



Law Society
of Scotland

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Years
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Memorandum of Comments

Referendums Bill

August 2019



Introduction

The Law Society of Scotland is the professional body for 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law sub-committee welcomes the opportunity to consider and respond to the Referendums Bill at Stage 1 before the Finance and Constitution Committee. The sub-committee has the following comments to put forward for consideration.

General Comments

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

This bill will enable the Parliament to scrutinise, debate and approve the rules and procedures for Scottish referendums.

The policy objectives of the bill are stated in paragraph 10 of the Policy Memorandum as being:

“...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”.

Our Comment

These policy objectives are, in our view met by the bill. As stated later in these comments we have some concerns about constraints on the role of the Electoral Commission.

The policy memorandum goes on in paragraph 11 to state that:

“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”.

We agree that the provision of a standing legal framework will enable future referendums to be legislated on in a consistent and timely manner. However, we have reservations about the use of subordinate legislation for the most important questions relating to the Constitution. Such issues require full and proper scrutiny which subordinate legislation does not provide. Our comments will explain our point of view more fully.

2. What are your views on the extent to which the Bill reflects good practice in holding referendums?

Our Comments

We agree that subject to our later comments generally the bill provides the sound statutory basis for holding referendums in a fair and open way.

Section 3(5) effectively replicates section 104(2) of the Political Parties, Elections and Referendums Act 2000 to require the Commission to consider the wording of the question and publish a statement as to the intelligibility of the question as soon as reasonably practicable after the bill is introduced and, in such manner, as they may determine.

We have concerns about the role of the Electoral Commission in respect of referendum questions under section 3 (7).

Section 3 (7) provides:

This section does not apply in relation to a question or statement if the Electoral Commission have—

(a) previously published a report setting out their views as to the intelligibility of the question or statement,

or

(b) recommended the wording of the question or statement.

Section 3(7) excludes consideration by the Electoral Commission where they have previously published a report setting out their views as to the intelligibility of the question or statement or recommended the wording of the question or statement.

Section 3(7) therefore excludes the Electoral Commission if at any time in the past they have carried out these actions. We take the view that this approach precludes the Commission from scrutinising the question in the light of conditions as they are at the time the question is to be posed. The assumption in the

bill is that, once approved, the wording of the question is suitable for ever. In other words that there are right and wrong answers to questions of intelligibility rather than judgements to be made in context.

3. What are your views on these regulation-making powers?

Section 1

Section 1(1) provides that Scottish Ministers “may by regulations provide for a referendum to be held throughout Scotland on one or more questions” The regulations must specify the date on which the poll is to be held, the form of the ballot paper including the wording of the question or questions and possible answers to those questions and the referendum period.

Our Comment

Although these regulations are subject to affirmative resolution and Scottish Ministers must consult the Electoral Commission before laying a draft before Parliament, we are concerned that the Bill will have the effect of reducing the time for parliamentary or public scrutiny. There is no requirement for Parliamentary or public consultation and the draft regulations would not be amendable or be subject to the level of scrutiny and accountability which should be applied to important questions which may affect the whole of Scotland.

This goes further than the Political Parties, Elections and Referendums Act 2000 Section 101 which requires specific primary legislation to set the date, the question and the entitlement to vote.

In our view, legislation setting the date for, and the question or questions to be asked in, a referendum should take the form of an ASP or a SSI subject to super affirmative procedure which can be amended during its scrutiny process in the same manner as instruments under section 1 of the Census Act 1920 or section 27 of the Civil Contingencies Act 2004.

It should be noted that, even if regulations provide for the wording of the referendum question, it would still be a devolution issue as to whether that question would be within devolved competence. Accordingly, it would be possible for the Advocate General for Scotland or the Lord Advocate to seek a judicial ruling as to whether that question in the SSI, or even in the draft SSI, is within devolved competence.

Section 2

Section 2 provides that the Act applies to any referendum to be held in pursuance of regulations under section 1 (1) subject to any modifications specified in regulations. The modifying regulations are subject to affirmative procedure and Scottish Ministers must consult the Electoral Commission before laying a draft.

Our Comment

Section 2(3)(b) provides that these regulations may modify any enactment. It is not clear whether that would include the Bill itself because sometimes this is expressly stated. It is therefore suggested that this should be clarified.

We consider that any such regulations should be subject to super affirmative procedure, particularly if they would be able to modify the provisions of this Bill.

Section 3

Our Comment

The relationship between section 1 and section 3 is not particularly clear. Perhaps section 3 (1) has the effect of applying section 3 (2) to regulations under section 1 (1) but this could be expressed with greater clarity.

As section 2 provides that the Act applies to any referendum held in pursuance of regulations under section 1(1) (which are subject to affirmative procedure), we find it confusing that section 3(1) also applies subsections (2)and (3) to provisions in other ASPs which provide for the holding of a referendum and subsection (3) refers to where the wording of the question is specified in regulations subject to negative procedure. Negative procedure SSIs are only referred to otherwise in the bill in relation to section 38(3) and Schedule 1 paragraph 17(5). It would be helpful if Scottish Ministers could explain the reference to negative procedure in Section 3(3).

4. Should the Bill provide for the possibility of citizen-initiative referendums?

This is an intriguing idea which could have far reaching consequences for the nature of democracy in Scotland. The implications of such referendums would need to be thoroughly worked out before advancing to legislation. We suggest that if the Scottish Government wishes to propose such an idea it should be consulted on in the normal way focusing on how such a referendum would be triggered, how such a referendum would be carried out, whether the result would be binding or not binding and who would pay for the referendum.

5. What are your views on the Bill's approach as to who is entitled to vote?

Section 4 those who are entitled to vote

Section 4 describes the franchise for any referendum and applies to any person who is: -

(a) Age 16 or over

(b) Registered in the Register of Local Government Electors

(c) Not subject to any legal incapacity to vote (age apart) and

(d) A commonwealth citizen, citizen of the Republic of Ireland or a relevant citizen of the European Union.

Section 4(c) relates to legal incapacity to vote and is amplified by section 5 which provides that for the purposes of the Referendums (Scotland) Act a person is on any date subject to a legal incapacity to vote if the person would be legally incapable of voting at a local government election in Scotland held on that date. As the law currently stands this would apply to prisoners who are disenfranchised.

Section 5 Those who are subject to a legal incapacity to vote

Section 5 defines a person's incapacity to vote by reference to legal incapability to vote in a local government election. Accordingly, this engages the Representation of the People Act 1983 which excludes prisoners from voting. However, the Scottish Elections (Franchise and Representation Bill) (which was introduced on 20 June 2019) provides for section 3 of the Representation of the People Act 1983 to be amended so that a convicted person who is detained for less than 12 months will not be legally incapable of voting.

Our Comment

The Scottish Independence Referendum (Franchise) Act 2013 provided that convicted prisoners were not eligible to vote in the Scottish independence referendum on 18 September 2014. In the case of *Moohan and Another (Appellants) v The Lord Advocate (Respondents)* [2014] UKSC 67, two Scottish prisoners challenged that exclusion by judicial review. They relied on case law establishing that a general and automatic prohibition that bars prisoners from participating in general elections violates article 3 of Protocol 1 ("A3P1") of the European Convention on Human Rights. The judicial review applications were refused by the Court of Session. The UK Supreme Court decided the appeal in advance of the referendum and dismissed the appeal. The Court held that the statutory disenfranchisement of convicted prisoners from voting in the Scottish referendum was lawful and not contrary to A3 P1.

The provisions in terms of the franchise are made with reference to the Representation of the People Act 1983. The Scottish Elections (Franchise and Representation) bill was introduced into the Parliament on 20 June 2019. Section 4 of the bill (voting by convicted persons sentence to terms of 12 months or less) proposes that "A convicted person is not legally incapable of voting at a local government election in Scotland...During the time that the person is detained in a penal institution in pursuance of the sentence imposed for a term not exceeding 12 months".

If the Scottish Elections (Franchise and Representation) bill becomes law it will bring the law in Scotland into compliance with A3P1 and through the change to the local government franchise will enable those imprisoned on the date of any referendum who are subject to a sentence of 12 months or less to vote in the referendum.

6. What are your views on the extent to which the Bill will provide for referendum polls and counts to be run in an efficient, transparent and fair manner?

The bill follows the scheme for the referendum under the Scottish Independence Referendum Act 2013 and mirrors provisions in the Political Parties, Elections and Referendums Act 2000.

Our Comment

The Electoral Commission reported on the Scottish Independence Referendum stating that the referendum was "well run":

https://www.electoralcommission.org.uk/_data/assets/pdf_file/0010/179812/Scottish-independence-referendum-report.pdf

Although there was a challenge to the franchise legislation there was no challenge in court to the referendum result.

Section 9 Function of the Chief Counting Officer and other Counting Officers

Section 9(5) allows Scottish Ministers to remove the Chief Counting Officer for, amongst other things, any physical or mental illness or disability.

Our Comment

These limitations do not apply to the power of the Chief Counting Officer who can remove a counting officer if that officer is “*for any reason unable to perform the ...functions*” section 8(4) (a). The Government should explain why this distinction in powers of removal is needed.

Section 11 Expenses of Counting Officers

Section 11(4) and (5) make provision for the Scottish Ministers to pay additional expenses.

Our Comment

The Government should explain the reason for this new power.

7. What are your views on whether the Bill will ensure that campaigns in support of a referendum outcome are conducted in a fair and transparent manner?

Section 13 Campaign Rules

The bill follows the scheme for the referendum under the Scottish Independence Referendum Act 2013 and mirrors provisions in the Political Parties, Elections and Referendums Act 2000.

Our Comment

The development of referendum campaigning since 2014 has been significant. With that development of campaigning activity wider issues of compliance with audit provisions to prevent abuse have recently been raised in the context of the referendum on the UK leaving the EU.

The Electoral Commission undertook investigation into campaign financing during the EU referendum. In particular on 17 June 2018 the Electoral Commission published the results of its investigation into campaign spending of Vote Leave and a number of other campaigners.

The investigation found significant evidence of joint working between the lead campaigner and another campaign group. The investigation considered the accuracy and completeness of spending returns, whether one unregistered campaigner exceeded its spending limit and whether there was failure to comply

with an investigation notice and to report a donation. As a result, significant fines were levied upon a campaign body and an individual. The individual concerned was successful in an appeal that fine was overturned.

Recent scrutiny by the UK Parliament's Digital, Culture, Media and Sport Committee report on Disinformation and 'fake news' together with evidence from the Information Commissioner, Elizabeth Denham indicates concern about online political advertising. The Digital, Culture, Media and Sport Committee Paper on the Online Harms White Paper (HC2431) developed the Committee's belief that electoral law is not fit for purpose and needs to be updated to reflect changes in digital campaigning techniques. The Committee recommended that a category should be introduced for digital spending on campaigns and that information about all political advertising material should be searchable in a public repository. The Committee had also recommended that the UK Government include in its White Paper analysis material about the targeting of voters by foreign interests and that the current legislation to protect the electoral process from malign influence is insufficient. The Government has not taken these recommendations on board.

The Committee's report also criticises the Government for failing to acknowledge the role and power of unpaid campaigns which influence elections and referendums (both inside and outside the designated period). The Committee did note that the Government had indicated it would bring forward a technical proposal for a regime on digital imprints later this year. That is a matter on which the Electoral Commission agrees with the Committee.

The Venice Commission "Code of Good Practice on Referendums" states that "funding must be transparent particularly when it comes to campaign accounts" (Paragraph 24).

We also draw attention to the Information Commissioner's Office (ICO) report entitled "*Democracy Disrupted?: Personal Information and Political Influence*". <https://ico.org.uk/media/2259369/democracy-disrupted-110718.pdf>

The ICO has made 10 policy recommendations:-

- 1) The political parties must work with the ICO, the Cabinet Office and the Electoral Commission to identify and implement a cross-party solution to improve transparency around the use of commonly held data.
- 2) The ICO will work with the Electoral Commission, Cabinet Office and the political parties to launch a version of its successful *Your Data Matters* campaign before the next General Election. The aim will be to increase transparency and build trust and confidence amongst the electorate on how their personal data is being used during political campaigns.
- 3) Political parties need to apply due diligence when sourcing personal information from third party organisations, including data brokers, to ensure the appropriate consent has been sought from the individuals concerned and that individuals are effectively informed in line with transparency

requirements under the GDPR. This should form part of the data protection impact assessments conducted by political parties.

- 4) The Government should legislate at the earliest opportunity to introduce a statutory code of practice under the DPA2018 for the use of personal information in political campaigns. The ICO will work closely with Government to determine the scope of the code.
- 5) It should be a requirement that third party audits be carried out after referendum campaigns are concluded to ensure personal data held by the campaign is deleted, or if it has been shared, the appropriate consent has been obtained.
- 6) The Centre for Data Ethics and Innovation should work with the ICO and the Electoral Commission to conduct an ethical debate in the form of a citizen jury to understand further the impact of new and developing technologies and the use of data analytics in political campaigns.
- 7) All online platforms providing advertising services to political parties and campaigns should include expertise within the sales support team who can provide political parties and campaigns with specific advice on transparency and accountability in relation to how data is used to target users.
- 8) The ICO will work with the European Data Protection Board (EDPB), and the relevant lead Data Protection Authorities, to ensure online platforms' compliance with the GDPR – that users understand how personal information is processed in the targeted advertising model and that effective controls are available. This includes greater transparency in relation to the privacy settings and the design and prominence of privacy notices.
- 9) All of the platforms covered in this report should urgently roll out planned transparency features in relation to political advertising to the UK. This should include consultation and evaluation of these tools by the ICO and the Electoral Commission.
- 10) The Government should conduct a review of the regulatory gaps in relation to content and provenance and jurisdictional scope of political advertising online. This should include consideration of requirements for digital political advertising to be archived in an open data repository to enable scrutiny and analysis of the data.

Although these recommendations are focussed at UK elections much of the material in the report has validity for the conduct of referendums too and we urge the Scottish Government to consider whether aspects of the report can inform the bill's policy.

We believe that the issues raised by the EU referendum campaign concerning clarity and adequacy of controls on campaigning are very important and should be taken into account when legislating for any future Scottish referendums.

8. What are your views on the extent to which the provisions for franchise, conduct and campaigns within the Bill reflect lessons learned from previous referendums within Scotland and the UK?

The provisions for the franchise will need to reflect best practice in voting particularly as regards detained persons. The conduct of proponents and the campaigns should be regulated to avoid issues which arose from the EU referendum campaign and which have been the subject of public concern, action by the Electoral Commission and litigation and upon which we comment in our answer to question 7.

9. What are your views on whether the FM adequately identifies the financial implications of the Bill?

We have no comments to make.



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