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The Scottish Parliament
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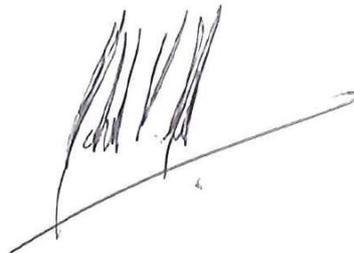
Dear Bruce

REFERENDUMS (SCOTLAND) BILL – STAGE 1 REPORT

I am grateful to the Committee for its scrutiny of the Bill and for its detailed conclusions and recommendations in the Stage 1 Report.

The Scottish Government has responded to each of your recommendations in the Annex to this letter. We will undertake further considerations of some of the recommendations and arrange conversations with stakeholders. As set out in the Annex, I intend to write to you again after we have undertaken these considerations – but prior to the start of Stage 2 - with updated responses on some of these matters.

The numbered headings in the Annex refer to the paragraph numbers from the Stage 1 report.



MICHAEL RUSSELL

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ANNEX A

30 The Committee recommends that the Bill be amended so that referendums on constitutional issues must require primary legislation and that all other referendums will ordinarily require primary legislation.

31 The Committee recommends that if the Cabinet Secretary wishes to identify specific criteria for other referendums which would not ordinarily require primary legislation, he should lodge the necessary amendments at Stage 2.

The Scottish Government will consider the Committee's recommendation that a referendum should ordinarily require primary legislation, and that any criteria for using secondary legislation should be brought forward by the Scottish Government as amendments at Stage 2.

The Government is, however, happy to confirm that a subsequent short bill would be considered appropriate in the event of an independence referendum.

Accordingly, the Scottish Government will bring forward an amendment to meet this recommendation at Stage 2.

51 The Committee welcomes the Cabinet Secretary's openness to consideration of having a minimum regulated referendum period in the Bill and recommends that it should be amended to include a minimum period of 10 weeks.

The Scottish Government is minded to accept the recommendation and amend the Bill to include a default referendum period of 10 weeks.

72 The Committee recommends that the Cabinet Secretary recognises the weight of evidence above in favour of the Electoral Commission testing a previously used referendum question and must come to an agreement, based on this evidence, with the Electoral Commission, prior to Stage 2.

The Scottish Government is continuing discussions with the Electoral Commission and fully intends to seek an agreement on this matter.

89 The Committee is very concerned about the decline in the completeness and accuracy of Scottish local government registers as recently reported by the Electoral Commission and invites the Scottish Government to respond to the findings of the report.

The Scottish Government responded to the Commission's report on the completeness and accuracy of the electoral registers in Great Britain on 21 October 2019. I have attached a copy of this for the Committee's information.

It is clear that more needs to be done to increase the level of registration in Scotland, particularly among under-registered groups such as younger people, EU and Commonwealth citizens and private tenants. The Scottish, UK and Welsh Governments are working together to deliver the reforms to the Annual Canvass which will address some of the issues that the Commission's report highlights.

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The Scottish Government fully supports the Commission's and the wider electoral community's aim of improving electoral registration, be that through the Canvass Reform work, developing more innovative uses of public data, or by any other means.

The Scottish Government will continue to engage with the Commission, electoral administrators and the UK and Welsh Governments to modernise the electoral registration system, so that our citizens are more readily able to register as electors and participate in our democracy.

94 The Committee shares the views of many of our witnesses that political literacy is an element of the discussions in relation to modernising our democratic processes. The Committee invites the Scottish Government to respond to the view of one of our witnesses that there is clear evidence that a sizeable number of young Scots do not receive appropriate political education and, if that is the case, what action it is taking to respond especially in light of the possibility of more referendums in the future.

Political literacy is central to citizenship education within the Curriculum for Excellence. The 'You Decide' resource for schools has recently been updated to cover topics such as Fake News and how to encourage children and young people to consider the sources of the information they use.

The Electoral Commission is currently working with Education Scotland and the Scottish Parliament's Education service to explore developing a hub for all resources which support the teaching of political literacy in schools including information on how to register and vote.

At the elections in 2016 and 2017 the Electoral Commission ran the Ready to Vote campaign to encourage schools to hold registration events with all students who would be eligible to vote in those elections. Over 80% of Scottish secondary schools participated.

As happened in 2014, it is likely that at any future referendum the Electoral Commission will work with education and electoral administrators to develop a political literacy briefing for secondary schools pointing to sources of information and advice for teaching about the referendum in schools.

99 The Committee's view is that, given referendums are most likely to be called solely on significant issues of major public interest, these should be standalone events. The Committee invites the Scottish Government to seriously consider whether the Bill should be amended to provide for this.

The Scottish Government agrees that referendums should be standalone events, as any issue which warrants a referendum is important enough to be given its own date. This is the policy intention of the Bill. Whilst it would be possible to legislate in this bill that a referendum cannot be held on the same day as another scheduled election, it cannot stop an unscheduled early UK Parliament general election or a by-election being held on the same day.

Given the timescales set out in the legislation, the date of a referendum will have been known before the date of an unscheduled poll. So, there is little, apart from requesting a change that the Scottish Government can do to avoid a clash, however, should a situation arise where an unscheduled election is likely, the Scottish Government would make appropriate representations requesting that it be held on a different day from any scheduled

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referendum. On that basis, the Scottish Government thinks that this bill is not the most effective place to provide for this.

109 The Committee notes that one of the major challenges in relation to purdah is the restrictions it places on the types of activities UK public bodies can undertake during a referendum under the provisions of the Bill. For example, if there was a referendum on a health issue in Scotland whether there would need to be restrictions on NHS England and other UK and devolved health public bodies. The Committee recommends that the necessary negotiations with the UK Government and, if necessary, other devolved governments should be carried out at the earliest opportunity once the enabling legislation has been passed.

The Scottish Government fully supports this recommendation.

It is not within the powers of the Scottish Parliament to pass legislation that would restrict the actions of other governments and public bodies outwith Scotland.

The Scottish Government would start negotiations with the UK and devolved governments as soon as practicable with the view to agreeing a protocol around the way that governments interact with referendums which are being held in another country.

The Scottish Government was able to agree to provisions in the Edinburgh Agreement with the UK Government under which the UK Government committed to matching the pre-election rules applicable to the Scottish Government in the run up to the 2014 Independence Referendum. I would expect that other governments would agree to act according to the same PPERA-based rules during the 28-day period.

110 The Committee supports the SPCB's proposed amendments to the Bill in relation to purdah.

Taking into consideration the amendments requested by the Scottish Parliament Corporate Body, the Scottish Government will develop amendments for Stage 2 to expand the exemptions on the publication of promotional material so that it covers all material published on the different official Parliament websites and online platforms controlled by the Scottish Parliament Corporate Body.

We do not wish to restrict the Parliament's ability to carry out its normal business and the amendments will aim to ensure that is avoided where appropriate.

116 The Committee recommends that the Scottish Government gives careful consideration to the recommendations of the Electoral Commission regarding the conduct of polls and campaigns and sets out its views in its response to this report.

Chief Counting Officer

The Scottish Government is more than happy to consult with the Electoral Commission before appointing or replacing a Chief Counting Officer. However, the ability of Scottish Ministers to make an appointment without consultation where speed is essential, such as sudden illness on the day of the referendum, needs to be retained. The Scottish Government cannot therefore accept the Electoral Commission's suggestion that the Bill be amended to include a requirement to consult them before making an appointment, as any room for flexibility in extreme circumstances would be lost.

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On the issue of the Chief Counting Officer consulting the Electoral Commission ahead of issuing directions, the Scottish Government's view is that consulting with the Electoral Commission would ensure that any directions issued by the Chief Counting Officer meet the highest standards of electoral administration.

The Scottish Government have discussed the Electoral Commission's suggestion that it be consulted by the Chief Counting Officer on proposed directions with representatives the Electoral Management Board. The Scottish Government is therefore proposing to bring forward an amendment at Stage 2 to require the Chief Counting Officer to consult with the Electoral Commission before issuing any directions.

The Scottish Government will continue to conduct discussions with the Electoral Management Board about the early preparation of counting officer guidance and how the Scottish Government may assist in that process. Unlike PPERA, this Bill sets out the rules for how any referendum will be administered, so guidance will only need to be prepared once and will only require updating if the law is changed. Under PPERA, new guidance is required for every referendum. The Scottish Government sees no reason why the counting officer guidance should not be in place well before counting officers need to comply with it.

Appointment of Counting Officers

The suggestion that the Bill should designate the Returning Officer for each local government areas as the counting Officer does not take account of a situation where the returning officer may not, due to illness or other reason, be able to carry out the duties of the counting officer. The appointment procedure did not cause any issues at the 2014 referendum; the Chief Counting Officer simply appointed the local returning officers to the post of local counting officers. Having considered the Electoral Commission's suggestion, the Scottish Government do not think it would be appropriate to remove the Chief Counting Officer's ability to appoint counting officers.

Code of Practice for Observers

The Scottish Government has discussed the Electoral Commission's concerns with it and will bring forward an amendment at Stage 2 to allow for the Local Government code of practice for observers to be used at Referendums. Use of that code is sensible as there are no significant differences between observing at a referendum and observing at an election.

There is currently one code of practice for all UK elections, UK referendums and local government elections, approved by the UK and Scottish Parliaments. The proposed amendment will extend the use of that code to devolved referendums.

117 The Committee also recommends that the Scottish Government should give careful consideration to explicitly listing accredited electoral observers as being permitted to attend polling stations, postal vote issuings and openings and the count.

The Bill already provides for Observers to attend the electoral events highlighted by the Committee's advisor. The rights of Observers are referred to by reference to various sections of the Bill rather than by naming the individual processes.

The Code of Practice for Observers, which under the Bill will be prepared by the Electoral Commission, will make it clear to observers which electoral events they can attend.

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An amendment is considered unnecessary in these circumstances given that the Bill already allows for attendance at the highlighted events and the Code of Practice will provide clarity once produced.

128 The Committee supports the recommendation of the Electoral Commission that the Bill is amended to remove "unless it is not reasonably practical to do so" from the requirement to include an imprint in non-printed material.

The Scottish Government has listened to the arguments around the “reasonably practicable” exemption on imprints and, in line with the recommendation in the Stage 1 report, is content to remove this exemption. An amendment to that effect will be brought forward alongside other changes to the imprint requirements indicated below.

129 The Committee recommends that the Scottish Government gives careful consideration to the other recommendations of the Electoral Commission in relation to the scope of the imprint requirement and sets out its views in its response to this report. The Committee also recommends that the Scottish Government provides clarification as to the intended scope of the Bill as introduced in relation to non-printed referendum campaign material.

The Scottish Government’s policy intention on the imprint requirement for online materials has always been to cover campaign material, rather than individual views. The discussion has been around how best to achieve this.

The Scottish Government has been working closely with the Electoral Commission on this issue and will be bringing forward amendments at Stage 2 to ensure that an individual, who is not working on behalf of a campaign organisation, will be able to freely share their views on line without having to add an imprint.

The Commission has suggested changes which would help focus the provision on campaigning activity, but ensure that personal opinions expressed on-line by voters are not caught. The Scottish Government is considering how the Commission’s suggestion can be translated into law.

Adjusting the Bill to include such an additional exemption on personal opinion will ensure that individuals who wished to take part in the referendum debate would not be required to give their name and address on such communications. Any individual who was also a registered campaigner, or who spent money to create campaign materials, would continue to be required to include an imprint.

Taken together with the Scottish Government intention to increased fine level for offences, linked to making the offence of not providing an imprint triable under solemn procedure with a jury, increasing the civil sanction powers of the Electoral Commission, extended monitoring powers, and the removal of the reasonably practicable test to encourage a requirement to create digital imprints, this would significantly increase the deterrents for campaigners who breach imprint rules, but without deterring individuals from participating.

130 The Committee also recommends, as highlighted by one of our witnesses, that the Scottish Government should take account of the UK Government’s technical proposal for a regime on digital imprints.

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The Scottish Government will study the UK Government's technical proposal carefully, once available, to see how it may be applied or adapted for elections and referendums in Scotland.

If any changes need to be made to this Bill in order to implement the technical proposal, the Scottish Government can potentially use the power to amend the bill provided by section 37 to make those changes, subject to the Parliament's approval.

135 The Committee recommends that the Scottish Government should give careful consideration to the Electoral Commission's recommendation on donations from outside the UK and sets out its views in its response to this report.

While the Scottish Government understands the intention behind the Electoral Commission's recommendation, and shares these concerns, this issue requires some further consideration before any amendments can be brought forward.

The Scottish Government is therefore happy to accept the Committee's recommendation on consideration of the Electoral Commission's recommendation and will undertake to have further discussions with the Commission on this issue.

One amendment planned by the Scottish Government would increase the powers of the Electoral Commission to monitor donations by requiring disclosure of details in respect of qualifying bodies or individuals, which will help ensure that they are eligible donors.

143 The Committee recognises that challenges in providing a Scotland-wide electoral register but asks the Scottish Government what consideration has been given to standardising the data format for electoral registers at a local level so that they can all talk to one another so that a common format might make permissibility checking easier for campaign organisations.

Whilst there is no technical reason why a Scotland-wide electoral register could not be created, there are issues around data protection in relation to the safe handling of personal information. The Scottish Government is already looking at the practicalities of introducing a national, or standardised, register within Scotland, but its consideration is still at an early stage.

149 The Committee invites the Scottish Government to give serious consideration to the Electoral Commission's recommendations in relation to reporting requirements and sets out its views in its response to this report.

The Scottish Government shares the Commission's concerns and has discussed post poll reporting requirements with the Electoral Commission. There are a number of shared concerns and matters to be considered in developing this proposal, particularly about the practicality of shortening the timescale for returning audited accounts.

The Scottish Government has agreed with the Commission that this issue should be considered further, including consulting with political parties who have experience of making these sorts of returns, with a view to developing the best measures to elicit the practicality of the Commission's proposals.

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150 The Committee asks the Scottish Government to explain in more detail why the proposed reporting requirements for referendums are different from the requirements in general elections where weekly reports are required.

The Scottish Government has considered the evidence provided to the Committee in relation to reporting arrangements and agree the different arrangements for elections and referendums result from the way the different measures have developed. The Scottish Government will explore this matter further with the Electoral Commission ahead of Stage 2.

154 The Committee invites the Scottish Government to give serious consideration to the recommendations of the Electoral Commission in relation to campaigners' declaration of assets at registration and sets out its views in its response to this report

The Scottish Government welcome this recommendation in principle and are happy to consider it further. However, further discussions with the Electoral Commission about the practicalities of its recommendations have established that the Commission recognise that some recommendations will require consultation with parties and campaigners to ensure that any rules are workable, and so these should be taken forward in the longer term through future legislation, rather than amending the Bill at this stage.

160 The Committee invites the Scottish Government to respond to the view of one of our witnesses that the campaign spending limits are not fit for purpose and should be reduced significantly to ensure that the designated campaigns are paramount in any referendum contest and that spending limits are meaningful.

The Scottish Government is of the view that the proposed campaign limits set out in the Bill worked well at the 2014 independence referendum. The participation of campaign groups and political parties contributed to a vibrant campaign and promoted participation from a range of groups.

The Scottish Government is not therefore proposing to make any change to the campaign limits.

161 The Committee supports the recommendation of the Electoral Commission that the costs of producing campaign material in accessible formats for people with disabilities should not be included within spending limits.

The Electoral Commission's recommendation to exempt additional costs due to the need to provide campaign materials in accessible formats for people with disabilities is in line with this Government's desire to promote the involvement of disabled individuals in political activity.

The Scottish Government is therefore proposing to bring forward an amendment at Stage 2 which will exempt additional costs from the campaign limits.

168 The Committee invites the Scottish Government to respond to the evidence from the Electoral Commission in relation to its enforcement powers and sets out its views in its response to this report.

The Scottish Government is of the view, in light of penalties available to comparable regulators and the risks of avoidance from certain parties, that increasing the maximum civil

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penalty from £10,000 to £500,000 would be reasonable from discussions with the Electoral Commission and proposes to take this forward at Stage 2.

The Scottish Government will also be bringing forward amendments at Stage 2 to make certain specific offences discussed with the Electoral Commission, the committing of which could be used to mask a more serious offence triable under solemn procedure with a jury, increasing the penalties available to the courts. These amendments mainly focus around offences relating to the supply of information or the failure to provide reports or returns as required. This would significantly strengthen the powers of the Commission and act as a deterrent to breaches of the rules. Alongside this, the Commission has confirmed it will take a proportionate approach to enforcement.

The Scottish Government has also discussed ways of strengthening the Electoral Commission's investigative powers and proposes to bring forward amendments which would extend the Commission's powers to issue disclosure notices to organisations or individuals who appear to be campaigning but have not registered as campaigners, and those that are supplying services to campaigners and in certain other cases where linked to specific information the Commission requires in connection with its functions.

172 The Committee's view, as noted above in relation to concurrent electoral events, is that referendums are most likely to be called solely on significant issues of major public interest. It is also likely that there will be competing views which is why a referendum would be needed to resolve the issue. On this basis the Committee does not believe that, at this stage, there is sufficient evidence to support amending the Bill to include a provision for public funding.

The Scottish Government welcomes the Committee's view, and agrees that public funding for campaign organisations should not be included in the Bill. If the interest in a subject is not sufficient to encourage wide participation, spending or donations to campaign funds, then there should not be a referendum.

178 The Committee supports the provisions in the Bill which set out the Electoral Commission's role in promoting awareness and understanding of each referendum in Scotland. The Committee does not support extending this role to include providing objective information during a referendum campaign.

The Scottish Government welcomes the Committee's view, and agrees that the Electoral Commission's role should not include these activities.

180 The Committee supports the SPCB's recommendation that the Bill should be amended to provide for SPCB funding of the Electoral Commission's expenditure to be in line with the SPCB's duties for the other independent bodies it funds.

The funding mechanism proposed in the Bill is the same as that which was set for the 2014 independence referendum. The Scottish Government is committed to funding the costs of referendums held under this bill and is working with the Scottish Parliament Corporate Body to look again at amendments to these provisions in the Bill to take account of the SPCB's suggestions.

189 & 190 The Committee supports the objective of section 37 of the Bill in providing for dynamic legislation particularly given the need to respond to the increasing

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influence of electoral campaigning via social media. At the same time the Committee notes the views of some of our witnesses that the power is very wide and welcomes the Cabinet Secretary's openness to consider amendments which would limit the use of the power while still meeting the policy objective.

The Committee recommends that the Cabinet Secretary lodges amendments at Stage 2 which provide the necessary reassurance that the section 37 power "is not amending by the back door" including deleting "proposed modification" in section 37(1)(a).

The Scottish Government welcomes the Committee's support of the objective to provide for dynamic legislation that can be responsive to future developments in electoral legislation. The intention of the power is to allow the framework to be updated in line with developments in other electoral laws, including where good ideas are put forward by other legislatures within the UK. The Scottish Government accepts that it can provide reassurance by limiting the power as suggested by the Committee. It will also consider whether additional changes would strengthen the Parliament's scrutiny of this power further.

196 The Committee invites the Scottish Government to respond to the concerns of our witnesses and the views of our Adviser regarding the costs provided in the Financial Memorandum.

The Scottish Government has been clear that it is committed to meeting the full additional costs of the work necessary to run any future referendum provided for by this legislation. A tangible measure of this commitment is the inclusion of a specific provision to allow the Scottish Government to refund any additional costs which fall on electoral registration officers, which was not in the 2014 referendum legislation.

The Scottish Government notes the comments made by the Committee's advisor. The Scottish Government will always try to ensure that any estimate of the cost of a referendum is as accurate as possible, and will justify those costs to the Parliament in the event of presenting the legislation to provide for a particular referendum.

Costs per elector can provide an alternative way to estimate the likely cost of a poll. These costs can be derived from other polls held in Scotland; for example, the average cost per elector at the 2016 Scottish Parliament elections was £2.91. However, differences between elections e.g. in relation to the number of ballot papers, or in the administrative procedures, mean that such comparisons must also be caveated. The Scottish Government will undertake further work to identify alternative approaches to referendum costs, and provide additional information in due course.

197 The Committee supports the policy objective of the Bill to put in place a generic framework for referendums on the basis that the Bill is amended to reflect the weight of evidence we received as discussed in detail throughout this report.

The Scottish Government welcomes the Committee's support for the policy objective of the Bill, and the careful considerations the Committee had undertaken. The Scottish Government will consider the recommendations made by the Committee.

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