

REFERENDUMS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Referendums (Scotland) Bill introduced in the Scottish Parliament on 28 May 2019.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 46–EN);
 - a Financial Memorandum (SP Bill 46–FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 46–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

GENERAL OVERVIEW

4. This Bill provides a legal framework for the holding of referendums on matters that are within the competence of the Scottish Parliament.
5. The framework set out in the Bill covers technical aspects of holding referendums such as the franchise, rules for voting and how a poll should be conducted. It also provides for persons and organisations to become permitted participants and for the designation of official campaigns, sets out campaign rules and deals with the administration of, and limits upon, spending and donations to campaign participants. The rules are largely based on existing UK and Scottish legislation covering elections and referendums.
6. The Bill provides for the date, question(s), campaign period and the form of ballot paper for a referendum to be set out in regulations, following consultation with the Electoral Commission.
7. In establishing a standing framework for referendums held under the authority of the Scottish Parliament, the Bill follows the precedent of Part 7 of the Political Parties, Elections

and Referendums Act 2000 (“PPERA”) which provides a standing framework for referendums held under Acts of the UK Parliament.

8. The Bill covers a range of issues, with much of the detail set out in schedules.
9. These can be broken down into three main topic headings:
 - the framework;
 - conduct of polls and counts;
 - campaign rules.

PURPOSE OF THE BILL

10. The main policy objective of the Bill is to ensure that future referendums on matters that are within the competence of the Scottish Parliament maintain the high standards achieved by the referendum on Scottish independence in 2014. In particular, the Bill will ensure that:

- entitlement to vote is in accordance with clear principles and is determined in a fair and consistent manner;
- voting and counting processes are clear and transparent, operate smoothly and effectively, and are subject to effective controls and audit; and
- campaigns leading up to a referendum are well regulated and independent from Parliament and Government. Rules will be in place so that spending by those campaigning is limited to reasonable levels and all sides in the campaigns will operate on a level playing field.

11. The Bill provides an opportunity for the Scottish Parliament to scrutinise, debate and approve the rules and procedures for Scottish referendums to ensure that the framework commands public confidence that referendums will be fair and open in line with established best practice. Having a standing legal framework in place will enable legislation for any future referendum to be taken forward in a timely manner and allow parliamentary scrutiny to focus on the merits of that particular proposal, the question or questions to be asked and the timing of the referendum.

BACKGROUND

12. Unlike the position for referendums held under Acts of the Westminster Parliament, there is no standing framework for devolved Scottish referendums. The 2014 independence referendum was provided for specifically by two pieces of legislation (the Scottish Independence Referendum Act 2013 and the Scottish Independence Referendum (Franchise) Act 2013), covering all aspects of the campaign and poll. The arrangements for the 2014 referendum have been praised by the Electoral Commission, which said that it “provides, in the main, a model for the future development of referendum and electoral legislation”. Voters

also reported positive experiences of the poll, with 94% of those who voted in a polling station reporting satisfaction with the voting process.¹

13. The precedent for a standing framework of procedural rules for a referendum is Part 7 of the Political Parties, Elections and Referendums Act 2000 (“PPERA”). That was put in place in the light of recommendations in Chapter 12 of the 1998 (5th) Neill report on standards in public life.² In the explanatory notes to PERA, the (then) UK Government confirmed that “these recommendations were directed principally at ensuring that the two sides in a referendum campaign each have a fair opportunity to put their views to the public and that referendum campaigns are not skewed by the intervention of the government of the day. Hitherto there have been no standing statutory arrangements for the conduct of referendums”.³ The controls as recommended by the Committee on Standards in Public Life in the Neill Report served the “need to provide both sides of an argument with a proper voice during the course of a referendum”.⁴

14. Since 2000, several referendums have been held under the framework set out in PERA, with various bespoke provisions added for each poll in primary and secondary legislation. Notwithstanding these general arrangements, the House of Commons Public Administration and Constitutional Affairs Committee, in evaluating the conduct of the EU referendum, recommended in March 2017 that the law relating to referendums should be consolidated⁵ in order to “end the current practice whereby each referendum results in a process of ‘reinventing the wheel’ with referendum-specific provisions required which, in the case of conduct, essentially duplicate the provisions that were made for previous referendums”. The Committee also concluded that “consolidation in the form of a new generic conduct order would streamline the process of calling a referendum. It would provide greater stability in the constitutional and legal framework for referendums, and would also provide greater clarity for parliamentarians, campaigners and the electorate”.⁶

15. An Independent Commission on Referendums convened by the Constitution Unit at UCL which considered “the future political, legislative and administrative arrangements for the authorisation and conduct of referendums in the UK”, reported in 2018. The Commission noted that it was a long time since the standing framework for referendums has been comprehensively reviewed, and that there was a need for a wholesale review to bring the framework up to date with recent developments and international best practice.⁷ The Bill takes account of a number of recommendations made by the Independent Commission. For example,

¹ The Electoral Commission *Scottish Independence Referendum: report on the Referendum held on 18th September 2014*, p8, p66.

² Neill Report on Standards in Public Life, 1998.

³ Explanatory Notes, paras 9, 24, 195, see- <http://www.legislation.gov.uk/ukpga/2000/41/notes>

⁴ Fifth Report of the Committee on Standards in Public Life, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336870/5thInquiry_FullReport.pdf

at S.14 (p.4), and by reference to the list of recommendations at paras 83 to 93, as well as Ch 12.

⁵ House of Commons Public Administration and Constitutional Affairs Committee, *12th Report: Lessons from the EU Referendum*, p20-22.

⁶ Para 51.

⁷ https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/EC_and_C_and_R_-_ICR_Final_Report.pdf

the Bill proposes a specific role for the Electoral Commission in the development and evaluation of referendum questions. It also includes provision for one sided designation, where a lead campaigner is not appointed for all of the referendum outcomes. It also includes updates to the online imprint rules that were used at the 2014 independence referendum. The Bill also takes account of a range of recommendations made by the Electoral Commission in relation to referendums.

16. Internationally, the number of national referendums has increased substantially in the last half century, particularly in the last thirty years, and these are now widespread across democracies, though with some variation in how often these are held. For instance, between 1990 and May 2018, Switzerland held the most by a significant margin (261), while Italy held 56, Ireland 27, New Zealand 14, Denmark 7 and Poland 10, compared with 2 in the UK.⁸ Countries also hold sub-national referendums, including some of those countries – like Germany and the United States – that do not hold national referendums. Against that background, the Independent Commission on Referendums has argued that referendums now constitute an important part of how democracy functions in numerous countries around the world.⁹

17. Well-regulated referendums are important in ensuring democratic quality,¹⁰ suggesting that standing frameworks can play an important role. Legal provisions for referendums and associated regulatory frameworks vary across countries but commonly cover the definition of the electorate, their initiation, the formulation of the question(s), campaign rules and quorums.

18. As noted, the framework in Part 7 of PPERA applies to referendums held under UK Acts, but not to referendums held by or under Acts of the Scottish Parliament. The Bill accordingly provides a framework for referendums on matters within the competence of the Scottish Parliament.

Recent context

19. In October 2016, the Scottish Government published a draft independence referendum Bill based on the model of the legislation for the 2014 referendum so that it would be ready for introduction should the Scottish Government conclude – and the Parliament agree – that independence is the best or only way to protect Scotland’s interests in the wake of the EU referendum. That draft bill was the subject of a public consultation that closed in January 2017. The responses, which were published and independently analysed, and have informed the preparation of the framework Bill.¹¹

⁸ As calculated by the Independent Commission on Referendums (2018) Report of the Independent Commission on Referendums. Constitution Unit. UCL. https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/ICR_Final_Report.pdf

⁹ As above.

¹⁰ Tierney S (2018) Democratic credentials and deficits of referendums: a case study of the Scottish independence vote. Chapter 10 in: Morel L and Qvortrup M (eds) (2018) *The Routledge Handbook to Referendums and Direct Democracy*. Routledge.

¹¹ <https://www.gov.scot/publications/consultation-draft-referendum-bill-analysis-responses/>

20. On 28 March 2017, the Scottish Parliament passed a motion mandating the Scottish Government to take forward discussions with the UK Government for a referendum on Scotland's future, including independence. The First Minister wrote to the Prime Minister on 31 March to commence discussions leading to an order under section 30 of the Scotland Act 1998, as in 2013, to enable the Scottish Parliament to legislate for a referendum between the autumn of 2018 and the spring of 2019. In June 2017, the First Minister announced that she would give an update on next steps for an independence referendum "when the terms of Brexit were clear".

21. On 24 April 2019 the First Minister gave a statement to the Scottish Parliament, setting out next steps on Brexit and Scotland's future. She said that the Scottish Government would take steps so the option of giving people a choice on independence later in the current term of the Parliament remained available. The Referendums (Scotland) Bill would help to facilitate that by ensuring that the rules for any referendum that is now, or in future, within the competence of the Scottish Parliament are clear.

ALTERNATIVE APPROACHES

22. As discussed above, whilst PPERA provides for referendums held under Acts of the UK Parliament, there is currently no legislation covering the conduct of referendums held under Scottish Parliament legislation. The Bill is therefore required to put in place the procedures for the running of referendum campaigns, polls, counts and declarations and certification of results.

23. An alternative approach would be for the UK Parliament to legislate. This would not be an effective or acceptable option. The Scottish Parliament should set the rules for referendums within its legislative competence, as this is the only legislative approach that respects the rights and role of the Parliament. It would also ensure that the rules for such referendums would be decided upon in accordance with Scottish circumstances and requirements.

24. Approaches to administering referendums in different countries vary. While in a majority of countries the constitution provides the legal basis for holding some forms of referendum, the legal basis for the administrative requirements of referendums is more often contained in specific legislation.¹² In some countries, for example Denmark,¹³ Ireland¹⁴ and Poland,¹⁵ there is general legislation covering the administration of referendums. In others, general legislation provides for specific types of referendum and not others, for example in New Zealand, government initiated non-binding referendums (and citizen-initiated

¹² The International Institute for Democracy and Electoral Assistance (International IDEA) Direct Democracy Database: <https://www.idea.int/data-tools/question-view/592>

¹³ Parliamentary Election Act of Denmark 2009: <https://www.legislationline.org/documents/id/15814>

¹⁴ The Referendum Acts, 1992 to 2001. <http://www.irishstatutebook.ie/>

¹⁵ The Act on Nationwide Referendum 2003 <https://www.legislationline.org/documents/id/21825>

referendums) can be held by postal vote under general legislation,¹⁶ but binding referendums cannot.¹⁷

25. The only other alternative would be for the legislation for individual referendums to include the rules for the conduct of the poll and the campaign at the referendum. As outlined above, this is a less effective option as it requires Parliament to consider similar procedural provisions for each separate referendum, and is out of step with recent development in electoral administration and good practice elsewhere in the UK. In providing a generic framework, the Bill will provide certainty for campaigners and electoral officials and enable the parliamentary scrutiny of any future proposal for a referendum to focus on the merits of a referendum itself, particularly the question to be asked and the timing of the poll.

POLICY OBJECTIVES OF THE BILL

The framework

26. The policy objective is to put in place a generic framework for referendums that provides technical arrangements which can be applied for specific referendums.

Trigger regulations for a referendum

27. The Bill allows for Scottish Ministers to make regulations providing for the holding of a referendum throughout Scotland. The regulations must specify:

- the date on which the referendum will be held;
- the form of the ballot paper to be used, including the wording of the question or questions and the possible answers to it or them.
- the referendum period.

28. The Electoral Commission must be consulted on these regulations before they are laid in the Parliament.

29. The regulations will be debated in the Parliament and the Parliament must give its approval to the question and timing of any future referendum.

¹⁶ Referenda (Postal Voting) Act 2000

(<http://www.legislation.govt.nz/act/public/2000/0048/latest/DLM73881.html#DLM74568>)

¹⁷ McGee (2017) Parliamentary Practice in New Zealand, Fourth edition, Oratia Books

(<https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/chapter-40-referendums/>)

Consultation

30. The Scottish Government's *Consultation on a Draft Referendum Bill (2016)* consulted on proposals for a standalone referendum, rather than a framework for referendums.¹⁸

CONDUCT OF POLLS AND COUNTS

Overview

31. The policy objective is to ensure that referendum polls and counts are run in an efficient, transparent and fair manner that will be familiar to voters and to those running them. If the process is seen as simple and clear to voters it should inspire public confidence in the legitimacy of the process and of the result. The rules in the Bill about the conduct of the poll and the count are closely based on the rules applying to the conduct of elections to the Scottish Parliament and local government elections as well as other UK elections and referendums.

Consultation

32. The Scottish Government's *Consultation on a Draft Referendum Bill (2016)* contained a chapter on the management of the referendum proposed in the Bill consulted on. A majority of respondents supported the proposals and principles set out in the consultation document on the management of the referendum. Comments focused on the principles which should underpin the administration and management of a referendum, including that the poll should be run securely and to a high standard.

The referendum poll

33. The Bill provides that a referendum will be a traditional poll held on a single day with votes cast either at polling stations across the country or by post. Once the counting officer has published notice of the referendum, a poll card will be sent to every eligible voter in the counting officer's area. Voters will have the option to vote in person, by post or proxy in the same way as they do for Scottish Parliament and local government elections. The votes will be counted by hand.

34. The Bill sets out detailed rules relating to the arrangements for voting and the conduct of the poll. These include arrangements for polling stations, procedures for voting and counting votes, and rules for absent voting (i.e. by post or by proxy). These arrangements are all in line with the well-tested procedures for Scottish Parliament and local government elections. Behaviours which would constitute an offence in an election will constitute offences in referendums and will be dealt with in a similar way.

¹⁸ Consultation paper available at <https://consult.gov.scot/elections-and-constitutional-development-division/draft-referendum-bill/>; Consultation analysis report available at <https://www.gov.scot/publications/consultation-draft-referendum-bill-analysis-responses/>.

Register

35. The Bill sets out that the franchise at referendums will be any UK or Commonwealth citizen, citizen of the Republic of Ireland or relevant citizen of the European Union who is aged 16 or over, is registered in the register of Scottish local government electors and is not subject to any legal incapacity to vote. This is the same franchise as used at the 2014 referendum and at recent Scottish Parliament and local government elections.

36. The intention is that the referendum franchise should continue to mirror the Local Government and Scottish Parliament franchise in future, taking into account the changes to be proposed in the forthcoming Electoral Franchise Bill to correct the ECHR incompatibility on prisoner voting.

37. The Bill provides for the following groups and organisations to have access to the register:

- Counting officers, who need the information in order to administer polling. They also need it to arrange for the printing and distribution of poll cards for all voters, and for the preparation and distribution of postal voting packs to postal voters.
- Registered campaigners and the official campaign organisations for the referendum (referred to as “permitted participants” and “designated organisations” respectively in the Bill). The campaign organisations need all voters' details so that they can send every voter or household a postal communication in advance of the referendum. These communications will be used to set out the campaign groups' positions on the referendum, so it is important to ensure that every eligible voter receives them before casting their vote. Permitted participants need access to be able to identify donors for campaign donations, as required by the transparency requirements in the campaign rules.
- The Electoral Commission, in its capacity as the independent regulator, in order to monitor of the referendum campaign.

38. The version of the register received by permitted participants, designated organisations and the Electoral Commission will only include electors' names and addresses. The version of the registers provided to counting officers and to organisations that print and distribute voter materials on behalf of electoral administrators will include electors' names, addresses and voter numbers.

Chief Counting Officer and other counting officers

39. The Bill establishes the office of Chief Counting Officer (CCO), who will oversee the referendum's process and be responsible for the voting process, for the count and for the eventual declaration and certification of the result. The Bill provides that the CCO will be appointed by the Scottish Ministers (as was the case at the 2014 referendum on Scottish independence), and that the appointed person will normally be the Convener of the Electoral Management Board for Scotland appointed under section 2 of the Local Electoral

Administration (Scotland) Act 2011. The CCO will operate entirely independently of Government.

40. The CCO will have a number of duties set out in the Bill. Most importantly, the CCO must appoint a counting officer for each local authority area. This will probably be the returning officer for each area, although the CCO has the power to make a different appointment. The CCO will certify the number of ballot papers cast for the whole of Scotland and the number of votes for each proposition on the ballot paper. Each counting officer will have to certify the number of ballots cast and the number of votes for each proposition in the local authority area for which they have been appointed, in accordance with any directions given by the CCO.

41. The CCO role is one which has been established at previous referendums in the UK. The role in a referendum under this Bill will be the same as that played by the CCO in the Scottish independence referendum in 2014.

42. The CCO and the counting officers will claim their expenses from the Scottish Government, under the terms of regulations under the Bill. The Scottish Government is committed to ensuring that any such regulations will be developed in consultation with the Electoral Management Board and others.

Timing of the count

43. In accordance with recent practice at elections, the Bill makes provision for the CCO to direct the timing of the count. This will ensure that all counts are carried out to a similar timescale and that any delay in getting the results from a particular area will be minimised. The Scottish Government would expect that in practice counting at most polls would take place overnight, although the Bill includes flexibility to allow a daytime count if this would be required or preferred.

Declaration of result

44. The Bill requires counting officers to provide the CCO with the certified results of a count, information on rejected ballot papers and other information as soon as practicable. The CCO will then authorise the counting officer to announce the local result. When the CCO is in receipt of all the certified local results for the whole of Scotland, a national declaration will be made.

Referendum agents, polling agents and postal ballot agents

45. The Bill allows each permitted participant to appoint a “referendum agent” for any local government area. Referendum agents act as the participants’ representatives for the poll and can appoint further polling and postal ballot agents. These agents are entitled to attend polling stations, to be present when postal ballot papers are received, and to be present when votes are counted. This is in line with standard practice at other elections and referendums (for example, the 2014 and 2016 referendums).

Electoral Commission representatives and observers

46. The responsibility the Bill confers on the Electoral Commission includes observing the conduct of the referendum at polling stations and the conduct of the count. To enable them to carry out these responsibilities, the Bill gives Electoral Commission representatives the right to attend any proceedings which are the responsibility of the CCO or a counting officer, or to observe any of their work carried out under the Bill.

47. The Bill also provides for any individual (over the age of 16) or organisation to apply to the Commission to be appointed as an accredited observer. Accredited observers are permitted to be present at the issue or receipt of postal ballot papers, the poll, and the count. This is in line with standard electoral practice in the UK.

Offences

48. The Bill extends existing electoral offences to a referendum.

Alternative approaches

49. It would be possible to establish a different set of referendum rules to those set out in the Bill, varying the organisations involved in administering and regulating the poll, and any of the specific arrangements set out in the Bill. Given the number of processes involved, there is a large variety of ways in which the arrangements could be varied. Varying the approach from existing electoral practice has a number of drawbacks. Establishing a separate set of administrative practices for a referendum significantly increases the risk of voter confusion, where practices differ from those used at elections. Establishing new organisations to run and regulate referendums would duplicate existing structures and would not be a good use of public funds. It would also increase the possibility of confusion in the administration of the poll. On that basis, establishing conduct rules and processes that are, as far as possible, similar to those used at elections is considered by the Scottish Government to be the best approach.

CAMPAIGN RULES

Policy objectives

50. The Bill includes referendum campaign rules. The objective of putting in place detailed rules governing participation in referendum campaigns is to ensure that the campaigns in support of each referendum outcome are run in a demonstrably fair and transparent manner. The technical rules in the Bill about the conduct of a campaign build on, and are therefore very similar in substance to, those used at the 2014 and 2016 referendums. They will therefore be familiar to those running campaigns and who have to adhere to the rules governing them. This familiarity will reduce the risk of confusion and help ensure that there is confidence in the legitimacy of the process and of the result.

51. The aim of the campaign rules is to create a level playing field between campaigns supporting each potential outcome of a referendum, so as to prevent any organisation or political party from being able to influence the campaign disproportionately, such as by excessive spending.

Consultation

52. The Scottish Government's *Consultation on a Draft Referendum Bill (2016)* contained a chapter on campaign rules and sought views on the proposed spending limits in connection with a referendum on Scottish independence. A majority of respondents supported the campaign regulation proposals and principles set out in the consultation document. Comments focussed on the principles which should underpin the spending arrangements, such as equitable limits, accountability and transparency.¹⁹

The Electoral Commission

53. The Scottish Government wants to ensure that all referendums are run to the highest possible international standards and that the results are accepted by all parties. It is therefore essential that adherence to referendum campaign rules is properly monitored and policed. The Bill confers a range of guidance, regulatory and monitoring functions on the Electoral Commission including:

- promoting awareness and understanding about voting;
- publishing guidance for permitted participants;
- recording the money spent and donations received by permitted participants and making that information available for public inspection;
- observing the conduct of the referendum at polling stations;
- observing the conduct of the count;
- publishing a report on the conduct and administration of the referendum; and
- monitoring compliance with the campaign rules, with their investigatory and civil sanction powers available.

54. The functions are specified in the Bill in a way that will ensure that the Commission will not be influenced by outside organisations. In keeping with that principle, the Commission will report to the Scottish Parliament rather than the Scottish Government.

55. The Bill provides that the Scottish Parliamentary Corporate Body will reimburse the Electoral Commission for expenditure incurred in fulfilling its functions under the Bill. This is in line with practice at the 2014 Scottish independence referendum and established arrangements for the Commission in relation to their role for UK elections and referendums, where they are funded by the Speaker's Committee at Westminster. This arrangement will underpin the Commission's impartiality and independence from Government. The Commission is required to include details of their expenditure in their report on the conduct and administration of the referendum.

¹⁹ Consultation paper available at <https://consult.gov.scot/elections-and-constitutional-development-division/draft-referendum-bill/>; Consultation analysis report available at <https://www.gov.scot/publications/consultation-draft-referendum-bill-analysis-responses/>.

Observers

56. While most respondents to the 2016 consultation were generally supportive of the proposed role for the Electoral Commission, some felt that other arrangements to provide independent international oversight of the referendum process should be put in place.

57. At the 2014 referendum the Electoral Commission accredited 224 observers, who came from many parts of the world, including Kenya, Georgia, United States, Chile, Catalonia, Russia, Switzerland and Lithuania. In addition, there were hundreds of counting agents representing campaigners on both sides of the referendum debate.

58. Every count centre in Scotland provided access for print, broadcast and online media. In addition, officers from Police Scotland were present at every count centre. As a result, the count centres received extremely high level of observation and scrutiny and the CCO was content that, had any instances of perceived wrongdoing occurred, these would have been reported by those in attendance.

59. The Scottish Government's view is that if there were to be a future referendum of similar importance to the 2014 Scottish independence referendum, it would generate a similar level of domestic and international interest. The Scottish Government therefore does not think it necessary, or practical, to legislate for international observers to be present at future referendums. This would also not be practicable as the Scottish Parliament does not have the power to force international observers to attend polls in Scotland. International observers will always be welcomed to observe electoral events in Scotland and the Scottish Government hopes that they will continue to attend.

Campaign spending limits

Background

60. As was the case at the 2014 Scottish independence referendum, it is for the Scottish Government to propose, and the Scottish Parliament to determine, the spending limits for the referendum period. The Scottish Government's consultation paper *Consultation on a Draft Referendum Bill (2016)* proposed broadly the same approach to spending limits as was used in the Scottish independence referendum of 2014.

61. Those proposed limits were designed to ensure a level playing field in terms of the amount of money that organisations could spend on campaigning for particular outcomes, and to prevent certain individuals or organisations from dominating the referendum campaign.

Spending limits in the Bill

62. The Bill sets out spending limits for different types of permitted participants. These limits vary depending on the type of organisation. A designated organisation, defined as a permitted participant which has been designated by the Electoral Commission as representing those campaigning for a particular outcome, is allowed to spend up to £1,500,000. Other permitted participants are allowed to spend up to £150,000.

63. A person or organisation that is not a declared permitted participant will be allowed to spend not more than £10,000 on campaigning for a particular outcome in the referendum.

64. The Bill provides that spending limits for permitted participants which are also qualifying political parties will be calculated using a formula. This formula is based on the party's share of the constituency and regional votes at the most recent Scottish Parliament general election and is discussed in more detail below. The table below sets out what the spending limits would be based on the distribution of votes at the 2016 Scottish Parliament Election.

65. The Bill includes provision for secondary legislation to vary specific sums in the Bill, including to increase spending limits in line with inflation.

Type of participant	Spending limit in Bill (based on 2016 Scottish Parliament Election).
Designated Organisation	£1,500,000
Political Party represented in the Scottish Parliament	Scottish National Party £1,332,000 Scottish Conservatives £672,000 Scottish Labour £630,000 Scottish Liberal Democrats £201,000 Scottish Greens £150,000
Other Permitted Participant	£150,000

Permitted participants

66. Following the principles established in the legislation for the 2014 referendum, the Bill provides that any UK individual or organisation wishing to campaign for a particular outcome in the referendum must make a declaration to the Electoral Commission stating the wish to be a permitted participant. That declaration must also state the outcome for which the participant intends to campaign. A person or organisation that is not a declared permitted participant will be allowed to spend not more than £10,000 on campaigning for a particular outcome in the referendum.

67. The purpose of having declared permitted participants is to help to ensure an open campaign where those who wish to publicly support a particular outcome must register that intention, so that the public know who is campaigning for what. Imposing spending limits on those declared participants will create as far as possible a level playing field with regard to campaign spending and thus prevent certain individuals or organisations from dominating the referendum campaign.

68. There are three categories of permitted participants in the referendum:

- designated organisations;
- registered political parties represented in the Scottish Parliament at the start of the referendum period; and
- other permitted participants.

Designated organisations

69. A permitted participant may apply to the Electoral Commission to be the principal campaigner representing one of the outcomes of a referendum. A permitted participant so designated (so-called “designated organisations”) will in effect be the main campaign body for each of the outcomes of the referendum.

70. As the main campaigning body for an outcome in a referendum, a designated organisation will have a higher campaign spending limit than other permitted participants. In addition, each designated organisation will be entitled to one free mailshot to every household or voter in Scotland to promote its campaign, provision for which can be made by order under the Scotland Act 1998. As at elections and other referendums, designated organisations will also be entitled to use school rooms or other rooms funded by Scottish Ministers or any Scottish public authority for holding public campaign meetings during the 28-day period before the referendum is held.

71. The intention is that campaigners at a referendum should be able to put forward their arguments to voters by campaigning on a similar scale to political parties campaigning at a Scottish Parliament election, which have a spending limit of £1,500,000. This is therefore the spending limit adopted in the Bill for the designated organisations. It is also the same limit as in the 2014 referendum.

Political parties

72. The Bill also sets spending limits for political parties which stood candidates in both the constituency and regional polls at the last Scottish Parliament elections and had votes cast in favour of their candidates.

73. The spending limit for each registered party represented in the Scottish Parliament at the start of a referendum period will be set by reference to the share of the vote that party received at the last Scottish Parliament election, as was the case at the 2014 Referendum. The Electoral Commission:

- will calculate the limits with reference to the actual share of the vote received by each party, rather than using bands; and
- will apply the share of the vote to a maximum value equivalent to the combined value of the limits of the two designated organisations. In other words, the combined spending limits for all political parties represented in the Scottish Parliament is approximately equal to the combined spending limits for the two designated organisations, with each party’s share of that overall limit being determined by their share of the vote at the last Scottish parliament election. This approach is intended to provide party limits sufficiently high to allow parties to carry out a significant national campaign separately from any designated organisation.

Other permitted participants

74. For groups which are not political parties and wish to campaign outside of the designated organisations as permitted participants (whether or not they also form part of such a group) the spending limit be set at 10% of each designated organisation's spending limit (in other words, £150,000, which represents 10% of the designated organisations' limit of £1,500,000). This is in line with the limit applied at the 2014 independence referendum. The limit should be sufficient to allow other groups to have some national impact, while encouraging them to join the designated organisations if they wish to contribute more substantially. The Bill also contains restrictions which prevent campaigners from evading the spending limits by setting up multiple campaigns which work to a common plan. These restrictions replicate the approach taken in the 2014 and 2016 referendums.

Expenses that count towards spending limits

75. Expenses will count towards the spending limits if they are in relation to activities supporting a referendum campaign or promoting an outcome in the referendum. Such activities include:

- referendum campaign broadcasts;
- advertising;
- unsolicited material addressed to voters;
- any material that provides information about the referendum, its questions, or promotes an outcome;
- market research or canvassing of people's voting intentions;
- press or media conferences;
- transport costs for the purposes of obtaining publicity about the referendum; and
- rallies and other forms of public meetings.

76. Benefits in kind associated with property, facilities or services that are provided free of charge or at a preferential rate are also counted as referendum expenses if the benefit exceeds £200. These are referred to as "notional referendum expenses" in the Bill and must be declared to the Commission, along with the other expenses.

77. Breach of the campaign spending limits is treated as an offence in the same way as PPERA treats such breaches. It would therefore be an offence for an individual or body which is not a permitted participant knowingly to exceed its spending limit of £10,000. Anyone guilty of this offence would be liable, on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both) and, on conviction on indictment, to imprisonment for a term not exceeding 12 months, or to a fine without limit (or both).

78. Similarly, it is an offence for permitted participants to exceed their spending limits. A person guilty of such an offence would be liable, on summary conviction, to a fine not exceeding the statutory maximum and, on conviction on indictment, to an unlimited fine.

79. To ensure that referendum campaigns are conducted openly, it is crucial that the campaign expenditure incurred is properly accounted for and reported. Those running campaigns must demonstrate that they have maintained control over what they have spent on their campaigns so that their spending can be reported and made public. The Bill therefore puts in place detailed rules, similar to those used for the 2014 referendum, to ensure that each participant has appropriate procedures in place to authorise and account for its expenses. To ensure maximum transparency, the Bill also requires all permitted participants to provide regular reports to the Electoral Commission ahead of the poll on all donations and loans received.

Donations made to permitted participants in the referendum campaign

80. As set out above, the Bill puts in place detailed rules to ensure that any donations made to permitted participants in support of their campaign – whether in the form of money or other property – are declared and administered appropriately to ensure that the campaigns are run with fairness and transparency.

81. Donations to registered political parties are already subject to a regulatory regime established in Part 4 of PPERA. That regime applies regardless of whether an election or referendum campaign is taking place. There is therefore no need to create an additional set of rules in this Bill regulating donations to registered political parties solely for the purposes of a referendum.

82. The Bill puts in place rules about donations to permitted participants who are not registered parties or are minor parties, and who are therefore not subject to the relevant PPERA rules. These rules are again based on those used for the 2014 referendum and existing legislation for referendums in the UK, set out in PPERA. In general terms, the rules in the Bill define what donations are allowed, both by description and monetary value (or a determination of monetary value), who is allowed to make a donation, and what a permitted participant must do to record and report the donations of over £500 which they receive (donations under £500 are not regarded as donations to a permitted participant). A “relevant donation” is the term used to describe a donation to a permitted participant for the purposes of meeting their referendum expenses. Such donations would include:

- a gift to the permitted participant of money or other property;
- sponsorship provided to the permitted participant (money or other property transferred to the permitted participant to help them meet or not incur referendum expenses in connection with an event organised by or on their behalf, or publications or research - but payment of an admission charge to an event, or the purchase price of publications, do not count as sponsorship);
- any money spent by someone other than the permitted participant themselves in paying any referendum expenses incurred by or on behalf of the permitted participant;
- the provision of any property, services or facilities on anything other than commercial terms for the use or benefit of the permitted participant (including the services of any person); and

- any subscription or other fee paid for affiliation to, or membership of, the permitted participant (where a permitted participant is not an individual).

83. Loans and benefits provided to those permitted participants are regulated by similar detailed rules to those on donations as “regulated transactions” drawn from rules which applied at independence referendum.

84. Permitted participants can only accept donations if they are made by “permissible donors” who are defined in the Bill as including:

- individuals registered on the electoral register anywhere in the UK;
- companies registered under the Companies Act, incorporated in the EU and that conduct business in the UK;
- registered parties;
- trade unions;
- building societies;
- limited liability partnerships;
- friendly societies; and
- unincorporated associations carrying on business or other activities wholly or mainly in the UK and having their main office there.

85. Permitted participants will not be able to accept certain anonymous donations or donations from other individuals or organisations if they do not meet the criteria set out above.

Returns to the Electoral Commission by permitted participants about their campaign finances

86. In addition to the arrangements for pre-poll reporting of loans and donations, the Bill requires permitted participants to provide a report to the Commission about their finances during the campaign. A person designated by a permitted participant as the “responsible person” (in the case of a registered political party, the treasurer) must make a return to the Electoral Commission within three months of the date of the referendum, setting out full details of expenses and donations. It is an offence to fail to do so.

87. Permitted participants that spend over £250,000 during the referendum campaign will be required to submit an auditor’s report with their return within six months of the date of the referendum.

Supply of registers

88. The Bill provides that, in order to be permissible, donations must be made by permissible donors, defined in the Bill, and that “all reasonable steps” must be taken by the permitted participant receiving the donation to verify that a donor is such. The Bill sets out the full range of those who are deemed to be permissible donors, including any individual

registered in an electoral register. This is in line with the access provided at the 2014 referendum and at referendums held under UK legislation. The Bill provides for all permitted participants to have access to the local government register of electors which will enable them to verify the permissibility of donors who appear on that register. If they receive a donation from an individual who is not on the local government register, they will be able to check other electoral registers operating in Scotland and the rest of the UK through the normal public access routes.

89. As previously mentioned, the designated organisations as permitted participants will be able to request a copy of the complete register, which will include all voters in the referendum. This will give them designated organisations the names and addresses of those who are eligible to vote, enabling them to send a postal communication to every household or voter in Scotland using the free mailshot to which they are entitled under the Bill and by provision to be made by order under the Scotland Act 1998.

Publications and broadcasts during the referendum campaign

90. In line with established practice, the Bill provides that, for the 28-day period before the date of a referendum, the Scottish Ministers, the Scottish Parliament Corporate Body and certain public authorities in Scotland cannot publish any material providing general information about the referendum, dealing with issues raised by the questions to be voted on in the referendum, putting any arguments for or against a particular answer to the questions to be voted on, or which is designed to encourage voting in the referendum. This follows the approach taken at the 2014 referendum and at other elections and referendums.

91. The Scottish Government would expect that the UK government (and reserved or cross-border UK public bodies) would undertake, as at previous referendums, not to publish material on a similar basis.

92. As the recognised campaign bodies representing the campaign for a particular outcome in the referendum, only designated organisations will be allowed to make referendum campaign broadcasts, to be permitted by provision made by order under the Scotland Act 1998. Any such order to be made under that Act must be agreed and taken forward in the UK Parliament by the UK Government.

Alternative approaches

93. The Bill sets out campaign regulation arrangements that draw on the arrangements used at previous referendums, with some changes and improvements. It would be possible to take a different approach to many aspects of the campaign regulation; this section discusses specific aspects of the arrangements that were commented on by respondents to the 2016 consultation.

94. It would be possible to establish a separate Scottish referendums regulator, instead of giving the regulatory role to the Electoral Commission. When undertaking policy development for the 2014 Scottish independence referendum, the Scottish Government considered whether to set up a separate and one-off Scottish Referendum Commission on the basis that it was essential that the Commission was accountable to the Scottish Parliament, rather than the UK

Parliament. However, the Local Electoral Administration (Scotland) Act 2011 gave the Electoral Commission a statutory role for the first time in Scottish local government elections and established the principle of the Electoral Commission reporting to the Scottish Parliament on the exercise of its functions in Scotland. This arrangement worked successfully during the local government elections in May 2012, and at subsequent polls. Additionally, the regulatory arrangements worked well at the 2014 Scottish independence referendum.

95. It would be possible to set different spending limits for a referendum, by increasing or decreasing the limits for different categories of permitted participants. The spending limits for regulating the referendum campaigns are set at levels which are proportionate to ensure a level playing field at the referendum. The Bill also includes a power to vary specified sums, allowing the framework to be updated if the balance of factors leading to a specific spending limit changes in future.

96. Using PPERA as the model for prescribing permissible donors for the referendum, it might be possible to restrict some of the “permissible donors” identified above to those with headquarters or bases in Scotland. Whilst this approach might be desirable it would give rise to a number of practical inconsistencies and anomalies. For example, such restrictions would mean that only three trade unions and three building societies could become donors.

97. Furthermore, in practice, registered political parties are the main organisations that are likely to donate money to the referendum campaign organisations. The PPERA rules apply to registered political parties on a UK-wide basis. It is not within the legislative competence of the Scottish Parliament to legislate to regulate the donations that registered political parties receive from voters in other parts of the UK and then use in the referendum. Political parties can receive donations at any time and they are not normally specifically earmarked for a particular use. There would be no practicable way to determine whether or not donations made prior to the referendum announcement were intended to be used for referendum campaigning. To restrict minor parties and other permitted participants to donations from voters and organisations registered only in Scotland would be unfair to them when the largest political parties can legitimately use money from elsewhere. For these reasons, the Bill adopts the UK-wide definition of permissible donors set out in PPERA. This approach is the same as used for the 2014 referendum.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

98. The Bill’s provisions are not discriminatory on the basis of age, gender, race, disability, marital status, religion or sexual orientation. They are intended to ensure equality of opportunity for people in having their say on the options in a referendum. In particular, the Bill places responsibilities on the CCO and counting officers to make provision so that as many people as possible have the opportunity to take part in the referendum. This follows existing legislation and practice for elections.

Age

99. The Bill allows for 16 and 17 year-olds to vote in referendums, as they did at the 2014 referendum and can at Scottish Parliament and Scottish local government elections.

Disability

100. In line with elections, a counting officer will be required to ensure that polling stations are accessible to all. The Bill includes the following provisions to help people with disabilities to vote:

- if a voter applies to vote with the assistance of someone else on the grounds of blindness, other physical disability or an inability to read, the presiding officer of the polling station must approve the application if the presiding officer is satisfied that the voter and the companion meet the terms of the legislation;
- postal voters must be given information about how to obtain guidance for voters in Braille, pictorial format, audible format or in other formats;
- each polling station must have a sample copy of the ballot papers in large text for voters who are partially sighted, and a ‘tactile voting device’ for enabling voters who are blind or partially sighted to enable them to vote without the need for assistance; and
- an enlarged sample copy of the ballot paper must be displayed at every polling station.

Race and ethnicity

101. The Bill puts in place measures to ensure that those who are more comfortable reading directions in a language other than English can also take part in the democratic process. Postal voters must be given information about how to obtain guidance for voters in languages other than English, and an enlarged sample copy of the ballot papers translated into other languages may be displayed at every polling station as appropriate.

Human rights

102. The Scottish Government has considered the potential effect of the Bill on human rights. It is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights. The spending limits for regulating the referendum campaigns are set at levels which are proportionate to ensure a level playing field at the referendum. The publicly available register of local electors is used, in line with election law and subject to the necessary safeguards to prevent impersonation and ensure a fair referendum. The Bill also creates criminal offences where necessary, each of which are compatible with Convention rights.

Island communities

103. The Bill has no disproportionate effect on island communities and alternative methods of voting are available where transportation might be a difficulty.

Local government

104. The Bill establishes the office of the CCO. The CCO will normally be the Convener of the Electoral Management Board and will most probably appoint existing returning officers to

be the counting officers in each local authority area. The people responsible for conducting the referendum are most likely to be the local authority officers who are currently responsible for running elections in Scotland.

105. The CCO and counting officers will claim their expenses from the Scottish Government, under the terms of regulations to be made under the powers in this Bill. Therefore, although it is local authority officers who will in effect incur expenditure in running the referendum, there will be no additional pressure on local authority budgets arising as a result of the referendum.

106. In 2016, when developing and consulting on the Draft Referendum Bill, Scottish Government officials worked closely with a range of electoral professionals - local authority returning officers, electoral registration officers and the Electoral Commission. Whilst no formal consultation has been undertaken on this Bill, officials have used the results of previous engagement and consultation to ensure the proposals in the Bill reflect and build on the “gold standard” rules used at the successfully-run referendum in 2014 and those governing elections.

107. The accompanying Business and Regulatory Impact Assessment sets out the impact on local government in full.

Sustainable development

108. The Bill will have no negative impact on sustainable development. The Bill includes a number of assumptions about specific resources needed to run a referendum - e.g. paper needed to produce ballot papers. However, it makes use, where appropriate, of existing electoral systems and processes - e.g. in relation to registration, minimising any additional use of resources.

109. The potential environmental impact of the Bill has been considered.

110. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

This document relates to the Referendums (Scotland) Bill (SP Bill 46) as introduced in the Scottish Parliament on 28 May 2019

REFERENDUMS (SCOTLAND) BILL

POLICY MEMORANDUM

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