The Committee will meet at 9.00 am in Committee Room 1.

1. **Scottish Independence Referendum (Franchise) Bill**: The Committee will take evidence on the Bill at Stage 1 from—

   John McCormick, Electoral Commissioner for Scotland, Andrew Scallan, Director of Electoral Administration, and Andy O’Neill, Head of Office Scotland, Electoral Commission;

   and then from—

   Mary Pitcaithly, Convener, and Chris Highcock, Secretary, Electoral Management Board;

   Brian Byrne, Chair of the Electoral Registration Committee, Scottish Assessors’ Association;

   Kate Crawford, Chair of the Scotland and Northern Ireland Branch, Association of Electoral Administrators;

   Bruce Robertson OBE, Education Policy Adviser, Association of Directors of Education in Scotland.

2. **Work programme**: The Committee will consider its approach to Stage 1 scrutiny of the proposed Scottish independence referendum bill.
The papers for this meeting are as follows—

**Agenda item 2**

Approach paper REF/S4/13/7/1

**Additional information**

Note by the Clerk - Scrutiny at Westminster REF/S4/13/7/2

Note by the Adviser - prisoner voting and ECHR REF/S4/13/7/3
Referendum (Scotland) Bill Committee

Approach to Scottish Independence Referendum Bill

Note by the Clerk

Background

1. This paper invites the Committee to agree its approach to Stage 1 scrutiny of the Scottish Independence Referendum Bill. In particular, it invites agreement to a draft call for evidence, invites the Committee to agree witnesses to be invited to give oral evidence and invites it to delegate witness expenses to the Convener.

Call for evidence

2. The Scottish Government has announced that the Bill will be introduced in “mid-March” and there is no evidence to suggest this timetable has slipped. It therefore seems likely that the Bill will be introduced, at the latest, sometime between today’s meeting (21 March) and next week’s meeting (28 March).

3. To maximise the time available for witnesses to prepare written evidence, it is suggested that a call for evidence be published as soon as the Bill is available in print (i.e. the day following introduction). This would pre-empt formal referral by the Bureau, but given that this Committee was established with a remit referring directly to the Bill, and that the Bill does not fall within the remit of any other committee, referral can be considered to be a formality in this instance.

4. The Committee’s agreed timetable suggests concluding oral evidence by 13 June in order to review the evidence on 20 June and consider a draft Stage 1 report on 27 June. Normal practice is to invite the relevant Minister (in this case, the Deputy First Minister) as the final oral witness, so she can respond to points made by all other witnesses. (The DFM’s availability on 13 June has been confirmed.)

5. On that basis, the draft call for evidence suggests 6 June as the deadline for written evidence. This allows a couple of days for the clerks to process evidence arriving on the deadline, and so ensure that it can all be published and circulated in advance of the meeting attended by the Deputy First Minister. This provides a fairly generous period of nearly 11 weeks for written evidence to be submitted.

6. A draft call for evidence is set out in Annexe A to this paper. The description of the Bill it contains takes account of input from Bill team officials, but may need to be further refined prior to publication to ensure it is accurate.

7. The call for evidence will be published on the Committee’s webpage and brought to the attention of media contacts and stakeholders.
Oral Evidence

8. There are ten Committee meetings between (and not including) today’s meeting and the 20 June meeting (when all the evidence is to be reviewed). However, as the published timetable indicates, not all of these are available for oral evidence on the Referendum Bill:
   - the 28 March meeting is allocated to oral evidence on the Franchise Bill
   - at least half of the 18 April meeting will be needed to review the evidence on the Franchise Bill
   - the 25 April and 2 May meetings are needed for consideration of the draft Stage 1 report on the Franchise Bill
   - the 6 June meeting will be required for Stage 2 of the Franchise Bill.

9. That leaves, in practice, 5 full meetings, plus (possibly) half of the meeting on 18 April. Assuming that all of the time on 13 June is given over to evidence from the Deputy First Minister, that leaves the following four full meetings available for other witnesses:
   - 9 May, 16 May, 23 May, 30 May.

10. An updated version of the Committee’s timetable is set out in Annexe B.

11. As Thursday meetings must end by around 11.30, a 9.30 start would make up to 2 hours available at each meeting – which would allow two panels of witnesses (at up to an hour per panel). It may be possible to accommodate three panels (up to 45 minutes per panel) in a meeting starting at 9 am. However, it needs to be borne in mind that panels involving witnesses from different organisations almost inevitably require more time than single witnesses/organisations.

12. Assuming two panels at each of the May meetings gives eight panels of witnesses. If the Committee wished to hear from more panels than this, the options are either to fit three panels into one or more of those meetings and/or to include one panel on the 18 April meeting – making a total of, say, 10 panels.

13. It would be helpful if the Committee was able to identify at this stage the organisations or individuals it wishes to hear oral evidence from. It is not essential to agree all the oral witnesses at this meeting, although agreeing some would enable early contact to be made and dates finalised. If need be, further witnesses could be agree at next week’s meeting.

14. Suggested witnesses for the oral evidence sessions have been set out below for consideration. Related organisations have been grouped where some or all of them could form a single panel, and the broad themes on which they might be questioned are also indicated.

(1) Previous campaign groups (from the AV or Welsh referendums)
   - Principles / Citizen engagement / Question
(2) Law Society of Scotland and/or other legal experts (Faculty of Advocates, legal academics)

- Legal framework / Challenges, including to the result / Offences and enforcement

(3) Electoral Commission

- Role (guidance, regulation and monitoring) / Electoral registration and the register / Citizen engagement /
- Question / Ballot paper /
- Information on referendum / Timing and declaration of the count / Resources and cost / Reporting on referendum / Access to referendum documents / Conduct of poll (postal and proxy) /
- Legal Framework / Challenges, including to the result / Offences and enforcement /
- Recognition of permitted participants and designated campaign groups / Campaign spending rules and reporting / Donations to permitted participants¹

(4) Electoral Management Board, Scottish Assessors Association, Association of Electoral Administrators, SOLAR

- Electoral registration and registers / Ballot paper / Conduct of Poll

(5) Religious Groups*, Young People, Older people, Disabled Groups

- Information on referendum / Date of the referendum* / Timing and declaration of the count

(* - particularly if the referendum is to be held on a religious holiday or rest-day, e.g. a Saturday)

(6) Civic Scotland groups, Electoral Reform Society

- Information on referendum / Campaign spending rules and reporting / Donations to permitted participants

(7) UK Information Commissioner (responsible for data protection)

- Access to referendum documents

¹ According to the Electoral Commission's website, only the following types of individuals or organisations may be permitted participants:

- an individual registered on a UK electoral register or resident in the UK
- a UK-registered political party
- a UK-registered company which is incorporated in the EU and carries on business in the UK
- a UK-registered trade union
- a UK-registered building society
- a UK-registered limited liability partnership which carries on business in the UK
- a UK-registered friendly, industrial, provident or building society
- a UK-based unincorporated association of two or more people whose main office is in the UK and which carries on the majority of its activities in the UK
(8) Probable Designated Campaign Groups (Yes Scotland, Better Together), Political Parties, Possible Permitted Participants

- Citizen engagement / Conduct of poll (postal and proxy) / campaign funding, campaign spending rules and reporting / donations to permitted participants

Witness expenses

15. It is normal practice for committees to delegate to the Convener, at the outset of an inquiry, responsibility for witness expenses. Under Rule 12.4.3, committees may invite the SPCB to pay expenses of witnesses it has invited to give oral evidence (under the Parliament’s agreed witness expenses scheme). Delegating this to the Convener enables claims to be authorised without requiring consideration by the whole Committee at a meeting.

Conclusion

16. The Committee is invited to:

- agree the draft call for evidence in the Annexe A (subject to final adjustment of the outline of the Bill)
- decide those from whom it wishes to hear oral evidence; and
- agree to delegate witness expenses to the Convener.
Call for evidence on the Scottish Independence Referendum Bill

The Referendum (Scotland) Bill Committee has been established to consider the legislation relating to the forthcoming referendum on independence.

The Committee is already scrutinising the Scottish Independence Referendum (Franchise) Bill, which was introduced on 11 March. It now invites written evidence on the general principles of the Scottish Independence Referendum Bill, which was introduced on [date]. A copy of the Bill and its accompanying documents can be found at:

Scottish Independence Referendum Bill (link not yet active)

Aims of the Bill

The Bill provides for a referendum on Scottish independence to be held on [date] 2014. In particular, the Bill:

- provides for the date of the referendum, the question to be asked and the form of the ballot paper (schedule 1)
- requires Ministers to appoint a Chief Counting Officer, and for him or her to appoint counting officers, and defines their functions
- provides for the manner of voting, registration, the handling of postal votes and the supply of Polling Lists (schedule 2)
- sets out conduct rules (schedule 3)
- sets out campaign rules – including in respect of campaign organisations, permitted participants and expenses (schedule 4)
- defines the role of the Electoral Commission in overseeing the referendum, including in providing information to voters and guidance to the Chief Counting Officer, and in relation to campaign rules (schedule 5)
- makes provision about civil sanctions (schedule 6) and offences (in schedule 7)

Further details on the Bill are contained in the Policy Memorandum and Explanatory Notes.

Referendum (Scotland) Bill Committee consideration

The Referendum (Scotland) Bill Committee plans to take oral evidence on the Bill during May, and to report to the Parliament immediately after the summer recess (i.e. in early September). It is expected that the Finance Committee and the Subordinate Legislation Committee will also consider aspects of the Bill that fall within their remits, and report on them to this Committee.

Written submissions to the Referendum (Scotland) Bill Committee may cover any aspect of the Bill or its implementation. Witnesses may, in particular, wish to comment on some or all of the following:

- the date of the referendum and the wording of the question
• the conduct rules  
• the campaign rules  
• the role of the Electoral Commission  
• the proposed limits on funding for campaign organisations and political parties.

Please note that the remit of the Committee is to scrutinise the legislation that will enable a referendum to take place, and not to scrutinise the wider arguments for and against independence itself – which are for the people of Scotland to decide in [month] 2014.

Written evidence should be submitted by no later than **Thursday 6 June 2013**. Witnesses are encouraged to submit evidence ahead of this deadline if possible, so that any points raised can be taken into account by as many as possible of those invited to give oral evidence. (Submissions made after 6 June will still be circulated to the Committee but it may be more difficult for them to be taken fully into account in the Committee’s Stage 1 Report.)

**How to submit written evidence**

Written evidence should normally not exceed 6 pages in length and should, if possible, be submitted electronically (preferably in MS Word format) to the Committee clerks at referendum.committee@scottish.parliament.uk. It may also be posted to Clerk to the Referendum (Scotland) Bill Committee, Room T2.60, Scottish Parliament, Edinburgh EH99 1SP.

Before submitting evidence please read the Parliament’s policy on the treatment of written evidence. Any queries should be directed to the Committee clerks, whose details are available on the Committee’s web-page.

**Contact**

Any queries about written submissions should be addressed in the first instance to the Referendum (Scotland) Bill Committee clerking team at the above email address or (0131) 348 5417.
Annexe B

Provisional timetable (reflecting planning assumptions set out in the paper)

Referendum (Scotland) Bill Committee

Dates shown fall on a Thursday unless indicated otherwise.

<table>
<thead>
<tr>
<th>Date</th>
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<th>Referendum Bill</th>
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<tr>
<td>Mid/late March</td>
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<td>Introduction</td>
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<td>28 March Committee</td>
<td>Oral evidence (Deputy First Minister)</td>
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<td>18 April Committee</td>
<td>Review evidence and conclusions</td>
<td>Oral evidence (max 1 panel)</td>
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<td>Thursday 9 May</td>
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<td>Stage 1 Debate in Chamber</td>
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<td>Oral evidence (2 panels)</td>
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<td>20 June Committee</td>
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<td>Date</td>
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<td>Referendum Bill</td>
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<td>5 September</td>
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<td>Finalise Stage 1 Report</td>
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<tr>
<td>12 September (pm)</td>
<td></td>
<td><strong>Stage 1 Debate in Chamber</strong></td>
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<td>3 October</td>
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<td><strong>Stage 2 proceedings</strong></td>
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<td>Committee meeting</td>
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<td>(day 1)</td>
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<td>10 October</td>
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Referendum (Scotland) Bill Committee

Scrutiny at Westminster

Note by the Clerk

1. The House of Commons Scottish Affairs Committee (SAC), as part of its ongoing inquiry into what it refers to as the “referendum on separation for Scotland”, is taking oral evidence on Tuesday 19 March from the Electoral Commission and from the Ministry of Defence.

2. The SAC’s evidence from the Electoral Commission will be mainly on the Commission’s reports, published in January, on the Scottish Government’s proposed referendum question and proposed spending limits. These Reports are available on the Electoral Commission website:


3. The issues covered by these reports are more relevant to the main Referendum Bill than to the Franchise Bill. This Committee is likely to have its own opportunity to take evidence on these issues from the Electoral Commission at a later date, during Stage 1 scrutiny of the Referendum Bill.

4. However, the SAC web-page indicates that questioning on 19 March may also cover issues relevant to this Committee’s Stage 1 scrutiny of the Franchise Bill, including registering 16 and 17-year olds and mechanisms to ensure the register is as complete as possible. This Committee is, of course, also taking evidence from the Electoral Commission on the Franchise Bill (on 21 March).

5. The SAC evidence session is also likely to consider the issue of informing service personnel about the means by which they can vote in the referendum.

6. A transcript of the SAC evidence will be available shortly after the meeting (probably on Friday 22 March) from the following web-page (scroll down to “Uncorrected oral evidence”):

http://www.parliament.uk/business/committees/committees-a-z/commons-select/scottish-affairs-committee/Publications1/
Competence Issue: Background

There is a possible vires issue in relation to draft Section 3 of the Scottish Independence Referendum (Franchise) Bill (‘the Franchise Bill’) which the Committee may wish to consider.

Section 3 provides: ‘A convicted person is legally incapable of voting in an independence referendum for the period during which the person is detained in a penal institution in pursuance of the sentence imposed on the person.’

The Committee may seek to satisfy itself that this provision is within the competence of the Parliament in terms of s29(2)(d) of the Scotland Act 1998 (compatibility with ECHR rights) in light of a decision by European Court of Human Rights in 2005 that the United Kingdom’s general ban on prisoner voting was incompatible with the Convention.

Summary: I think it more likely than not that the draft section 3 is within vires but there are possible question-marks.

Law on Prisoners’ Voting Rights

In light of the 2005 case Hirst (No.2)\(^1\) the UK Government has asked a Joint Committee of the UK Parliament to consider the implications of this decision and may recommend a change to the law.\(^2\)

However, the Scottish Government in its Policy Memorandum published with the Franchise Bill makes clear ‘convicted prisoners will not be able to vote in the referendum irrespective of whether UK electoral law is amended to extend the vote to prisoners for parliamentary elections before the referendum in 2014.’\(^3\)

There is a strong argument that section 3 of the Bill can be distinguished from the situation in Hirst (No.2). The relevant provision of the ECHR is Article 3 of Protocol 1 ("A3P1") which states: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” (emphasis added).

In light of the specific reference to ‘choice of the legislature’ the European Court has found that A3P1 does not apply to referendums, leaving states free to determine the limit of the franchise for referendums.\(^4\) It has distinguished referendums from

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\(^1\) Hirst v the United Kingdom (No 2) [2005] ECHR 681.
\(^3\) Franchise Bill Policy Memorandum, para 13.
\(^4\) See reference to this distinction in Franchise Bill Policy Memorandum, para 41.
parliamentary elections in these cases: Bader v Austria 1996\(^5\); Niedzwiedz v Poland 2008\(^6\). In the latter, the Court stated: ‘… the obligations imposed on the Contracting States by Article 3 of Protocol 1 are limited to “the choice of the legislature” and do not apply to the election of a Head of State or to referendums.’\(^7\)

It is also the case that a challenge to UK law in relation to the 1975 referendum on continued membership of the EEC (X v United Kingdom, Application No.7096/75) was unsuccessful, with the European Commission on Human Rights ruling the application inadmissible precisely because it was concerned with a referendum and not an election.

It can, furthermore, be noted that the Court in Hirst (No.2) provided the UK with a wide margin of appreciation in terms of how the right to vote issue should be resolved (Grand Chamber para. 61), provided the restriction is not ‘general, automatic and indiscriminate’ (para 82).

Can section 3 be seen as a ‘general, automatic and indiscriminate restriction’? Possibly. But even if it is viewed in this way there is still a strong argument that it would be saved by the precise nature of the obligation in A3P1 – i.e. its focus on choice of the legislature and not referendums.

**Caveats**

While the distinction between a referendum and an election to the legislature does seem to be a convincing defence of the vires of section 3 there are a number of reasons why the outcome of any legal challenge may be unpredictable:

1. Domestic courts *take account* of ECHR case law, they do not necessarily follow it (Human Rights Act 1998 s2). It would be open a domestic court to read the implications of A3P1 differently than did the European Court of Human Rights. They are generally not inclined to do so (the so-called ‘Ullah Principle’) but there have been strong criticisms of the UK position by legal commentators: [http://ukconstitutionallaw.org/2011/05/18/jeff-king-should-prisoners-have-the-right-to-vote/](http://ukconstitutionallaw.org/2011/05/18/jeff-king-should-prisoners-have-the-right-to-vote/)

2. One of the reasons that the application in X v United Kingdom was deemed inadmissible was that the referendum on the EEC was deemed to be of a ‘purely consultative character’. Will the independence referendum be seen to be purely consultative and if not could that lead to a different reading of A3P1? I would suggest that in light of Bader v Austria there would not be a different reading of A3P1, but the position is perhaps open to question.

3. It might be argued that the law has moved on and the European Court is becoming more protective of the right to vote; could this lead to a more ‘purposive’ interpretation of A3P1 which might catch referendums within its remit? (This argument was advanced by Paul Reid, Advocate in a blog of 12

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\(^5\) Bader v Austria (1996) 22 EHRR CD213, see No. 7096/75, Dec. 3.10.75, D.R. 3 p.165.


\(^7\) In this case the Court also referred to a number of other cases in which the same limitation applied.
March, citing the recent case of Scoppala 2013\(^8\) 

4. It has been argued that it is logically incongruous that the ECHR guarantees to prisoners a right to vote in parliamentary elections but not on such an important issue as independent statehood, and on this basis that a court might read such a right into A3P1. (See for example [http://ukhumanrightsblog.com/2013/03/12/no-prisoner-votes-in-scottish-independence-referendum-andrew-tickell/](http://ukhumanrightsblog.com/2013/03/12/no-prisoner-votes-in-scottish-independence-referendum-andrew-tickell/)


5. The European Union Charter of Fundamental Rights Articles 39 and 40 provide for the right of every citizen to vote respectively in elections to the European Parliament and in municipal elections. In other words, this too does not seem to cover referendums. However, if we also take into account the International Covenant on Civil and Political Rights to which the United Kingdom is a party, Article 25 provides a broader right: ‘To take part in the conduct of public affairs’. The Human Rights Committee which interprets the Covenant has interpreted this to include the right to vote in referendums: ‘Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum’ (General Comment 25, para 6); and any restrictions on this right should be ‘objective and reasonable’ (General Comment 25, para 4).\(^9\) The Scottish Parliament is not bound to act compatibly with this Covenant but its terms could be considered by a court in interpreting A3P1 of the ECHR.

**Conclusion**

Challenges could be brought either by way of a SA section 33 reference by a law officer or post-enactment by way of a judicial review application. I am not persuaded that either challenge would be successful but the caveats I mention should be considered.

18 March 2013

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\(^8\) Scoppola v Italy (2013) 56 EHRR 19.  
\(^9\) General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25):12/07/1996. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments).
Appendix

Franchise Bill Explanatory Notes

*Offenders in prison etc. not to be entitled to vote*

9. Section 3 provides that convicted prisoners who are detained in a penal institution are debarred from voting in an independence referendum. Prisoners held on remand who have not been convicted will be able to vote, although they will need to do so using a postal or proxy vote. This is identical to provision made, in relation to parliamentary and local government elections, by section 3 of the 1983 Act. It has been included in the Bill because the UK Parliament is considering proposals to alter section 3 of the 1983 Act and the Scottish Government would not wish any alteration to apply for the purposes of an independence referendum.

Franchise Bill Policy Memorandum

13. Convicted prisoners detained in a penal institution will not be eligible to vote in the referendum. Prisoners held on remand who have not been convicted will be able to vote, although they will need to do so using a postal or proxy vote. While the franchise at the referendum is a matter for the Scottish Parliament to determine, the franchise at elections in Scotland (as throughout the UK) is a matter for the UK Parliament. The UK Government announced in November 2012 that it would ask a committee of parliamentarians to consider a range of options set out by the Government in response to successive rulings by the European Court of Human Rights that the UK’s current blanket ban on prisoners voting in elections to state legislatures breaches the European Convention on Human Rights. The committee will report later in 2013. The ECHR ruling (and human rights case law) does not relate to referendums, and convicted prisoners will not be able to vote in the referendum irrespective of whether UK electoral law is amended to extend the vote to prisoners for parliamentary elections before the referendum in 2014.

40. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR). The publicly available register of local government 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 applies existing criminal offences for the purposes of the RYV, where necessary, none of which are incompatible with Convention rights.

41. The Bill prohibits convicted prisoners who are detained in pursuance of their sentence from voting in the referendum. As discussed in paragraph 13, the Scottish Government is satisfied that this approach is compatible with the ECHR. Article 3 of Protocol 1 to that Convention, the right to free elections, does not create rights that would apply to an independence referendum.'