

REFERENDUMS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

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 Referendums (Scotland) Bill. It describes the purpose of each 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 the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

OUTLINE OF BILL PROVISIONS

3. This Bill provides a legislative framework for the holding of national referendums in Scotland, rather than regional or local referendums, that are within the legislative competence of the Scottish Parliament. It covers the technical aspects of holding the referendum by setting the rules for voting and setting out the rules for how the poll should be conducted. The Bill also provides campaign rules to regulate campaigning at the referendum. The rules are largely based on existing UK and Scottish legislation covering elections and referendums. They include the administration and limits of spending by and donations given to participants during the referendum campaign.

4. The Bill covers a range of issues, with much of the detail set out in schedules, as follows:

- Provision for a referendum
- Provision about voting etc.
- Rules concerning the conduct of the poll
- Campaign rules and enforcement
- Referendum agents and observers
- Other functions and funding of the Electoral Commission
- Offences

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

- Power to make incidental, supplementary and in some cases consequential provision
- Legal proceedings
- Final provisions and interpretation

RATIONALE FOR SUBORDINATE LEGISLATION

5. The Government has had regard, when deciding what subordinate legislation powers and respective Parliamentary procedures are appropriate for the Bill and whether provisions should be in primary or in subordinate legislation, to:

- the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances (for example changes to the rules for running other referendums and elections in the UK);
- the need to make proper use of valuable Parliamentary time; and
- the need to deal with the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament (for example problems with the on-line electoral registration system).

6. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

DELEGATED POWERS

Section 1 – Power to provide for referendums

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish Statutory Instrument

Parliamentary Procedure: affirmative

Provision

7. This provision provides that the Scottish Ministers may make regulations providing for a referendum to be held nationally in Scotland (and therefore not regionally or locally). The regulations will specify the question or questions to be asked in the referendum, the form of the ballot paper and the date on which the referendum is to be held, and the referendum period.

8. The provision also sets out that prior to the laying of the draft regulations before the Parliament for approval, the Scottish Ministers must consult with the Electoral Commission.

Reason for taking power

9. The provisions set out in this Bill are intended to be a framework for future referendums in Scotland. The Bill does not directly provide for a specific referendum. Therefore, it does not contain the question or questions to be asked at any future referendums or the dates of those referendums. This is the same approach as for referendums held under Acts of the UK Parliament in Part 7 of the Political Parties, Elections and Referendums Act 2000. Previous referendums have been criticised by the Law Commissions for *ad hoc* statutory provision made anew for different referendums¹. It is, however, considered useful to have a set of rules and standards able to be employed more quickly where appropriate for particular referendums, and where the Parliament believes that is the appropriate way forward.

10. The Scottish Government therefore considers it valuable for there to be a mechanism for parliamentary approval by regulations of the holding of a referendum and for consideration of the question or questions to be asked at, and the dates of, any future referendums.

Choice of procedure

11. The question, or questions, to be asked and the date will be at the core of any future referendum and therefore a high level of parliamentary scrutiny, short of primary legislation, is required. The affirmative procedure is considered to be appropriate, so that no regulations can be made under this section unless the Parliament has seen them in draft and approved their making.

12. In addition, it is considered appropriate to have the specific safeguard of provision for consulting the Electoral Commission under sections 1(4) and 3(1)(b) to (3), (5) and (7) of the Bill, in advance of laying of the whole regulations under section 1. This will cover respectively the date of the referendum and form of the ballot paper, and specifically the wording and intelligibility of the referendum question.

13. Section 3 is modelled on the specific provisions which apply to provision made under UK Acts in section 104(3) to (7) of the Political Parties, Elections and Referendums Act 2000, and includes a requirement on the Commission to publish any views it has on the intelligibility of the referendum question, which the Scottish Ministers must report to the Parliament when laying draft regulations, or regulations. There is an exception where the Commission has previously published a report setting out its views on that matter or recommended the wording of the question (and any preceding statement).

Section 2 – Application of this Act

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: affirmative

¹ http://www.lawcom.gov.uk/app/uploads/2016/02/electoral_law_interim_report.pdf, p195.

Provision

14. This provision confers a power on the Scottish Ministers to modify the Bill as it applies to any particular referendum to be held under regulations made under section 1. Such regulations may include incidental, supplementary, consequential, transitional, transitory or saving provision and may modify any enactment.

Reason for taking power

15. The power, which is designed to be used together with section 1 where necessary, enables the provisions of the Bill and other electoral legislation to be updated as they apply to a particular referendum to take account of the particular circumstances giving rise to the need for that particular referendum, or indeed developments in wider electoral or referendum legislation as may be considered appropriate for such a referendum.

16. Electoral legislation is a rapidly changing environment. The Electoral Commission regularly reports on past elections and referendums and makes recommendations for consideration by government. In order to allow the rules for any future referendum to comply, where necessary, with the current practice or new recommendations for elections and referendums, it is necessary to allow for the rules and standards in the Bill framework to be adapted as they apply to specific referendums as appropriate. Therefore, while this power is intended to allow preparations and adjustments to the rules to be made for specific referendums, e.g. a change to the applicable campaign rules, it does not include the power for the provisions of the Bill itself to be amended so that rules and standards for one referendum can be automatically applied to other future referendums.

Choice of procedure

17. The conduct and campaigning of referendums and elections and the entitlement to vote are important aspects of any future referendum. This is a wide power and it is difficult currently to predict what use might be made of it, therefore a high level of parliamentary scrutiny is proposed. The affirmative procedure is, therefore, considered to be appropriate, in order that changes do not proceed without parliamentary consent. For the same reason, a requirement to consult the Electoral Commission before laying draft regulations is considered appropriate.

Section 11(3), (5) and (6) – Expenses of counting officers

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary Procedure: no procedure

Provision

18. This provision provides that the Scottish Ministers may make regulations setting out the maximum amounts that the Chief Counting Officer and counting officers can claim for charges and expenses incurred in connection with the carrying out of their functions in relation to referendums covered by the provisions in this Bill.

19. The regulations will set a maximum amount limiting how much each counting officer may claim for specified charges and expenses. However, the Scottish Ministers may provide more than the maximum amount if they are satisfied that it was reasonable for the counting officer to incur the charges or expenses, and that the amount of the charges or expenses is reasonable. This is in line with the funding arrangements for Scottish elections, e.g. article 18 of the Scottish Parliamentary Elections Order 2015².

Reason for taking power

20. The use of regulations to set the maximum amount counting officers may claim allows the Scottish Ministers to adjust the maximum amounts to take account of any costs flowing from changes to the rules and procedures or inflation over time.

Choice of procedure

21. The default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010). This is considered appropriate because this is a purely administrative function and the policy behind the provision will already have been considered by the Parliament during the passage of the Bill. This is consistent with the position for similar orders at other referendums and elections in the UK.

Section 34(2), (4) and (5) – Registration officers’ expenses

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary Procedure: no procedure

Provision

22. This provision provides that the Scottish Ministers may make regulations setting out the maximum amounts that registration officers can claim for expenses incurred in connection with the carrying out of their functions in relation to referendums covered by the provisions in this Bill. The power is similar to section 11(3), (5) and (6) on the expenses of counting officers considered above.

Reason for taking power

23. The use of regulations to set the maximum amount registration officers may claim allows the Scottish Ministers to adjust the maximum amounts to take account of any costs flowing from changes to the rules and procedures or inflation over time.

Choice of procedure

24. The default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010). This is considered appropriate because this is a purely

² SSI 2015/425

administrative function and the policy behind the provision will already have been considered by the Parliament during the passage of the Bill. This is consistent with the position for similar orders at other referendums and elections in the UK.

Section 37 – Power to modify this Act

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary Procedure: affirmative

Provision

25. This provision gives the Scottish Ministers the power to make modifications to the provisions of the Bill in consequence of or in connection with legislative changes being made or proposed to other electoral or referendum legislation about the conduct of, or campaigning in, or entitlement to vote at, referendums or elections, or to give effect to recommendations made by the Electoral Commission.

26. The power is a power to amend primary legislation. It includes the power to make incidental, supplementary, consequential, transitional, transitory or saving provision.

Reason for taking power

27. The provisions set out in this Bill are intended to be a framework for future referendums in Scotland. This power allows the Bill framework to be updated to ensure it is in line with other legislation on the conduct of and campaigning in referendums and elections, entitlement to vote and recommendations made by the Electoral Commission after an electoral event, ensuring it remains up to date and fit for purpose.

Choice of Procedure

28. The conduct of and campaigning in referendums under the provisions in the Bill, and entitlement to vote at such a referendum, are important aspects of any future referendum. As provision is made enabling the amendment of primary legislation, a high level of parliamentary scrutiny is required. The affirmative procedure is, therefore, considered to be appropriate, so changes about these significant matters cannot be made to the framework without parliamentary consent. As any use of the power is likely to have already been subject to consideration by the Electoral Commission, a requirement to consult with it is not considered necessary in this case.

Section 38 – Power to vary specific sums

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary Procedure: negative/affirmative

Provision

29. This provision gives the Scottish Ministers the power to vary sums specified in the provisions of the Bill, effectively in respect of fees and penalties in the Bill, as a result of inflationary effects or on the recommendation of the Electoral Commission. Similar provision is made in section 155 of the Political Parties, Elections and Referendums Act 2000.

30. In particular, the power will apply to the following provisions:

schedule 1 rule 54(2)	Fee for supply of the marked register
schedule 3 paragraph 13(9)	De minimis amount for notional referendum expenses for use of property, services or facilities.
schedule 3 paragraph 15(2)	De minimis amount for providing an invoice or receipt in support of payments in respect of referendum expenses
schedule 3 paragraph 19(2)	Maximum total referendum expenses incurred by or on behalf of an individual or a body that is not a permitted participant during the referendum period.
schedule 3 paragraph 20(1)	Maximum total referendum expenses incurred by or on behalf of a permitted participant during the referendum period
schedule 3 paragraph 21(4)	Maximum amount for referendum expenses incurred as part of common plan to be treated as being incurred only by the designated organisation.
schedule 3 paragraph 22(10)	Maximum total amount of such expenses incurred by or on behalf of a permitted participant in relation to the requirement to deliver the declaration or provide a return as to referendum expenses.
schedule 3 paragraph 23(1)	Amount above which the return as to referendum expenses must be completed by a qualified auditor.
schedule 3 paragraph 33(2)	Maximum amount above which payments etc. should be regarded as donations.
schedule 3 paragraph 35(4)	Maximum amount above which each individual contribution is to be treated as if it were a separate donation.
schedule 3 paragraph 35(6)	Maximum amount above which details of a donor must be supplied to the responsible person for the permitted participant.
schedule 3 paragraph 41(3)	The minimum amount above which a donation from permissible donor must be included in the statement of relevant donations.
schedule 3 paragraph 43(3) & (4)	The minimum amount above which a donation must be included in donation reports during the referendum period
schedule 3 paragraph 47(12)	The minimum level for regulated transactions.
schedule 3 paragraph 55(3)	The minimum level for recordable transactions.
schedule 3 paragraph 61(3) & (4)	The minimum amount for including regulated transactions in the transaction reports during the referendum period.
schedule 5 paragraphs 1(3) & 2(2)	The amount of the fixed monetary penalties which can be imposed by the Electoral Commission in respect of campaign expenses.

- schedule 5 paragraph 6(3) The maximum amount of monetary penalty which can be imposed by the Electoral Commission in respect of campaign offences.
- schedule 5 paragraph 11(2) The maximum amount of non-compliance penalty which can be imposed by the Electoral Commission in respect of failing to comply with a non-monetary discretionary requirement.

Reason for taking power

31. As set out in the provision, the power to vary these sums is to be used to keep the legislation up to date. This is limited to taking account of inflationary effects or giving effect to a recommendation of the Electoral Commission.

Choice of procedure

32. Where the power is exercised to take account of inflationary effects the regulations are subject to the negative procedure. This is considered appropriate because while it allows variation of the figures on the face of the provisions in the Bill this is a largely administrative function to reflect changes in the value of money.³

33. Where the power is exercised to give effect to recommendations from the Electoral Commission, the affirmative procedure applies. Any such recommendation from the Commission could suggest a change in the policy in relation to specified sums. The campaign provisions, including specified sums, are important aspects in any future referendum and therefore a high level of parliamentary scrutiny is appropriate.

Schedule 1, paragraph 17(4) - Alterations in the register of local government electors

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations made by Scottish Statutory Instrument**
Parliamentary Procedure: **negative**

Provision

34. This provision allows the Scottish Ministers, after consultation with the Electoral Commission, to extend the deadline for electoral registration in the run up to a referendum under the provisions in the Bill.

Reason for taking power

35. Shortly before the deadline for registration before the EU referendum in June 2016, the on-line registration system became unavailable due to a large number of individuals trying to register in the final 2 hours before the deadline of midnight. Due to the risk that some voters may not have been able to register, and would therefore be denied the right to vote, the UK government extended

³ Though not directly relevant, the similar power in section 155(2)(a) of the Political Parties, Elections and Referendums Act 2000 had no parliamentary procedure.

the registration deadline by two days. This allowed those individuals who had not been able to register before the original deadline, a further opportunity to vote.

36. Whilst the capacity of the online registration system has been significantly increased since this outage, and has worked well at subsequent elections, it is thought prudent to have the provision to extend the deadline, should it be needed. The requirement to consult the Electoral Commission is considered appropriate, to provide independent scrutiny of any proposed use of the power.

Choice of procedure

37. Negative procedure is considered appropriate for this essentially technical and administrative matter due to the likelihood that there will be a need to make any extension without delay.

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