys of the involvement of the Electoral Commission were expounded by Professor Tierney. Do you have anything to add to that?

Professor Page: Well, obviously, the integrity of the process is crucial, and that extends to the question being asked.

Q219 Chair: Your legal view, though, about who has the right to do these things is not, unless I am mistaken, affected by whether or not it is a loaded question. The question in a sense is separate, because the whole purpose of the legislation makes the whole thing illegal. Is that a statement of your position?

Professor Page: I am not sure you can separate the question of the legality of the referendum from the question being asked. I see the two as being inseparable. If you can have a referendum on it, then there is a separate question in my view about the propriety of the question that is being asked, which would be addressed-it is not clear that it would be addressed, but ought to be addressed-

through the kind of process that Professor Tierney was talking about. The threshold question you have to get over is: can we have a referendum?

Q220 Chair: Fine. Mr O'Neill?

Aidan O'Neill: I would not get caught up in the wording aspect at the moment. Two different proposed wordings have come out from the Scottish Ministers, according to section 44(2) of the Scotland Act. The first proposal was on the basis of them running this rather complex legal argument that they could ask an advisory question, which is: should the Scottish people give them a mandate to open up negotiations and the like? The suggested wording has changed in the latest consultation document, but I rather thought that the change in wording was because there has been an implicit acceptance in the consultation document from the Scottish Government that a section 30 order was, in fact, required.

Q221 Mr McKenzie: Could the panel therefore advise us on the process for adding to the powers of the Scottish Parliament?

Professor Page: As I explained in my memorandum, and as the Committee is aware, there are a variety of means by which the Scottish Parliament could be empowered to hold a referendum. It could be done by way of primary legislation-through the current Scotland Bill, an amendment to the Scotland Bill currently going through Parliament, stand-alone legislation or, alternatively, subordinate legislation, that is to say by a section 30 order under section 30 of the Scotland Act-which would have to be agreed by both Parliaments. I think there is little argument that it is the section 30 order that is the best way of empowering.

Q222 Mr McKenzie: Could the section 30 order set out the question and the timing of the question?

Professor Page: That is what the argument is about because, on the one hand, you have an offer to put this matter beyond legal doubt; that is to say, an offer from the UK Government to put the matter beyond legal doubt. The question is what strings, if any, should be attached to that. In the consultation paper to which Aidan O'Neill referred, I think the Scottish Government made plain its preference for the power with no strings attached, and it is not my understanding that that is what is on offer. The argument is about precisely what terms the powers should be granted on-in other words, what conditions should be attached.

Q223 Lindsay Roy: Who in your view should regulate the referendum?

Professor Page: My view is the Electoral Commission, and I do not think there is any real argument.

Q224 Lindsay Roy: Why would that be the case?

Professor Page: Well, because it exists-that is its job. If it ain't broke, don't fix it. Why reinvent something?

Q225 **Chair:** Can I just clarify a point? By "regulate", do you mean things like setting the date?

Professor ***Page***: No. I meant the actual holding of the referendum, how much money you can spend, and all the rest of it. Not the question of the date, no.

Chair: So the question of the date, the question of the electorate to be used-all that, in your view, would fall outwith that, as it were?

Professor ***Page*****:** Oh, absolutely, yes.

Q226 **Chair:** Fine. Some of these things we want to be clear about. So you would see the Electoral Commission as being responsible for the fair running of the referendum.

Professor ***Page:*** Making sure that it was not rigged, yes.

Q227 **Chair:** Control over open periods, closed periods, questions and the like, rather than issues of the electorate and issues of date, which should be resolved by a process of haggling?

Professor ***Page***: Yes.

Q228 **Chair:** Is that the view of the two others?

Aidan O'Neill: Yes, it is mine, actually.

Chair: Fine. We are just trying to get these things on the record, because simply nodding is not recorded, you see, in *Hansard*. Smiling approvingly cannot be seen by those behind, either.

Professor ***Tierney***: There is a clear distinction with political decisions that are made around a referendum. Any Parliament or Government organising a referendum takes certain decisions about the big issues like the question and timing and so on, but there is a whole other set of issues about the detailed mechanics to make sure it runs on a fair basis that should be overseen by an independent body.

Q229 **Chair:** Those questions that would not appropriately fall to the Electoral Commission could quite easily all be included in a section 30 order-who the electorate should be, what the date should be, possibly even what the closed and open period should be, and so on? All of that is entirely appropriate for a section 30 order?

Professor ***Page***: The draft section 30 order that is attached to the UK Government's consultation paper sets out the kinds of conditions that might be attached, including that you can only have one referendum.

Chair: Yes. We are just trying to clarify whether or not you disagree with any of this.

Professor ***Tierney***: I think there are some issues that seem clearly not to be within the competence of the Scottish Parliament, such as extending the franchise to younger people, so that would need either Westminster primary legislation or embodiment in an order. If there is an agreement that the Scottish Parliament can hold some kind of referendum, then an issue such as timing would be something that the Scottish Parliament could set if it had the authority to run a referendum. Similarly, the question would be something that the Scottish Parliament could set if it had the power to hold a referendum. I think we need to distinguish between the powers that it might well have already under the Scotland Act and powers that it clearly does not have.

Q230 **Chair:** Can I pick up those three points? The first is the question of the electorate. Unless I am mistaken, you are saying that the Scottish Parliament does not have the powers to change or to determine what the electorate should be, and therefore that would have to come from Westminster under a section 30 order.

Professor ***Tierney***: My understanding is very clearly that the Scottish Parliament does not have the power to extend the mandate.

Q231 **Chair:** The second question is the issue of timing. I would have thought that is something that potentially is the product of a haggle. It is not clear that the Scottish Parliament has or does not have the power to determine the timing of a referendum at the moment. Is that correct?

Professor ***Tierney***: It depends where we start from. The closest analogy we can start from is the powers that the Westminster Parliament has, because there is nothing in the Scottish Act that sets out in detail how the Scottish Parliament would go about running a referendum that it could run. I think it is generally agreed that the Scottish Parliament has the power to hold referendums, at least on devolved matters. I think everyone would agree to that. As far as timing goes, that is something that at Westminster level would be set out in a Bill or would be left to the Government to determine. We don't have anything to go by in the Scotland Act on timing specifically, so it seems to be a political issue, and if one believes the Scottish Parliament has the power to pass legislation to hold a referendum, then it seems to me it could set the timing.

Q232 **Chair:** Well, that is right, and if you believe they do not have the power, then they do not have the power to set the timing either.

Professor ***Tierney***: By definition, if they can't have a referendum, how can they set the timing?

Q233 **Chair:** That is right. The third is the wording of the question, and I think we have covered that. I just wanted to be clear whether or not your view was that the Electoral Commission, if it was involved, would have the power to veto a rigged question, or whether or not, if it was reporting simply to, say, the Scottish Government, the Scottish Government could overrule it and say, "No, we want such and such a question. Do you agree that the sun will shine every day if Scotland is separated?" or something similar. I want to be clear about whether or not under the terms that you would wish to see, with the Electoral Commission being involved, they would have the power to determine the question, as distinct from simply being advisory.

Professor ***Tierney***: The Electoral Commission does not have the power to set questions, and it is very clear, I think, that the Electoral Commission would not want such a power. The thing about direct democracy is it relates to representative democracy. Although the people are making a decision in a referendum, the organisation comes from representatives-from either yourselves or from MSPs, in passing legislation-and there are some issues that are big political issues, such as setting a question. There are other systems that set questions in different ways, but in the United Kingdom, that is not how it has been done. The Electoral Commission has more of an oversight role here to test for intelligibility. They would say, "We don't think this question is clear", as I think they did with the AV question, but they would not, I think, say, "Here is the question for you". I think you would have to ask them about that, but from my discussions with the Electoral Commission it seems that they are very careful about exactly what they can and can't do.

Q234 **Lindsay Roy:** But it would be foolhardy to ignore advice given in good faith, in terms of intelligibility and clarity.

Professor ***Tierney***: I think, going beyond that, the Electoral Commission has a lawful role in this regard and I would imagine a question that they thought unintelligible would clearly be open to judicial review. I don't know if my colleagues would agree.

Q235 **Lindsay Roy:** It need not be a yes/no scenario. It could be a yes/yes: "Do you wish to remain within the UK? Do you wish for an independent Scotland?" That could be the framework. It could be positive responses rather than a positive negative.

Professor ***Tierney***: As I say, it would depend what the Electoral Commission makes of the particular question. I am certainly not going to second-guess what they would make of particular questions.

Lindsay Roy: But that is a possibility?

Professor ***Tierney***: Sorry, I am not entirely sure what-

Lindsay Roy: What I am suggesting is that there could be questions such as, "Should Scotland remain within the United Kingdom?" "Yes." "Should Scotland become an independent or separate state?" "Yes." They would be your options, so there would be two yes responses rather than a yes/no.

Chair: Well, it would be an either. In a certain sense it would be an either/or. Two positive statements; you do one or the other.

Professor ***Tierney***: Okay. As I say, that would be for them. Are you asking me if I think that would be lawful?

Lindsay Roy: That would seem to be an option.

Professor ***Tierney***: I don’t know. I have never thought to look at it. I have looked at a lot of the international best practice on question-setting under the Venice Commission rules and so on, and there is very little clarity on the specifics of questions and what they think would be illegitimate and legitimate. It is very hard to find international good practice on this stuff.

Q236 **Chair:** Gentlemen, do you want to add anything to the points that have been made there?

Professor ***Page***: The only point I would add is that I thought the exact standing of the Electoral Commission in relation to the referendum is unclear, and that is something that needs to be sorted out. There has been talk about reporting to the Scottish Parliament, but that still leaves your point, or the point behind your question: "They say this, but do we have to pay any attention to what they say? Can we just go ahead regardless?" I think that is a real issue.

Aidan O'Neill: That could be dealt with by any empowering legislation as well. One could enhance the role for the Electoral Commission, saying "The wording of any referendum is set by the Scottish Parliament with the agreement of the Electoral Commission," giving them a formal veto or the like. Everything is open, as it were. Just because this is how the Electoral Commission has worked previously in relation to Westminster does not mean to say that another rule can’t be envisaged for it.

Q237 **Chair:** These issues, such as the role of the Electoral Commission, can quite clearly be expressed in the section 30 order and made quite explicit; is it similar for the question of the date, the electorate and the other issues that we have touched on?

Professor ***Page***: That is the "one question or two" issue, which you have not touched on yet.

Q238 **Mr McKenzie:** Could the actual wording of the question be included in the section 30 order, or is it required to be included?

Professor ***Page***: We are not saying the wording of the question would be, but we are saying that all of these issues could be addressed in the conditions attached to the grant of power.

Mr McKenzie: So you are saying that the actual wording of the question does not have to be included in the section 30 order, but could be included?

Professor ***Page***: We are assuming, I think, in what we have said so far that it would not be, but going back to what Aidan said, there is no reason why it could not be.

Aidan O'Neill: Although I have to say that the more complicated it is-the more questions you want in there-the more it feels like primary legislation from Westminster, rather than something that is argued out between Governments. There is no scope, as Professor Page has said, for amendment of any section 30 order, although it has to be approved by both Houses of Parliament and by the Scottish Parliament. They can either accept it or reject it, but there is no amendment of it, and when it gets into the details of this, it feels more like primary legislation.

Chair: That is helpful.

Q239 **Mr McKenzie:** Given the nature of a union, how does the panel feel about the question being applied to the other half of the Union as well-the question of how the separation applies to England?

Chair: Or the rest of the United Kingdom.

Mr McKenzie: Or the rest of the United Kingdom.

Professor ***Page:*** In other words, should they be asked? Is that your question?

Mr McKenzie: Yes.

Professor ***Page:*** I have heard the argument raised, but I don't think anybody is serious about that. The assumption is that it will be decided in Scotland.

Aidan O'Neill: I raised the argument once, in the sense that if one regards Scottish independence and separation as the dissolution of the United Kingdom, or at least of the Union of Scotland and England, then clearly there are implications for that for south of the border. As I have said, there are implications potentially in terms of international law-what the standing is of the rest of the United Kingdom, in relation to international organisations, the UN, the Security Council and the like, and continued membership of the EU. There are potentially big questions, and I think there is a perfectly legitimate interest in this issue south of the border; this is not a purely internal Scottish matter. This has repercussions and implications for the United Kingdom as a whole. Whether or not politically one would wish to extend the question throughout the United Kingdom is a political judgment. As I have said publicly, I suspect that if that happened, England would vote for Scottish independence.

Chair: Well, that is one of the unknown unknowns. No, known unknowns.

Professor ***Tierney***: I think this again highlights the crucial distinction between the political and legal effect of a referendum, because if a referendum was held and there was a yes vote in Scotland, that would not be the end of the matter. It would have to have a legal effect and go to negotiation. At

that point, the rest of the UK would be involved, because they would be involved in the negotiation of any terms for this Union. It would be, at that point, up to the Westminster Parliament perhaps to decide to have a referendum in the rest of the UK, asking them about the terms of the negotiation or what they thought of the issue. I think this does highlight the fact that the referendum is not the end of the game, in legal terms, in any way.

Q240 **Chair:** Going back to the question of how any Bill might end up in court, I wanted to clarify who has the power to challenge the competence of a Bill that came forward from the Scottish Parliament. Jim picked up on the Law Officers having the power to do so. Do they have an obligation to do so?

Professor ***Page***: I don't think so. I think it has been expressed as discretion; they may. Surprise might be expressed, I suppose, were they not to. One can imagine that the Lord Advocate might prefer not to, because he will already have, one assumes, expressed a view on whether or not it is within competence. As I think was stressed earlier on, whether or not the Law Officers intervene, there is nothing to prevent someone challenging the legislation once it is on the statute book, and I think we are all certain that that would happen.

Q241 **Jim McGovern:** By anyone, do you mean any citizen, only the Scottish electorate, or anybody in the UK?

Professor ***Page***: You would have to satisfy the requirement of standing, but I don't see that as an insuperable obstacle for getting the issue into court.

Aidan O'Neill: Under section 33 of the Scotland Act, the Advocate-General, the Lord Advocate or the Attorney-General of England and Wales-and, I suspect, the Attorney-General for Northern Ireland-can refer a Bill to the Supreme Court after it has been passed but before Royal Assent has been given. There is a period of grace in which they can make that reference but thereafter, once it has been enacted, the decision of the Supreme Court in AXA, which Professor Tierney has referred to, has opened up the previously rather narrow rules that allowed people to come to court to complain about the invalidity of Acts. It is now said that you just have to show sufficient interest-that this is not a fanciful issue, and that there is a real legal question that has to be determined.

Certainly if this challenge were raised in England and Wales-I suspect it would not be incompetent to raise it before the courts of England and Wales-there would be absolutely no problem about a general member of the public, an NGO or an interest group of any sort raising it. I suspect the same would also now be the case in Scotland. It would not have been the case three or four years ago, but the rules have changed very recently.

Q242 **Jim McGovern:** On the subject of the position of the Lord Advocate, if the Lord Advocate offered advice and that advice was subsequently ignored, what would be his position? Would he have to resign?

Professor ***Page***: Well, he might want to consider it.

Q243 **Jim McGovern:** But he would not have to?

Professor ***Page***: That would be for him. He would not have to, no. His position might be thought to be untenable, though; having given his advice, it was ignored.

Aidan O'Neill: It is a fluid constitutional situation. It is a matter for the Lord Advocate. Certainly, classically, one would expect that if the Law Officers' advice is ignored and that becomes public, you wouldn't particularly want to stay on board in the position. In the AXA case, interestingly, an issue arose when the Attorney-General for Northern Ireland challenged the competency of a Bill that had been passed by the Northern Ireland Assembly in relation to asbestos-related conditions, and that evoked some surprise among the judges of the Supreme Court. They were not used to the idea that a Law Officer might challenge Bills from their own constitutional basis, but clearly there is another vision of what a Law Officer is for, and it may well be that if the advice is ignored the Law Officer might independently decide to take the issue to the courts without resigning.

Q244 **Jim McGovern:** Just for the record, how could an ordinary citizen challenge the competency of a Bill? As a supplementary to that, how long would it take?

Aidan O'Neill: Well, the AXA case was a challenge to the damages related to the Damages (Asbestos related Conditions) (Scotland) Act 2009. It took two and a half to three years to get a final resolution. It took an awfully long time in court-I think maybe about 40 days of argument. That was brought by a coalition of insurance companies. Other interested parties came on board who were the beneficiaries of the Act. It is just a question of getting a lawyer to draft you a petition for judicial review before the Court of Session, and then the argument is raised by the lawyers, in the sense that it is a fairly low hurdle for the citizen to say that they have sufficient interest to come in and have this argument heard.

Q245 **Jim McGovern:** So it is an ordinary citizen employing the services of a lawyer to raise it, and then after that, on the length of time, it is a case of "how long is a piece of string?"? It is not an exact science?

Aidan O'Neill: It would have to be a very extraordinary citizen, in terms of having very deep pockets, because the potential for not just paying for-

Jim McGovern: I know, to engage a lawyer, yes.

Aidan O'Neill: It is not just paying for your own lawyer. If you lose, you will be landed with the costs and expenses of the other side, which, if you are going through three tiers of court and going all the way to the Supreme Court in London, are immense amounts of money.

Q246 **Chair:** I always remember the Strathclyde fluoridation case. Is this not something for which legal aid would potentially be available and therefore could continue? Mrs McColl, was it-a lady who had one tooth-was strongly opposed to fluoridation and did manage to get legal aid for something that she then dragged on for years, with the assistance of lawyers. Presumably somebody would be able to get legal aid for this.

Aidan O'Neill: No, I doubt it. Because of the Strathclyde fluoridation case, the Scottish Legal Aid Board tightened up its approach to giving legal aid in cases where individuals were claiming to represent the public interest. They said in that case, "Well, the public as a whole should pay for it, rather than an individual getting the benefit of legal aid". It would be very difficult for an individual to get legal aid if those rules by the Scottish Legal Aid Board are upheld as lawful.

Q247 **Chair:** So, in fact, the theoretical right that was mentioned to Jim there about somebody being able to take it to court would depend upon that person being a multi-millionaire?

Aidan O'Neill: Just a millionaire would do, but yes. That is the problem with access. Although there is theoretical access to courts for everyone, the costs of doing it and the risks involved mean that, ultimately, access is for the rich and the corporations. That is the way the cookie crumbles if you don't have a comprehensive legal aid system.

Chair: So the case can only really be taken up by somebody who could buy Rangers with their loose change, essentially?

Aidan O'Neill: And pay for it.

Q248 **Chair:** Indeed, and pay for it. Right, okay, I will remember that. I think we are getting close to the end of our questioning here. Could I touch on one point-the question of the franchise, and whether or not you have any observations to make on what the nature of the franchise should be? Obviously there are different choices available. Is this something that you feel qualified to comment on?

Aidan O'Neill: From a legal point of view, as Professor Tierney says, the Representation of the People Act is a matter that is reserved, and that sets out the usual franchise that requires one to be an 18-year-old. Currently the franchise, because of European Union law, allows other European citizens to vote in Scottish parliamentary elections and in all local government elections. That is where we currently are in terms of the law. As Professor Tierney says, we are all agreed that in theory it is open to the Scottish Parliament to hold referenda within devolved competence. If it was open to do that, then if what it was doing was within devolved competence, I don't see why it should not also be able to change the franchise. Of course, my argument is that it is not within devolved competence.

Q249 **Chair:** Can I clarify your view on one point? It has been argued that the Scottish Parliament, as a subsidiary legislature, has a particular franchise. There are a number of people excluded from that franchise in the elections to what is considered to be the state, the nation state. If we are having a referendum to create a new nation state, should the electorate not be the electorate that was used in the elections to the existing nation state, as distinct from the subsidiary legislature, which would mean that the appropriate electorate would be that for the UK elections? That is the issue about European migrants and so on who come here for either benefits tourism, work or a variety of other reasons, and who have no long-term commitment to the country, but who would have an eligibility to vote in either European elections, which I can understand, or the subsidiary elections, but not in the nation state elections. Are there any legal issues involved in that at all?

Aidan O'Neill: Interestingly, there are, under the citizenship rights granted under article 21 of the European Union treaty on the functioning of the European Union, and also the Charter of Fundamental Rights of the European Union, which says that, as you say, European citizens have a right to vote in European parliamentary elections. They also have a right under EU law to vote in municipal elections within member states where they happen to be residing, but it is not clear what municipal elections are. It has been interpreted, in the UK implementing legislation, as everything apart from elections to the UK Parliament. Whether or not that is a proper understanding is a matter that has never yet been determined by the European Court of Justice, but that is who would be the ultimate determinant of that. It is a matter of EU law rather than national law.

Q250 **Chair:** Is that a view that is supported by your two colleagues?

Professor ***Tierney***: It is not a provision I am familiar with, but it sounds very convincing that that is the case. It would be something that a Government holding a referendum would have to be very wary of in order not to lock into a legal challenge if it is preventable.

Professor ***Page***: The question would be, as I understand it, "Is this a municipal election?" If it is a municipal election, EU citizens would have the right to vote. As Aidan said, the meaning of municipal is something that would fall ultimately to be determined by the European Court of Justice.

Q251 **Chair:** I understand your point about the European Court of Justice, but how could it possibly be assumed that the creation of a new nation state was akin to a municipal election?

Professor ***Page***: That would be the argument-that it wasn't-but it is an argument, and so therefore it is before the courts, potentially.

Q252 **Chair:** It seems a statement of the bleeding obvious, in a sense, does it not? I mean, in terms of the balance of that-

Professor ***Page***: You would make a great judge, if I may say.

Chair: It just seems so obvious that this is nowhere near akin to a municipal election-the creation of a new state. I think we have maybe got as much as we can out of that.

Q253 **Jim McGovern:** But on that subject, are there any examples-I am guessing the plural is "referenda" rather than "referendums"-either from within the UK or internationally of best practice that cover, for example, exactly who is allowed to participate?

Professor ***Page***: There was a massive debate about what the plural was way back in the 1970s, as I recall, but we seem to have all settled on referendums rather than referenda.

Jim McGovern: You guys speak Latin; I am an ex-altar boy. Mine is a bit-

Chair: I am sure there are four opinions there, but we will not get into that just now.

Professor ***Tierney***: I think it is referendums.

Aidan O'Neill: But in terms of the statement of the bleeding obvious, in terms of whether this is a matter of EU law or not, there has been a recent decision from the Court of Justice-a rather technical decision-about the rights to accrue pension depending on where one worked, in the Czech Republic or in the Slovak Republic. The Court of Justice said, "This is a matter of EU law and we will determine it". The Czech Constitutional Court is not at all happy about that, saying, "This is a matter of essential national constitutional law". There is a bit of a stand-off between the two courts as to which is the statement of the bleeding obvious, so there is potential for conflict and resolution on what is a municipal election, I would suggest.

Professor ***Tierney***: Other than that, the Venice Commission of the Council of Europe has issued guidelines on referendums and it has covered the participation issue. Leaving aside the EU position, which is very important in our context, it has generally taken the view that residence should be the issue-people who are ordinarily resident should have the vote. Where the controversies have arisen have tended to be in Eastern Europe, particularly in the former Yugoslavia, where people, often through no fault of their own, have migrated or have been refugees in other territories. For example,

in Montenegro, which had a referendum in 2006, one issue was whether people living in the rest of Serbia, or in Serbia and Montenegro within Serbia, who were Montenegrin or claimed to be Montenegrin had the right to vote. The Council of Europe took a view that they should not-that it should still be a residence issue-on the basis that people living in Serbia could vote in other elections, so they didn't need a double franchise, as it were.

That is a slightly different point, but it would certainly cover the issue, for example, of those who argue that people born in Scotland now living in England should have the vote. I think there is a pretty strong argument, in terms of residence and fairness, that that franchise should not be extended to people not living here and paying taxes here, and so on. That is a slightly different issue, but on the thing about European migrants, I think we would have to be very careful on the EU front when it comes to being seen to be excluding people who would be able to vote in local elections, even though I take your point that a self-determination issue is surely different from a local government issue.

Q254 **Chair:** The other point that I wanted to have your opinion on is the question of a multi-option referendum. We have already touched on the possibility of whether or not a single question should be yes/no, or either/or-two separate statements, as it were. I wondered whether or not you had any observations to make to us, from a legal basis, about the possibility of there being a variety of different questions all being asked at the same time, unlike the previous referendum, where one did not follow on from the other-the yes/yes question, where if you voted no, the second question fell. This would be a question of perhaps mutually incompatible alternatives. Do you have any observations on that?

Professor ***Page***: Not from a specifically legal point of view, no, and the question is whether or not it would introduce confusion to have more than one question. For myself, I don't see that it necessarily would if it was raised properly. "Do you think it should be changed-yes or no?" If the answer to that is yes, "What form should that change take?" But I don't claim any particular expertise in the matter, and I am simply conscious of the issue.

Aidan O'Neill: From a legal point of view, one could say that there is an obligation in public law to be clear and potentially, I suppose, the idea of having too many questions points towards unclarity, but I think a court would wish to shy away from ruling on issues as to whether multiple options were legal or not. I don't have any particular view on it in the abstract, as it were.

Professor ***Tierney***: The first thing I would say is there has not been a lot of practice with more than two options. Most referendums have been just two-option referendums. Having said that, under the international guidelines I have been talking about from the Venice Commission, there are clearly no rules against it. There is nothing under international best practice that suggests that this is in some way illegitimate. If we were to take the deliverance of democracy point of view, one might say that there might be an argument to be put for giving voters more choice rather than less. I think the real controversy possibly turns on how you make the decision when you have more than two options. That is the really tricky bit.

Q255 **Chair:** We intend to take evidence from experts in these sorts of things at a later stage. The final point that I wanted to raise, particularly with Mr O'Neill, relates to the section in your paper where you are dealing with the EU. We are not entirely clear from what you have said whether or not, in the debate about the terms of entry of a separate Scotland, it would be assumed that a separate Scotland was obliged to join the euro or Schengen, or whether or not they were able to benefit from the EU's opt-outs. Can you clarify the position for us?

Aidan O'Neill: Unfortunately, I can't. I would love to, but-

Chair: Can you try to clarify the position?

Aidan O'Neill: Yes. What I have set out in the paper is simply my legal opinion from a perspective that is not normally taken, which is that of looking at the notion not of continued EU membership of states but rather of continued EU citizenship of individuals living within those states. What I say from a legal point of view is that because of the increasing importance that the Court of Justice of the European Union is affording to EU citizenship, from a legal ruling point of view they would wish to favour a result that meant there was a continuing EU citizenship of individuals within the territories, even when they had split up or dissolved. From that "ground upwards" perspective, one can say it is more likely than not that the Court of Justice would consider that there was a continuing membership, despite the dissolution of the United Kingdom.

From a legal point of view, the details of how that would work out in practice-how many seats the rest of the UK would get, how many votes it would get in qualified majority voting, how many votes Scotland got-that would all be a matter for political negotiation within the context of a ruling by the Court of Justice that they are, in fact, still within the EU, and it is just a matter of negotiating. Again, from a legal point of view as to the opt-outs in terms of Schengen and the euro area, those issues apply in relation to new states wishing to come into the European Union under the treaty, but if you have an existing territory that is dissolved, there will be arguments either way-for example, you have to apply for euro membership. I think the reality is that politically, that is not going to happen. People are not going to be forced to take the euro, certainly not under the current regime. On whether they would be forced to enter Schengen, there might be a bit more give and take on that issue, because clearly the thrust of European Union law is towards a common area, common borders, and free movement. Schengen is an opt-out, but a bit of a compromise from that, and it is regarded, I think, in EU terms as being a bit of an anomaly that will not always last.

Having said that, it is not just the UK that has extra-Schengen, as they say; there is the case of Denmark. There are variations in terms of membership of the EU. There are strong pushes towards what they call variable geometry-sorry to use all the ridiculous EU jargon-which is that states opt into different levels. I am afraid that is why I can't give a clear answer on it. I think what I would say is the clear answer is that existing EU citizens, existing Scots and existing British nationals would remain EU citizens by fiat of the European Court of Justice. How their respective states would be represented within the EU would be a matter for political negotiation still.

Q256 **Chair:** It is unknown and potentially unknowable until we get to that situation?

Aidan O'Neill: It is not a matter of law, so it is outside my competence, I think.

Q257 **Chair:** That is very helpful. Are there any points that you were ready to tell us about that we have not given you the opportunity to enunciate, or any answers that you had ready to questions that we haven't asked you? It is with some trepidation that I ask lawyers that, but I just thought I had better give you the chance.

Professor ***Page***: No, I think we have had a pretty fair crack of the whip.

Chair: Any observations or any points that my colleagues want to raise finally? Thank you very much for coming along. I think this has been an immensely helpful hearing. I am particularly grateful that a couple of you gave us written evidence. We have seen Professor Tierney's blog as well. No doubt we will be returning to these issues with other witnesses in due course and it may

be, if you are agreeable, that we will want to raise points with you that arise from observations that other witnesses make, or on which, on reflection, we want to seek clarification. Thank you very much for what I think has been a very helpful afternoon.