

# Electoral Commission response to Scottish Government proposals for a Referendum Franchise (Scotland) Bill

The Electoral Commission is an independent body set up by the UK Parliament. We regulate party and election finance and set standards for well-run elections and referendums. We work to support a healthy democracy, where elections and referendums are based on our principles of trust, participation and no undue influence.

For council elections in Scotland we undertake a number of roles relating to the administration of the elections for which we report directly to the Scottish Parliament.

## General comments

1.1 On 7 December the Scottish Government sought the Commission's comments on a policy proposal and an initial draft of the Referendum Franchise (Scotland) Bill (hereafter referred to as the initial draft Bill). The proposal and initial draft Bill seek to establish a legal framework to enable all 16 and 17 year olds to register and cast a vote in the referendum on independence for Scotland. In our response<sup>1</sup> to the Scottish Government's consultation, *Your Scotland, Your Referendum*, we were concerned that if the Scottish Government's policy intention was to lower the voting age to 16 it might not be achieved via the then proposals. We welcome the clarity of the new policy paper and initial draft Bill which seeks to enfranchise all those who would be 16 on the referendum polling day.

1.2 We note, however, that the initial draft Bill does not cover all of the Scottish Government's proposals to enable 16 and 17 year olds to vote in the referendum as some of the proposals will be legislated for in the main Referendum Bill (for example, the marked registers), some may be provided for through secondary legislation and others do not require legislation. We recognise that the bill is in the early stages of development but would welcome confirmation of what will be legislated for in the Referendum Bill or subsequent secondary legislation.

1.3 The Commission notes that under the Edinburgh Agreement the question of the franchise is a matter for the Scottish Government and Parliament to determine. Our priority is that there are no barriers to participation in the referendum by all eligible electors, and that the registers used to administer the poll are complete and accurate, regardless of the

---

<sup>1</sup> [http://www.electoralcommission.org.uk/\\_\\_data/assets/pdf\\_file/0011/146927/The-Scottish-referendum-Response-to-consultations.pdf](http://www.electoralcommission.org.uk/__data/assets/pdf_file/0011/146927/The-Scottish-referendum-Response-to-consultations.pdf)

particular franchise in use. The purpose of this response is to comment with the aim of ensuring that these principles are achieved in the legislation. We will continue to monitor the proposals against this priority as they are developed.

1.4 The referendum legislation, either in a redraft of the initial draft Bill, the draft Referendum (Scotland) Bill or related secondary legislation, needs to make clear how the young voters register and the merged register will be used, when and by whom for the following purposes:

- ensuring that the register to be used at the referendum is kept up to date
- supplying the registers to Counting Officers (COs) for the purpose of taking the poll at polling stations and for postal voting,
- enabling registered referendum campaigners to put their arguments directly to those who will be eligible to vote in the referendum
- enabling registered referendum campaigners to check the permissibility of donations and loans received
- supply of the marked merged register to registered referendum campaigners following the referendum
- public inspection of the marked merged register following the referendum
- storage by the proper officer of the relevant council after the referendum
- access for the purposes of any legal proceedings

1.5 A number of our comments identify gaps in the current proposals that will need to be addressed if the registers are to be used for all of these purposes.

1.6 In redrafting the Bill to this effect, the Scottish Government will also need to ensure that any potential unintended consequences are identified and mitigated where appropriate, including data protection and child protection issues. We note and welcome that the Scottish Government has already recognised these potential issues and has sought to address them in its proposal.

1.7 Electoral Registration Officers (EROs) will need to collect the details of some 15 year olds so that they are registered to vote in time for the referendum if they will be 16 by polling day. We are pleased to note that the Scottish Government has been in discussion with organisations concerned with children's issues and data protection to ensure that these proposals do not adversely affect anyone under the age of 16. If these discussions identify any issues which require significant changes to the policy or initial draft Bill, we would appreciate the opportunity to discuss these with the Scottish Government. It will also be important to ensure that any relevant changes to the proposals – as a result of this consultation or otherwise - are discussed with these organisations as the policy is developed further.

1.8 The policy paper indicates that further details of how the policy is to be implemented are to be contained in secondary legislation or are still to be identified and included in a schedule to the draft Bill. The Commission is

happy to provide comments on the proposals and initial draft Bill at this stage, but we may wish to review our comments further once the fully developed proposals and draft legislative provisions are available.

1.9 The Scottish Government, along with the Commission, EROs, COs, registered campaigners and others, will want to ensure that the language used in all information materials targeted at young people clearly and consistently explains which young people will be eligible to register and vote and who will not. We would not wish to see any young person inadvertently misled due to their nationality or precise age for example. We will be happy to work together with others to prepare some common language on this issue.

1.10 The Commission is happy to expand on its comments further or to meet with Scottish Government officials to discuss our comments in more detail.

## Impact of Individual Electoral Registration (IER)

1.11 The Electoral Registration and Administration (ERA) Bill at present before the UK Parliament provides for a fundamental change to the registration of electors in Great Britain. The UK Government currently anticipates that that Bill will shortly be approved by the UK Parliament, with secondary legislation to give effect to these changes to follow.

1.12 The Scottish Government's initial draft Bill applies and makes modifications to existing electoral law such as the Representation of the People Act 1983 (RPA 1983) and some secondary legislation. Given that much of this existing law will be repealed or amended if the ERA Bill and its secondary legislation is approved in the UK Parliament, the Scottish Government will need to ensure that their Bill achieves its objectives. For example, the initial draft Bill applies Section 10 of the RPA 1983 to provide for the conduct of the canvass for the young voters register. This section will only apply in respect of Northern Ireland once the ERA Bill is enacted.

1.13 The Scottish Government will need to be in regular communication with the Cabinet Office of the UK Government on the transition to IER. We note that this is already occurring and should continue until all the necessary legislation under the ERA Bill and the revised draft of the Bill is in place. Both Governments should work together to identify any issues which the introduction of IER may have on the referendum and develop plans to ensure any such issues are resolved in the best interests of voters.

1.14 We recognise that IER is a UK Government policy and thus not within the control of the Scottish Government. **However, we recommend that the Scottish Government, following detailed discussions with the Cabinet Office, publishes its understanding of how IER will impact upon the administration of the referendum when a revised draft of the Bill is introduced to the Scottish Parliament.**

1.15 Such a process should identify the processes for registering as young voters as well as those registering as local government electors. If personal identifiers for over 18s are to be required from July 2014, then similar

legislation would be needed for those under 18 who would be eligible to be added to the young voters register. However, if this was not to be the case, then different requirements will be needed and separate public awareness campaigns with different messages will be required for young voters. Clarity on this point is essential at an early stage to allow all those involved to be clear and able to plan accordingly.

1.16 In addition, IER will introduce changes to the process of applying to vote by post and by proxy. This will similarly need to be considered in developing legislation for the referendum and should be included in the Scottish Government's document.

1.17 The ERA Bill will allow the Secretary of State, through regulations, to confer functions on the Electoral Commission, including requirements to design a canvass form or an invitation to register. The UK Government has also published draft secondary legislation providing for the Electoral Commission to determine the application form for registering or altering an application on the register under IER.

1.18 In advance of the transition from household to individual registration, the Commission will produce user-friendly paper application forms, notes and covering letters in accordance with the relevant legislative requirements that are easy for the public to understand and use and that collect the necessary registration information in a consistent format. It is important to ensure that the draft Bill provides for any amendments which may need to be made to these new forms to ensure that they can be used for the registration of 16 and 17 year olds. The Scottish Government should consider how these amended application forms are consistent across Scotland and develop proposals to deliver this in practice.

## Implementation

1.19 It is difficult to comment currently on the workability of the detailed proposals as a whole given that the section of the initial draft Bill setting out what modifications to secondary legislation will be required has not yet been completed. We would welcome sight of and the opportunity to comment on a revised version of the draft Bill, as soon as it becomes available.

1.20 In particular, we would like to know whether any secondary legislation is planned under the draft Bill, what its content might be and the timescales for its introduction. We are aware the Scottish Government is talking with Scotland's EROs in order to ensure the legislation is capable of being implemented in a timely manner. We would, however, expect the Scottish Government to indicate that the legislation will be in force at least six months before the annual canvass to give EROs sufficient time to plan and effectively implement the changes.

1.21 Paragraph 12 of the policy proposal states that a marker will appear next to the name of every young voter on the merged register and that this will make it possible to determine the turnout of 16 and 17 year olds. It is unclear

from the policy proposal who will be responsible for calculating the turnout, on what basis it is to be calculated, and how and when it will be published. We would welcome further clarity from the Scottish Government on this matter.

## Access, supply and inspection of the register

### Supply of the register to registered campaigners

1.22 In discussions with Scottish Government officials, we have previously highlighted some concerns about the proposed approach to making registers available to campaigners at the referendum. The annex to the Deputy First Minister's letter of 7 December 2012 says (on page 5) that the designated lead campaign organisations on each side of the question will need to access the names and addresses of all electors, including those on the Register of Young Voters, and that before the details of young electors are provided to campaigners they will be merged with the details of those drawn from the register of local government electors.

1.23 At PPERA referendums the full electoral register is made available to all those campaigners who register with the Electoral Commission, and not just to the designated lead organisations. The register can only be used by campaigners for two purposes – to campaign in the referendum, and to comply with the PPERA rules on donations (and on loans where these are regulated), by checking that individuals who donate or lend more than £500 to the campaign are on an electoral register, and are therefore permissible donors or lenders.

1.24 The Scottish Government's policy proposal therefore raises several matters which need to be addressed:

- The intention of making the electoral register available only to designated lead campaigners, and not to all registered campaigners, will make it very difficult for those campaigners that are not designated as lead organisations to comply with their obligations to check the permissibility of donations and loans from individuals. This would place an unnecessary additional burden on these campaigners and may also undermine voters' trust in the effectiveness of the permissibility controls.
- This approach will also make it more difficult for campaigners to put their views to voters than at PPERA referendums, since they will not have access to the names and addresses of all eligible voters. We think it is important that all those people and organisations which are eligible to register with us to campaign at the referendum have the information they will need to put their arguments to voters, in the same way as campaigners at PPERA referendums, and political parties at elections.
- If the lead campaigners are only able to access the electoral register after they are designated, some weeks into the referendum period, then they will also face obstacles in checking the permissibility of donations and loans received before that point, and in planning to contact voters.
- If the details of young voters are merged with those of people on the register of local government electors, so that campaigners cannot distinguish between people on the two registers, that will make it

impossible for campaigners to use the register to comply with their obligations to check the permissibility of donations and loans to individuals, since only those on the register of local government electors will be permissible donors and lenders (PPERA s.54(8)). This will be a significant problem for campaigners, since there is no reliable alternative means for them to check whether an individual is a permissible donor or lender.

1.25 We therefore think it is important that the full register be provided to all registered campaigners at the referendum in a format that will enable them to determine whether any given individual is a permissible donor or lender. It is also important that all registered campaigners have access to the information they need to put their views to all those eligible to vote in the referendum.

1.26 In addressing these issues, the Scottish Government will of course need to consider how to ensure adequate protection of data relating to young voters. If the Scottish Government wishes to explore options for legislative change that may affect the PPERA permissibility controls, it will also need to consult those affected including the Commission and the UK Government. We would of course be happy to provide advice to the Scottish Government on issues relating to permissibility controls and campaigning.

#### **Availability of the marked registers**

1.27 In order to have a transparent referendum which inspires confidence and trust in the result, we recommend that the marked register of electors should be able to be supplied to any of the permitted participants upon request, in a similar manner as marked registers are supplied to candidates and political parties following an election. In responding to the Scottish Government's consultation paper *Your Scotland, Your Referendum*, we have already said that a new Schedule is required that sets out how the register used for the referendum should be made available for supply and inspection.

1.28 Paragraph 13 of the policy proposal states that no individual or group, other than those in paragraph 10, will have access to the merged register. This is incorrect if the merged register is to be provided to COs for the use of taking the poll at polling stations and then becomes the marked register. Under any of the alternatives listed in paragraph 28, this register which identifies who voted and also whether or not they are under 18, will be available for public inspection.

#### **Compilation of the merged register**

1.29 In paragraph 11 of the policy proposal, the Scottish Government lists some alternatives for the way in which the merged register will be compiled. While EROs are entitled to collect information about 16 and 17 year olds as part of the normal annual canvass, there is no legal provision which creates a register of 'sleeping attainers'. Given that registered campaigners will need the registers in order to put their views to voters and check the permissibility of any donations or loans they receive, all those who are eligible and registered to vote in the referendum must be on a register that is capable of being published. For this reason, we believe that EROs should have a power to determine applications to register from eligible young people, and that the

legislation should make it clear that any information already provided to EROs by sleeping attainers for the purpose of ensuring their names are added to the electoral register can be used to invite an eligible young person to register.

## Technical comments

1.30 We would query the drafting of Clause 5(2)(b) of the initial draft Bill. We assume that this provision is intended to clarify that any person who is registered in the young voters register and who reaches the age of 16 prior to the referendum will not be able to vote at any electoral event other than the referendum. However, the drafting does not quite appear to reflect this intention - it provides that the person is only to be taken as a voter for the referendum (only) until they attain the age of 16. If our understanding of the policy intention is correct we suggest this clause is clarified.

1.31 We note from the Schedule to the initial draft Bill (Part 2) that Section 13A of the RPA 1983 is applied, with modifications. Section 13A(2) provides for the monthly updating of the young voters register by issuing, 'in the prescribed manner', monthly notices of alteration. The usual provisions for issuing notices of alteration require an ERO to make a copy of it available for inspection. However, our understanding is that the Scottish Government does not intend for these notices of alteration to be published and we would suggest Section 13A(2) is modified to require the 'preparation' of monthly notices of alteration (as for the approach to the preparation of the young voters' register).

1.32 There is no equivalent of Section 3A of the Representation of the People Act 1983 (Disenfranchisement of offenders detained in mental hospitals) contained within the Bill. If the intention of the Scottish Government is that the same requirements for registration apply to young people as for those 18 and over, an equivalent section will need to be drafted.

## Consequences for the Referendum (Scotland) Bill

1.33 The Referendum (Scotland) Bill will need to be carefully revised in its entirety to ensure that references to the register of young voters, or the single merged register, are included where appropriate.

1.34 The Scottish Government intends that young people will be eligible to apply to vote by post or by proxy on the same basis as other electors. The absent voting rules that were contained in Schedule 2 of the draft Referendum Bill allow for postal and proxy votes for those on the local government electoral register. We would expect that Bill to be revised before its introduction to the Scottish Parliament to make those rules applicable to persons on the register of young voters as well.

1.35 To ensure that permitted participants are able to put their views to voters, the lists of postal voters and of proxies under Schedule 2 should include the details of young people who have successfully applied to the ERO to vote by post or by proxy.

1.36 The Scottish Government's policy intention is that the register of local government electors and the register of young voters will be merged before it is supplied to Counting Officers and campaign organisations. There will need to be an explicit provision in legislation that requires this to be done and sets out exactly how the merged register should be prepared. This would include how to allocate elector numbers so that there is no duplication and would also need to consider the best way of ensuring that any updates to the young voters register that occur after the two registers are merged are carried over to the merged register.

**The Electoral Commission**  
**January 2013**