

SCOTTISH INDEPENDENCE REFERENDUM (FRANCHISE) BILL

LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Constitutional Law Sub-Committee ('the committee'). The Sub-Committee is comprised of senior and specialist lawyers (both in-house and private practice).

General Comments

Section 1 - Application to independence referendum

No comment.

Section 2 - Those entitled to vote in an independence referendum

No comment.

Section 3 - Offenders in prison etc. not to be entitled to vote

This provision might be challenged -- some solicitors are quoted as being ready to act on behalf of aggrieved clients presumably on the basis that the exclusion of prisoner voting is contrary to the spirit of the European Convention on Human Rights (ECHR). In order to be competent under the Scotland Act 1998 the bill must comply with ECHR.

Prisoner voting cases have all been based on alleged breaches of ECHR Article 3 Protocol 1 (A3P1) which states,

'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

A3P1 does not govern voting in referenda but only in elections for the 'choice of the legislature'. Accordingly the European Court of Human Rights jurisprudence relating to prisoner voting rights, *Hirst v United Kingdom (No.2)* [2006] 42 EHRR 41, *Greens & MT v United Kingdom* [2012] ECHR 1826 and the domestic law applying under the Human Rights Act 1998 eg in *Smith v Scott* 2007 SC 345 do not apply to the referendum.

The right to vote in referenda has been considered by the European Commission on Human Rights in 1975 in the case of *X v UK* App No 7096/75. The Commission

came to the view that the UK referendum on continued membership of the EEC did not fall within the scope of A3P1 because the referendum did not concern the choice of a legislature. Accordingly it follows that the right to vote in the referendum could not be derived from A3P1 either and that a prohibition on voting by prisoners in the referendum was not contrary to the Protocol 1. A similar result was reached in 1996 in the case of *Bader v Austria* (1996) 22 EHRR CD 213 and *Neidzwiedz v Poland* (2008) 1345/06.

Section 3 appears to be on the basis of the case law compliant with the Convention. That, of course does not mean to say that the Section may not attract a challenge but such a challenge on the basis of the current law is unlikely to be successful.

Section 4 - Register of young voters

No comment.

Section 5 - Those entitled to be registered in the register of young voters

No comment.

Section 6 - Applications of enactments relating to the register of young voters

No comment.

Section 7 - Declaration of local connection: additional ground for young people

No comment.

Section 8 - Register of young voters: canvas form

No comment.

Section 9 - Register of young voters not to be published

This section ensures that there should be no publication of the register of young voters.

Section 9(3) allows publication of the register in limited circumstances but there is no detail of those circumstances in the bill. It will be important for the Referendum Bill to specify clearly to whom the register may be disclosed and to ensure that the interests of those affected by such disclosure should be properly safeguarded.

Section 10 - Registration officers' expenses

No comment.

Section 11 - Power to make supplementary etc. provision and modifications

This section enables Scottish Ministers to make orders by affirmative procedure which will amend the Act. Section 11 (2) and (3) are very wide and there is no requirement on Scottish Ministers to consult before making such an order.

Great reliance will be placed on the Parliament to scrutinise the need for the exercise of this power and the provisions made in any order under this power during the affirmative procedure for such an order.

Section 12 - Interpretation

No comment.

Section 13 – Commencement

No comment

Section 14 - Repeal

This section provides for the repeal of the Act on 1 January 2015. This will ensure compliance with the Scotland Act 1998 (Modification of Schedule 5) Order 2013.

Section 15 - Short title

No comment.

Schedules 1 and 2

No comment.

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Law Reform
The Law Society of Scotland