

**Referendums (Scotland) Bill written submission from the Electoral Commission****August 2019**

1. This response sets out the Electoral Commission's views on the Referendums (Scotland) Bill. It addresses specific questions asked by the Committee in its call for evidence and also highlights areas where the Commission believes the proposed legislation should be strengthened in order to improve the efficient conduct of the poll, the count and the regulation of campaigning. We are in discussions with Scottish Government officials about the detailed technical implications of these recommendations.

What are your views on the overall policy objectives of the Bill?

2. The Referendums (Scotland) Bill provides for a legislative framework for all future referendums held under the powers of the Scottish Parliament. This framework would help to provide clarity of the rules for anyone administering or campaigning at a particular referendum. It would enable Counting Officers (COs), campaigners and the Electoral Commission to begin appropriate planning and preparation at an early stage, rather than wait for detailed legislation to be finalised on each occasion that a referendum is proposed.
3. The Bill reflects many of the recommendations for improvements that the Commission made following the 2014 Scottish independence referendum as well as the UK-wide referendums in 2011 and 2016. These include strengthening the rules around imprints on digital campaign material and enabling COs to promote the participation of voters in the poll.
4. However, the Commission have identified some specific areas – addressed in detail below – where further steps should be taken to ensure voter confidence in the administration of the referendum process, the effective regulation of campaigners and compliance with the campaign rules.

**Key recommendations****The Bill should be amended to ensure that:**

- The Electoral Commission must be required to assess any referendum question proposed in legislation, and set the Commission's views before the Scottish Parliament, regardless of whether the Commission has previously published views on the question proposed.
- The Electoral Commission's powers to obtain information outside an investigation are strengthened to help the Commission deal with compliance issues in real time.
- Campaigners are required to report more details about their campaign spending in the spending returns. This will give voters more meaningful transparency about how campaigners have spent money trying to influence them, and help the Electoral Commission carry out compliance work after a referendum.
- The maximum fine for breaches of the campaign finance rules is increased to a level that is high enough to have a deterrent effect on all campaigners.

What are your views on these regulationmaking powers?

5. The Bill provides that Scottish Ministers may bring forward a referendum by laying regulations setting out the referendum question, date of the poll and the duration of the period during which campaigns will be regulated. It requires Ministers to consult the Electoral Commission prior to the laying of these regulations; this will ensure that the Scottish Parliament is able to take into account the Commission's independent expert advice as it considers any draft regulations.
6. The Commission would, however, welcome further commitments in relation to the timing of any referendum legislation, the duration of the regulated campaign period, and the Commission's assessment of any question proposed either on the face of any Bill or via secondary legislation.

Timing of referendum legislation

7. The Commission continues to recommend that all legislation for any future referendum should be clear (whether by Royal Assent to a Bill or the introduction of regulations to the Scottish Parliament for approval) at least six months before it is required to be implemented or complied with by campaigners, COs and the Electoral Commission. This is so that campaigners and Counting Officers have sufficient time to understand, take advice on, receive guidance, and generally prepare to comply with the rules once they are in force. Most importantly, it is this lead in period that also enables voters to be informed about the issues at stake in the referendum and have confidence in the process leading to a free and fair referendum with a result that has overall legitimacy for the public.
8. This would also ensure that the Electoral Commission and the Chief Counting Officer (CCO) are able to draft and publish guidance for campaigners and Counting Officers in good time before the rules come into force. The Commission's report on the 2014 Scottish independence referendum highlighted the benefits for voters, campaigners and electoral administrators of early confirmation of the legislative framework for the referendum, which was clear nine months before the referendum date.

Referendum period and timetable

9. The Bill specifies that the process for designating lead campaigners will last six weeks and take place before the referendum period. The referendum period when campaigners' spending and donations will be regulated would be set by regulations, and the Bill does not set a minimum timeframe for that period.
10. When legislating for a referendum under this framework, it will be important to ensure that the referendum period allows sufficient time for voters to engage with the campaign and understand the arguments. This will depend on the context and subject matter of the proposed referendum. For example, the length of the referendum period and timing of designation for previous referendums<sup>1</sup> was:

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<sup>1</sup> For further information see the Report of the Independent Commission on Referendums, 2018, Table 3.1 page 51

- 2011 Welsh devolution referendum: 11 week referendum period *including* 6 weeks for designation of lead campaigners
- 2011 Parliamentary Voting Systems referendum: 11 week referendum period *including* 6 weeks for designation of lead campaigners
- 2014: Scottish Independence Referendum: 16 week referendum period *preceded* by 6 weeks for designation of lead campaigners
- 2016: EU membership Referendum: 10 week referendum period *preceded* by 6 weeks for designation of lead campaigners

11. The Commission supports the approach set out in the Bill which provides for the designation of lead campaigners to take place before, rather than during, the referendum period. This will ensure that they have more time to plan their campaigns and to reach voters with their arguments. And where pre-designation is in place, we recommend that the minimum regulated campaign period is ten weeks. The Commission would provide advice to the Scottish Parliament about the implications of any proposals for regulated periods at future referendums held under this framework.

#### Referendum question

12. At any referendum it is essential that voters can easily understand and answer the question and any statement which precedes it on the ballot paper. The intelligibility of the referendum question is fundamental to voters' ease of understanding and participation in the referendum and underpins the legitimacy of the outcome.
13. The Commission plays an important role in providing independent expert advice to parliaments about the intelligibility of any proposed referendum question in order to inform scrutiny of legislation introduced by governments. Since 2004 the Commission has assessed and reported on many referendum questions, including those proposed for UK, Scotland and Wales wide referendums along with a number of regional and local referendums. In order to inform the Commission's views we:
- carry out research with voters from different backgrounds and across different areas, through focus groups and one to one interviews;
  - ask for advice from experts on accessibility and plain language
  - talk to potential campaign groups, other interested groups and individuals, including political parties who may want to campaign at the referendum<sup>2</sup>
14. The Commission's assessment of any proposed question can take approximately 12 weeks from being notified of the question to providing a statement on the Commission's view. This includes about eight weeks for carrying out public opinion research. The Scottish Parliament will want to ensure that there is sufficient time to

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<sup>2</sup> For further information see our factsheet: [Our approach to assessing the intelligibility of referendum questions](#)

receive and consider our views in order to ensure effective scrutiny of the legislation, whether the question is specified in primary legislation or regulations.

15. The Bill requires Scottish Ministers to consult the Electoral Commission on the wording of future referendum questions, and for a report of the Commission's views to be laid before the Scottish Parliament to inform their scrutiny of the primary or secondary legislation in which the question is proposed. It does not, however, require this if the Commission has previously published a report setting out our views on, or recommended the wording of, the specific question proposed in a Bill or regulations.
16. It is important that the Scottish Parliament's scrutiny of any Bill or subordinate legislation which included the question is informed by any relevant new evidence. The Commission firmly recommends that it must be required to provide views and advice to the Scottish Parliament on the wording of any referendum question included in legislation under this proposed framework, regardless of whether we have previously published our views on the proposed wording.

Does the Bill provide for referendum polls and counts to be run in an efficient, transparent and fair manner?

17. With some exceptions which we raise below, the Commission is content with the electoral administration arrangements set out in the Bill. These are largely based on the arrangements in place for the 2014 Scottish independence referendum

which was well run and commanded high levels of voter satisfaction and confidence in the results. The Commission has, however, identified some issues in the Bill which we believe need to be addressed.

Delivering the poll

### **Chief Counting Officer**

18. The Bill would provide for the Convener of the Electoral Management Board (EMB) to be appointed to the role of Chief Counting Officer (CCO) for any referendum. The Commission would support the continuation of this approach, which worked well in 2014.
19. The Bill currently provides for Scottish Ministers to remove the CCO from their duties in certain circumstances, such as ill health or disability. It also provides for Ministers to appoint such person „as they consider appropriate“ to the CCO role in the event that the EMB Convener role is either vacant or the incumbent does not wish to undertake the CCO role. In order to ensure public confidence in the process in these exceptional circumstances, Scottish Ministers should be required to consult the Electoral Commission before removing a CCO or appointing anyone to the CCO role.
20. The Bill requires COs and Electoral Registration Officers (EROs) to carry out any functions under the legislation in accordance with any directions given by the CCO. It does not, however, require the CCO to consult the Electoral Commission before issuing any directions, which is required at local government elections in Scotland.

To ensure consistency of practice across polls, the Bill should be amended to create a requirement for the CCO to consult the Commission on any proposed directions. The Commission's wider experience and overview is an important check and balance for effective and efficient delivery of the poll.

21. As noted above, it will be important to ensure that the referendum legislation enables sufficient time for the CCO to draft and provide guidance ahead of COs needing to comply with it, and that the CCO is adequately resourced to do so.

### **Appointment of Counting Officers**

22. The Bill provides that ahead of every referendum the CCO must appoint in writing Counting Officers for each local government area. To reduce uncertainty and enable effective planning ahead of any future referendum, the Bill should instead designate the Returning Officer for that local government area as CO in any referendum.

### **Code of practice for referendum observers at the referendum**

23. The Bill currently requires the Electoral Commission to lay before the Scottish Parliament a new Code of Practice on the attendance of observers at the proceedings of each referendum. The Commission has, since 2011, been required to prepare and lay a Code of Practice on the attendance of observers at local government elections in Scotland. To ensure consistency of expectation for observers and polling station staff across polls in Scotland, the Bill should instead allow the existing local government Code for observers to apply at any future referendum held under this framework.

### **Public awareness and encouraging participation**

24. The Bill would give responsibility to the Electoral Commission for promoting public awareness and understanding in Scotland about the referendum, the referendum question, and voting in the referendum. The Commission has significant experience in running public awareness campaigns ahead of major polls across the UK including at the referendums in 2011, 2014 and 2016 and is well-placed to take on this responsibility.
25. In order to ensure consistency, impartiality and clarity of messaging to potential voters ahead of previous referendums, the Commission has worked closely with COs and EROs to share awareness campaign materials and messaging. EROs are uniquely placed to encourage registration ahead of the referendum in their local area, including with hard to reach groups. The duty to encourage participation should therefore be extended to cover EROs as well as COs at future referendums.
26. In addition, the Bill should also ensure that EROs are exempted from the restrictions on publishing promotional material by central and local government (as currently set out in Schedule 3 of the Bill). This would remove any element of doubt as to their role in providing impartial information to potential voters on how to register to vote ahead of any referendum held under this framework.

Does the Bill ensure that campaigns in support of a referendum outcome are conducted in a fair and transparent manner?

Improving transparency about campaigners

### **Requirement for imprints on referendum campaign material**

27. The Bill would require non-printed referendum campaign material to include an imprint identifying who is responsible for it. Imprints help voters to check the source of election material, and also help the police, prosecutors and the Commission to enforce the spending rules. In our recent public opinion research, 46% of the respondents in Scotland thought that inadequate regulation of political activity on social media is a problem. Introducing an imprint requirement for digital campaign material is an important step to address this concern.
28. A requirement to include an imprint on non-printed referendum material was first introduced at the Scottish independence referendum. It is positive that the framework legislation includes a similar requirement. However, there are several aspects where the Bill should be amended to ensure the scope of the imprint requirement is as intended. This will help campaigners to comply with, and enable the Commission to enforce, the requirement. Given the fast changing pace of digital technology it will be important to keep this requirement under review to ensure it remains in step with technological developments.
29. The proposed requirement for imprints on non-printed material would rightly not cover voters simply discussing the referendum online. But as drafted it may unintentionally still cover individuals advocating for or expressing their opinions about a particular referendum outcome online. The rules for non-printed material should ensure that voters can express their personal opinions online without having to include imprints on their posts or other online activity, if they aren't making or receiving payment for them. But if people incur referendum expenses through their online activity, the rules about referendum expenses should apply. In that case, they should have to put imprints on their online material.
30. The Bill says that non-printed material must include an imprint unless it is not reasonably practicable to include one. There would be no similar exemption in relation to printed materials. The Commission is concerned that this exemption may stop digital platforms and channels from innovating to allow full imprints to be part of the message itself. It would also give campaigners an easy excuse not to include imprints.

### **Funding of referendum campaigns**

31. The Bill sets out who can give money to referendum campaigners. The only groups that can give money to campaigners are people who are registered to vote or organisations based in the UK. It is important that the rules for future Scottish referendums include appropriate safeguards to prevent funding of referendum campaigners from non-UK sources.

### **Company donations**

32. The Bill specifies that a company is a permissible donor to a referendum campaigner if it is incorporated within the European Union and carrying

on business in the United Kingdom. But it doesn't say that a company has to make enough money in the UK to fund its donation or loan.

33. This risks foreign companies using UK subsidiaries to fund referendum campaigns in Scotland with money that comes from outside the UK. For the safeguard against foreign funding to be effective in terms of companies, there needs to be an amendment to the Bill's definition of permissible donors to ensure that only companies that have made enough money in the UK can donate or make a loan to referendum campaigners.

### **New campaigners' assets and data**

34. The Bill specifies that the rules on donations and loans would only apply to campaigners after they have registered with the Commission, other than for political parties where the rules on donations and loans apply year-round. The Bill does not require transparency about money or assets that campaigners have received before they register. This means that voters will not have information about who has backed campaigners financially before the start of the regulated period. Having this information would help the Commission to ensure compliance with and enforce the political finance rules more effectively after a referendum held under this framework.
35. The Commission would welcome an amendment to ensure that new campaigners should be required to submit a declaration of assets and liabilities over £500 upon registration. Data about voters is an increasingly valuable asset for running targeted election campaigns, and the declaration should therefore include an estimate of the costs the campaigner has incurred when buying or developing the data they hold when they register.

### **Checking permissibility**

36. The Bill provides that individuals across the UK would be permissible donors to referendum campaigners as long as they are included on an electoral register anywhere in the UK. In order to check donations for permissibility, campaigners need to have access to the electoral registers. However, the duty to provide a copy of the electoral register to referendum campaigners under this framework would only be extended to EROs in Scotland, who would only be able to supply copies of the local government register. This means that there would be no automatic route for campaigners to check the permissibility of donors other than those registered as local government electors in Scotland. The Scottish Government will need to find a practical solution to this issue in order to enable campaigners to fully comply with their legal duties under the proposed legislation. A longer term solution would be for the Scottish, UK and Welsh Governments to legislate to provide access to all electoral registers for registered campaigners at referendums which have been enabled via legislation in devolved administrations

### **Donations to political parties**

37. The Bill specifies the controls that apply to donations to all registered campaigners at a Scottish referendum except registered political parties or minor parties. This is because rules on donations to registered political parties are

reserved to the UK Parliament. Parties are already subject to the regulatory regime in the Political Parties, Elections and Referendums Act 2000 (PPERA).

38. This is the same as the approach used in legislation for the referendums held in 2014 and 2016. However, whilst those referendums were held under Acts designed for a single poll, this is a framework Bill that will apply to any future Scottish referendum. It means that any future changes to the donation rules for political parties under PERA would also need to be considered for their relevance to the framework of controls for referendums held under this Act. Scottish Ministers may need to use their powers to modify this Act to keep pace with any changes made to PERA.

#### Transparency of campaign spending

39. Communication between campaigners and voters during a referendum is an important part of the democratic process. It is therefore important that there is transparency about the money being spent on campaigning. Our public opinion research<sup>3</sup> conducted earlier this year found that just over half (51%) of respondents in Scotland thought that inadequate regulation of the money political parties spend on their election campaigns was a problem. A number of changes should be made to the Bill to address this.

#### Better information about campaign spending

40. The Bill specifies that campaigners must prepare a return of their referendum expenses after the referendum. They must list all the payments they have made to suppliers, all disputed claims and all unpaid claims. But it does not require campaigners to give details about what they spent money on, or when, where and how they spent it.
41. The Commission would welcome an amendment so that campaigners would be required to include this information in their spending returns. This would give voters more meaningful transparency about how campaigners have spent money trying to influence them. It would also help the Commission to ensure compliance with and enforce the political finance rules more effectively after a referendum held under this framework. Any requirement for additional information will need to be proportionate so that it does not impose an unreasonable burden on campaigners when they compile their spending returns.

#### Earlier information about campaign spending after the referendum

42. Referendum campaigners that spend £250,000 or less at the referendum would be required to report their expenses within three months after the poll. For those that spend more than £250,000 the deadline would be six months. After these spending returns have been submitted to the Commission, we would also need to carry out compliance checks and prepare the spending returns for publication. That means in practice that information about the highest spending campaigners will not

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<sup>3</sup> The finding stems from our annual “Winter tracker” survey designed to provide an overview of public sentiment towards the process of voting and democracy in the UK. The result of the 2019 survey can be found here: <https://www.electoralcommission.org.uk/our-work/our-research/public-opinion-surveys/wintertracker>



be available before around nine months after a referendum. During this time, voters have no information about how much money campaigners spent, or what they spent it on, to influence the result.

43. Information about money spent needs to be available to voters and us as soon as possible after a referendum, while it is still a live issue. When the Commission undertook research<sup>4</sup> with the public on political finance regulation and digital campaigning in 2018, participants said they wanted to see information about spending by campaigners reported more quickly after an election or referendum. The Commission would welcome an amendment to the Bill to bring forward the deadlines for campaigners to submit their spending returns, particularly to reduce the deadline for those that spend more than £250,000 to less than six months. A shorter deadline would still need to allow time for campaigners to have their returns audited before submission.
44. Additionally, the participants in the research thought that submitting spending returns after a campaign was too late. Some thought that campaigners should have to report their spending during a campaign. The Commission also wants information to be available to voters and us more quickly during a campaign and would therefore welcome an amendment to provide for reporting of spending in real time. The amendment could set out the detail of such a requirement or provide for details to be set out in future under the powers to modify the Act.
45. We are in discussion with Scottish Government officials about how these recommendations could be implemented in law and will be able to update the Committee on the progress of these discussions in due course.

#### Engagement with disabled voters

46. It is important that campaigners are able to engage with disabled voters. Under the Bill the cost that a campaigner incurs when translating referendum material into an accessible format will count towards their spending limit.
47. The Commission would welcome an amendment to the Bill that ensures that expenses incurred which are reasonably attributable to an individual's disability should not count towards the campaigners' spending limits. With an exemption in place, campaigners would not have to consider how addressing accessibility needs will impact on their spending limits, and would therefore make it easier for them to make campaign material and events accessible to voters with disabilities. An exemption could be modelled on the exemption that are already in place for nonparty campaigners at Scottish Parliament elections. Enforcing the rules
48. It is important for voter confidence and the integrity of the referendum that campaigners comply with the rules. The Bill needs to ensure that there is a sound regulatory framework in place, with meaningful deterrents that will encourage campaigners to comply with the rules.

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<sup>4</sup> In 2018 the Electoral Commission contracted research agency GfK to carry out qualitative research with the public to get their views on political finance regulation and digital campaigning. The result of the research can be found here: <https://www.electoralcommission.org.uk/our-work/our-research/research-report/library/political-finance-regulation-and-digital-campaigning-a-public-perspective>

49. The Electoral Commission's public opinion research<sup>5</sup> found that a fifth (19%) of the respondents in Scotland disagreed that the authorities would take appropriate action if a political party or campaigner breaks the rules. The Commission needs the right tools to address voters' concerns by ensuring compliance and deterring breaches of the law. In order to ensure a more robust regulatory system for future Scottish referendums we recommend that the Commission's investigative and enforcement powers are strengthened.

### **Increasing the Electoral Commission's maximum fine**

50. The Bill would limit the maximum amount the Commission could fine campaigners for breaches of referendum laws to £10,000 for individual offences. It is important that the level of financial penalty for breaches of the law is high enough to have a deterrent effect that encourages compliance by all campaigners.

51. A suitable maximum fine for offences relating to Scottish referendums should be proportionate to the spending and funding of the designated lead campaigners, and it should reflect the seriousness of offences under this Bill.

52. As a benchmark, the level of financial penalties available for breaches of referendum law should be in line with the fines that other comparative regulators are able to impose, such as the Information Commissioner's Office (ICO). The ICO has a maximum fine of £500,000<sup>6</sup> under the Privacy and Electronic Communications Regulations. The Commission would encourage the Scottish Parliament to consider £500,000 as a starting point when determining its maximum fine for Scottish referendums.

### **Strengthening the Commission's powers to obtain information**

53. As with the Electoral Commission's powers at Scottish Parliament elections, the Bill gives the Commission wide evidence-gathering powers once it has opened an investigation. However the Commission's powers to gather information to assess whether we need to open a formal investigation are more limited. That is because the Commission is only able to obtain information related to the income and expenditure of registered referendum campaigners.

54. If the Commission needs information about those that campaign without having registered, we currently rely on third parties cooperating voluntarily with us. The Commission's experience is that organisations have been reluctant to give this information on a voluntary basis. Strengthening the Commission's powers to obtain information would allow us to deal with compliance issues in real time. For example, with the increase in online campaigning the Commission would want to have the power to require social media companies to give us information about the source of an online campaign that is running anonymously.

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<sup>5</sup> The finding stems from our annual "Winter tracker" survey designed to provide an overview of public sentiment towards the process of voting and democracy in the UK. The result of the 2019 survey can be found here: <https://www.electoralcommission.org.uk/our-work/our-research/public-opinion-surveys/wintertracker>

<sup>6</sup> The ICO imposes fines under both the PECR and GDPR. The ICO's fine under the General Data Protection Regulation was significantly increased last year to up to €20 million or 4% of the organisation's turnover

55. It is important for voter confidence that the Commission is able to deal with compliance issues in real time. We would be able to do that more effectively at future Scottish referendums if our powers to obtain information outside an investigation were strengthened. This would be consistent with regulation in other fields.

## Sharing information

56. The Bill gives the Commission the power to share information relating to our responsibilities at a referendum with other bodies. However, in some cases the Commission holds information which does not directly fall under our remit at the referendum, but would benefit another regulator or enforcement body in undertaking their duties. Currently the Commission is not able to share that information, and where we can rely on other regulators using their powers to get the information from us. In the normal accepted way for regulators, the Commission would want the power to share information with other bodies where it is in the public interest to do so.

## Ensuring fairness for campaigners

### **Restriction on publication of promotional material by central and local government**

57. The Bill would prohibit Scottish central and local government and public authorities from publishing material about the referendum, or material designed to encourage voting, during a specified period before polling day. This is to prevent government using the considerable public resources at its disposal to try and influence the outcome of the referendum during the final part of the campaign.

58. The restriction covers a wide amount of material, but it only applies during the final 28 days of the referendum period. This means that government and public authorities may spend potentially significant amounts of public money promoting their preferred outcome as close as four weeks before polling day. During the same period, referendum campaigners – including any officially designated lead campaigners – must work within statutory spending limits. It can affect voter confidence if there is a perception that the rules on spending do not apply equally during the referendum period. This was an issue of significant public importance and debate ahead of both the 2014 Scottish independence referendum and the 2016 EU referendum.

59. The restriction on the publication of promotional material by central and local government set out in the Bill should apply during the whole of the referendum period. To mitigate the potential impact on activity which would be considered the normal day-to-day business of governments and public authorities, the scope of the restriction could be redrafted to apply to more specific types of activities or issues.

60. The Commission recognises that the Scottish Parliament is unable to legislate to restrict the activities of other governments in the UK. However, in the absence of any statutory limitations, where the subject of any particular referendum is a matter of interest to other governments in the UK, we would expect and encourage voluntary compliance with the same restrictions on the publication of referendum material, which was the case for the 2014 Scottish Independence referendum.

## Financial memorandum

61. The Commission notes that the financial memorandum accurately reflects the costs the Commission incurred in carrying out our duties at the 2014 Scottish independence referendum. Some costs, particularly those related to public

awareness activity, are subject to fluctuation and we would expect to provide an updated estimate of our costs ahead of any future referendum.