Referendum (Scotland) Bill Committee

2nd Report, 2013 (Session 4)

Stage 1 Report on the Scottish Independence Referendum Bill

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Referendum (Scotland) Bill Committee

2nd Report, 2013 (Session 4)

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Referendum (Scotland) Bill Committee

Remit and membership

Remit:

To consider matters relating to The Scotland Act 1998 (Modification of Schedule 5) Order 2013, the Referendum (Scotland) Bill, its implementation and any associated legislation.

Membership:

Bruce Crawford (Convener)
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EXECUTIVE SUMMARY

This report sets out the Committee's conclusions on the general principles of the Scottish Independence Referendum Bill (“the Referendum Bill”), which was introduced on 21 March 2013.

The main objective of the Bill is to provide for a referendum (to be held on 18 September 2014) on whether Scotland should be an independent country, following a “fair, open and truly democratic process which is conducted and regulated to the highest international standards”. In accordance with the Edinburgh Agreement, the Bill’s provisions are based on those for running a referendum set out in the Political Parties, Elections and Referendums Act 2000 (PPERA).

The Committee has considered the Bill over a six-month period, taking oral evidence at five meetings, and receiving 31 written submissions. This summary sets out the Committee’s conclusions, based on the evidence received. Cross-references are to relevant sections of the main report.

General principles of the Bill (paragraphs 322-323)

The Committee is confident that its Stage 1 inquiry has enabled this important Bill to be subject to a wide-ranging and robust scrutiny process. Inevitably, as with any large and complex piece of legislation, there are some aspects of the Bill that require adjustment, and other points on which clarification is needed. Overall, however, the Committee is confident that this Bill should provide a suitable framework for next year’s referendum.

On this basis, the Committee recommends to the Parliament that the general principles of the Scottish Independence Referendum Bill be agreed to.

The Bill in general (paragraphs 30-39)

The Committee welcomes the principle set out in the Edinburgh Agreement, that the referendum “should be based on PPERA, with particular Scottish circumstances, such as the establishment of the Electoral Management Board and subsequent role of the Electoral Commission, reflected in the Referendum Bill”. We accept that PPERA may not be perfect, but must be taken as the starting point, and we are encouraged that the Electoral Commission has expressed confidence in the robustness of the Bill. We are also encouraged by the extent to which this Bill has already been influenced by the views of the large numbers of people who responded to the consultation. Once the legislative framework is in place, we consider that it will be for the lead campaigns, and for the parties and others on both sides of the argument, to ensure that this becomes a genuine national debate to which individuals and communities across Scotland feel able to contribute.
Section 1 (referendum on Scottish independence) (paragraphs 40-44)

The Committee recognises that the referendum question in the Bill reflects the outcome of the Electoral Commission’s independent testing, and considers it to be straightforward and clear. We note the date proposed for the referendum, which is consistent with the timetable set out by the Scottish Government in the Your Scotland, Your Referendum consultation and with the established practice of holding major electoral events on Thursdays.

Schedule 1 (form of ballot paper) (paragraph 45-56)

Placement of official mark
The Committee notes the concerns expressed about the placement of the official mark, and invites the Scottish Government to clarify whether it will be lodging an amendment to address it.

Ballot paper in Gaelic
We acknowledge the views of those who would like to see the question set out in Gaelic as well as English on the ballot paper. We don’t consider that a persuasive case has been made for a bilingual ballot paper. One of the great virtues of the ballot paper set out in the Bill is that it is simple and clear. As witnesses have pointed out, a Gaelic translation will be available to those who wish to refer to it. We note that there will be translations into other languages widely used in Scotland (including by some voters who cannot read English).

Section 2 (franchise) (paragraphs 57-60)

Children of service personnel
The Committee recognises that the Deputy First Minister has undertaken to see whether there is a practical way of including within the franchise for the referendum any 16 and 17-year olds who will be living outside Scotland with parents serving in the armed forces in September 2014, and we look forward to her further updates on progress on this issue.

Section 3 and schedule 2 (provision about voting etc.) (paragraphs 61-69)

Absent voters – new provision in UK legislation
The Committee notes the new approach to absent voting arrangements in UK election law, and that the Scottish Government is considering whether to incorporate these changes in the referendum legislation. The Committee welcomes this, and asks to be updated as soon as the Scottish Government has reached a conclusion on this issue.

Deadlines for applications for proxy and postal votes
The Committee notes that the Deputy First Minister is currently in discussion with the Electoral Commission on the deadline for proxy and postal votes. On the basis of the evidence, we would be inclined to support a later deadline for proxy voting, in line with normal practice, unless the Scottish Government can explain – before Stage 2 – why the approach taken in the Bill is preferable.
Sections 4-8 (Chief Counting Officer, counting officers, and their functions) (paragraphs 70-74)

The Committee notes the specific points raised in relation to sections 4-7 by witnesses (as outlined in paragraphs 68-70), and invites the Scottish Government to respond, indicating whether any amendments to these provisions are likely to be proposed. We would also welcome early sight of a draft order under section 8, so we can be satisfied that counting officers will be properly reimbursed.

Section 9 and schedule 3 (conduct rules) (paragraphs 75-112)

Provision of polling stations
The Committee, like many witnesses, is hopeful that turnout for the referendum will be high. We are confident that those responsible for administering the referendum have the experience and resources they need to judge appropriately the likely turnout and ensure that sufficient polling stations are provided, and that the polling places are accessible and appropriately located.

Appointment of presiding officers and clerks
The Committee is encouraged by the Electoral Management Board’s evidence on the appointment of presiding officers and clerks, and is content to rely on the “trust and common sense” of counting officers to ensure that candidates for these posts are appropriately vetted as part of the appointment process.

Voting by persons with disabilities
The Committee is content, on the basis of the evidence and legal advice it has received, that these provisions already cover visually impaired as well as blind voters. It is certainly important that they and other voters whose disabilities make it difficult or impossible to vote without assistance get the assistance they need to record their votes. We would therefore invite the Electoral Management Board to give an assurance that guidance to electoral administrators will make clear how the Bill applies to visually impaired voters, so that polling station staff can be properly briefed to provide such assistance whenever it is required.

Attendance at the count
The Committee notes the concerns of the Electoral Management Board about counting officers being required to publish notice of the count and the effect this may have on the general management of the count. We therefore invite the Scottish Government to explain why it has apparently departed from precedent on this point, and to give further consideration to the practical effect of this provision. On attendance of referendum agents at the count, the Committee invites the Scottish Government to discuss further with electoral administrators whether counting officers can be given sufficient powers to prevent any disruption to the counting process without having to resort to excluding referendum agents altogether. The Committee welcomes the indication that electoral administrators are planning on the basis that counting will take place overnight and that any operational issues that might make this difficult in certain areas are being identified and solutions developed.
Declaration of results

The Committee endorses the approach taken in the Bill, which allows local results to be made before the national result, and gives discretion on exact timings to the Chief Counting Officer. Nevertheless, we would expect the Chief Counting Officer, in practice, to authorise counting officers to announce local results without any unnecessary delay, and we would welcome further clarification from the Electoral Management Board as to how these decisions are likely to be made in practice.

Section 10 and schedule 4 (campaign rules) (paragraphs 113-199)

Designation of lead campaigners
The Committee notes the evidence of witnesses who had experience of the 2011 Wales referendum, but considers that the approach to designated organisations provided in the Bill is appropriate in the circumstances of the 2014 referendum.

Application for designation
The Committee also agrees that it is appropriate, particularly given the long lead-in time, for lead campaigners to be designated by the time the 16-week referendum period begins. We invite the Scottish Government to consider how to amend the Bill accordingly, and in particular to consider carefully, in view of the evidence we have received, how far in advance of that period the deadline for applications should be set.

Spending limits
The Committee recognises that any approach to spending limits needs to meet the test set out in the Edinburgh Agreement of securing “rules that are fair and provide a level playing field”, while at the same time protecting free speech and encouraging wide participation in the debate. Having carefully considered the evidence, we think the Electoral Commission recommendations achieve as good an overall outcome as is likely to be possible. In particular, we endorse the principle of giving the political parties limits reflecting their share of the vote in the most recent Scottish Parliament elections, while enabling other permitted participants, without limits on their numbers, to spend the same amount each regardless of which side they support. This reflects the practical reality that we can already be sure which sides the parties will line up on, but we cannot predict – and should not seek to control – the choices made by others who wish to play a part in campaigning. We recognise concerns about multiple participants, each able to spend up to £150,000, funded by a few wealthy individuals, but we also recognise that people should be entitled to campaign freely within the rules, and that absolute parity of funding is never going to be achievable. We believe that a combination of public scrutiny and the oversight of the Electoral Commission should be capable of preventing spending power alone, on either side, unfairly affecting the outcome.

Referendum expenses incurred as part of a common plan
The Committee notes the apprehensiveness of some witnesses regarding the potential for co-ordinated activity to undermine the effectiveness of the spending limits. Having reflected on the evidence provided, however, we are generally satisfied that the statutory provisions are sufficiently robust. All the same, we would welcome further clarification from the Electoral Commission about how they
will in practice ensure that permitted participants stay within both the letter and spirit of these rules.

Restrictions on publication of promotional material ("purdah")
The Committee strongly endorses the principle of a “purdah” period in the immediate run-up to the referendum, based on established precedent. We accept that 28 days is the appropriate period, given the need not to interrupt the normal business of government for longer than is necessary, and given that this is in any case the period endorsed by the two Governments in the Edinburgh Agreement. We recognise that (as with any election) there is limited scope for formal enforcement of these rules, but we are confident that the main practical sanction is the likelihood that any breach would generate publicity more damaging than any perceived advantage gained.

We accept the Deputy First Minister’s view that there is no reason to doubt the good faith of the UK Government’s commitment to observe purdah restrictions equivalent to those imposed on the Scottish Government in the Bill. Nevertheless, there is an asymmetry, and we invite the UK Government to indicate whether it would be prepared to put the purdah restrictions to which it is committed on a statutory footing. We would request that the Scottish and UK Governments each issue guidance to those public bodies for which it is responsible on the limits applicable to them during the 28-day period.

The purdah period is to begin on Thursday 21 August 2014. The Parliament has now agreed recess dates that include a period of recess from 28 June to 3 August 2014 (inclusive) and another from 23 August to 21 September 2014 (inclusive). As a result, there will be a 2-day overlap between the purdah period and a period of Parliamentary business. The Committee draws this to the attention of the Parliamentary authorities.

In terms of the rules on parliamentarians, we recognise these are matters for the relevant authorities, here and at Westminster, and that it is unrealistic to expect these to be directly co-ordinated. Nevertheless, we hope that similar rules will apply. The Committee expects the SPCB to issue clear guidance for all MSPs and invite the Independent Parliamentary Standards Authority to do the same for MPs.

Control of donations
The Committee is generally satisfied with the rules on donations. However, we would invite the Scottish Government to consider further whether a lower threshold for reporting donations would be merited, and whether there should be greater public access to information about donations during the referendum campaign, in the interests of transparency. We would also welcome further clarification on how, in practice, permitted participants are to check donors’ eligibility by reference to electoral registers other than the one register to which they are to be guaranteed access.
Section 11 and schedule 6 (civil sanctions) (paragraphs 200-205)

The Committee considers the civil sanctions regime to be an important part of the regulatory regime established under the Bill. We would therefore welcome early sight of the supplementary order that is to establish its scope, or confirmation that it will be closely based on the equivalent order made under PPERA.

Section 16 (referendum agents) (paragraphs 209-212)

The Committee is content with the timescales for appointing referendum agents.

Sections 17-20 (observers) (paragraphs 213-216)

On the question of whether there should be a statutory requirement for a code of practice for observers, the Committee welcomes the Electoral Commission’s recommendation, notes that it is under discussion and encourages the Scottish Government to seriously consider amending the Bill.

Section 21 (information for voters) (paragraphs 217-235)

Promoting understanding of the question
The Committee is very clear that the Electoral Commission should provide impartial information on the processes surrounding the referendum, and should not seek to provide information on the matters of substance that are at issue between the two sides. We are confident that the Electoral Commission understands this distinction, and that the Bill gives it adequate discretion in deciding how to promote understanding of the question in a manner consistent with its role.

Information from Governments about process following referendum
The Committee acknowledges the Electoral Commission’s recommendation about providing voters with general information about the process that would be followed post-referendum, either in the event of a Yes vote or a No vote. We are encouraged to hear that the Scottish Government and the UK Government are discussing these matters, and would welcome further information about the nature of those discussions, and regular updates on progress.

Section 24 (report on conduct of referendum) (paragraphs 238-243)

The Committee notes the evidence provided by the Electoral Commission, and would welcome further clarification about the reporting timescales the Commission expects to apply in this instance.

Section 32 and schedule 8 (interpretation – meaning of “referendum period”) (paragraph 255-266)

The Committee accepts that 16 weeks is an appropriate length for the regulated period, particularly as altering this would call into question other matters, such as spending limits and the purdah period. We recognise that this means that a lot of campaigning activity is not subject to the formal restrictions in the Bill, and we
welcome the extent to which the two campaigns have already committed themselves to a degree of transparency.

The Committee recognises that for most of the regulated period, public bodies will not be formally restricted by the Bill’s provisions. We accept, however, that there are conventions in place about how such bodies behave. The Committee would wish to have early sight of the Scottish Government’s proposed guidance to those public bodies for which it is responsible – and any equivalent guidance that the UK Government plans to issue to those bodies dealing with reserved matters.

**Grants to campaigners** *(paragraphs 267-278)*

The Committee agrees with the Scottish Government’s policy of not providing grants from public funds to the two campaigns. We are confident that the two sides are capable of raising the funds they need in other ways, and that a lack of grants will therefore not compromise the public’s ability to make a well-informed decision.

**Electoral timetable and index of conduct rules** *(paragraphs 279-283)*

The Committee sees merit in the suggestion that a timetable and index be included in the Bill to provide clarity for electoral administrators. On the issue of disregarding days of public thanksgiving or public mourning, the Committee notes that the Scottish Government is considering this further and asks it to clarify its position as soon as possible.

**Data protection implications** *(paragraphs 297-301)*

The Committee requests the Information Commissioner’s Office to provide a copy of its guidance in relation to the Privacy and Electronic Communications (EC Directive) Regulations 2003 as soon as possible.

**Financial implications** *(paragraphs 307-311)*

The Committee notes the issues raised by respondents and the oral evidence provided by Scottish Government officials to the Finance Committee. We are content with the level of detail provided in the Financial Memorandum and that discussions are continuing with the key organisations to refine costs where possible.

**Policy Memorandum** *(paragraphs 312-313)*

The Committee considers that the memorandum provides adequate detail on the policy intention behind the provisions in the Bill and explains why alternative approaches considered were not favoured.
The Committee has considered the delegated powers carefully. We note in particular, that the powers delegated by sections 1 and 30 include power to modify enactments, including the Act resulting from the Bill. Such powers, often referred to as Henry VIII powers, can be controversial and merit particular justification. Nevertheless, in both cases, we are content that they are justified.

The delegated power in section 1 is very limited in scope and it is clearly important to have a reserve power to defer the referendum should unexpected events make it impossible or impractical to hold the poll on the planned date.

The delegated power in section 30 is very much wider in scope, and could in theory be used to make substantial changes to the legislation even at a late stage in the process. However, there is no realistic prospect of this, given the need for advance certainty about how the referendum arrangements will work, and a shared interest by all campaigners in ensuring that those arrangements are seen to be fair and balanced. The key point is that the referendum is a one-off event, for which complex and detailed provision is required – so it is reasonable to ensure that there is a mechanism that can be used to correct any problem that emerges in the run-up to the poll. Given that rationale, we accept that the powers delegated to Ministers must be wide enough to deal with whatever issue may arise; and that setting a time-limit on when it may be exercised, or requiring prior consultation, could compromise the purpose of delegating the powers in the first place. For these reasons, we are content with the section 30 powers.

Finally, we note the recommendation of the Delegated Powers and Law Reform Committee on the schedule 6 powers and invite the Scottish Government to indicate whether it is prepared to amend the Bill accordingly.
INTRODUCTION

The Committee and its role

1. The Referendum (Scotland) Bill Committee was established by the Parliament on 23 October 2012 to scrutinise the legislation that will provide the basis for the referendum on Scottish independence, to be held on 18 September 2014.

2. The Committee has already considered and reported on the Scotland Act 1998 (Modification of Schedule 5) Order 2013 (SI 2013/242) (“the section 30 Order”), and has completed its scrutiny at Stages 1 and 2 of the Scottish Independence Referendum (Franchise) Bill (“the Franchise Bill”) which was passed by the Parliament on 27 June.¹

3. This report sets out the Committee’s conclusions on the general principles of the Scottish Independence Referendum Bill (“the Referendum Bill”). This Bill is closely linked to the Franchise Bill and contains most of the detail about how the referendum is to be conducted. In particular, it makes provision for the date of the referendum, the wording of the question and the role and responsibilities of the Electoral Commission and electoral professionals. It also contains rules for the conduct of the referendum, campaign rules (including spending limits) and provision about offences and other sanctions for breach of these rules.

Parliamentary scrutiny

4. The Referendum Bill was introduced into the Scottish Parliament on 21 March 2013. It was accompanied by Explanatory Notes, a Financial Memorandum, and a Policy Memorandum, as required by the Parliament’s Standing Orders.²

¹ The Committee's previous reports are available from the Scottish Parliament website: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/55799.aspx
² The Bill and accompanying documents are available at: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/61076.aspx
5. The Referendum (Scotland) Bill Committee was confirmed by the Parliamentary Bureau as lead committee on the Bill on 26 March 2013. The only other committees with a role in Stage 1 scrutiny are the Delegated Powers and Law Reform Committee (formerly known as the Subordinate Legislation Committee) and the Finance Committee.

6. The Subordinate Legislation Committee (as it was then known) considered the Delegated Powers Memorandum and reported on 14 May 2013. The Finance Committee took evidence on the Bill’s Financial Memorandum on 29 May 2013, and subsequently wrote to the Committee. The conclusions of these two committees are set out in Annexe A.

**Witnesses**

7. The Committee took oral evidence on the Bill over the course of five committee meetings during May and June.

8. At the 9 May meeting, the Committee first heard from the Law Society of Scotland and the Faculty of Advocates on the legal aspects of the Bill. It then took evidence from Professor Richard Wyn Jones, Professor of Welsh Politics and Director of the Wales Governance Centre, Cardiff University, and from William Norton from “No to AV”, and Willie Sullivan from “Yes to Fairer Votes”. This latter session enabled the Committee to draw on experiences from two previous referendums – the referendum on extending devolution in Wales, and the referendum on changing the voting system for UK Parliament elections from first-past-the-post to the alternative vote system, both held in 2011.

9. At its meeting on 16 May, the Committee brought together key organisations with responsibility for the administration of the referendum – the Electoral Management Board for Scotland (Electoral Management Board), the Scottish Assessors Association, the Society of Local Authority Lawyers and Administrators in Scotland (SOLAR), and the Association of Electoral Administrators. The Committee also heard from two legal academics, Professor Tom Mullen and Professor Neil Walker.

10. On 23 May, witnesses from the Electoral Commission gave evidence on its role and responsibilities under the Bill, while the Information Commissioner’s Office responded to questions on data protection implications in particular.

11. At the 30 May meeting, the Committee considered the implications for the two organisations expected to be the lead campaigners, or “designated organisations” – Yes Scotland and Better Together. This was followed by a roundtable discussion focussing on issues of voter awareness and civic participation, involving representatives of the Scottish Youth Parliament (SYP), the Scottish Council for Voluntary Organisations (SCVO), the Equality and Human Rights Commission Scotland (EHRC), Inclusion Scotland and the Federation of Small Businesses (FSB), together with Professor Aileen McHarg.

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3 Parliamentary Bureau Minutes for 26 March 2013

12. Finally, at the meeting on 13 June, the Committee heard from Nicola Sturgeon, the Deputy First Minister, and her officials.

13. The Committee also received written evidence in response to a call for evidence it issued immediately after the Bill's introduction. A total of 31 submissions were received from a wide range of organisations and individuals.

14. Extracts from the minutes of relevant Committee meetings are attached at Annexe B. Links to Official Reports of oral evidence sessions, together with associated written submissions and other written evidence, comprise Annexe C. All the evidence received is available on the Parliament’s website.5

15. The Committee is grateful to all those who provided evidence, whether orally or in writing. The Committee would also like to thank its two advisers, Iain Grant and Professor Stephen Tierney, for their helpful advice and input throughout the scrutiny process.

BACKGROUND TO AND PURPOSE OF THE BILL

16. The purpose of the Bill is to make provision for the referendum on independence that the Scottish Government plans to hold on 18 September 2014.

17. The holding of an independence referendum is a long-standing commitment of the Scottish National Party (SNP). Since the party’s election as a majority administration in May 2011, it has been the Scottish Government’s intention to introduce legislation in the Parliament to provide for a referendum on independence in the autumn of 2014.

18. In January 2012, the Scottish Government published a consultation paper, Your Scotland, Your Referendum, which included a draft Referendum Bill. The question proposed in the consultation paper was “Do you agree that Scotland should be an independent country?” Respondents were also asked about whether there should be a second question on a form of extended devolution and about possible ways of making voting easier for people, including holding the poll on a Saturday. The consultation paper set out a timetable for the process leading up to the referendum, and invited comments on a number of other issues, including the option of extending the franchise to those 16 and 17-year olds already able to register as ‘attainers’, and the proposed responsibilities of the Electoral Management Board and the Electoral Commission in overseeing the referendum. Finally, the paper set out suggested spending limits that would apply during the 16-week regulated period before the poll – namely £750,000 for the two designated organisations, £250,000 for political parties, £50,000 for other permitted participants and £5,000 for other individuals or bodies.

19. Over 26,000 valid responses to the consultation were received. Independent analysis revealed substantial support for the proposed referendum question (64% of respondents) and timetable (62% of respondents). However, a majority

5 http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/60762.aspx
of respondents (62%) opposed the idea of including a second question, with only 32% in favour; there were also mixed views (46% in favour, 32% opposed) on the suggestion of holding the referendum on a Saturday.⁶

20. The Scottish Government’s negotiations with the United Kingdom Government culminated in the signing of the “Edinburgh Agreement” in October 2012, which in turn led to the making of the section 30 Order, referred to above.

21. Under the Agreement, the two 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, and deliver a fair test and decisive expression of the views of people in Scotland and a result that everyone will accept.⁷

22. The associated “memorandum of agreement” stated that the referendum should be based on the framework established by the Political Parties, Elections and Referendums Act 2000 (PPERA), adjusted for Scottish circumstances, and that the Electoral Commission should perform most of the same functions as it does in PPERA referendums, reporting to the Scottish Parliament. It also committed both governments to respecting a 28-day period during which Ministers and public bodies refrain from publishing material that would have a bearing on the outcome, and to “continue 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 United Kingdom”.

23. The section 30 Order amended the Scotland Act 1998 so as to put beyond doubt the Scottish Parliament’s legislative competence to pass the necessary legislation.

24. Following the Edinburgh Agreement, the Scottish Government submitted its proposed question and spending limits to the Electoral Commission for independent testing. The Commission reported on both topics in January 2013, recommending a shorter question and higher spending limits, and that the UK and Scottish Governments clarify in advance the process that will follow either a Yes or No outcome.⁸

25. The Scottish Government accepted the Commission’s recommendations, and the Bill that it introduced uses the Commission’s recommended question and spending limits in place of those proposed in the Scottish Government’s consultation paper. On the day of the Bill’s introduction, the First Minister also

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announced the date on which the referendum is to be held – Thursday 18 September 2014.

Content of the Bill

26. According to the Policy Memorandum, the Bill’s main objective is to provide for a referendum on whether Scotland should be an independent country, following a “fair, open and truly democratic process which is conducted and regulated to the highest international standards”.

27. The Bill’s provisions are based on those for running a referendum set out in the Political Parties, Elections and Referendums Act 2000 (PPERA).

28. The Bill consists of 34 sections and eight schedules – with much of the detail included in the latter. The structure of the Bill is as follows:

- **section 1** and **schedule 1** provide for the date of the poll (with a mechanism to defer it in limited circumstances), the question and the form of the ballot paper
- **section 2** cross-refers to the separate Franchise Bill in relation to who is entitled to vote
- **section 3** introduces **schedule 2**, which makes detailed provision about voting (including for absent voting, i.e. proxy and postal voting), registration and the supply of the polling list to various participants
- **sections 4 to 8** govern the role of the Chief Counting Officer (CCO) and other counting officers
- **section 9** introduces **schedule 3**, which sets out rules for the conduct of the referendum, including provision about the hours of polling, the appointment of polling and counting agents, the keeping of order in polling stations, the count and the declaration of the result
- **section 10** introduces **schedule 4**, which sets out the rules governing those campaigning in the referendum, including rules on the donations they may receive and the expenses they may incur, and restrictions on publications by certain public authorities
- **sections 11 to 15** and **schedules 5 and 6** make further provision about campaigning, including the Electoral Commission’s role in monitoring and enforcing compliance with the campaign rules
- **sections 16 to 20** make provision for referendum agents and observers (representing the Electoral Commission or accredited by it)

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sections 21 to 23 require the Electoral Commission to provide information to voters and enable it to issue guidance to counting officers and advice to other persons

section 24 requires the Commission to report to the Parliament on the conduct of the referendum

sections 25 to 27 make further provision about the Electoral Commission, including for the reimbursement of its costs

schedule 7 (introduced by section 28) and section 29 deal with offences in connection with the referendum

section 30 gives Ministers the power to make supplementary, incidental or consequential provision by affirmative instrument

section 31 puts a 6-week time limit on any challenge to the number of ballots counted or votes cast brought by way of judicial review

section 32 introduces schedule 8, which defines terms used in the Bill

sections 33 and 34 deal with commencement and the Bill’s short title.

EVIDENCE AND CONCLUSIONS ON THE BILL AND ITS PROVISIONS

29. The remainder of this report sets out the evidence received by the Committee, together with the conclusions reached – first on the Bill in general, and secondly on specific provisions within it. The report then examines a number of other topics raised by witnesses that the Committee considers directly relevant to the organisation of the referendum.

The Bill in general

30. The Deputy First Minister explained that the Bill was informed by a large consultation exercise, and “contains the Government’s proposals for the running and regulating of the referendum in a way that will command the confidence of the Parliament, both sides of the campaign and the wider Scottish public”. She said that it reflected the Electoral Commission’s recommendations on the question and on spending limits, and mirrored as far as possible standard arrangements for Scottish and UK referendums. The Scottish Government “worked very closely with the Electoral Management Board for Scotland, the Electoral Commission, electoral registration officers and others to ensure that the arrangements are fit for purpose, to incorporate lessons from recent polls and to ensure that we are thinking through all the practicalities”.  

31. No to AV said it had been “highly critical” of the draft Bill and welcomed “the fact that many of its deficiencies have been addressed”. The organisation thought it positive that the Bill was largely based on PPERA, but regretted the fact that it carried over some aspects that “ought to have been amended”; it also

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10 Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, col 552.
expressed concern that, “in a number of key areas, the Bill deviates from the PPERA template”.\textsuperscript{11}

32. On a similar note, Navraj Singh Ghaleigh was disappointed that the Bill “scarcely departs from PPERA’s referendum scheme, and where it does so, it does so ill advisedly.” Although he agreed with the aspiration to have a referendum “conducted and regulated to the highest international standards”, he felt that “whatever else may be said of PPERA, it does not track the highest international standards”. He also cautioned against drawing lessons from previous referendums, saying that “what obtains in a mid to low-salience contest (i.e. 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”.\textsuperscript{12}

33. Willie Sullivan welcomed the long lead-in time for the referendum legislation, contrasting this with the much shorter timescales that applied in the case of the 2011 AV referendum.\textsuperscript{13} In oral evidence, he set out three key principles. First, “no set of interests should have more power and money to influence the outcomes” – and transparency should help to ensure this. Secondly, there should be room for the media and civil society to challenge what the campaigns are saying. Thirdly, there was a need to recognise the paradox that referendums are “elite-driven undertakings”, despite their needing popular support – and people should either be honest about that, or “genuinely try to make it a process in which citizens can take part”.\textsuperscript{14}

34. Professor Richard Wyn Jones, who had co-authored a book on the Welsh devolution referendum of 2011, said that the problems with that referendum, which was about “a rather arcane” choice between types of law-making powers, should not apply in the Scottish context, which concerns “a fundamental constitutional issue”.\textsuperscript{15}

35. The Electoral Management Board said its aim was to declare “a result that everyone will trust – there must be no question about the integrity or accuracy of the process. To achieve this, guiding principles are that:

- the referendum should be administered efficiently and produce results that are accepted as accurate; and
- there should be no barriers to voters taking part.”\textsuperscript{16}

36. The Electoral Commission said it had been working with the Scottish Government for a number of months and was “pleased that many of our recommendations have been taken on board … we believe that this is a strong piece of legislation that – if it is enacted within the anticipated timetable – will

\textsuperscript{11} No Campaign Ltd (No to AV), written evidence.
\textsuperscript{12} Navraj Singh Ghaleigh, written evidence.
\textsuperscript{13} Willie Sullivan (Yes to Fairer Votes), written evidence.
\textsuperscript{14} Scottish Parliament Referendum (Scotland) Bill Committee, 9 May 2013, Official Report, cols 351-2.
\textsuperscript{15} Scottish Parliament Referendum (Scotland) Bill Committee, 9 May 2013, Official Report, col 349.
\textsuperscript{16} Electoral Management Board for Scotland, written evidence
provide us with the necessary foundation and the time to deliver a referendum that truly puts the voter first and puts the voter at the centre of the planning".17

37. Blair Jenkins said that Yes Scotland was “acutely aware of the historical importance of the referendum” and was “determined to run the kind of positive campaign that will engage and enthuse people in Scotland”. Later, he added that the process was important, as well as the outcome: “It is hugely important that the people of Scotland feel that they have gone through a very good process.”18

38. Craig Harrow of Better Together said that the rules and regulations were “of heightened importance in a once-in-a-lifetime referendum”, and welcomed the Electoral Commission’s recommendations as having delivered a “big step forward in ensuring that we have fair referendum rules”. He also agreed with Willie Sullivan that “essentially, referendums are run by elites. We must ensure that in this referendum we get to as many people as possible.”19

39. The Committee welcomes the principle set out in the Edinburgh Agreement, that the referendum “should be based on PPERA, with particular Scottish circumstances, such as the establishment of the Electoral Management Board and subsequent role of the Electoral Commission, reflected in the Referendum Bill”.20 We accept that PPERA may not be perfect, but must be taken as the starting point, and we are encouraged that the Electoral Commission has expressed confidence in the robustness of the Bill. We are also encouraged by the extent to which this Bill has already been influenced by the views of the large numbers of people who responded to the consultation. Once the legislative framework is in place, we consider that it will be for the lead campaigns, and for the parties and others on both sides of the argument, to ensure that this becomes a genuine national debate to which individuals and communities across Scotland feel able to contribute.

Section 1 (referendum on Scottish independence)

40. Section 1 of the Bill provides for a referendum to be held on Scottish independence on 18 September 2014, or on a later date specified by order if Ministers consider it impossible or impracticable to hold it on that date, or that it could not be conducted properly if held on that date. The section also sets out the wording of the question to be asked and specifies that the ballot paper is to be in the form set out in schedule 1.

41. The Electoral Reform Society (ERS) Scotland commented it was “happy” with the date of the referendum and the wording of the question. ERS Scotland referred to its previous submissions in which it “made clear our support for the Electoral Commission testing and approving the question and we welcome the

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18 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, cols 465 and 481.
19 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, cols 466 and 481.
20 Memorandum of agreement, attached to the Edinburgh Agreement, paragraph 3.
acceptance of their suggested changes. On timing, our experience of the AV referendum in 2011 made it clear that a longer rather than shorter lead-in time to a referendum is to be preferred.”

42. The Scottish Trades Union Congress (STUC) regretted the fact that a second question had been ruled out in the Edinburgh Agreement, but recognised that the wording of the question presented was “clear and fair”. Similarly, the Scottish Youth Parliament (SYP) said it was pleased that the Scottish Government’s original wording had been independently tested by the Electoral Commission, and it was “content with the wording of the question proposed in the Bill”.

43. One individual, John Shields, however, was “extremely concerned” about the question as set out in the Bill. He believed that a single yes/no question would “never be able to escape the accusation of being a leading question, and of encouraging one answer over another”, and that this could “cast doubt on the final result”.

44. The Committee recognises that the referendum question in the Bill reflects the outcome of the Electoral Commission’s independent testing, and considers it to be straightforward and clear. We note the date proposed for the referendum, which is consistent with the timetable set out by the Scottish Government in the Your Scotland, Your Referendum consultation and with the established practice of holding major electoral events on Thursdays.

Schedule 1 (form of ballot paper)

45. Schedule 1 sets out the form of the ballot paper, with the question and the Yes and No boxes on the front, and other data, including the official mark, on the back. It also includes directions on how the ballot paper is to be printed.

Placement of official mark

46. The Electoral Management Board suggested that (as is usual at elections) the official mark should be printed on the front, rather than the back, of the ballot paper “to facilitate identification of doubtful ballot papers at the count without the need to turn each ballot paper over”. ERS Scotland agreed with the Electoral Management Board’s suggestion.

47. The Deputy First Minister explained that the reason for putting the official mark on the back was to enable voters to demonstrate to polling staff that their ballot papers were genuine without revealing how they had voted, but that the Scottish Government was now discussing with returning officers the
practicalities of moving the official mark to the front of the ballot paper, in line with the preference of returning officers and with electoral precedent.  

48. The Committee notes the concerns expressed about the placement of the official mark, and invites the Scottish Government to clarify whether it will be lodging an amendment to address it.

**Ballot paper in Gaelic**

49. The Committee received a number of written submissions advocating a bilingual English-Gaelic ballot paper.

50. Bòrd na Gàidhlig was disappointed that the Scottish Government appeared to have rejected this idea (based on its answer to a parliamentary question). It said that the Gaelic Language (Scotland) Act 2005 required Ministers to take steps to secure Gaelic’s “equal status” and that this was a separate issue from the ability of Gaelic speakers to understand English. In view of the number of bilingual voters, the Bòrd thought it would be “ironic as well as unjust” were Gaelic to be “marginalised in the context of the referendum ballot”.

51. Arthur Cormack argued that Gaelic should be included in the ballot paper on the basis of the equal respect the language was owed as an “official language of Scotland”. In his view, the fact that Gaelic speakers could comprehend the question in English “misses the point somewhat” since the Electoral Commission had not been asked to test a bilingual question. Nor, in Mr Cormack’s view, was it relevant to cite precedent from the 1997 devolution referendum since that pre-dated the establishment of Gaelic’s official language status and the preparation of a National Gaelic Language Plan.

52. No to AV thought it odd that the question and ballot paper were provided only in English, considering this is a “low-level concern from the point of view of voter engagement”. It wondered whether Gaelic-language referendum broadcasts had been considered.

53. John McCormick of the Electoral Commission said—

“...We tested the question that we were given by the Government, which was in English. During that process, we tested the question with groups of Gaelic speakers in different parts of Scotland to ensure that there were no ambiguities for anyone whose first language is Gaelic and whose second language was English. ... Our public information campaigns and information that will be available in polling places on how to vote and what to do will be available in Gaelic as well as many other languages. However, we have not been asked to consider a question in the Gaelic language. If we were, we

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27 Deputy First Minister, Letter to the Convener of the Referendum (Scotland) Bill Committee, 22 June 2013.
28 25 February 2013, S4W-12829
29 Bòrd na Gàidhlig, written submission.
30 Arthur Cormack, written submission.
31 No Campaign Limited (No to AV), written evidence.
would strongly recommend that it be tested separately from the English language question”.  

54. The Deputy First Minister recognised that the issue was not about Gaelic speakers’ ability to understand English, and said the Scottish Government remained committed to promoting the use of Gaelic. However, she said that the priority was to make the voting process familiar to voters, and that an English-only ballot paper followed established practice at elections. 

55. We acknowledge the views of those who would like to see the question set out in Gaelic as well as English on the ballot paper. We don’t consider that a persuasive case has been made for a bilingual ballot paper. One of the great virtues of the ballot paper set out in the Bill is that it is simple and clear. As witnesses have pointed out, a Gaelic translation will be available to those who wish to refer to it. 

56. We note that there will be translations into other languages widely used in Scotland (including by some voters who cannot read English). 

Section 2 (franchise) 

57. Section 2 cross-refers to the Franchise Bill for provision about who is entitled to vote in the referendum. 

Scots living outside Scotland 

58. During its inquiry, the Committee received a few further submissions from those – including individuals born or educated in Scotland but now living elsewhere – unhappy about not being entitled to vote in the referendum. However, as this issue has already been dealt with as part of the Committee’s scrutiny of the Franchise Bill, it is not further referred to in this report. 

Children of service personnel 

59. The Committee received additional evidence from the Deputy First Minister about an issue that arose during its scrutiny of the Franchise Bill, but which has not been resolved – namely, whether it was possible to extend the franchise to the 16 and 17-year-old children of service personnel who had made a service declaration. The Deputy First Minister explained that it was difficult to obtain data on the number of young people likely to be involved, although it was likely to be at the lower end of a range from zero to the low hundreds. However, she accepted that there was “an issue of principle” and she undertook to “determine whether there is a legislative solution” that could be implemented through the Referendum Bill, and to report to the Committee after the summer recess. 

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33 Deputy First Minister, Letter to the Convener of the Referendum (Scotland) Bill Committee, 22 June 2013. 
34 Charlotte Black, Michael Forbes Smith, the London Scottish Conservative Club and Dylan Thomas, written evidence. 
60. The Committee recognises that the Deputy First Minister has undertaken to see whether there is a practical way of including within the franchise for the referendum any 16 and 17-year olds who will be living outside Scotland with parents serving in the armed forces in September 2014, and we look forward to her further updates on progress on this issue.

Section 3 and schedule 2 (provision about voting etc.)

61. Section 3 introduces schedule 2, which makes further provision about the manner of voting (including absent voting – i.e. voting by post or by proxy), the register of electors, and about the supply of certain documents.

Absent voters – new provision in UK legislation

62. The Electoral Registration and Administration Act 2013 introduced a number of changes to absent voting arrangements at future elections in the UK, which will be implemented for the European Parliament elections in May 2014. The Electoral Commission supported these changes on the grounds that they “remove administrative barriers to voting and improve the security of the postal voting system”, and recommended that they should be applied for the referendum. 36 Similar points were made by Highland Council’s returning officer. 37

63. Brian Byrne of the Scottish Assessors Association agreed that it would be worth considering “whether those changes can be incorporated in the Bill”. He said the changes would provide for the early issue of postal votes and “a mechanism for cancelling a postal vote if a person is no longer registered”. 38

64. The Deputy First Minister confirmed that the Scottish Government was considering the changes to UK legislation “to determine if and how these should be incorporated into the conduct rules for the referendum”. 39

65. The Committee notes the new approach to absent voting arrangements in UK election law, and that the Scottish Government is considering whether to incorporate these changes in the referendum legislation. The Committee welcomes this, and asks to be updated as soon as the Scottish Government has reached a conclusion on this issue.

Deadlines for applications for proxy and postal votes (paragraphs 7 and 18)

66. Mr Byrne suggested that there was an error in the bill, since it provided the same cut-off date for applications for proxy votes and postal votes – 5 pm on the eleventh working day before the poll – even though they were “usually a week apart”. 40

36 The Electoral Commission, written evidence.
37 The Returning Officer, Highland Council, written evidence.
39 Deputy First Minister, Letter to the Convener of the Referendum (Scotland) Bill Committee, 22 June 2013.
67. The Electoral Commission made a similar point, recommending changing the deadline for a proxy vote application to 5 pm on the sixth day before (the deadline in election legislation). This was because “a deadline closer to polling day gives those who are too late to apply for a postal vote another option”. It gave the example of the disruption caused by the Icelandic volcano prior to the 2010 UK general election, when people who suddenly realised they would be unable to vote in person as they had planned still had time to appoint a proxy.  

68. The Deputy First Minister mentioned this issue as one which the Scottish Government was continuing to discuss with the Commission. 

69. The Committee notes that the Deputy First Minister is currently in discussion with the Electoral Commission on the deadline for proxy and postal votes. On the basis of the evidence, we would be inclined to support a later deadline for proxy voting, in line with normal practice, unless the Scottish Government can explain – before Stage 2 – why the approach taken in the Bill is preferable. 

Sections 4-8 (Chief Counting Officer, counting officers, and their functions) 

70. The Law Society of Scotland (the Law Society) questioned why the criteria in section 4 for removing the Chief Counting Officer (CCO) differs from the criteria in section 5 for removing an individual counting officer, and suggested the Scottish Government “should explain the rationale for this difference”. 

71. The Law Society also questioned why section 6 does not match its PPERA equivalent, both by omitting the provision in PPERA that requires a local authority to put its officers at the disposal of the counting officer for its area, and by including an additional obligation on counting officers to certify the number of rejected ballot papers. It suggested the Scottish Government should “explain the rationale for this difference”. 

72. The Electoral Commission noted that the Bill (by contrast with election legislation) did not provide either a power or a duty for counting officers to promote voter participation in the referendum. It suggested that “an explicit power or duty would clarify the intention of the Bill and enable counting officers to take forward their local public awareness plans with increased confidence”. 

73. Section 8 allows Scottish Ministers to determine, by order, the maximum amount of the charges and expenses which the Chief Counting Officer and counting officers are entitled to have reimbursed by Ministers. The Law Society and Highland Council’s returning officer wanted to see a draft of the order before the Bill completes its passage. 

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41 The Electoral Commission, written evidence. 
42 Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, col 553. 
43 The Law Society of Scotland, written evidence. 
44 The Law Society of Scotland, written evidence. 
45 The Electoral Commission, written evidence. 
46 The Law Society of Scotland, written evidence. 
47 The Returning Officer, Highland Council, written evidence.
74. The Committee notes the specific points raised in relation to sections 4-7 by witnesses (as outlined in paragraphs 68-70), and invites the Scottish Government to respond, indicating whether any amendments to these provisions are likely to be proposed. We would also welcome early sight of a draft order under section 8, so we can be satisfied that counting officers will be properly reimbursed.

Section 9 and schedule 3 (conduct rules)

75. Section 9 introduces schedule 3, which sets out rules for the conduct of the referendum. These rules set out various powers and obligations of counting officers, referendum agents (who appoint polling and counting agents) and presiding officers at polling stations, on matters such as the hours of polling, the use of schools and public rooms for polling and counting of votes, rights of admission to polling stations, the keeping of order in polling stations, the assistance that may be provided to blind and disabled voters and the counting of ballot papers.

Use of schools and public rooms for polling and counting votes (rule 7)

76. The Law Society questioned this provision on the grounds that it would enable the Chief Counting Officer to use, free of charge, meeting rooms maintained by a wide range of Scottish public authorities – and not just those meeting rooms maintained by local authorities (as was the case for the 2011 referendum on the alternative vote). Michael Clancy added in oral evidence: “I doubt very much that, say, the Mental Welfare Commission for Scotland will want a ballot box sitting in its vestibule on 18 September.” The Society raised the same point in relation to paragraph 7 of schedule 4 (use of rooms by designated organisations).

77. Highland Council’s returning officer suggested that the Scottish Government provide a list of the relevant public authorities so that they could be made aware of the responsibilities placed on them by this provision.

78. On a related point, the ERS Scotland wanted voters to be able to choose which of the polling places in their local government area to use, rather than restricting them to the one nearest to where they lived. ERS also wanted “more commonly used venues with higher public familiarity”, such as supermarkets, to be considered as polling places.

79. However, Gordon Blair of SOLAR said that “the last thing that we want to do is to chop and change the polling places.” He noted that a mandatory review of polling places for Westminster elections was due to begin in October 2013, which could impact on all the polls due to be held in 2014 and 2015.

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48 The Law Society of Scotland, written evidence.
50 The Law Society of Scotland, written evidence.
51 The Returning Officer, Highland Council, written evidence.
Provision of polling stations (rule 9)

80. Rule 9 of schedule 3 requires counting officers to provide “a sufficient number of polling stations”. More than one polling station may be provided in the same room (within a polling place such as a school).

81. Mary Pitcaithly of the Electoral Management Board assured the Committee that one of the EMB’s key principles was that “there should be no barriers to people who want to vote”, adding that a situation where, because of the need to queue, people got fed up and left “would not be acceptable”. She said that the EMB would “look carefully at the projected turnout figures when we make our final decision on how many polling stations to have” – although she also pointed out a significant increase in postal voting could offset any increased turnout in terms of the numbers using polling stations on the day. She explained that it was normal practice in elections to plan for turnouts of 70-80%, even though actual turnouts were around 50%, so a high turnout in the referendum would not necessarily create difficulties even if the number of polling stations was the same as for an election. She and Gordon Blair explained that turnout was assessed locally, by returning officers, based on press coverage and feedback from parties and candidates.

82. Mrs Pitcaithly also explained that the number of polling stations required for the European elections in May 2014 could be lower than for the referendum, given the anticipated difference in turnout, and this was something returning officers would need to consider carefully: “We need to make every effort and take every opportunity to ensure that people understand where they should vote. Where there is a difference between the two sets of elections, we will need to highlight that.” Additional signage and stewarding might also be required.

83. The Deputy First Minister confirmed that officials were talking to electoral administrators to ensure that each part of the country was “sufficiently resourced to deal with turnouts that may be higher than in a normal election”. She thought it reasonable to hope that turnout in the referendum would be higher than the 70-80% level normally planned for in elections.

84. The Committee, like many witnesses, is hopeful that turnout for the referendum will be high. We are confident that those responsible for administering the referendum have the experience and resources they need to judge appropriately the likely turnout and ensure that sufficient polling stations are provided, and that the polling places are accessible and appropriately located.

Appointment of presiding officers and clerks (rule 10)

85. The Law Society noted that rule 10 prevents a person being appointed as a presiding officer or clerk if that person “has been involved in campaigning for a particular outcome”, but does not define what “campaigning” involves. The Law Society argued that the restriction in the 2011 AV referendum legislation,
prohibiting the appointment of those who had been employed by or on behalf of a permitted participant, was “narrower and clearer and can be interpreted with more certainty”.  

86. However, Mary Pitcaithly of the Electoral Management Board said that “the intention behind both of these rules is clearly the same, that is to preserve the integrity and, importantly, the appearance of the integrity of polling at the referendum by preventing individuals who are obviously identified with a particular campaign from officiating at a polling station”. She anticipated that anyone offered a job as presiding officer or clerk would be required to “self-certify” that they had not been involved in campaigning for a particular outcome. This put the responsibility on the individual “to be satisfied that they can honestly make such an assertion”, and anyone found to have done so dishonestly would lose their job. “Ultimately”, she concluded, “it is a matter of trust and common sense”.  

87. The Committee is encouraged by the Electoral Management Board’s evidence on the appointment of presiding officers and clerks, and is content to rely on the “trust and common sense” of counting officers to ensure that candidates for these posts are appropriately vetted as part of the appointment process.  

Admission to polling station (rule 15)  
88. The Electoral Commission noted that this rule entitles a large number of people to attend polling stations, but allows presiding officers to regulate only the number of voters and their children admitted at the same time. The Commission suggested amending the rule to give priority to voters and polling agents, with presiding officers able to regulate the numbers attending the polling station in various categories, but without being able to exclude them altogether. 

89. The Deputy First Minister pointed out that rule 17 already gave presiding officers power to keep order in the polling station, but said the Scottish Government would discuss with electoral administrators whether any further provision was needed.  

Keeping of order in polling station (rule 17)  
90. Gordon Blair explained that presiding officers would be trained to manage and enforce rules and guidance on conduct in and around polling stations – including preventing political material being displayed. Mary Pitcaithly added that training used to be “fairly perfunctory” but the Electoral Management Board had “beefed that up quite a lot in recent years”. She said there would inevitably be some issues to deal with on the day, but the Board’s main concern was “in

56 The Law Society of Scotland, written evidence.  
57 The Electoral Management Board for Scotland, written evidence.  
58 The Electoral Commission, written evidence.  
59 Deputy First Minister, Letter to the Convener of the Referendum (Scotland) Bill Committee, 22 June 2013.
ensuring that a consistent approach is taken across the country” based on a single set of guidance.\textsuperscript{60}

**Voting procedure (rule 21)**

91. Rule 21 includes provision to ensure that anyone who attends a polling station before the end of the polling period (10 pm) is able to vote, even if they are still waiting to do so at that time. This provision was specifically noted and welcomed by the ERS Scotland.\textsuperscript{61}

**Voting by persons with disabilities (rules 22 and 23)**

92. Rule 22 enables voters who are “incapacitated by blindness or other disability”, or who are unable to read, to ask the presiding officer to mark their ballot papers for them. Alternatively, under rule 23, such voters may apply to the presiding officer for permission to have a companion with them to assist with marking their ballot paper.

93. This aspect of the voting arrangements particularly concerned Inclusion Scotland. Bill Scott initially said that, whereas physically disabled people could seek assistance with voting, the visually impaired could not. He later acknowledged that the Bill did make provision for this in rules 22 and 23, but still felt there might be a problem for people who were not blind, but whose visual impairment meant they could not read the ballot paper.\textsuperscript{62} He noted that visually-impaired voters could be given a large-print version of the ballot paper for reference, but could not use it to cast their vote.\textsuperscript{63}

94. The Electoral Commission said that, in relation to the equivalent rules at elections, there was no legal definition of “disability”, and this was “determined via a self-declaration by the voter”. The Commission also referred to the availability of “tactile voting devices”, and said that large print versions of the ballot paper would be provided in polling stations.\textsuperscript{64}

95. The Deputy First Minister said that the reference in the Bill to “blindness or other physical disability” could apply to people who were partially-sighted, but undertook to consider further whether clarification was needed about how the rules would be applied – for example, on whether presiding officers would always accept a self-declaration or would expect people to provide evidence of their disability.\textsuperscript{65}

96. The Committee is content, on the basis of the evidence and legal advice it has received, that these provisions already cover visually impaired as well as blind voters. It is certainly important that they and other voters whose disabilities make it difficult or impossible to vote without assistance get the assistance they

\textsuperscript{60} Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, cols 383-5.

\textsuperscript{61} Electoral Reform Society Scotland, written evidence.

\textsuperscript{62} Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, cols 499 and 501-3

\textsuperscript{63} Inclusion Scotland, supplementary written evidence.

\textsuperscript{64} The Electoral Commission, written evidence.

\textsuperscript{65} Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, cols 570-1.
need to record their votes. We would therefore invite the Electoral Management Board to give an assurance that guidance to electoral administrators will make clear how the Bill applies to visually impaired voters, so that polling station staff can be properly briefed to provide such assistance whenever it is required.

Attendance at the count (rule 29)

97. This rule requires counting officers to make arrangements for the counting of votes “as soon as reasonably practicable” after the close of the poll, and to publish notice of the time and place at which the count will begin.

98. The Electoral Management Board suggested that, instead of requiring notice of the time and place of the count to be published, the Bill should simply require such notice to be given to those entitled to attend. This was because publishing the notice “would lead people to believe that they could just turn up at the count and walk in without any accreditation or without fulfilling any of the requirements”. Gordon Blair pointed out that there was not a requirement to publish the notice in the context of an election, adding “if something was good for previous polls, why not have the same approach for this poll?”

99. The Electoral Commission said that the focus of rule 29 should be on ensuring that the count can be conducted efficiently and scrutinised properly. It therefore recommended that counting officers should not be entitled to exclude referendum agents altogether, and that in exercising their general power to exclude people from the count, they should follow any relevant guidelines issued by the Chief Counting Officer or by the Commission.

100. The Deputy First Minister said that counting officers had power only to exclude those whose presence might impede the count, and although it was important that referendum agents were able to observe the count, “the priority should be that the count itself is unimpeded”. She said the Scottish Government would discuss the matter further with returning officers.

101. One individual, Harry Hayfield, was keen to see the count broadcast live on satellite as well as terrestrial TV, and for the count to take place during the following day (rather than overnight) to enable as many people as possible to watch it.

102. However, the Deputy First Minister confirmed that planning was for an overnight count, rather than a next-day count.

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68 The Electoral Commission, written evidence.
69 Deputy First Minister, Letter to the Convener of the Referendum (Scotland) Bill Committee, 22 June 2013.
70 Harry Hayfield, written evidence.
103. The Committee notes the concerns of the Electoral Management Board about counting officers being required to publish notice of the count and the effect this may have on the general management of the count. We therefore invite the Scottish Government to explain why it has apparently departed from precedent on this point, and to give further consideration to the practical effect of this provision. On attendance of referendum agents at the count, the Committee invites the Scottish Government to discuss further with electoral administrators whether counting officers can be given sufficient powers to prevent any disruption to the counting process without having to resort to excluding referendum agents altogether. The Committee welcomes the indication that electoral administrators are planning on the basis that counting will take place overnight and that any operational issues that might make this difficult in certain areas are being identified and solutions developed.

Decisions on ballot paper (rule 33)

104. The Law Society suggested that this provision, which states that the decision of a counting officer in respect of a ballot paper is final, should be made subject to section 31, which limits the right to challenge the outcome of the referendum by judicial review to a six-week period after the result is announced.  

Re-counts (rule 34)

105. Rule 34 of schedule 3 makes provision for counting officers, on their own initiative, or on the instructions of the Chief Counting Officer (CCO), to have the votes cast in their area recounted. However, it does not expressly permit referendum agents appointed by registered campaigners to request a recount at local level in the same way that candidates and election agents can request a recount at other elections.

106. The Electoral Commission recommended the Bill be amended to allow local recounts following reasonable requests from referendum agents appointed for the local authority area or counting agents designated for this purpose – citing the precedent set in the Parliamentary Voting System and Constituencies Act 2011, which legislated for the 2011 AV referendum.

107. Mary Pitcaithly said that she expected the Electoral Management Board to issue guidance to counting officers about their power to order a recount, and that this “would help counting officers in the exercise of their discretion”. She emphasised that “all sorts of processes to double check and triple check results would be gone through before any announcement was made”.

108. The Deputy First Minister added that the Bill already gives counting officers discretion to order a recount, including if requested to do so by a referendum or counting agent, so giving referendum agents a statutory right to make such a

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72 The Law Society of Scotland, written evidence.
73 The Electoral Commission, written evidence.
request would make “little practical difference”, since the final decision would still be for the counting officer to make.\textsuperscript{75}

Declaration of results (rule 35)

109. Gordon Blair said that there was no provision in the Bill requiring local results to be declared, adding that “it is clear that the Bill is designed for a national result to be declared first before any local ones”.\textsuperscript{76} However, when the Committee wrote to the Deputy First Minister on this issue, she said that the Bill “requires counting officers to declare local results as soon as the CCO has authorised them to do so. When the CCO is in receipt of all certified local results, the CCO will make the formal national declaration. To allow flexibility, the Bill does not require that all local totals must have been declared before the national result is announced.” This was a change from the consultation draft, which would have required the national result to be declared before any local ones – an approach which the Electoral Commission and the Electoral Management Board had suggested could be impractical.\textsuperscript{77}

110. The Electoral Commission explained that “the purpose of the local count is absolute certainty. If the Chief Counting Officer is satisfied with the count, they will authorise the local counting officer to declare it locally. … And we expect the spirit of that, as contained in the Deputy First Minister’s letter, to be translated into the legislation”.\textsuperscript{78} In supplementary evidence, the Commission said that normal practice in referendums was for local results to be declared as soon as they were ready and had been checked by the Chief Counting Officer – and it expected the same to apply with the independence referendum.\textsuperscript{79}

111. Mary Pitcaithly said the Electoral Management Board had a workstream to consider the steps involved in collecting and collating local results and co-ordinating the declaration of local and national results.\textsuperscript{80}

112. The Committee endorses the approach taken in the Bill, which allows local results to be made before the national result, and gives discretion on exact timings to the Chief Counting Officer. Nevertheless, we would expect the Chief Counting Officer, in practice, to authorise counting officers to announce local results without any unnecessary delay, and we would welcome further clarification from the Electoral Management Board as to how these decisions are likely to be made in practice.

\textsuperscript{75} Deputy First Minister, Letter to the Convener of the Referendum (Scotland) Bill Committee, 22 June 2013.
\textsuperscript{76} Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, cols 390-1.
\textsuperscript{77} Deputy First Minister, Letter to the Convener of the Referendum (Scotland) Bill Committee, 20 May 2013.
\textsuperscript{78} Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col 451.
\textsuperscript{79} The Electoral Commission, supplementary written evidence.
\textsuperscript{80} Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, cols 380-1.
Section 10 and schedule 4 (campaign rules)

113. Section 10 introduces schedule 4, which sets out rules to govern the conduct of those campaigning in the referendum. Schedule 4 defines who may be a “permitted participant”, and allows such participants to apply to the Electoral Commission to be the “designated organisation” with a lead role in campaigning for one or other outcome. It gives designated organisations certain rights, including a right to use public rooms for meetings. Importantly, under the section 30 Order, the designated organisations will also have the right to express their views in campaign broadcasts and via free mailshots. Schedule 4 also makes detailed provision about the spending limits applicable to designated organisations, other permitted participants and others, and about how referendum expenses are to be accounted for. It imposes restrictions on what certain public bodies may publish in the 28 days before the poll, and sets out detailed rules on receiving and reporting on donations, and on certain transactions (involving loans or credit) between permitted participants and other persons.

Designation of lead campaigners (schedule 4, paragraph 5)

114. Paragraph 5(3) allows the Electoral Commission to designate a permitted participant as lead campaigner on one side only.

115. This was described as a “high-level concern” by No to AV, which described it as a “significant deviation” from the “both-or-neither” rule in PPERA and as something that “creates the risk of an unfair referendum”. In No to AV’s view, a one-sided designation would be very difficult to reconcile with the duty of impartiality on broadcasters; it would also be “clearly wrong in principle” to give only one side a free mailshot to all voters. No to AV suspected the purpose of the provision was to create a disincentive to “tactical non-designation” by one side, but argued that providing grants to both sides was likely to be a better approach to addressing this risk.

116. Professor Richard Wyn Jones said that the Welsh referendum experience had demonstrated that PPERA “allows for gaming. The no side chose not to apply for official designation, knowing that the impact of that would be that the yes side would then not be allowed official designation” – a decision that resulted in “absurdly tight” spending limits. For him, the lesson of the Welsh experience was that “PPERA is not fit for purpose”. He preferred the approach in the Bill, but agreed with No to AV that grants that can be spent on campaigning would also help.

117. However, the Electoral Commission said that its ability to appoint a lead campaigner on one side only addressed a recommendation it had made based on experience with the 2011 referendums. In its comments on the 2012 draft Bill, the Commission had noted that this approach could raise issues of fairness,

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81 No Campaign Limited (No to AV), written evidence.
but concluded that “in the circumstances of this referendum we are content that the risks of this approach are low”.\(^{85}\)

118. Both Yes Scotland and Better Together confirmed their intention to seek designated organisation status. Blair Jenkins said that Yes Scotland would “certainly apply”, while Blair MacDougall said he could not envisage any circumstances in which Better Together would not apply.\(^{86}\) The Deputy First Minister agreed that “we pretty much know the designated organisations on both sides”.\(^{87}\)

119. The Committee notes the evidence of witnesses who had experience of the 2011 Wales referendum, but considers that the approach to designated organisations provided in the Bill is appropriate in the circumstances of the 2014 referendum.\(^{88}\)

**Application for designation (schedule 4, paragraph 6)**

120. A permitted participant wishing to become a designated organisation is required to apply to the Electoral Commission within the first 28 days of the 16-week referendum period, and the Commission must determine the application within a further 14 days.

121. Peter Horne of the Electoral Commission noted that the effect of this was that “the campaign period is actually compressed into 10 or 11 weeks, rather than 16 weeks.” He said that the Commission was “exploring with the Scottish Government the opportunity – which arises specifically because of how well prepared the poll is – to pull the designation timetable for lead campaigners forward”. John McCormick added that such a change would “preserve the purity” of the 16-week regulated period.\(^{89}\)

122. In written evidence, the Commission suggested a revised timetable by which lead campaigners would be designated by early May 2014, around a month before the start of the referendum period. This would reduce uncertainty and give the lead campaigners the full duration of the referendum period to make the most effective use of the benefits available to them. It would also simplify the effect of some of the Bill’s rules on donations and campaigning.\(^{90}\)

123. Both Yes Scotland and Better Together were keen to have the designation process completed as early as possible. Blair Jenkins summarised his position as “the earlier, the better”, subject to the Electoral Commission following a

\(^{85}\) The Electoral Commission, written evidence.

\(^{86}\) Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 467.

\(^{87}\) Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, col 574.

\(^{88}\) Tavish Scott dissented from this paragraph.

\(^{89}\) Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, cols 438-40.

\(^{90}\) The Electoral Commission, written evidence.
Referendum (Scotland) Bill Committee, 2nd Report, 2013 (Session 4)

proper process. Blair McDougall took a similar view, adding that early designation would “give certainty about status”.  

124. ERS Scotland agreed with the campaign groups that early designation “would be beneficial”, saying that late designation “provokes uncertainty as to status, with implications for donations and spending.” It wanted designation to “run concurrently” with the referendum period, so that spending limits and reporting requirements would “commence at the moment of designation”.  

125. The Deputy First Minister said she was sympathetic to earlier designation, but there was a need to “discuss the practicalities, any unintended consequences and any relationship with other pieces of legislation”.  

126. The Committee also agrees that it is appropriate, particularly given the long lead-in time, for lead campaigners to be designated by the time the 16-week referendum period begins. We invite the Scottish Government to consider how to amend the Bill accordingly, and in particular to consider carefully, in view of the evidence we have received, how far in advance of that period the deadline for applications should be set.  

Expenses incurred for referendum purposes (schedule 4, paragraph 10)

127. This paragraph defines the expenditure that qualifies as referendum expenses, which includes the costs of producing referendum campaign broadcasts, advertising costs, the costs of unsolicited mailings to voters, market research, media relations, transport and the costs of organising rallies and other events. It also allows the Electoral Commission to issue a code of practice on what qualifies as referendum expenses.  

128. Blair McDougall said that Better Together was, “broadly speaking”, content with what was in the Bill and the guidance provided so far, and would “certainly have no problem with using free mailshots and things like that”.  

129. For Yes Scotland, Blair Jenkins said he was concerned the two campaigns might only be allowed two broadcasts each during the 16-week regulated period, suggesting that four each would be a more appropriate number. He doubted that the two sides could agree on how much to spend on the production costs associated with such broadcasts. Blair McDougall agreed that more airtime would be welcome, and said it was possible to create effective broadcasts even with limited budgets.
130. The Law Society suggested that any code of practice on referendum expenses be laid before the Parliament promptly “so that those who will be campaigning know what expenses they can incur.”

Spending limits (schedule 4, paragraph 18)
131. Paragraph 18 of schedule 4 sets upper limits on the amount of referendum expenses that may be incurred by permitted participants, namely:

- for each designated organisation, £1.5 million
- for political parties, a proportion of £3 million based on their percentage share of the vote at the 2011 Scottish Parliament election, or £150,000 (whichever is greater)
- for other permitted participants, £150,000 each.

132. The Policy Memorandum (paragraph 72) provides an explanation of how the formula for political parties will translate into actual limits for each of the parties represented in the Parliament – as follows:

- 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.

133. This approach to spending limits was identified in No to AV’s written evidence as one of its “high-level concerns”. That evidence included a table suggesting that the main parties opposed to independence would have significantly lower spending limits under the Bill than under PPERA-equivalent rules, while the SNP limit would only be slightly lower, and it doubted that the choice of this approach would do anything to enhance voter trust. In oral evidence, William Norton described the PPERA approach, which he preferred, as bottom-up, but said the Bill took “a half top-down approach” – it sought “to cap total spending by the two sides, but it does not apply the logic of that all the way through”, meaning there would still be “an imbalance at the bottom with regard to non-party campaigners, who can be funded by as many donations as they can raise”. He acknowledged that the Electoral Commission’s approach produced a “level playing field”, but said this depended on certain assumptions, including that none of the political parties would change sides or decide not to register on either side.

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96 The Law Society of Scotland, written evidence.
97 No campaign Limited (No to AV), written evidence.
134. However, Willie Sullivan (Yes to Fairer Votes) said that “what the Electoral Commission proposed for the Bill provides a more level playing field than PPERA did”. In written evidence, he said the lower and more equal spending limits in the Bill, compared to those in the AV referendum, would reduce the potential for “wealthy interests” influencing the outcome.

135. Other witnesses also disagreed with the No to AV critique. Professor Wyn Jones said the Bill produced an outcome that was “roughly fair”, whereas the PPERA approach “would not look roughly fair to most people” and could result in there being “huge questions about the legitimacy of the process as a result”.

136. Professor Walker felt that the Bill struck a good balance between the “top-down” and “bottom-up” approaches:

“On the one hand, there is value in having as precise a level playing field as possible; on the other hand, there is an argument for saying that there are so many voices in the referendum debate and that they do not necessarily divide into two obvious camps. … I think that there is a bit of a trade-off between those two ideals or goals. I like the approach that is taken in the Bill, which allows for other permitted participants.”

137. The Electoral Commission explained the principles on which its recommendations (reflected in the Bill) were based:

“Spending limits for a referendum should enable campaigners to campaign and set out their arguments to the voters …; limits should be in place to deter excessive spending; and the limits should not be so low that they encourage campaigns to distort the regulatory approach that is in place”.

138. The Commission had recommended £1.5m limits for designated organisations “having considered what would be a reasonable expectation of campaigners’ spend over a 16-week period”. For political parties, the Commission took the view that the banding approach implied by PPERA would result in an “uneven distribution of funding on either side of the campaign” so instead it recommended limits based on “the share of the vote in the most recent election – the election to the Scottish Parliament”.

139. Although the Commission recognised that “in a free democracy there is clearly the opportunity for other organisations to make their voices heard”, it felt

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100 Willie Sullivan (Yes to Fairer Votes), written evidence.
103 Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col 422.
104 Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col 422.
that “there should be some controls and there should be transparency”. The spending limit of £150,000 was set “by considering what activities organisations might undertake, and what it would be reasonable and appropriate for them to do”. That was 10% of the limit for designated organisations, and aimed to “strike a balance between allowing people to make their views heard but ensuring that they could not be a significant player in the debate without having appropriate electoral support behind them”.106

140. The Commission also said it would be inappropriate for it to seek to limit the number of campaigning organisations on either side, noting there was “a freedom of speech issue”. Peter Horne also pointed out that raising funds for campaigning was difficult and that, although “multiple campaigns might register … my view is that very few as a proportion will reach the limit of £150,000”.107

141. Yes Scotland said that, although its preference had been for a spending limit of only £50,000 for permitted participants, it had accepted the Electoral Commission recommendation for the £150,000 limit that is in the Bill. But Blair Jenkins warned that this was “a lot of money in campaign terms. If a large number of entities come from outside Scotland, for instance, and put such sums of money into the referendum campaign, that would raise legitimate questions”.108

142. Denis Canavan said he could not envisage any of the organisations with which Yes Scotland was in contact having as much as £150,000 to spend, adding that it would be “up to them to decide whether they want to register as permitted participants”.109

143. Blair McDougall said he understood the concern around the £150,000 figure. For him, the issue was about “rich individuals who have no real grass-roots support and who, it is feared, might come in and set up £150,000 funding vehicles”. He said that Better Together would seek to engage with the Commission on that issue.110

144. Blair Jenkins took a similar view, saying that “the position on who can register and then proceed to spend large sums of money is very loose. I agree that it would be pretty difficult to limit that or to put a controlling framework in place in respect of what constitutes a proper organisation to be a registered participant”.111

110 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, cols 472 and 477.
145. The Committee recognises that any approach to spending limits needs to meet the test set out in the Edinburgh Agreement of securing “rules that are fair and provide a level playing field”, while at the same time protecting free speech and encouraging wide participation in the debate.\footnote{Edinburgh Agreement, memorandum of agreement, paragraph 24 (campaign finance).} Having carefully considered the evidence, we think the Electoral Commission recommendations achieve as good an overall outcome as is likely to be possible. In particular, we endorse the principle of giving the political parties limits reflecting their share of the vote in the most recent Scottish Parliament elections, while enabling other permitted participants, without limits on their numbers, to spend the same amount each regardless of which side they support. This reflects the practical reality that we can already be sure which sides the parties will line up on, but we cannot predict – and should not seek to control – the choices made by others who wish to play a part in campaigning. We recognise concerns about multiple participants, each able to spend up to £150,000, funded by a few wealthy individuals, but we also recognise that people should be entitled to campaign freely within the rules, and that absolute parity of funding is never going to be achievable. We believe that a combination of public scrutiny and the oversight of the Electoral Commission should be capable of preventing spending power alone, on either side, unfairly affecting the outcome.

Referendum expenses incurred as part of a common plan (schedule 4, paragraph 19)

146. Under paragraph 19 of schedule 4, expenses incurred by one individual or body during the referendum period are to be treated as having also been incurred by any other individual or body if they were incurred as part of “a common plan or other arrangement” between them in relation to their referendum campaigning. This provision only applies where there is a designated organisation for each side of the argument.

147. No to AV noted that this provision is not found in PPERA, and doubted whether it would achieve its purpose – for example, because it would not prevent a group that had reached its spending limit shutting down and then re-registering as a new organisation in order to get a new spending limit. In its view, the better way to address the potential abuse of spending limits by creating dummy organisations would be to strengthen the requirements on registering as a permitted participant, something that it felt would also reduce the administrative burden on the Electoral Commission in enforcing the rules.\footnote{No Campaign Limited (No to AV), written evidence.}

148. Professor Neil Walker doubted that spending limits could be subverted by the creation of dummy organisations. Pointing to the various rules in the Bill’s schedules which aimed to prevent this he said, “I know that none of that is perfect, but often what you are talking about are not clandestine front organisations but ideological fellow travellers who are close in their objectives” – something he would not necessarily want to stop.\footnote{Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, col 407.}
149. Professor Mullen thought that the donation reporting requirements would help to address the problem, because they would provide evidence during the campaign of where separate organisations were receiving funding from the same source. “If it was thought that organisation A is really organisation B wearing a different hat, the donation trail might help to substantiate the case”.  

150. Peter Horne explained that the Electoral Commission’s approach would be “first, to set out the rules clearly and to help people to understand how we will enforce them … that helps them to comply because the vast majority of organisations with which we deal are seeking to comply”. The Commission also worked on the principle that “if people know that we have the powers available and that we are serious about using them, they are less likely to breach the rules”. If there was evidence suggesting that organisations were “seeking to work together and breach the rules, we would have the appropriate powers to be able to act” – adding that “we will come down heavily on that sort of activity”. However, Mr Horne conceded that enforcement could take time and that, in a one-off event such as a referendum, there were “incentives for campaigners to do what they can before the event and take the consequences afterwards”.

151. Peter Horne said there was nothing to prevent wealthy individuals funding a number of separate organisations all campaigning on the same side and each having a spending limit of £150,000 – but “if an individual was seeking to set up multiple organisations and was not only funding them, but controlling them in such a way that their activities were co-ordinated to avoid being duplicative, we would take action”. However, he acknowledged there was “a slightly grey area as to what is egregious working together” and what was legitimate.

152. Questioned about its staffing resources, the Electoral Commission said that, although it had only around 20 officials to monitor campaigning across the UK, it was confident it would be able to spot abuses. “With the traditional links that the Commission has built up over a decade in Edinburgh and Scotland in general, and the support that we will have from both sides of the campaign as they police their opponents, we will have a lot of information coming in”.

153. On the theme of common plan expenses, the Committee questioned the two lead campaigns on their structures and relationships with other campaigning groups.

154. Craig Harrow explained that Better Together’s aim was clarity about which organisations fell under its umbrella. Better Together had its own sectoral groups – including a women’s group, a youth group and a business group – which were politically autonomous, but were not separate in terms of accounting. Blair McDougall added that both they and the local groups were

118 Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col 430.
expected not to have their own bank accounts, so that any expenditure they incurred within the regulated period would be paid for from Better Together’s central bank account. He went on to explain that “if an individual wanted to financially support the work of one of our rural groups, they would donate the money to us rather than directly to the group and we would ring fence it to ensure certainty with regard to accounting”. Mr McDougall later added that it was possible for other organisations to be established outside Better Together and to register as separate permitted participants, but he did not currently anticipate that happening.119 120

155. Speaking for Yes Scotland, Blair Jenkins said that “the key principle is transparency and ensuring that people understand the difference between the official campaigns and other bodies that might or might not have a view on either side of the argument”. He mentioned Women for Independence and Business for Scotland as examples of groups that advocated a yes vote, but were not part of Yes Scotland – although he did not expect some of these to spend enough to require them to become permitted participants. He said that local yes groups “have not been encouraged to open their own bank accounts”, adding that “there must be clear mechanisms to ensure that we are aware of any spend that is locally incurred by an official yes group”.

156. Both campaign groups felt that the rules on common expenses were workable. For Yes Scotland, Blair Jenkins said it was “fairly clear” what the rules were where there was an intention to co-ordinate on campaigning or to have joint funding: “if we intend to be integrated with a group to that level, or to any extent, the group has to come under the funding limit for Yes Scotland as the designated campaign organisation”.121 Mr Jenkins expected the Commission to “give us very clear advice on what is and what is not permissible”.122

157. For Better Together, Blair McDougall said that “if an organisation is co-ordinating with us, it will be in house so that there is no risk of our falling foul of that co-ordination issue”.123 He also said that previous Electoral Commission guidance had been “incredibly stringent”, and he was “pretty confident” that the guidance for the referendum would “be strong enough to deter us from co-ordinating”, although he recognised that it was difficult to prevent that “while maintaining people’s right to free speech”. He added that Better Together had concerns, which it was discussing with the Electoral Commission, about whether it was “logical to have such stringent controls” on the relationship between a cross-party campaign and the individual parties within it. He said that the Commission’s guidance would appear to require Patrick Harvie, a Yes

120 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, cols 467-70 and 472.
121 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 473.
122 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 475.
123 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 472.
Scotland board member, to “forget what he knows about the Yes Scotland strategy when he then runs the Green Party campaign, and must ensure that those two strategies do not connect. Given the cross-party nature of the campaigns, there is a risk of getting into some slightly ridiculous situations in that respect”.  

158. On a similar note, ERS Scotland warned against overly restrictive rules for small campaign groups, saying that “diversity in the debate is important as is a plurality of voices”.  

159. The Deputy First Minister said it was for the Electoral Commission to govern the arrangements for permitted participants, and she was “satisfied that the legislation goes as far as legislation can go to ensure that that system is above board”. She added that “the whole concept of having permitted participants is to allow people – if they are not part of a political party or a designated organisation – to participate and to spend money in support of their participation”. While she would consider suggestions made, she was not planning any amendments to the rules on permitted participants.  

160. The Committee notes the apprehensiveness of some witnesses regarding the potential for co-ordinated activity to undermine the effectiveness of the spending limits. Having reflected on the evidence provided, however, we are generally satisfied that the statutory provisions are sufficiently robust. All the same, we would welcome further clarification from the Electoral Commission about how they will in practice ensure that permitted participants stay within both the letter and spirit of these rules.  

Returns on referendum expenses – delivery to Electoral Commission and public inspection (paragraphs 22 and 24)  

161. Paragraph 20 requires each permitted participant to submit a return to the Electoral Commission in respect of its referendum expenses. Under paragraph 22, if the amount of expenses incurred exceeds £250,000, the return (accompanied by an auditor’s report) must be submitted within 6 months of the end of the referendum period; otherwise, the return must be submitted within 3 months. Criminal sanctions are specified for certain failures to comply. Paragraph 24 requires the Commission to make returns available for public inspection for a period of two years.  

162. The Law Society questioned the effectiveness of the sanctions against a failure to provide the Electoral Commission with a proper return in relation to its referendum expenses, given the length of time between when the expenses are incurred and when the return must be made. It also suggested that returns should be published and not merely made available for public inspection. ERS Scotland warned against overly restrictive rules for small campaign groups, saying that “diversity in the debate is important as is a plurality of voices”.  

124 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, cols 473 and 476.  
125 Electoral Reform Society Scotland, written evidence.  
Scotland agreed, saying it would “welcome regular reporting of expenditure throughout the campaign" rather than a single report after the event.\textsuperscript{127}

**Restrictions on publication of promotional material (“purdah”) (schedule 4, paragraph 25)**

163. Paragraph 25 of schedule 4 prevents the Scottish Ministers or any other part of the Scottish Government, the Scottish Parliamentary Corporate Body or any Scottish public authority with devolved functions from publishing certain material during the final 28 days before the referendum (sometimes referred to as the “purdah” period). This includes material providing general information about the referendum, as well as material putting the arguments for one side or another, and includes publication in any form and by any means.

164. No to AV noted that this provision matches one in PPERA aimed at preventing undue influence through the use of public resources, but said it was “not fit for purpose”, as it could not be effectively applied against Ministers, and the enforcement machinery was “too obscure and slow-working to provide any remedy even in a case that constitutes a clear breach”. It wanted the purdah period to start earlier, preferably from when the Yes and No campaigns were designated. It also advocated changes to schedules 5 and 6 to allow the Electoral Commission to compel compliance with the purdah provisions, and to apply civil penalties for any breach.\textsuperscript{126,129}

165. Other witnesses also commented on the purdah issue, including on whether the 28-day period was long enough. Blair McDougall of Better Together was concerned that there was a “messiness about the disconnect between purdah and the regulated period. I guess that the counter-argument would be that the business of government has to continue throughout that four-month period”.\textsuperscript{130} Blair Jenkins of Yes Scotland had not given much thought to lengthening the purdah period, but did not see a compelling case for doing so.\textsuperscript{131}

166. The Deputy First Minister said that the 28-day period was “appropriate” and in line with existing electoral law. She did not think the period should be longer, saying “we have to strike a balance between fairness in the referendum period and allowing the Government of the day to get on with the business of being the Government”. She also explained that the purdah restrictions applied to oral as well as written statements made by Ministers when they were acting in that capacity and supported by civil servants, but would not prevent those same Ministers from campaigning in their capacities as party members and politicians.\textsuperscript{132}

\textsuperscript{127} The Law Society of Scotland, written evidence; Electoral Reform Society Scotland, written evidence.

\textsuperscript{128} No Campaign Limited (No to AV), written evidence.

\textsuperscript{129} Scottish Parliament Referendum (Scotland) Bill Committee, 9 May 2013, Official Report, col 364.

\textsuperscript{130} Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 488.

\textsuperscript{131} Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 488.

\textsuperscript{132} Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, cols 554 and 557-8.
167. A number of witnesses questioned the extent to which the UK Government would be bound by similar restrictions, given that its commitment to observing purdah rules was contained only in the non-statutory Edinburgh Agreement.

168. Professor Wyn Jones felt strongly that the same rules should apply to UK Ministers, “because neither Government is a neutral player in this particular fight”, but did not know how to make that happen. He also acknowledged that purdah was “a difficult issue because it makes government difficult”. 133

169. Professor Tom Mullen believed that any breach by the UK Government could be challenged through judicial review proceedings, since there was an argument that the Edinburgh Agreement was enforceable by reference to the legal concept of “legitimate expectation”. However, he felt that “it would be more appropriate if, for both Governments, the purdah period was on a statutory footing” – adding that putting in place the relevant UK legislation “would be straightforward. It is a matter of political will”. 134

170. Professor Neil Walker agreed that the Edinburgh Agreement was probably enforceable, on the basis that it was “a kind of law or a quasi-law” and created a legitimate expectation. However, his conclusion from this was that “UK legislation would be an unnecessary additional hurdle”. 135

171. Dennis Canavan of Yes Scotland wanted the UK Government to be under an equivalent statutory obligation to apply the purdah rules, suggesting that it could be invited “to introduce a statutory instrument or something”.  (30/5, col 486) Craig Harrow of Better Together did not have a view on whether such legislation was needed, but noted that “during a Scottish general election, there is an agreement but there is no statute, as there is for when Westminster is in purdah”. 136

172. The Electoral Commission, in its written evidence, said that it would not have a regulatory or sanctioning role in respect of the purdah restrictions. This was “not in itself a concern, provided that both Governments explain to voters how the Edinburgh Agreement commitments will be observed”. In oral evidence, John McCormick said there was “a tradition of Governments accepting and observing” purdah rules. His colleague Andy O’Neill pointed to paragraph 29 of the Edinburgh Agreement, which committed the UK Government to abide by the same purdah rules as the Scottish Government, saying “that commitment is already there in writing”. 137 138

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134 Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, cols 411 and 413.
135 Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, col 413.
136 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, cols 486 and 490-1.
137 The Electoral Commission, written evidence.
173. The Deputy First Minister pointed out that the Parliament cannot legislate to apply purdah rules to the UK Government, but said the Edinburgh Agreement made clear the UK Government’s “intention voluntarily to submit to the same rules”. She added: “I fully expect the UK Government to honour that commitment in full, and I have no reason to expect that it will not do so.” She added that it was up to the Committee whether to recommend additional legislation applying purdah rules on the UK Government, and it would be up to the UK Government to respond to any such recommendation.  

174. The Committee also took evidence from legal experts and others on how the purdah restrictions in the Bill could be enforced.

175. The Electoral Commission, in its written evidence, noted that the approach taken in the Bill was narrower than under PPERA, and did not make any provision for sanctions in respect of breaches.  

176. According to Professor Mullen, the courts might be willing to say that a breach of purdah constituted an illegal act, but might be reluctant to go further and draw any conclusions about whether it had affected the outcome of the referendum. He also noted that a court ruling issued before the referendum could be “significant beyond its actual legal outcome” since the very fact of the litigation “might create reputational damage for one side or the other”.  

177. A similar view was expressed by Blair McDougall of Better Together, who said that “the real sanction, or what makes us behave ethically, is the court of public opinion and the increased scrutiny that comes from the media during that time”.  

178. ERS Scotland was also concerned to ensure that governments did not “use their public resources to their advantage”. Although it acknowledged the points made by other witnesses about “the court of public opinion”, it wanted both the Scottish and UK Governments “to make a public undertaking that they will respect the rules restricting campaigning activity by public bodies, including the Governments themselves, whilst understanding that public money and public bodies should find a way to encourage involvement and debate as part of the democratic process” – saying that, although difficult, this was “not outwith the wit of man to resolve”.  

179. John McCormick of the Electoral Commission felt that, because the two Governments were on opposite sides, “the monitoring and scrutiny will be quite intense” and there would be “active public scrutiny of whether each side is obeying the rules”. He felt it would be “presumptuous for the Electoral Commission, as a regulator, to comment publicly on the conduct of the

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139 Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, cols 554 and 560.
140 The Electoral Commission, written evidence.
141 Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, cols 411 and 412.
142 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 486.
143 Electoral Reform Society Scotland, written evidence.
Government or the Parliament. That is why we believe that public scrutiny is the best test in this regard.”

180. Graham Fisher (Scottish Government legal directorate) confirmed that judicial review was available as a potential sanction for breaches of the purdah rules. He said that the remedies available if a challenge was upheld would depend on what was sought and on the context of the decision. The Deputy First Minister added that any alleged breach by a Minister in either Government was likely to be seized upon by the other side and so picked up in the media: “The provision is in law because we want to ensure that there is an appropriate restriction, but the public price of breaching the purdah rules operates as a constraint as well.”

181. Concerns were also raised in evidence from No to AV that the purdah restrictions in the Bill were narrower in scope than those in PPERA in that they did not apply to bodies that, although not public authorities, were mostly reliant on public funds (including European Union funds).

182. However, the Electoral Commission pointed out that any individual or organisation, whether or not they receive public funds, would be able to spend up to £10,000 on “promoting or procuring an outcome” at the referendum without being subject to regulation. Organisations that receive public funds would need to comply with any restrictions that apply to their use of those funds, but that would be a matter for the relevant funding body or any appropriate regulator rather than for the Commission.

183. In oral evidence, Peter Horne explained that the scope of the purdah restrictions in the Bill was consistent with the Electoral Commission’s recommendation. He said the rationale for the recommendation was that, while the referendum involved “an intensely important discussion about the nature of democracy in Scotland, … there will also be a requirement for on-going Government and public administration, and a line needs to be drawn at some point”. He felt the PPERA rules were “so broad that entirely valid activity that was undertaken by organisations could be seen as being covered”. He said it was not the Commission’s role to police what is said by organisations that receive public funds – unless they became permitted participants, in which case “we will regulate them at that point”.

184. On the question of how the purdah restrictions would apply to MSPs and MPs, Peter Horne said that the main restrictions on how public funds could be

144 Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col 442.
146 The Electoral Commission, written evidence.
147 Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, cols 440-1 and 446.
spent came from parliamentary codes of conduct. Any breach of those rules would be dealt with by the appropriate parliamentary authorities.148

185. Blair McDougall of Better Together said that “both Parliaments already have fairly clear rules about what constitutes political campaigning and the use of expenses”.149 He believed “similar standards should apply to both Parliaments” and that “both Parliaments will have to look at their procedures and issue new guidance”.150 But Dennis Canavan of Yes Scotland was concerned that the Westminster rules “appear to be a bit more flexible” than those of the Scottish Parliament, and suggested that the Speaker of the House of Commons could be asked “to ensure that during the period MPs abide by a code of conduct that is very similar to that which operates in the Scottish Parliament”.151

186. The Deputy First Minister was careful to stress that this was a matter for the relevant parliamentary authorities rather than Ministers, but she hoped that appropriate steps would be taken to ensure there was a level playing field. She also noted that the public were likely to “take a very dim view” of any politician seen to be misusing public funds, and that this created “a self-regulating pressure on politicians”.152

187. Asked about the impact of the purdah restrictions on the SPCB and the implications for Parliamentary business, the Deputy First Minister accepted that the Bill “could preclude the publication of an enormous amount of material that relates to the business of governing Scotland”. While noting that recess times were a matter for the Parliament, she said that for the Parliament to meet during the purdah period “would undoubtedly mean that we would sit with enormous constraints on what the Parliament and the Government could do … it would be difficult to imagine how a normal First Minister’s question time, for example, would proceed in a way that is consistent with the law”.153

188. The Committee strongly endorses the principle of a “purdah” period in the immediate run-up to the referendum, based on established precedent. We accept that 28 days is the appropriate period, given the need not to interrupt the normal business of government for longer than is necessary, and given that this is in any case the period endorsed by the two Governments in the Edinburgh Agreement.154 We recognise that (as with any election) there is limited scope for formal enforcement of these rules, but we are confident that the main practical sanction is the likelihood that any breach would generate publicity more damaging than any perceived advantage gained.

149 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 486.
150 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 491.
151 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 487.
152 Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, col 555.
154 Tavish Scott dissented from this sentence.
189. We accept the Deputy First Minister’s view that there is no reason to doubt the good faith of the UK Government’s commitment to observe purdah restrictions equivalent to those imposed on the Scottish Government in the Bill. Nevertheless, there is an asymmetry, and we invite the UK Government to indicate whether it would be prepared to put the purdah restrictions to which it is committed on a statutory footing.\(^{155}\) We would request that the Scottish and UK Governments each issue guidance to those public bodies for which it is responsible on the limits applicable to them during the 28-day period.

190. The purdah period is to begin on Thursday 21 August 2014. The Parliament has now agreed recess dates that include a period of recess from 28 June to 3 August 2014 (inclusive) and another from 23 August to 21 September 2014 (inclusive).\(^{156}\) As a result, there will be a 2-day overlap between the purdah period and a period of Parliamentary business. We draw this to the attention of the Parliamentary authorities.

191. In terms of the rules on parliamentarians, we recognise these are matters for the relevant authorities, here and at Westminster, and that it is unrealistic to expect these to be directly co-ordinated. Nevertheless, we hope that similar rules will apply. We expect the SPCB to issue clear guidance for all MSPs and invite the Independent Parliamentary Standards Authority to do the same for MPs.

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**Control of donations (schedule 4, Part 5)**

192. Part 5 of schedule 4 sets out rules on the control of donations, including a requirement on permitted participants to check that every donation of over £500 is from a permissible donor, and a requirement to report to the Electoral Commission on every donation of over £7,500. Permissible donors are individuals or organisations meeting certain criteria – including (for individuals) being registered in one of a number of electoral registers (listed in para 1(3) of the schedule).

193. Professor Mullen suggested that the donation reporting threshold in the Bill could be lowered, since under the current threshold of £7,500 “quite a lot of substantial donations of several thousand pounds would not have to be disclosed”.\(^{157}\) Similar points were made by ERS Scotland.\(^{158}\)

194. For Navraj Singh Ghaleigh, the lack of a requirement to report on donations during the campaign was a “glaring” regulatory gap. Such “ex ante” reporting would allow voters to evaluate donations and their likely impact, and so “allow them to align themselves with or against a campaign on the basis of their published supporters”. Current, voluntary disclosure of donations by the lead campaigns was “laudable” but “very much a second best”. He also argued that

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\(^{155}\) Patricia Ferguson, Annabel Goldie, James Kelly and Tavish Scott dissented from this sentence. 
\(^{156}\) Source: Minutes of the Parliament for Wednesday 26 June 2013 (item 11): http://www.scottish.parliament.uk/S4_BusinessTeam/pm-v3n20-s4.pdf 
\(^{158}\) Electoral Reform Society Scotland, written evidence.
soliciting donations from people outside the UK risked having “a distortive effect on the campaign, inimical to the statutory concept of the permissible donor.”  

195. Peter Horne of the Electoral Commission said the referendum was “the first for which reporting will be introduced for donations more than £7,500 in the regulated period, and so the Bill was “a significant improvement on previous legislation, in that there is transparency prior to the event”. But he acknowledged “it would be possible to reduce that level if there was a view that that would increase transparency.”  

196. The Electoral Commission was concerned that the Bill would make it difficult for campaigners to check the permissibility of some donations, since the Bill only requires EROs in Scotland to provide a copy of the local government register to campaigners – unlike in PPERA referendums, where campaigners are entitled to a copy of all the relevant registers. In practice, campaigners would either have to rely on the donor providing evidence that they are on a register, or try to make arrangements to inspect other registers in person. The Commission said this would be a less robust process and would “place additional and potentially onerous burdens on both campaigners and donors”.  

197. The Deputy First Minister said that, although campaigners were entitled to a copy of the Scottish local government register, the Parliament “cannot legislate for the sharing of other registers in operation either in Scotland or in the rest of the UK”. However, she assured the Committee that “even if a donor is not on the local government register there are other ways of checking their eligibility as a donor”.  

198. The Deputy First Minister said that the Bill already required campaigners to report to the Electoral Commission, before the poll, on donations received during the referendum period. She said it was important that voters could see how campaigns were funded before deciding how to vote, and that the Scottish Government had discussed with the Commission a possible amendment that would require it to publish promptly the donation reports it received.  

199. The Committee is generally satisfied with the rules on donations. However, we would invite the Scottish Government to consider further whether a lower threshold for reporting donations would be merited, and whether there should be greater public access to information about donations during the referendum campaign, in the interests of transparency. We would also welcome further clarification on how, in practice, permitted participants are to check donors’ eligibility by reference to electoral registers other than the one register to which they are to be guaranteed access.

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159 Navraj Singh Ghaleigh, written evidence.
161 The Electoral Commission, written evidence.
162 Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, col 553.
Section 11 and schedule 6 (civil sanctions)

200. Section 11 sets out the Electoral Commission’s general obligations for monitoring and enforcing compliance with the campaign rules. Schedule 6 gives the Electoral Commission powers to apply civil sanctions (including fixed monetary penalties) for breaches of the campaign rules.

201. Throughout schedule 6, various powers of the Electoral Commission to impose civil penalties are defined according to whether a person has committed a “prescribed campaign offence”. This, in turn, is defined as an offence prescribed in a “supplementary order” made under paragraph 16. As a result, the scope of the Commission’s power to enforce the campaign rules using civil penalties will only become clear once a supplementary order is made by Ministers listing the relevant provisions. The Electoral Commission is also required by paragraph 25 of the schedule to issue guidance on its approach to enforcement, including how it will apply its powers to impose civil sanctions.

202. No to AV noted that this approach was based on PPERA, but said there was no reason in this instance to follow the PPERA model and that the relevant offences and rules should be specified in the Bill, something that “would greatly assist prospective campaigners, election officials and the Commission itself”.163

203. Yes Scotland pointed out that a UK civil sanctions order had been made in 2010, specifying the offences and rules to which the PPERA civil penalties regime applies. In its view, that order gave a good indication of what provisions in the Bill were likely to be subject to civil penalties, so it did not have a strong view on whether the relevant statutory provision for the referendum was made in the Bill or by a later statutory instrument: “The end result would be the same.”164

204. The Electoral Commission explained that it was now normal practice for it to have civil as well as criminal sanctions available. Although the Bill provides for the Commission to consult on its approach, the Commission envisaged relying on established practice in applying the civil sanctions regime.165

205. The Committee considers the civil sanctions regime to be an important part of the regulatory regime established under the Bill. We would therefore welcome early sight of the supplementary order that is to establish its scope, or confirmation that it will be closely based on the equivalent order made under PPERA.

Sections 13 to 15 (campaign offences)

206. Sections 13 and 14 define the scope of campaign offences and specifies the penalties that apply where a person is convicted of such an offence. Section 15 requires the court in which a person is convicted to notify the Electoral Commission.

163 No Campaign Limited (No to AV), written evidence.
164 Yes Scotland, written evidence.
207. The Law Society questioned why some of the offences carried heavier penalties than others, suggesting it may be based on “a proportionality argument”. It also thought it odd that the maximum term of imprisonment for the more serious offences was the same (12 months) whether the offence was prosecuted summarily or on indictment.\textsuperscript{166}

208. The Law Society also said that the offences appeared to be “strict offences” without a defence of reasonable excuse. However, in oral evidence, the Faculty of Advocates pointed out that in fact all the offences were qualified in ways that made allowance for the circumstances, so none imposed strict or absolute liability – a point acknowledged by the Society.\textsuperscript{167}

**Section 16 (referendum agents)**

209. Permitted participants are entitled under section 16 to appoint, for each local authority area, a referendum agent to act on its behalf, and must notify the relevant counting officer of the agent’s details by noon on the 25th working day before the referendum.

210. No to AV pointed out that this deadline was earlier than the 16-day deadline in the AV referendum, suggesting this “increases the inconvenience for campaigners”.\textsuperscript{168}

211. However, Yes Scotland supported the existing provisions in the Bill, pointing out that there would be around 273 days between the Bill being passed and the deadline for appointing referendum agents, compared with only 50 in 2011. There were also differences in scale, with counting taking place in only 32 local authority areas, compared with the 440 voting areas for the AV referendum in 2011. Its conclusion was that it was generally “of benefit to election administrators to know the identity of referendum agents as soon as possible in the process so that they have a local contact to discuss such matters as the arrangements for the opening of postal ballot packs in the area, local polling arrangements and the count”.\textsuperscript{169}

212. The Committee is content with the timescales for appointing referendum agents.

**Sections 17-20 (observers)**

213. Section 17 entitles Electoral Commission representatives to attend proceedings relating to the referendum, and to observe the working practices of registration and counting officers. Sections 18 and 19 allow individuals or organisations to be accredited as observers by the Commission.

214. The Electoral Commission pointed out that PPERA also required the Commission to prepare and publish a code of practice for observers at

\textsuperscript{166} The Law Society of Scotland, written evidence.
\textsuperscript{167} Scottish Parliament Referendum (Scotland) Bill Committee, 9 May 2013, Official Report, cols 341-2.
\textsuperscript{168} No Campaign Limited (No to AV), written evidence.
\textsuperscript{169} Yes Scotland, written evidence.
elections, but this requirement only applied to referendums if provided for in the referendum legislation. The Commission recommended amending the Bill to provide for a statutory code of practice in the context of the referendum, as this would demonstrate “a clear commitment to transparency by facilitating international scrutiny of a country’s electoral processes”.

215. The Deputy First Minister said that the issue was under discussion with the Electoral Commission, and she would consider whether the Bill needed to be amended.

On the question of whether there should be a statutory requirement for a code of practice for observers, the Committee welcomes the Electoral Commission’s recommendation, notes that it is under discussion and encourages the Scottish Government to seriously consider amending the Bill.

Section 21 (information for voters)

217. Section 21 requires the Commission to take such steps as they consider appropriate to “promote public awareness and understanding” of the referendum, the referendum question and voting in the referendum.

Promoting understanding of the question

218. A number of witnesses singled out for criticism the particular requirement to promote understanding of the referendum question.

219. According to Nigel Smith, this “would be a major change in the conduct of referendums in the UK” departing from previous practice. He said the Electoral Commission had only supervised three major referendums “earning mixed reviews”, but he also opposed the provision in principle. The challenge of providing unbiased information on a referendum question had, he said, “largely defeated referendum commissions around the world”, and most previous efforts had either been dull, valueless or “unwittingly partisan”.

220. No to AV also argued against this provision, saying it would, for example, be “impossible” for the Commission to “explain what it means for Scotland to become an ‘independent country’ without being either subjective or partisan”. In oral evidence, William Norton added that the combination of the question and the duty on the Commission would “create a massive headache for it”, and prompt it to produce “a very bland document”.

221. Willie Sullivan agreed that the Bill gave the Electoral Commission “an impossible job”, adding that both sides in the AV referendum felt that the document the Commission created on that occasion was biased “and that is

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170 The Electoral Commission, written evidence.  
172 Nigel Smith, written evidence.  
173 No Campaign Limited (No to AV), written evidence.  
going to happen again”.\textsuperscript{175} ERS Scotland also felt the task for the Commission was “simply not possible”, and that “proper balanced broadcast media coverage” and a programme of citizen engagement would be a better way of addressing the need for impartial information.\textsuperscript{176}

222. The Law Society of Scotland said the section reflected international good practice (established under the Venice Commission), which required authorities to “provide objective information”.\textsuperscript{177}\textsuperscript{178} Michael Clancy did not think anything in the Bill would make the Electoral Commission’s role in providing objective information more difficult.\textsuperscript{179}

223. Asked about the Commission’s role, John McCormick said the organisation was “very clear” about its “role in providing impartial information on the process, as distinct from the campaigning arguments”. He also pointed out that section 21 only required it to take such steps as it considered appropriate, and that it would “not seek to explain to voters what independence means”. Its focus would instead be on information “aimed at ensuring that all eligible electors are registered and know how to cast their vote”.\textsuperscript{180}\textsuperscript{181}

224. The two lead campaigns differed on whether the duty on the Commission to promote understanding of the question was problematic. Better Together said that “it seems inevitable that attempts to impartially explain political aspects of the referendum question would be extremely difficult (rather than providing basic technical information or educating people on how to participate in the referendum)” – adding that the meaning of the question was “necessarily a matter of contest between the two campaigns.”\textsuperscript{182}

225. By contrast, Yes Scotland said that “If the Electoral Commission does not consider a possible step in promoting understanding of the referendum question to be appropriate, there is no duty under the Bill to take it. A clear example of an inappropriate step to take in promoting understanding of the question would be a step which compromised its political neutrality. We consider that it is essentially a matter for the Electoral Commission to take a view on whether it is content with section 21 as it is framed”.\textsuperscript{183}

226. The Deputy First Minister said there was “a very clear distinction” between the roles of the Electoral Commission and of the two campaigns: “The Electoral Commission has a responsibility to provide information that will advise people how to register to vote and how to vote, but it will not – nor should it – in any

\begin{footnotesize}
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\item \textsuperscript{175} Scottish Parliament Referendum (Scotland) Bill Committee, 9 May 2013, Official Report, col 370.
\item \textsuperscript{176} Electoral Reform Society Scotland, written evidence.
\item \textsuperscript{177} Paragraph 3.1(d) of the Code of Good Practice on Referendums drawn up by the European Commission for Democracy through Law.
\item \textsuperscript{178} The Law Society of Scotland, written evidence.
\item \textsuperscript{179} Scottish Parliament Referendum (Scotland) Bill Committee, 9 May 2013, Official Report, col 346.
\item \textsuperscript{180} Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col 431.
\item \textsuperscript{181} The Electoral Commission, written evidence.
\item \textsuperscript{182} Better Together, written evidence.
\item \textsuperscript{183} Yes Scotland, written evidence.
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way, shape or form stray into providing information that puts the case for one side of the referendum debate or the other, or even for both sides. It is not the Electoral Commission’s role to get into the issues and the arguments behind the debate. That is very much for the two campaigns, and I am pretty sure that both will be working very hard to ensure that they provide the electorate with the information that people need to make their decision”.

227. On the idea of the Commission including text from both sides in its own information material, the Deputy First Minister said that, if the campaigns were in favour of that approach, they would have to discuss it with the Electoral Commission.

228. The Committee also asked the Commission to comment on this idea. John McCormick confirmed it was “currently considering the merits of doing this” and would “consider the specific context of the Scottish referendum, including the views of campaigners and impact on voters, before reaching a decision”.

229. The Committee is very clear that the Electoral Commission should provide impartial information on the processes surrounding the referendum, and should not seek to provide information on the matters of substance that are at issue between the two sides. We are confident that the Electoral Commission understands this distinction, and that the Bill gives it adequate discretion in deciding how to promote understanding of the question in a manner consistent with its role.

Information from Governments about process following referendum

230. John McCormick explained that the work the Electoral Commission had done to test the referendum question revealed that people “wanted more information on the big issues, such as the economy, the monarchy, defence, immigration and citizenship, before they voted” and some also wanted to know more about what would happen after the referendum. He accepted that the Commission could not produce “genuinely neutral and authoritative information of the type that voters have expressed a desire for, but we believe that clarity on how the terms of independence will be decided would help voters to understand how the competing claims of the campaigns will be resolved.” Such information, if it could be agreed by the two Governments, “might include information on how negotiations would take place between the Governments, the timescales for those negotiations, and so on”. In a follow-up letter, Mr McCormick added that the Commission would expect any such joint position to be included in the leaflet it was planning to send to all households in Scotland, and in its public awareness campaign.

231. Yes Scotland and Better Together agreed with the Electoral Commission that the Scottish and UK Governments should make clear in advance what process

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184 Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, col 569.
185 The Electoral Commission, letter to the Convener, 21 June 2013.
would follow either a yes or no outcome. Blair Jenkins said that “the two Governments ought to be able to agree on and outline in very clear terms the process that would be followed, as the Electoral Commission suggested”.  

232. The Deputy First Minister confirmed that there was “on-going discussion between my officials and counterparts in the UK Government about what a statement of that nature might look like”. She thought there was a duty on both Governments to accept the Electoral Commission’s recommendation, and she offered to report back to the Committee when discussions had concluded.

233. The Committee acknowledges the Electoral Commission’s recommendation about providing voters with general information about the process that would be followed post-referendum, either in the event of a Yes vote or a No vote. We are encouraged to hear that the Scottish Government and the UK Government are discussing these matters, and would welcome further information about the nature of those discussions, and regular updates on progress.

**Information in alternative formats**

234. Bill Scott of Inclusion Scotland advocated the provision of information for voters in “Easy Read” format. Designed for people with learning impairments, it also worked well for people with low literacy levels and was “a really good way of communicating with the whole electorate”. Easy Read information helped, in particular, to avoid confusion and increase people’s confidence – “they do not want to look a fool in public, going into a polling station and not knowing what to do”.  

235. In response, the Electoral Commission stated “We routinely produce key voter information in Easy Read format and we would expect to make any voter information booklet we produce for the referendum available in that format.” It provided as an example its Easy Read information booklet from the 2012 Scottish council elections. The Commission said it also produced voter information in other accessible formats including British Sign Language, Braille, audio format and large print.

**Sections 22 and 23 (guidance and advice by Electoral Commission)**

236. Section 22 allows the Electoral Commission to issue guidance to the Chief Counting Officer, with the CCO’s consent to counting officers, and to permitted participants and others.

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188 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 483.
190 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 498.
191 Easy Read Booklet: http://www.scottish.parliament.uk/S4_ReferendumScotlandBillCommittee/Ref_15b_Example_of_Easy_Read_booklet.pdf
192 The Electoral Commission, written evidence.
237. The Electoral Commission noted that the Bill does not give the Chief Counting Officer power to issue guidance to counting officers, even though the CCO will be responsible for the overall conduct of the poll. The Commission therefore recommended that “a clear power for the CCO to issue guidance should be inserted in the Bill and the equivalent Commission power removed”. It said the Scottish Government had indicated that it was receptive to this suggestion; the Deputy First Minister confirmed that discussion on this point was on-going.\textsuperscript{193}

\textbf{Section 24 (report on conduct of referendum)}

238. Under section 24, the Electoral Commission must report to the Parliament on the conduct of the referendum “as soon as reasonably practicable after the referendum”.

239. The Law Society questioned whether this timetable was realistic given what it was required to report on, and the timescales for participants to make returns to the Commission on their referendum expenses.\textsuperscript{194}

240. However, the Commission didn’t think there was a problem, explaining that its equivalent report on the referendums that took place in March and May 2011 were presented in July of that year, while its “considered report, with issues arising and recommendations to the Parliament” was made in October.\textsuperscript{195} The Commission was discussing with the Scottish Government options for similarly reporting on the referendum in two stages and expected these discussion to conclude “fairly soon”.\textsuperscript{196}

241. Prof Wyn Jones said that the Electoral Commission’s report on the Welsh devolution referendum “was an exercise in self-justification – pure and simple” and it “made no real effort to think critically about its own role”. (9/5, col 350) Feedback from those involved included “a lot of critical noise about the Commission, particularly about how incredibly cautious and often opaque its responses to queries were”.\textsuperscript{197}

242. However, John McCormick said he was “quite surprised and a bit disappointed” by these comments. He explained that Commission reports were “based on externally verified data”, and had to “survive line-by-line scrutiny by the commissioners, who ensure that they are robust, independent and based on the right kind of data – as you would expect from a public regulator such as the Commission”.\textsuperscript{198} He said lessons had been learned from previous referendums, particularly about the need for proper planning and an adequate timescale from

\textsuperscript{193} The Electoral Commission, written evidence; Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, col 553.
\textsuperscript{194} The Law Society of Scotland, written evidence.
\textsuperscript{195} Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col 437.
\textsuperscript{196} Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, cols 437-8.
\textsuperscript{197} Scottish Parliament Referendum (Scotland) Bill Committee, 9 May 2013, Official Report, col 368.
\textsuperscript{198} Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col 435.
passing the legislation to polling day. Peter Horne added, as examples of lessons learned, the importance of pre-poll reporting to provide transparency about campaigners’ sources of funding, and the need to enable a lead campaigner to be designated on one side only, as a disincentive to tactical non-designation.\(^{199}\)

| 243. The Committee notes the evidence provided by the Electoral Commission, and would welcome further clarification about the reporting timescales the Commission expects to apply in this instance. |

**Section 30 (power to make supplementary etc. provision)**

244. Section 30 gives Ministers power to make further provision, in subordinate legislation, that is “supplementary, incidental or consequential” to the Bill, including provision to modify any enactment (including the Act resulting from the Bill). The exercise of the power is subject to the affirmative procedure – in other words, any instrument made under the power requires to be approved by resolution of the Parliament.

245. No to AV said that the powers in this section could, in theory, be used to re-write everything in the Bill before polling day. It argued that there should be a deadline beyond which the conduct rules could not change, to provide certainty for campaigners and election staff.\(^{200}\)

246. The Law Society of Scotland wanted Ministers to be required to consult on any subordinate legislation made under this provision.\(^{201}\)

247. The power is further considered under ‘delegated powers’.

**Section 31 (power to challenge result)**

248. Under this section, any judicial review application seeking to challenge the number of ballot papers counted or votes cast may only be brought within 6 weeks of when the relevant results are certified.

249. Richard Keen of the Faculty of Advocates noted that this time limit was half the three-month period used in other contexts – though he made clear that this was not a criticism.\(^{202}\)

250. Professor Mullen noted that the provision was similar to those in the legislation for the 2011 referendums on AV and Welsh devolution and in compulsory purchase and planning legislation.\(^{203}\) He felt that the six-week period struck an appropriate balance – the period should not be too short, as

\(^{199}\) Scottish Parliament Referendum (Scotland) Bill Committee, 23 May 2013, Official Report, col 436.

\(^{200}\) No Campaign Limited (No to AV), written evidence.

\(^{201}\) The Law Society of Scotland, written evidence.

\(^{202}\) Scottish Parliament Referendum (Scotland) Bill Committee, 9 May 2013, Official Report, col 347.

\(^{203}\) Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, col 398.
the information needed to mount a challenge might not be available immediately, but there was also a clear need to achieve finality about the result. Many things would follow from the outcome and “it would not be in the public interest to unpick all those things six months or a year later”.\footnote{Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, col 398.} Professor Neil Walker agreed, noting that “time is of the essence in this particular context”.\footnote{Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, col 398.}

251. Both Professors Mullen and Walker believed the purpose of the provision was simply to set a time limit for challenges on specific grounds, and not to restrict the right to judicial review more generally. In Professor Walker’s view, this section was not intended to be “a general ouster clause, which would exclude all other forms of judicial review. Even if it was intended as such, I do not think that it would necessarily have that effect”. However, he also felt that it was very unlikely there could be grounds of challenge other than those made subject to the six-week time-limit in section 31. One reason for this was that a referendum was different to an election, in that a referendum is a single, national poll. As such, the only thing that can really be challenged is the overall result; there is no intermediate option, as there is with an election, of challenging the result in a single constituency.\footnote{Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, cols 404-5.}

252. Both professors considered whether a challenge to the outcome could be brought on the grounds that statements made by one side or the other about the subject matter of the referendum were false. Professor Mullen felt that “the risk that people will make outrageous statements simply has to be combatted by non-legal means … any attempt to regulate the distinction between legitimate debate and unfair and false statements is not feasible”. Professor Walker agreed, saying that anyone who tried to regulate such debate would find their neutrality compromised.\footnote{Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, col 402.}

253. Professor Mullen also noted that recent case law had established that people could bring judicial review proceedings on public-interest grounds in Scotland, as they have long been able to do in England, without having to establish a direct personal interest – but this remained very unlikely in relation to the referendum result, given the costs of bringing such a challenge and the risk of having to pay the costs involved if the challenge was unsuccessful. Any such challenge was more likely to come from one of the campaign organisations, which already had enough “personal interest” and would not need to establish a public interest as well.\footnote{Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, col 398 and 400.}

254. For the Scottish Government, Graham Fisher explained that the time-limit set by section 31 applied only to challenges brought in relation to the counting of the votes cast. There was no fixed time limit for judicial review on other
grounds, and the likelihood of any challenge succeeding would depend on the particular circumstances. The Deputy First Minister added that the Bill aimed to replicate restrictions imposed in previous legislation without “fettering the normal right of access to judicial review”, but it would be “reasonable to consider whether the provision is as tightly drawn as it should be”.209

Section 32 and schedule 8 (interpretation – meaning of “referendum period”)

255. Schedule 8, introduced by section 32, defines various words and expressions used in the Bill. One of these is “referendum period”, which is defined as a 16-week period ending on the date of the referendum. This term describes the regulated period during which permitted participants are subject to the various controls on their spending and corresponding obligations to report to the Electoral Commission.

256. The Committee considered some evidence on whether this was an appropriate duration for these controls to apply.

257. Willie Sullivan wanted the referendum period to be “as long as practicably possible” given that only expenditure during that period was covered by the spending limits, while ERS Scotland wanted the referendum period to begin “as soon as possible after the Bill receives Royal Assent”.210

258. For the Law Society of Scotland, the issue was about the effectiveness of spending limits that apply only during a 16-week period: “As a control on expenditure this is not effective as expenses are currently being incurred without such controls.”211 Similarly, Navraj Singh Ghaleigh felt that the obvious risk of regulating only a 16-week period was that “campaigners could ‘front load’ their expenditure in order to avoid the strictures of the Bill”.212 The STUC also warned that there was “an obvious potential for any inequality of arms in relation to the funding of campaigns to be manifested in the lead up to rather than during that period”.213

259. Professor Walker acknowledged that campaigning for and against independence was already happening – “it is an issue that has been bubbling under in Scottish politics for many years” – but he felt that trying to regulate campaigning “from day 1 ... would be a minefield”. He concluded it would be better to leave things as they are, “although a period of 16 weeks is perhaps a bit too short”. However, he also recognised that extending the period would have the complication of overlapping with the European Parliament elections in May 2014.214

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210 Electoral Reform Society Scotland, written evidence.
211 The Law Society of Scotland, written evidence.
212 Navraj Singh Ghaleigh, written evidence.
213 STUC, written evidence.
260. Peter Horne from the Electoral Commission explained that “there is an interlinked relationship between the amount of money that people are allowed to spend and the period of time that is set, so if you were to unpick one you would probably have to unpick the other … the limit of £1.5 million for lead campaigns essentially comes down to a few pence per voter per week. As we extend the regulated period, we start to push that and make it tighter”. Overall, the Commission view was that “16 weeks was a sufficient time for people to build up to a campaign and put their arguments to voters”; there was an argument for extending the period slightly, but he was not convinced.\textsuperscript{215}

261. Better Together agreed with the Electoral Commission’s view that extending the regulated period would affect spending limits. “It would be kind of unpicking things, which we would not recommend”. Yes Scotland said that the “The difficulty of having a longer regulated period is that it would overlap with the European elections next year … we have ended up in the right place, and I am not concerned about the 16 weeks”.\textsuperscript{216}

262. A related issue raised in evidence was that the Bill, in common with established election and referendum practice, did not seek to control the activities of central government or public authorities throughout the 16-week period, but only during the final 28-day purdah period (under paragraph 25 of schedule 4).

263. One witness, Nigel Smith, said that “both governments will be regulated for the first three months of the referendum not by this Bill but ministerial codes and public outcry. And for the last month, by a referendum Commission with few tools in the Bill and its own uncertain will. This is no regulation of government at all”.\textsuperscript{217}

264. The Deputy First Minister noted that a wide range of public bodies – including the Scottish Legal Aid Board, the Scottish Information Commissioner and the Scottish Police Services Authority – fell into the category of bodies that were restricted by the purdah rules but unregulated in the rest of the referendum period. However, she strongly rejected any suggestion that they would behave inappropriately: “Public authorities do not operate in a political way, and they will not do so during the regulated period any more than they do now.” To suggest that such bodies would be “out there campaigning for either side in the referendum … stretches credibility”, she said, adding that the Scottish Government would be issuing guidance to relevant public bodies, and offered to provide a draft to the Committee.\textsuperscript{218}

265. The Committee accepts that 16 weeks is an appropriate length for the regulated period, particularly as altering this would call into question other matters, such as spending limits and the purdah period. We recognise that this

\textsuperscript{216} Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 485.
\textsuperscript{217} Nigel Smith, written evidence.
\textsuperscript{218} Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, col 563-6.
means that a lot of campaigning activity is not subject to the formal restrictions in the Bill, and we welcome the extent to which the two campaigns have already committed themselves to a degree of transparency.

266. The Committee recognises that for most of the regulated period, public bodies will not be formally restricted by the Bill’s provisions. We accept, however, that there are conventions in place about how such bodies behave. The Committee would wish to have early sight of the Scottish Government’s proposed guidance to those public bodies for which it is responsible – and any equivalent guidance that the UK Government plans to issue to those bodies dealing with reserved matters.

EVIDENCE AND CONCLUSIONS ON OTHER ISSUES

Grants to campaigners

267. During its Stage 1 inquiry, the Committee heard some evidence on other issues not directly covered in the Bill. One of these concerned the lack of provision for any public grants to lead campaigners, as had been provided in some cases.

268. No to AV said the provision of grants to campaigners had been a key recommendation of the Committee on Standards in Public Life. However, it said that the grants available in other recent referendums could not be used to cover the cost of preparing campaign broadcasts or free-post mailings. Its view was not just that grants (capped at £150,000 for each designated organisation) should be available, but that the campaigns should be able to use them to reimburse up to half of their costs in relation to broadcasts and mailshots, to help ensure that the public receives a minimum level of information from both sides.\(^\text{219}\)

269. In oral evidence, William Norton explained that the grants available to the AV campaigns in 2011 could only be used for things like computers, which was not particularly useful. However, No to AV had had to commit, in advance of being designated, to spending around £1 million on TV broadcasts and leaflets: “in effect I bet my house on being able to raise the moneys”.\(^\text{220}\)

270. Prof Wyn Jones agreed that, in Wales, “there was money available to pay for stuff that people did not need to pay for” such as computers, whereas the things they needed to pay for, such as leaflets and broadcasts “was all stuff that the campaigners could not spend money on” – making the money “pointless, in a sense”.\(^\text{221}\)

271. Willie Sullivan (Yes to Fairer Votes) also regretted the lack of provision for grants in the Bill, saying it “would be an additional improvement”. In particular, he felt that those arguing for the status quo would have “a huge advantage” in

\(^{219}\) No Campaign Limited (No to AV), written evidence.
\(^{220}\) Scottish Parliament Referendum (Scotland) Bill Committee, 9 May 2013, Official Report, col 351.
\(^{221}\) Scottish Parliament Referendum (Scotland) Bill Committee, 9 May 2013, Official Report, col 367.
securing donations from vested interests – and described this as “a good reason for having a public grant”. 222

272. Nigel Smith also favoured grants, mainly as an alternative to requiring the Electoral Commission to provide unbiased information about the referendum question. He said the Scottish Government seemed to see grants “as a random and superfluous use of public money rather than an integral part of the solution”. 223

273. Navraj Singh Ghaleigh described the absence of public funding as an “oddity”, saying the benefits included “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”. He said that almost all previous UK referendums had provided public funding and those that have not have justly criticised”. 224

274. ERS Scotland said the lack of public funding set “an unwelcome precedent”. Combined with strict spending limits, grants could “limit the extent to which large donors could be seen to influence or curry favour with politicians and political parties”, it claimed – but it accepted that grants would not be provided for this referendum. 225

275. However, Professor Walker was sceptical about public grants being required in the circumstances of the referendum, saying “I can imagine situations in which one might be extremely concerned about the asymmetry of resources between the two sides and one might want to do certain things such as provide public funding as a way to resolve that. I might be naïve, but I do not think that we are in that situation … I do not see this as a situation in which millionaires can buy the result.” 226

276. Yes Scotland said it was not seeking a grant, adding: “There is no need for public funding for this referendum and absolutely no public appetite for it”. 227

277. Better Together noted “it seems that the issue of grants to designated organisations is most important when either the issue in the referendum is not emotive enough for campaigns to successfully raise funds or when, as happened in the recent Welsh Referendum on additional powers, there is doubt over whether a campaign to argue the case for one side of the referendum will exist. Clearly neither of these seems to be the case with the referendum”. 228

278. The Committee agrees with the Scottish Government’s policy of not providing grants from public funds to the two campaigns. We are confident that the two...

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223 Nigel Smith, written evidence.
224 Navraj Singh Ghaleigh, written evidence.
225 Electoral Reform Society Scotland, written evidence.
227 Yes Scotland, written evidence.
228 Better Together, written evidence.
sides are capable of raising the funds they need in other ways, and that a lack of grants will therefore not compromise the public’s ability to make a well-informed decision.

Electoral timetable and index of conduct rules

279. The Bill sets out a number of timescales and deadlines for the preparation and holding of the referendum, and the various steps that it requires or permits campaigners and others to take. The Committee’s adviser (Iain Grant) helpfully prepared a list of these, showing for each one the dates on which deadlines fall, or periods begin and end.\(^{229}\)

280. Mary Pitcaithly of the Electoral Management Board felt that including a timetable in the Bill would be “helpful for administrators” to ensure that “everybody has a clear understanding of all the dates”.\(^{230}\) Gordon Blair agreed, saying that such a timetable “aids understanding of the legislation and minimises the time taken to apply it”. Although he acknowledged a timetable was “cosmetic”, he felt it was “a useful and practical tool”.\(^{231}\) Mr Blair added that an index or contents for the conduct rules in schedule 3 would be normal in electoral legislation and it would aid understanding to have a similar “quick reference” in the Bill.\(^{232}\)

281. A related question concerned whether the Bill should provide for days of public thanksgiving or public mourning to be disregarded in the calculation of certain key dates. The Electoral Management Board raised this as an issue in relation to the cut-off date for registering to vote (paragraph 18 of schedule 2), pointing out that the Bill was inconsistent with legislation for local government elections. Similarly, the Law Society of Scotland questioned why such days were not excluded in calculating the deadline for giving notice of the referendum (Rule 1(2) of schedule 3), contrasting this with the legislation for the 2011 AV referendum, and the deadline for appointing polling and counting agents (Rule 14(5)). In oral evidence, Brian Byrne said that such days should be treated in the same way as Saturdays, Sundays and public holidays – that is, as days disregarded in the calculation of timescales. The problem was that such a day could be announced at short notice, leading to unanticipated changes to the dates on which certain deadlines fall. However, as Mr Byrne pointed out, should the days affected include the date of the referendum itself, there was provision in the Bill to defer the referendum to a later day (section 1(6)).\(^{233}\)

\(^{229}\) The timetable of key dates is available on the Committee’s web-page: http://www.scottish.parliament.uk/S4_ReferendumScotlandBillCommittee/Ref_key_dates.pdf


\(^{231}\) Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, col 380.


\(^{233}\) Scottish Parliament Referendum (Scotland) Bill Committee, 16 May 2013, Official Report, cols 394-6.
282. The Deputy First Minister said the Bill followed precedent from the 1997 devolution referendums, but that the point would be discussed with electoral administrators.  

283. The Committee sees merit in the suggestion that a timetable and index be included in the Bill to provide clarity for electoral administrators. On the issue of disregarding days of public thanksgiving or public mourning, the Committee notes that the Scottish Government is considering this further and asks it to clarify its position as soon as possible.

Encouraging participation and raising awareness

284. A major issue for the Committee throughout its inquiry was establishing from witnesses how all those people who would be entitled to vote could, in practice, be made aware of their right to vote and how to do so, and how active engagement in the debate about the independence question can be encouraged at all levels of society.

285. Blair Jenkins said that Yes Scotland would be ―involved with the Electoral Commission—and, I am sure, with Better Together—in any initiative that is aimed at building voter awareness, building public awareness and ensuring a high level of participation. Separately from that, we will do our own things to try to secure greater participation and turnout.‖

286. John Downie of the SCVO noted concerns about the low turnout at recent elections, saying it was ―clear that many of our citizens are disengaged from the democratic process or politics itself‖. It had recently held a round-table session with both of the campaign groups, academics, third sector organisations and others to discuss how this problem could be addressed. The answer, he felt, was not about providing information or raising awareness of the referendum, but about giving local people an opportunity to discuss the issues that matter in their communities. This would be a bottom-up rather than top-down approach:

“We and the STUC believe that the UK and Scottish Governments need to think about how to facilitate that process, for instance by setting up a fund that community organisations can access in order to set up a series of discussions.‖

287. Bill Scott of Inclusion Scotland took a similar view, saying there was “a serious degree of disengagement among a lot of people in our most deprived communities and in particular marginalised groups, such as disabled people‖. For him, the main challenge was to make people realise that it related to something that was relevant to their lives. What was required was “active participation and drawing people into the process rather than just letting things flow and hoping that people turn up on the day‖. People in deprived communities were likely to be unsung heroes of the campaign.

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234 Deputy First Minister, Letter to the Convener of the Referendum (Scotland) Bill Committee, 22 June 2013.
235 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 482.
236 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, cols 493-4 and 496.
communities “need to know what the referendum means to their everyday lives, to make it real for them”.237

288. Euan Page of the EHRC agreed, noting that a key conclusion from the SCVO’s round-table meeting was “the idea that, if we want people to engage in debate about the constitution, the last thing that we want to talk about is the constitution”. People were “utterly disengaged from the language and arguments of high constitutional politics” – what was needed was to start with what exercises people – for example, practical problems with the delivery of key public services that they rely on in their personal and family lives.238 (30/5, col 509)

289. Willie Sullivan, from Yes to Fairer Votes, also suggested “giving public money to a process of citizens’ engagement and awareness raising”. For him, the problem was that the campaigns had an electoral incentive to “exaggerate, mislead and misinform voters”, while the political parties faced a loss of legitimacy.239 240

290. Professor Aileen McHarg said that there were “all sorts of reasons why people in deprived communities do not register” to vote – including “fear of being on the register and the publicity that comes with that”. She felt that people were being “turned off by the way in which the debate is currently being conducted”; what was needed was engaging people in a serious way that does not necessarily require jazzy videos and gimmicks”.241

291. Bill Scott agreed on the point about non-registration, adding that a lot of the fear dated back to the 1980s, when people got into the habit of not registering in order to avoid paying the poll tax (community charge).242

292. The SYP said that “information on registering and the voting process, together with impartial information on the issues, should be distributed online, through apps and text messaging”. However, it “would not support designated organisations and political parties producing referendum teaching materials for schools”.243 Kyle Thornton MSYP told the Committee that the referendum had engaged young people’s interest in a way that party politics did not. He said it was “for the campaigns to make the case and for the third sector to help to provide the forum for, and access to, the debate”. He said the SYP could help to mediate debates involving young people, while there was also a need to target groups “that find it harder to engage in the debate” – noting that “a lot of the debate in the media is very detailed and for a lot of people, it just goes over

238 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, col 509.
239 Willie Sullivan (Yes to Fairer Votes), written evidence.
241 Scottish Parliament Referendum (Scotland) Bill Committee, 30 May 2013, Official Report, cols 496 and 508.
243 Scottish Youth Parliament, written evidence.
their heads”. Mr Thornton’s particular concern was that awareness-raising and engagement efforts could be wasted if people did not realise that they needed to be registered in advance, and found themselves unable to vote on the day.  

293. In this context, there was some discussion among witnesses about the role of the Electoral Commission in raising awareness among the public. Most of the participants in the Committee’s round-table session had already had some engagement with the Commission. Euan Page of the Equality and Human Rights Commission said there was an on-going dialogue, but that the two bodies had “not had a sustained conversation thus far”. John Downie of SCVO said it always talked to the Electoral Commission, and had already invited it to its own round-table discussions. Kyle Thornton praised the Commission for its website and videos on voter registration, but felt the Commission needed to do more to engage directly with young people, including through the SYP. 

**Manner of voting**

294. While the Bill provides for voting to be done in the traditional manner – by marking a cross on a ballot paper (either in person or by proxy) or voting by post – the Committee did hear some evidence on other methods that could be used.

295. Kyle Thornton MSYP advocated greater use of electronic rather than paper communication, for example, using text messages to remind people shortly beforehand that the poll is taking place and where the nearest polling station is. He did not think most young people would mind giving out their phone numbers or e-mail addresses for that purpose.

296. Colin Borland of the Federation of Small Businesses added that moving to smarter ways of voting – although it wasn’t going to happen for the referendum – could have benefits for business by avoiding “the rather bizarre process of closing down primary schools, which means that working parents have to make alternative arrangements for childcare” – with all the knock-on costs on employees and employers.

**Data protection implications**

297. The Committee invited Ken Macdonald of the Information Commissioner’s Office (ICO) to comment on the data protection implications of the Bill and his office’s role in relation to the referendum.

298. According to Mr Macdonald, it was part of the ICO’s role to give guidance to parties and campaigners in elections, and it also took enforcement action for...
breaches of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR), which “covers telephone marketing, spam texting and so forth”. It had already written to Better Together and Yes Scotland “to remind them of their obligations”, and planned also to work with the Electoral Commission, so that issues raised by PECR were covered in the Commission’s guidance to political parties.

299. Mr Macdonald also explained that the ICO had its own monitoring and compliance powers under the Data Protection Act 1988, and could take action if public complaints were made to it. It would be working with the Electoral Commission to ensure the public were aware of the ICO’s role in enforcing the data protection legislation.

300. In relation to the Bill, Mr Macdonald did not have any particular data protection concerns, describing the provisions to protect children and anonymous voters as “quite reasonable” and as appearing to “fit in with the data protection legislation”. Overall, he was “pleased that, in this Bill and in the Franchise Bill, data protection has been taken very seriously”.

301. The Committee requests the Information Commissioner’s Office to provide a copy of its guidance in relation to the PECR Regulations as soon as possible.

Equalities

302. Equalities issues arose at various points during the Committee’s inquiry, including in relation to the use of Gaelic on the ballot paper (schedule 1), and the assistance available to blind and disabled voters (rules 22 and 23 of schedule 3), considered earlier in the report.

303. Inclusion Scotland pointed out that the Scottish Government and the Parliament have a duty, under article 29 of the UN Convention on the Rights of Disabled People, “to ensure that disabled people are enabled to participate equally in political life”. It said that barriers to participation included the physical accessibility of polling stations, and the need to provide electoral information in appropriate formats, such as British Sign Language, and in language suitable for those with learning difficulties. On a similar theme, Glasgow Council for the Voluntary Sector (GCVS) suggested that “an easier to read guide” should be made available by around April 2014, accompanied by a publicity campaign, to allow time for learning providers to work with the individuals it was aimed at.

304. During the Committee’s round-table evidence session on 30 May, it was suggested that the Electoral Commission had the power to order returning officers to make improvements to the accessibility of polling places. The Commission clarified that this was a very specific power which only applied in relation to statutory reviews of polling districts and places. The Commission also

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249 Inclusion Scotland, written evidence.
250 Glasgow Council for the Voluntary Sector, written evidence.
said it provided guidance for returning officers on meeting their accessibility standards, but did not have any powers to enforce compliance. However, the Commission believed that returning officers were subject to the Equality Act 2010 and had a duty to make reasonable adjustments to ensure that people with disabilities were not put at a substantial disadvantage.\footnote{The Electoral Commission, further supplementary written evidence.}

305. The Electoral Commission said it provided “tailored information” for organisations working with disabled people. The Commission’s experience was that “this work is most effective when undertaken in the period immediately prior to any poll, which is when most voters start to think about the voting process and when the accessible resources are available for them to access.” It aimed to provide more detail on its approach to public awareness before the summer recess.\footnote{The Electoral Commission, further supplementary written evidence.}

306. The Committee has no particular recommendations to make on the equalities issues raised in relation to the Bill.

Financial implications

307. Under Rule 9.6.3 of Standing Orders, the Committee is required to report on the Bill’s Financial Memorandum. This estimates the cost of running the referendum at around £8.6 million, with other costs associated with the referendum – including the cost of free campaign mailshots and costs incurred by the Electoral Commission – amounting to a further £4.7 million, making a total of £13.3 million. This does not include the estimated £358,000 directly attributable to those provisions in the Franchise Bill that extend the franchise to 16 and 17-year olds.

308. The Financial Memorandum explains that the £8.6 million figure is based on the Electoral Commission’s estimate (from its report on the 2011 referendum on the alternative vote system for House of Commons elections) of the cost of a stand-alone referendum in Scotland (£8.4 million), and is less than the £10.3 million set aside for the 2011 Scottish Parliament elections (had they been taken in a separate poll).

309. The Finance Committee issued a call for evidence and considered the Bill’s Financial Memorandum at its meeting on 29 May where it took evidence from the Scottish Government bill team as part of its scrutiny. The officials explained to the Finance Committee that the Bill’s costs are separated into four broad categories: “the costs of running the referendum; the costs of funding the Electoral Commission to oversee and regulate the referendum campaigns and report on the conduct of the referendum; the publicity costs incurred by the commission in fulfilling its duty to provide information to voters about the referendum; and the costs of allowing the two campaign organisations a free mailshot to every voter or household in Scotland”.\footnote{Scottish Parliament Finance Committee, 29 May 2013, Official Report, col 2682.} The Committee asked for clarification on a number of areas: the Chief Counting Officer’s costs, the Fees and Charges Order, comparison of costs with other elections and referenda,
household communication versus individual letters, postal votes, margins of uncertainty, Electoral Commission costs, Electoral Management Board costs, cost of producing ballot paper in Gaelic, overnight counting costs, and costs associated with 100% checking of postal votes.

310. The Deputy First Minister told the Committee she was satisfied that the estimates in the Financial Memorandum were accurate. At the time the draft bill was published in 2010, the cost of the referendum was estimated at £10 million, and the current estimate was £8.6 million for the referendum itself, plus £4.7 million for the Electoral Commission’s costs and the cost of free mailshots. The Electoral Commission’s experience in overseeing the AV referendum in 2011 had enabled “much more accurate” estimates to be made for its costs, while the estimated costs of free mailshots now reflected the PPERA approach of allowing mailshots to be sent to each elector, and not just to each household.\(^\text{254}\)

| 311. The Committee notes the issues raised by respondents and the oral evidence provided by Scottish Government officials to the Finance Committee. We are content with the level of detail provided in the Financial Memorandum and that discussions are continuing with the key organisations to refine costs where possible. |

Policy Memorandum

312. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the policy memorandum which accompanies the Bill.

313. The Committee considers that the memorandum provides adequate detail on the policy intention behind the provisions in the Bill and explains why alternative approaches considered were not favoured.

Delegated Powers

314. There are four delegated powers in the Bill:

- in section 1, a power, by order, to appoint a later day for the referendum, and to make supplementary or consequential provision (including modifications of enactments) – any such order to be subject to the affirmative procedure

- in section 8, a power, by order, to set maximum amounts for the charges and expenses that counting officers can recover from the Scottish Government, and to make incidental and supplementary provision – any such “fees and charges order” not to be subject to any Parliamentary procedure

- in schedule 6, paragraph 16, a power, by “supplementary order”, to make provision fleshing out the detail of the civil sanctions regime (including fixed monetary penalties, enforcement undertakings, extensions of time for

\(^\text{254}\) Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, cols 575-6.
criminal proceedings, and appeals) or making other supplementary, consequential or incidental provision – any such order to be subject to the affirmative procedure if it relates to certain aspects of the civil sanctions regime or amends an Act, otherwise to be subject to the negative procedure; and (in either case) only to be made after consulting the Electoral Commission and other appropriate parties

- in section 30, a general power, by order, to make supplementary, incidental or consequential provision, including modifications of enactments – any such order to be subject to the affirmative procedure.

315. The Delegated Powers Memorandum (DPM) explains that the power in section 8 is not expected to be used, but is there as a fall-back to deal with unforeseen circumstances; that the power in section 8 is modelled on established provision in electoral legislation; that the power in schedule 6 is replicated from PPERA; and that although there are no current plans to use the power in section 30, it is there to deal with any changes to the referendum legislation that may be needed, for example if UK electoral law changes in the interim.

316. The DPM also notes that the Bill delegates other powers, to the Chief Counting Officer and to the Electoral Commission, that are of an executive rather than a legislative nature, including powers to give directions, issue guidance and prescribe forms.

Scrutiny by Delegated Powers and Law Reform Committee

317. The Delegated Powers and Law Reform Committee (when it was known as the Subordinate Legislation Committee) considered the Bill at its meetings on 16 April and 14 May. The Committee determined that it did not need to draw the attention of the Parliament to the powers in sections 1, 8 and 30. On the schedule 6 power, the Committee sought and obtained further explanation from the Scottish Government and, although it was largely satisfied, it recommended that it should be mandatory, rather than optional, for Ministers to specify (by supplementary order) a maximum amount for the “non-compliance penalties” that the Electoral Commission is able to impose on anyone who has breached the campaign rules and then failed to comply with an initial requirement or undertaking.

Committee’s consideration

318. This Committee, too, has considered the delegated powers carefully. We note in particular, that the powers delegated by sections 1 and 30 include power to modify enactments, including the Act resulting from the Bill. Such powers, often referred to as Henry VIII powers, can be controversial and merit particular justification. Nevertheless, in both cases, we are content that they are justified.

319. The delegated power in section 1 is very limited in scope and it is clearly important to have a reserve power to defer the referendum should unexpected events make it impossible or impractical to hold the poll on the planned date.

320. The delegated power in section 30 is very much wider in scope, and could in theory be used to make substantial changes to the legislation even at a late
stage in the process. However, there is no realistic prospect of this, given the need for advance certainty about how the referendum arrangements will work, and a shared interest by all campaigners in ensuring that those arrangements are seen to be fair and balanced. The key point is that the referendum is a one-off event, for which complex and detailed provision is required – so it is reasonable to ensure that there is a mechanism that can be used to correct any problem that emerges in the run-up to the poll. Given that rationale, we accept that the powers delegated to Ministers must be wide enough to deal with whatever issue may arise; and that setting a time-limit on when it may be exercised, or requiring prior consultation, could compromise the purpose of delegating the powers in the first place. For these reasons, we are content with the section 30 powers.

321. Finally, we note the recommendation of the Delegated Powers and Law Reform Committee on the schedule 6 powers and invite the Scottish Government to indicate whether it is prepared to amend the Bill accordingly.

GENERAL PRINCIPLES OF THE BILL

322. The Committee is confident that its Stage 1 inquiry has enabled this important Bill to be subject to a wide-ranging and robust scrutiny process. Inevitably, as with any large and complex piece of legislation, there are some aspects of the Bill that require adjustment, and other points on which clarification is needed. Overall, however, the Committee is confident that this Bill should provide a suitable framework for next year’s referendum.

323. **On this basis, the Committee recommends to the Parliament that the general principles of the Scottish Independence Referendum Bill be agreed to.**
ANNEXE A: REPORTS FROM OTHER COMMITTEES

Subordinate Legislation Committee

29th Report, 2013 (Session 4)

INTRODUCTION

1. At its meetings on 16 April and 14 May 2013 the Subordinate Legislation Committee considered the delegated powers provisions in the Scottish Independence Referendum Bill at Stage 1 (“the Bill”). The Committee submits this report to the Referendum (Scotland) Bill Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

OVERVIEW OF THE BILL

3. The Scottish Independence Referendum Bill was introduced in the Scottish Parliament by the Scottish Government on 21 March 2013.

4. This Bill is the second of the two Bills which will provide for a referendum to be held on the independence of Scotland from the rest of the United Kingdom. The first Bill (already considered by the Committee) provides the rules for who will be entitled to vote in the independence referendum. This Bill sets out the practical arrangements for the holding of the referendum.

5. In the consideration of the DPM at its meeting on 16 April, the Committee agreed to write to Scottish Government officials to raise a question on the delegated powers. This correspondence is reproduced at the Annex.

DELEGATED POWERS PROVISIONS

6. The Committee considered each of the delegated powers in the Bill.

7. The Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

   - Section 1: Referendum on Scottish Independence
   - Section 8: Expenses of Counting Officers
   - Section 30: Power to make supplementary etc. provision and modifications

8. The Committee’s comments and, where appropriate, recommendations on the other delegated power in the Bill is detailed below.
Schedule 6 paragraph 16: Supplementary orders: general

Power conferred on: Scottish Ministers
Power exercised by: Order
Parliamentary procedure: Affirmative or negative depending on type of order

9. Schedule 6 contains a civil sanction regime which allows the Electoral Commission to impose certain sanctions in connection with its role in monitoring and securing compliance with the campaign rules set out in the Bill. Paragraph 16 provides that the Scottish Ministers may make “supplementary orders” in relation to this regime. The provision of such orders may make transitional, consequential or incidental provision. In addition various matters throughout the schedule may be “prescribed” by the Scottish Ministers in a supplementary order. The scope of such provision and its significance in the context of the overall scheme varies.

10. Supplementary orders may also modify legislation. The procedure which would apply to an order depends on its content. Any order which amends primary legislation would be subject to the affirmative procedure as would any order which prescribes the offences to which fixed penalties, discretionary requirements, stop notices or enforcement undertakings apply or the amount of fixed penalties. Other supplementary orders are subject to the negative procedure. The DPM advises that the scheme is directly replicated from that which is applied in relation to UK elections under Schedule 19C to the Political Parties, Elections and Referendums Act 2000.

11. No justification was given in the DPM for taking these delegated powers beyond the statement that this is the practice in relation to UK elections. That said the Committee does not consider this is to be an unusual or unreasonable use of delegated powers. Since the independence referendum is a one off event it could perhaps have been possible to fix the remaining details of the civil sanction regime at this point based on current practice in UK elections. However, the Committee considers that it is also reasonable to take the view that these matters are not of sufficient priority that would require them to be worked through at this point, or to require the detailed parliamentary scrutiny that placing them in the Bill would engage. The Committee recognises that it would also be sensible to have a means of fine tuning these requirements should the need arise without having to resort to further primary legislation.

12. The Committee is therefore content with the delegation of the powers set out in schedule 6 in principle.

13. The Committee agrees that orders which amend primary legislation or those which specify relevant offences to which the various elements of the scheme apply should be subject to the affirmative procedure. The same reasoning applies to orders which set the amount of the fixed monetary penalty since this is an issue of substance.
14. The Committee queried whether the correct level of scrutiny was to be applied to two matters which could be made by supplementary order. The DPM simply states that “other uses of the power are likely to be administrative or technical in nature” and therefore the negative procedure is appropriate.

15. Under paragraph 2 of the schedule a supplementary order may prescribe the amount of the payment which a person may pay in order to discharge their liability under a notice of intention to impose a penalty. Similarly in paragraph 9 there is a power to prescribe the maximum and minimum amounts of a non-compliance penalty. Both are subject to the negative procedure.

16. The Committee also notes that if no maximum or minimum amounts are specified using the power in paragraph 9 then the Commission will have a complete discretion over the amount of the non-compliance penalty to be charged in any individual case. The Committee does not consider it appropriate for the Commission to be delegated such discretion, considering that control over the range of such penalties a matter which the Parliament should be able to scrutinise.

17. The Committee sought clarification from the Scottish Government as to why the negative procedure was appropriate in each case. The Government repeats that it has mirrored the approach taken to elections and referendums under the Political Parties, Elections and Referendums Act 2000. It also advises that the amount payable to discharge a penalty is less significant than a fixed monetary penalty since it cannot be a greater sum. The power to set the minimum and maximum amounts of the non-compliance penalty which can be imposed by the Commission under paragraph 9 were also considered to be less significant than identifying the circumstances in which the penalty may be payable.

18. The Committee welcomes this clarification and is content with the scrutiny procedures applied in the light of it.

19. The Committee is content with the powers to make supplementary orders in schedule 6 with the following exception. The Committee considers that the delegation of the non-compliance penalty powers to the Commission should be subject to a maximum amount. It therefore recommends that the setting of the maximum amount should be mandatory rather than discretionary.

ANNEX

Correspondence with the Scottish Government

Thank you for the Committee’s letter of 16 April 2013. The Committee asks the Scottish Government:

“Schedule 6 contains a civil sanction regime which allows the Electoral Commission to impose certain sanctions in connection with its role in monitoring and securing compliance with the campaign rules set out in the Bill. Paragraph 16 provides that the Scottish Ministers may make “supplementary orders” in relation to this regime. The provision of such orders may make transitional, consequential
or incidental provision. In addition various matters throughout the schedule may be “prescribed” by the Scottish Ministers in a supplementary order.

The Committee asks the Scottish Government:

- to explain why the negative procedure is a suitable level of scrutiny for prescribing the amount payable under an offer to discharge liability for a fixed monetary penalty under paragraph 2 or the minimum and maximum amounts of a non-compliance penalty under paragraph 9 when the affirmative procedure is considered appropriate for the scrutiny of fixing the amount of a fixed monetary penalty.”

As the Committee are aware, the intention behind schedule 6 to the Bill is to replicate insofar as appropriate the civil sanctions regime in and under Schedule 19C to the Political Parties, Elections and Referendums Act 2000.

The Scottish Government considers that negative procedure is appropriate for the two powers the Committee mentions for the following reasons.

- Setting the amount payable to discharge liability for a fixed monetary penalty under paragraph 2 of schedule 6 against fixing that penalty under paragraph 1(3), fixing the penalty is considered more significant as it prescribes the overall penalty which can be imposed. The amount which can be paid to discharge the liability as part of the procedure by contrast must be less than or equal to the penalty. Negative procedure is thought suitable for the discharge amount as a result.
- On maximum or minimum limits on the penalty under paragraph 9 for non-compliance with a non-monetary discretionary requirement, the offence or restriction or requirement in the campaign rules for which such a penalty can be imposed is subject to affirmative procedure under paragraph 5. The Commission could not impose a non-compliance penalty without such affirmative provision by Order having been made. Where Parliament approves the use of discretionary requirements, it is considered important that the Commission has robust sanctions to underpin compliance with the enforcement regime, by allowing the Commission to set (an open) amount payable in paragraph 9(2) itself – the schedule would operate in the absence of any supplementary order setting maximum and minimum limits. In addition, there is a power to appeal a notice served under paragraph 9 if the amount is thought to be unreasonable. In this context the negative procedure is considered appropriate for setting or changing the financial value of the range of that penalty.

The equivalent powers under the 2000 Act take the same procedures, affirmative and negative, at Westminster. However, in practice, each of the powers under the 2000 Act were exercised in a single instrument (S.I. 2010/2860) combining affirmative and negative procedures; the Scottish Government at present proposes to take a similar approach, subject to consultation with the Electoral Commission as required by paragraph 17 of schedule 6. It was however considered appropriate to set the procedures for making provision under the powers the Committee mentions for the reasons noted.
The Finance Committee took oral evidence from Scottish Government officials on the Scottish Independence Referendum Bill’s Financial Memorandum (FM) at its meeting on 29 May. The Committee raised a number of issues in relation to the FM and agreed to refer the Official Report of the evidence session to the lead Committee for consideration in advance of its oral evidence session with the Deputy First Minister on 13 June.

The Official Report can be accessed via the link below:


The Finance Committee will give no further consideration to the Bill’s FM.

Kenneth Gibson MSP
Convener
31 May 2013
ANNEXE B: EXTRACTS FROM THE MINUTES OF THE REFERENDUM (SCOTLAND) BILL COMMITTEE

6th Meeting, 2012 (Session 4), Thursday 29 November 2012

Proposed Government Bills: The Committee provisionally agreed to seek approval for the appointment of an adviser or advisers in connection with scrutiny of forthcoming Government Bills and to consider a shortlist of candidates in private at its next meeting.

7th Meeting, 2012 (Session 4), Thursday 13 December 2012

Proposed Government Bills: The Committee gave preliminary consideration to its approach to scrutiny of proposed Government Bills. It agreed to write to the Deputy First Minister seeking more detail on the proposed "paving Bill" and the main Referendum Bill, and on the expected timescales. It also agreed to take some general evidence ahead of introduction of the proposed Bills from those with experience of electoral administration, particularly where a lower minimum voting age has been applied.

Proposed Government Bills (in private): The Committee considered a list of candidates for the post of adviser. It agreed in principle to appoint one adviser on the practical and technical aspects of the proposed legislation, but to allow more time for further candidates to be identified, and one adviser on the legal and constitutional aspects, subject to confirmation of the availability of its preferred candidate.

1st Meeting, 2013 (Session 4), Thursday 17 January 2013

Work programme: The Committee considered correspondence from the Deputy First Minister and the implications for its timetable for scrutiny of proposed Government Bills. [...] The Committee agreed to write to the Deputy First Minister to seek further explanation of her preferred timescale for Stage 3 of the referendum bill.

Proposed Government Bills (in private): The Committee agreed a ranked list of candidates for appointment as adviser in connection with the practical and technical aspects of scrutiny of proposed Government Bills.

2nd Meeting, 2013 (Session 4), Thursday 31 January 2013

Work programme: The Committee agreed a timetable for scrutiny of the proposed referendum bill [...]
7th Meeting, 2013 (Session 4), Thursday 21 March 2013

Work programme: The Committee considered its approach to Stage 1 scrutiny of the Scottish Independence Referendum Bill. It agreed a draft call for evidence and agreed in general terms the witnesses to invite to give oral evidence. The Committee also agreed to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses on the Bill.

8th Meeting, 2013 (Session 4), Thursday 28 March 2013

Scottish Independence Referendum Bill (in private): The Committee further considered whom to invite to give oral evidence on the Bill at Stage 1.

10th Meeting, 2013 (Session 4), Thursday 25 April 2013

Decisions on taking business in private: [...] The Committee also agreed that its consideration of key themes on its approach to taking oral evidence on the Scottish Independence Referendum Bill, and its consideration of a draft report on that Bill, be taken in private at future meetings.

11th Meeting, 2013 (Session 4), Thursday 2 May 2013

Scottish Independence Referendum Bill (in private): The Committee agreed the key themes for its approach to taking oral evidence on the Bill at Stage 1.

12th Meeting, 2013 (Session 4), Thursday 9 May 2013

Scottish Independence Referendum Bill: The Committee took evidence on the Bill at Stage 1 from—

- Michael Clancy OBE, Director of Law Reform, The Law Society of Scotland;
- Richard Keen QC, Dean of Faculty, Faculty of Advocates;
- Professor Richard Wyn Jones, Professor of Welsh Politics and Director of the Wales Governance Centre, Cardiff University;
- William Norton, Responsible Person and Referendum Agent, NO to AV;
- Willie Sullivan, Former Director of Field Operations, Yes to Fairer Votes.

13th Meeting, 2013 (Session 4), Thursday 16 May 2013

Scottish Independence Referendum Bill: The Committee took evidence on the Bill at Stage 1 from—
Mary Pitcaithly, Convener, Electoral Management Board;

Gordon Blair, Chair of the Elections Working Group, Society of Local Authority Lawyers and Administrators in Scotland (SOLAR);

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

Professor Neil Walker, Regius Professor of Public Law, University of Edinburgh;

Professor Tom Mullen, Professor of Law, University of Glasgow.

14th Meeting, 2013 (Session 4), Thursday 23 May 2013

Scottish Independence Referendum Bill: The Committee took evidence on the Bill at Stage 1 from—

John McCormick, Electoral Commissioner for Scotland, Andy O'Neill, Head of Office Scotland, Andrew Scallan, Director of Electoral Administration, and Peter Horne, Director of Party and Election Finance, Electoral Commission;

Dr Ken Macdonald, Assistant Commissioner (Scotland & Northern Ireland), Information Commissioner's Office.

15th Meeting, 2013 (Session 4), Thursday 30 May 2013

Scottish Independence Referendum Bill: The Committee took evidence on the Bill at Stage 1 from—

Dennis Canavan, Chair of the Advisory Board, and Blair Jenkins OBE, Chief Executive, Yes Scotland;

Blair McDougall, Campaign Director, and Craig Harrow, Director, Better Together;

and, in a round table discussion, from—

Professor Aileen McHarg, Professor of Public Law, University of Strathclyde;

Bill Scott, Chief Executive, Inclusion Scotland;

Colin Borland, Head of External Affairs Scotland, Federation of Small Businesses;

Kyle Thornton MSYP, Vice Chair, Scottish Youth Parliament;
Euan Page, Parliamentary and Government Affairs Manager, Equality and Human Rights Commission Scotland;

John Downie, Director of Public Affairs, Scottish Council for Voluntary Organisations (SCVO).

17th Meeting, 2013 (Session 4), Thursday 13 June 2013

Decision on taking business in private: The Committee agreed to review the evidence received on the Scottish Independence Referendum Bill at Stage 1 in private at its next meeting.

Scottish Independence Referendum Bill: The Committee took evidence on the Bill at Stage 1 from—

Nicola Sturgeon, Deputy First Minister, and Graham Fisher, Legal Directorate, Scottish Government.

18th Meeting, 2013 (Session 4), Thursday 20 June 2013

Scottish Independence Referendum Bill (in private): The Committee reviewed evidence received on the Bill at Stage 1.

19th Meeting, 2013 (Session 4), Thursday 27 June 2013

Scottish Independence Referendum Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to, and the Committee agreed to hold an additional meeting in August to further consider the draft report.

20th Meeting, 2013 (Session 4), Thursday 15 August 2013

Scottish Independence Referendum Bill (in private): The Committee considered a revised draft Stage 1 report. Various changes were agreed to, and the Committee agreed the report for publication. The Committee agreed to delegate to the Convener and Deputy Convener responsibility for finalising a news release.
ANNEXE C: ORAL AND WRITTEN EVIDENCE

Please note that all oral evidence and associated written evidence is published electronically only, and can be accessed via the Referendum (Scotland) Bill Committee’s webpages, at:  
http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/55798.aspx

Oral Evidence

12th Meeting, 2013 (Session 4), Thursday 9 May 2013

Panel 1:

Michael Clancy OBE, Director of Law Reform, The Law Society of Scotland
Richard Keen QC, Dean of Faculty, Faculty of Advocates

Panel 2:

Professor Richard Wyn Jones, Professor of Welsh Politics and Director of the Wales Governance Centre, Cardiff University
William Norton, Responsible Person and Referendum Agent, NO to AV
Willie Sullivan, Former Director of Field Operations, Yes to Fairer Votes

13th Meeting, 2013 (Session 4), Thursday 16 May 2013

Panel 1:

Mary Pitcaithly, Convener, Electoral Management Board
Gordon Blair, Chair of the Elections Working Group, Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)
Brian Byrne, Chair of the Electoral Registration Committee, Scottish Assessors’ Association

Panel 2:

Professor Neil Walker, Regius Professor of Public Law, University of Edinburgh
Professor Tom Mullen, Professor of Law, University of Glasgow
14th Meeting, 2013 (Session 4), Thursday 23 May 2013

Panel 1:

John McCormick, Electoral Commissioner for Scotland, Andy O’Neill, Head of Office Scotland, Andrew Scallan, Director of Electoral Administration, and Peter Horne, Director of Party and Election Finance, Electoral Commission

Panel 2:

Dr Ken Macdonald, Assistant Commissioner (Scotland & Northern Ireland), Information Commissioner's Office

15th Meeting, 2013 (Session 4), Thursday 30 May 2013

Panel 1:

Dennis Canavan, Chair of the Advisory Board, and Blair Jenkins OBE, Chief Executive, Yes Scotland

Blair McDougall, Campaign Director, and Craig Harrow, Director, Better Together

Round table discussion featuring:

Professor Aileen McHarg, Professor of Public Law, University of Strathclyde

Bill Scott, Chief Executive, Inclusion Scotland

Colin Borland, Head of External Affairs Scotland, Federation of Small Businesses

Kyle Thornton MSYP, Vice Chair, Scottish Youth Parliament

Euan Page, Parliamentary and Government Affairs Manager, Equality and Human Rights Commission Scotland

John Downie, Director of Public Affairs, Scottish Council for Voluntary Organisations (SCVO)

Clarification of evidence provided by Kyle Thornton, MSYP, Scottish Youth Parliament

17th Meeting, 2013 (Session 4), Thursday 13 June 2013

Nicola Sturgeon, Deputy First Minister, and Graham Fisher, Legal Directorate, Scottish Government
Written Evidence

Charlotte Black
Bòrd na Gàidhlig
Arthur Cormack
Electoral Commission
Electoral Commission (2) (supplementary to oral evidence on 23 May 2013)
Electoral Commission (3) - information on accessibility and awareness raising
Electoral Commission (4) - example of Easy Read leaflet
Electoral Management Board for Scotland
Electoral Reform Society Scotland
Faith in Community Scotland
Navraj Singh Ghaleigh
Glasgow Council for the Voluntary Sector (GCVS)
David Hall
Harry Hayfield
Highland Council (Returning Officer)
Inclusion Scotland
Inclusion Scotland (follow-up to oral evidence on 30 May 2013)
The Law Society of Scotland
The Law Society of Scotland (supplementary to oral evidence on 9 May 2013)
London Scottish Conservative Club
John Macleod
Professor Tom Mullen
NO to AV (William Norton and Matthew Elliott)
Scottish Community Alliance
Scottish Council for Voluntary Organisations (SCVO)
SCVO (supplementary to oral evidence on 30 May 2013, supported by STUC)
Scottish Trades Union Congress (STUC)
Scottish Youth Parliament
Scottish Youth Parliament - clarification of oral evidence on 30 May 2013
John Shields
Michael Forbes Smith
Nigel Smith (relating to Section 21 of the Bill)
Nigel Smith (relating to Schedule 4 to the Bill)
Willie Sullivan (Yes to Fairer Votes)
Dylan Thomas
Jamie Wallace

The written submissions are all available on the following webpage:
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.