

Written evidence on the Scottish Independence Referendum Bill

1. 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.
2. We provided guidance and technical advice to Scottish Government officials during the drafting of the legislation drawing on our experience of overseeing two referendums in short succession in 2011. We are pleased to note that the majority of our recommendations have been included in the published Bill and we believe the legislation will provide a sound foundation for a referendum run to the highest standards which produces a result which is accepted.
3. There are a small number of issues which we have identified in the Bill which give us cause for concern and we continue to progress these with Scottish Government Officials. This briefing sets out the areas of the Bill where we are yet to resolve our concerns and the Committee may wish to give these areas their consideration.

Code of practice on attendance of observers

4. The United Kingdom is a party to a number of international instruments that endorse electoral observation as an important verification method to assess electoral arrangements against internationally accepted norms and standards. Clauses 17 to 20 of the Bill provide for Commission representatives and accredited observers to observe proceedings at the referendum.
5. The Political Parties, Elections and Referendums Act 2000 (PPERA) gives the Commission responsibility for accrediting individuals and organisations who wish to observe elections in the UK. We are required to prepare and publish a code of practice for observers that details the application process for accreditation and also sets out the rights and responsibilities of accredited observers, including the proceedings of the poll which they have the right to observe. This code of practice helps ensure that elections in the UK meet the highest international standards of transparency by supporting full independent scrutiny of our electoral processes.
6. While PERA provides for the code of practice for electoral observers to be published on a statutory basis in respect of all elections in Scotland, it does not

apply to referendums unless provided for in the referendum legislation. A statutory code of practice demonstrates a clear commitment to transparency by facilitating international scrutiny of a country's electoral processes. We recommend that the Bill be amended to statutorily apply the Commission's published code of practice to the referendum.

Public Awareness

7. As the Committee is aware, Clause 21 of the Bill requires us to take such steps as we consider appropriate to promote public awareness and understanding in Scotland about the referendum, the referendum question, and voting in the referendum. Since our creation in 2000 we have been responsible for running public awareness campaigns ahead of all major elections in the UK and for referendums held under PPERA, including both referendums held in 2011. The aims of our public awareness campaigns are to:
 - a. Ensure as many eligible people as possible are registered to vote
 - b. Ensure voters have enough information to cast their vote confidently on polling day
8. We have developed a substantial level of knowledge and experience in how to plan and deliver effective public information campaigns. However, no two polls are the same and our approach to public awareness for the referendum will be informed by research with the public, including evidence from our assessment of the referendum question which showed that people want factual information in advance about what will happen after the referendum. The Committee will be aware that we have asked the UK and Scottish Governments to provide that clarity and we will then make sure it is part of our public awareness campaign. Ensuring 16 and 17 year olds are able to participate will also be an important aspect of our plans and we have been working with others to develop these, including Education Scotland, the Association of Directors in Education in Scotland, School Leaders Scotland and Electoral Registration Officers (EROs).
9. We note and welcome the Committee's interest in how we are developing our public awareness plans. Our planning for public awareness is well underway and we intend to set out our approach on this in more detail before summer recess.

Guidance for Counting Officers

10. Clause 22 of the Bill currently provides the Commission with a power to issue guidance to Counting Officers about their functions at the referendum, with the consent of the Chief Counting Officer (CCO). However, the Bill does not provide the CCO with an equivalent explicit power to provide guidance for Counting Officers, even though the CCO will be responsible for the conduct of the poll, counting of votes, certifying the result of the referendum and ensuring that the referendum is well-run. The CCO will also have a power of direction over Counting Officers and would need to be able to provide guidance on how to comply with any directions

issued. Given the importance of clear lines of accountability and responsibility for the conduct of the referendum we have recommended to Scottish Government officials that a clear power for the CCO to issue guidance should be inserted in the Bill and the equivalent Commission power removed. They have indicated that they are willing to do so.

Schedule 2

Deadline for applications to vote by proxy

11. The normal deadline for applications to vote by proxy is 5pm on the sixth working day before polling day. The effect of Paragraph 7 as read with Paragraph 18 is that the deadline for such applications for the referendum will be 5pm on the eleventh day before the poll.
12. A deadline closer to polling day gives those who are too late to apply for a postal vote another option by which to cast their vote. This has been an important option in the past where unexpected events, such as the eruption of the Icelandic volcano prior to the 2010 UK general election, have meant that people would have been unable to cast their vote in person as they had planned. We therefore recommend that these paragraphs be amended so that the deadline for applications to vote by proxy is the sixth day before the poll.

Access to the full polling list for campaigners

13. Our [written evidence to the Referendum Bill Committee on the Scottish Independence Referendum \(Franchise\) Bill](#), noted our concern that the restrictions set out in Schedule 2 paragraph 48 on the availability of the polling list would mean that registered campaigners other than the designated lead campaigners would not have access to the names and addresses of those voters on the Register of Young Voters.
14. We think it is important that all campaigners should be able to get their messages to all those eligible to vote. Potential voters would then have access to the full range of information available to help them make an informed decision when voting. This would bring the provision in line with those that apply to campaigners at PPERA referendums, and political parties at elections.
15. However, we recognise that access to the Register of Young Voters raises issues about child protection. It is of course for those with expertise in this area to advise about the associated risks and for the Scottish Parliament to determine what course to follow.

Access to registers for compliance checks

16. The Bill follows PPERA in requiring that registered campaigners must ensure that donations and loans over £500 for campaigning in the referendum period are from permissible sources. Campaigners can only accept donations from individuals if they are on an electoral register. We are concerned that the Bill will make it difficult for campaigners to check the permissibility of some donations.
17. Schedule 4 paragraph 1(2) of the Bill provides that permissible donors include those individuals who are registered in an electoral register. Schedule 4 paragraph 1(3) defines an 'electoral register' as a register in any part of the UK of (i) parliamentary or local government electors, (ii) relevant citizens of the European Union, and (iii) peers. Individuals on the Register of Young Voters are not included.
18. At PPERA referendums, campaigners are entitled to a copy of all the relevant registers to enable them to check permissibility of donations. However, the Bill only requires Electoral Registration Officers (EROs) in Scotland to provide a copy of the register of local government electors to registered campaigners. The Representation of the People (England and Wales) Regulations 2001 do not allow EROs from other parts of the UK to supply the register to campaigners for the purposes of the independence referendum.
19. In practice this means that campaigners will have to either rely on the donor providing evidence that they are on a register, or try to make arrangements to inspect the register in person. This will be a less robust permissibility checking process and will place additional and potentially onerous, burdens on both campaigners and donors.
20. We appreciate that the Scottish Parliament cannot change the law in the other parts of the UK, but given these concerns, we recommend that the Scottish and UK Governments arrange for campaigners to be given access to all the registers which include permissible donors at the referendum.

Schedule 3

Admission to polling stations and counts

21. Rule 15 of Schedule 3 entitles a large number of people to attend at each polling station, including the polling station staff, voters, polling agents of campaigners, elected representatives for the area, accredited observers and Electoral Commission representatives. The rules as currently drafted enable the Presiding Officer of each polling station to regulate the number of voters and their children coming into the polling station but not any other category of attendee.

22. We believe that priority should be given to ensuring voters are able to cast their vote without any undue hindrance and that polling agents are able to effectively scrutinise the polling station processes. We recommend that the rules providing for the rights and regulations of those attending polling stations be amended to give priority to voters and polling agents. Presiding Officers should be able to regulate attendance of all other attendees at the polling station. This should be limited to regulating the number of people in the polling station in each category, but not excluding all such people.
23. Rule 29 entitles the Counting Officer to exclude all referendum and counting agents appointed by registered campaigners, elected representatives and accredited observers from the count centre. We believe the focus of this Rule should be on ensuring that the Counting Officer and their staff can count the votes efficiently and the referendum and counting agents can scrutinise that process and satisfy themselves that the correct figures are certified by the Counting Officer. We recommend that the Counting Officer should not be entitled to exclude the referendum agents appointed by each campaigner to scrutinise the conduct of the count. Where a Counting Officer can exclude some of those entitled to attend the count, they should follow any guidelines for doing so issued by the Chief Counting Officer or, in relation to the attendance of accredited observers and Commission representatives, guidance issued by the Electoral Commission in the code of practice for electoral observers.
24. Where access to the polling station or count is regulated it should be done in accordance with any guidelines for doing so issued by the Chief Counting Officer, local Counting Officer or, in relation to the attendance of accredited observers and Commission representatives, guidance to be issued by the Electoral Commission in the code of practice for electoral observers which we have recommended be applied.

Requesting local recounts

25. A referendum has one result which is built from local count totals. Consequently, campaigners must have confidence in each local count total in order to have confidence in the referendum result. Rule 34 of Schedule 3 makes provision for both the Counting Officer and the CCO to instruct a recount of votes in a local authority area where they believe it is appropriate to do so. However, it does not allow referendum agents appointed by registered campaigners to request a recount at local level in the same way that candidates and election agents can request a recount at other elections. We believe the Bill should reflect the provisions that applied in the Parliamentary Voting System and Constituencies Act 2011.
26. We recommend the Bill be amended to allow local recounts following reasonable requests from referendum agents appointed for the local authority area or, in their absence, a counting agent who was designated for this purpose when originally

appointed. This would require amendments to Rule 14 to include the ability to designate a particular counting agent for the purpose of requesting a recount.

Applying new provisions for absent voting

27. The Electoral Registration and Administration Act 2013 introduced a number of changes to absent voting arrangements at future elections in the UK. These include:

- publishing additional electoral registers prior to an election
- extending the emergency proxy provisions to those suddenly called away on business or military service
- enabling postal votes to be dispatched earlier
- increasing the proportion of personal identifiers on postal voting statements to be checked to 100%
- notifying postal voters whose postal votes were rejected of the reasons for this.

28. We supported these changes because we believe they remove administrative barriers to voting and improve the security of the postal voting system. These changes will be in effect at the European Parliament Elections in May 2014. These provisions are not included in the Bill. We recommend that they should be applied for the referendum on independence for Scotland to ensure that voters receive a consistently high standard of service and can have the same confidence in the security of the process.

Counting Officers duty to promote participation

29. Section 69 of the Electoral Administration Act 2006 gave Returning Officers in Scotland a duty to promote the participation of voters in Scottish, UK and European Parliamentary elections. Section 26 of the Local Electoral and Registration Services Act 2006 provides a power to promote participation in respect of local government elections in Scotland. However, the Bill does not provide either a power or a duty for Counting Officers to promote voters' participation in the referendum. Although the Bill specifically exempts the Chief Counting Officer and Counting Officers from the restriction on the publication of promotional material about the referendum by public bodies during the 28-day pre-referendum period, we believe that an explicit power or duty would clarify the intention of the Bill and enable Counting Officers to take forward their local public awareness plans with increased confidence.

Schedule 4

Designation of lead campaigners

30. Once registered, campaigners are able to apply to the Commission to be designated as a lead campaigner for one of the outcomes. Following the 2011 referendums, we recommended that at future PPERA referendums the UK Government should take

steps to reduce the potential advantages to a prospective lead campaigner of deciding not to apply for designation. The Bill addresses this recommendation by allowing us to designate a lead campaigner on only one side of the debate if there is no suitable applicant on the other side. In our 2012 consultation response to the draft Bill we noted that this approach could raise issues of fairness. However, in the circumstances of this referendum we are content that the risks of this approach are low.

31. Schedule 4 paragraph 6 (2) provides for the designation application process to start at the beginning of the 16 week referendum period. The process is made up of a four week application period followed by a maximum of two weeks for the Commission to make its decision. The process therefore potentially takes up the first six weeks of the referendum period.
32. However, the independence referendum will be the first referendum where the enabling legislation is expected to receive Royal Assent significantly in advance of the start of the referendum period. In view of this we think there would be significant benefit in taking the designation decision earlier, so that the lead campaigners are designated shortly before the start of the referendum period. This would reduce uncertainty and give the lead campaigners the full duration of the referendum period to make the most effective use of the benefits available to them. It would also simplify the effect of some of the Bill's rules on donations and campaigning. For example, political parties cannot donate to referendum campaigners other than designated lead campaigners; early designation would make it easier for the lead campaigners to manage donations from parties. It would also make it easier for lead campaigners to plan the way in which they work with others, since the rules on campaigners working together apply to designated leads in a different way from other campaigners.
33. We note that both Yes Scotland and Better Together recognised the benefits of designating early in their oral evidence to the Committee on 30 May 2013.
34. The benefits of bringing forward the designation process have to be balanced against the risk that support for a lead campaigner may change before the start of the referendum period. In our view, the benefits and risks would be best balanced by starting the designation application process in mid-March 2014. This would mean that decisions would be due by the beginning of May 2014, approximately a month before the start of the referendum period.

Restrictions on publication of material by central and local government

35. At PPERA referendums, restrictions are imposed on the publication of material about a referendum by central and local government and by publicly funded bodies in the 28 days before the poll. In our report on the 2011 referendums we

recommended that the UK Government should clarify the provisions and should consider what sanctions, if any, should apply to breaches.

36. The approach the Scottish Government has taken in Schedule 4 paragraph 25 of the Bill is narrower than that at PPERA referendums. It only applies to Scottish Ministers or any other part of the Scottish Administration, the Scottish Parliamentary Corporate Body, and any Scottish public authority with mixed functions or no reserved functions.
37. The Bill does not make any provision for sanctions in respect of breaches of the relevant provisions, and we understand that the UK Government does not intend to put its Edinburgh Agreement commitment on a statutory basis. The Commission will therefore not have a regulatory or sanctioning role in respect of restrictions on government activity in respect of this referendum.
38. In our view, this is not in itself a concern, provided that both Governments explain to voters how the Edinburgh Agreement commitments will be observed.

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