Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Constitutional Law Sub-Committee (‘the committee’). The committee is comprised of senior and specialist lawyers (both in-house and private practice).

General Comments

The Scottish Independence Referendum Bill is a complex measure which derives from the Political Parties, Elections and Referendums Act 2000, the Scotland Act 1998, the Scotland Act 1998 (Modification of Schedule 5) Order (SI 2013/242) and the agreement between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland (15 October 2014) (‘the Edinburgh Agreement’).

The Bill does not contain any major points of principle as most of the Bill is taken up with the detailed rules relevant for the operation of the referendum.

Paragraphs 41 and 42 of the Policy Memorandum state that the detailed rules in the Bill for voting and the conduct of the poll are in line with those for Scottish Parliament elections and, moreover, that the Scottish Government has consulted extensively with electoral professionals to ensure that the referendum poll will be delivered consistently with election polls.

The Committee had previously been concerned, when commenting on the Franchise Bill, that there should be adequate protection for the Register of Young Voters. There is some protection in the Franchise Bill itself, but the Referendum Bill also ensures that, when the full "Polling List" is prepared, the entries drawn from the register of local government electors will be merged with the register of young voters in such a way that it is not possible to identify from which register a particular name has been drawn (see Paragraph 17 of Part 2 of Schedule 2 to the Bill and Paragraph 17(3) and (4) in particular). Dates of birth are not to be shown on the Polling List and the clear intention is to protect young people's details (see also Paragraph 44 of the Policy Memorandum).

This written evidence only refers to those provisions in the bill on which the Committee has comments to make.
Section 1 – Referendum and Scottish Independence

This Section complies with the terms of the Scotland Act 1998 (Modification of Schedule 5) Order 2013 and the Edinburgh Agreement.

Section 2 – Those who are entitled to vote

This Section links the Bill to the Scottish Independence Referendum (Franchise) Act 2013.

Section 4 – Chief Counting Officer

This Section requires Scottish Ministers to appoint a Chief Counting Officer for the Referendum. Section 4(5) allows Scottish Ministers to remove the Chief Counting Officer if they are satisfied that he or she is unable to perform his or her functions by reason of any physical or mental illness or disability. This provision is slightly different from the provisions of Section 5 – Other Counting Officers which allows the Chief Counting Officer to remove a Counting Officer from Office if he or she is satisfied that the Counting Officer is “for any reason” unable to perform the Counting Officer’s functions. It is not clear why there is a difference between these two provisions. The Government should explain the rationale for this difference.

Section 5 – Other Counting Officers

See comments in Section 4

Section 6 – Functions of the Chief Counting Officer and Other Counting Officers

This Section sets out the responsibility of the Chief Counting Officer to ensure that the Referendum is properly and effectively conducted including the conduct of the poll and the counting of votes in accordance with the legislation. It obliges each Counting Officer to conduct a poll on counting votes in the local government area for which each Officer is appointed, to certify the number of ballots counted by the Officer, the number of votes cast and the number of rejected papers. This Section broadly reflects Section 128 of the Political Parties Elections and Referendums Act 2000 (PPERA) although there is no reflection of Section 128(4) which requires a local authority to place the services of their Officers at the disposal of the Counting Officer for the area and there is an inclusion in Section 6(2)(b)(iii) of the number of rejected ballot papers which is not reflected in Section 128(6) of (PPERA). The Government should explain the rationale for this difference.

Section 8 – Expenses of Counting Officers

This Section provides that the Chief Counting Officer and Counting Officers can recover from Scottish Ministers charges for and any expenses incurred in connection with the exercise of their function. The maximum amount of charges and expenses will be determined in an order made by the Scottish Minister.

A draft of this Order should be made available prior to the passage of the Bill.
Section 13 – Campaign rules, general offences

Section 13 provides that a person commits an offence if that person alters, supresses, conceals or destroys any document (which includes any book, record or other document liable to be required to be produced for inspection under Schedule 5, Paragraphs 1 or 3. It is also an offence to withhold information or fail to provide information to the relevant person or to provide false information. There are two offence provisions, Sections 13(7) and (8). Section 13(7) applies to an offence committed under Sub-Sections (1)(4)(b) or (5). The penalty is on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both) on conviction of an indictment to imprisonment for a term not exceeding 12 months or to a fine (or both). A person committing an offence under Sub-Section (4)(a) is liable on summary conviction to a fine not exceeding level 5 on the standard scale. It is not clear why there are two different offence provisions, both based on Sub-Section (4) although there may be a proportionality argument. However, it is perhaps odd that the term of imprisonment on both summary conviction and on indictment should not exceed 12 months. These offences appear to be strict offences and there is no provision for a reasonable excuse defence.

Section 15 – Duty of court to report convictions to the Electoral Commission

This Section requires the court to notify the Electoral Commission of the conviction as soon as is practicable. Should this duty be imposed on a named individual, say the Clerk of Justiciary or the Clerk of the Court.

Section 21 – Information for voters

This Section obliges the Electoral Commission to take such steps as they consider appropriate to promote public awareness and understanding in Scotland about:

1. The Referendum;
2. The Referendum question; and
3. Voting in the Referendum

This Section is important because it reflects Paragraph 3.1.D of the European Commission for Democracy through Law (Venice Commission) Code of Practice on Referendum (2009) which requires that authorities “provide objective information” about the Referendum.

Section 24 – Report on the conduct of the Referendum

Section 24 requires the Electoral Commission to prepare and lay before the Scottish Parliament a report on the conduct of the Referendum as soon as reasonably practicable after the Referendum. Section 24(2) mandates some of the content of the report relating to how the Commission carried out their function and the expenditure of the Commission. There may be an issue concerning the publication of this report “as soon as is practicable” and the time limits for providing returns on Referendum expenses and delivery of returns under Schedule 4, Part 3, Paragraph 20 and 22 which stipulate a time limit of three months and six months respectively.
Section 30 – Power to make supplementary, etc. provision and modifications

This Section allows Scottish Ministers to make supplementary, incidental or consequential provision in order to give full effect to any provision of the Act. There is no obligation to consult on the subordinate legislation enacted in connection with this provision. The Government should be required to conduct such a consultation.

Section 31 – Restriction on legal challenge to Referendum result

Section 31 provides that any legal challenge to the certification of the votes cast in the Referendum must be brought by way of judicial review and must be lodged within six weeks of the last certification of the result. This is in conformity with most Referendum legislation.
Schedule 3 – Conduct rules

Rule 1 - Publication of notice of the referendum

Rule 1(2) provides that certain days are to be disregarded in the computation of the time limit for publishing the notice of the Referendum. These include Saturdays, Sundays, Christmas Eve or Christmas Day or Bank Holidays. In the Referendum Bills under the Parliamentary Voting System and Constituencies Act 2011, Rule 2(1)(c) included the provision that any day appointed as a day of public Thanksgiving or Mourning should be disregarded. There should be a similar provision in Rule 1(2).

Rule 7 – Use of schools and public rooms for polling and counting votes

Rule 7 provides that the Counting Officer may “use, free of charge, for the purpose of taking the poll or counting the votes… any meeting room to which this rule applies in accordance with Paragraph (3).” (3)(b) applies the rule to meeting rooms situated in Scotland the expense of maintaining which is payable wholly or mainly by any Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998). The Scottish Public Authorities search on the Scottish Information Commissioner website www.itspublicknowledge.info/scottishpublicauthorities/authorities indicates that Scottish Public Authorities includes bodies as diverse as local authorities but also including the Accountant in Bankruptcy, the Auditor General for Scotland, Children’s Hearing Scotland, Disclosure Scotland, Fife Constabulary, Greater Glasgow NHS Board, Her Majesty’s Chief Inspect of Prisons for Scotland, the Judicial Appointments Board for Scotland, the Keeper of the Registers of Scotland, the Mental Welfare Commission for Scotland, OSCR, the Public Appointments Commissioner for Scotland, Quality Meat Scotland, the Risk Management Authority, the Scottish Court Service, Tayside Valuation Joint Board, all the universities, Visit Scotland and the Water Industry Commission for Scotland.

The Parliamentary voting system and Constituencies Act 2011 restricts the free room provision to rooms, the expense of maintaining which is met by any local authority in Scotland.

What is the reason for including the rooms of Scottish Public Authorities?

Rule 10 – Appointment of presiding officers and clerks

Rule 10(2) provides that “the Counting Officer may not appoint any person who is or has been involved in campaigning for a particular outcome in the Referendum”. This is distinct from Rule 14(1) of the Parliamentary Voting System and Constituencies Act 2011 which provides that the Counting Officer may not employ “a person who has been employed by or on behalf of a permitted participant in or about the Referendum”.

Rule 10 does not provide a definition of “campaigning nor does Schedule 8. The provision in the 2011 Act although narrower is clearer and can be interpreted with more certainty.
What is the reason for the difference in approach?

*Rule 12 – Loan of Equipment for Referendum*

Rule 12(1) provides that a Council must, if requested by a Counting Officer, loan to the Officer any ballot boxes, fitting and compartments provided by or belonging to the Council.

Rule 12 (2) provides that this does not apply if the Council requires the equipment for immediate use by that Council.

There is no provision for a fall-back. Where would a Counting Officer obtain equipment if Rule 12(2) applied?

*Rule 14 – Appointment of polling and Counting Agents*

Rule 14(5) provides for certain days to be disregarded in the calculation of the time limit for notification of appointment of polling or Counting Agents by the Referendum agent. It does not include days allocated to public mourning or thanksgiving.

See the comments on Rule 1(2)

*Rule 15 – Admission to polling station*

Rule 15(2) allows certain persons to attend the polling station. These include MPs, MSPs, MEPs and Councillors. There were no such provisions in the analogous rules under the 2011 Act, Rule 21.

What is the rationale for this difference?

*Rule 17 – Keeping of order in polling station*

In Rule 17(2) should it be made clear that the person is to be removed immediately from the polling station?

*Rule 33 – Decisions on ballot papers*

Rule 33 provides that the decision of the Counting Officer on any question arising in respect of a ballot paper is final. The 2011 Act has a similar provision in Rule 44 stating however that the final decision of the Counting Officer is “subject to review in accordance with Paragraph 23 of Schedule 1”. Paragraph 23 of Schedule 1 corresponds to Section 31 in the Bill where there can be a legal challenge to the Referendum result by way of judicial review. Rule 30 should reflect the possibility of challenge under Section 31.

*Rule 40 – Orders for production of documents*

Rule 40 provides that the Court of Session or a Sheriff Principal may make an order for the inspection or production of rejected ballot papers, for the opening of a sealed packet and for the inspection of any counted ballots for the purposes of instituting or
maintaining a prosecution or proceedings under Section 31. In the 2011 Act, this power was given to the Court of Session or the Sheriff.

What is the rationale for allocating this jurisdiction to the Sheriff Principal?

**Schedule 4 – Campaign rules**

*Part 2 – Permitted participants and designated organisations*

Paragraph 7(3)(b), see comments on Schedule 3, Rule 7.

*Part 3 - Referendum Expenses*

This applies to expenses incurred for referendum expenses and which fall within Paragraph 10. These provisions generally follow those in PPERA, Chapter 11, Criminal Controls.

*Paragraph 10(3) - Expenses qualifying where incurred for referendum purposes*

The Electoral Commission may issue a code of practice regarding whether expenses fall within paragraph 10. This code must be sent to Scottish Ministers who must lay the code before Parliament. This should be done soon so those who will be campaigning know what expenses they can incur.

*Paragraph 11(12) – Notional referendum expenses*

See comments regarding Section 13.

*Paragraph 13(2) – Restriction on payments in respect of referendum expenses*

Expenses of less than £200 do not need to be vouched by receipt. This reflects PPERA but should not all expenses be vouched?

*Paragraph 17 - General Restriction on referendum expenses*

This paragraph sets a limit on expenses of £10,000 which can be incurred by individuals or bodies which are not permitted participants. However the limit only applies during the referendum period i.e. 16 weeks before the referendum. As a control on expenditure this is not effective as expenses are currently being incurred without such controls.

There are offence provisions for spending more than £10,000 in the referendum period.

*Paragraph 18 - Special restrictions on referendum expenses by permitted participants*

This paragraph sets out the expenditure limits by permitted participants during the referendum period. These limits and the associated offence provisions apply only
during the 16 week period and do not apply at the moment. It would have been clearer if the Bill had prescribed the limits for each of the political parties in the Scottish Parliament based on the formula rather than merely setting out the formula - see Schedule 4, Paragraph 18(2) of the Bill which is explained in Paragraph 80 of the Policy Memo.

Paragraph 22 - Delivery of return's to Electoral Commission

This paragraph requires a responsible person to deliver the returns under paragraphs 20 and 21 to the Electoral Commission within 6 or where appropriate 3 months of the end of the referendum period. This is reinforced by a criminal sanction but it seems inadequate to police expenditure in this way when the time lag between incurring the expenditure and the reporting of that expenditure is so long.

Paragraph 24 - Public inspection of returns under paragraph 20

This paragraph allows public inspection of the returns. Should there not be a requirement to publish the returns?

Part 4 - Publications

Paragraph 25(2) provides that for 28 days before the referendum the Scottish Ministers, SPCB and any Scottish Public Authority will be in purdah.

Para 29 of the Edinburgh Agreement states that “The UK Government has committed to act according to the same PPERA-based rules during the 28-day period.” Does this mean that the UK Government will follow purdah in the same way as the legislation sets out?

Schedule 5 – Campaign rules: investigatory powers of the Electoral Commission

Schedule 5 gives the Electoral Commission investigatory powers including powers to inspect documents, to apply to the Court of Session for a document disclosure order, to retain documents and to copy them.

Legal professional privilege is protected in paragraph 10.

Paragraph 11 – Admissibility of statements

This Paragraph provides that a statement made by a person is admissible in any proceedings i.e. civil or criminal proceedings. However, where the proceedings in question are criminal the statement is only admissible if the person who made it introduces it into the proceedings. Accordingly the Commission will require to inform a person making a statement with the potential for court proceedings to follow about the terms of this provision and to allow the person access to a solicitor.
Schedule 6: Campaign rules: civil sanctions

Schedule 6 gives the Commission power to impose fixed penalties on referendum rule offenders if it is satisfied beyond reasonable doubt that the responsible person has committed the prescribed offence or has breached Schedule 4.

Paragraph 2 – Representations and appeals, etc.

This Paragraph allows for representations to be made to the Commission but here is no detail in the Schedule as to how the Commission reach the decision to impose the penalty especially where that imposition can only occur when the Commission is satisfied 'beyond reasonable doubt'. Paragraph 2 recognises this issue when it provides in Paragraph 2(5) and (6) that following written representations the Commission may not impose the penalty and that the person on whom the penalty is imposed may appeal to the Sheriff on various grounds including that the decision was wrong in law or fact or was unreasonable.

Paragraph 25 – Guidance as to enforcement

This Paragraph provides that the Electoral Commission must publish guidance on the sanctions but does not prescribe when this publication is to occur.

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