

# Scottish Independence Referendum Bill

## Stage 2 Amendments Briefing

This briefing sets out our views on amendments that are due to be considered by the Committee at Stage 2 of the Scottish Independence Referendum Bill.

In our written and oral evidence at Stage One we drew the Committee's attention to some areas of the Bill where we had concerns about the workability of the legislation as drafted or where we believed the provisions could be strengthened in order to improve transparency or accessibility for voters and campaigners. We have also continued to work with Scottish Government officials to offer technical advice on the legislation, and have made some suggestions to them about areas where the workability of the legislation could be improved or its provisions brought into line with other electoral events. We have therefore focussed our comments on the Government amendments that address these issues.

We have not commented on all amendments tabled, and the absence of comment on an amendment does not imply that we support it.

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## Schedule 1, Amendments 4-5, Schedule 3 Amendments 22- 23

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These amendments require the official mark to be placed on the front of the ballot paper with only the unique identifying number remaining on the back.

**We support these amendments** as they would improve the efficient administration of the count and are in line with practice at other polls.

## After Section 2, Amendment 6

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This amendment provides a mechanism to enable 16 and 17 year olds who are currently resident outside of Scotland - due to a parent or legal guardian's service

in the armed forces – to register and vote in the referendum. The amendment would provide for affected 16 and 17 year olds to be able to make their own service declaration in order to be added to the young voters register.

The franchise at the referendum is a matter for Parliament to decide. If Parliament's intention is to include these young people in the franchise then we consider that the amendment provides a workable mechanism for enabling them to register to vote at the referendum.

## Schedule 2, Amendments 7 – 10

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These amendments extend the eligibility criteria for emergency proxy votes from voters who become ill or disabled after the application deadline for normal proxy votes to include those voters who will be, or are likely to be, unavoidably absent on the date of the referendum and who only became aware of that fact after the application deadline for a normal proxy vote.

The Referendum Bill as currently drafted provides for the deadline for a normal proxy vote applications to be 5pm on the eleventh working day before the poll (or 3 September 2014) as opposed to the sixth working day before the poll as is the practice at other electoral events. In our written evidence to the Committee at Stage One we raised concerns about this. We noted that the later deadline would provide voters with more time to apply to vote by proxy and we recommended that the bill be amended to move the deadline to 5pm on the sixth working day before the poll and we remain of that view.

The amendments introduce the requirement for attestation of an application for those received after the eleventh working day before the poll, whilst widening the categories of voters who may apply. This means that some voters will be inconvenienced by fulfilling the attestation requirements

The Commission has previously recommended that the eligibility criteria for emergency proxy votes be extended to include a wider range of circumstances which might prevent voters from casting their vote, and which they could not anticipate prior to the application deadline for a normal proxy vote. We welcome the intention of the amendment to include any voter who will be unexpectedly absent from their qualifying address for any reason. However, we note that this would not extend the availability of emergency proxy applications to those voters who may unexpectedly be unable to attend the polling station but who would **not** be absent from their qualifying address, including those with caring responsibilities (except those undertaking such roles as part of their occupation, service or employment).

## Schedule 2 Amendment 13, Schedule 3 Amendments 24-25

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These amendments remove the restriction on Counting Officers sending out postal ballot papers before 5pm on the eleventh working day before the referendum poll and instead places a duty on the Counting Officer to issue postal ballot papers 'as soon as practicable'.

**The Commission supports these amendments** as they will give postal voters as much time as possible to return their postal ballot in time for it to be counted and is in line with recommendations we have previously made for governments to review electoral timetables to ensure that postal votes could be issued as early as possible

## Schedule 2 Amendment 14

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Amendment 14, provides that where an existing postal voter successfully applies to vote by proxy after postal ballot papers have already been issued then the original postal ballot papers shall be void and of no effect. It then confers a duty on the applicant to return the documents and sets out a process for cancelling and storing them once returned.

The amendment does not confer a duty on the ERO to notify the Counting Officer that the proxy application has been granted which we believe it should. Neither does it provide for what should happen if the applicant does not return the ballot papers. The amendment only has effect for the cancellation of previously issued postal ballot papers in the case of a postal voter who successfully appoints a proxy and not where a person changes their manner of voting in other ways – for example by cancelling their postal vote in favour of voting in person.

**While we welcome the broad intent of the amendment we believe further amendments will be required to improve the workability of the proposed change.**

## Schedule 4, Amendment 30

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This amendment provides that the same person cannot be the responsible person for more than one permitted participant.

This mirrors a restriction that applied at the 2011 referendum on the UK parliamentary voting system. **We support this amendment** which strengthens the controls against campaigners seeking to circumvent the spending limits.

## Schedule 4, Amendments 31 to 33

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These amendments change the timetable for designating lead campaigners so that they are appointed before the start of the regulated referendum period.

This will be the first referendum with designated lead campaigners where the enabling legislation is expected to receive Royal Assent well before the start of the referendum period. As such, we recommended in our evidence to the Referendum Bill Committee in June 2013 that there would be significant benefit in uncoupling the designation process from the referendum period and taking the designation decision earlier<sup>1</sup>. This would enable the lead campaigner(s) to be designated shortly before the start of the referendum period. Our recommendation was supported by both Yes Scotland and Better Together<sup>2</sup> and by the Referendum Bill Committee in their Stage 1 report<sup>3</sup>.

**We therefore support these amendments** which will:

- provide clarity to campaigners and voters about who the lead campaigners are in time for the start of the referendum period
- provide lead campaigners with the full duration of the referendum period to make the most effective use of the benefits available to them
- make it easier for lead campaigners to work with other campaigners to put arguments to voters (since the rules on campaigners working together are different where a lead campaigner is involved), and
- enable political parties to donate to a lead campaigner throughout the referendum period (since parties can only donate to designated lead campaigners)

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<sup>1</sup> [Written evidence on the Scottish Independence Referendum Bill](#), paragraphs 30-34

<sup>2</sup> [Official Report of Meeting 30 May 2013](#), column 467

<sup>3</sup> [2nd Report, 2013 \(Session 4\): Stage 1 Report on the Scottish Independence Referendum Bill](#), paragraphs 120-126

## Schedule 4, Amendment 34

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This amendment removes the requirement for the Commission to be satisfied that there is a 'special reason' to grant leave for a campaigner to pay a late claim.

We recommended to the Scottish Government that this requirement be removed as we would expect to grant leave unless it appeared that the late claim related to an attempt to avoid transparency. It appeared to us that the term 'special reason' had no clear meaning in this context, and may increase the potential for legal challenge to a decision to grant leave. **We therefore support this amendment.**

## Schedule 4, Amendments 35 to 37

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These amendments remove the ability of the Commission to appoint an auditor where a campaigner has failed to do so.

We recommended to the Scottish Government that this requirement be removed because we would not expect to be in a position to use it in the period before an audited return is due. Where an audit is required but has not been carried out, we will have the option of using our civil sanctioning powers to require one to be undertaken, such as issuing a compliance notice. **We therefore support these amendments.**

## Schedule 4, Amendment 38

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This amendment removes the requirement for campaigners to deliver a copy of a Commission decision to grant leave to pay a late claim with their return. We recommended to the Scottish Government that this requirement be removed as we will already hold a copy of any decision we make. **We therefore support this amendment** which will reduce the regulatory burdens on campaigners.

## Schedule 4, Amendment 39

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This amendment clarifies that post poll returns relate to donations 'accepted' rather than 'received'. **We support this amendment** which brings post-poll reporting at the independence referendum in line with the requirements at other electoral events.

## Schedule 4, Amendments 42, 43, 117 and 118

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These amendments extend the pre-poll reporting requirements on campaigners. The Bill as introduced requires the donation and loan reports that campaigners must submit for publication during the referendum period to include information about donations received during the period. The effect of the amendments is that campaigners will also have to report donations received between the Act being passed and the start of the referendum period, if those donations are towards regulated spending that is used during the referendum period. This will include donations made to campaigners before they register with us.

We recommended to the Scottish Government that this reporting requirement be extended to increase transparency for voters before they go to the poll. **We therefore support these amendments..**

## Schedule 5, Amendments 51 and 52

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These amendments will enable the Commission to publish a separate report on its use of its investigatory and sanctioning powers if necessary. We recommended this because in practice, the majority of our enforcement work takes place after campaigners' spending reports have been published and people have had an opportunity to digest the published information. This means that we may not be able to report fully on our use of the investigatory and sanctioning powers by the time the Commission makes its main statutory report on the referendum to the Scottish Parliament.

**We therefore support this amendment** which will enable us to provide appropriate and timely reports to the Scottish Parliament.

## Schedule 6, Amendments 53 to 105

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These amendments set out the details of the civil sanctions to be made available to the Commission for use where the campaigning rules have been broken, including the rules to which the sanctions will apply. The Bill as introduced provided for this information to be set out in secondary legislation. The amendments ensure that both the Commission and campaigners at the referendum have early confirmation of how the sanctions will work.

**We therefore support these amendments** which confirm our ability to regulate campaigning at the independence referendum in a proportionate manner. The Commission will have access to a range of sanctions from fixed monetary penalties through to stop notices in the case of the most serious harm to public confidence in the controls.

## After Section 20, Amendment 110

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This amendment places a duty on the Electoral Commission to prepare and publish a Code of Practice on the attendance of observers at the referendum.

In our written evidence to the Committee on the bill we noted that the provisions in the Political Parties Elections and Referendums Act 2000 (PPERA) which require the Commission to prepare and publish a code of practice for observers at all UK elections in the UK did not extend to the Scottish independence referendum and the bill as then drafted did not address this gap. Consequently **we support this amendment**, as it will ensure that the referendum meets the highest international standards of transparency by supporting full independent scrutiny of the referendum processes.

## Section 22 Amendment 107

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This amendment inserts a power for the Chief Counting Officer (CCO) to give guidance to Counting Officers and Electoral Registration Officers.

As noted in our written evidence to the Committee at Stage One, we believe that the CCO should have a clear legal power to provide guidance for Counting Officers and therefore **we support this amendment**.

## After Section 23, Amendment 111

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This amendment places a duty on the CCO and Counting Officers to take appropriate steps to encourage participation in the referendum.

**We support this amendment** as we believe the CCO and Counting Officers have an important role to play in running voter information campaigns to increase the reach of national voter awareness activity carried out by the Commission.

## Co-ordinated campaigning and the 'common plan' rules

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We note that a number of concerns have been raised around the 'common plan' rules in the Bill and that amendments have been tabled to amend the rules. The common plan rules as currently drafted require the total combined regulated spending of all those involved in the common plan to count against each campaigner's spending limit, (or the registration threshold of £10,000 in the case of unregistered campaigners). Once registered, campaigners can only accept donations from certain sources, and must report their spending and donations towards it.

In our view the common plan rules are an important tool for ensuring that the Bill's controls on campaigning are effective, since they prevent campaigners evading the spending limits by co-ordinating multiple campaigns for the same outcome. We therefore support the Bill's provisions as currently drafted

We are aware from the Committee's Stage 1 report on the Bill that members would welcome more information from the Commission about how we will, in practice, regulate the common plan rules and how we will ensure that our guidance is clear and supports campaigners to work within the rules. We are currently consulting campaigners and parties on our draft guidance on the common plan rules and we would expect to have concluded this by the end of October 2013.

We will write to the Committee in November to set out our approach to the regulation of co-ordinated campaigning. We therefore do not think any specific amendments that require us to produce guidance on common rules are necessary. **We also believe that amendment 120, which requires the Commission to include specific information on the circumstances that would constitute a common plan, may create workability issues and we do not support it for this reason.**