Referendums (Scotland) Bill written submission from Professor Toby S. James, University of East Anglia

Introduction

I am Professor of Politics and Public Policy at the University of East Anglia and an expert on electoral administration and management. I have served as an advisor or expert witness to several parliamentary bodies in Scotland, Wales and Westminster. Recent research has included studies that evaluated the management of the AV referendum in 2011, and with Alistair Clark, the EU Referendum in 2016. The findings of this research can be found in several published and forthcoming publications which can be made available to the committee on request, but key findings of interest have been summarised here. My evidence is submitted on the basis of my direct, peer-reviewed academic research and not all questions are therefore answered.

To summarise:
- The Bill is broadly very well designed and will help to bring about legal certainty which is important for the running of future referendums.
- It also rightly achieves an important principle of legal and technical simplicity.
- There is some scope to consider greater innovation in the running of future referendums though mechanisms such as extended voter outreach activity, a centralised complaints system, and there the referendum result could be made externally audible. These measures could boost participation and confidence.
- The use of directions, as proposed in the Bill, has been shown to be an effective way to improve the smooth running of a referendum.

What are your views on the overall policy objectives of the Bill?

There are three policy objectives that the Bill could seek to achieve. Each of which can come into conflict with each other and cannot all be achieved without some trade off. The Bill currently meets most of the first two of these.

Legal Certainty

The Bill provides a legal framework for the holding of referendums in Scotland. Since there is no standing framework for devolved Scottish referendums, it is an important piece of proposed legislation. It will give considerable certainty to how future referendums should run. One challenge that electoral officials have faced in recent years is the passage of late legislation. This can cause high levels of stress for the workforce and are therefore the conditions under which administrative problems can occur. An independent report into problems at the Scottish Parliamentary and Local elections therefore recommended that ‘… electoral legislation should not be applied to any election held within six months of the new provision coming into force.’ 1 The establishment of this framework would made that goal more realisable and put Scottish

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referendums onto a more surer ground. This policy objective is therefore important for integrity of the system – and contributed to by the Bill.

**Legal Simplicity**

One further challenge that electoral officials face in the UK is the volume and complexity of electoral laws. Although the text of the law may not appear to be a major problem from the perspective of the citizen or candidate - the high volume and complexity of laws that electoral officials have to run elections in line with have a significant unseen effect on elections on the ground. Research shows that the complex laws make administrative errors more likely. From interviews that I have done with electoral officials, including those in Scotland, a key challenge has been to understand the legislation in times of stress. To quote some, interviewed as part of my research:

‘One of the things that we all find quite difficult the convoluted legislation. Different pieces of legislation have different timetables and different days count in and count not in. Some of the legislation is UK some of it’s Scottish Government.

‘And it’s all amendment Act, amendment Act, amendment Act… It’s just not understandable to the vast majority of people and most of the administrators as well.

‘we.. will sit and argue black and white over a piece of legislation. I mean is this timetable right? Yes it is. No it’s not. Yes it is. No it’s not!’

‘if you were to come in as a newcomer now, I think that would be a huge challenge, to get your head round the actual legislative aspect of it.’

The proposed Bill is therefore right to seek to ensure that the referendum runs, as far as possible, under the same technical rules as other electoral events. This will reduce training costs and opportunities for error at subsequent Scottish referendums. Given that the slightest glitch could be amplified into the news via social media, it is also important for voter confidence in the outcome of elections.

**Innovation**

A third principle that the committee should consider is whether there are also opportunities for policy innovation and modernisation. Devolution offers Scotland the opportunity to take a different policy approach on many aspects of policy (rather than technical detail). There are many areas of electoral legislation in Scotland and across the UK, that are not necessarily the best possible practice. These areas and possible

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innovations are suggested in answer to the next questions. It is evident that such innovation can come into conflict with the principle of legal simplicity, however.

What are your views on the extent to which the Bill reflects good practice in holding referendums?

A newly established framework for evaluating the quality of electoral management has identified a number of areas where the electoral machinery across the UK could be improved. These have informed 21 recent recommendations for UK-wide policy reform set out in the report *Missing Millions, Still Missing.* As noted above, the Bill provides an opportunity for Scotland to innovate with its own referendums and adopt new best practices. Within the spirit of those reforms, the committee therefore might consider this an opportune moment to set Scottish referendums in good stead by:

- **Ensuring funding sufficiently and timeliness.** Electoral services have been under significant financial strain, with real term declines in budgets in many areas. The committee should therefore ensure that sufficient funding is provided in a timely way to officials.

- **Funding transparency.** The actual expenditure on running the election should be published (rather than the upper limit that can be claimed by Counting Officers). This should include the amount paid to Counting Officers, paid to other staff and other costs involved in the delivering the referendum. This would allow future analysis of cost-efficiency and provide greater accountability. The Scottish Parliamentary Committee for Local Government and Communities considered this issue at length in 2017.

- **Mandating registration at public bodies.** The completeness of the electoral register is a problem across the UK with many people incorrectly registered or missing entirely. Registration problems are thought to be less of a problem in Scotland than the rest of the UK. However, it remains the case that many voters are not able to vote because while they think that they are on the register, they are not. The bill could require public agencies in Scotland to ask citizens to register to vote ahead of the referendum. Given that the voting age is 16, and younger people are the most under-registered group, the bill could require schools to undertake voter registration activities alongside some citizenship lessons about the referendum. The committee may even wish to consider expanding the provision to universities and explore whether private sector companies can be required to prompt voters to register to vote.

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7 https://www.parliament.scot/S5_Local_Gov/Reports/LGC052017R01.pdf

- **Voter outreach activity.** The Bill sets out that the Electoral Commission should undertake voter engagement and awareness work. There is anecdotal evidence, however, that civil society groups can be more cost-effective at raising awareness and registration rates, especially amongst young people. The committee may therefore wish to consider proposing a board comprising the Electoral Commission, schools and civil society groups in collaboration with the Electoral Management Board for Scotland that could collaboratively steer investment in voter engagement.

- **Providing for a simple complaints procedure.** There is often public confusion about who to complain to when there are problems at polling stations and lost ballot papers. A central complaints procedure for citizens could be established in which they are encouraged to email/write to the Chief Counting Officer. This would allow complaints to be logged, responded to and lessons to be learnt for future electoral events.

- **Enabling the auditing of the referendum.** Electoral results and referendums cannot be externally audited as they can in some countries. Provision to enable external auditing of the results is good practice from the perspective of transparency and might serve to increase confidence in the result, especially given that concerns (usually without evidence) were raised about the result of the 2014 Independence referendum.

**What are your views on these regulation-making powers?**

The wording of a referendum question and the detail of how a referendum is run can significantly shape the outcome. There is therefore a risk that any government with a sufficient majority could propose a referendum with a legislative framework to shape the outcome. It is therefore important that there is some independent regulation of the process. Since it was established in 2000 the Electoral Commission has developed a reputation of being a ‘fearless’ independent watchdog. It has regularly criticised governments across the UK and therefore has the institutional culture to provide this role effectively.⁹

**What are your views on the extent to which the Bill will provide for referendum polls and counts to be run in an efficient, transparent and fair manner?**

While the managerial frameworks for running elections in Scotland and the UK have been long-established and unreformed, the managerial frameworks for referendums have only been used in the past few years. One policy innovation has been the use of centralised directions. Legislation for referendums has allowed the Chief Counting Officer to issue directions to Counting Officers. This has introduced some degree of centralisation and this is not possible in elections. Research has not been undertaken on the effectiveness of this practice in the Scottish independence referendum.

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However, I have undertaken research on this on the UK-wide 2011 AV Referendum and 2016 EU Referendum (with Alistair Clark). This is relevant to Scotland because it shows the effects that the use of centralised directions could have.

The use of directions in 2011 had a number of negative effects which included additional financial costs, additional staff time and negative effects on staff morale. Moreover, the centralised directions led to loss of the use of local knowledge of electoral officials as they were forced to do what they otherwise might not have done. There were some positive effects, however. It helped to ensure more consistent services to the voter and prevented some possible problems that were due to occur.

The second use of the scheme in 2016 was much more positive. This owed much to the Chief Counting Officer taking a more inclusive approach in defining the standards and using them more cautiously. It was also likely to be the result of the electoral community becoming used to the practice of central directions.

Centralised directions can therefore be a useful instrument for any Chief Counting Officer to bring about good management of the referendum. They should therefore be supported and included in the Bill as proposed.

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