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Clerk to the Delegated Powers and Law  
Reform Committee  
Room T1.01  
Scottish Parliament  
Edinburgh  
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13 August 2019

Dear Andrew

### **Referendums (Scotland) Bill at Stage 1: Delegated Powers Memorandum**

Thank you for your letter of 1 July 2019 to James Hynd, seeking clarification on behalf of the Committee on a number of issues in relation to the Referendums (Scotland) Bill 2019. Mr Russell has been invited to give evidence to the Committee on Tuesday 10 September and we hope that the information below will assist the Committee in its consideration of the Bill and preparation for this discussion.

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

The Committee sought clarification on the following points:

*(a) Delegation of Power: The Committee discussed the appropriateness of the delegation of the power to hold a referendum and agreed to seek clarification on the undernoted matters:*

*(i) why the Bill proposes to proceed by way of future referendums being established in subordinate legislation and not primary legislation; and*

*(ii) why the Government accepts, at paragraph 9 of the DPM, that the approach of Part 7 of the Political Parties, elections and Referendums Act 2000 is appropriate for the rules of a referendum but that it does not follow the same process set out in that Act for establishing future referendums through Acts of the Scottish Parliament.*

*(b) Procedure: The Committee also discussed the procedure, and therefore the scrutiny, to which regulations under section 1 of the Bill will be subject and agreed to seek clarification on the undernoted matters:*

*(i) why the Bill does not make provision for the Parliament to be consulted prior to the laying of draft regulations;*

*(ii) why it is considered necessary to consult with the Electoral Commission but not with the Parliament;*

*(iii) why does the Bill only specify that the Scottish Ministers are to consult with the Electoral Commission rather than consult with the Commission on draft regulations; and*

*(iv) does the Government consider that a form of super-affirmative procedure, which involves a draft of any regulations to be provided to the Parliament for a consultation period before being formally laid, would be appropriate for a significant power such as section 1.*

*(c) Referendum Questions: Furthermore, the Committee noted that as part of the process for laying regulations under section 1, section 3 of the Bill requires the Scottish Ministers to lay a report before the Parliament on the views expressed by the Electoral Commission on the intelligibility of any questions to be put in a referendum. Where a question is specified in a bill introduced into the Parliament, section 3 requires the Electoral Commission to publish a statement of its views on the intelligibility rather than the Scottish Ministers.*

*The Committee seeks to understand why the statement of the Electoral Commission, rather than the Scottish Ministers, is not required when regulations are laid?*

## **Scottish Government response**

### Delegation of power

The Referendums (Scotland) Bill is intended to put in place legislation which will providing certainty around the process and rules for the running of any future national referendums on devolved topics in Scotland. The intention in bringing forward this Bill is to ensure that the legislation providing for any future referendums is subject to appropriate parliamentary scrutiny whilst reducing the requirement for the Parliament to re-consider the process of running the poll, as it will be the same for every referendum. This Bill sets out that proposed process.

Any proposal for such a referendum would continue to require Parliamentary scrutiny and approval. The Bill also allows flexibility, depending on the circumstances of any referendum, on whether primary or subordinate legislation would be appropriate for providing for a referendum.

Two key objectives of the Bill are to allow referendums to be held on a timely basis, and to allow proper parliamentary scrutiny of the proposed question and timing of a

referendum. Section 1 which provides for making regulations through the affirmative procedure is intended to fulfil both of these objectives.

As set out in the supporting documents, the approach taken in the Bill has many commonalities with the principles and details of the Political Parties, Elections and Referendums Act 2000 (PPERA).

There are, however, differences in policy decisions and approach. For example, Part 7 of PERA only covers the campaign rules for a referendum; it does not cover most of the operational detail of how the referendum will be run. This is why the legislation which a UK Government brings forward to run referendums relying on the framework of rules in PERA is so substantial. The European Union Referendum Act 2015 ran to over 60 pages, most of which dealt with applying other Acts, including the PERA rules, with modifications, which is another reason why primary legislation is required in the UK Parliament. In addition, separate regulations were required to set out the conduct rules for the poll and count.

The Referendums (Scotland) Bill would provide, in one place, a complete legislative basis to run referendums in Scotland without the need to refer to or apply other legislation.

Section 37 of the Bill specifically allows the processes in the Bill to be updated using subordinate legislation. PERA does not include a similar power. Hence a UK Government requires primary legislation to apply PERA when bringing forward legislation for referendums.

The Scottish Government is of the view that because the Bill, if passed by the Parliament, will include virtually all the rules necessary for running a referendum, and which can be kept up to date by subordinate legislation, it should not be necessary to use primary legislation to provide for a referendum. The additional flexibility will allow for any future Government to pick the most appropriate method of providing for a referendum. In either circumstance, the Parliament would scrutinise the proposals being brought forward.

For clarity, I should add that for the framework in the Bill to apply to a referendum provided for by a future Scottish Parliament bill, there is no requirement for express provision in this Bill (as appears in section 101 of PERA). This is because any Bill for such a referendum could simply apply the provisions of this Bill.

The intention under this Bill is that the legislation providing for a referendum will only require to specify the date of the referendum, the form of the ballot paper (including the wording of the question), and the referendum period. The referendum question will, under section 3, have been the subject of a consultation with the Electoral Commission, unless a previously tested question is being re-used. This could mean that the referendum date and period may be the only “new” proposals that the Parliament will be considering.

The Government is of the view that any issue on which there is going to be a proposed referendum will already have been the subject of significant discussion and debate in Parliament. If an instrument providing for a referendum does not meet the

approval of the Parliament, the Parliament can refuse approval. This would allow Parliamentary committees to take further evidence, including from the Government, and the Government potentially to bring the instrument back later for further discussion and scrutiny.

The Government's main concern is that if primary legislation is the only option for providing for a referendum, it will reduce the opportunity to plan and run referendums effectively. The parliamentary process for primary legislation can be longer than that for secondary legislation and, more importantly there is no set timing for the process. This could create a situation where there would be insufficient time to develop and debate a policy in the Parliament; decide that a referendum would be an appropriate vehicle to gauge the electorate's views; consult on the wording of the question; lay and debate the primary legislation providing for the referendum; run the referendum; and implement the outcome of the referendum within a single parliamentary term. The certainty around the timing of secondary legislation, 56 days for affirmative secondary legislation, will allow a Government to have greater certainty over whether or not it would be able to implement the outcome of any referendum.

To summarise, the Government is of the view that allowing the use of subordinate legislation to provide for a referendum allows certainty around timing a vote, which primary legislation does not; that the Parliament has, and will have had, the opportunity to debate the subject of the referendum and, ultimately, the legislation will not become law unless the Parliament votes to approve it.

### Procedure

As mentioned above, it is difficult to conceive of a situation where legislation to provide for a referendum will be brought forward without the subject of the referendum being discussed and debated in the Parliament at length. The Government is therefore of the view that it is unnecessary for the legislation to include specific provision for the Parliament to be consulted prior to the laying of the draft regulations. Beyond consultation, the Parliament has a full veto on the legislation with the affirmative procedure vote. The Parliament would also scrutinise the Government's consultation on the regulations brought forward in line with the usual practice.

Statutory consultation with the Electoral Commission is a requirement for some subordinate electoral legislation, and is also used for subordinate legislation for referendums. The statutory consultation is designed to allow the independent Electoral Commission to review the Government's proposals, to consult others as they consider necessary, and to give impartial advice to Government on the practicality and effectiveness of its proposals. It is normal practice for the Electoral Commission to publish its responses to government consultations.

The Committee considering the subordinate legislation will of course have the benefit of the Electoral Commission's response to the Government's statutory consultation to inform its consideration.

Some form of super-affirmative procedure would be an option for draft regulations, although as noted it is not considered necessary in this case. The super affirmative process is normally used to build a statutory consultation period into the secondary legislation period. However the Government's view is that it is extremely unlikely that any proposal would have been subject to significant public and parliamentary debate before it reaches the referendum stage.

### Referendum Questions

Section 3 is drafted in this way to cover all situations in which the Bill's provisions may be used, including where the primary legislation to provide for a referendum may not be a Scottish Government Bill. It would not be appropriate for the Scottish Government to have to provide as part of the formal statutory procedure a report on the intelligibility of any question contained in a Bill which it has not brought forward, although the Government would be happy to offer such views to the Parliament on any such, and could do so without provision for this. In cases where the Bill or secondary legislation has been introduced by the Government, the Government would of course provide its views on intelligibility and stand ready to justify the question to the Parliament as part of the usual scrutiny procedures.

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

The Committee asked the following questions in relation to section 2:

*(a) why there is no requirement to consult with the Parliament before draft regulations are laid;*

*(b) why the power has not been more narrowly drawn; for example, why the power has not been restricted to being available only where the modifications are recommended by the Electoral Commission; and*

*(c) why it is necessary to have the delegated power in section 2; specifically, why the delegated power in section 37 is not sufficient to address any recommendations of the Electoral Commission.*

### **Scottish Government response**

Section 2 covers the situation where the Government may wish to apply the Bill with modifications to suit the particular circumstances for an individual referendum. The Government does not have any particular situation in mind for including this provision, but it is there in case it is required by any future Government.

As mentioned above, it is difficult to conceive of a situation where legislation to provide for a referendum will be brought forward without the subject of the referendum being discussed and debated in the Parliament at length. The Government is therefore of the view that it is not necessary for the legislation to make specific provision for the Parliament to be consulted prior to the laying of the draft regulations.

This provision is intended to deal with any modifications required for the running of a particular referendum, rather than more general modifications for all referendums, which would be covered by section 37.

It would not be appropriate to bind any future Government to a situation where it can only make modifications recommended by a third party. The Electoral Commission has to be consulted on any proposed draft regulations and the Commission's published report on those draft regulations will be available to inform the Parliament's consideration of the draft regulations. The Parliament retains the power to accept or reject any regulations brought forward by the Government.

As mentioned above, section 2 is designed to cover any necessary changes to the Bill's provisions for a particular referendum; section 37 is a more general power to allow for changes to the Bill which will then apply to all future referendums held under the terms of this Bill. Whilst section 37 is more general, it is also more limited as it only allows for modifications in connection with other changes to electoral or referendum legislation or as a result of specific Electoral Commission recommendations. Section 2 is about tailoring the legislation to an individual referendum, if necessary, whilst section 37 is about keeping in line with other electoral legislation. Section 2 also provides some of the practical flexibility to tailor the regime as available under PPERA.

An example of circumstances where the power in section 2 would be appropriate would be to make any necessary adjustments to the application of the Bill if a referendum were to be held during the period of the annual canvass.

I hope that the Committee will find the above information helpful. If further explanation or information would help inform its deliberations, we would be happy to provide additional information.

Yours sincerely

Rebecca Whyte

Referendums (Scotland) Bill Team Leader