

# **REFERENDUMS (SCOTLAND) BILL**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Referendums (Scotland) Bill, introduced in the Scottish Parliament on 28 May 2019.
2. The following other accompanying documents are published separately:
  - a Financial Memorandum (SP Bill 46–FM);
  - a Policy Memorandum (SP Bill 46–PM);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 46–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

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

### **BACKGROUND TO THE BILL**

6. This Bill provides a legislative framework for referendums. It provides a power for the Scottish Ministers, by regulations, to provide for the holding of referendums throughout Scotland within the legislative competence of the Scottish Parliament.
7. The Bill covers the technical aspects of holding a referendum. It prescribes the rules for voting and sets out the rules for how the poll should be conducted. The Bill also provides for campaign rules to regulate campaigning at the referendum. The rules are largely based on existing UK and Scottish legislation covering elections and referendums, such as Part 7 of the Political Parties, Elections and Referendums Act 2000, which makes equivalent provision for

referendums held under Acts of the UK Parliament. The rules include the administration and limits of spending by and donations given to participants in the referendum campaign.

## **COMMENTARY**

8. The Bill consists of 42 sections, with most of the detailed provisions set out in seven schedules.

### *Section 1 - Power to provide for referendums*

9. Section 1 sets out a power for Scottish Ministers to make regulations to provide for a nationwide referendum to be held throughout Scotland on one or more questions. Any regulations made under this power are subject to the affirmative procedure. Before laying the regulations, Scottish Ministers must consult the Electoral Commission.

10. The regulations must include the date on which the referendum is to be held, the referendum period, and the form of the ballot paper to be used (including the wording of the question or questions to be asked and the possible answers).

### *Section 2 - Application of this Act*

11. Section 2 provides that the provisions of the Bill apply to a referendum for which provision is made by regulations under section 1 subject to any modifications that the Scottish Ministers may specify in regulations. Such regulations are subject to the affirmative procedure and may include incidental, supplementary, consequential, transitional, transitory or saving provision and may modify any enactment.

12. Before laying regulations under this section the Scottish Ministers must consult the Electoral Commission.

### *Section 3 - Referendum questions*

13. Section 3 relates to the consideration of referendum questions by the Electoral Commission. This section does not apply to a referendum question or statement where the Electoral Commission have previously published a report giving their views on the intelligibility of the question or statement, or where the Electoral Commission have recommended the wording of the question or statement.

14. Subsections (1) to (3) set out the process if the wording of the question in the case of a referendum or poll to which this Bill would apply is to be specified in secondary legislation.

15. If the subordinate legislation is subject to the affirmative procedure, the Scottish Ministers must consult with the Electoral Commission on the wording of the question before the draft instrument including the question is laid before the Scottish Parliament. It must also lay before the Parliament a report stating any views as to the intelligibility of the question which the Commission have expressed in response to the consultation.

16. Subsections (4) and (5) set out the process if a Bill is introduced to the Scottish Parliament that provides for holding a referendum throughout Scotland, and also includes the wording of the question. The Electoral Commission must consider the wording of the question, and publish a statement on the intelligibility of the question as soon as is reasonably practicable after the Bill was introduced. This statement can be made in any way the Commission determine.

17. The provisions in this section also apply to any statement that is to be included before the question on the ballot paper.

#### *Section 4 - Franchise*

18. Section 4 provides details of those who can vote in a referendum. The franchise is the same as at local government elections and Scottish Parliament elections which is set out in section 2 of the Representation of People Act 1983. An individual is entitled to vote in a referendum held under this framework if the person meets all the following criteria as at the date of the referendum:

- aged 16 or over.
- a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the European Union (defined in schedule 7 as a citizen of the EU who is not also a Commonwealth citizen or a citizen of the Republic of Ireland).
- registered in the register of local government electors maintained under section 9(1)(b) of the Representation of the People Act 1983 for any area in Scotland.
- not subject to any legal incapacity to vote (age apart).

#### *Section 5 - Legal incapacity to vote*

19. This section sets out that a person is subject to a legal incapacity to vote in a referendum if they would be legally incapable under any enactment or rule of law of voting in a local government election held in Scotland on that same date.

#### *Section 6 - Voting etc.*

20. Section 6 introduces schedule 1 which sets out provisions about the manner of voting, the register of electors, postal voting and the supply of documents used in this process. These rules broadly follow existing law and practice for local government elections in Scotland, though they are adapted to fit the circumstances of a referendum.

### **Schedule 1: Further provision about voting in the referendum**

#### *Part 1: Manner of voting*

21. Paragraph 1 of schedule 1 sets out the various ways to vote in the referendum, giving voters an entitlement to vote in person at polling stations unless they have opted to vote by post, in which case they may do so. A voter may also vote by using a proxy. Offences related to voting are set out in schedule 6.

22. Sub-paragraph (5) allows someone who is working for a counting officer or is a police constable on duty on the day when polling is taking place to vote at any polling station in the same local council area as the polling station at which they would normally vote (provided they have a certificate as described under Rule 15(6) of schedule 2).

23. Sub-paragraph (6) allows voters who have been detained in a mental or psychiatric hospital to vote in person at the polling station, if they have permission from the hospital to do so, or to vote by post or proxy if they are entitled to do so. Sub-paragraph (6)(b) permits someone remanded in custody, and to whom section 7A of the Representation of the People Act 1983 applies, to vote only by post or proxy.

24. The Act uses the term ‘absent voter’ to describe both postal voters and proxy voters. Paragraph 2 grants an absent vote in the referendum to postal and proxy voters already on the relevant lists for Scottish local government or Scottish Parliamentary elections. Such voters are referred to as existing postal voters and existing proxy voters.

25. Paragraph 3 deals with new applications for postal votes and proxy votes for the referendum from applicants who are already on, or have applied to be on, the register of electors, including those with anonymous entries. The ‘register of electors’ for the purposes of the Bill means the register of local government electors. Applications must be accepted provided they are submitted before the cut-off date, which is 5 pm of the sixth day before the date of the referendum (see paragraph 18 of this schedule) and meet the requirements set out in this paragraph and paragraph 7. Paragraph 3 also deals with applications from existing postal voters to vote by proxy and existing proxy voters who wish to vote by post.

26. Paragraph 4 places a requirement on electoral registration officers to keep absent voters lists that comprise a list of all those entitled to a postal vote in the referendum (the postal voters list) and all those entitled to a proxy vote (the list of proxies). Sub-paragraph (4) requires that where someone has an anonymous entry in the register of electors, any entry in the absent voter’s list should include only the person’s voter number. Sub-paragraph (5) requires electoral registration officers to notify anyone who is removed from either of these lists, where it is practicable to do so, with the reason for their removal.

27. Paragraph 5 sets out the requirements for someone who votes as proxy for another voter. The voter can have only one person appointed as proxy to vote for them. The proxy cannot be someone who would be below voting age on the date of the referendum, who would be subject to any other legal incapacity to vote, or who does not fulfil the citizenship qualifications for a local government election. The proxy must also be on the register of electors on the day of the poll. No one can vote as proxy for more than two people who are not their spouse, civil partner or other close family relation. There is a duty on the registration officer to make the appointment of a proxy provided the applicant is entitled to an absent vote and makes an application in accordance with paragraph 3, the nominated proxy is willing and able to be a proxy and the application meets the requirements set out in paragraph 7. These include provision of details of the person the applicant wishes to be appointed as their proxy. Sub-paragraph (10) allows a person to cancel the appointment of a proxy by giving notice to the registration officer.

28. Paragraph 6 sets out the requirements for voting as a proxy. The proxy can vote by post if they opt to have a postal vote, or they may vote at a polling station. Where someone has a proxy and the proxy opts to vote by post, the person who has the proxy is not allowed to apply for a ballot paper to vote at a polling station (other than a tendered ballot paper as described in Rule 24 of schedule 2). They must rely on the proxy's postal vote. However, where someone has a proxy and the proxy does not opt to vote by post, the person may vote at a polling station, provided they do so before a ballot paper has been issued to their proxy (see paragraph 1(4)). Sub-paragraph (6) requires that where someone applies to the registration officer to vote by post as a proxy for someone else, the application must be granted if they are an existing proxy voter for that person and the application meets the requirements of paragraph 7.

29. Sub-paragraph (7) places a requirement on electoral registration officers to keep a proxy postal voters list comprising existing proxies who opt to vote by post and those whose applications under sub-paragraph (6) have been granted. Sub-paragraph (9) requires that where a voter has an anonymous entry in the electoral register, any entry in the proxy postal voter's list should include only the person's voter number. The proxy may only vote by post if they are named on that list. Sub-paragraphs (10) and (11) require the registration officer to retain details (name, date of birth and signature) of those who have applied for proxy votes under this paragraph until one year after the date of the referendum.

30. Paragraph 7 sets out the requirements for applications:

- From voters to vote by post.
- From voters to vote by proxy.
- From existing postal voters for their ballot paper to be sent to a different address.
- From existing postal voters to vote by proxy in the referendum.
- From existing proxy voters to vote by post.
- From voters wishing to appoint a proxy to vote for them.
- From voters wishing to vote by post as proxy for someone else.
- From proxies who wish to vote by post for their ballot paper to be sent to a different address.

31. Such applications must be made in writing before the cut-off date (sub-paragraph (2)). They must also include certain information such as the person's name, date of birth and signature (unless a signature is not required due to a disability or inability to read or write), as set out in sub-paragraphs (4), (5) and (6). Sub-paragraph (7) sets out the requirements for the format of the applicant's date of birth and signature on the application. Sub-paragraph (8) sets out the required details in relation to the person to be appointed as a voter's proxy.

32. Sub-paragraphs (9) and (10) allow for emergency proxy applications, where someone becomes unable to vote in person at the polling station due to a disability, or reasons relating to the applicant's occupation, service or employment that occurs after the cut-off date and that person wishes to appoint someone as their proxy. Such applications must be submitted before 5pm on the day of the poll.

33. Paragraph 8 sets out additional requirements for emergency proxy applications. For proxies on the basis of disability, these are as follows:

- The application must contain a statement of the date on which the applicant became aware of the reasons given for requiring a proxy.
- Where the application is made on or after the fifth day before the poll, the application must be signed by someone who is 16 or over, knows the applicant, but is not related to the applicant.
- The person signing the application in accordance with sub-paragraph (3) must certify that the reason given by the applicant, and the date on which it arose, is true to the best of their knowledge and belief.
- The person signing the application in accordance with sub-paragraph (3) must also give their name and address, and state that they meet the criteria set out in sub-paragraph (3).

34. Sub-paragraphs (8) to (11) apply to emergency proxies on the grounds of occupation, service or employment. Sub-paragraph (8) states that the application should include the name of the applicant's employer (if the applicant is an employee) or the details of the applicants occupation or service (if the applicant is not an employee), as well as the date on which the applicant became aware of the reasons given for needing an emergency proxy vote.

35. Sub-paragraphs (9) to (11) set out additional information that must be provided for emergency proxies on grounds of occupation or employment. These provisions do not apply to service voters.

- Where the applicant is an employee, the application must be signed by their employer or another employee to whom the function is delegated by the employer.
- Where the applicant is not an employee, the application must be signed by someone who is 16 or over, knows the applicant, but is not related to the applicant.
- The person signing the application in accordance with sub-paragraph (9) must certify that the reason given by the applicant and the details given under sub-paragraph (8) are true to the best of their knowledge and belief.
- The person signing the application in accordance with sub-paragraph (9) must also give their name and address. If the applicant is an employee, the person signing the application must state that they are the applicant's employer or another employee to whom the function is delegated by the employer. If the applicant is not an employee, the person signing the application must state that they are 16 or over, know the applicant, and are not related to the applicant.

36. Sub-paragraph (12) sets out the definition of 'related to' and 'service voter'.

37. Sub-paragraph (13) defines days which are not to be included in the timetable.

38. Paragraph 9 places an obligation on electoral registration officers to notify applicants for a postal or proxy vote whether the application has been accepted or not, and to give a reason if the application is refused.

39. Paragraph 10 requires the registration officer to supply, on request, as many forms as necessary to anyone wishing to use them in connection with registering to vote, or to applying for an absent vote, at the referendum. The forms must be free of charge. Paragraph 43 provides that the style of the form is as prescribed by the Chief Counting Officer.

40. Paragraph 11 requires registration officers to keep a record of the dates of birth and signatures of voters who have applied for a postal or proxy vote. This information must be made available to the relevant counting officer as soon as possible after the cut-off date. This information is used by counting officers to verify postal voting statements returned along with postal votes.

41. Paragraph 12 states that any entry relating to a voter or proxy who has opted to vote by post should be marked with the letter 'A' on any list of voters provided for use at a polling station. This highlights the fact that the voter is an absent voter and is not entitled to vote in person.

42. Paragraph 13 deals with registration appeals made under existing legislation about registering on the electoral register under section 56 of the 1983 Act. Sub-paragraph (1) states that until the appeal has been decided, any activity related to the referendum proceeds on the basis that there is no appeal. For example, if an individual is appealing against the registration officer refusing to register them, they are not entitled to a vote in the referendum.

43. Under sub-paragraph (2), if, when an appeal is decided it results in an alteration of the register of electors (which is usually carried out by means of a notice rather than by publication of a completely new register), any referendum-related activity should take place in light of the decision as represented by the notice. In other words, once the notice is issued the appeal decision should be acted upon, but until that point the appeal should be ignored.

## *Part 2: Registration*

44. Part 2 of schedule 1 sets out the consequences of being registered to vote and the functions of registration officers.

45. Paragraph 14 prevents anyone who is registered in the electoral register (or who is on the list of proxies) from not being allowed to vote in the referendum on the grounds that they are ineligible to vote. However, if they are found later to be ineligible to vote, their vote can be rejected and they may be subject to pay a penalty for a voting offence. The effect of this is that if the person has an entry in the electoral register or on the list of proxies, the person is to be treated as being entitled to vote.

46. Paragraph 15 prevents any minor error, such as a spelling error, in the electoral register or any of the other relevant documents used in relation to voting in the referendum from hindering the use of that document.

47. Paragraph 16 requires registration officers to carry out their functions in accordance with any directions given by the Chief Counting Officer, which must in turn be in accordance with this Bill and all other legislation which currently applies to registration officers (mostly they are regulated under the Representation of the People Act 1983, particularly as amended by the Representation of the People Act 2000). A registration officer may appoint more than one deputy for the purposes of this Act. It also allows a deputy registration officer to carry out a registration officer's duties and in that event the provisions of the Bill apply to deputy registration officers. The paragraph also requires councils to provide staff to a registration officer to enable the officer to fulfil their functions under the Bill.

48. Under the provisions of paragraph 17, any alteration that is to be made to the electoral register within five days of the date of the referendum will have no effect in the referendum. Sub-paragraph (3) applies section 13B(2) to (6) of the Representation of the People Act 1983 to the referendum. The effect is that where an alteration is to take effect at least five days before the referendum but under the normal rules about alterations the notification would not be issued by that date, the registration officer must issue a notice of the alteration which takes effect on the day on which it is issued. This allows alterations to be made quickly so that counting officers are aware of every person who is entitled to vote.

49. Sub-paragraph (4) provides that Scottish Ministers may make regulations to modify sub-paragraphs (1) and (3)(a). This has the effect of allowing the deadline for registration for the poll to be moved. Scottish Ministers must consult the Electoral Commission before making these regulations, and the regulations are subject to the negative procedure.

50. Paragraph 18 defines the cut-off date for different purposes and sets out the days that are not to be counted in working out the cut-off date of 11 days and six days before the referendum by which certain things must be done for a voter to vote. These include weekends, Christmas Eve and Christmas Day, bank holidays in Scotland, and days of public thanksgiving and mourning.

### *Part 3: Postal voting: issue and receipt of ballot papers*

51. Part 3 of Schedule 1 sets out the rules for the handling of postal ballot papers.

52. Paragraph 19 specifies that only the counting officer and their staff may be present at the issuing of postal ballot papers, though it protects the right of representatives of the Electoral Commission and accredited observers to attend. At the receipt of the postal ballot papers, counting officers and their staff may be present, along with the Commission's representatives and observers. However, referendum agents and their nominated attendees ('postal ballot agents') may also attend at the receipt stage (the maximum number of attendees will be the same for each referendum agent and will be determined by the counting officer). Notice of the appointment of a postal ballot agent must be given to the counting officer in advance of the postal voters box being opened.

53. Paragraph 20 requires the counting officer to ensure that anyone attending the issue or receipt of ballot papers has been provided with a copy of the requirement of secrecy contained in paragraph 7 of schedule 6.

54. Paragraph 21 states that the counting officer has a duty to issue the postal ballot papers as soon as practicable.

55. Paragraph 22 provides the rules for the issuing of postal ballot papers to the addresses shown on the postal voters or proxy postal voters lists. The voter number (as specified in the polling list) must be marked on the corresponding number list beside the unique identifying number of the ballot paper issued to that voter. A mark must also be made on the postal voters list or proxy postal voters list to denote that a ballot paper has been sent to that voter.

56. Under paragraph 23 a counting officer must issue only one ballot paper to a voter with more than one entry in the postal voters list or proxy postal voters list.

57. Under paragraph 24 a counting officer must issue two envelopes to postal voters; an envelope marked “A” in which to put the completed ballot paper (‘the ballot paper envelope’); and an envelope marked “B” in which to return envelope A along with the postal voting statement.

58. Paragraph 25 requires the counting officer to seal the corresponding number lists in a packet after the issue of each batch of ballot papers, and to maintain the security of the marked postal voters list and proxy postal voters lists.

59. Paragraph 26 provides that all postage costs for postal ballot papers must be pre-paid for any address within the UK.

60. Paragraph 27 makes provision for a postal voter who accidentally spoils their ballot paper or postal voting statement to return them, along with the envelopes supplied, to the counting officer and to receive a replacement postal ballot pack. To receive a replacement ballot paper after 5pm on the day before the poll, the ballot pack must be returned in person.

61. The counting officer must, under sub-paragraphs (6) and (7), immediately cancel any returned postal ballot packs and put them into a sealed packet. Under sub-paragraph (9), the counting officer must keep a list of spoilt ballot papers detailing the name and number of the voter and the ballot paper number, and, where the postal voter is a proxy, their name and address.

62. Paragraph 28 allows a postal voter who has lost or has not received their postal ballot paper, postal voting statement or return envelopes to apply to the counting officer for a replacement in the same way as described in paragraph 27. The counting officer may refuse to issue another postal ballot paper if the officer considers that it is reasonable for the voter to allow further time for the delivery of the documents.

63. Paragraph 29 provides for situations in which an application by a postal voter to vote instead by proxy has been granted, but the voter has already been issued with a postal ballot paper. The counting officer is required to cancel the previously issued documents (postal ballot paper and postal voting statement) to ensure that the postal ballot paper is to have no effect. The applicant is required to return the postal ballot paper and associated documents. The

counting officer must seal these documents up in a separate packet and maintain a list of superseded ballot papers.

64. Paragraph 30 requires the counting officer to give at least 48 hours' notice in writing to referendum agents of the opening of any postal ballot box and its contents. They must include details of the time and place and the number of postal ballot agents permitted.

65. Paragraph 31 requires the counting officer to provide separate boxes to collect covering envelopes and postal ballot papers, marked with their purpose and the name of the local government area. The box must be shown to any postal ballot agents to prove that it is empty before being locked and sealed by the counting officer (and any referendum agent or postal ballot agent who wishes to attach their own seal).

66. Sub-paragraph (5) requires the counting officer to provide separate containers for rejected votes, postal voting statements, ballot paper envelopes, rejected ballot paper envelopes, and votes rejected during the verification procedure.

67. Sub-paragraph (6) requires the counting officer to ensure the safety and security of all of the boxes described in this paragraph.

68. Paragraph 32 requires the counting officer to place any returned postal vote covering envelopes (and any other envelopes which contain a ballot paper, ballot paper envelope or postal voting statement) immediately into a postal voters box.

69. Sub-paragraphs (3) and (4) allow the counting officer to collect, or arrange to have collected, any postal ballot papers which have been delivered to polling stations. These should be contained in packets, sealed by the presiding officer and any polling agent who wishes to attach their own seal.

70. Paragraph 33 states that each postal voters box must be opened by the counting officer in front of any postal ballot agents in attendance. As long as one box remains sealed to receive covering envelopes until the close of poll, the counting officer may open the other boxes. The last postal voters box and the postal ballot box must be opened at the counting of the votes under the conduct rules.

71. Paragraph 34 requires the counting officer to count and record the number of covering envelopes in each opened box. The counting officer must then open each of the remaining covering envelopes, keeping the ballot papers face downwards. The counting officer must not be allowed to view the corresponding number list used at the issuing of the postal ballot papers.

72. Where the envelope is missing either a postal voting statement or ballot paper envelope (or, where there is no ballot paper envelope, is missing a ballot paper), the counting officer should mark the covering envelope 'provisionally rejected' and place it, with its contents attached, into the container for rejected votes.

73. Under sub-paragraph (7), where the envelope does contain a postal voting statement, the counting officer should mark the marked copy of the postal voters list or proxy postal voters list with a separate, clear mark, to highlight that the voter has returned their postal vote.

74. Sub-paragraph (9) requires the counting officer, once the last covering envelope has been opened, to make a sealed packet containing the marked postal voters list and proxy postal voters list.

75. Paragraph 35 allows anyone on the postal voters list or proxy postal voters list to request confirmation from the counting officer that their postal voting statement has been received at any time between the issuing of the postal ballots and the close of the poll.

76. Paragraph 36 sets out the procedure for verifying personal identifiers. The counting officer must determine whether the postal voting statement has been properly completed, including comparing the signature and date of birth on the postal voting statement with those contained in the record of personal identifiers. Votes rejected under this paragraph should be placed in the rejected votes (verification procedure) container. The postal ballot agents must be shown the postal voting statement and permitted to view the personal identifiers record, and may object to the decision, in which case the statement will be marked to show that the rejection was objected to.

77. The counting officer must then compare the numbers on the postal voting statements with those on the ballot paper envelopes. If the numbers match, the postal voting statements and ballot paper envelopes should be placed in their respective containers. Where they do not match, or where there is a valid postal voting statement but no ballot paper envelope, the counting officer should mark the documents 'provisionally rejected' and put them in the container for rejected votes.

78. Paragraph 37 requires the counting officer to open the ballot paper envelopes and place the ballot papers in the postal ballot box, except where the ballot paper envelope is empty, or where the number on the ballot paper does not match the number on the ballot paper envelope (in which case they should be marked 'provisionally rejected' and placed in the containers for rejected ballot paper envelopes or the container for rejected ballot papers respectively).

79. Paragraph 38 allows the counting officer to retrieve any cancelled ballot paper which has been placed in a postal voters box, postal ballot box or the container for ballot paper envelopes.

80. Paragraph 39 requires the counting officer to keep a list of the ballot paper numbers of any postal ballot paper which was received without a corresponding postal voting statement; and a separate list of the ballot paper numbers of any postal ballot papers which were not received with the corresponding postal voting statement.

81. Paragraph 40 provides that where a postal voting statement is received with no attached ballot paper, or vice versa, the counting officer should check to see whether the corresponding papers are included on either of the lists described above. If the papers can be matched, the

counting officer must act as though the papers had not been marked ‘provisionally rejected’ and must treat the papers accordingly.

82. Paragraph 41 requires the counting officer, as soon as possible after the matching of papers, to make up separate sealed packets containing the contents of the containers of rejected votes, postal voting statements, rejected ballot paper envelopes, rejected votes (verification procedure), and the lists of spoilt and lost ballot papers.

83. Under paragraph 42, the counting officer is required to send all of the sealed packets to the proper officer of the local authority along with the other documents to be sent as part of the conduct rules in schedule 3 and a statement of the contents and date. A copy of this statement should be provided to the Electoral Commission. Where any papers are received too late to be included in the packs, the counting officer should package and send these separately.

84. Paragraph 43 allows the Chief Counting Officer to prescribe forms to be used under paragraphs 10 and 42. Where the forms are prescribed by the Chief Counting Officer, they may be used with such variations as circumstances require.

*Part 4: Supply of the register of electors etc.*

85. Part 4 of schedule 1 deals with the supply of the register of electors and related documentation.

86. Paragraph 45 requires registration officers, at the request of the relevant counting officer, to supply to the counting officer the register of electors, any notices of alterations to the register of electors, and any record of anonymous entries. Counting officers may request as many copies as they reasonably require for the purposes of the referendum, and the copies must be provided free of charge. Counting officers should also be provided with as many free copies of the postal voters list, list of proxies and proxy postal voters list as they may reasonably require. This includes a duty to supply up to two copies in data form. Where additional copies of any of the lists mentioned above are requested, printed copies should be issued. Anyone who receives a copy of a list under this paragraph is prohibited from supplying a copy, disclosing or making use of any of the information contained in it which is not also available in the edited copy of the local government register.

87. Paragraph 46 requires registration officers to supply a free copy of the latest version of the register of electors and any alterations, the postal voters list, the list of proxies, and the proxy postal voters list to the Electoral Commission (in data form unless a paper copy is requested). The registration officer must, on request, supply a further copy if the officer is satisfied that it is necessary to do so in the circumstances. The Electoral Commission and their staff are subject to similar restrictions around disclosing the information as registration officers under paragraph 48. The Commission may, however, use the information contained in the register to fulfil their duties in relation to the permissibility of donors, and they may also publish anonymised voter information.

88. Paragraph 47 requires registration officers to supply to permitted participants in the campaign, on request, one copy of the full version of the local government register and any

alterations, the postal voters list, the list of proxies, and the proxy postal voters list on their making a request in writing. The registration officer may, on request, supply a further copy if satisfied that it is necessary to do so in the circumstances. Unless otherwise requested, the copy will be supplied in data form. These copies are to be used only for the purposes of campaigning and complying with the controls on donations and regulated transactions in schedule 3.

89. Paragraph 48 requires that copies of the register supplied under paragraphs 45, 46 or 47 are to contain the same information as in the register of electors, except for entries relating to person aged 16 or 17, the dates on which they attain the age of 18 are to be omitted.

90. Paragraph 49 confirms that the duty on a registration officer under this schedule is a duty only to supply the data in the form in which the registration officer holds it, although they may supply it in any other form agreed with the recipient of the data.

91. Paragraph 50 is an additional general restriction on the use of registration documents by those other than those for whom they are intended (for the purposes of this paragraph, 'registration documents' means the register of electors, notices altering the register, record of anonymous entries, postal voters list, list of proxies, or proxy postal voters list), stating that any person who receives a copy of such a document must not supply any copies of that document, or disclose or make use of the information contained in it.

92. Paragraph 51 deals with offences in relation to disclosures of registration documents. A person is guilty of an offence if they breach any of the disclosure restrictions under this Part of the schedule, unless they were under direction of a supervisor with whose instructions they complied, or unless they took all reasonable steps to prevent the breach. An offence under this paragraph carries a penalty, on summary conviction, of a fine of level 5 on the standard scale (currently £5,000).

93. Under paragraph 52, any person who holds a document supplied under paragraph 45, or 47 must securely destroy the document no later than one year after the referendum, unless the Court of Session or a sheriff principal orders otherwise. A person who fails to do so is guilty of a similar offence.

*Part 5: Supply of marked register of local government electors etc.*

94. Part 5 of schedule 1 deals with the supply of marked polling lists (i.e. the polling lists which were annotated on the day of the poll to show which voters were provided with a ballot paper).

95. Paragraph 53 allows designated organisations to request the counting officer to supply them with a copy of the marked versions of the polling list, any notices setting out alterations to the polling list, the postal voters list, list of proxies, and proxy postal voters list. The request must be made for purposes in connection with the campaign in respect of the referendum, or of complying with the schedule 3 controls on donations and regulated transactions, and if these purposes are satisfied the counting officer has a duty to supply the requested copies. The copies under this paragraph are subject to the same conditions as unmarked copies.

96. Paragraph 54 sets out the fees to be paid in relation to the supply of copies under paragraph 53.

#### *Section 7 - Conduct*

97. Section 7 of the Bill provides for the appointment of the Chief Counting Officer (CCO). The CCO will be the person who, at the time the “triggering” legislation comes into force, is convener of the Electoral Management Board unless there is no-one in post at the time, the person in post is unwilling or unable to act as the CCO or the person has previously been removed from office as the CCO. This section also provides for appointment of a replacement if the CCO dies, resigns or is removed from the post by the Scottish Ministers, who have a limited power to remove the CCO on certain grounds e.g. health or if the CCO has committed an offence. The CCO has the power to appoint a deputy. Any appointees under this section (including the CCO) must be, or have been, a returning officer.

#### *Section 8 - Other counting officers*

98. Under the provisions of section 8, the CCO must appoint a counting officer for each local government area and notify the Scottish Ministers. This section also provides for the appointment of replacement counting officers if one should die, resign or be removed from post by the CCO (who has power to remove a counting officer who cannot perform their functions, or who does not follow the CCO’s directions). Counting officers also have the power to appoint deputies.

#### *Section 9 - Functions of the Chief Counting Officer and other counting officers*

99. Section 9 deals with the functions of the CCO and counting officers. The CCO is responsible for the proper and effective conduct of the referendum, including the conduct of the poll and the count of the votes. Each counting officer is responsible for conducting the poll and the count of votes in their local government area. The CCO must certify the total number of ballot papers in the referendum and the total number of votes cast in favour of each answer to the referendum question (section 9(4)), while the counting officers do the same for each local government area (section 9(2)) under the direction of the CCO. The CCO can give directions to counting officers with which they must comply. Local authorities are responsible for providing the CCO and counting officers with the property, staff and services they need to conduct the referendum (section 9(8) and (9)).

#### *Section 10 - Correction of procedural errors*

100. Section 10 gives the counting officers, including the CCO, a power to remedy, or correct, any act or omission which would constitute a procedural error by a relevant person (the persons listed in subsection (3)) and which is not in accordance with the requirements of the legislation. This power does not extend to a re-count of the votes after a declaration of the result has taken place.

#### *Section 11 - expenses of counting officers*

101. Section 11 deals with the expenses incurred by counting officers and the CCO. Counting officers, including the CCO, can recover their costs from the Scottish Ministers, up to a maximum amount to be set out in regulations made by the Scottish Ministers. These

regulations (which must be laid in the Parliament, subject to no further procedure) may include provision for counting officers to submit accounts of expenses to Scottish Ministers before payments are made. The regulations can specify the deadline for submitting accounts, and the form and manner in which they are to be submitted. The Scottish Ministers may pay in excess of the maximum amount as long as the charges and expenses were reasonable. The Scottish Ministers may provide monies in advance to the CCO and counting officers if they consider it appropriate to do so.

*Schedule 2: Conduct rules*

102. Schedule 2 of the Bill, introduced by section 12, sets out the conduct rules for a referendum.

103. To make voters aware of the arrangements for a referendum, Rule 1 of schedule 2 requires each counting officer to publish notice of the referendum not later than the 25th working day before the date of the referendum. The notice must state the date of the referendum, details of who is entitled to vote, the hours of polling (7am – 10pm under the provisions of Rule 2), the location of polling stations and the dates by which applications to register to vote and to vote by post and proxy (and other applications and notices about postal or proxy voting) must reach the registration officer. The counting officer must provide a copy of this notice to the referendum agents appointed for their area.

104. Under the provisions of rules 3, 4, 5, and 6, each voter will receive one ballot paper with a unique identifying number and an official mark. Counting officers must keep a ‘corresponding number list’ which records the unique identifying number of every ballot paper. The printing of the ballot papers should be arranged locally by counting officers unless the CCO takes over the printing arrangements.

105. Rule 7 gives counting officers a right to use rooms for the poll or for counting the votes, free of charge, in schools maintained by education authorities and other public meeting rooms maintained at a cost to the Scottish Ministers or most public authorities in Scotland. The counting officer must cover any associated expenses such as the lighting, heating or cleaning of the room.

106. Rule 8 places a duty on counting officers to issue postal voters with ballot papers and other associated documentation, including information about how to obtain directions or guidance for voters translated into other languages and Braille or in picture, audible or other formats.

107. Rule 9 places a duty on counting officers to provide enough polling stations and polling booths for the referendum and to allocate voters to polling stations appropriately. It is possible for more than one polling station to be in the same room.

108. Under Rule 10, counting officers must appoint and pay a presiding officer and sufficient clerks for each polling station. People who have been involved in campaigning for an outcome in the referendum are excluded from undertaking these roles. A counting officer may act as a presiding officer at a polling station and the rules applying to presiding officers also then apply

to a counting officer who does that. The presiding officer can authorise a clerk to do anything the presiding officer can do under these rules, except remove and exclude persons from the polling station.

109. Rule 11 places a duty on counting officers to issue the following to voters as necessary, and to the appropriate address:

- A poll card
- A postal poll card
- A poll card to a proxy
- A postal poll card to a proxy.

110. Poll cards include the voter's name, address and electoral register number and inform the voter of the date of the poll, the hours of polling and the polling station at which they should vote (where applicable). Where the voter has appointed a proxy, the poll card should confirm this

111. Rule 12 places a duty on local authorities to lend ballot boxes and other relevant equipment to counting officers on terms and conditions which they agree.

112. Rule 13 puts a duty on the counting officer to provide presiding officers at polling stations with enough ballot boxes (designed to ensure that no ballot papers can be removed from the box without opening it) and ballot papers as necessary for the referendum, and materials for voters to mark their ballot papers. Counting officers also have to provide each polling station with the documentation needed to run the poll, including the register of voters for that area, a list of the postal and proxy voters for the area, the relevant part of the corresponding number list and any notices, declarations or other documents needed for the poll.

113. Rule 13 further provides that information to help voters with the voting process is to be displayed inside and outside the polling station and in every polling booth. To help voters who have a visual impairment, an enlarged sample copy of the ballot paper(s) is to be made available, along with a device for enabling voters who are blind or partially sighted to vote without any assistance. The counting officer also has a power to display an enlarged copy of the ballot paper(s), marked as a specimen copy, translated into other languages as they deem appropriate for that area.

114. Rule 14 allows referendum agents to appoint polling agents or counting agents to attend the poll or the count. Referendum agents must give the counting officer notice of the appointments by the fifth day before the referendum. The number of counting agents allowed to attend the count may be limited by the counting officer, provided that each referendum agent is permitted an equal number, and that number is not less than the number of clerks employed divided by the number of referendum agents. A referendum agent may also undertake the duties of a counting or polling agent under this section. If an agent appointed under this section fails to attend to witness the proceedings, this does not invalidate the process so long as it is otherwise conducted properly.

115. Rule 15 lists the people who are allowed to be admitted to a polling station. The presiding officer has overall control on how many voters and any accompanying children under the age of 16 may be admitted to the polling station at any one time. Each permitted participant in the referendum cannot have more than one polling agent representing them in the polling station at any time.

116. Rule 15 also allows the counting officer's staff and police constables on duty at a polling station to vote at a polling station other than the one they were allotted, provided they have a certificate to do so.

117. Under the provisions of Rule 16, counting officers must ensure that everyone at a polling station, other than voters and those accompanying them, and police constables, has been given a copy of the requirement of secrecy set out in sub-paragraphs (1), (3), (5), (8), (9) and (10) of paragraph 7 of schedule 6 of the Bill. Schedule 6 paragraph 7 sets out that before the poll closes, they are not to discuss or reveal the name or electoral registration number of anyone who has or has not requested a ballot paper. The official mark on every ballot paper (under the provisions of schedule 2, Rule 6) must not be discussed (sub-paragraph (3) of paragraph 7 of schedule 6). Nor should they (under sub-paragraph (5)):

- make any attempt to interfere with a voter when recording their vote.
- make any attempt in the polling station to find out how the voter intends to vote or has voted.
- discuss with anyone how a voter intends to vote or has voted.
- discuss the ballot paper number on the back of a voter's ballot paper.
- cause a voter to display a marked ballot paper which might reveal how they have voted or intend to vote in the referendum.

118. If a companion has helped a voter with disabilities to vote in the referendum, they should not reveal to anyone how the person has voted or intends to vote, or the unique identifying number on the back of the ballot paper (sub-paragraph (8)).

119. The final piece of information, contained in sub-paragraphs (9) and (10), that counting officers are required to give to everyone at the polling station, is that if they fail to adhere to these requirements they commit an offence. The penalty for the offence is a maximum of 12 months imprisonment or a fine up to level 5 on the standard scale or both.

120. Similar provision is made in relation to those attending the counting of votes. The counting officer must give them notice of sub-paragraph (4) of paragraph 7 of schedule 6, which requires them to maintain secrecy and, in particular, not to attempt to find out the unique identifying number or to communicate any information obtained at the count about how any voter has voted.

121. Rule 17 imposes a duty on the presiding officer to keep order at the polling station and includes a power to order a person to be removed immediately if they are doing anything to stop the polling station from operating effectively. Such a person can be removed either by the

presiding officer or a police constable and may not enter the polling station again that day, other than to vote. If charged with an offence, the person may be taken into custody without a warrant. The presiding officer cannot remove someone if it would prevent a voter from voting.

122. Rule 18 sets out the procedures for dealing with the ballot boxes during the poll. Before the poll opens, the presiding officer must demonstrate to anyone present that the ballot boxes are empty and then they must place a seal on the box in such a way that if the box is opened, the seal would be broken. Any referendum or polling agents who are present may also attach their own seals to the ballot boxes. This verifies to everyone that the box has remained closed and not been tampered with by anyone during the poll. The box must be visible to the presiding officer during the poll for the same reason and it must remain sealed until after the poll closes and it is delivered to the counting officer for the count of the votes.

123. Rule 19 sets out the questions that can be put to voters by the presiding officer when they arrive at the polling station to vote, if a referendum agent or polling agent requires it or the presiding officer considers it appropriate to do so. There are different questions for voters wanting to vote in person and those wanting to vote as proxy. Only the questions set out in this paragraph may be asked about a voter's eligibility to vote. The person's answers to the questions help the presiding officer to determine whether the person is eligible to vote and whether the person should be given a ballot paper to vote in the referendum.

124. Rule 20 makes provision for circumstances where someone declares that the voter is not who they claim to be or the voter is arrested on suspicion of committing or being about to commit an offence of personation. These situations are not to be treated as reasons to prevent the voter from voting, however it does not affect the voter's liability to any penalty for voting.

125. Under the provisions of Rule 21, unless an eligible voter has failed the questions put to them under Rule 19 satisfactorily, the voter must be given a ballot paper. Before handing a ballot paper to a voter, the staff at the polling station should call out the voter's name and number as it appears in the register and then write the voter's number against the number of the ballot paper contained in the corresponding number list. This ensures that there is a record of that ballot paper being given to that voter. In the copy of the register, the voter's name should be marked to show that they have received a ballot paper and if the voter is voting as proxy, a mark should be put against their name in the list of proxies. If the voter has an anonymous entry in the electoral register, only their number should be called out.

126. Having received a ballot paper, the voter is required to go immediately to a polling booth to vote, cast their vote, show the ballot paper number on their ballot paper to the presiding officer and then put their ballot paper in the ballot box provided. They must then leave the polling station without delay. Where a voter arrives at the polling station before 10pm, but is still in waiting to vote at 10pm, the presiding officer must allow them to vote after the normal 10pm deadline. The polling station must be closed immediately after the last such voter has voted.

127. If a voter asks for help to cast their vote because of an inability to read or because of a disability, such as blindness, Rule 22 places a duty on the presiding officer, in the presence of any polling agents, to ensure that their vote is cast as they wish to vote and their ballot paper is

placed in the ballot box. The voter's name and number from the register is to be marked in a 'marked votes list' along with the reason for the entry in that list.

128. Rule 23 covers other circumstances under which a voter who is unable to read, is blind or has a physical disability may vote. If the voter asks the presiding officer to vote with the help of a companion, the presiding officer will ask them to explain the reason for needing assistance. The companion must complete a form, prescribed by the CCO, stating that they are the parent, grandparent, brother, sister, spouse, civil partner, child or grandchild of the voter, aged 16 or over, and eligible to vote in the referendum. The presiding officer cannot charge a fee for the declaration and must sign and retain it.

129. If the presiding officer is satisfied that the voter needs assistance and that the companion is eligible to fulfil the role, the request must be granted. If an application has been granted, the voter's name and number from the register and the companion's name and address must be marked in an 'assisted voters list'. If someone is voting by proxy in this way, the number to be entered is the voter's number. If the voter being assisted by the companion has an anonymous entry in the electoral register, only the voter's number is to be entered in the assisted voters list.

130. Rule 24 sets out four situations which may occur where there is doubt that the person is eligible to vote in the referendum. These situations, set out in paragraphs (2) to (5) are where:

- someone claiming to be a voter (but not named on the postal voter or proxy voter lists) or claiming to be a proxy voter (but not a postal proxy voter) asks for a ballot paper after someone has already voted as that person either in person or as a proxy voter.
- someone asking for a ballot paper claims to be a voter on the register, is named in the postal voters list and claims that either they have not applied to vote by post in the referendum or that they are not an existing postal voter (under schedule 1, paragraph 2(2)).
- someone asking for a ballot paper claims to be a proxy voter in the list of proxies, is named in the proxy postal voters list and claims that either they have not applied to vote by post as a proxy in the referendum or that they are not an existing postal proxy voter in local government or Scottish Parliament elections (under schedule 1, paragraph 6(4)).
- someone claims after the last time for replacement postal ballot papers, but before the close of the poll, that they have lost or never received a postal ballot paper and they claim that they are named on the register and the postal voters list or that they are a proxy voter in the list of proxies and named in the postal proxy voters list.

131. In all four of the situations described above the person would be allowed to complete what is known as a tendered ballot paper, provided they answered the questions set out in Rule 19 to the satisfaction of the presiding officer.

132. In these circumstances, the person will receive a ballot paper of a colour prescribed by the CCO that is different to the colour of the normal ballot paper used in the referendum. Once they have marked their vote, the 'tendered ballot paper' is given to the presiding officer who

will write the voter's name and voter number on the ballot paper. The ballot paper is not placed in the ballot box, but is instead placed in a separate packet and kept to one side. Such votes are not counted towards the declared result of the referendum, but could subsequently be examined in any court proceedings. The voter's name and voter number is then entered on a list known as the 'tendered votes list' (paragraph (8)). If someone is voting as proxy for a voter in these circumstances, the voter's number is entered on the tendered votes list (paragraph (9)). Where someone has an anonymous entry in the electoral register, the same procedure is to be followed, except that only the voter's number would be entered in the tendered votes list (paragraph (10)).

133. Rule 25 deals with ballot papers that have been inadvertently spoiled. If the voter makes an error or the ballot paper cannot be used for some other reason, the original ballot paper must be returned to the presiding officer of the polling station, who will immediately cancel it and issue a new ballot paper.

134. Under Rule 26, the presiding officer must keep a list, known as the 'polling day alterations list', of people who receive ballot papers because they have had their entry in the electoral register altered on the day of the poll itself (done by issuing a late notice of alteration under the Representation of the People Act 1983), and who are then eligible to vote at the referendum.

135. Rule 27 provides a procedure which the presiding officer is to follow if proceedings at the polling station are interrupted by riot or open violence. The presiding officer will close the polling station until the next day and let the counting officer know immediately what has happened. The poll will be adjourned and the polling station will observe the same opening hours the following day.

136. Under the provisions of Rule 28, as soon as possible after the poll closes, the presiding officer must seal each ballot box using the presiding officer's own seal, so that no more votes can be cast. Any referendum or polling agents who are present may also attach their own seals to the ballot boxes. Separate packets are to be sealed containing:

- unused and spoilt ballot papers.
- tendered ballot papers.
- marked copies of the register, marked copy notices and the list of proxies (all in one packet).
- certificates from police constables or the counting officer's staff who voted at a polling station instead of the one they were allotted.
- the completed corresponding number list. This is to be in a different packet from the one containing the marked copies of the register (as is the list of certificates from police constables and counting officer staff).
- the tendered votes list and other specified lists.
- any postal ballot papers or postal voting statements returned to the polling station.

137. The presiding officer must include a statement with the packets, known as the 'ballot paper account' which provides a breakdown of the ballot papers the presiding officer was

given, the number issued, unused ballot papers, spoilt ballot papers and the tendered ballot papers. At the count, this statement will be checked against the number of ballot papers in the ballot box to ensure that all the ballot papers issued to the presiding officer are accounted for.

138. The sealed ballot boxes and the packets are then to be delivered to the counting officer. If the presiding officer does not deliver the ballot papers in person, the counting officer must approve any alternative delivery arrangements.

139. Rule 29 places a duty on counting officers to make arrangements for the count of votes in accordance with any direction issued by the CCO, and to give notice in writing to the CCO, each referendum agent appointed for the area, and any counting agents appointed to attend the count stating where and when the count will take place. The counting officer can start the count the next day, subject to any direction given by the CCO about when the count should start. The CCO may make directions to alter the time of the count. At the count, the counting officer must not knowingly appoint or employ anyone who has been involved in campaigning for an outcome in the referendum. There is also a duty on the counting officer to ensure that the ballot boxes and packets are kept secure from the time they assume responsibility for them until the count gets underway.

140. Paragraph (8) sets out the categories of people who are allowed to attend the count. As with polling and counting agents, counting officers may limit the number of permitted participants' agents ('counting agents') at the polling stations or the count of votes, but they cannot favour one permitted participant over another – they would have to ensure that each permitted participant could have the same number of counting agents present.

141. Before the count of votes for each referendum outcome can start, the counting officer must check the number of votes to be counted from each ballot box against the number of ballot papers issued, as recorded on the ballot paper account by the presiding officer of each polling station. Rule 30 sets out the procedure for this. Each ballot box must be opened with any counting agents present, and the ballot papers it contains counted and recorded (paragraph (1)). The number of ballot papers is to be checked against the ballot paper account supplied by the presiding officer for that box. The ballot paper account is then verified, again with counting agents present, by comparing its totals with the number of ballot papers recorded, the unused and spoilt ballot papers and the tendered votes list. The packets containing the unused and spoilt ballot papers and the tendered votes list are then resealed. The counting officer must then prepare a statement, known as the 'verification statement' that records the totals of these counts against the ballot paper accounts provided by presiding officers of the polling stations (paragraph (2)).

142. The number of postal ballot papers is also counted and recorded. Postal ballot papers cannot be included in the count unless they have been delivered by hand to a polling station in the right local authority area or posted to the counting officer before the close of the poll. A postal voting statement that is signed (unless no signature is needed due to a disability or inability to read or write) and includes the voter or proxy's date of birth must be included with the postal ballot paper (paragraph (4) of Rule 30).

143. Under paragraph (5), before the count of votes can start, postal ballot papers must be mixed with the ballot papers from at least one ballot box. Ballot papers in a ballot box must be mixed with the ballot papers of at least one other box (this prevents anyone from being able to tell from observing the count how voters in a particular locality have voted in the referendum). Only then can the count of votes for each outcome in the referendum get under way.

144. No tendered ballot paper is to be counted. No postal vote can be included in the count if the counting officer, having verified the personal identifiers (the voter or proxy's signature and date of birth), is not satisfied that the postal voting statement has been completed correctly.

145. The counting officer must make every effort to ensure that no one can identify the voter that cast a particular vote in the referendum.

146. Once started, the count should normally proceed to a conclusion, but Rule 30(9) does allow the counting officer to exclude counting between 7pm on any day after the day of the poll and 9am the following morning, i.e. if the poll is on a Thursday, then the counting officer can suspend the count at 7pm on the Friday evening until 9am on the Saturday morning. This rule does not preclude an overnight count following the close of poll.

147. Rule 31 deals with ballot papers that are rejected from the count because they do not bear the official mark, the voter has voted for more answers than are permitted in response to a referendum question, they include anything that identifies the voter or they are unmarked or the person's voting intention is unclear. The counting officer must mark these papers rejected (and, if any counting agent objects to the counting officer's decision, mark them 'rejection objected to'), and prepare a statement that records the numbers of ballot papers rejected for these reasons.

148. Paragraph (3) gives the counting officer the power to decide whether a vote can be counted if the voter's cross is not where it should be on the ballot paper, they marked the paper other than with a cross or if they marked the paper more than once. So long as the voter's intention is clear, the counting officer can decide to include the ballot paper in the count of votes. However, the vote cannot be counted if it is possible to identify the voter from the ballot paper.

149. Rule 32 gives the counting officer a duty to count the votes for each answer to the referendum question.

150. Rule 33 provides that any decision of the counting officer on a question that arises in respect of a ballot paper is final, subject to any judicial review in accordance with section 39.

151. Rule 34 gives both the counting officer and the CCO the power to have votes re-counted and re-counted again if they consider it appropriate to do so.

152. Once the count of votes in their area has been concluded to the counting officer's satisfaction, under Rule 35, the counting officer has a duty to immediately provide the CCO with the total number of votes counted, the number of votes for each answer to the referendum

question, the details of the verification statements that relate to the ballot paper account and the details of the rejected ballot papers statement. Once authorised by the CCO, the counting officer must then announce the local result.

153. Once the CCO has received the local information for every area and is satisfied that no re-counts are required, they must declare the result of the referendum for the whole of Scotland which includes the number of votes counted, and the number of votes both for and against the referendum question and the number of rejected ballot papers.

154. Once the CCO has confirmed that no recount is required, each counting officer is required as soon as possible under Rule 36 to seal separate packets containing counted ballot papers and rejected ballot papers. Counting officers are not to open the packets containing tendered ballot papers, the corresponding number lists, the certificates presented by police constables and those working at polling stations and the marked copies of the registers and any marked copies of the notices of late alterations to the register of electors. This ensures that it is not possible to link a ballot paper to an individual voter.

155. Once the papers have been sealed, Rule 37 requires the counting officer to add a label to each packet that describes their contents and includes the date of the referendum, and to send them to the proper officer of the local authority for which the ballot papers were counted. The proper officer has responsibility for custody of these kinds of documents under existing local government electoral legislation. The package of papers to be sent must include packets of the following:

- the packets of ballot papers.
- the ballot paper accounts from each polling station, the rejected ballot paper statement and the verification statements.
- the tendered votes list, the assisted votes list, the marked votes list, the polling day alterations lists and the companion declarations.
- the completed corresponding number lists.
- the certificates presented by police constables and those working at polling stations under Rule 15.
- the marked copies of the registers and marked copies of the notices of late alteration of the register.

156. The proper officer of the local authority is then required under Rule 38 to keep all of the papers for one year after which they must be destroyed unless they are required to keep them for longer by order of the Court of Session or a sheriff principal

157. With the exception of the ballot papers, the corresponding number lists and the certificates submitted by police constables and those working at polling stations, all the papers must be made available for public inspection as the officer of the local authority sees fit. Anyone who wishes to inspect the papers is allowed to take handwritten notes but they must not copy them by any other means; to do so would be an offence.

158. Under Rule 39, the CCO must keep any certifications made by the CCO or by counting officers under section 9 regarding the results of a referendum. These are to be made available for public inspection as determined by the CCO.

159. If someone is being prosecuted for an offence relating to any ballot papers, under Rule 40, the Court of Session or a sheriff principal may order inspection of any rejected ballot papers, corresponding number list, employment certificate or ballot paper that has been counted. The Court of Session or sheriff principal can place conditions on who, when, where and how the inspection of these papers may take place. The way in which a voter voted should not be revealed until it is proved that the vote was given and a court has declared the vote to be invalid. Any appeal against a sheriff principal's order would be heard in the Court of Session.

160. When the officer of the local authority produces a document in relation to the case, it is to be taken as conclusive evidence that the document relates to the referendum. Anything written on the packet in which the document is kept is to be taken as evidence that the ballot papers in that packet are what is written on the packet (unless there is evidence to the contrary). When the officer of the local authority produces a ballot paper or corresponding number list in relation to a case, these documents are to be taken as evidence that the voter who voted using the ballot paper was the same person whose voter number appears in the corresponding number list against the number of that ballot paper (again unless there is evidence to the contrary).

161. Other than for the purposes of a prosecution relating to an offence, no one is allowed to inspect any counted or rejected ballot papers or open any sealed packet containing the corresponding number list or the employment certificates provided by police constable or people working at polling stations on the day of a referendum.

162. Rule 41 confirms that the CCO can prescribe the forms necessary for a referendum.

### *Section 13 - Campaign rules*

163. Section 13 introduces schedule 3, which makes provision about the conduct of campaigning in the referendum. This includes limiting the expenses that can be incurred by campaigners, restricting publication of certain material and controlling donations and loans and credit to certain campaigners.

### *Section 14 - Monitoring and securing compliance with the campaign rules*

164. Section 14 of the Bill gives the Electoral Commission responsibility for monitoring and securing compliance with the rules which regulate campaigning at the referendum contained in schedule 3. It also gives the Commission power to issue guidance on how to comply with the requirements or restrictions. Schedules 4 and 5 replicate the Commission's usual investigatory powers and power to impose civil sanctions to help them fulfil their duties under section 14.

### *Section 15 - Inspection of Electoral Commission's registers etc.*

165. Under section 15, the Commission must make the register of declarations they hold under schedule 3, paragraph 6, available for public inspection, either in their offices, by

arrangement, or by providing a copy. The Commission are entitled to charge a reasonable fee for this service.

*Section 16 - Campaign rules: general offences*

166. Section 16 specifies that a person commits an offence by altering, suppressing, concealing, destroying or falsifying a document liable to be produced for inspection, in order to circumvent the campaign control provisions of the Bill. It is also an offence to withhold information or to fail to provide information to the relevant person without a reasonable excuse, or to provide false information. Offences under this section carry a penalty of, depending on the offence, imprisonment or a fine, or both.

*Section 17 - Campaign offences: summary proceedings*

167. Section 17 states that summary proceedings under section 16 or schedules 3 to 5 may be taken in respect of a body at any place where it has a place of business and, in the case of a person, at any place where that person is for the time being. Subsection (2) allows criminal proceedings to be commenced at any time within three years after the offence is committed, or within six months of the prosecutor having knowledge of sufficient evidence to justify proceedings.

*Section 18 - Duty of court to report convictions to the Electoral Commission*

168. Section 18 places an obligation on the courts to notify the Electoral Commission of a conviction for any campaign offence under the Bill as soon as practicable after it arises.

*Schedule 3: Campaign rules*

*Part 1: Interpretation*

169. Section 13 introduces schedule 3 of the Bill which provides for the rules which govern campaigning at the referendum. Paragraph 1 contains definitions of words and phrases used in the schedule.

*Part 2: Permitted participants and designated organisations*

170. Paragraph 2 of schedule 3 provides that if an individual or an organisation (including a political party) wishes to spend more than £10,000 (a limit set by schedule 3, paragraph 19) on campaigning, they will have to declare to the Electoral Commission the outcome they will campaign for at the referendum. Paragraph 2 also sets out the criteria that individuals and bodies must fulfil to be eligible to become permitted participants.

171. Paragraph 3 sets out the requirements for the declarations. Declarations made by a registered political party must be signed by the responsible officers of the party (usually the treasurer) or in the case of a minor party (one that contests only one or more parish or community election) it must include the name of the person who will be responsible for the party's compliance with the referendum campaign rules.

172. Declarations made by individuals wishing to become permitted participants must be signed by the individual and give their full name and home address.

173. Declarations made by registered companies; trade unions; building societies; limited liability partnerships; friendly societies and unincorporated associations of two or more must be signed by the secretary or similar office bearer of the body and must include the name and address of the organisation, including, in the case of a company, its registered number. Unincorporated associations must provide additional details of their officers (if they have more than 15 members) or their members.

174. Declarations made by bodies incorporated by Royal Charter, charitable incorporated organisations and partnerships must be signed by the secretary or similar office bearer of the body and must include the name and address of the body's principal office or main office in the United Kingdom.

175. Declarations to be a 'permitted participant' must be accompanied by a signed statement from the responsible person confirming that they are willing to exercise the functions conferred on the responsible person.

176. Paragraph 4 provides that the Electoral Commission may reject a declaration given by an unincorporated association with a name that is, in the opinion of the Commission, obscene, offensive, criminal or is either the same as, or similar to, the name of an existing permitted participant so as to be likely to result in confusion. Where an unincorporated association seeks to change its name on the register to one that, in the opinion of the Electoral Commission, fits those criteria, the Commission do not have to enter the name on the register, or make public any documents bearing that name.

177. Paragraph 5 prohibits a responsible person for a permitted participant from making a declaration under paragraph 2 by or on behalf of another permitted participant. If an individual is a permitted participant and also treasurer of a registered party other than a minor party, the individual ceases to be a permitted participant if the party registers as a permitted participant. A declaration by a qualifying body or minor party will be considered not to satisfy the requirements of paragraph 3(1)(b), 3(3)(a)(ii) or 3(5)(a)(ii) to notify who is the responsible person for a permitted participant if the intended responsible person is already a responsible person for another permitted participant or a permitted participant in their own right. References to treasurers are to be read in some circumstances as references to campaign officers.

178. Paragraph 6 places a duty on the Electoral Commission to create and maintain a register of declarations made by registered parties, individuals and other organisations who wish to become permitted participants in the referendum. The register must not include the home address of an individual who has made a declaration.

179. Paragraphs 7 and 8 provide that a permitted participant may apply to the Electoral Commission to be the principal campaign organisation representing one of the outcomes of the referendum. These permitted participants are called 'designated organisations' and have a higher campaign spending limit (full limits are set out in paragraph 20). Paragraph 8 specifies the form that applications must take and sets out the timetable for applications and for the Electoral Commission's decision. It makes clear that even where an application has been made only in respect of one outcome, the Electoral Commission can make the designation provided

they are satisfied that the applicant is genuinely representative of those campaigning for that outcome. The Commission may designate an organisation in relation to any of the possible outcomes. The Commission may designate the same organisation for more than one of the possible outcomes.

180. Under paragraph 9, designated organisations are entitled to use school rooms or meeting rooms in publicly maintained buildings for public campaign meetings during the four-week period before the referendum is held.

181. Paragraph 10 requires the designated organisation to contact the education authority in advance if it wishes to use a school room and entitles it to inspect a list of the rooms that are available for it to use.

### *Part 3: Referendum expenses*

182. Paragraph 11 defines referendum expenses as any of the activities specified in paragraph 12 which are incurred in the running or conduct of a referendum campaign, or are incurred in connection with the promotion of any particular outcome in the referendum.

183. Paragraph 12 sets out different types of activities which qualify to be counted as referendum expenses (including campaign broadcasts, advertising, material addressed to voters, market research or canvassing, press conferences or media dealings, transport, rallies or public meetings). Sub-paragraph (2) confirms that the definition of referendum expenses does not extend to any expenses which fall to be met out of public funds (see paragraph 1(4) and (5) of schedule 3), any campaign staff costs, any expenses incurred by an individual which are not reimbursed, or any expenses related to the publication of material about the referendum which is not an advertisement.

184. Sub-paragraph (3) gives the Electoral Commission a power to issue guidance on the different kinds of expenses that qualify as referendum expenses, and requires them to provide a copy of this guidance to Scottish Ministers, who will lay a copy before the Scottish Parliament.

185. Paragraph 13 deals with the concept of notional referendum expenses, where an individual or body is given property or allowed to use property, services or other facilities either free of charge or at more than 10% discount from the market rate for their use, for the purposes of campaigning for an outcome in the referendum. Notional expenses are counted towards the referendum expenses limit of the individual or body. There are four situations where notional expenses are calculated:

- Where a property is provided free of charge, the ‘appropriate amount’ of expenses is calculated as a reasonable proportion of the market value of the property taking into account the use of the property.
- Where the property is provided at a discount of more than 10%, the appropriate amount of expenses is the reasonable proportion of the difference between the market value of the property and the amount actually spent.

- Where property, services or other facilities are provided free of charge, the appropriate amount of expenses is calculated as a reasonable proportion of the commercial rate for their use of the property taking into account the use of the property.
- Where property, services or other facilities are provided at a discount of more than 10%, the appropriate amount of expenses is the reasonable proportion of the difference between the commercial rate for their use and the amount actually spent.

186. Where an employer makes the services of an employee available to the individual or body, the notional referendum expenses are taken to be the person's salary (but not other payments such as bonus payments for example) during the time they are working on behalf of the individual or body.

187. The effect of sub-paragraphs (9) and (10) is that only the proportion of the expenses incurred for the use of the property, services, facilities or employees during the referendum period is to be declared by a permitted participant in a return to the Electoral Commission. Only notional referendum expenses of over £200 need be declared. Notional referendum expenses do not include the costs associated with the transmission of a referendum campaign broadcast, any free mailshot of referendum material, or the use of public rooms under paragraphs 9 and 10 for designated organisations. Time or services given voluntarily by an individual are also excluded. Under sub-paragraph (11), someone who makes a false declaration in the return commits an offence.

188. Paragraph 14 requires that any expenditure incurred on behalf of a permitted participant must have the authority of the responsible person (e.g. its treasurer or other named officer as defined in schedule 7) or someone authorised in writing by the responsible person. Anyone who spends money without this authority commits an offence.

189. Similarly, paragraph 15 requires that any payment made by the permitted participant in connection with referendum expenses must have the authority of the responsible person or someone authorised in writing by the responsible person and there must be an invoice or receipt for any payment over £200. When a payment of over £200 is made by someone authorised by the responsible person, that person must notify the responsible person that the payment has been made and give the responsible person the relevant invoice or receipt. If anyone fails to follow these rules they commit an offence.

190. Paragraph 16 requires someone with a claim for payment of referendum expenses to submit it to the permitted participant's responsible person or someone authorised by the responsible person within 30 days of the date of the referendum. Claims can be submitted beyond the 30-day period if the Electoral Commission agree that it is appropriate to do so. All other claims must be paid within 60 days of the date of the referendum. Paying a claim after that time is an offence. Paying a claim that should not be paid is also an offence. Any other rights a creditor of the permitted participant may have in relation to payment (for example right to earlier payment under a contract agreed by the creditor and permitted participant) are not affected by the timescale for payment of not later than 60 days after the referendum period.

191. Sub-paragraph (8) of paragraph 16 applies section 77(9) and (10) of the Political Parties, Elections and Referendums Act 2000, to prevent the 30 and 60-day periods from ending on a Saturday, Sunday or other national day of thanksgiving, mourning or holiday.

192. Where the permitted participant's responsible person (or someone allegedly authorised to incur the expenditure) fails or refuses to pay a claim for referendum expenses within 60 days of the date of the referendum, this is known as a 'disputed claim'. Paragraph 17 allows the person who made the claim to bring a court action to decide whether the claim ought to be paid, whether the 60-day period has passed or not. The court may consider whether there is a special reason for the claim to be paid if it was submitted after the 30-day period was over. Paragraph 18 confirms that the rights of the creditors of permitted participants to receive payments due to them are not affected by a permitted participant having incurred expenditure or spent money when prohibited by the campaign rules in schedule 3 from doing so, so long as the creditor was unaware that the contract or expenditure contravened those rules.

193. Paragraph 19 sets a spending limit of £10,000 in the referendum campaign for individuals or bodies that are not permitted participants. Sub-paragraphs (8) to (10) include within the £10,000 limit the appropriate sum of notional referendum expenses for property, services or facilities incurred before or during the referendum period. If that limit is exceeded, then the individual or body is guilty of an offence, and in the case of a body, the person who authorised the expenses is also guilty of an offence if that person knew or should have known that the limit would be exceeded as a result of the payment. It is a defence for an individual or body to show that they complied with a code of practice issued by the Electoral Commission at the time of deciding whether to incur the expense, and in so doing, had not exceeded the spending limit at that time.

194. Paragraph 20 sets out the spending limits for permitted participants. Where a permitted participant is a designated organisation, they will have a campaign spending limit of £1,500,000. Permitted participants who are registered political parties and for whom constituency and regional votes were cast in the last election for the Scottish Parliament before the relevant day will have a spending limit of either £3,000,000 multiplied by their percentage share of the votes cast at that election, or a minimum of £150,000. The 'relevant day' is the day on which the regulations providing for a referendum come into force.

195. Permitted participants who are not political parties will have a limit of £150,000. If a permitted participant is a member of a designated organisation (but not the organisation itself), that will not affect their separate entitlement to incur expenditure up to their own limit. Sub-paragraphs (8) to (10) of paragraph 19 also apply to these spending limits the notional appropriate sum of property, services or facilities incurred before or during the referendum period. Any referendum expenses incurred before the individual or body became a permitted participant also count towards the spending limit and should be noted in their expense return to the Electoral Commission.

196. Breach of the spending limits is treated as an offence, in the case of a political party, both by the party itself and by its responsible person or deputy treasurer. If the permitted participant is an individual, then the individual is guilty of the offence and, if the permitted participant is some other body, then both the body and the responsible person are guilty of the

offence if the spending limits are exceeded. As with those who are not permitted participants, it is a defence to show that they had complied with a code of practice issued by the Electoral Commission at the time of deciding whether to incur the expense, and in so doing, had not exceeded the spending limit at that time.

197. Paragraph 21 makes provision for campaigners working together as part of a common plan or arrangement, to provide a co-ordinated message to voters, while preventing an organisation or body declaring themselves a permitted participant under a number of different names in order to take advantage of multiple spending limits. Referendum expenses incurred by two or more permitted participants working together to a common plan or arrangement are to be treated as counting towards the spending limits of each permitted participant for the purposes of the spending limits in paragraphs 19 and 20. Such expenditure also counts towards the spending limit of a non-permitted participant, if one is involved in the common plan or arrangement. To allow a designated organisation to lead co-ordinated activity amongst campaigners, where a designated organisation is involved in a common plan, the designated organisation is taken to have incurred the total amount of common plan expenditure, and the other participants do not count any common plan expenditure against their individual spending limits. Any unregistered campaigner who spends more than £10,000 as part of a common plan with a designated organisation is, however, required to register as a permitted participant. Unregistered campaigners who spend less than £10,000 in a common plan with a designated organisation are effectively exempt from the common plan rules. These rules on working together do not apply unless there is a designated organisation for each of the possible outcomes in the referendum.

198. Paragraph 22 requires each permitted participant to provide a report to the Electoral Commission about its finances including its spending, any disputed claims in which it was involved, unpaid claims and any relevant donations it has received (with the exception of registered political parties, which are separately required under UK legislation to submit a return about their donations to the Electoral Commission). The report must also include details of any expenditure incurred by or on behalf of an individual, body or permitted participant which must be treated as expenses incurred as part of a common plan under paragraph 21 of schedule 3, including any expenses which were incurred on behalf of a permitted participant before they became a permitted participant.

199. This report or 'return' must include all invoices and receipts in relation to expenditure and a statement identifying the amount of any notional referendum expenses incurred. The return need not include details of, but must be accompanied by a declaration of the total amount of, any referendum expenses incurred before the individual or body became a permitted participant. The Electoral Commission have a power under sub-paragraph (15) to issue guidance about the form to be used for the return. Those who are not permitted participants do not need to submit a return to the Commission.

200. Paragraph 23 requires designated organisations that have spent over £250,000 to submit an auditor's report on their financial return to the Electoral Commission. The auditor has the right to access the designated organisation's books and other paperwork and the responsible person must provide any relevant additional information that the auditor requires for the purposes of the audit. If the responsible person fails to do so, the Commission may direct them

to do so. If the responsible person fails to comply with the written directions of the Commission, the Commission can apply to the Court of Session to deal with the person as if they had failed to comply with a court order. A deliberately misleading, deceptive or false statement, whether oral or in writing by the responsible person to an auditor about the finances of the designated organisation is an offence.

201. Under paragraph 24, returns which require an auditor's report must be submitted to the Commission within six months of the date when the referendum took place. Returns that do not need an auditor's report must be submitted to the Commission within three months. Where the Electoral Commission decides that a claim for expenses that was submitted after the 30-day deadline should be paid (under paragraph 16), the responsible person must, within seven days of the payment, submit to the Commission a return detailing the payment. The responsible person commits an offence by failing to comply with the requirements of this paragraph.

202. Paragraph 25 requires the responsible person to sign the return and provide a declaration to the effect that they have examined the return and to the best of their knowledge and belief it is complete and correct and all expenses in the return have been paid by the responsible person or someone authorised by them. Where the permitted participant is not a registered political party, the declaration must also state that all relevant donations recorded in the return have been accepted from permissible donors and that no other donations have been accepted. The responsible person commits an offence if they knowingly or recklessly make a false declaration in the return.

203. Paragraph 26 requires the Commission to make a copy of the returns they receive from permitted participants available for public inspection while the return is in the Commission's possession. The Commission must ensure that where a donor is an individual rather than an organisation, the donor's address is not made public in the statement of relevant donations. A similar restriction applies where the return contains information about a regulated transaction. If the transaction was entered into with an individual, the individual's address should not be made public. The Commission have a power to destroy returns and any other papers they receive once two years have passed since they first received them, or else at the responsible person's request the Commission must send the return and other papers back to the permitted participant.

#### *Part 4: Publications*

204. Paragraph 27 provides that, for the 28-day period ending with the date of the referendum, the Scottish Ministers and certain public authorities in Scotland cannot publish any material providing general information about the referendum, dealing with issues raised by the question to be voted on in the referendum, putting any arguments for or against a particular answer to the question to be voted on, or which is designed to encourage voting in the referendum. However, this rule does not apply to information made available following a specific request; specified material published by or under the auspices of the Scottish Parliament Corporate Body; any information from the Electoral Commission, a designated organisation or the CCO or any other counting officer; or to any published information about how the poll is to be held.

205. Under paragraph 28, printed material associated with the referendum cannot be published unless it meets the following requirements:

- If the material is contained on a single side of a printed page, then the name and address of the printer, the promoter and the person on behalf of whom the material is being published must be on the face of the document.
- If the printed material is not on a single sided page, then those names and addresses must appear on the first or last page of the document.
- If the printed material is a newspaper or periodical advertisement, then the name and address of the printer of the newspaper or periodical must appear on its first or last page and the names and address of both the promoter and the person on behalf of whom the material is being printed must be in the advertisement.

206. The rule also prevents non-printed material associated with the referendum, such as material on the internet, from being published unless it includes the name and address of the person on behalf of whom the material is being published. There are exceptions if it is not reasonably practicable to comply with these requirements; an example might be very small advertisements or stickers, or where this cannot reasonably be regarded as campaign material promoting or procuring a particular outcome at the referendum.

207. If any printed material is published without meeting the requirements, then the promoter of the material, the printer, and any person who publishes it are all guilty of an offence. If any non-printed material fails to meet the requirements, then the promoter of the material and publisher are guilty of an offence. In both cases, it is a defence to show that circumstances beyond the person's control caused the offence to be committed and that they took all reasonable steps to avoid committing an offence.

208. Paragraph 29 applies the Town and Country Planning (Control of Advertisements) (Scotland) Regulations 1984 in relation to the display on any site of an advertisement relating specifically to the referendum as they have effect in relation to the display of an advertisement relating specifically to parliamentary election.

#### *Part 5: Control of donations*

209. The Bill deals with controls of donations to permitted participants who are not registered parties or are minor parties. Donations to registered political parties are reserved to the UK Parliament and are already subject to the regulatory regime established in the Part 4 of the Political Parties, Elections and Referendums Act 2000. The rules set out in Part 5 of schedule 3 of the Bill define what donations are allowed, both by description and by monetary value (or a determination of monetary value), who is allowed to make a donation and what a permitted participant must do to record and report the donations of over £500 that they receive.

210. Paragraph 30 defines a 'relevant donation' in this context as meaning a donation to a permitted participant for the purposes of meeting referendum expenses. Under sub-paragraph (6), only permitted participants that are designated organisations can accept donations from registered political parties.

211. Sub-paragraph (7)(a) adds anti-avoidance provisions in order to cover donations provided so that expenses are not incurred, and sub-paragraph (7)(b) provides for a test of reasonably assuming something to be a donation.

212. Sub-paragraphs (8) to (10) provide an explanation of what constitutes a donation in relation to any money spent in paying any referendum expenses incurred by or on behalf of the permitted participant. Sub-paragraph (11) makes it immaterial where a donation is received.

213. Paragraph 31(1) explains what constitutes a donation for the purposes of the referendum. Where the value of the transaction, whether it be in money or in the form of property, services or facilities at less than the market rate, the money or property transferred to a permitted participant is taken to be a gift and therefore a donation made to the permitted participant. Sub-paragraph (3) explains that in order to determine whether property, services or facilities are provided to a permitted participant on terms better than a commercial rate, a comparison is needed with the total sum involved. Further clarification is provided in sub-paragraph (5) which explains that anything given to someone representing a permitted participant that is not for their personal use is assumed to be a donation to the permitted participant.

214. A donation to a permitted participant includes any sponsorship of the permitted participant. Paragraph 32 explains that sponsorship in this context includes any money given to the permitted participant in order to help with referendum expenses or to avoid incurring costs in the referendum. This includes the sponsorship of conferences or other events run by or on behalf of the permitted participant, costs associated with a publication by or on behalf of the permitted participant and any study or research it undertakes. However, sponsorship does not include someone paying for admission to a conference, buying a publication or payment for an advertisement where the cost involved is charged at the usual commercial rate.

215. Paragraph 33 outlines other payments that are not donations for the purposes of the Act. These include grants from public funds, any rights to a free mailshot which are given to a designated organisation under any enactment (which would include provision by order under the Scotland Act 1998), the use of public rooms under paragraphs 9 and 10 of schedule 3, transmission by a broadcaster of referendum campaign broadcasts, the services of someone volunteering to work with or for the permitted participant at no charge, or any interest that may accrue on a donation. Any donation with a value of £500 or less is to be disregarded.

216. Paragraph 34 explains how the value of a donation is to be established. The value of any donation other than money is to be taken as the market value of the property involved. Where goods or services are provided to the permitted participant at a rate preferential to the commercial rate, the value of the donation is taken to be the difference in value between what was actually paid and what would have been paid had the commercial rate been applied. The value of sponsorship is taken as either the money involved, or the market value of any property transferred to the permitted participant. Any value accruing to the sponsor from the sponsorship is to be disregarded. The value of any loan, or property, services or other facilities provided at a rate better than the commercial rate is taken to be the difference between the amount actually paid by the permitted participant and the amount that would have been paid had the commercial rate been applied. If the permitted participant benefits from such a donation over a period of

time, for example through paying a lower rent over several months, the donation involved is the total amount saved over those months.

217. Paragraph 35 prohibits permitted participants from accepting certain donations. Only donations from people or bodies listed in paragraph 1(2) of schedule 3 as ‘permissible donors’ can be accepted:

- individuals registered on the electoral register.
- companies registered under the Companies Act or incorporated in the EU or that conduct business in the UK.
- registered parties under Part 2 of the Political Parties, Elections and Referendums Act 2000 (only designated organisations may receive donations from registered parties, under sub-paragraph 30(6)).
- trade unions.
- building societies.
- limited liability partnerships.
- friendly societies.
- unincorporated associations carrying on business or other activities wholly or mainly and having their main office in the UK.
- a body incorporated by Royal Charter.
- a Scottish or UK charitable incorporated organisation.
- a partnership constituted under Scots law which carries on business in the UK.

218. In addition, donations from exempt trusts are to be counted as relevant donations.<sup>1</sup> However, a donation from a trustee of any property which is not an exempt trust donation, or if the beneficiaries under the trust are not permitted participants or members of an unincorporated association which is a permissible donor, is to be taken as a donation from an impermissible donor, i.e. it should not be accepted by the permitted participant.

219. Where someone provides a donation to the permitted participant on behalf of themselves together with someone else as a ‘principal donor’, or an agent provides a donation on behalf of others, then each donation of over £500 is to be taken as a donation from each of the individuals. In such cases, the responsible person of the permitted participant must be given certain details about the donor. An offence is committed by the principal donor or the agent if the details are not provided. The details to be provided depend on the status of the donor but

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<sup>1</sup> “Exempt trust donations” are donations received from a trustee where the trust was created before 27 July 1999 and which has had no property transferred to it after that date nor have the terms of the trust varied after that date or it is a donation received from a trustee where the trust was created either by a person who was a permissible donor under section 54 of the Political Parties, Elections and Referendums Act 2000 or created in the will of such a person and no property has been transferred to the trust other than by the person who created or by the will. (See section 162 of the 2000 Act and the definition in paragraph 1(1) of the Act).

usually it involves their name and address. These details are to be provided for each donation in the statement of donations to be submitted to the Electoral Commission under paragraph 40.

220. Under paragraph 36, if a donation is accepted by the permitted participant, they should make every effort to verify that the donor is who they say they are, that the donor is a permitted donor and to verify the donor's name and address. If the permitted participant receives a donation they should not accept, then the donation should be returned within 30 days to whoever provided it. An offence is committed if these steps are not taken within the 30-day period but it is a defence to show that within the 30 days steps were taken to identify the donor and it was concluded that the donation was from a permissible donor.

221. Under paragraph 37, if the donation was provided in such a way that the identity of the donor is not obvious, it should be returned to the person who provided it on the donor's behalf or the financial institution they used to send it. If that is not possible, the donation should be sent to the Electoral Commission which will then pay it into the Scottish Consolidated Fund.

222. Under paragraph 38, where a permitted participant accepts a donation that it should not have accepted (because the identity of the donor is not known or by someone other than a permissible donor), a sheriff can, regardless of whether legal proceedings have been brought in connection with an offence, order the permitted participant to forfeit money equivalent to the amount of the donation. The permitted participant can appeal against the sheriff's decision to the Court of Session. If the amount of the donation is forfeited, then the money is paid into the Scottish Consolidated Fund.

223. If someone deliberately tries in any way to make a donation to a permitted participant when the donor is not a permissible donor, that person commits an offence under the provisions of paragraph 39. An offence is also committed if someone provides deliberately false information to the responsible person of the permitted participant about the amount of a donation or the donor. Similarly, an offence is committed if someone deliberately tries to deceive the responsible person of the permitted participant by withholding information about the amount of a donation or the donor.

224. As part of the return to the Electoral Commission, the permitted participant is required by the provisions of paragraph 40 to provide a statement of relevant donations.

225. Paragraph 41 sets out the information to be provided in the statement of relevant donations. For individual donations of over £7,500 or cumulative donations of over £7,500 from the same donor, the statement must include the amount of the donation or its value if the donation was something other than money, the date when it was accepted by the permitted participant and other information about the donor, which, although dependent on the status of the donor, is in most cases the donor's name and address.

226. Where the donation is made by a body incorporated by Royal Charter, a charitable incorporated organisation or a partnership constituted under Scots law which carries on business in the UK, then the name of the body and the address of its principal or main office in the UK must be provided.

227. The total value of all the other donations which are under £7,500 should also be provided in the statement. Where someone who has an anonymous entry on the electoral register has made a donation, the statement should also include a copy of the evidence that the donor has an anonymous entry.

228. Where a donation has been received by a permitted participant from an impermissible donor in accordance with the rules for such donations in paragraph 35(1)(a), paragraph 42 requires that the statement should record the name and address of the donor, the amount of the donation or its value if the donation was something other than money, the date the donation was received and the date it was sent back to the donor or the person acting on the donor's behalf in accordance with paragraph 36(3)(a). Where a donation has been received by a permitted participant from an unidentifiable donor in accordance with the rules for such donations in paragraph 35(1)(b), the statement should record the name and address of the donor, the amount of the donation or its value if the donation was something other than money, the date the donation was received and the date it was dealt with in accordance with paragraph 36(3)(b).

229. Paragraph 43 requires that reports are prepared by responsible persons for permitted participants during the referendum period which include details of donations received of more than £7,500 that are to be used for the purpose of meeting referendum expenses incurred by the permitted participant during the referendum period. Reports must be prepared in respect of:

- the period beginning when the draft Scottish statutory instrument providing for the holding of the referendum was laid before the Parliament for approval, and ending with the 28<sup>th</sup> day of the referendum period;
- the two succeeding periods of four weeks; and
- the period from the end of the second of these four-week periods until the end of the day before the date of the referendum.

230. If no donations of more than £7,500 were received, this information must also be included in the report. The reports must be delivered to the Electoral Commission within seven days at the end of each period. It is an offence to fail to make such a report, or if the report does not comply with the requirements of this rule.

231. Paragraph 44 requires each of these reports to be accompanied by a declaration, signed by the responsible person, confirming that the report is complete. A false declaration, or a failure to make one by a responsible person, is also an offence.

232. Paragraph 45 requires the Electoral Commission to make pre-poll donation reports publicly available as soon as practicable.

#### *Part 6: Control of loans and credit*

233. The rules set out in Part 6 of schedule 3 provide for the control of 'regulated transactions', i.e. loan or credit transactions entered into by permitted participants who are not registered parties. Paragraph 46 sets out the scope of operation of this Part of the schedule.

234. Paragraph 47 defines a regulated transaction as an agreement by someone to lend money or provide credit to a permitted participant, where the permitted participant intends to use all or part of the money or credit to meet referendum expenses. An agreement of this type may also be supplemented by a ‘connected transaction’, where a third party backs up the permitted participant by offering security to the lender. In this case, the connected transaction is also considered to be a regulated transaction. Agreements where the value is less than £500, and payments which are already covered in statements to the Electoral Commission under paragraph 40, do not count as regulated transactions.

235. Paragraph 48 clarifies the valuation of regulated transaction. Where the transaction is a loan agreement, the value is the full amount of the money to be lent. Where the transaction is a credit agreement, the value is the maximum credit limit. Both of these exclude any interest provisions in the agreement. Where the transaction is arranged on the basis of a security, the value is the liability under the security.

236. Paragraph 49 prohibits permitted participants from entering into regulated transactions with anyone who is not a permissible donor as defined in paragraph 1(2) of schedule 3.

237. Under paragraph 50, any transaction between a permitted participant and an impermissible donor is void. Any money received under the transaction must be repaid, along with any interest due. If the money is not repaid, the Electoral Commission may apply to a sheriff to make an order to return the money or discharge any security, with the effect that both parties return to the positions they would have been in if the transaction had never existed.

238. Paragraph 51 provides that where a regulated transaction is void due to impermissibility of the donor as under paragraph 50, any connected transaction as described in paragraph 47(3)(b) is also void. If the lender is unable to recover the full amount owed by the permitted participant, the lender may recover such sums from the third party.

239. Paragraph 52 confirms that any attempt by an authorised participant to transfer their interest in a regulated transaction to an unauthorised participant is not valid.

240. Paragraph 53 provides the offences related to regulated transactions, including:

- it is an offence to enter into a regulated transaction in the knowledge (or where it ought reasonably to have been known) that the other party is not an authorised participant.
- where a permitted participant has entered into a transaction with an unauthorised participant, but could not reasonably have been expected to know, it is still an offence not to take reasonable steps to repay the money after the impermissibility of the other party becomes apparent.
- it is an offence to benefit from or be in line to benefit from a connected transaction which involves an unauthorised participant where their impermissibility was known or could reasonably have been expected to have been known. It is also an

offence, where the impermissibility was not known, to fail to take all reasonable steps to repay the benefits once the impermissibility becomes apparent.

- it is an offence to knowingly enter into, or knowingly facilitate, any arrangement which is likely to result in the permitted participant being involved in a regulated transaction with an unauthorised participant.

241. The offences include situations where the other party was originally an authorised participant but later ceased to be one. It is a defence for a person who is the responsible person for the permitted participant to show that they took all reasonable steps to prevent the permitted participant entering into the transaction.

242. It is an offence for a permitted participant knowingly to receive money under a loan or other regulated transaction from a person who has ceased to be an authorised participant, or to fail to repay money received under a loan or other regulated transaction from a person who has ceased to be an authorised participant after becoming aware the person has so ceased. It is a defence for a person to show that they took all reasonable steps, as soon as practicable, to repay the loan or regulated transaction.

243. Paragraph 54 details the penalties associated with the offences listed in paragraph 53, which, depending on the offence, are either a fine or imprisonment for a term of up to 12 months (or both).

244. Paragraph 55 sets out the requirement for permitted participants to include regulated transactions in the statements prepared for the Electoral Commission under paragraph 22. The transaction need only be included in the return where the value exceeds £7,500, or where the aggregate value of the transaction and any other relevant benefits exceeds £7,500.

245. Paragraph 56 sets out the information that must be recorded in the statement prepared under paragraph 22 in relation to each recordable transaction to which an authorised participant was a party.

246. Paragraphs 57 and 58 require the statement to include details of any authorised or unauthorised participants, and must also include details of the transaction in line with schedule 6A to the 2000 Act (which deals with transaction reports prepared by registered political parties), subject to the modifications made by sub-paragraph (2) and any other necessary modifications.

247. Under paragraph 59, where there is any change to the agreement, such as different participants, the information from before and after the change must be included in the statement, as well as the date the change was made. Where the loan has been repaid in full or the debt released this information must be included.

248. Paragraph 60 requires that the statement also includes the total value of regulated transactions that are not recordable.

249. Paragraph 61 requires that reports must be prepared by the responsible person in relation to permitted participants detailing regulated transactions which have a value exceeding £7,500 that are to be used for the purpose of meeting referendum expenses incurred by the permitted participant during the referendum period. These transaction reports must be prepared in respect of the same periods as required in paragraph 43 for donations. If no such transactions were entered into, the report must state this. Failure to make a report and failure to comply with the requirements of paragraph 61 are offences.

250. Paragraph 62 requires each of these transaction reports to be accompanied by a declaration, signed by the responsible person, confirming that the report is complete. Making a false declaration, or a failure to make one by a responsible person, is also an offence.

251. Paragraph 63 requires the Electoral Commission to make pre-poll transaction reports publicly available as soon as practicable.

252. Paragraph 64 deals with a situation where a sheriff, on the application of the Commission, is convinced that a failure to comply with any requirement under this part of the schedule was caused by a person attempting to conceal the existence of, or true value of, the transaction. In this case, the sheriff may make an order which will return the parties to the same position as if the transaction had never been made.

253. Paragraph 65 makes provision in relation to the court proceedings before the sheriff under paragraphs 50 or 64, confirming that they will take place as civil proceedings, and that orders of the sheriff are appealable to the Court of Session. Rules of court may make provision with respect to court applications or appeals.

254. Paragraph 66 contains definitions of words and phrases used in this schedule.

*Schedule 4: Campaign rules: investigatory powers of the Electoral Commission*

255. Schedule 4, introduced by section 14(4), contains the investigatory powers afforded to the Electoral Commission to allow them to monitor and enforce compliance with the campaign rules.

256. Paragraph 1 allows the Commission, after issuing a ‘disclosure notice’, to require a permitted participant, or officer of a permitted participant, to produce or provide documents or an explanation in relation to income or expenditure where reasonably required by the Commission to carry out their functions. Sub-paragraph (4) obliges the person to comply with a requirement set out in a disclosure notice within a reasonable time.

257. Paragraph 2 enables a person authorised by the Commission to enter premises at any reasonable time and inspect relevant documentation, to enable the Commission to carry out their functions. This power can only be exercised after the Commission have obtained a warrant from a sheriff or justice of the peace authorising entry of the specified premises and is restricted so that it can only be used in relation to permitted participants.

258. An inspection warrant will be valid for one month from the day on which it is issued and may not be used in connection with an investigation by the Commission of a suspected breach or offence.

259. Paragraph 3 provides that, where the Commission have reasonable grounds for suspecting that a campaign offence has been committed or the restrictions or requirements of schedule 3 have otherwise been contravened, they may issue a notice to a person requiring that person to produce or provide any documents or explanation reasonably required for an investigation by them of the suspected offence or contravention. ‘Campaign offence’ is defined in schedule 7 as an offence under section 16 or any of schedules 3 to 5. Sub-paragraph (4) obliges the person to comply with the notice within a reasonable time. This power is wider than that in paragraph 1 because it is not restricted to documentation or information relating to income or expenditure nor is it restricted to a list of specified individuals or bodies. Sub-paragraph (5) allows an investigator authorised by the Commission to require a person to come and answer in person any questions that the investigator reasonably considers relevant to the investigation.

260. The powers created by paragraph 3 can be used in relation to a person who is also covered by paragraph 1, albeit for a different purpose (i.e. that of investigating purported wrongdoing), and may be used against any other person who holds, or is thought to hold, information reasonably required for an investigation by the Commission. It follows that the power may be used in respect of the individual or body suspected by the Commission of having committed an offence or contravention, but is not limited to such an individual or body.

261. Paragraph 4 applies where the Commission have given a notice under paragraph 3 requiring documents to be produced. Sub-paragraph (2) allows the Court of Session to issue a document disclosure order against a person following an application from the Commission if satisfied of four things. First, that there are reasonable grounds for believing that a campaign offence has been committed, or that another contravention of schedule 3 has occurred. Second, that documents referred to in the notice under paragraph 3 have not been produced in response to that notice. Third, that the documents are in the custody of the person against whom the order is issued. Finally, that the documents are reasonably required for the purposes of an investigation. The order requires the person to whom it is given to deliver to the Commission documents referred to in the order within the timeframe set out in the order. A document is in a person’s control if the person has possession of it, or a right to possession of it. Sub-paragraph (5) stipulates that a person who fails to comply with the order may not be punished for both contempt of court and an offence under paragraph 12 of the schedule.

262. Paragraph 5 applies where the Commission have given notice under paragraph 3 requiring any information or explanation to be produced. The Court of Session can issue an information disclosure order against a person on an application from the Commission if satisfied of four things. First, that there are reasonable grounds to suspect a person has committed a campaign offence or has otherwise contravened schedule 3. Second, that the information or explanation referred to in the notice under paragraph 3 has not been provided. Third, that the respondent is able to provide the information or explanation. Finally, that it is reasonably required for the purposes of an investigation. The order requires the person to whom it is given to provide the Commission with information or explanation referred to in the order

within the timeframe set out in the order. A person who fails to comply with the order may not be punished for both contempt of court, and an offence under paragraph 12(1) of the schedule.

263. Paragraph 6 specifies that the Commission may retain documents delivered to them in compliance with an order under paragraph 4 for three months. However, if during that time any relevant proceedings are begun, or notices are issued or penalties imposed under schedule 5, the documents may generally be retained until they are no longer required in relation to the proceedings or civil sanctions.

264. Paragraph 7 provides that the Commission, or a person authorised by the Commission, may make copies or records of relevant information or explanations obtained under paragraph 4.

265. Paragraph 8 requires that any authorisation of a person by the Commission made under this schedule must be in writing.

266. Paragraph 9 deals with documents held in electronic form. Sub-paragraph (1)(a) gives the Commission a power to require such documents to be made available in a legible form. Sub-paragraph (1)(b) enables a person authorised to inspect documents to require any person on premises being searched to give reasonable assistance to allow the inspector to make legible copies of electronic documents, or records of information contained in them. Under this power, such assistance may also be required by an inspector in order to enable the inspector to inspect and check any computer or associated apparatus used in connection with the information.

267. Paragraph 10 exempts information subject to confidentiality of communications from any requirement to produce information (in whatever form) under any power provided by this schedule. The appropriate test is whether a claim to confidentiality of communications could be maintained in legal proceedings in respect of the material in question.

268. Paragraph 11 deals with the admissibility of statements provided under compulsion. A statement made in response to a requirement under the schedule may be used in any proceedings, provided that it complies with any other rules of evidence in those proceedings. But sub-paragraph (2) provides that the statement is not admissible against the maker of the statement in criminal proceedings unless evidence about the statement is relied on, or a question about it is asked, by the maker, or unless the proceedings are for an offence mentioned in sub-paragraphs (3) and (4). (These offences are similar to perjury.)

269. Paragraph 12 provides that it is an offence to fail to comply with any requirement imposed under schedule 4 (for example, to refuse to supply the Commission with information requested under paragraph 1 or 3); to obstruct intentionally somebody performing functions under the schedule; or knowingly or recklessly provide false information in response to a requirement imposed under the schedule.

270. Paragraph 13 imposes a duty on the Commission to publish guidance on the matters set out in sub-paragraph (1) (a) to (g), which concern the ways in which they will make use of the investigatory powers set out in schedule 4. Sub-paragraph (2) obliges the Commission to keep

the guidance under review where appropriate, and sub-paragraph (3) requires the Commission to have regard to the guidance or revised guidance in exercising their functions.

271. Paragraph 14 requires the Commission to report on their use of the investigatory powers contained in schedule 4 in their report to the Scottish Parliament under section 29 or in a separate report

272. Sub-paragraph (2) explains what information the Commission must include in the report on the use of their investigatory powers. Sub-paragraph (3) exempts the Commission from having to report any information that, in their opinion, it would be inappropriate to include because it would be unlawful or because it would prejudice an on-going investigation or proceedings.

*Schedule 5: Campaign rules: civil sanctions*

273. Schedule 5, introduced by section 14(5), of the Bill contains powers to impose civil sanctions enforceable by the Electoral Commission in respect of specified campaign offences.

*Part 1: Fixed monetary penalties*

274. Paragraph 1 allows the Electoral Commission to impose fixed monetary penalties where they are satisfied beyond reasonable doubt that a campaign offence listed in Part 7 of schedule 5 has been committed or a contravention of requirements to deliver certain returns under paragraph 24 of schedule 3 has taken place. The penalties can be imposed either on a person or on a permitted participant where the responsible person for that permitted participant has committed the offence.

275. Paragraph 2 sets out the representations and appeals processes. The Commission can serve notice of an intention to impose a fixed monetary penalty on a person. This must offer the opportunity to discharge the penalty by paying £200. Alternatively, the person can opt to make written representations and objections to the Commission against the penalty. If the deadline for making representations and objections passes without the person having paid, the Commission must decide whether to impose the penalty and serve a further notice recording that on the relevant person (sub-paragraph (4)). If the person's representations have raised any matter that leads the Commission no longer to be satisfied that the person was at fault, the Commission do not have to impose the penalty. The person may appeal to the sheriff against the decision to impose the penalty on the grounds set out in sub-paragraph (6) within 28 days of a decision notice being received, and the penalty is suspended until the appeal is determined or withdrawn.

276. Paragraph 3 explains what information the Commission must include when giving notice of an intention to impose a fixed monetary penalty on a person or when giving notice of a subsequent decision to impose the penalty. This must include the grounds for imposition of the sanction, the right to make representations or appeals and the time periods in which these can be made.

277. Paragraph 4 makes provision for the late payment of fixed monetary penalties. If the penalty is not paid within 28 days of the notice being received, the amount of the penalty is

increased by 25%, and if it is not paid within 56 days, the amount is increased by 50%. Where a penalty is upheld on appeal, or such an appeal withdrawn, similar increases apply from the determination or withdrawal of the appeal.

278. Paragraph 5 limits the criminal proceedings that can be taken against a person for a listed campaign offence or other breach that may be dealt with by way of a fixed monetary penalty. If the Commission notify the person of their intention to impose a fixed monetary penalty for the breach, no criminal proceedings for the breach can be brought during the period when liability can be discharged under paragraph 2(2). This paragraph also precludes such proceedings being taken against a person who does discharge liability by making the payment. Finally, paragraph 5(2) precludes a person on whom the Commission imposes a fixed monetary penalty under paragraph 2(4) from being convicted of an offence for the breach.

*Part 2: Discretionary requirements*

279. Paragraph 6 allows the Electoral Commission to impose a discretionary requirement on a person where they are satisfied, beyond reasonable doubt, that the person has committed one of the listed offences or contravened the relevant return delivery requirements in paragraph 24 of schedule 3. A discretionary requirement as a sanction can take the form of a monetary penalty or alternatively an instruction to take certain actions designed either to prevent the recurrence of the offence or contravention or to restore the position to what it would have been had the offence or contravention not occurred. Sub-paragraph (4) limits the use of discretionary requirements by preventing the Commission from imposing a discretionary requirement on a person more than once for the same act or omission. Sub-paragraph (6) sets the financial limit of a variable monetary penalty for offences which are triable summarily—where such offences are punishable by a fine, the variable monetary penalty must not be greater than the maximum fine.

280. Paragraph 7(1) requires that, where the Commission intend to impose a discretionary requirement on a person for a listed campaign offence or other breach, they must first notify the person of their intention. Sub-paragraph (2) allows the person to make written representations and objections to the Commission against the proposed penalty. If anything is raised which leads the Commission no longer to be satisfied that the offence or contravention took place, the Commission may not impose the penalty (sub-paragraph (4)). In all other cases, the Commission may proceed to serve on the person a notice formally imposing the discretionary requirement, which will specify what the requirement is (sub-paragraph (5)). The person may appeal to a sheriff against the decision to impose the discretionary requirement on the grounds specified in sub-paragraph (6).

281. Paragraph 8 explains what information the Commission must include when giving the initial notice of an intention to impose a discretionary requirement on a person. This includes the grounds for imposing the requirement and the period within which representations and objections may be made (no less than 28 days from the day on which the notice is received). Sub-paragraph (3) sets out the information that must be provided by the Commission when they are imposing a discretionary requirement, such as the grounds for the proposed discretionary requirement, details of any monetary penalty, rights of appeal and the consequences of non-compliance.

282. Paragraph 9 limits the use of other sanctions against a person who has had a discretionary requirement imposed upon them. If a discretionary requirement is imposed on a person, that person cannot be convicted of a criminal offence arising from the same act or omission. However, this protection from future prosecution does not apply in cases where the discretionary requirement imposed was non-monetary, no variable monetary penalty was imposed, and the person failed to comply with the non-monetary discretionary requirement.

283. Paragraph 10 provides that where the Commission are satisfied that a discretionary requirement has been complied with, they must issue a certificate confirming that this is the case. This causes the original requirement notice to cease to have effect. A person who has been served with a discretionary requirement notice may apply to the Commission for a compliance certificate and the Commission must decide whether to issue one within 28 days. If the Commission decide not to issue a certificate, the applicant may appeal to a sheriff within 28 days of the date of receiving the Commission's decision.

284. Paragraph 11 allows the Commission to impose a 'non-compliance penalty' on a person who fails to comply with a non-monetary discretionary requirement. A notice must be served including the grounds for imposing the penalty, specifying a period of at least 28 days to comply, and informing about the right of appeal to the sheriff against a non-compliance penalty (sub-paragraphs (3) and (4)).

285. Paragraph 12 requires that a variable monetary penalty must be paid within 28 days of the relevant notice being received, or the amount of the penalty will increase by 25%. If the penalty is not paid within 56 days of the notice being received, it will increase by 50%. Where a penalty is upheld on appeal, or such an appeal withdrawn, similar increases apply from the determination or withdrawal of the appeal.

### *Part 3: Stop notices*

286. Paragraph 13 provides that the Electoral Commission can impose a stop notice on a person in order to prevent the person from continuing or repeating a particular activity which the Commission reasonably believe is (or is likely to be) an offence listed in Part 7 of schedule 5. A stop notice can also be imposed where the Commission believe that a person's behaviour is likely to lead to them committing an offence or acting in contravention of a listed requirement or restriction. In both cases the Commission must believe that the activity, or potential activity, is seriously damaging to public confidence in the effectiveness of the controls in schedule 3, or significantly risks doing so.

287. Paragraphs 14 to 17 set out the details and limitations of how the stop notice system operates. Paragraph 14 lists the information to be included in a stop notice—the grounds for imposition, rights of appeal and consequences of non-compliance. Paragraph 15 requires the Commission to issue a 'completion certificate' once they are satisfied that the person has taken the steps set out in the stop notice (at which point it will cease to have effect). The person upon whom a notice has been imposed may apply for a completion certificate at any time and the Commission must make a decision on the application within 14 days of receipt. Paragraph 16 explains how a person may appeal against the imposition of a stop notice, or against a decision not to issue a completion certificate, and provides that any appeal will be heard by a sheriff. It

also sets out the grounds for appeal in both circumstances. Paragraph 17 provides that a person who does not comply with a stop notice is guilty of an offence.

*Part 4: Enforcement undertakings*

288. Paragraph 18 outlines the powers of the Electoral Commission to accept an enforcement undertaking from a person whom the Commission have reasonable grounds for believing has committed a listed campaign offence or contravened a listed restriction or requirement. An enforcement undertaking may be offered by the person suspected of the offence or contravention and outlines the action the person will take (within a specified period). The action may be with a view to preventing the recurrence of the offence or contravention or returning the position to what it would have been had the offence or contravention not taken place. Sub-paragraph (1)(d) states that the undertaking will take effect only if the Commission accept it. Sub-paragraph (2) provides that a person who has complied with the accepted undertaking will generally be exempt from other sanctions, including criminal proceedings, in relation to the acts or omissions on which the undertaking is based as long as the undertaking is complied with.

289. Paragraph 19 makes provision about the form of enforcement undertakings and provides that they may be varied at the agreement of both the person who has entered into it and the Commission. It also permits the Commission to publish enforcement undertakings. Paragraph 20 sets out the process by which the Commission may issue a compliance certificate for an enforcement undertaking, and paragraph 21 provides for the grounds and time limit (28 days) for appeal against a decision not to issue a compliance certificate.

*Part 5: General and supplemental*

290. Paragraph 22 limits the use of fixed monetary penalties, discretionary requirements and stop notices. It explains that a fixed monetary penalty may not be imposed on a person if the person is already subject to a discretionary requirement or stop notice for a breach. Additionally, if a person has had a fixed monetary penalty imposed on them for a breach, or has paid a sum to discharge liability for a fixed monetary penalty, the person cannot be given a discretionary requirement or a stop notice in relation to the breach.

291. Paragraph 23 allows the Commission to withdraw a fixed penalty notice, withdraw or vary notice of a discretionary requirement and withdraw a stop notice. If a stop notice is withdrawn, this does not prevent another stop notice in respect of the same activity.

292. Paragraph 24 provides that, if someone is required under schedule 4 to make a statement as part of an investigation by the Electoral Commission, the Commission must not take account of that statement when deciding whether to impose a civil sanction on the person. The only exception is for the offence of providing false information set out in paragraph 12(3) of schedule 4.

293. Paragraph 25 stipulates that any financial penalty imposed on an unincorporated association must be paid from its own funds.

294. Paragraph 26 requires the Commission to publish guidance about enforcement of the campaign rules. The guidance must include details of the sanctions available (both civil and criminal), the circumstances in which civil sanctions may be used and the rights of appeal available. Sub-paragraph (7) requires the Commission to carry out consultations with persons that they consider appropriate prior to publishing guidance. Under sub-paragraph (8) the Commission are required to have regard to the guidance when exercising their functions.

295. Paragraph 27 enables the Commission to recover fixed monetary penalties, variable monetary penalties and non-compliance penalties as a civil debt. Any interest or financial penalty for late payment may also be recovered as a civil debt.

296. Paragraph 28 stipulates that the monetary penalties paid to the Commission as a result of the imposition of civil sanctions under schedule 5 must be paid into the Scottish Consolidated Fund.

297. Paragraph 29 requires the Commission to include in a report a list of the cases (other than those where sanctions have been successfully appealed against) in which they have imposed fixed monetary penalties, discretionary notices or stop notices; cases in which liability for a fixed monetary penalty has been accepted through payment of a sum; and cases in which an enforcement undertaking has been accepted. Sub-paragraph (2) enables the Commission to exclude information if it might be unlawful for the report to include it or might adversely affect on-going investigations or proceedings. The information may be included in the report on the referendum under section 29 or in a separate report.

298. Paragraph 30 allows the Commission to request information from procurators fiscal or constables in Scotland when exercising the powers under the schedule. It will not enable disclosure where that would breach the Data Protection Act 1998 or Part 1 of the Regulation of Investigatory Powers Act 2000 or in relation to certain reserved enactments. It also provides that other powers of disclosure that are independent of this power are not affected by it.

299. Paragraph 31 sets out the powers of a sheriff on appeals against civil sanctions imposed by the Commission. If a person appeals a fixed monetary penalty, the sheriff may overturn or confirm the penalty. On an appeal against a discretionary requirement, non-compliance penalty or stop notice, the sheriff may overturn, confirm or vary the sanction. The sheriff also has the same powers as the Commission as to steps that may be taken in response to such an appeal, or can remit the decision regarding the requirement or notice, or matters relating to the decision, to the Commission. On an appeal against a decision by the Commission not to issue a completion certificate for a stop notice, a compliance notice for a discretionary requirement, or a compliance certificate for an enforcement undertaking, the sheriff may issue the appropriate completion or compliance certificate.

#### *Part 6: Interpretation*

300. Paragraph 32 sets out definitions of words and expressions used in the schedule.

*Part 7: Listed campaign offences*

301. Part 7 lists the campaign offences for which civil sanctions may be imposed under the provisions of schedule 5.

*Referendum agents*

302. Section 19 deals with referendum agents. Referendum agents may be appointed by permitted participants for a particular local government area, and notice must be given to the relevant counting officer of the appointment. The notification must give the names and addresses of the permitted participant, and the referendum agent, must be in writing, signed, and received before noon on the 25th working day before the referendum. The counting officer must then publish details of this notification.

*Observers*

303. Section 20 deals with Electoral Commission observers (anyone who is a member of the Commission, or a member of staff, or is appointed by the Commission for the purposes of this section) and gives them a right to attend any proceedings which are the responsibility of the CCO or a counting officer, or to observe any of their work carried out under this Act.

304. Section 21 allows anyone aged 16 or over to apply to the Commission to be accredited as an observer, which permits them to be present at the issue or receipt of postal ballot papers, proceedings at the poll, or at the count. Accredited observers are subject to all rules contained in the Bill regarding their attendance at these proceedings. The application should be made in the form specified by the Commission and, if granted, may be revoked at any time by them. The Commission must give reasons for the refusal of an application or for revocation of an accreditation.

305. Section 22 provides for organisations to apply to be accredited to allow them to nominate observers, who may attend the proceedings described in the previous paragraph on their behalf. Any observers so nominated must be members of the organisation and the Commission may specify a limit to the number of nominees. The same provision as in section 21 applies to applications.

306. Section 23 allows a CCO, counting officer, or any person authorised by them, to limit the number of people in attendance at proceedings under sections 21 or 22, or to cancel the entitlement to attend in case of misconduct. The presiding officer has the same power in relation to proceedings at a polling station.

307. Section 24 requires the Commission to prepare a code of practice on the attendance of representatives of the Commission; accredited observers; and nominated members of accredited organisations at proceedings related to the referendum. The code must specify the manner in which applications for accreditation by individuals or organisations are to be made to the Commission, and the criteria that will be taken into the account by the Commission when deciding whether to grant or refuse such applications. In addition to giving guidance to persons observing proceedings, they should also give guidance to relevant officers as to the exercise of their powers to limit the number of people in attendance at proceedings or to remove a person's entitlement to attend proceedings because of an act of misconduct. The Commission must

consult the Scottish Ministers before preparing the code and must lay the code before the Scottish Parliament. The provisions also allow the Commission to revise the code at any time, subject to the same requirements for consultation and laying before the Scottish Parliament.

*Information, guidance, advice and encouragement*

308. Section 25 allows the Electoral Commission to give voters information on the referendum, the referendum question and the manner of voting in the referendum.

309. Section 26 gives the Commission power to issue guidance to the CCO regarding the CCO's role under the Bill, and with the CCO's consent to issue guidance to counting officers. They may also issue guidance to permitted participants or potential permitted participants on the campaign rules (schedule 3). This section also confers power on the CCO to issue guidance to counting officers and registration officers about the exercise of their functions under the Bill.

310. Section 27 gives the Commission power to provide advice to anyone who requests it regarding the application of the Bill or any other matter relating to the referendum.

311. Section 28 confers a power on the CCO to take whatever steps are considered to be appropriate to encourage participation in the referendum, and to facilitate co-operation among counting officers in doing the same. The provisions also require a counting officer to take such steps as they think appropriate to encourage participation in the referendum in the local area for which the officer is responsible.

*Report on referendum*

312. As provided for by section 29, the Commission must prepare a report for the Scottish Parliament on the conduct of the referendum and must publish that report.

*Electoral Commission: administrative provision*

313. Section 30 deals with the Electoral Commission's costs in respect of functions under the Act, which will be refunded by the Scottish Parliamentary Corporate Body (SPCB).

314. Section 31 requires the Commission to estimate their costs and income before the start of each financial year and send this to the SPCB for approval. A revised estimate may be sent during the year.

315. Section 32 provides that an investigation by the Scottish Public Services Ombudsman into the Electoral Commission's functions under the Act is not prevented under the Scottish Public Services Ombudsman Act 2002.

*Information about persons under 16*

316. Section 33 provides that provisions in the Scottish Elections (Reduction of Voting Age) Act 2015 concerning exceptions from prohibition on disclosure of information about persons aged under 16 have effect in relation to the conduct of a referendum under this Bill.

*Registration officers' expenses*

317. Section 34 provides that a registration officer is entitled to recover from the Scottish Ministers any expenses incurred by them that are attributable specifically to the exercise of the registration officer's functions under this Bill. The amount of these expenses should not exceed such maximum amount as is specified in, or determined under, regulations made by the Scottish Ministers. However, the Scottish Ministers may pay an amount that exceeds the maximum if they consider that it was reasonable for the registration officer to incur the expenses and the amount of the expenses is reasonable. These regulations (which must be laid in the Parliament subject to no further procedure) may include provision for registration officers to submit accounts of expenses to Scottish Ministers before payments are made. The regulations can specify the deadline for submitting accounts, and the form and manner in which they are to be submitted.

318. Scottish Ministers may pay expenses that exceed this maximum amount if they consider it was reasonable for the registration officer to incur the expenses, and the amount of the expenses is reasonable.

*Offences*

319. Section 35 introduces schedule 6 which contains provisions about offences related to the referendum

320. Section 36 provides for offences by a body corporate, a Scottish partnership or other unincorporated association under the Bill. In this case, where it can be proved that the offence was committed with the consent or connivance, or caused by the neglect of, an individual, the individual, as well as the body, is liable.

*Schedule 6: Offences*

321. Schedule 6, introduced by section 34, contains details of the offences under the Bill. Some are deemed 'corrupt practices' (such as the 'personation' offence in paragraph 1) and carry a penalty of imprisonment for a term not exceeding two years or to an unlimited fine or both (see paragraph 15 of this schedule). Other offences are 'illegal practices' (such as the voting offences in paragraph 2) which are summary offences and the maximum penalty is a £5,000 fine (see paragraph 16 of this schedule). Schedule 6 includes the following provisions:

322. **Personation** (paragraph 1) – this is where any individual votes as someone else (whether that person is living or dead or is a fictitious person), either by post or in person at a polling station as an elector or as a proxy or where the person has reasonable grounds for supposing their proxy appointment is no longer valid.

323. **Other voting offences** (paragraph 2) – there are a number of voting offences listed in this paragraph. Knowingly causing someone else to commit one of the voting offences below is itself an offence:

- Voting in person or by post, or applying to vote by proxy or by post, knowing that you are subject to a legal incapacity to vote.

- Applying for the appointment of a proxy, in the knowledge that you or the proxy is subject to a legal incapacity to vote.
- Voting, whether by proxy or by post, knowing that the voter for whom you are voting as proxy is subject to a legal incapacity to vote.
- Voting more than once in the referendum (other than as a proxy).
- Voting in person when entitled to vote by post.
- Voting in person in the knowledge that someone else has voted by proxy on your behalf or is entitled to vote as a postal proxy.
- Applying for someone to vote as your proxy without cancelling the appointment or application for appointment of someone already appointed as your proxy voter.
- Voting by proxy for the same voter more than once.
- Voting in person as proxy for someone when you have opted to vote by post as proxy for that voter.
- Voting in person as proxy for a voter in the knowledge that the person has already voted in person.
- Voting as proxy for more than two people of whom you are not the spouse, civil partner, parent, grandparent, brother, sister, child or grandchild.

324. **Imitation poll cards** (paragraph 3) - producing false poll cards which are intended to deceive people, for the purpose of achieving a particular outcome in the referendum, is an offence.

325. **Offences relating to applications for postal and proxy votes** (paragraph 4) – it is an offence to try to prevent a vote or gain a vote in the referendum by: applying for a postal or proxy vote as someone else (including a fictitious or dead person), making a false statement in, or providing false information in connection with, a postal or proxy vote application, causing a ballot paper relating to a postal or proxy vote to be sent to an incorrect address or to cause information related to a postal or proxy vote or a postal ballot paper not to be delivered to the correct recipient.

326. **Breach of official duty** (paragraph 5) – the CCO and any proper officer of a council, registration officer, counting officer, presiding officer, their deputies or any other person assisting them in the running of the referendum may be guilty of an offence by means of an act or omission in breach of their official duty under the Bill.

327. **Tampering with ballot papers etc.** (paragraph 6) – it is an offence to:

- deliberately deface or destroy a ballot paper, postal voting statement or official envelope used in postal voting.
- give someone a ballot paper without proper authority.
- put any paper into the ballot box other than the authorised ballot paper.
- remove a ballot paper from a polling station.

- destroy, take, open or interfere with a ballot box or packet of ballot papers.
- counterfeit a ballot paper or the official mark on a ballot paper.

328. **Requirement of secrecy** (paragraph 7) - everyone involved in the electoral process should be aware of the secrecy of the ballot and should not breach it. The counting officer will give everyone who attends the opening or counting of ballot papers a copy of parts of the requirement of secrecy, as required by Rule 16 of schedule 2 of the Bill. Breach of the requirement of secrecy is an offence under paragraph 7(9).

329. **Prohibition on publication of exit polls** (paragraph 8) – it is an offence for anyone to publish a statement before the close of the poll about the way voters have voted based on information they provided after voting or to publish a forecast of the result before the close of the poll based on information provided by voters about how they voted.

330. **Payments to voters for exhibition of referendum notices** (paragraph 9) – it is an offence for a voter to be paid for exhibiting a poster, advert or notice on their property to promote a referendum outcome, where it is not the voter’s usual course of business.

331. **Treating** (paragraph 10) - a person is guilty of treating if either before, during or after the referendum the person directly or indirectly gives or provides (or pays wholly or in part the expense of giving or providing) any meat, drink, entertainment or provision in order to influence any voter to vote or refrain from voting.

332. **Undue influence** (paragraph 11) - a person is guilty of undue influence if they directly or indirectly use or threaten to use force, violence or restraint, or cause or threaten to cause injury, damage, harm or loss in order to induce or compel any voter to vote or refrain from voting. A person may also be guilty of undue influence if they impede or prevent the voter from freely exercising their right to vote. This latter offence can also be committed where a person intends to impede or prevent the free exercise of a vote even where the attempt is unsuccessful.

333. **Bribery** (paragraph 12) - a person is guilty of bribery if the person directly or indirectly gives money to, or procures an office for any voter, in order to induce any voter to vote, or not vote, for a particular outcome, or to vote or refrain from voting. This includes making any gift or procurement in favour of the voter, giving, lending, agreeing to give or lend, offering promising or promising to procure or endeavour to procure any money or valuable consideration. It is an offence for a person to commit bribery in connection with the referendum, and a voter who receives a bribe in connection with the referendum is also guilty of an offence.

334. **Disturbances at public meetings** (paragraph 13) – it is an offence deliberately to disrupt a public meeting by causing a disturbance.

335. **Illegal canvassing by police constables** (paragraph 14) – it is an offence for a police constable to try to persuade someone to vote or not vote in a particular way.

336. **Penalties for corrupt practices** (paragraph 15) - this paragraph sets out the penalties for someone guilty of a corrupt practice.

337. **Prosecutions for illegal practices** (paragraph 16) - this paragraph sets out the penalty for someone guilty of an illegal practice.

338. **Conviction of illegal practice on charge of corrupt practice** (paragraph 17) – this paragraph clarifies that someone charged with a corrupt practice may be found guilty of an illegal practice which attracts a lesser maximum penalty (a person cannot be imprisoned when convicted of an illegal practice and the maximum fine is limited). A person charged with an illegal practice may be found guilty of that offence whether or not the act was a corrupt practice.

339. **Incapacity to hold public or judicial office in Scotland** (paragraph 18) – anyone convicted of a corrupt or illegal practice under schedule 6 is not allowed to hold any public or judicial office in Scotland for five years from the date of their conviction. If they already hold such a position, they vacate it on conviction.

340. **Prohibition of paid canvassers** (paragraph 19) – if someone pays someone else to canvass to promote a particular outcome in the referendum, then the person paying the canvasser and the canvasser are both guilty of illegal employment.

341. **Providing money for illegal purposes** (paragraph 20) - someone who provides or replaces money for a payment contrary to the Bill, for any expenses that exceed the spending limits, is guilty of an illegal payment.

342. **Prosecutions for illegal employment or illegal payment** (paragraph 21) – this paragraph sets out the penalty for someone found guilty of illegal employment or an illegal payment under paragraphs 19 or 20 (the maximum penalty is a level 5 fine, currently £5,000). A person charged with one of these offences may be convicted of the other.

*Power to modify this Act*

343. Section 37 confers a power on the Scottish Ministers to make regulations to modify the Act resulting from the Bill in certain circumstances. This could be in consequence of any modification or proposed modification of any other law relating to the conduct of referendums or elections, campaigning at referendums or elections, or entitlement to vote in any referendum or election. They may also make modifications to give effect to recommendations of the Electoral Commission. These regulations are subject to the affirmative procedure.

*Power to vary specified sums*

344. Section 38 confers a power on the Scottish Ministers to make regulations to vary any sum specified in this Act. They may only do this to reflect changes in the value of money, for example due to inflation, or to give effect to a recommendation of the Electoral Commission.

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

345. Regulations made to reflect changes in the value of money are subject to the negative procedure; regulations made to give effect to the recommendations of the Electoral Commission are subject to the affirmative procedure.

*Legal proceedings*

346. Section 39 provides that any legal challenge to the certification of the votes cast at the referendum must be brought by way of judicial review and must be lodged with the court within six weeks of the last certification of the result.

*Final provisions*

347. Section 40 introduces schedule 7, which contains the definitions of words and expressions used in the Act.

348. Section 41 confirms that the Act comes into force the day after receiving Royal Assent.

349. Section 42 confirms the short title of the Act: the Referendums (Scotland) Act 2019.

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

# **REFERENDUMS (SCOTLAND) BILL**

## **EXPLANATORY NOTES**

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