

Briefing paper on Referendums (Scotland) Bill - Dr. Alistair Clark

Approach

This analysis has been approached in the spirit of the 2007 Gould report into the combined Scottish parliament and local government elections. This indicated that voters should be put first in designing electoral processes.¹ From the *voters'* viewpoint, this means that those eligible can register and cast a vote without impediment, that voters can easily understand the question put, that they can have confidence that any campaign funding, spending and messages are transparent and fair, and that the result and its implications is well understood.

This also has implications for other actors. With *campaigners*, the various viewpoints should be able to make their arguments, it should be easy to register as a permitted participant, and the process for designating lead campaign organisations is fair and transparent. From the *administrative* perspective, referendums should be administered efficiently, produce accepted and reliable results, and be run to a clear legal framework with clear roles and responsibilities.²

The Bill has been analysed with current controversies about electoral integrity and referendum conduct informing discussion. These include issues around conducting electoral processes in the digital age, transparency of donations and spending, problems around the timing of referendum processes and their regulation, and about government and political communication during any referendum. Some of these issues overlap with reserved competences, and are being looked at by other bodies at the UK level. These include: the Electoral Commission, the Digital, Culture, Media and Sport (DCMSC) and Public Administration and Constitutional Affairs (PACAC) Select Committees in the House of Commons, and the Cabinet Office.

The briefing begins with an overall assessment of the bill. The second section addresses the questions in and around Sections 1-3 of the bill, in addition to some more general questions around referendums. This section also addresses the Referendums (Scotland) Bill's relationship to the Scottish Elections (Franchise and Representation) Bill.³ The third part addresses the conduct of any referendum, while

¹ Electoral Commission (2007) *Scottish Elections 2007: The independent Review of the Scottish Parliamentary and Local Government Elections 3 May 2007*, Edinburgh/London: Electoral Commission

² Electoral Commission (2011) *Referendum on the Voting System for UK Parliamentary Elections: Report on the May 2011 Referendum*, London: Electoral Commission. P20-21.

³ An electoral reform bill has been announced by the Scottish government and is expected to be laid before parliament soon. Its specific contents are currently unknown and therefore its relationship to the Referendums (Scotland) Bill is not discussed in this briefing.

the fourth section moves on to discuss regulation of the campaign, donations and spending. The final section briefly addresses the financial memorandum.

Overall Assessment

The Scottish Independence Referendum (SIR) 2014 was generally held to have been a model of good practice in holding referendums. The current bill is derived from that experience and therefore has been suggested to reflect high standards in referendum provision.⁴

International IDEA suggest that it is good practice: to aim to ensure a 'level playing field' in campaign spending between the various sides of the referendum question; for voting procedures to be tried and tested and follow essentially the same rules as for normal elections; and for there to be general and permanent referendum legislation on the statute book to avoid ad hoc contests.⁵ The Venice Commission also note the need for 'equality of opportunity' between campaigns including in relation to public funding and regulation, and highlight the importance of readily understandable voting procedures.⁶

These issues have, broadly, been dealt with in the Referendums (Scotland) Bill. The desire to create a 'level playing field' between campaigns is explicitly mentioned in the Policy Memorandum.⁷ Voting procedures rely heavily on standard polling practices and, having been used in recent referendums (SIR 2014; EU 2016), are well understood both by administrators and voters. The explicit aim of the Referendums (Scotland) Bill is to provide the sort of standing framework that International IDEA talk of.

There was some concern in the 2016 EU Referendum about the Electoral Commission having a dual role for both campaign regulation and electoral administration, which presented a conflict between the two roles.⁸ Following the practice of the Scottish Independence Referendum Act (SIRA) 2013, the Referendums (Scotland) Bill separates the two functions. The Electoral Commission retain powers over campaign regulation and enforcement, while the Electoral Management Board is responsible for delivery of the poll. There is thus a separation of responsibilities in Scotland which would not exist in a UK-wide referendum.

⁴ Policy Memorandum, paras 10 & 12. For comparison between the Referendums (Scotland) Bill & previous referendum legislation see the SPICe comparison analysis at: https://www.parliament.scot/S5_Finance/General%20Documents/Comparison_between_different_referendum_legislation_June_2019.pdf [10/8/2019].

⁵ International IDEA (2008) *Direct Democracy: The International IDEA Handbook*, Stockholm: International IDEA.

⁶ Venice Commission (2007) *Code of Good Practice on Referendums*, Strasbourg: Venice Commission, pp 7 & 9.

⁷ Paragraph 10.

⁸ Public Administration & Constitutional Affairs Committee (2017) *Lessons Learned from the EU Referendum: Twelfth Report of Session 2016-17*, London: House of Commons.

The Bill also avoids a problem evident in the 2011 Welsh referendum, which required designation on both sides of the referendum argument. Failure to apply for designation as lead campaign group on one side was used as a method of preventing nomination of a lead campaign organisation on the other side. Instead of requiring designation on both sides of a campaign, the Bill permits designation only on one side. This is identified as good practice in the report of the Independent Commission on Referendums.⁹

There can also be confidence in the ability of Scottish electoral administrators to deliver a referendum; Scottish electoral administration typically performs at a higher level than its counterparts in the rest of Britain.¹⁰ Responsibilities and potential overlaps between the Electoral Management Board and Electoral Commission are well understood, and have already been tested in a high profile referendum in SIR 2014.

This notwithstanding, electoral administrators and registration officers consistently highlight underfunding as causing difficulties in delivering referendum processes.¹¹ Sufficient electoral registration and administration funding has been linked to delivering high-quality electoral events.¹² An issue arose in SIR 2014 where electoral registration costs were not provided for. Record registration resulted creating additional and unexpected costs. In the 2016 EU referendum, the crash of the government registration website led to extra expense for electoral registration teams.¹³ One complaint is that electoral administration funding comes initially from local authorities, who are then refunded by government (Scottish or UK as appropriate) for permitted expenses to a maximum amount, anything up to two years later.

Written evidence from the various electoral administrators' bodies highlight the issue of costs.¹⁴ The Bill attempts to mitigate the worst effects of these issues. Section 11 covering the costs of Counting Officers permits excess costs over maximum amounts to be approved by ministers, and allows for advances if necessary. Section 34 permits Registration Officers' expenses to be recovered and may permit an excess of

⁹ Independent Commission on Referendums (2018), p.140.

¹⁰ Clark, A. (2015) 'Public Administration and the Integrity of the Electoral Process in British Elections', *Public Administration*, 93, (1), pp86-102.

¹¹ Clark, A. and James. T. (2016) *An Evaluation of Electoral Administration at the EU Referendum*, London: Electoral Commission. Clark, A. (2019a) 'The Cost of Democracy: The Determinants of Spending on the Public Administration of Elections', *International Political Science Review*, 40, (3), pp354-369.

¹² Clark, A. (2014) 'Investing in Electoral Management' in P. Norris, R. Frank & F. Martinez I Coma (eds.) *Advancing Electoral Integrity*, New York: Oxford University Press, pp165-188; Clark, A. (2017) 'Identifying the Determinants of Electoral Integrity and Administration in Advanced Democracies: The Case of Britain', *European Political Science Review*, 9, (3), pp471-492.

¹³ Clark and James, (2016); Devolution (Further Powers) Committee, 2015, *Report on the Electoral Management of the Scottish Independence Referendum*, Edinburgh: Scottish Parliament SP paper 686, pp. 8-9

¹⁴ E.g. from the Association of Electoral Administrators, Scottish Assessors' Association and Electoral Management Board.

maximum permitted on approval by ministers. Both measures are intended to resolve any difficulties, and are an advance on previous practice.

While there is therefore evidence of good practice in the Bill, its basis in previous referendum acts, notably the Political Parties Elections and Referendums Act (PPERA) 2000 and SIRA 2013, means that its emphasis is in past practice. It could be more forward-looking. Discussion around electoral integrity has moved on in light of conduct at the 2016 EU Referendum and subsequent elections with issues around online campaigning, so-called 'dark money' donations, and campaign spending among other issues.¹⁵ These are not addressed in detail in the Bill, although it does include provision for online/digital imprints. Consequently, the Constitution Unit suggest that while an important step forward, the Bill is also marked by 'conservatism'.¹⁶ Some of these issues are addressed below.

Framework

Legal Framework

The Venice Commission suggest that 'the fundamental aspects of referendum law should not be open to amendment less than one year before a referendum'.¹⁷ These fundamental rules include: the composition of electoral commissions or any other body responsible for organising the referendum; the franchise and electoral registers; the procedural and substantive validity of the text put to a referendum; and the entitlement of the respective campaign groups to public broadcasts. In British terms, what the Venice Commission appear to mean is of the nature of a framework bill. Thus, these fundamental aspects should have at least the rank of a statute and are to be either written into a constitution or be at a level 'superior to ordinary law'.¹⁸ Technical matters and details may however be legislated for by regulations. No time frame is set out for such technical legislation.

PPERA 2000 has provided the framework legislation for recent British referendums, with specific acts of parliament providing detail. There has been variation in the period between passing the specific legislation, and the referendum being called, and referendum day. While the Parliamentary Voting System and Constituencies Act (PVCSA) 2011 legislated for the Alternative Vote referendum only three months in advance, the Electoral Commission, and the Gould report in 2007, indicate that electoral or referendum legislation should be passed a minimum of six months before

¹⁵ E.g. Digital, Media, Culture & Sport Committee (2019) *Disinformation and 'fake news': Final Report: Eighth Report of Session 2017–19*, London: House of Commons HC1791; Digital, Media, Culture & Sport Committee (2019) *The Online Harms White Paper: Twelfth Report of Session 2017-19*, London: House of Commons HC2431.

¹⁶ Renwick, A. (2019) 'Scotland's plans for doing referendums better: an assessment', Constitution Unit Blog, June 25th, <https://constitution-unit.com/2019/06/25/scotlands-plans-for-doing-referendums-better-an-assessment/> [4/8/2019].

¹⁷ Venice Commission, 2007, p.10.

¹⁸ Venice Commission, 2007, p.10.

the event which it applies to.¹⁹ This would include legislation on regulation of campaign groups, and also that providing for the conduct of the poll. However, in its earlier report on the SIR 2014, the Electoral Commission noted that SIRA had been passed 9 months prior to polling day and that ‘future referendum legislation should be delivered to a similar timetable’.²⁰

The Association for Electoral Administrators, in their written evidence, argue that any fees and charges order, which enables electoral administrators to spend on practical referendum preparations, should be made at least six months before the date of the electoral event. This would be seen as good practice, and fits with the Gould principle.

Calling a referendum

The current Bill gives Scottish ministers wide powers to call referendums by secondary legislation (Section 1). The Venice Commission concede that ‘Where a referendum is requested by the executive, it is conceivable that (the executive) could set the rules for it. Such a situation is not entirely satisfactory, however, and the requirement for a procedural statute is the norm’.²¹ Written evidence from Dr. Alan Renwick of the Constitution Unit indicates that such powers would be ‘highly unusual’ and that he has found no parliamentary democracy giving ministers blanket authority to call a referendum by secondary legislation.²²

While mostly legislated for by primary legislation in the EU Referendum Act 2015, important parts of the EU Referendum were legislated for by secondary legislation. These included the date of the referendum, the referendum period, and periods for reporting and spending during the campaign.²³

Issues for Referendums

There is no discussion in the Bill, or associated documentation, about the issues on which referendums might be called. There are several possibilities, from major constitutional issues, through to moral questions and more local public policy issues. Referendums can be called not just to introduce new laws, but also to abrogate old laws. A 2010 House of Lords report into referendums suggested they be used for ‘fundamental constitutional issues’, although the Independent Commission on

¹⁹ Electoral Commission, 2016 *The 2016 EU Referendum: Report on the 23 June 2016 Referendum on the UK’s Membership of the European Union*, London: Electoral Commission. Electoral Commission, 2007. Evidence submissions from the AEA, EMB, SAA and Electoral Commission all indicate the importance of the Gould recommendation.

²⁰ Electoral Commission (2014) *Scottish Independence Referendum: Report on the Referendum held on 18th September 2014*, Edinburgh: Electoral Commission, p2.

²¹ Venice Commission, 2007, p.19.

²² A. Renwick, Written evidence p.3.

²³ The European Union Referendum (Date of Referendum etc.) Regulations 2016.

Referendums did not think it appropriate to offer a view on when referendums should be called beyond where required by law.²⁴

Binding or Advisory?

The question of whether a referendum should be binding or not has been brought sharply to the fore in the aftermath of the 2016 EU referendum, which was advisory. There is a range of international practice. International IDEA point to Australia, Ireland and Lithuania as countries which all put proposed constitutional amendments to a binding referendum. They also note that Swiss referendums, whether mandated by the constitution or not, are always binding.²⁵ However, in quantitative terms, advisory referendums are more prevalent in Europe. Just over 75% of European countries make provision for advisory referendums, while slightly over 50% make provision for mandatory referendums.²⁶

IDEA state that whether or not a referendum is binding or advisory should be 'carefully considered and, if possible, specified in a referendum law'. The Venice Commission similarly indicate that it should be clearly stated in the Constitution or in law if referendums are legally binding or advisory.²⁷ International IDEA also suggest that 'consideration should also be given to the length of time within which the result should be implemented'.²⁸

This question was addressed by the House of Lords Select Committee investigating referendums. They concluded that 'because of the sovereignty of parliament, referendums cannot be legally binding in the UK and are therefore advisory'. Some witnesses were critical however, suggesting a non-binding referendum as being little different from an opinion poll. Its report went on to say however that 'it would be difficult for parliament to ignore a decisive expression of public opinion', thereby making a distinction between legally binding, and what might be considered the politically binding imperatives of referendum 'mandates'.²⁹

There have, however, been exceptions to the advisory principle in British practice. The PVCSA 2011 legislated in advance to ensure that, had that referendum been successful in convincing voters of the need for electoral reform, this would have been implemented. Having failed, that provision was repealed. A similar procedure is used in Danish constitutional referendums.³⁰

²⁴ House of Lords Select Committee on the Constitution (2010) *Referendums in the UK*, London: House of Lords HL paper 99; Independent Commission on Referendums (2018), p77.

²⁵ International IDEA, 2008, pp.26-33

²⁶ International IDEA, 2008, Fig. 2.1, p.42.

²⁷ Venice Commission, 2007, p.15.

²⁸ International IDEA, 2008, p.196.

²⁹ House of Lords Select Committee on the Constitution (2010), pp.44-46.

³⁰ Independent Commission on Referendums, 2018, p.81.

The Independent Commission on Referendums makes a distinction between pre- and post-legislative referendums. The former are on the principle of any question, while the latter provide proposals for change which are already set out in legislation and to be implemented if the referendum is successful.³¹ The PVCSA 2011 would therefore have been post-legislative while the 2016 EU referendum was pre-legislative.

The Independent Commission on Referendums recommend that referendums be post-legislative, in other words containing already legislated for proposals to act and therefore considered binding. Where that is not possible, they suggest a two-referendum model, first on the principle, and then on the detail which has been legislated for. The Venice Commission alternatively suggest that 'Referendums on questions of principle or other generally-worded proposals should preferably not be binding. If they are binding, the subsequent procedure should be laid down in specific rules'.³²

It is not clear that any of this resolves the issue of whether a referendum is or is not binding. If any parliament cannot bind its successor, then this suggests that even if a referendum decision is implemented, even after a two-referendum process, it could be repealed or changed by a later government or put to a further referendum.

Referendum Questions and Testing

In their code of practice on referendums, the Venice Commission indicate that: the question put to the vote must be clear; it must not be misleading; it must not suggest an answer; electors must be informed of the effects of the referendum; and voters must be able to answer the questions asked solely by yes, no or a blank vote.³³ The Independent Commission on Referendums suggest that, via the Electoral Commission, the 'UK has one of the most rigorous processes for assessing referendum questions'.³⁴ International IDEA use the UK Electoral Commission's process for question testing as an example of good practice in their handbook on direct democracy.³⁵

The Electoral Commission, in its written evidence, indicates that question testing can take approximately 12 weeks, from notification of the question to reporting. Their approach involves looking at the intelligibility of the question, the responses to that question, and any statement or preamble that comes before that question. It indicates that any question should present options clearly, simply and neutrally. Its guidelines set out a range of things to be examined in its testing. These include it being easy to

³¹ Independent Commission on Referendums (2018) pp.82-84.

³² Venice Commission, 2007, p.15.

³³ Venice Commission, 2007, 3.1c., p.8.

³⁴ Independent Commission on Referendums (2018) *Report of the Independent Commission on Referendums*, London: Constitution Unit, p.103.

³⁵ International IDEA, 2008, pp.133-135.

understand, to the point and unambiguous, while avoiding misleading voters and encouraging one question and response more favourably than others.³⁶

Since its establishment, the Electoral Commission has approved only binary questions. It has approved different types of answer; yes/no in SIR 2014, leave/remain in the EU 2016 referendum. The House of Lords inquiry into referendums in 2010 however suggested that, while there should be a presumption of binary questions, there may be occasions where multiple option questions are appropriate.³⁷ One version of this was used in the 1997 Scottish parliament referendum, where voters were asked whether there should be a Scottish parliament, and whether it should have tax raising powers. The appropriateness of binary or non-binary questions should be for the Electoral Commission to judge, the Lords concluded.

The Electoral Commission's written evidence 'firmly recommends' that it be required to report to parliament on any referendum question, including any that it may previously have provided its views on.

Franchise and relation to the Scottish Elections (Franchise and Representation) Bill

International democracy organisations point to the need for the franchise to be settled well in advance of any referendum. The Venice Commission suggest that referendum franchises 'should not be open to amendment less than one year before a referendum'.³⁸ In SIR 2014, the referendum legislation was passed 9 months before polling day, while franchise legislation was passed some three months before that, but just shortly before the start of the annual electoral registration canvass. According to the Electoral Commission, this was very tight for ensuring the canvass took appropriate account of the newly enfranchised 16-17 years olds who were able to vote in SIR 2014.³⁹

The Referendums (Scotland) Bill sets the franchise as that for Scottish local government elections. This includes 16-17 year olds, Commonwealth, Irish and European Union citizens (Sections 4 & 5). The Scottish Elections (Franchise and Representation) Bill is currently before the Standards, Procedures and Public Appointments Committee for Stage 1 scrutiny. This will amend the Scottish local government franchise to permit overseas citizens legally resident in Scotland to vote and also to permit prisoners serving a sentence of under 12 months to vote. If the Franchise Bill is passed, this will require electoral registers to be updated to take account of the extension of the local government franchise. This will be an ongoing process. Electoral registers are constantly being updated as people move house, or become newly eligible. This extension to the franchise will most likely be incorporated

³⁶ <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/referendum-question-research>

³⁷ House of Lords Select Committee on the Constitution (2010), p.38.

³⁸ Venice Commission, 2007, p.10.

³⁹ Electoral Commission 2014, p.9 & p.37.

into that established updating process, although the exact requirements and procedure to be used are not yet clear.

The Bill Team's evidence on 26th June indicated that when the Scottish Elections (Franchise and Representation) Bill becomes law, the new Scottish local government franchise will then apply to the Referendums (Scotland) Bill/Act and any referendum held under its provisions.⁴⁰

Winners & Thresholds

The convention in recent UK referendums for declaring a winner has been by a simple majority of valid votes cast i.e. 50% +1 vote. This was not explicitly set out in any of SIRA 2013, EU 2016 or PPERA 2000. Counting officers are only required to certify and declare the number of ballot papers counted, the number of votes in favour of each referendum answer, and the total number of rejected ballot papers (Referendums (Scotland) Bill, Section 9).

Several pieces of legislation related to referendums have however set out this majoritarian principle more explicitly. The Parliamentary Voting Systems and Constituencies Act 2011 provided for the 2011 AV referendum. A majoritarian rule is outlined in it. Section 8, Para 1 a) of the PVCSA requires the implementation of the alternative vote provisions 'if more votes are cast in favour of the answer 'yes' than in favour of the answer 'no'. Alternatively, 'If more votes are not cast in the referendum in favour of the answer "Yes" than in favour of the answer "No", the Minister must make an order repealing the alternative vote provisions' (PVCSA 2011, Section 8, Para 2). The Good Friday Agreement's discussion of border polls is also predicated on a majority being in favour. Similarly, the Governance of Wales Act 2006 (103 sub-para 2; 105 sub-para 1) committed the UK-government to increase the powers of the Assembly if a majority voted for that in a referendum.

Some countries specify turnout requirements for referendums. Thus, for Italian abrogative referendums, a turnout of 50% is required for the measure to pass.⁴¹ Such turnout thresholds are often argued to be a protection against measures which do not have wider support among the population, but only amongst a motivated minority. They have a major downside however. Campaigns can promote abstention as a way of achieving the outcome that they want in the referendum. This would run counter to the requirement in the Referendums (Scotland) Bill for Counting Officers to encourage participation (Section 28).

An alternative threshold is to specify the proportion of the electorate who should be in favour of a referendum question before it passes. A version of this is the only time a threshold has been set in a UK referendum. The Scottish devolution referendum act

⁴⁰ Official Report, 26th June, Cols. 27 & 28.

⁴¹ Such referendums seek to overturn existing laws and can be held when requested by either 500,000 voters or five Regional Councils. See: Article 75, Constitution of the Italian Republic, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [21/8/2019]

of 1979 had an amendment, the so-called Cunningham amendment, specifying a threshold of 40% of the electorate having to be in favour inserted into the act. Although 51.6% voted for a Scottish parliament, this represented less than 40% of the electorate. This resulted in the failure of the referendum.

Electorate thresholds are problematic. This is partly because of difficulties with the electoral registration process, most recently in the aftermath of the UK-wide introduction of individual electoral registration (IER). In Scotland, this was only implemented *after the record registration of SIR 2014*. Many have been estimated to have dropped off the register since IER was introduced.⁴² Typically these have included harder to reach groups such as students, ethnic minorities, and disadvantaged communities. There is no necessary reason to think Scotland immune from these difficulties. An Electoral Commission assessment in late 2015 suggested that the Scottish local government registers were 85% complete and 91% accurate.⁴³ Lack of completeness of the electoral register therefore undermines the basis for any electorate-based threshold.

The House of Lords report into referendums in 2010 suggested that there should be a general presumption against electorate or turnout thresholds as a consequence, although recognising that under exceptional circumstances they might be deemed appropriate. The report of the Independent Commission on Referendums indicated that the use of turnout and electorate thresholds was 'not recommended' in its recent report. Both also declined to support supermajorities in referendums because of the rarity of their use in UK constitutional politics. The Venice Commission also recommend against both turnout and electorate thresholds.⁴⁴

Power to Modify

Section 37 appears to give Scottish Ministers wide powers to modify the Act by regulations 'as they consider necessary or expedient'. There may be good reason for regulations to rectify some administrative problem, as with the extension of the electoral registration deadline in 2016 after the failure of the online electoral registration portal. Nonetheless, Dr Alan Renwick calls these powers 'unusually extensive'.⁴⁵ There was no such power in the PVSCA 2011, PPERA 2000 or the EU Referendum Act 2015. The power, however, largely copies that in SIRA 2013 (Section 33), although with two main differences. First, instead of the 'necessary or expedient' wording in the present Bill, the wording in SIRA 2013 was as Ministers think 'appropriate'. Second, the power to modify in the current Referendums (Scotland) Bill

⁴² James, T. S., Bite the Ballot & Clark, A. (August 2019) *Missing Millions Still Missing: A Vision for Electoral Modernisation in the UK*. London: All Party Parliamentary Group on Democratic Participation.

⁴³ Electoral Commission (2016b) *The December 2015 Electoral Registers in Scotland*, London: Electoral Commission.

⁴⁴ House of Lords, 2010; Independent Commission on Referendums 2018, p.117; Venice Commission, 2007, p.14.

⁴⁵ Renwick, 2019.

is extended ‘to give effect to recommendations of the Electoral Commission’ (Section 37, 1, b)), a provision not included in SIRA 2013.

The power to make supplementary provision and modifications by regulations contained in SIRA 2013 was criticised by some evidence in the Stage 1 scrutiny of it by the then Referendum (Scotland) Bill Committee. After consideration, the Committee was however satisfied that the powers were necessary in case of any difficulties during the SIR that needed to be resolved, and that the time-limited nature of that Bill – to provide for a single referendum – ensured no further use could be made of those powers.⁴⁶

Timings

The various timings and deadlines in the Referendums (Scotland) Bill are not always clear. This is even more so without a (hypothetical or otherwise) polling date to work back from. Table 1 presents an attempt to summarise the various dates and deadlines contained in the bill.⁴⁷

Table 1: Relevant dates & deadlines

Issue	Timing	Section
Notification of referendum agents	25 days before referendum	19 subsection (3)
Petition for judicial review	6 weeks after certification by CO or CCO	39 subsection (2)
Application for Proxy Vote	With some exceptions, 5pm 11 th day before date of referendum	Schedule 1, Part 2, 18, sub-para (1)
Application for emergency proxy	5pm on date of the referendum	Schedule 1 7 sub-para (10)
Alteration of registration status/details	5pm 11 th day before date of referendum	Schedule 1, Part 2, 18, sub-para (1)
Cut-off date	5pm 11 th day before date of referendum	Schedule 1, Part 2, 18, sub-para (1)
Notice of Referendum (by COs)	25 th day before referendum	Schedule 2, 1, sub para(1)

⁴⁶ Referendum (Scotland) Bill Committee (2013) *Stage 1 Report on the Scottish Independence Referendum Bill: Second Report 2013 (Session 4)*, Edinburgh: Scottish Parliament SP Paper 379, p.45 & pp.58-59.

⁴⁷ These timings are subject to confirmation.

Notification of polling or counting agents	No later than 5 th day before referendum	Schedule 2, 14, sub para (4)
Relevant period for Permitted Participants to use public meeting rooms	28 days ending day before referendum	Schedule 3, Part 2, 9 sub para (1)
Application for designated status	28 days prior to 12 noon on the first day of the decision period.	Schedule 3, Part 2 8 sub para (6)
Decision on application for designated status	16 days decision period, ending the second day before the first day of the referendum period	Schedule 3, Part 2 8 sub para (6)
Returns for referendum expenses for permitted participants to EC	Within 3/6 months from referendum period end, depending on nature of expenses	Schedule 3, Part 3 22 (11) b) & 24 (2) & (3)
Purdah	28 days ending with date of referendum	Schedule 3, Part 4, 27 (4).
Reporting Periods for Permitted Participants' donation statements	the period starting with the day referendum SI laid before parliament & ending with the 28th day of the referendum period, (b) each of the two succeeding periods of 4 weeks during the referendum period, and (c) the period from the end of the second of the preceding 4 week period, until the end of the day before the date of the referendum.	Schedule 3, Part 5, 43 (1)
Reporting Period for Loans	As for donations	Schedule 3, Part 6, 61 (1).

Purdah

Restrictions on government publishing promotional information with regard to referendum questions (hereafter referred to by its more colloquial term of purdah) has been controversial in recent referendums.⁴⁸ PPERA section 125 provides for a 28-day period of purdah, ending with referendum day. The concern in the EU referendum was that this would restrict government business, and an (eventually unsuccessful) attempt was made to disapply this rule. A further concern in both the EU referendum and SIR 2014 was whether the 28-day period was too short, since it permitted government publication for all but the last 28-days of a campaign. There was also considerable concern in SIR 2014 over statements from UK-wide public bodies during the course of the referendum, including during the purdah period. Following PPERA and SIRA 2013, the Referendums (Scotland) Bill also proposes a 28-day purdah period (Schedule 3, Part 4, 27 (4)).

PACAC, following recommendations by the Electoral Commission, has suggested that Purdah be extended for the full referendum period. This was supported by the Independent Commission on Referendums in its report.⁴⁹ International practice varies. In some referendums, governments have been active participants. Elsewhere, for instance, Spain and Ireland, electoral authorities or courts have mandated governmental neutrality.⁵⁰ Portugal's referendum law bans public bodies from taking positions in referendums.⁵¹ The Venice Commission note only that while it can be legitimate for governments to have an interest and to put a case during a referendum, 'they must not abuse their position ... (and) ... must not engage in excessive, one-sided campaigning but show objectivity'. The only time-limit the Venice Commission put on government publication of referendum material is that it should be published 'sufficiently in advance of the vote (at least two weeks beforehand)'.⁵²

In a referendum where the UK government had an interest, the Referendums (Scotland) Bill does not restrict UK government activity. The Bill Team evidence session conceded that any restriction on UK public bodies would need to be by negotiation with the UK government.⁵³

Conduct of the Referendum

Referendum Period

⁴⁸ Public Administration Select Committee (2015) *Lessons for Civil Service Impartiality from the Scottish Independence Referendum: Fifth Report of Session 2014-15*, London: House of Commons. Public Administration and Constitutional Affairs Select Committee (2017).

⁴⁹ Public Administration & Constitutional Affairs Committee (2017); Independent Commission on Referendums 2018, p.131.

⁵⁰ International IDEA, 2008, pp.145-146.

⁵¹ Independent Commission on Referendums, 2018, p128.

⁵² Venice Commission 2007, p.18.

⁵³ Official Report, 26th June, Col. 22.

There is no minimum referendum period in the Bill. The referendum period will be notified in regulations issued by Scottish Ministers setting out the details of any referendum. Clarity is crucial since this governs the period for which campaign regulations are active, and various reporting dates for spending and donations. Longer referendum periods are desirable. They give campaign groups more time to become established, get their message across, to be challenged, and for campaign groups and regulators to work together effectively to ensure compliance. They give electoral administrators time to prepare properly and help improve voter awareness of the referendum and issues involved. Shorter periods reduce the amount of time for each of these issues, and should there be a legal challenge, for instance, to the designation of campaign groups, this would have greater effect in a shorter period. In addition, explicit specification of prescribed minimum referendum periods avoid the perception of timeframes appearing to be manipulated in favour of one outcome or another.

The Electoral Commission has recommended at least 16 weeks as a referendum period.⁵⁴ SIR 2014 was 16 weeks, the 2004 North East Assembly Referendum was 14.5 weeks, the 2011 Voting System & Welsh Devolution Referendums both 11 weeks, while the 2016 EU Referendum was 10 weeks. PPERA 2000 has a 10-week minimum period. In its written evidence to the Committee, the Electoral Commission underline the importance of a 10-week minimum period, preceded by a six week period for designation of lead campaigners.⁵⁵ International IDEA recommend only that referendum legislation 'should allow for an adequate period for the campaign' without specifying what that period should be. They add that 'general and permanent rules for the length or referendum campaigns may improve democratic legitimacy' and that ad hoc rules should be used as little as possible.⁵⁶

Referendum & Concurrent Elections

Scottish practice since 2007 has been to hold major electoral events separately. Research shows that holding electoral events simultaneously can lead to lower quality electoral processes.⁵⁷ Campaign messages for concurrent processes can become confused & risk being overshadowed by particular issues in one or the other contest. This was arguably the case in the AV Referendum in 2011, held concurrently with devolved and English local elections. The Electoral Commission have recommended that referendums be held separately.⁵⁸ There is no consensus on international good practice in this regard.⁵⁹ Concurrent elections are normally justified as potentially raising turnout and minimising costs. The 2011 AV referendum legislation explicitly made provision for it to be held concurrently with local and devolved elections.

⁵⁴ Electoral Commission, 2011, p.107; 2014, p.117.

⁵⁵ Written evidence, Electoral Commission, p.3.

⁵⁶ International Idea, 2008, p.200.

⁵⁷ Clark, A. (2017).

⁵⁸ Electoral Commission, 2014.

⁵⁹ E.g. International IDEA, pp.53-54 only set out briefly the benefits and drawbacks of both options. The Venice Commission is silent on the matter in its code.

The Bill is silent on whether a referendum might be held on the same day as another electoral event. Is the intention to ensure that referendums are standalone events, or might they be combined with other electoral events? Should either of these eventualities be legislated for in the Bill?

Electoral Observers

SIR 2014 had a separate accreditation scheme to the standard Electoral Commission observer scheme albeit still run by the Commission. Is the intention under the Bill, as appears to be suggested, a separate Scottish referendums observer scheme, or to rely on the standard EC Accredited Electoral Observer Scheme? The Electoral Commission's written evidence suggests that, rather than a separate electoral observer scheme for Scottish referendums, the bill should instead adopt the standard observer scheme and code of practice used for Scottish local government elections.⁶⁰

Electoral Commission accredited observers are explicitly permitted to observe various procedures under a code of conduct (Sections 21-24). However in the list of individuals explicitly entitled to attend polling stations, attend postal vote issuing and openings, and the count, accredited electoral observers are not explicitly identified, only 'any other person the presiding/counting officer permits to attend' (Schedule 1, Part 3, (19), Schedule 2, 15 (2), 29 (8)). In one recent UK by-election, an accredited observer group was denied access in some polling locations due to a lack of awareness of electoral law on the part of polling station staff. A failure of explicit provision may have been part of that problem.

To avoid any confusion, the provisions could explicitly list accredited electoral observers as permitted to attend polling stations, postal vote issuings and openings and the count.

Polling Stations & Exceptional Events

There is provision in the bill (Schedule 2, Para 27) for proceedings in polling stations to be adjourned until next day in the event of riot or open violence. This is a standard provision in electoral legislation.

Other events can also be problematic. For example, some polling stations were affected by flash flooding in the 2016 EU referendum and had to be moved. Should the bill broaden the riot/open violence provision to explicitly provide for other potential threats or events, and also in relation to the count (e.g. severe weather; terrorism etc)?⁶¹

Referendum Staffing and Political Activity

⁶⁰ Written evidence, Electoral Commission, p.5.

⁶¹ See also written evidence from the Association of Electoral Administrators.

The Referendums (Scotland) Bill prevents anyone who has campaigned for an outcome in a particular referendum from being appointed as a presiding officer or clerk in a polling station (Schedule 2, 10, (2)), or working at the count (Schedule 2, 29, (2)). With regard to polling stations, this is the same provision as in SIRA 2013 (Schedule 3, 10, (2)). There was no equivalent provision for the count in the 2013 Act. This means that the Referendums (Scotland) Bill extends restrictions on referendum activity to those working at the count.

Electoral Registration as a Reserved Matter

Accurate electoral registration is crucial to the success of electoral events, particularly major events like referendums. Electoral registration procedures, such as Individual Electoral Registration (IER) and its canvass, are reserved matters. There are three main issues to be considered. The first of these was an issue in SIR 2014, while the second and third were issues that EROs had to deal with across the UK, including Scotland, in the 2016 EU referendum. The issues are:

- Registration canvass timings may conflict with Scottish Referendum periods and their separate registration deadlines. How might this be avoided or dealt with?
- If a registration surge collapsed the online (UK) government registration portal during a Scottish referendum (as happened in the EU referendum), how would such an event be dealt with?
- How could Scottish Electoral Registration Officers (EROs) avoid having to deal with many duplicate applications to register during a referendum because of how IER is set up?

Campaign Rules

Designation time frame

The Venice Commission talk of achieving equality of opportunity between supporters and opponents of referendum questions, while recognising that any public subsidies or backing may be limited to those who meet a minimum percentage of the electorate.⁶² International IDEA's recommendation is only that 'the creation of official campaign committees should be considered'.⁶³ The specific process and timings for designating lead campaign organisations appears to be a British practice. PPERA 2000 appears to follow the Venice Commission idea of covering broad section of the electorate by requiring that the Electoral Commission designate the group that 'appears to them to represent to the greatest extent those campaigning for that outcome' (Part VII, Chapter 1, 109, 5). The same requirement is in the Referendums (Scotland) Bill (Schedule 3, Part 2, 8 (5)).

PPERA 2000 only made provision for applications for Designation to be made during the first 28 days of the referendum period, with the Electoral Commission having a

⁶² Venice Commission, 2007 p.7 & p.17.

⁶³ International IDEA, 2008, p.200.

further 14 days to decide upon designation (Part VII, Chapter 1, 109, 2 b) & 3). In early PPERA referendums, such as the 2004 North East Regional Assembly, or 2011 AV referendum, the designation process was carried out during the referendum period, thereby limiting time for groups to campaign. Reports on referendum campaign regulation have consistently highlighted the need to designate lead campaigns early in the process, and preferably before the regulated period begins.⁶⁴ Subsequently, the timings for designation in referendums were changed. The Designation process in SIR and the EU referendum was carried out prior to the regulated campaign period commencing.

The Referendums (Scotland) Bill proposes to award designated status before the commencement of the regulated campaign period (Schedule 3, Part 2, Para 8). The Electoral Commission have a 16-day decision period, ending two days before the first day of the referendum period. Campaign organisations have 28 days before that to apply for designation, with a deadline at 12 noon the day before the decision period commences. In terms of application process, SIRA 2013 was virtually identical. However, there are two differences. While the present Bill explicitly makes the application deadline 12 noon, there was no such time in the equivalent SIRA provision. In the present bill, the time between the end of the decision period and the commencement of the referendum period has been shortened. While the 16-day decision period remains, SIRA places the end of that at 'the 28th day before the referendum period', by comparison with two days before in the present bill (SIRA 2013, Schedule 4, Part 2, 7, (6)). The application process is document-based. There is no provision for interviews to take place.

Written evidence suggests that designated status should be awarded at least a month before commencement of the regulated referendum period.⁶⁵ This is particularly necessary where there is likely to be competition for designation on one or other side of the argument. Research from the EU referendum suggested that campaign organisations had difficulty in raising money prior to designation, and could not make any arrangements – printing; booking advertising etc – in case they were not designated, since this would lead to potential overspending should they be restricted to permitted participant status. These issues did not arise in SIR 2014 since there was no competition between campaign groups for designation.

Permitted Participants & Designated Organisations

There is currently no provision in the Referendums (Scotland) Bill for grants to Designated Organisations in any Scottish Referendum. Grants of up to £600,000 are available to Designated Participants under PPERA 2000. Such grants have been

⁶⁴ Denver, D. (2004) *North East Referendum 2004: Campaigning: Report for the Electoral Commission*, Lancaster University. Fisher, J. and Rottweiler, B. (2016) *Research Among Permitted Participants at the EU referendum*, London: Electoral Commission.

⁶⁵ Form Prof. Fisher.

awarded in various referendums. In the 2004 North East referendum, a limit of £100,000 was paid to each side. In the 2011 AV referendum, with a total of £380,000 awarded to each designated campaign, and around £140,000 eventually claimed by each group.⁶⁶ The 2016 EU Referendum saw both campaign sides claim the maximum amount of £600,000.⁶⁷ The PVSCA 2011 added provision for such grants to be paid in instalments in that contest (Section 16). In the SIR, the Scottish government decided not to make such grants available, and consequently there was no provision made for them in SIRA 2013.

Expenses & Donations

Spending

Table 2: Spending limits

Type of Participant	Spending Limit (based on 2016 SP election)
Designated Organisation	£1,500,000
Political Party represented in Scottish parliament	SNP £1,332,000 Scottish Conservatives £672,000 Scottish Labour £630,000 Scottish Liberal Democrats £201,000 Scottish Greens £150,000
Other permitted participant	£150,000
Unregistered campaigners	£10,000

Source: Policy Memorandum, Para 65.

The upper limit for campaign spending for designated organisations is £1.5m, for political parties in the Scottish parliament a formula based on previous vote share, and for other permitted participants £150,000.⁶⁸

Based on research into regulating EU referendum participants, there is a suggestion in written evidence that there may be a need to reduce spending limits for permitted participants to maintain a 'level playing field'.⁶⁹ This is because the amount permitted to be spent by Designated Organisations, selected as lead campaigners, might be surpassed were there a large number of permitted participants on one or other side of

⁶⁶ Electoral Commission, 2011, pp.96-98.

⁶⁷ Independent Commission on Referendums, 2018, p.147.

⁶⁸ Referendums (Scotland) Bill, Policy Memorandum, para 65, p.13.

⁶⁹ Written evidence from Prof. Fisher.

a campaign. For example, it would only need 10 permitted participants to spend to the maximum to equal the limit for spending of the Designated Organisation under the Bill's provisions. The argument seems to be that current limits risk undermining the case for designation, leading to fragmented campaigns and messages. However, although the Electoral Commission regulated 21 campaigners on either side of the SIR campaign in 2014, in no case did their spending come close to the Designated Organisation limit.⁷⁰

A related difficulty and consistent theme of reports of referendum campaign regulation has been that the Working Together, or common plan, rules are poorly understood. These aim to prevent collusion between campaign groups on the same side of a referendum argument. They are intended to prevent the situation where a campaign avoids spending limits by setting up several separate organisations, each spending to the maximum allowed, and, combined, exceeding what would otherwise be their spending limits.⁷¹ The provisions in the Bill (Schedule 3, Part 3, 21) are based on SIRA 2013 and the EU Referendum 2016, and referred to incurring expenses 'as part of a common plan'. Guidance and advice for participants will clearly be necessary, but the appropriateness, clarity and effectiveness of the measures and spending limits might require exploring with the Electoral Commission and academic witnesses.

Importantly, the Electoral Commission rightly note that, as with the Cambridge Analytica scandal in the EU Referendum, campaign groups are likely to be spending on data in advance of any major referendum. Their written evidence argues for groups applying to register as permitted participants and for Designated status to include an estimate of the costs they have incurred when buying or developing the data they hold when they register. This would be a sensible step to address in the Bill.

It may be worth investigating if this can be pushed further in the bill in two ways. Firstly, by ensuring campaign groups also submit itemised statements of their spending on data and its development post-registration i.e. *during the campaign*. Secondly, that these declarations also include a list of the data held, the use to which it is intended and the manipulations made to it. The aim would be to link data usage in Scottish referendums explicitly to GDPR requirements where possible and appropriate. This should be investigated with the Electoral Commission and possibly the Information Commissioners' Office, if felt appropriate.

Donations

Well organised campaign groups may be accepting donations and spending well in advance of any regulated referendum period. In SIR 2014, and subsequently in the

⁷⁰ Electoral Commission (2015) *Report on the regulation of campaigners at the independence referendum held on 18 September 2014*. London: Electoral Commission, and <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/scottish-independence-referendum/campaign-spending-scottish-referendum> [12/8/2019].

⁷¹ E.g. Fisher and Rottweiler, 2016, pp.18-20. Electoral Commission 2015, pp.31-37.

EU referendum, a 'pre-poll reporting' process was used by the Electoral Commission. This involved reporting loans and donations of over £7500 received by registered campaigners in advance of the regulated referendum period. The Electoral Commission have recommended that this be incorporated into future referendums conducted under PPERA 2000.⁷² This procedure is included in the Bill (Schedule 3 Part 5, para 43, sub-paras 6 and 7). The Electoral Commission, in paragraph 45, is required to make pre-poll donation reports available as soon as practicable.

The Bill provides for the donation reporting process during the referendum period. This requires reports to be submitted on a 4-weekly basis (Schedule 3, Part 5, para 43, 1 and 2). This is consistent with donation reporting in SIRA 2013, but different from the length of reporting periods in the EU Referendum.⁷³ Written evidence from Dr. Renwick notes that this requirement is not consistent with that contained in PPERA (Part IV, Chapter III) for donation reporting during general elections. This requires political party donations to be reported on a weekly basis, as opposed to the normal quarterly reporting cycle. The suggestion in the submission is that the reporting requirement in the Bill be changed to bring it into line with that for general elections.

The Bill permits donations from outside of Scotland (Policy Memorandum paras 96-97). This raises an important issue in checking permissibility of donations, which was also raised as an issue in Stage 1 scrutiny of SIRA 2013. The Committee then invited further consideration of the issue, but the difficulty remains.⁷⁴ It is straightforward to ensure access to the Scottish local government registers and this is provided for in the Bill. The problem arises at the UK-level. How would designated participants access full UK registers to ensure permissibility of any donations? Written evidence suggests that the need to apply for the electoral register to 32 individual local authorities in Scotland, and just under 400 UK-wide, is problematic, potentially disadvantaging newly established campaign groups in particular.⁷⁵ Is it therefore enough to say that UK registers can be accessed through 'the normal public access routes',⁷⁶ or might access need to be negotiated with the UK government if there were significant levels of donations from rUK?

The Commons DCMS Committee's recent response to the UK government's *Online Harms* white paper emphasised Electoral Commission evidence noting that anti-money laundering legislation requiring checks over and above simple permissibility of

⁷² Electoral Commission (2014) *Scottish Independence Referendum: Report on the Referendum held on 18th September 2014*, Edinburgh: Electoral Commission. Electoral Commission (2017) *The 2016 EU Referendum: Report on the Regulation of Campaigners at the Referendum on the UK's Membership of the European Union held on the 23rd June 2016*, London: Electoral Commission.

⁷³ Respectively 21, 28 and 12 days each, provided for in the Schedule of The European Union Referendum (Date of Referendum etc.) Regulations 2016.

⁷⁴ Referendum (Scotland) Bill Committee, 2013, p.37.

⁷⁵ From Prof. Fisher & also the Electoral Commission.

⁷⁶ Policy Memorandum, para 88.

donations is not a requirement on political parties.⁷⁷ The Referendums (Scotland) Bill's roots in previous referendums and electoral legislation mean that only a permissibility check using 'all reasonable steps' is required (Policy Memorandum, para 88). The suggestion from the Electoral Commission's Director of Regulation, Louise Edwards, to DCMSC was that integrating money laundering requirements might be a straightforward idea which can be implemented into electoral law. If so, might this be included in the Referendums (Scotland) Bill in an attempt to aid transparency of referendum donations? Relatedly, the Commission's written evidence also suggests important and what seem straightforward amendments regarding company donations.

The Bill allows the Electoral Commission to dispose of documentation regarding campaign spending, donations and loans after two years (Schedule 2 Part 3, 26 (3), Part 5, 45 (3), Part 6, 63 (3)). Controversy over the EU referendum has shown that there can be questions about these issues for some time. The Bill permits retention of these records in the event of legal action, and for the period of that action. In the interests of transparency and confidence in electoral processes, should it permit the retention of at least electronic copies of such records beyond that two-year period?

In summary, do such thresholds, both in spending and donations, potentially create loopholes, below which transparency might be evaded? Should these thresholds be reduced? Should all spending require to be receipted and reported, and recording of donations tightened further? Can the Bill improve its transparency measures on both donations and spending?

Imprints

There is always some controversy over the inclusion of imprints in election material. There is a requirement in the Bill to provide an imprint on all printed campaign material (Schedule 3, Part 4, para 28). Some imprints on campaign material in the 2016 EU Referendum were vanishingly small, and difficult to read. Consequently, the origin of the material was difficult to ascertain. PPERA 2000 contains provision under such circumstances for the Secretary of State, after consulting the Electoral Commission, to specify 'the manner and form in which such details must be included in any such material' in order to comply (Part VII, Chapter III, Para 126, Sub-paras 6 & 7). There is no such equivalent provision in the appropriate section (Schedule 3, Part 4, 28 sub-para (1)) in the Referendums (Scotland) Bill, nor was there in SIRA 2013. In order to aid transparency, should such powers be provided for?

Online Advertising

A key concern in recent elections has been online targeting and campaigning the regulation of which is largely reserved. A number of UK public bodies are looking at the issue. These include the Information Commissioner's Office, DCMS Select

⁷⁷ Digital, Media, Culture & Sport Committee (2019) *The Online Harms White Paper: Twelfth Report of Session 2017-19*, London: House of Commons HC2431, p.4.

Committee, PACAC, the Electoral Commission, and, for the UK government, the Cabinet Office. DCMSC have called for urgent legislation to deal with the issues, albeit to little effect so far.

Several proposals have been made to address these issues, although they are unlikely to be able to deal with, for example, some social media campaigns. Firstly, online imprints have effectively become a potential solution which the Electoral Commission, DCMS and Cabinet Office have all supported. Digital imprints are made provision for in the Bill (Schedule 3, Part 4, para 28), with the wording of the clause stating that ‘publish’ means make available to the public at large, or any section of the public, in whatever form and by whatever means’. This means that Scottish referendum law in this regard would currently be ahead of UK electoral law, with the UK government only saying it will bring forward proposals at some point later in 2019.⁷⁸

The Electoral Commission make a clear distinction in their written evidence about who should have to comply with the online imprint provision. This is that if people incur referendum expenses through their online activity, they should be required to include an imprint in their online material. This would help avoid including those only expressing personal opinions on referendum outcomes on their social media posts in the need to provide online imprints.⁷⁹

The DCMSC suggest the format of digital imprints should be ‘clear, persistent banners on all paid-for political adverts and videos, indicating the source and the advertiser’.⁸⁰ PACAC heard evidence in its current inquiry into electoral law that this should be of a reasonable, and readable size, and that this information should clearly be on the landing page of any online document/advertisement.⁸¹ The provision in the bill is based on that for printed publication and only indicates that if a single side document, the imprint should appear on its face, but if a longer document, on its first or last pages (Schedule 3, Part 4, para 28, (13)). This appears open to interpretation as does the definition of both print and publication, which just states ‘by whatever means’, thereby including but not explicitly mentioning online advertising. This could all be more clearly specified. The suggestion above in regard to creating provision to increase or alter the size of imprints, if adopted, might also be extended to include digital imprints.

The Electoral Commission’s written evidence highlights a potential loophole in the Bill which might give digital platforms an excuse to avoid complying with the digital imprint requirement. They highlight the wording that non-printed material should include an imprint ‘unless it is not reasonably practicable’ to do so (Schedule 3, Part 4, para 28,

⁷⁸ <https://www.gov.uk/government/news/government-safeguards-uk-elections>

⁷⁹ Electoral Commission, Written Evidence, p7.

⁸⁰ Digital, Media, Culture & Sport Committee (2019) *Disinformation and ‘fake news’: Final Report: Eighth Report of Session 2017–19*, London: House of Commons HC1791, p.60.

⁸¹ Evidence from the current author.

(7)). The suggestion is that this ‘not reasonably practicable’ exemption be removed, to make online material consistent with printed material.⁸²

Other proposals have included: the creation of a searchable repository of online advertisements, including the organisation behind it, source of funding, and who is being targeted; increased enforcement powers for the Electoral Commission, including increasing the fines it can impose from £20,000 to a share of turnover, for non-compliance; and the creation of a category in political parties’ spending returns to the Electoral Commission.⁸³ Most of these potential solutions are mentioned in the Electoral Commission’s written evidence to the Committee.

Financial Memorandum

Overall cost estimates for past electoral events are not necessarily good indicators on their own. Overall costs for electoral events have increased steadily for the last decade and more. Such costs have increased at a rate beyond inflation.⁸⁴ This needs to be taken account of in future estimates, not simply base them on events which may be some years in the past.

Overall spending is not the only indicator for the cost of electoral processes, nor is it necessarily indicative of value for money. International best practice is to also report or estimate spending/costs per elector, which enables a better comparison across electoral events, and across local authorities. The 2016 EU referendum cost £3.06 per elector across the UK, while the 2017 general election cost £3.05.⁸⁵

Two questions arise. Do the figures in the Financial Memorandum quoted for past referendums and electoral processes underestimate the potential cost of future referendums? And is best practice being followed in reporting estimates i.e. are other measures such as cost per elector potentially also helpful in indicating value for money. Should these be reported in any future estimates or referendum proposals?

⁸² Electoral Commission, written evidence, p.7.

⁸³ Digital, Media, Culture & Sport Committee (2019) *Disinformation and ‘fake news’*

⁸⁴ Clark, A. 2019.

⁸⁵ IFES/UNDP (2005) *Getting to the CORE: A Global Survey on the Cost of Registration and Elections*, New York: UNDP. Clark, A. (2019).