SCOTTISH INDEPENDENCE REFERENDUM BILL

WRITTEN SUBMISSION FROM NAVRAJ SINGH GHALEIGH

1. I am grateful for the opportunity to give evidence to this Committee. The 2014 Independence vote will be unusual in the UK’s thin experience of direct democracy, being the first such poll capable of being characterised as a high salience referendum. For the first time voters will be given the decisive say in what is commonly agreed to be the ‘most important issue’ of the day.¹ We should accordingly be careful when drawing lessons from past referendums – what obtains in a mid- to low-salience contest (ie. practically all of the UK’s referendums to date) will not follow automatically in a competitive, closely fought campaign that holds the nation’s attention.

2. The Scottish Independence Referendum Bill (‘the Bill’), as introduced on 21 March 2013, is accordingly something of a disappointment. It scarcely departs from PPERA’s referendum scheme, and where it does so, it does so ill advisedly. Quite rightly the Government has stated that the 2014 referendum should be “conducted and regulated to the highest international standards.”² Unfortunately, this policy objective has had no discernible impact on the substance of the Bill. There is no evidence, either on the face of the Bill or the accompanying documentation of non-trivial engagement with the voluminous comparative experience of referendums.³ Rather, the Bill has sought to ensure that the conduct and regulation of the Referendum map the United Kingdom’s standards, aping the scheme in PPERA. Whatever else may be said of PPERA, it does not track the highest international standards. This is especially true for its Part VII.

3. It is worth reminding ourselves why PPERA’s approach to referendums has always been seen as questionable. PPERA was stamped from the cookie cutter of the Committee on Standards in Public Life (‘CSPL’).⁴ The Funding of Political Parties in the United Kingdom ⁵ closely mapped the Labour Party’s policy preferences and was subsequently enacted as the Political Parties Elections and Referendums Act 2000. The one exception to this is Part VII on referendums, where the CPSL exhibited some independence. For referendums alone (ie. in distinction to the scheme for all other elections), the CPSL rejected the notion of expenditure limits, of ex ante disclosure, and of public funding. The reasons for these are highly contingent – the referendum debate of the day (late 1990s) was entry into the Euro. Moreover, two of the more significant members of the committee were overtly euro sceptical – the Chair (Lord Neill) and Labour’s Peter Shore. Among the community of party finance scholars, Part VII’s status as a conceptual outlier is attributed to these

¹ The referendum on the Good Friday agreement could possibly be similarly characterized.
² Scottish Independence Referendum Bill, Policy Memorandum SP Bill 25-PM, Session 4 (2013), 1
³ For a conspectus, see Karin Gilland Lutz and Simon Hug (eds), Financing Referendum Campaigns (Palgrave Macmillan 2009)
⁴ This quasi-independent body, then chaired by Sir Patrick Neill QC, was charged with the responsibility of enquiring into the funding of political parties by Tony Blair in 1997.
factors. It was designed to ensure (or rather, avoid) a particular outcome in a particular vote.

4. That said, large parts of the regulatory regime that pertain to referendums are in fact general to PPERA. Matters such as the control of donations, loans etc, monitoring and securing compliance, and the Electoral Commission’s investigatory powers are shared with other electoral events and have been provided to work more or less satisfactorily. To the extent that there are shortcomings, the new range of sanctions contained in the Bill – stop notices, enforcement undertakings etc – (which are substantially similar to those added into the PPERA regime by section 3 of the Political Parties and Elections Act (PPEA) 2009) are very welcome. Breaches that previously incurred criminal proceedings and referral to the Crown Prosecution Service/Procurator Fiscal, can now be dealt with by the new array of civil sanctions. This flexibility, which the Commission had long been arguing for, may have resulted in different outcomes to well known party finance scandals.

5. The below considers some of the less satisfactory aspects of the Bill, some departing from PPERA’s scheme, some not.

The Referendum Period

6. Tucked away in Schedule 8 of the Bill, in the long list of terms for interpretation, is the line that “referendum period’ means the period of 16 weeks ending on the date of the referendum”. Although this terms serves a number of differing purposes, for finance purposes it carries the heavy burden of demarcating the period during which monies expended in campaigning count for the purposes of the campaign limits. These limits – total referendum expenses – vary according to the status of the body in question – up to £10,000 for ordinary individuals or bodies, £150,000 for non-party permitted participants, or £1,500,000 for Designated Organisations, or for registered political parties a formula based on success in the previous Scottish Parliament election is used. However, these limits will only apply to money expended in the period 29 May 2014 to 18 September 2014. Any sums expended prior to that time are unconstrained by expenditure limits. The distortive effect of this is easily anticipated.

---


8 Including marking the period within which prospective DOs must make their applications (Sch 4, Pt 2, paragraph 6(2)(b)).

9 Sch 4, Pt 3, paragraph 17.

10 Sch 4, Pt 3, paragraph 18(1)(c).

11 Sch 4, Pt 3, paragraph 18(1)(a).

12 Sch 4, Pt 3, paragraph 18(1)(b). See further ¶8 below.
7. We have been here before. Pre-campaign expenditure has been a growing trend in general elections, especially in the all-important ‘target seats’ with the attendant argument that the regulated campaign period of PPERA failed to capture significant activity that might affect the election result. The problem revolved around the issue of triggering – in the absence of fixed term parliaments, when would the regulated campaign period commence? This was partially addressed by section 21 of PPEA by which expenditure is triggered by the adoption of a candidate – a solution which is easily gamed. In any event, that solution has no application in the referendum space. What could the triggering event be in executive dominated referendums (one can see that popular initiatives, the ‘referendum period’ could be triggered on the successful conclusion of an initiative)? The obvious solution is for the referendum period to commence upon the coming into force of this Bill, thereby capturing all expenditure that contributes to the formation of public opinion in respect of the referendum.

8. The risk with the proposed constraint of only counting expenditure between 29 May 2014 and 18 September 2014 period is obviously that campaigners could ‘front load’ their expenditure in order to avoid the strictures of the Bill and as such expend in an incontinent fashion. In the present Scottish context this is not so much a question of equality of arms between the campaigns (both sides are thought to have substantial financial reserves to draw upon) but of circumvention of a expenditure limits and the ‘loudhailer effect’ – of well-funded speech drowning out less capital friendly views.

Expenditure Limits

9. Unlike Committee on Standards in Public Life but like PPERA, the Bill opt for expenditure limits. This is, in and of itself desirable and brings the regulation of referendums into line with the other forms of electoral campaigning. But what of the levels and why index to Scottish Parliament elections rather than General Elections in Scotland, or local government elections, or indeed some combination of them? The selection of index election leads to very different results. The risk is that without adequate justification – and there has not been to date – the Government will be accused of designing a scheme which is skewed towards its own interests.

Public Funding, Absence of

10. The absence of public funding from the Bill’s scheme is an oddity. Public funding is a constant feature of all UK politics, including the Scottish Parliament and

---

14 Defined at PPERA section 80.
16 As a consequence of the Fixed-term Parliaments Act 2011, now less of an issue.
18 See EN at ¶150ff.
19 See Policy Memo ¶81.
its elections, and referendums under PPERA. It serves a number of valuable functions: levelling the playing field, providing unfunded voices with the capacity to contribute to the formation of public opinion, and publically demonstrating the value of viewpoint diversity. Almost all UK referendums to date have provided for public funding and those that have not have not been justly criticised – viz. Wales 1997.

11. The stance of the Bill not to support these practices or principles requires substantial justification. Presumably the argument is that both ‘sides’ have amply resources and so state provision is unnecessary. Or perhaps the argument is borne of austerity. In either case, it is unconvincing. Whilst it is true that both campaigns are already up and running, they are not and ought not be the entirety of the campaign. The two campaign groups are closely related to the major political parties. Even if both sides are well funded, this does not take into account the substantial, non-party aligned, sections of Scottish public life that risk being drowned out by the familiar dominant voices. Scotland’s vibrant civil society – its churches and faith groups, charities and not-for-profits, other association groups – which are often unaffiliated, should be supported by public funding even if the parties and official campaigns should not.

Transparency

12. Transparency is lauded as a key goal and achievement of PPERA. Nonetheless, we need not take these plaudits on trust, nor need we ignore the substantial regulatory gaps that are contained in PPERA and replicated in the Bill. The first and most glaring of these is the absence of ex ante donation reporting for referendum campaigns. This was a matter that the CSPL took very seriously in the context of general elections and their words are worth extracting at length:

“… information is urgently needed [in the period immediately before a general election]. It may have an immediate bearing on the response of other potential donors and it may impact upon voters’ intentions. In this period, therefore, there should be a recurrent obligation to furnish the best available information about disclosable donations within seven days of receipt. The formula ‘best available information’ is proposed because there is bound to be difficulty in the hectic pre-election days in producing absolutely comprehensive information.”

13. Ex ante interrogation of donations allows electors to evaluate the nature of a donation, its effect on the upcoming poll, and allow them to align themselves with or against a campaign on the basis of their published supporters. The US Supreme Court in Buckley put it thus, “the sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.” There is no principled reason for not extending this logic to referendums, as for general elections. Indeed,
the CSPL did not even address the issue directly. The Bill, in making a similar omission, makes the identical error.\textsuperscript{23}

14. On the basis of the scheme currently contained in the Bill, the electorate will form its opinion on the largest question that Scots have ever had to decide without knowing who is funding the two sides of the campaign, what they think of those donors and what that knowledge tells them about the respective campaigns. This weakness was addressed in part by the two campaigns in the Voting System referendum of 2011,\textsuperscript{24} both of whom criticized the absence of transparency on funding prior to polling day.\textsuperscript{25} Indeed, on a voluntary basis both campaign groups published their donations \textit{ex ante}. Whilst laudable, and considerably better than nothing, such voluntary actions are very much a second best, lacking as they do the commensurability of mandated reports in terms of timing, format and thresholds. Moreover, not having the force of law behind them, the possibility for inaccuracies in reporting cannot be discounted. The rather laconic response of the Electoral Commission that “current donation reporting requirements mean that voters are not guaranteed access to information about who has funded the campaigners until long after polling day”\textsuperscript{26} can be inverted – the current arrangements guarantee that reliable information about who has funded the campaigners is denied the electorate. The Bill itself puts in place the requirement that “all permitted participants [must] provide regular reports to the Electoral Commission ahead of the poll on all donations and loans received.”\textsuperscript{27} This is allegedly to “ensure maximum transparency”\textsuperscript{28} but it does not unambiguously do so. At most it provides information to the Commission necessary for the monitoring and enforcement of funding controls, but it reveal who is funding whom. As to the argument that in the frantic final weeks of a referendum campaign, the Commission could not verify donation report, recourse could be had to the criminal law formulation of “knowingly or recklessly making a false declaration”, as contained in sections 10 and 11 PPEA 2009.

\textit{Disclosure Thresholds}

15. The £5,000 disclosure threshold was increased to £7,500 by the PPEA.\textsuperscript{29} Although this Act was principally a response to the spate of scandals that afflicted the Labour Party from 2005 onwards – ‘Cash for honours’/Lord Levy, Peter Hain’s think tank, proxy donations and David Abrahams\textsuperscript{30} – the legislature also took the opportunity to raise the disclosure threshold by 50%. The reasoning revolved around

\textsuperscript{23} RIDER – in discussions with representatives of the government, it appears that they believe that the Bill does provide for ex ante disclosure. That is not my reading of the Bill, nor apparently that of the Electoral Commission (private conversation with an EC official). If I (and the EC) are wrong about this, then ¶12-14 herein should be ignored.


\textsuperscript{25} Ibid., ¶5.95.

\textsuperscript{26} Ibid., ¶5.97.

\textsuperscript{27} Policy Memo, ¶87.

\textsuperscript{28} Ibid.

\textsuperscript{29} c.12 Pt 2 s.20(3) (January 1, 2010). For local parties, the disclosure threshold was raised to £1,500 and for the purposes of permissibility from £200 to £500.

\textsuperscript{30} Navraj Singh Ghaleigh, Paul Reid, and Ben Kemp, ‘Politics As A Profession: Electoral Law, Parliamentary Standards and Regulating Politicians’ [2012] Public Law
unsubstantiated ideas of “administrative convenience”. The thinness of this reasoning is clear when one asks what administrative burden is lifted by raising the threshold? Is it the burden on the Electoral Commission or parties? If the former, is that a sufficient reason or even plausible in a world of electronic filing? If the latter, are there really so many donations at the local level around £1,500 that constituency parties (essentially volunteer operations) cannot cope with them? If this burden applies to central parties, similar considerations apply but their force is diminished owing to their non-voluntary staffing.

16. In any event, this threshold now places the UK in a dim light in comparison with the USA where federal candidates, party committees and PACs must disclose to the Federal Election Commission the name and address of any person who makes a contribution or contributions aggregating more than $200 during a calendar year, together with the date and amount of any such contribution. There is no obvious administrative reason why the Bill could not make similar requirements for donations. Its effect on public knowledge of the reality of the donation landscape would be dramatic. A donation to a campaign of £7,499 would remain secret, yet its campaign effects would be significant. It would fund the printing of 450,000 leaflets – more than every household in Edinburgh. The idea that donations of this size should remain secret should be a source of embarrassment.

17. For the purposes of the Bill however, PPERA’s provisions are again passively replicated. These are hardly “the highest international standards”. It is odd to have to argue, with a legislature that has full legislative competence in this matter, that opaque processes tend to facilitate corruption or capture. Corruption or its appearance is more likely because secret funding facilitates rent-seeking and transparent processes make quid pro quos more difficult, increasing the likelihood that they will be exposed. Rights-based arguments can also bring us to this same destination – transparent constitutional processes are a necessary precondition for citizens to participate in democratic self-government. In the presence of information asymmetries, citizens struggle to make meaningful decisions, as political equals, at the ballot box.

Foreign Donations

18. The question of foreign donations was somewhat confused by a recent Supreme Court decision. In any event, the broad position is that donations from those not on a UK electoral register are impermissible. Nonetheless, foreign donations are being actively solicited by at least one of the campaigns. The website of Yes Scotland states that “if you are not on an electoral register in Scotland we will not be able to accept a donation of more than £500 from you.” Their website

31 HC Deb, vol 488, col 588, 2 March 2009; PBC cols 78-81, November 6, 2008.
33 R (on the application of the Electoral Commission) (Respondent) v City of Westminster Magistrates Court (Respondent) and the United Kingdom Independence Party (Appellant) [2010] UKSC 40.
34 As a matter of law, this is incorrect. A permissible donor, either in the terms of PPERA (section 54) or the Bill (Sch 4, Part 1, section 1(2) and (3)) is inter alia an individual registered in an electoral maintained under section 9 of the Representation of the People Act 1983.
further states that, “£5 produces 300 leaflets, £25 distributes leaflets to 300 homes, £50 sends a campaign team to a local event, £100 delivers a community campaign meeting, £500 sends a resource starter pack to five new local groups.” That being the case, even a single ‘legal’ foreign donation can have notable campaign effects in a society as small as Scotland. Namely, a single foreign donation would fund the printing of 30,000 leaflets, or 6,000 homes leafleted, 10 campaign teams sent to local events, 5 community campaign meetings delivered or 5 resources starter packs sent new local groups. Given the large Scottish diaspora, and the active soliciting of such donations, even a trivial volume of such donations would have a distortive effect on the campaign, inimical to the statutory concept of the permissible donor.

**Final Remarks**

19. The various failings of the Bill should be a cause for concern to the Committee. Whilst it is commonly said, under the Chatham House rule, that the Government will not admit any substantial changes to the Bill, it should be clear that such changes are necessary. The risk under the Bill’s current scheme is that big money will dominate the referendum campaign, much of it from abroad, to squeeze out non-mainstream voices and hidden from public scrutiny and discussion.

6 June 2013

---

contrast, the Better Together website states that, “we will ask all donors to confirm they are not from overseas; we will check that anyone who gives a donation of over £500 is not from overseas.” Moreover, those wishing to execute an online donation, are required to complete a tick box stating that “I Confirm That I Live In The United Kingdom And Am On The UK Electoral Register.” <https://secure.bettertogether.net/page/contribute/default> accessed on April 3, 2013.