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Referendums (Scotland) Bill Stage 1 Briefing

November 2019



Introduction

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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 provide this briefing on the Referendums (Scotland) Bill in advance of the Stage 1 Debate on 7 November 2019. We have had the opportunity to take account of the Stage 1 Report by the Finance and Constitution Committee on the Bill (the Report).

General Comments

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”.

Our Comment

The policy objectives are, in our view met by the bill (see paragraph 15 of the Report). As stated later in these comments we have some concerns about constraints on the role of the Electoral Commission.

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. Therefore, we join the Finance and Constitution Committee in welcoming the approach of the Cabinet Secretary for Government Business and Constitutional Relations to be open to improvements in the bill (Report para 5).

Section 1 Power to provide for referendums

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

During the Stage 1 evidence process we commented that we were concerned that the Bill will have the effect of reducing the time for Parliamentary or public scrutiny of a future proposal for a referendum. Under the Bill as currently drafted there is no requirement for Parliamentary or public consultation and draft regulations would not be amendable or be subject to the level of scrutiny and accountability which should be applied to important or constitutional questions.

We therefore agree with the Committee’s recommendation that referendums on constitutional issues must require primary legislation (Report para 30).

Section 2 Application of this Act

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 Referendum questions

Our Comment

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.

We note the terms of the Committee's Report (para 72) and look forward to hearing the outcome of the discussions between the Scottish Government and the Electoral Commission.

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) is about "legal incapacity to vote" and is which is defined in section 5.

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.

Changes to 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, through the change to the local government franchise, enable those imprisoned for a sentence of 12 months or less on the date of any referendum to vote.

Section 7 Functions of the Chief Counting Officer and other counting officers

Section 7(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.

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 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.

We note the recommendations by the Committee in connection with campaign rules and broadly support them.

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. It is necessary that the Bill reflects the most up to date campaign rules to avoid any referendum being undermined.



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