Consultation on a draft referendum bill

Response to Scottish Government consultation

24 November 2016

Introduction

1. The Electoral Commission is an independent body established in 2000. 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.

2. This response sets out the Electoral Commission’s views on the Scottish Government’s consultation on a draft referendum bill, published on 20 October 2016. It addresses the specific questions asked in the consultation paper and makes additional recommendations that we would want the Scottish Government to reflect in any referendum bill.

3. The Commission notes that the draft bill would replicate the allocation of the various roles performed by the Convener of the Electoral Management Board for Scotland (EMB) as Chief Counting Officer, the Electoral Commission, Counting Officers (COs) and Electoral Registration Officers (EROs), building on the established Scottish electoral structures. The Commission supports this allocation of roles.

4. The Commission reports on the conduct of the poll and the campaign rules after each referendum, and we are pleased to see that the Scottish Government has taken on board a number of the recommendations we made in our report following the Scottish Independence Referendum in 2014. In September 2016 we published our report on the June 2016 EU referendum, in which we made a number of further recommendations on the administration of future referendums. We have highlighted the relevant recommendations contained in that report in this response.
The referendum question

5. The consultation paper sets out the Scottish Government’s proposed approach to determining the question for a referendum on Scottish independence:

“1.6 In the 2014 referendum the question was “Should Scotland be an independent country?” At this stage, it is expected that the same question would be used again - but if as a result of consultation the Scottish Government is minded to propose a variation on that question it would submit the proposal to the Electoral Commission for independent testing in the usual way.”

6. The Electoral Commission is required to publish a statement of its views on the intelligibility of a referendum question included in any Bill to which the Political Parties, Elections and Referendums Act 2000 (PPERA) applies. PPERA does not, however, apply to a referendum bill introduced in the Scottish Parliament. The 2012 Edinburgh Agreement between the Scottish and UK Governments made clear that the Commission would review the intelligibility of the question proposed by the Scottish Government for the 2014 independence referendum, and that the Commission’s assessment would be laid before the Scottish Parliament as it considered the Scottish Independence Referendum Bill:

“8. Consistent with the provisions in PPERA, the Scottish Government will refer the proposed referendum question and any preceding statement to the Electoral Commission for review of its intelligibility. Interested parties will be able to submit their views on the proposed wording to the Electoral Commission as part of the Commission’s review process, in the normal way. The Electoral Commission will report on the question and this report will be laid before the Scottish Parliament. In turn the Scottish Government will respond to the report, indicating its response to any recommendations that the Electoral Commission may make.”

7. The Commission’s role is to provide independent expert advice to the relevant parliament or legislature about the intelligibility of a proposed referendum question in order to inform scrutiny of legislation introduced by governments. The Commission has published guidelines which set out the approach we will normally take to assessing the intelligibility of referendum questions, which includes research to test the question wording with the public.

8. Our approach has added demonstrable value to parliamentary scrutiny of proposed referendum questions: our recommendations for changes to the wording of questions have been accepted by governments and parliaments for each of the three referendums held under PPERA since 2011. Our recommendations for changes to the wording of the question proposed by the Scottish Government for the 2014

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1 Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland (October 2012)
2 Electoral Commission, Our approach to assessing the intelligibility of referendum questions and Referendum question assessment guidelines (both November 2009)
independence referendum were also accepted by the Scottish Government and the Scottish Parliament.

9. In order to support appropriate scrutiny of future referendum legislation by the Scottish Parliament, the Electoral Commission should be asked to review the intelligibility of any proposed referendum question, whether the wording is the same or different to that used for the 2014 independence referendum.

Mechanics of the referendum

Question 1: What are your views on the proposed arrangements for managing the referendum?

10. The consultation paper and draft Bill set out proposed arrangements for managing the referendum, including the appointment of Chief Counting Officer and the role of the Electoral Commission in monitoring, regulating and reporting on the referendum.

11. The Chair of the Electoral Commission (or someone they appoint) will act as the Chief Counting Officer for any referendum held under PPERA. As noted above, however, PPERA does not apply to a referendum bill introduced in the Scottish Parliament.

12. The Convener of the Electoral Management Board for Scotland was appointed as the Chief Counting Officer for the 2014 Scottish independence referendum under the Scottish Independence Referendum Act 2013 (SIRA). Our statutory report on the administration of the referendum concluded that:

   “We believe the referendum was well-run by the CCO and her CO and ERO colleagues because of careful planning (in part possible because of existing administrative structures in Scotland), sufficient resourcing and careful delivery of the administrative process.”

13. Our statutory report on the June 2016 EU referendum highlighted the role of the Chair of the Electoral Commission as Chief Counting Officer for the referendum, but also noted that they may not be the most appropriate person to act as the Chief Counting Officer for referendums which take place only in Scotland or Wales. For referendums which take place only in Northern Ireland, PPERA specifies that the Chief Electoral Officer for Northern Ireland would be the Chief Counting Officer.

14. We agree that the Convener of the Electoral Management Board would be the most appropriate person to act as the Chief Counting Officer for any future Scottish referendum, as was the case for the 2014 Scottish independence referendum.

15. The proposed monitoring, regulating and reporting functions mirror similar responsibilities given to the Commission at UK referendums held under PPERA. We believe these provisions will enable us to carry out our roles
effectively. We note our responsibilities relating to the accreditation of observers and public awareness are similar to the 2013 Act and the proposed provisions for the reimbursement of the Commission’s costs. We believe these to be appropriate.

16. We welcome that the Commission would be accountable to the Scottish Parliament for the delivery of these functions.

Question 2: What are your views on the proposed technical changes to polling and count arrangements?

17. The consultation paper proposes that the detailed rules about the conduct of the poll will be based on those applying to the conduct of elections, subject to specific technical changes.

18. We agree that the rules for the conduct of the referendum poll and count should be based on those applying to the conduct of elections. They should be updated to reflect changes to the conduct of elections which have been made since the 2014 referendum.

19. The Commission’s view remains that the decision about the franchise for any future referendum should be for the relevant parliament to decide. Our focus would be to ensure that anyone who is eligible to vote at a referendum has the right information to enable them to register and participate if they wish.

Campaign rules

20. The consultation paper and draft bill set out proposed rules for regulating campaigning at the referendum based on those used in 2014 (and which were based on those prescribed in PPERA for UK-wide referendums).

21. Our statutory report on the 2014 Scottish independence referendum concluded that, overall, the regulatory controls for the referendum worked well and improved on the rules from previous referendums. We did, however, make a number of recommendations which were intended to further improve the regulation and reduce the burdens on those who wished to campaign at future referendums.3

22. We are pleased that the draft bill addresses many of the regulatory recommendations we made following the 2014 referendum. In many areas the proposed amendments to the 2013 legislation reflect the provisions that applied at the 2016 UK-wide EU referendum. These amendments will improve the regulatory controls over those that applied in 2014 and reflect more recent changes to the law on elections.

3 Electoral Commission Scottish Independence Referendum Report on the referendum held on 18 September 2014 (December 2014), Scottish Independence Referendum Report on the regulation of campaigners at the independence referendum held on 18 September 2014 (June 2015)
23. There are, however, a number of areas where we would welcome the opportunity to discuss with the Scottish Government the practical implications of the regulatory controls that applied in 2014. These include:

- The timetable for designating lead campaigners
- Rules on imprints on non-printed material
- Late claims and payments process, and
- The Electoral Commission’s sanctioning powers.

**Designation timetable**

24. Applying SIRA to a future independence referendum would mean that designation of lead campaigners would take place before the start of the regulated referendum period as it did in 2014. We support that approach.

25. We recommend that further consideration is given to how long before the commencement of the referendum period lead campaigners should be appointed. For example, the legislation for the 2014 referendum required the lead campaigners to be appointed at least 28 days before the start of the regulatory controls (which included the spending limits for campaigners). For the 2016 EU referendum, the legislation required the lead campaigners to be appointed at least one day before the start of the regulatory controls.

26. We would welcome the opportunity to work with the Scottish Government to consider the timetable for designation and commencement of the regulatory controls when the circumstances and timeframe for a future independence referendum become clearer. It would be important to strike an appropriate balance between early confirmation of who the lead campaigners are (so that they have sufficient time to prepare to comply with regulatory controls) and commencement of the regulatory controls (so that potentially significant campaign activity carried out by the designated lead campaigners is covered by the controls).

27. There would also be significant administrative benefit for applicants and the Commission if the deadline for applications for designation was set at 12 noon on the last day for applications rather than (via statutory interpretation) 12 midnight. This would enable campaigners to have a clear understanding of the deadline and plan for the submission of their applications during normal business hours.

**Imprints**

28. To take into account modern forms of campaigning, the 2014 referendum was the first in the UK to apply imprint requirements to non-printed campaign material, such as websites, electronic communications and social media. However, as we highlighted in our post-referendum report, there were practical issues with regulating the requirements that applied in SIRA.

29. We continue to believe that all campaign material should be required to include an imprint so that the campaigner’s identity is clear to voters, regardless of whether it is paper-based or non-printed material. **We therefore recommend that further consideration should be given to the drafting and application of the imprint rules in SIRA so that they strike the right balance between ensuring there is transparency about who is campaigning and having proportionate and modern regulatory requirements.**
Late claims and payments
30. The 2014 referendum was the first referendum in the UK where the Commission had discretion for granting permission to pay invoices in breach of the statutory deadlines. The Commission based process did not apply for the EU referendum, and therefore, like other events, campaigners were required to seek leave from a court. There would be benefit in considering whether a Commission based process continues to be the best approach, and, if so, what steps could be taken to ensure compliance and the best use of public resources.

Electoral Commission sanctioning powers
31. SIRA gave the Commission investigative and sanctioning powers in respect of breaches of the rules. We had access to a range of civil sanctions from fixed fines of £200 up to £10,000 variable penalties. However, under PPERA, our maximum fine is £20,000. In addition, in our campaign spending report on the 2015 UK Parliamentary General Election we called for an increase to our PPERA maximum penalty for a single offence to an amount more in proportion with the spending and donations handled by large campaigners.

32. We would welcome the opportunity to work with the Scottish Government to ensure that the draft bill provides for the Commission to have access to appropriately robust sanctioning powers that will be both proportionate and a suitable deterrent.

Question 3: What are your views on the proposed changes to rules on permissible participants?
33. The consultation document and draft bill propose changes to the:
   - Categories of organisation that can register as a referendum campaigner
   - Controls to require the responsible person to sign the registration form
   - Restrictions on the ability to register an obscene or offensive campaign name, and
   - Rules to allow a political party’s campaigns office to take on the Treasurer’s role of responsible person.

34. We support these proposed changes which address recommendations we made following the 2014 referendum and recent changes in electoral law.

35. There are, however, a number of further technical improvements and legal drafting changes to the rules on permissible participants contained in the EU Referendum Act 2015. Our report on the EU referendum also contains a recommendation for change in this area. We would welcome the opportunity to work with the Scottish Government and Parliament to consider additional technical rules on permissible participants to ensure that the controls in place for a future independence referendum reflect the most recent referendum practice. These include:

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Limiting donations to political parties from certain sources
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Restricting the ability for a political party campaigns officer to be the responsible person for more than one campaigner
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The registration requirements for unincorporated associations.
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Limiting donations to political parties
36. As with the draft bill, the legislation for the EU referendum extended the categories of organisations that were permitted to donate and lend to referendum campaigners, including to political parties. One of the implications of this change is that a wider group of donors are able to donate and lend money to political parties that register to campaign at a referendum than are able to fund parties campaigning at elections. Under the PPERA election rules, these donors are impermissible sources of election funding.

37. Allowing political parties to accept donations and loans from these extended sources for campaigning at a referendum means it is possible that funding from these sources could be used for future elections. The EU Referendum Act limited that risk by not allowing political parties to accept, in total, donations from these sources over and above that which they could spend campaigning at the referendum, or increase the value of a referendum loan. This safeguard should also apply at a future independence referendum.

Restricting the ability for a political party campaigns officer to be the responsible person for more than one campaigner
38. The draft bill provides that a political party’s campaigns officer can take on the Treasurer’s role of responsible person. The legislation for the EU referendum included provisions to ensure that such a campaign officer could not be the responsible person for two or more registered campaigners. This helped to ensure that the same campaigner could not set up multiple campaign groups in order to circumvent spending controls.

The registration requirements for unincorporated associations
39. Following the EU referendum, we recommended that the registration requirements that apply to unincorporated associations should be extended to enable the Commission to reject an application where the name is the same or similar to that of an already registered referendum campaigner, registered political party or recognised third party.

40. We also recommended that as part of the registration process, unincorporated associations should also be required to provide details of their membership to mirror the registration requirements for unincorporated associations that register as a recognised third party at elections.

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5 These included Royal Charter bodies, charitable incorporated organisations, Scottish charitable organisations and Scottish partnerships.
Question 4: What are your views on the proposed campaign rules and rules on spending?

41. As with the rules on permissible participants discussed above, there are a number of technical improvements and legal drafting changes in the EU Referendum Act 2015, as well as recommendations for further change in our post-referendum report, relevant to this consultation question. **We would welcome the opportunity to work with the Scottish Government to consider technical additions to the proposed campaign rules and rules on spending.** These include the:

- Rules for reporting the sources of funding before the poll
- Reporting requirements when campaigners work together, and
- Restrictions on the publication of promotional material by central and local government.

**Pre-poll reporting**

42. At the EU referendum, registered campaigners were required to report the sources of all funding that they received to meet referendum expenses after commencement of the relevant provision in their first pre-poll report (including those received before the start of the referendum period). This increased transparency during the months before the referendum poll and helped encourage campaigners to ensure that they only accepted donations from permissible sources. This is an important addition to the campaign rules should the draft bill be passed but not immediately come into force.

43. The legislation for the EU referendum also provided for a final pre-poll reporting period up to polling day with a submission date shortly after the poll. This provided transparency to donations and loans received close to the poll date, albeit after the referendum had taken place.

**Working together rules**

44. Campaigners that worked together at the EU referendum were required to include in their post-referendum spending report the names of those they worked with and how much they each spent. This additional reporting requirement improved transparency and the overall effectiveness of the controls and should be included for future referendums.

**Restrictions on the publication of promotional material by central and local government**

45. The restrictions that applied to the publication of promotional material by central and local government at the 2014 independence referendum differed from those that apply at PPERA referendums, including those that applied at the EU referendum.

46. SIRA restricted the information that Scottish Ministers and certain publicly funded bodies could publish about the referendum in the last 28 days before the 2014 poll. The restrictions related to publishing general information about the referendum as well as about the issues and arguments. The restrictions also applied to encouraging people to vote. The UK Government was not covered by the legislation but, as set out in the Edinburgh Agreement, agreed to abide by the same restrictions.
47. As we noted in our report on the 2014 independence referendum, there were concerns raised on both sides of the debate about the activities of those campaigning for the opposing outcome, both before and after the restrictions came into force.

48. Following the EU referendum, we recommended that the PPERA restrictions on the publication of promotional material by central and local government should be significantly redrafted before any future referendum. The redrafted provision should clarify the nature and scope of the restriction on activities by governments and other publicly funded bodies during the referendum period. The restrictions should be clear which activities are restricted, and whether there are any specific exemptions; it should be clear when the restrictions apply; and it should be clear who is responsible for enforcing the restrictions, and what the penalties would be for any breach of the restrictions. Clarification of these issues would also enable consideration to be given to whether the period of time covered by s125 could be longer than 28 days, including potentially applying to the full duration of the referendum period.

49. We would welcome the opportunity to work with the Scottish Government to ensure that the lessons learnt concerning the restrictions on the publication of promotional material by central and local government at previous referendums can be incorporated into the legislation for a future independence referendum.

50. We recognise that the Scottish Parliament cannot legislate to restrict the activities of the UK Government. For the 2014 referendum, the UK Government publicly committed in the Edinburgh Agreement to ‘act according to the same PPERA-based rules during the 28-day period’ as the Scottish Government. For a future independence referendum, we would again expect the UK Government to publicly commit to abide by the same restrictions as the Scottish Government.

Question 5: What are your views on the proposed changes to the rules on permissible participants’ expenses and transactions between qualifying and non-qualifying persons?

51. For the 2014 referendum, the Edinburgh Agreement gave us a role in advising on the spending limits that would cover campaigning in the last 16 weeks before the referendum, as we do for spending limits at PPERA referendums in a part of the UK. While the draft bill does not provide for us to have a role in advising on the spending limits, we note that the proposed approach to calculating the spending limits is in line with our recommendation for the 2014 referendum (subject to a minor change in rounding the calculation figures).

52. Our advice on the spending limits for the 2014 referendum was given in the context of the Edinburgh Agreement which pointed to the need for “fairness and a level playing field” in campaign finance rules. The recommended limits were based on reference to the actual share of the vote that political parties received at the 2011 Scottish Parliament election.
53. It will be important for the Scottish Parliament to consider the relevance of any changes to factors that informed the basis of the 2014 spending limits. While it is likely that the approach to calculating the limits remains valid, the fact that an election to the Scottish Parliament was held in 2016 and the distribution of actual share of the vote has changed compared to the 2011 election should be taken into account. We would look to provide advice on this matter as we did for the 2014 referendum.

54. The draft bill also provides for the rules on transactions between qualifying and non-qualifying persons to be updated to reflect changes that have applied for referendums since SIRA. We support these changes which will ensure that the controls in place for a future independence referendum reflect the most recent referendum practice.

Additional matters relevant to the campaign rules
55. Although not specifically addressed in the consultation document or draft bill, there are a number of other lessons learnt from the 2014 referendum and EU referendum relevant to the campaign rules which should also be incorporated into the legislation for a future referendum. These include:

- The benefits available in the case of designation of only one lead campaigner, and
- Access to all the necessary registers to comply with the campaign rules.

Designation benefits in the case of one lead campaigner
56. In our view, permitting one-sided designation is an acceptable approach to reduce the incentive for campaigners on one side of the debate to make a tactical decision against applying for designation. However, we recommend that one-sided designation should only be available alongside a reduced package of benefits to the designated campaigner and consideration of how the working together rules would apply. This is in order to avoid a one-sided campaign.

57. For the 2014 referendum, should a campaigner for only one outcome have been designated, they would have been entitled to all the benefits of designation. In the case of one-sided designation at the EU referendum, a lead campaigner would not have been entitled to campaign broadcasts or a publicly funded grant. In relation to campaign broadcasts in particular, this approach addressed concerns raised by broadcasters about having to show a referendum broadcast for only one outcome. It also went some way to mitigate the risk that voters may be less easily able to access arguments for one of the referendum outcomes compared to the other.

Access to the register
58. As for the 2014 referendum, the draft bill only places a duty on Scottish Electoral Registration Officers (EROs) to provide a copy of the register to enable campaigners to check the permissibility of donors and to promote its campaign in Scotland, and only to a copy of the register of local government electors. This is because SIRA was legislation produced by the Scottish Parliament and it could only legislate to impose a duty to supply the register on Scotland’s EROs.

59. However, the draft bill provides for individuals across the UK to be permissible donors and lenders to referendum campaigners if they are on an electoral register;
this includes a parliamentary and local government registers. This means that registered campaigners will not be provided with a copy of the registers from outside Scotland to enable them to permissibility check donations and loans from the rest of the UK. The same limited provision of the register also applies to the register we are permitted to use to enable us to undertake our compliance function.

60. In order to mitigate the risk of campaigners accepting impermissible donations from individuals from outside Scotland, and to enable us to fulfil our compliance function, **we recommend that the Scottish Government should seek agreement with the UK Government to allow campaigners and the Commission free access to all the necessary registers to comply with the campaign rules.**

**Further recommendations on the campaign rules**

61. We will be publishing a further report in 2017 on the EU referendum focusing on the spending and donation returns that campaigners are required to submit to us before the statutory deadlines in September and December 2016. The report will also include information on the use of our investigatory and sanctioning powers at the referendum. We will feed any further recommendations for change arising from that analysis into consideration of the draft bill.

**Timing of the referendum**

**The referendum date**

62. Since the 2014 Scottish independence referendum we have continued to recommend that any referendums on important constitutional or high-profile issues should be held on a separate day from other scheduled elections in order to give voters space to fully engage with the referendum issues and allow campaigners and electoral administrators to plan their activities effectively. It is also important that any debate should take place at a time that allows the full participation of voters and campaigners, uncomplicated by competing messages and activity from elections which might otherwise be held on the same day.

63. As the nature of referendums also attract cross-party campaigning, we would also be concerned that holding a high-profile referendum on the same day as other significant or scheduled polls, where political parties would be competing against each other, would be unworkable for campaigners and confusing for voters.

64. We believe that the starting assumption for governments and legislatures should be that referendums are not normally held on the same day as other significant or scheduled polls. In particular, referendums on significant constitutional questions, where political parties and other campaigners are likely to be working more closely together, should never be held on the same day as other scheduled polls.

65. **We recommend that referendums should not normally be held on the same day as other significant or scheduled polls.**

66. In scrutinising proposals to hold any future referendum on the same day as other significant or scheduled polls, the Scottish Parliament should ensure they are satisfied that voters and campaigners will be able to participate fully
in both the referendum and the other polls, and that electoral administrators can deliver both sets of polls.

**Timing of legislation for future referendums**

67. We continue to recommend that when considering proposals for any future referendum the Scottish Government should ensure that the timetable for developing and introducing all legislation provides sufficient opportunity for the Scottish Parliament to properly scrutinise those proposals.

68. The Scottish Government should also acknowledge the importance of allowing sufficient time for campaigners, the Chief Counting Officer and Counting Officers, Electoral Registration Officers and the Electoral Commission to prepare for their respective roles in any referendum. In particular, legislation should be clear in sufficient time to allow robust and detailed guidance to be developed and provided to campaigners, Electoral Registration Officers and Counting Officers.

69. **We recommend that in planning for any future referendums the Scottish Government should manage the development and approval of legislation for future referendums (including any secondary legislation containing detailed rules for the administration of the referendum poll and regulatory controls) so that it is clear at least six months before it is required to be implemented or complied with by campaigners or electoral administrators.**

70. This means that:

- Legislation for the regulation of referendum campaigners should be clear at least six months before the start of the regulated referendum period.
- Legislation relating to the conduct of a referendum poll should be clear at least six months before polling day.