Briefing for the Public Petitions Committee

**Petition Number:** PE1791  
**Main Petitioner:** Mike Fenwick  
**Subject:** Referendums (Scotland) Act 2020

Calls on the Parliament to urge the Scottish Government to recognise and respond to concerns that Section 39 of the Referendums (Scotland) Act 2020 establishes a legal challenge, namely that it breaches protections afforded by the Human Rights Act 1998.

**Background**

The Scottish Parliament passed the Referendums (Scotland) Bill on 19 December 2019. Royal Assent was received on 29 January 2020. As such, it is the Referendums (Scotland) Act 2020 ['the 2020 Act'].

Section 39 of the 2020 Act is concerned with legal challenge to a referendum result. The section provides that any legal challenge to the certification of the votes cast at the referendum must be brought by way of judicial review. Such a petition must be lodged before the end of the permitted period which is eight weeks beginning with the day the last certification of the result is made.

Similar provision was made ahead of the Scottish independence referendum in 2014 by section 34 of the Scottish Independence Referendum Act 2013 ['the 2013 Act']. In the 2013 Act, the permitted period was six weeks.

The European Convention on Human Rights (ECHR) provides a framework within which the Scottish Government and all other public bodies must act and is given legal force in Scotland through the Human Rights Act 1998 and the Scotland Act 1998.

Under the Human Rights Act 1998, all public authorities in Scotland must act in accordance with the Convention rights (ECHR) in everything they do.

The Scotland Act places a specific duty on Scottish Ministers and the Scottish Parliament to act in accordance with the 'Convention rights'. As such, Acts of the Scottish Parliament must be in line with the ECHR. The effect of the Scotland Act 1998 and the Human Rights Act 1998 is that Scots law can be challenged and declared unlawful (struck down) in the Scottish courts if it does not comply with the Convention.
All Bills submitted for introduction must be accompanied by the various documents required under paragraphs 2 to 4 of Rule 9.3 of the Scottish Parliament’s Standing Orders. This includes a statement on legislative competence by the Presiding Officer (under section 31(2) of the Scotland Act 1998 and Rule 9.3.1 of the Standing Orders) and a statement on legislative competence by the member in charge of the Bill (under section 31(1) of the Scotland Act 1998 Act and Rule 9.3.3(a) of the Standing Orders).

The Parliament’s legislative competence is defined according to five criteria set out in section 29(2) of the Scotland Act 1998. This includes that its legislation must be compatible with ECHR.

After the Parliament has passed a Bill there is a four-week opportunity for legal challenge of the Bill by the Advocate General for Scotland, the Lord Advocate, the Attorney General and the Secretary of State. The Presiding Officer may submit the Bill for Royal Assent ahead of the end of the four-week period if notified by all three law officers and the Secretary of State that they do not intend to challenge the Bill.

Scottish Government Action

The Scottish Government introduced the Referendums (Scotland) Bill on 28 May 2019. As introduced, section 39 of the Bill provided for a permitted period of six weeks. The permitted period is the period during which a legal challenge to the certification of the votes cast at the referendum can be brought.

Scottish Parliament Action

Jackie Baillie MSP lodged amendment 110 at stage 2. The amendment sought to change the permitted period provided for in section 39 from six weeks to eight weeks.

The amendment was debated at the Finance and Constitution Committee on 4 December 2019.

The Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, supported the amendment, stating that:

“Making a challenge is a big step for people to take, and I think that they should be given a slightly longer period to do so, so I am happy to accept the amendment.”

Members of the Committee agreed amendment 110 without division. The section was unchanged at stage 3. As such, the permitted period provided for under the Referendums (Scotland) Act 2020 is eight weeks.

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03/02/2020
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