

SCOTTISH INDEPENDENCE REFERENDUM BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Scottish Independence Referendum Bill introduced in the Scottish Parliament on 21 March 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 25–EN.

POLICY OBJECTIVES OF THE BILL

General overview

2. The Bill provides for a referendum to be held on whether Scotland should be an independent country.

3. The Scottish Government believes that the future prosperity and development of Scotland would be best served by it becoming independent. The referendum provided for by the Bill would provide the people of Scotland with the opportunity to vote on whether Scotland should be independent.

4. The main policy objective is for the referendum to be (and to be seen to be) a fair, open and truly democratic process which is conducted and regulated to the highest international standards. There must also be public confidence in the result on a par with that for national elections, which can be achieved by ensuring:

- that the question posed on the ballot paper is clear, intelligible and neutral;
- that entitlement to vote is determined in a fair and consistent manner, and is extended to all those aged 16 or 17 on the date of the referendum poll;
- that the voting and counting processes operate smoothly and effectively, and are subject to sufficient controls and audit to ensure certainty over the legitimacy of the result; and
- that the campaign leading up to the referendum is well regulated by the Electoral Commission, independent of Parliament and Government, has rules in place so that spending by those campaigning is limited to reasonable levels, and that all sides in

the campaign are operating on a level playing field in terms of resources spent on campaigning.

BACKGROUND

5. In 1997, the people of Scotland agreed in a referendum to the establishment of a Scottish Parliament with tax-varying powers. On 1 July 1999, the Scottish Parliament was formally vested with its full responsibilities.

6. In 2007 the Scottish National Party (SNP) was elected as the largest party, but its total number of seats fell short of that required for a majority. From 2007 to 2011 the SNP operated in Parliament as a minority Government. The Government published the white paper *Your Scotland, Your Voice*, which set out constitutional options and opportunities for Scotland, and brought forward plans for a referendum on Scotland's constitutional future. However, while there was broad support across Scotland for developing Scotland's constitutional position, it was clear that the other parties in the Scottish Parliament would not support a referendum on independence, and a Bill was not presented to Parliament.

7. The SNP was re-elected in 2011 with an overall parliamentary majority and a mandate to hold a democratic referendum on Scotland's constitutional future. In January 2012 the Scottish Government published a consultation paper (*Your Scotland, Your Referendum*¹) on its detailed proposals for organising, running and regulating the referendum. That consultation paper noted the Scottish Government's preference for a short, direct question about independence, and its view that there were suitable questions which would be within the legislative competence of the Scottish Parliament. However, it also noted the UK Government's publicly stated view that legislation providing for a referendum on independence would be outwith the existing powers of the Scottish Parliament, and the Scottish Government's willingness to work with the UK Government to resolve this issue.

8. At the same time as the Scottish Government's consultation, the UK Government published a consultation on a Scottish Referendum, along with an offer to the Scottish Government to negotiate the terms of an Order in Council under section 30 of the Scotland Act 1998 (or to amend the terms of the Scotland Bill then going through the House of Lords) to transfer the necessary powers to the Scottish Parliament to allow it to hold a referendum on independence.

9. The Scottish Government stated that it was ready to work with the UK Government to agree a clarification of the Scotland Act 1998 that would remove any doubts the UK Government had about the competence of the Scottish Parliament and put the referendum effectively beyond legal challenge.

10. The Scottish Government entered into discussions with the UK Government on this issue on the basis that, as a matter of democratic principle, it is for the Scottish Parliament to decide on the timing and terms of the referendum and the rules under which it is to be conducted.

¹ <http://www.scotland.gov.uk/Publications/2012/01/1006>

11. Those discussions culminated on 15th October 2012, when the First Minister of Scotland and the Prime Minister signed the Edinburgh Agreement² which paved the way for a referendum on Scottish independence. The governments agreed that the referendum should:

- have a clear legal base
- be legislated for by the Scottish Parliament
- be conducted so as to command the confidence of parliaments, governments and people
- deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.

12. The governments agreed to promote an Order in Council under section 30 of the Scotland Act 1998 in the Scottish and United Kingdom Parliaments to allow a single-question referendum on Scottish independence to be held before the end of 2014. The Order³ was approved by both Parliaments and came into force on 13 February 2013.

13. The Edinburgh Agreement confirms that the referendum should meet the highest standards of fairness, transparency and propriety, informed by consultation and independent expert advice and that the referendum legislation will set out:

- the date of the referendum
- the franchise
- the wording of the question
- rules on campaign financing
- other rules for the conduct of the referendum

14. The Bill proposes a referendum asking whether Scotland should be an independent country. The Scottish Government believes that Scotland's future interests would be best served by it becoming an independent country and assuming all of the responsibilities and rights of a European state. Independence would bring to Scotland the responsibilities that would not be devolved whilst remaining within the UK, such as macroeconomic policy, full European representation, foreign affairs and defence policy.

Policy objective of the Bill

15. Specifically, the policy objective is that the Bill should provide for a referendum:

- that is scheduled to take place on 18 September 2014;
- that invites voters to answer Yes or No to the question: Should Scotland be an independent country?

² <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>

³ The Scotland Act 1998 (Modification of Schedule 5) Order 2013 (S.I. 2013/242)

- in which all those who can currently vote in Scottish Parliament and local government elections in Scotland will be eligible to vote, as well as those aged 16 or 17 on the day of the poll; and
- that will be conducted and regulated to the highest international standards, with the referendum campaigns being run in a demonstrably fair and transparent manner. In particular, the referendum will be:
 - conducted under the direction of a Chief Counting Officer, appointed by the Scottish Ministers, who will be responsible for appointing local counting officers reporting to him or her;
 - preceded by a 16 week regulated formal campaign period, with set limits on the amount of money any registered participant may spend on campaigning in the period prior to the referendum; and
 - supervised by the independent Electoral Commission, whose powers in this regard are set out in the Bill. The Commission will have a regulatory role with regard to the campaign spending rules and a role informing the public about the referendum.

16. This memorandum deals with the following main issues:

- the ballot paper and voting system, including the referendum question itself, the timing of the referendum, and what would follow the referendum;
- the conduct of the referendum poll and counting of votes; and
- the referendum campaign rules, including the role of the Electoral Commission

17. The franchise for the referendum, and the registration arrangements necessary to extend the franchise to 16 and 17 year olds, are covered in the separate Scottish Independence Referendum (Franchise) Bill, introduced in the Scottish Parliament on 11 March. These issues are therefore dealt with in the policy memorandum for that Bill, published as SP Bill 24–PM.

Alternative approaches

18. There is no alternative to primary legislation. While the Political Parties, Elections and Referendums Act 2000⁴ (PPERA) provides for referendums held under Acts of the UK Parliament, there is currently no legislation governing the conduct of referendums held under Scottish Parliament legislation. The Bill is therefore required to put in place the procedures for the running of the referendum campaign, poll, count, and eventual declaration and certification of the result.

CONSULTATION

19. The Scottish Government's consultation paper *Your Scotland, Your Referendum* was published on 25 January 2012. The consultation set out the Government's proposals for inclusion in legislation and asked a series of open questions, aimed at finding out what people

⁴ http://www.opsi.gov.uk/acts/acts2000/ukpga_20000041_en_1

thought about the proposals for running and regulating the referendum. It also included a draft Bill.

20. Among others, comments were received from a wide range of individuals and organisations with interest and experience in electoral matters, such as electoral professionals, academics and political parties. The Scottish Government received just over 26,000 responses, which have been published on the Scottish Government website⁵, along with the results of an independent analysis of those responses.

21. A large majority of respondents to the consultation were in favour of holding a referendum, mostly on the grounds that it is the democratic right of the people of Scotland to have their say on their country's constitutional future.

22. Specific issues raised in the consultation that are relevant to measures included in the Bill are discussed under the relevant section headings within this document, including where alternative approaches were considered. A wide range of views was expressed in the consultation. However, not all were directly relevant to this Bill and so have not been included in this document.

23. In addition to the formal consultation, Scottish Government officials have worked closely with the Electoral Management Board for Scotland (EMB), the Electoral Commission and others to ensure the proposals in the Bill reflect, and build on where necessary, the rules governing elections, and take account of any relevant improvements made in light of Ron Gould's report on the 2007 Scottish Parliament and Local Government elections⁶. The improvements made ahead of the 2012 local government elections were widely seen to have contributed to the successful running of the elections and were highlighted in both the Electoral Management Boards for Scotland⁷ and the Electoral Commission⁸ reports on these elections.

THE BALLOT PAPER AND VOTING SYSTEM

Policy objectives

24. The Scottish Government drafted - and subsequently asked the Electoral Commission to test - a referendum question to provide voters with a clear opportunity to express their view on whether Scotland should be an independent country. It was developed so that it is (and is seen to be) clear, intelligible, neutral and fair. The ballot paper for the referendum is set out in schedule 1 to the Bill.

⁵ <http://www.scotland.gov.uk/Publications/2012/10/3849>

⁶ <http://www.electoralcommission.org.uk/scotland/research/Scottish-Election-Report-A-Final-For-Web.pdf>

⁷ http://www.edinburgh.gov.uk/downloads/file/9144/elections_scotland-201112_annual_report_of_the_electoral_management_board_for_scotland

⁸ http://www.electoralcommission.org.uk/data/assets/pdf_file/0019/150517/Scotland-elections-report-May-2012.pdf

Alternative approaches - support for a multi-option referendum

25. *Your Scotland, Your Referendum* made clear that the Scottish Government's preferred policy is independence, but that it was open to proposals for the inclusion of other options on the ballot paper if there was sufficient support for such a move. The public was asked whether they supported the option of a second question on the ballot paper. The consultation analysis indicated a majority against a second question (62% were against; 32% were in favour) for a variety of reasons.

26. In his evidence to the Scottish Affairs Committee on 17 September 2012, the Secretary of State for Scotland confirmed the UK Government position that, while the – then, ongoing – negotiation of the terms of the section 30 Order should be seen as a package, it was a “red line” for the UK Government that there should only be one question in the referendum.

27. The Edinburgh Agreement, and accompanying section 30 Order provided that there should be a single-question referendum on Scottish independence to be held before the end of 2014. In line with this, and the results of the consultation exercise, the Bill contains only one question.

The wording of the referendum question

28. The proposed referendum question “Do you agree Scotland should be an independent country?” was included in the consultation *Your Scotland, Your Referendum*. The analysis of the consultation shows that the broad weight of opinion was in favour of the Scottish Government's proposals on the referendum question (64% broadly agreed with the proposed wording of the question, 28% did not, and the remainder had unclear or mixed views). Respondents who agreed with the proposed referendum question generally described it as “clear”, “concise”, “unambiguous”, “simple”, “straightforward”, “to the point” and “easy to understand”.

29. In line with standard practice for PPERA based referendums held across the UK, the Scottish Government asked the Electoral Commission to test the question. The Deputy First Minister wrote to the Commission on 8 November 2012 to “request that the Electoral Commission provide advice and assistance to the Scottish Government by considering the wording of the following proposed question to be included on the ballot paper for the Scottish independence referendum to be held in the autumn of 2014”.

30. To inform its assessment, the Electoral Commission carried out research with members of the public to see how well the proposed question met its guidelines with regard to intelligibility. The Commission also wrote to individuals and organisations including the main political parties represented in the Scottish Parliament and likely campaigners, to seek their views on the proposed question. They also took account of views expressed by other individuals and groups who contacted them, and by members and committees of the Scottish and UK Parliaments.

31. The Commission looked at whether the question was clear, simple and neutral. They concluded that the question was written in plain language and was easy for people to understand and answer, and that it was clear to people what they were being asked to vote on.

32. However, based on their research and taking into account evidence from organisations and individuals who submitted their views on the question, the Commission considered that, while there was no suggestion that the “Do you agree...?” formulation was intended in such a way, the phrasing could be seen as encouraging a positive response. For that reason, the Commission recommended changing the way the question is introduced. Instead of asking ‘Do you agree..?’ they recommended the following wording:

‘Should Scotland be an independent country? Yes/No’

33. The Scottish Government accepted the Electoral Commission’s recommendations and announced that it would include the question “Should Scotland be an independent country?” in the Scottish Independence Referendum Bill when it was introduced to Parliament. This is therefore the question on the ballot paper included in the Bill for the Parliament’s consideration.

34. It will of course be crucial that voters are fully informed about the proposal they will be asked to vote on (i.e. what independence for Scotland will mean). During the next year, the Scottish Government will publish a series of papers setting out the main arguments for independence and how independence would be implemented, followed by a white paper in autumn 2013 that will set out the Government’s proposals for an independent Scotland.

Timing of the referendum

35. *Your Scotland, Your Referendum* set out the Scottish Government’s reasons for holding the referendum in the autumn of 2014. The consultation sought views on whether the referendum could be held on a Saturday as a way of increasing voter turnout. While there was some support for this proposal, the consultation also confirmed practical and other reasons why some people could not or would not vote on a Saturday. The Government considers therefore that, in line with the principle that the referendum should be run in a manner which is familiar to voters and electoral administrators, the poll should be held on Thursday. The Bill provides that the referendum will be held on 18 September 2014.

Referendum result

36. The Edinburgh Agreement confirms that the Scottish and UK governments have agreed to work together to ensure that a referendum on Scottish independence can take place. Among other things, the governments have agreed the importance of ensuring that the referendum delivers a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect. Paragraph 30 of the Edinburgh Agreement commits the two governments to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the UK.

37. The referendum will not be subject to any minimum turnout requirement or supermajority threshold, unlike the devolution referendums in 1979⁹. It is well established in the UK¹⁰ and

⁹ In the 1979 referendum on establishing a Scottish Assembly, despite a small majority voting in favour of an Assembly, the referendum did not pass because of the ‘40% rule’, which required that 40% of the electorate had to vote in favour of the proposition for the result to be valid.

¹⁰ The 1975 UK Referendum on continued membership of the EEC, the 1997 devolution referendums in Scotland and Wales, the 1998 Greater London Authority referendum, the 1998 referendum on the Belfast Agreement in

across Western Europe¹¹ that referendums should be decided by those who choose to vote on a simple majority basis. The 1997 Scottish devolution referendum was conducted on that basis.

38. The Venice Commission's 2005 report *Referendums in Europe – An Analysis of the Legal Rules in European States*¹² notes that most European states do not set thresholds for referendums - either in terms of participation or approval - that have to be exceeded for referendum results to be valid. In 2006 the Venice Commission published a voluntary Code of Good Practice for Referendums setting out its guidelines on best practice for referendums. Article 7 of the Code explicitly states that minimum turnout requirements and abnormal majority thresholds are not advisable. In the Scottish Government's view this is the correct approach and there is no need for any kind of turnout or majority threshold.

CONDUCT OF THE POLL AND COUNT

Policy objectives

39. The policy objective is to ensure that the referendum poll and count are run in an efficient, transparent and fair manner that will be familiar to voters and to those running it. If the process is seen as simple and familiar to voters it should inspire public confidence in the legitimacy of the process and of the result. The rules about the conduct of the poll and the count are based on the rules applying to the conduct of elections to the Scottish Parliament, UK Parliament, and local councils and at other referendums.

The referendum poll

40. The Bill provides that the referendum will be a traditional ballot box poll held on a single day with votes cast at polling stations across the country. The detail of what the ballot paper will contain is set out in schedule 1 to the Bill. Once the counting officer has published notice of the referendum, a poll card will be sent to every eligible voter in the counting officer's area. Voters will also have the option to vote by post or proxy in the same way as they do for local council or Scottish Parliament elections. The votes will be counted by hand.

41. The Bill sets out the detailed rules relating to the arrangements for voting and the conduct of the poll, including arrangements for polling stations, voting and counting procedure, arrangements for absent voting (i.e. by post or by proxy), and the conduct of the count, which are all in line with the procedures for local council or Scottish Parliament elections. In addition, behaviour which would constitute an offence in an election will constitute an offence in the referendum, and will be dealt with in a similar way.

Northern Ireland and the 2004 referendum on a regional assembly for the North East of England were all conducted without a minimum turnout requirement and with the result determined by a simple majority.

¹¹ Examples of referendums in western Europe where no minimum turnout requirement or abnormal majority threshold was set are: the 1992 Maastricht treaty referendums in France and Ireland, the 1994 referendum on joining the EU and the 2003 referendum on adopting the Euro in Sweden, the 2005 referendums on the Constitution for the EU in Spain, France and the Netherlands, the 2006 referendum on greater autonomy for Catalonia and the 2008 and 2009 Lisbon treaty Referendums in Ireland.

¹² [www.venice.coe.int/docs/2005/CDL-AD\(2005\)034-e.pdf](http://www.venice.coe.int/docs/2005/CDL-AD(2005)034-e.pdf)

42. Among those who specifically commented on the conduct of the poll in the consultation, a number agreed that the referendum should be run in the same way as other elections. The Bill provides for that, and the Scottish Government has consulted extensively with a range of electoral professionals to ensure that consistency is delivered in practice.

Polling list

43. The Scottish Independence Referendum (Franchise) Bill puts in place the necessary arrangements to enable young people who will be 16 on the date of the poll to register to vote in the referendum. That Bill provides for the details of those who are not yet 16 when they register, but will be by the date of the poll, to be compiled into a Register of Young Voters (RYV), and for strict protections to be placed on the handling of that register. It will be held separately from the local government register, and only Electoral Registration Officers and their staff will be able to access it. More detail on the RYV is set out in the policy memorandum for the Franchise Bill.

44. For use at, and leading up to, the poll, a list of all voters – i.e. those on the local government register and those on the RYV – will be needed. This Bill therefore provides for a single polling list to be compiled, merging the details of voters on the RYV with those of voters on the local government register. The details of young voters will not be distinguished from the details of other voters, and the list will not show dates of birth. This will ensure that young people's details are treated as securely as possible.

45. The Bill provides for the following groups and organisations to have access to the polling list:

- Counting officers, who need the information in order to administer polling. They also need it to arrange for the printing and distribution of poll cards for all voters, and for the preparation and distribution of postal voting packs to postal voters.
- The two official campaign organisations for the referendum (referred to as the “designated organisations”). The campaign organisations need all voters' details so that they can send every voter or household a postal communication in advance of the referendum. These communications will be used to set out the campaign groups' positions on the referendum, so it is important that we ensure young people receive them so they are provided with the same information available to older voters before casting their vote.
- The Electoral Commission, in its capacity as the independent regulator and monitor of the referendum campaign.

46. The version of the polling list received by designated organisations and the Electoral Commission will include only electors' names and addresses. The version of the merged registers provided to counting officers and to organisations that print and distribute voter materials on behalf of electoral administrators will include electors' names, addresses and voter numbers.

Chief Counting Officer and other counting officers

47. The Bill establishes the office of the Chief Counting Officer (CCO), who will oversee the referendum process and be responsible for the running of the vote on the day of the poll, for the count and for the eventual declaration and certification of the result. The Bill provides that the CCO will be appointed by the Scottish Ministers (reflecting a similar appointment by the Secretary of State for the 1997 referendum), and that the appointed person will be the Convener of the Electoral Management Board for Scotland by virtue of section 2 of the Local Electoral Administration (Scotland) Act 2011. The CCO will operate entirely independently of Government.

48. The CCO will have a number of specific duties, which are set out in the Bill. Most importantly, the CCO must appoint a counting officer for each local authority area. This is most likely to be the returning officer for each area, although the CCO has the power to make a different appointment if he or she wishes. The main duty of the CCO will be to certify the number of ballot papers cast for the whole of Scotland, and to certify the number of votes for each proposition on the ballot paper. Similarly, each appointed counting officer will have to certify the number of ballots cast and the number of votes for each proposition in the local authority area for which they have been appointed, in accordance with any directions given by the CCO.

49. The CCO role is one which has been established at previous referendums in the UK. Their role in the referendum will be similar to that played by the CCO in the 1997 devolution referendums and in the 2004 Regional Assembly and Local Government referendum held in the North East of England.

50. The approach taken in the Bill differs slightly from the 2011 UK referendum on parliamentary voting systems. At that referendum, the CCO was the Chief Executive of the Electoral Commission which was responsible for conducting the poll. The CCO appointed regional returning officers who in turn appointed local counting officers. For this referendum there is no need for the post of regional returning officer; counting officers will report directly to the CCO. The Scottish Government's planned separation of the responsibility for running the referendum from that of regulating and reporting on the referendum was welcomed in the Government's consultation.

51. The CCO and the counting officers will claim their fees and expenses from the Scottish Government, under the terms of a Fees and Charges Order to be made under an order making power in this Bill. The Order will be developed in consultation with the Electoral Management Board and others. The fees and charges set out in it will be consistent with recent elections and referendums.

Overnight counting

52. The Bill places a duty on individual counting officers to make arrangements for counting votes as soon as reasonably practicable after the close of the poll, but gives some flexibility to take any local circumstances into account. This is consistent with the arrangements for counting at elections. In practice the Scottish Government expects that counting will take place overnight, in line with normal election procedure.

Declaration of result

53. The Bill requires counting officers to provide the CCO with the certified results, information on rejected ballot papers and other information as soon as they are available. The CCO will then authorise the counting officer to announce the local result. When the CCO is in receipt of all certified local results, a national declaration will take place.

Referendum agents

54. The Bill provides for each permitted participant to appoint a “referendum agent” for any local government area. Referendum agents act as the participants’ representatives for the poll. As such they are entitled to attend polling stations, to be present when postal ballot papers are received, and to be present when votes are counted. This is in line with standard practice (for example, the AV referendum, as provided for by the Parliamentary Voting Systems and Constituencies Act 2011).

Observers

55. As mentioned at paragraph 62, the responsibilities the Bill confers on the Electoral Commission include observing the conduct of the referendum at polling stations and the conduct of the count. To enable them to carry out these responsibilities, the Bill gives Electoral Commission observers the right to attend any proceedings which are the responsibility of the CCO or a counting officer, or to observe any of their work carried out under the Bill.

56. The Bill also provides for any individual (over the age of 16) or organisation to apply to the Commission to be appointed as an accredited observer. Accredited observers are permitted to be present at the issue or receipt of postal ballot papers, the poll, and the count. This is in line with standard electoral practice.

Offences

57. The Bill extends standard electoral offences to the referendum.

CAMPAIGN RULES

Policy objectives

58. The Edinburgh Agreement confirms the importance of ensuring that the referendum campaign is subject to regulation that ensures that the referendum is fair and commands the confidence of both sides of the debate. The Scottish and UK Governments agreed that the regulations for the independence referendum campaign should be based on those set out in PPERA.

59. The Bill includes detailed provision for the referendum rules. The objective of putting in place detailed rules governing participation in the referendum campaign is to ensure that the campaigns in support of each referendum outcome are run in a demonstrably fair and transparent manner. The technical rules in the Bill about the conduct of the campaign build on, and are therefore very similar in substance to, the existing UK legislation and rules applying to the

conduct of referendums and elections. They will therefore be familiar to the electoral professionals running the poll, and to those running political campaigns who currently have to adhere to the existing rules governing them. This familiarity will help ensure that there is confidence in the legitimacy of the process and of the result.

60. The aim of the campaign rules is to create a level playing field between campaigns supporting each potential outcome, so as to prevent any political party or organisation from being able to disproportionately influence the campaign by excessive spending.

Consultation

61. The *Your Scotland, Your Referendum* consultation contained a chapter on Campaign Rules and sought views on the proposed spending limits. A majority of respondents supported the campaign regulation proposals and principles set out in the consultation document. Comments focussed on the principles which should underpin the spending arrangements, such as equitable limits, accountability and transparency.

The Electoral Commission

62. The Scottish Government intends that the referendum is run to the highest possible international standards. It is therefore essential that the referendum campaign rules are adhered to and are properly monitored and policed. The Bill confers a range of guidance, regulatory and monitoring functions on the Electoral Commission including:

- publishing guidance for voters
- publishing guidance for permitted participants
- recording the money spent and donations received by permitted participants and making that information available for public inspection
- observing the conduct of the referendum at polling stations
- observing the conduct of the count
- publishing a report on the conduct and administration of the referendum
- monitoring compliance with the campaign rules, with their investigatory and civil sanction powers available

63. The Electoral Commission will take a fair and balanced approach to its activities. The functions are specified in the Bill in a way which will ensure that the Commission will not be influenced by the Scottish or UK Governments in its affairs. The Commission will report to the Scottish Parliament.

64. The Bill provides that the Scottish Parliamentary Corporate Body will reimburse the Electoral Commission for expenditure incurred in fulfilling its functions under the Bill. This is in line with the established funding arrangements for the Commission in relation to its role for UK elections and referendums, where it is funded by the Speaker's Committee at Westminster as a means of demonstrating its impartiality and independence from Government. The Commission

will include details of its expenditure in its report on the conduct and administration of the referendum.

Alternative approaches

65. While most respondents to the consultation were generally supportive of the proposed role for the Electoral Commission, some felt that other arrangements to provide independent oversight of the referendum process should be put in place.

66. The Scottish Government previously considered setting up a separate and one-off Scottish Referendum Commission on the basis that it was essential that the Commission is accountable to the Scottish Parliament, rather than the UK Parliament. At the time, the Electoral Commission reported solely to the UK Parliament on all of its activities. However, the Local Electoral Administration (Scotland) Act 2011 gave the Electoral Commission a statutory role for the first time in Scottish local government elections and established the principle of the Electoral Commission reporting to the Scottish Parliament on the exercise of its functions in Scotland. This arrangement worked successfully during the local government elections in May 2012.

Campaign spending limits

Background

67. For UK-wide referendums, PPERA puts in place spending limits for any groups or individuals wishing to take part in the referendum campaign, and also makes arrangements for referendums held in part of the UK under UK legislation.

68. PPERA spending limits do not apply to the referendum on Scottish independence. It is for the Scottish Government to propose, and the Scottish Parliament to determine, the spending limits for the referendum period (this is the period beginning 16 weeks before the poll). The Scottish Government's consultation paper *Your Scotland, Your Referendum* proposed a range of spending limits for participants in the referendum campaign, broadly based on the rules in PPERA, tailored to reflect the context of a referendum held only in Scotland. These proposed limits were designed to ensure a level playing field in terms of the size of campaign available to organisations campaigning for particular outcomes, and to prevent one or a number of organisations from dominating the referendum campaign.

69. Under PPERA, the Electoral Commission is responsible for regulating campaign spending for UK-wide referendums. The Edinburgh Agreement confirmed that the Electoral Commission would be asked to regulate campaign spending for the referendum on Scottish independence as well. The Edinburgh Agreement states that, in setting the spending limits for the referendum period, the Scottish Government will “analyse and consider the responses to its consultation, consult with both existing referendum campaigns [...] and have regard to the Electoral Commission's views”.

70. On 30 January 2013 the Electoral Commission published a report setting out its recommendations on spending limits for the referendum¹³. Their proposed limits are detailed in column B of the table below. The Commission's report explained that the spending limits they recommended had been developed taking into account the principles of the Commission's 2010 paper *Key principles for Referendums*¹⁴ and its 2011 principles for formulating advice on spending limits for PPERA referendums in particular parts of the UK. The Commission stated that it had sought to apply these principles in a way that recognised the specific context of the independence referendum, including the information the Commission now had about the likely shape and scale of campaigning, the Edinburgh Agreement and (where relevant) lessons learnt.

71. In its response to the Commission's recommendations, the Scottish Government noted that the limits proposed by the Commission now accepted the need to ensure a level playing field and, as such, represented a move from the Commission's position in responding to the Government's consultation in March 2012. The Government accepted the Commission's recommended limits, and these are therefore the spending limits set out in the Bill.

Spending limits in the Bill

72. The table below summarises the spending limits originally proposed in *Your Scotland, Your Referendum* (column A), and those recommended by the Electoral Commission and subsequently accepted by the Scottish Government (column B). The limits in column B are those provided for in the Bill. (In the case of political parties, the Bill does not prescribe the limit for each party but sets out the formula by which each of the party limits below is calculated. The formula is explained at paragraph 80.)

Type of participant <i>(each category of participant is explained below)</i>	Column A: Proposed Spending Limit in Consultation draft of Bill	Column B: Revised Spending Limits in Bill as submitted to Parliament
Designated Organisation ¹⁵	£750,000	£1,500,000
Political Party represented in the Scottish Parliament	£250,000 flat rate	Scottish National Party £1,344,000 Scottish Labour £834,000 Scottish Conservative and Unionist Party £396,000 Scottish Liberal Democrats £201,000 Scottish Green Party £150,000
Other Permitted Participants	£50,000	£150,000

¹³ *Electoral Commission advice on spending limits for the referendum on independence for Scotland*, http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/153697/Report-on-spending-limits-for-the-referendum-on-independence-for-Scotland.pdf

¹⁴ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/87412/Referendum-Principles-Paper-2010-06-02-FINAL.pdf

¹⁵ Each designated organisation will also be entitled to one free postal communication to every household or voter in Scotland to promote its campaign.

Permitted participants

73. Following the principles established in Part 7 of PPERA for referendums held under UK legislation, the Bill provides that any UK individual or organisation wishing to campaign for a particular outcome in the referendum must make a declaration to the Electoral Commission stating that they wish to be a “permitted participant”. That declaration must also state which outcome they are campaigning for. Unless a person or organisation has declared themselves as a permitted participant they will only be legally allowed to spend £10,000 on campaigning for a particular outcome in the referendum.

74. The purpose of having declared permitted participants is to help to ensure an open campaign where those who wish to publicly support a particular outcome must publicly register that intention, so that it is clear who is campaigning for what. Imposing spending limits on those declared participants will create as far as possible a level playing field with regard to campaign spending and thus prevent individuals or organisations from dominating the referendum campaign.

75. There are three categories of permitted participants in the referendum:

- designated organisations;
- registered parties represented in the Scottish Parliament at the start of the referendum period; and
- other permitted participants or registered campaigners who are not a registered party represented in the Scottish Parliament at the start of the referendum period.

Designated organisations

76. A permitted participant may apply to the Electoral Commission to be the principal campaigner representing one of the outcomes of the referendum. These permitted participants are called “designated organisations” and will in effect be the main campaign bodies for each of the outcomes. In this referendum, there are two possible outcomes: Yes and No. There will therefore be a maximum of two designated organisations.

77. As the main campaigning body for an outcome in the referendum, a designated organisation will have a higher campaign spending limit than other permitted participants. In addition, each designated organisation will be entitled to recover the postage costs of one free mailshot to every household or voter in Scotland to promote its campaign. As at elections and UK referendums, designated organisations will also be entitled to use school rooms or other rooms for holding public campaign meetings during the four week period before the referendum is held.

78. There are no direct precedents for spending limits for designated organisations, political parties and other groups at a Scottish level. However, in its report the Electoral Commission suggested that the lead campaigners at a referendum on Scottish independence should be able to put forward their arguments to voters by campaigning on a similar scale to political parties campaigning at a Scottish Parliament election, which have a spending limit of £1,500,000. This is therefore the spending limit the Commission recommended for the designated organisations, and the limit adopted in the Bill.

Political parties

79. PPERA permits the largest political parties (i.e. those with over 30% of total number of votes cast at the last UK Parliamentary election) to spend the same as the designated organisations.

80. The Electoral Commission recommended that the spending limit for each registered party represented in the Scottish Parliament at the start of the referendum period should be set by reference to the share of the vote that party received at the 2011 Scottish Parliament election. To calculate the suggested limits on this basis, the Commission:

- calculated the limits with reference to the actual share of the vote received by each party, rather than using bands, which the Commission acknowledged can distort the impact of the share of the vote; and
- applied the share of the vote to a maximum value equivalent to the combined value of the limits of the two designated organisations. In other words, the combined spending limits for all political parties represented in the Scottish Parliament is approximately equal to the combined spending limits for the two designated organisations, with each party's share of that overall limit being determined by their share of the vote at the 2011 Scottish parliament election. This approach is intended to provide party limits sufficiently high to allow parties to carry out a significant national campaign separately from any designated organisation.

81. On this basis, the Commission recommended that the limits for the five registered parties represented in the Scottish Parliament should be:

Party	Limit
Scottish National Party	£1,344,000
Scottish Labour	£834,000
Scottish Conservative and Unionist Party	£396,000
Scottish Liberal Democrats	£201,000
Scottish Green Party	£150,000

Other permitted participants

82. For groups which are not political parties and wish to campaign outside of the designated organisations as permitted participants (whether or not they also form part of such a group) the Electoral Commission recommended that the spending limit be set at 10% of each designated organisation's spending limit (in other words, £150,000, which represents 10% of the designated organisations' limit of £1,500,000). This is in line with the Commission's 2010 paper *Key principles for Referendums*. The limit should be sufficient to allow other groups to have some national impact, while encouraging them to join the designated organisations if they wish to contribute more substantially. The Bill also contains restrictions which prevent campaigners from evading the spending limits by setting up multiple campaigns which work to a common

plan. These restrictions replicate the approach taken in the 2011 UK referendum on parliamentary voting systems.

Expenses that count towards spending limits

83. Expenses will count towards the spending limits if they are in relation to activities supporting a referendum campaign or promoting an outcome in the referendum. Such activities include:

- referendum campaign broadcasts¹⁶;
- advertising;
- unsolicited material addressed to voters;
- any material that provides information about the referendum, its questions, or promotes an outcome;
- market research or canvassing of people's voting intentions;
- press or media conferences;
- transport costs for the purposes of obtaining publicity about the referendum; and
- rallies and other forms of public meetings.

84. Cost savings associated with property, facilities or services that are provided free of charge or at a preferential rate are also counted as referendum expenses if they exceed £200. These are referred to as "notional referendum expenses" in the Bill and must be declared to the Commission, along with the other expenses.

85. Breach of the campaign spending limits is treated as an offence in the same way as PPERA treats such breaches. It would therefore be an offence for an individual or body which is not a permitted participant to knowingly exceed its spending limit of £10,000. Anyone guilty of this offence would be liable, on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum¹⁷ (or both) and, on conviction on indictment, to imprisonment for a term not exceeding 12 months, or to a fine without limit (or both).

86. Similarly, it is an offence for permitted participants to exceed their spending limits. A person guilty of such an offence would be liable, on summary conviction, to a fine not exceeding the statutory maximum and, on conviction on indictment, to a fine.

87. To ensure that the referendum campaign is conducted openly, it is crucial that the campaign expenditure incurred is properly accounted for and reported. Those running campaigns must demonstrate that they have maintained control over what they have spent on their campaigns so that their spending can be reported and made public. The Bill therefore puts

¹⁶ Radio and television broadcasts concerning referendums are restricted by the Communication Act 2003. The Bill does not provide for dedicated referendum broadcasts under the campaign rules, though provision is made in the section 30 order.

¹⁷ Currently set at £10,000.

in place detailed rules, based on the provisions of PPERA, to ensure that each participant has appropriate procedures in place to authorise and account for its expenses. To ensure maximum transparency, the Bill also requires all permitted participants to provide regular reports to the Electoral Commission ahead of the poll on all donations and loans received.

Donations made to permitted participants in the referendum campaign

88. As set out above, the Bill puts in place detailed rules to ensure that any donations made to permitted participants in support of their campaign – whether in the form of money or other property – are declared and administered appropriately to ensure that the campaigns are run with fairness and transparency.

89. Donations to registered political parties are already subject to a regulatory regime established in Part 4 of PPERA. That regime applies regardless of whether an election or referendum campaign is taking place. There is therefore no need to create an additional set of rules in this Bill regulating donations to registered political parties solely for the purposes of the referendum.

90. The Bill puts in place rules about donations to permitted participants who are not registered parties or are minor parties, and who are therefore not already subject to the relevant PPERA rules. These rules are again based on existing legislation for referendums in the UK, set out in PPERA. In general terms, the rules in the Bill define what donations are allowed, both by description and monetary value (or a determination of monetary value), who is allowed to make a donation, and what a permitted participant must do to record and report the donations of over £500 which they receive (donations under £500 are not regarded as donations to a permitted participant). “A relevant donation” is the term used to describe a donation to a permitted participant for the purposes of meeting their referendum expenses. Such donations would include:

- a gift to the permitted participant of money or other property;
- any sponsorship provided to the permitted participant. Sponsorship in this context can be described as money or other property that is transferred to a permitted participant for the purpose of helping them to meet referendum expenses, or in some cases, not incurring that expenditure;
- any money spent by someone other than the permitted participant themselves in paying any referendum expenses incurred by or on behalf of the permitted participant;
- the provision of any property, services or facilities on anything other than commercial terms for the use or benefit of the permitted participant (including the services of any person);
- any subscription or other fee paid for affiliation to, or membership of, the permitted participant (where a permitted participant is not an individual).

91. Loans and benefits provided to those permitted participants are regulated by similar detailed rules to those on donations as ‘regulated transactions’, drawn from rules which applied at the AV referendum¹⁸.

92. Permitted participants can only accept donations if they are made by “permissible donors”, who are defined in the Bill in accordance with PPERA rules as:

- individuals registered on the electoral register anywhere in the UK;
- companies registered under the Companies Act or incorporated in the EU or that conduct business in the UK;
- registered parties;
- trade unions;
- building societies;
- limited liability partnerships;
- friendly societies; and
- unincorporated associations carrying on business or other activities wholly or mainly and having their main office in the UK.

93. The Edinburgh Agreement confirmed that as is the case under PPERA, permitted participants will not be able to accept certain anonymous donations or certain donations from individuals or organisations from outside the UK.

Alternative approaches

94. Using PPERA as the basis for prescribing permissible donors for the referendum, it may be possible to restrict some of the “permissible donors” identified above to those with headquarters or bases in Scotland. However, that approach would be subject to a number of practical inconsistencies and anomalies. For example, such restrictions would mean that only three trade unions and three building societies could become donors.

95. Furthermore, in practice, registered political parties are the main organisations that individuals are likely to donate money to. The PPERA rules apply to registered political parties on a UK-wide basis. It is not possible for the Scottish Parliament to legislate to regulate the donations that registered political parties receive from voters in other parts of the UK and then use in the referendum. In any case, political parties can receive donations at any time and they are not normally specifically earmarked for a particular use. There would be no practicable way to determine whether or not those donations were intended to be used for referendum campaigning. To restrict minor parties and other permitted participants to donations from voters and organisations registered only in Scotland would be unfair to them when the largest political parties can legitimately use money from elsewhere. For these reasons, the Bill adopts the UK-wide definition of permissible donors set out in PPERA.

¹⁸ Held under the Parliamentary Voting System and Constituencies Act 2011 (c.1)

Returns to the Electoral Commission by permitted participants about their campaign finances

96. In addition to the arrangements for pre-poll reporting of loans and donations set out in paragraph 87, the Bill requires permitted participants to provide a report to the Commission about their finances during the campaign. A person designated by a permitted participant as the “responsible person” (in the case of a registered political party, the treasurer) must make a return to the Electoral Commission within 3 months of the date of the referendum, setting out full details of expenses and donations. It is an offence if they do not do so.

97. Permitted participants that spend over £250,000 during the referendum campaign will be required to submit an auditor’s report with their return within 6 months of the date of the referendum. The £250,000 threshold has been added following the Electoral Commission’s response to the consultation on the draft Bill. The threshold is the same as that provided in PPERA.

Supply of registers

98. The Bill provides that, in order to be permissible, donations must be made by permissible donors (defined in similar terms to section 54(2) of PPERA), and that ‘all reasonable steps’ must be taken by the permitted participant receiving the donation to verify that they are such. PPERA sets out the full range of those who are deemed to be permissible donors, including any individual registered in an electoral register. In line with the access provided at referendums held under UK legislation, the Bill provides for all permitted participants to have access to the local government register of electors. This will enable them to verify the permissibility of donors who appear on that register (which covers the great majority of people eligible to vote in the referendum). If they receive a donation from an individual who is not on the local government register, they will be able to check other registers operating in Scotland and the rest of the UK through the normal public access routes.

99. As previously mentioned, the designated organisations will be able to request a copy of the complete polling list, which will include all voters in the referendum (in other words, both those on the local government register and those on the Register of Young Voters). This will give the designated organisations the names and addresses of those who are eligible to vote, enabling them to send a postal communication to every household or voter in Scotland using the free mailshot to which they are entitled under the Bill and the section 30 Order.

Publications and broadcasts during the referendum campaign

100. The Scottish Government’s aim is that the campaign should be seen to be fair and should operate on a “level playing field” for all participants in the referendum. The Scottish Government therefore recognises that there should be no undue political influence on the campaign.

101. In support of this principle, the Bill provides that, for the 28 day period before the date of the referendum, Scottish Ministers, the SPCB and certain public authorities in Scotland cannot publish any material providing general information about the referendum, dealing with issues raised by the questions to be voted on in the referendum, putting any arguments for or against a

particular answer to the questions to be voted on, or which is designed to encourage voting in the referendum. This follows the approach taken in the run-up to elections, set out in PPERA. Under the terms of the Edinburgh Agreement, the UK Government has committed to act according to the same PPERA-based rules during the 28 day period.

102. As the recognised campaign bodies representing the campaign for a particular outcome in the referendum, only designated organisations will be allowed to make referendum campaign broadcasts.

Alternative approaches

103. In its consultation response in March 2012, the Electoral Commission expressed a view that the period should be extended from 28 days to cover the whole referendum period. However, PPERA applies a 28 day period for UK elections and referendums and the Scottish Government has concluded that in this matter the Bill should remain consistent with UK law. This approach was endorsed in the Edinburgh Agreement.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

104. The Bill's provisions are not discriminatory on the basis of age, gender, race, disability, marital status, religion or sexual orientation. They are intended to ensure equality of opportunity for people in having their say on the options in the referendum. In particular, the Bill places responsibilities on the CCO and counting officers to make provision so that as many people as possible have the opportunity to take part in the referendum. This follows existing legislation and practice for elections.

Age

105. The Bill extends the franchise to 16 and 17 year olds for the first time in a national poll, reflecting the Scottish Government's policy that young adults should be able to participate fully in the democratic process.

Disability

106. In line with other elections, the counting officer will be required to ensure that polling stations are accessible to all. The Bill includes the following provisions to help people with disabilities to vote:

- if a voter applies to vote with the assistance of someone else on the grounds of blindness, other physical disability or an inability to read, the presiding officer of the polling station must approve the application if the presiding officer is satisfied that the voter and the companion meet the terms of the legislation;
- postal voters must be given information about how to obtain guidance for voters in Braille, pictorial format, audible format or in other formats;

- each polling station must have a sample copy of the ballot papers in large text for voters who are partially sighted, and a ‘tactile voting device’ for enabling voters who are blind or partially sighted to enable them to vote without the need for assistance; and
- an enlarged sample copy of the ballot paper can be displayed at every polling station.

Race

107. The Bill puts in place measures to ensure that those who do not speak English as their first language or who are more comfortable reading directions in their first language, can also take part in the democratic process. Postal voters must be given information about how to obtain guidance for voters in languages other than English, and an enlarged sample copy of the ballot papers translated into other languages must be displayed at every polling station as appropriate.

Human rights

108. The Scottish Government has considered the potential effect of the Bill on human rights. It is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights. The spending limits for regulating the referendum campaigns are set at levels which are proportionate to ensure a level playing field at the referendum. The publicly available register of local electors is used, in line with election law and subject to the necessary safeguards to prevent impersonation and ensure a fair referendum. The Bill also creates criminal offences where necessary, each of which are compatible with Convention rights.

Island communities

109. The Bill has no disproportionate effect on island communities.

Local government

110. The Bill establishes the office of the Chief Counting Officer (CCO). The CCO will be the Convener of the Electoral Management Board and will most likely appoint existing returning officers to be the counting officers in each local authority area. The people conducting the referendum will therefore be the local authority officers who are currently responsible for running elections in Scotland.

111. The CCO and counting officers will claim their fees and expenses from the Scottish Government, under the terms of a Fees and Charges Order to be made under an order making power in this Bill. So, although it is local authority officers who will in effect incur expenditure in running the referendum, there will be no additional pressure on local authority budgets arising as a result of the referendum.

112. Scottish Government officials have worked closely with a range of electoral professionals - local authority returning officers, electoral registration officers and the Electoral Commission – to ensure the proposals in the Bill reflect, and build on where necessary, the rules governing elections, and take account of any relevant improvements to be made in light of Ron Gould’s report on the 2007 Scottish Parliament and local government elections.

This document relates to the Scottish Independence Referendum Bill (SP Bill 25) as introduced in the Scottish Parliament on 21 March 2013

113. The accompanying Business and Regulatory Impact Assessment sets out the impact on local government in full.

Sustainable development

114. The Bill will have no impact on sustainable development.

*This document relates to the Scottish Independence Referendum Bill (SP Bill 25) as introduced
in the Scottish Parliament on 21 March 2013*

SCOTTISH INDEPENDENCE REFERENDUM BILL

POLICY MEMORANDUM

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS
Group Scotland.

ISBN 978-1-78307-698-7