

# **SCOTTISH INDEPENDENCE REFERENDUM BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Scottish Independence Referendum Bill. It describes the purpose of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### **Outline of Bill provisions**

3. The Bill contains 34 sections and eight schedules. It contains provisions making practical arrangements for running the referendum, including the question to be asked in the referendum, the format of the ballot paper, the date of the referendum and the way in which the electorate may vote in the referendum. The Bill:

- sets out the question to be asked in the referendum and the format of the ballot paper;
- sets out the date of the referendum;
- sets out how people may vote in the referendum;
- provides for the Convener of the Electoral Management Board to fulfil the role of Chief Counting Officer, to oversee the running of the referendum and appoint counting officers to run the referendum in each local authority area;
- sets out the rules for the conduct of the referendum, i.e. the conduct of the poll, the count and declaration of the result;
- provides for the Electoral Commission to have responsibility for oversight of the referendum, including providing guidance and information about the referendum, overseeing and regulating the campaign leading up to the referendum and reporting on the conduct of the referendum; and

- includes provisions regulating the campaign prior to the referendum, including provisions limiting the amounts that may be spent on campaigning by permitted participants and provisions requiring them to account for their spending to the Electoral Commission.

4. The Bill also confers powers on the Chief Counting Officer, for example the power to direct local authority counting officers (section 6), and to prescribe various forms, statements etc. (paragraph 44 of schedule 2 and paragraph 41 of schedule 3 refer). Schedules 5 and 6 confer on the Electoral Commission powers of investigation and powers to impose sanctions, to help them to fulfil their role in monitoring and enforcing compliance with the campaign rules under section 11. The Electoral Commission may issue a code of practice on campaign expenses under schedule 4, guidance on other issues under section 11, or guidance to the Chief Counting Officer under section 22. It is considered that these are of an executive rather than legislative nature and as such they are not detailed in this memorandum.

5. Further information about the Bill's provisions is contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 25, and in the Policy Memorandum published separately as SP Bill 25.

### **Rationale for subordinate legislation**

6. The Bill contains several delegated powers which are explained in more detail below. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to:

- the need for any legislative provisions to be in place in adequate time for the referendum (preferably 6 months before the date of the poll, in accordance with the Gould Report<sup>1</sup>);
- the need to provide the flexibility to respond to changing circumstances, such as the power to make a supplementary order in support of the detailed civil sanctions regime in schedule 6, without the need for further primary legislation;
- the desire to allow adjustments to the technical detail of the arrangements for the referendum to be made without the need for further primary legislation.

### **Delegated powers**

7. The Bill contains the following delegated power provisions:

#### **Section 1 – Referendum on Scottish Independence**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Order  
**Parliamentary procedure:** Affirmative procedure

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<sup>1</sup> The Independent Review of the Scottish Parliamentary and local government elections 3 May 2007 by Ron Gould.

*Provision*

8. Section 1(6) allows the Scottish Ministers to make an order to change the date of the referendum if they are satisfied that it would be impracticable or impossible to hold the referendum on the date specified under subsection (4), or if to do so would mean that the referendum could not be conducted properly. The power does not extend to bringing the referendum forward; it may only be delayed to a date later than the one specified in subsection (4), and in any case it must be on or before 31 December 2014<sup>2</sup>. Subsection (7) provides that the order may include supplementary or consequential provision, and may modify any enactment, including the provisions made by the Bill.

*Reason for taking this power*

9. There is no expectation that this power will be used. The power provides an ability for the Scottish Ministers to delay the referendum in the event that unforeseen circumstances arise which make holding the poll on the date originally planned impractical or impossible.

*Choice of procedure*

10. Any use of this power will require the high level of parliamentary scrutiny attached to the affirmative procedure, given that it is intended for use only in exceptional circumstances and contains the facility to modify primary legislation.

**Section 8 – Expenses of Counting Officers**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Order  
**Parliamentary procedure:** No procedure

*Provision*

11. Subsections (1) and (2) of section 8 allow the Chief Counting Officer and counting officers to recover any costs associated with their duties in relation to the referendum from the Scottish Ministers. Subsection (3) allows the Scottish Ministers to make an order that sets the maximum costs that may be recovered by the Chief Counting Officer and counting officers in relation to any expenses and charges that they incur arising from their duties in relation to the referendum. Subsection (4)(a) allows the Scottish Ministers the flexibility to set different maximum limits for different functions, cases and areas. Subsection (4)(b) allows the Scottish Ministers to make incidental and supplementary provision.

*Reason for taking this power*

12. This section makes provision for setting a cap on the costs that arise from the activities of both the Chief Counting Officer and counting officers in the referendum. The Scottish Ministers will reimburse the Chief Counting Officer and counting officers for their duties but not exceeding a maximum amount specified in, or calculated using, the order.

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<sup>2</sup> Article 3 of the Scotland Act 1998 (Modification of Schedule 5) Order 2013 refers (S.I. 2013/242).

13. A Fees and Charges Order of this type is standard practice for the funding of returning officers at UK elections. They are made in advance of the election so that returning officers can plan delivery of the poll within the prescribed cost limits.

*Choice of procedure*

14. No parliamentary procedure is considered necessary given that the nature of the power is to make administrative and operational provision in relation to the funding of the referendum. The power is only to specify the maximum amount of recoverable charges and expenses, and associated detail. This is essentially an administrative power, relevant to a limited number of people (the Chief Counting Officer and 32 counting officers). Similar orders are made for other elections without the need for formal parliamentary procedure (for Westminster and Scottish Parliamentary elections, see e.g. S.I. 2010/830 and S.I 2011/1013).

**Section 30: Power to make supplementary etc. modifications and provision**

**Power conferred on:           the Scottish Ministers**  
**Power exercisable by:       Order**  
**Parliamentary procedure: Affirmative procedure**

*Provision*

15. Subsection (1) of section 30 empowers the Scottish Ministers to make supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to any provision of the Bill. Subsection (2) confirms that the power in subsection (1) extends to the power to make provision in consequence of, or in connection with, any modification, or proposed modification, of any enactment relating to the conduct of, or campaigning in, any referendum or election.

16. Subsection (3) states that an order under this section may modify any enactment, including the provision made by the Bill, apply any provision of any enactment (with or without modifications), and may include supplementary, incidental, consequential, transitory or transitional provision or savings.

*Reason for taking this power*

17. There are no current proposals to use this power. The power provides the flexibility to make any necessary adjustments that may arise as timeously as possible.

18. This is important because the Chief Counting Officer, counting officers and the Electoral Commission will need to begin carrying out activity under the legislation shortly after its enactment, and any necessary adjustments to the legislation should be finalised with sufficient time before the referendum takes place (in line with the Gould Report). Providing for the power to modify any relevant enactments without recourse to primary legislation is considered appropriate to provide the adaptability to respond to any future emerging needs. It is possible, for instance, that changes to UK electoral legislation would result in the need for flexibility to alter the arrangements for the referendum.

19. The Government's intention is that the referendum should be conducted in line with international standards for the conduct of referendums and elections. The power is also taken to allow the possibility of changes to the referendum scrutiny framework to keep pace with developments, in particular given the time which will elapse between the passing of the Bill and the date of the poll, for the reasons noted.

*Choice of procedure*

20. The Scottish Government recognises this power's potentially broad application, which includes the facility to modify primary legislation, and to alter the provisions in the Bill (though as with any such power it would require to be exercised within limits). For that reason any use of this power will require the high level of parliamentary scrutiny attached to the affirmative procedure.

**Schedule 6, paragraph 16: Supplementary orders: general**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Order  
**Parliamentary procedure:** Dependent on type of Order (see below)

*Provision*

21. Schedule 6 contains a civil sanction regime which allows the Electoral Commission to impose certain sanctions (such as fines, discretionary requirements and stop notices) to fulfil their role in monitoring and securing compliance with the campaign rules. Paragraph 16(1) empowers the Scottish Ministers to make an order which contains provisions supplementary to, consequential on, or incidental to, those contained in schedule 6, and this may include transitional provision. Under sub-paragraph (3) a supplementary order may amend, repeal or revoke an enactment.

22. Before making a supplementary order, the Scottish Ministers are required under paragraph 17 to consult with the Electoral Commission and other appropriate parties.

23. The supplementary order may contain provision by virtue of paragraphs 1 (prescribed offences, restrictions or requirements or amounts for fixed monetary penalties), 2 (prescribed sums for discharge, circumstances in which penalties cannot be imposed and appeal grounds), 5, 6 and 9 (for discretionary requirements), 10 and 13 (stop notices) and 15 (enforcement undertakings) of schedule 6. It can also deal with monetary penalties (paragraph 18), enforcement undertakings (paragraph 19), extensions of deadlines for the purposes of allowing criminal proceedings to take place (paragraph 20), or appeals (paragraph 21).

*Reason for taking this power*

24. This power provides a mechanism by which the Scottish Ministers can support the Electoral Commission by creating the full detail of the civil sanctions regime. The use of this power will make provision which will flesh out the provision for the civil sanctions regime already contained in schedule 6.

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

25. The provisions detailing the regime, and the power to make an order associated with the regime, are common practice in UK elections and the provisions are directly replicated from Schedule 19C to the Political Parties, Elections and Referendums Act 2000 as inserted by the Political Parties and Elections Act 2009<sup>3</sup>.

*Choice of procedure*

26. Supplementary orders under this power are subject to the affirmative procedure if they relate to fixed monetary penalties, discretionary requirements, stop notices, enforcement undertakings, or any provision amending an Act. This will afford a high level of parliamentary scrutiny to the exercise of any such power.

27. Other uses of the supplementary order power are likely to be administrative or technical in nature and would therefore be subject to the negative procedure.

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<sup>3</sup> The equivalent UK powers have been exercised in the Political Parties, Elections and Referendums (Civil Sanctions) Order 2010 (S.I. 2010/2860).



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