Referendums (Scotland) Bill written submission from Dr Alan Renwick, Deputy Director of the Constitution Unit, University College London

Summary

Introduction and overall assessment

- This evidence draws on the author’s extensive recent research into the design and conduct of referendums.
- The Referendums (Scotland) Bill should be welcomed: its objective of creating a legislative framework for future referendums is sound, and would allow Scotland to meet international best practice.
- Still, the Bill should be seen at this stage as a work in progress. Various aspects could be further strengthened.

Regulation-making powers

- The proposal that Ministers should be able to call referendums by regulations should be removed. Calling a referendum should continue, as now, to require primary legislation.
- A minimum duration for any referendum period should be specified.
- The proposed ministerial power to amend the Act by regulation should be removed or curtailed.

Referendum questions

- The Electoral Commission should be consulted on whether to update the criteria for question testing.
- Question testing should take place even when a question has previously been tested or proposed by the Commission.

Provisions relating to campaigning

- Multiple aspects of campaign regulation – including on digital imprints, spending returns, ‘common plan’ spending, donation reports, archives of political advertising, the Electoral Commission’s fining powers, and restrictions on government publications – should be strengthened in consultation with the Electoral Commission.

Scope for democratic innovation

- Citizen-initiated referendums should not be introduced, but serious consideration should be given to introducing citizen-initiated citizens’ assemblies.
- Ways of improving information during referendum campaigns should be considered. In particular, an enabling power might be added to the Bill allowing Ministers to establish citizens’ assemblies in the context of referendums.
- Consideration should be given to introducing provisions requiring two referendums in some circumstances.
Introduction

1. In commenting on aspects of the Referendums (Scotland) Bill, I draw on my recent research into the conduct of referendums, including:
   • as Research Director for the 2018 Independent Commission on Referendums
   • as consultant to the Rapporteur for the Parliamentary Assembly of the Council of Europe (PACE) inquiry into ‘Updating guidelines to ensure fair referendums in Council of Europe member States’
   • in my report, co-authored with Michela Palese, on Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?

I also draw on two invaluable sources of guidance regarding good referendum practice:

   • the Code of Good Practice on Referendums produced by the Venice Commission (the legal arm of the Council of Europe, which advises on good constitutional and democratic practice throughout the continent of Europe)
   • reports on past referendums produced by the UK Electoral Commission.

I do not attempt to comment on all parts of the Bill, but focus on those for which my research offers insights.

The overall policy objectives of the Bill

2. The Bill seeks to provide a standing legislative framework for referendums called by the Scottish Parliament. This should be strongly welcomed. Scotland currently has no such framework, meaning that all the rules have to be created afresh any time a referendum is called. That creates a danger that the rules might be unduly tailored to suit the purposes of the government of the day in a particular vote. A standing legislative framework helps protect against such distortions.

3. Referendums called by the UK parliament are already subject to standing rules, in the form of the Political Parties, Elections, and Referendums Act (PPERA) 2000. It is highly desirable that Scotland too should have equivalent provisions.

4. The absence of standing legislation means Scotland risks falling short of the standard proposed by the Venice Commission’s Code of Good Practice on Referendums, which says, ‘The fundamental aspects of referendum law should

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PACE, ‘
not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law’ (para. II.2.b). In January 2019, the Parliamentary Assembly of the Council of Europe (PACE) called on member states to ensure compliance with this recommendation.5

5. The Independent Commission on Referendums, which examined referendum practice in the UK and reported in 2018, came to the same view:

The Commission agrees with both the Electoral Commission and the Venice Commission that, so far as possible, the legal framework for referendums should be set down in standing legislation and not created for each individual referendum: this makes planning much easier and reduces the danger of manipulation for political gain. (para. 15.9)

6. The bill also improves upon the PPERA framework in several respects. One key point is that it stipulates the referendum franchise, which is one of the aspects of referendum law that the Venice Commission argues most need to be protected from opportunistic tinkering (para. II.2.c).

Regulation-making powers

7. The Bill proposes to confer three regulation-making powers upon Ministers that require scrutiny:
   a. Ministers would be empowered to call a referendum on any subject within the competence of the Scottish Parliament via secondary legislation (clause 1(1)).
   b. Ministers’ power to specify the referendum period (clause 1(2)(c)) would be very broad.
   c. Ministers would be given very wide powers to amend the Act by regulations (clause 37).

It would be highly desirable to limit each of these powers. The following paragraphs elaborate on this.

The power to call a referendum

8. A power to call a referendum on any subject by regulations would be highly unusual. In fact, I have found no well-functioning parliamentary democracy that gives Ministers blanket authority to call a referendum by secondary legislation. PPERA creates no such power: each referendum must be called through primary legislation. Some enactments – such as the Northern Ireland Act 1998 and the Government of Wales Act 2006 – do confer referendum-calling powers, but only on very specific matters.

9. Such a power would violate a core principle enunciated by both the Independent Commission on Referendums and PACE, that any proposal to hold a referendum should be subject to detailed scrutiny: a referendum can lead to enormous change, and a decision to call one should never be treated lightly. Many Leavers and Remainers would agree in seeing this as a vital lesson of the Brexit process: the decision in that case to call a referendum without any detailed examination of whether this was a good idea or what would happen in the event of a vote in favour
of leaving the EU was a serious error. In the words of the Independent Commission on Referendums:

Decisions about when to hold referendums and how to conduct them should be taken with a view to ensuring that extensive opportunities for careful deliberation exist: regarding whether a referendum is the best way forward, what the options should be, and what the strengths and weaknesses of each option are from different perspectives.\(^5\)

Similarly, PACE has said:

proposals put to a referendum should be as clear as possible and subject to detailed prior scrutiny, including by parliament, to ensure that they reflect voters’ concerns and can reasonably be expected to deliver on voters’ wishes.\(^7\)

10. I recognise that any regulation calling a referendum would be subject to the affirmative procedure. Nevertheless, scrutiny would be more limited than for primary legislation, and the Parliament would not be able to make amendments. Furthermore, treating this as a matter for secondary legislation sends the wrong signal as to how decisions on referendums will be treated. The importance of such decisions cannot be overstated. **I recommend that calling a referendum should continue, as now, to require primary legislation.**

**Determination of the referendum period**

11. That the referendum period should be determined on a case-by-case basis for each referendum that is called is not unreasonable: different topics may reasonably be suited to campaigns of differing durations. The Bill should, however, specify a minimum period. PACE says:

One requirement for fairness is that there should be sufficient time for all sides to develop and make their points and for voters to hear the arguments and form an opinion. It should not be possible to call a ‘snap’ referendum at very short notice, such that opponents of the proposal have insufficient time to organise. The absolute minimum time between calling a referendum and polling day could be set at four weeks. A considerably longer period of preparation is desirable, however, particularly if the topic has not already been subject to widespread public discussion.\(^6\)

12. As the Bill stands, it is not clear how the various timings that are stated relate to each other. Notice of the poll must be given at least five weeks before polling day (Schedule 2, paragraph 1), but there is nothing to suggest that the referendum period cannot be shorter than five weeks. The process of identifying designated campaign organisations includes a 28-day application period and a 16-day

\(^6\) *Updating guidelines*, Resolution, para. 3.2.
\(^7\) *Updating guidelines*, Explanatory memorandum, para. 82.
decision period, and the latter period ends just before the referendum period begins (Schedule 3, paragraph 8). It appears that it might be possible, therefore, for regulations to specify a referendum period of, say, one week, which would be too short for designated organisations to conduct any meaningful campaign. It would be prudent to specify a minimum of four weeks, which would be in line both with the PACE recommendation quoted above and with PPERA (section 103(1)).

Powers to amend the Act by regulation

13. Finally as regards regulation-making powers, clause 37 of the Bill would confer very wide powers on Ministers to amend the Act by regulation. In particular, the words ‘or proposed modification’ would seem to offer Ministers a mechanism for making almost any change without the need for primary legislation. It is true that the out-of-date state of PPERA illustrates the fact that lack of parliamentary time can be a problem in updating primary legislation. Nevertheless, referendum rules are constitutional rules: they should not be treated lightly. I recommend that the power to amend the Act by regulation be defined more tightly or removed. The Committee might follow the principle that such powers should not be conferred except where there is a specific, clear rationale for doing so.

Referendum questions

14. Clause 3 sets out procedures for consulting the Electoral Commission on referendum question wording. It mostly reproduces the PPERA provisions and is largely unproblematic. But two aspects do deserve further consideration.

15. The first concerns the basis for the Electoral Commission’s question review. Clause 3(5), replicating PPERA section 104(2), specifies that the Commission will consider the ‘intelligibility’ of the question. In practice, however, the Commission’s established question-testing procedure
also examines the neutrality of questions. That it should do so is essential for the fairness and legitimacy of the referendum process. It would be desirable to consult with the Commission as to whether it sees merit in making this explicit in the legislation.

16. One deviation from PPERA that is proposed in this area is in clause 3(7), which states that question testing will not occur ‘if the Electoral Commission have (a) previously published a report setting out their views as to the intelligibility of the question or statement, or (b) recommended the wording of the question or statement’. PPERA contains no such provision. Reasonable justifications for including such a provision can be imagined: question-testing is time-consuming; if it will just replicate a process that has already taken place, this may be thought to be time wasted. But the provision takes no account of the fact that circumstances may change and question wording that was appropriate at one time may not remain appropriate at a later time. Precedent suggests that such changes can matter: regarding referendums on EU membership, the Commission strengthened its advice between its reports on a Private Member’s Bill in 2013 and on the legislation underpinning the actual referendum of 2016, and this led to a change in the question wording. It should be remembered that haste in calling a referendum is not a virtue. Clause 3(7) should thus be removed or, at least, its scope significantly narrowed.

Provisions relating to campaigning

17. The rise of online campaigning has rendered the PPERA framework, in the words of the Commons Digital, Culture, Media, and Sport (DCMS) Committee, no longer ‘fit for purpose’. The Bill as introduced, however, largely replicates the PPERA rules as they were applied in the Scottish Independence Referendum Act 2013. It will be important, therefore, to consider ways in which these rules could be updated. The following paragraphs address several key aspects.

Digital imprints

18. The Bill does contain at least one significant deviation from PPERA in respect of campaign rules: in line with the Scottish Independence Referendum Act 2013 (Schedule 4, paragraph 27), it requires ‘imprints’ to be carried on digital as well as printed campaign materials wherever ‘reasonably practicable’ (Schedule 3, paragraph 28). This reflects a long-standing recommendation of the Electoral Commission. The Bill deviates from the 2013 rules on this point in one respect: it stipulates that the provision ‘applies to the publication of material only if the

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publication can reasonably be regarded as being done with a view to promoting or procuring a particular outcome in the referendum’ (sub-paragraph 2).

19. Notwithstanding this addition, the provision would still benefit from further revision.

20. In its report on the 2014 referendum, the Electoral Commission said it ‘would welcome the opportunity to work with relevant governments, not only in Scotland but also in other parts of the UK, when they are considering future legislation for referendums’ to ensure imprint rules are well designed. It also said, ‘The rules should only cover material produced by campaigners to influence the outcome of the poll, not individuals expressing their personal views on a contest.’ The clause as currently drafted does not draw this distinction. It would therefore be desirable for Ministers and the Committee to work with the Electoral Commission in order to refine this provision. It should be noted that the UK Cabinet Office has also promised to ‘bring forward the technical proposal’ for a ‘digital imprint regime’ ‘later on this year’. It would be healthy, therefore, for the two governments to seek to work together.

Campaign spending

21. The Electoral Commission and the Independent Commission on Referendums have in their recent reports made a range of recommendations designed to enhance the transparency of digital campaign spending. These include requiring greater transparency of invoices, requiring spending returns to be subdivided into categories that are meaningful in the digital age, and shortening the deadline for the submission of spending returns. It would again be desirable for Ministers and the Committee to work with the Commission in developing detailed proposals.

Common plan expenses

22. Schedule 3, paragraph 21 addresses ‘referendum expenses incurred as part of a common plan’. In doing so, it replicates the provision in the European Union Referendum Act 2015 (Schedule 1, para. 22). But the Electoral Commission, in its report on regulation of campaigners in the 2016 referendum, called for several improvements to this provision: it urged greater clarity on what ‘a common plan or other arrangement’ means and what ‘by or on behalf’ means; it suggested that it should itself be given a statutory code-making power; and it proposed a disclosure requirement in spending returns. It would be desirable for Ministers and the Committee to investigate all these matters further with the Commission.

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11 Ibid., para. 5.143.
**Reporting of donations**

23. Schedule 3, paragraph 43 requires registered campaigners to submit donation reports every four weeks during the referendum period. This replicates the equivalent provision in the Scottish Independence Referendum Act 2013 (Schedule 4, paragraph 42) and is broadly similar to the provision applied to the 2016 EU referendum, where reporting periods were stipulated of between two and four weeks at different stages of the referendum period (European Union Referendum (Date of Referendum etc.) Regulations 2016, Schedule). It is strikingly different, however, from the rule in relation to general elections, where weekly reporting is required (PPERA section 63). It is not obvious why such a difference should exist: weekly reports offer greater transparency than monthly reports; if they are possible for general elections, they should be equally possible for referendums. **I therefore recommend that weekly donation reports be required during referendum periods.**

**Archives of political advertising**

24. Tech giants such as Facebook and Google have begun to create archives of the political advertising that they carry on their platforms. This is generally welcomed as a step towards overcoming the problem of microtargeted ‘dark ads’. But there is also wide agreement that it should not be for the internet companies on their own to decide the terms on which citizens can access such important materials for the democratic process. **It may be too early for legislative interventions to be developed, but this is an area in which further investigation by the Committee would be desirable.**

**Power of the Electoral Commission to issue penalties**

25. The Bill gives the Electoral Commission the power to issue discretionary penalties of up to £10,000 (Schedule 5, paragraph 6). The Commission has long argued that its power under PPERA to issue penalties of up to £20,000 is inadequate: noting that designated lead campaigners in the 2016 EU referendum could spend up to £7 million, it said, ‘limiting our ability to fine to £20,000 for a single offence does not provide a strong deterrent to ensure compliance. It also has the potential to affect public confidence in the regulatory regime if we are unable to sanction breaches appropriately.’

26. The spending limit for designated campaign organisations proposed in the Bill is lower, at £1.5 million. Nevertheless, £10,000 is clearly a drop in the ocean compared to this. **Ministers and the Committee should examine with the Commission what the appropriate limit might be and how this might best be implemented in Scotland’s wider legal context.**

**Restrictions on government publications**

27. Schedule 3, paragraph 27 of the Bill mirrors PPERA section 125 and proposes very wide restrictions on the ability of the Government and other public authorities...
in Scotland to publish materials relating to the issue at stake in a referendum in the final 28 days of the campaign. Two major problems have been identified in these rules. First, the breadth of the prohibition means that, for a referendum on a subject as large as independence or Brexit, all sorts of normal government communications may be caught by it. Second, referendum campaigns are often in reality in full swing well before the 28-day period begins, such that the rules do not prevent potentially influential government interventions in the campaign. For these reasons, both the Electoral Commission and the Independent Commission on Referendums have recommended that the current ‘short and fat’ prohibition be replaced with a ‘long and thin’ provision, limiting the prohibition only to materials that specifically seek to intervene in the campaign, but extending this to cover the whole of the natural campaign period. I recommend that the ‘long and thin’ model be pursued, and that Ministers and the Committee engage with the Electoral Commission on how best to achieve this.

28. It would be prudent to survey which public authorities are covered by the provision and whether restrictions of the form proposed may either inhibit them from performing their normal functions in ways that would be problematic or inhibit them from playing a legitimate role in facilitating informed discussion of the referendum issue during the campaign. I am not aware of specific difficulties that might arise in Scotland, but there have been problems in UK referendums – for example, for the UK Statistics Authority.

Scope for democratic innovation

29. What is perhaps most striking about the Bill is its conservatism: for the most part, as already noted, it simply reproduces a UK legislative framework that is almost two decades old. Yet the Scottish Parliament has prided itself since its inception twenty years ago in seeking to build a more open, modern, ambitious democratic culture. It could advance that goal now by adopting a more forward-thinking approach to referendum design. The following paragraphs examine three possible aspects of this.

Citizen-initiated referendums

30. The Committee has itself raised the question in its call for evidence of whether the Bill should provide for the possibility of citizen-initiated referendums.

31. The Independent Commission on Referendums took the view that citizen-initiated referendums should not be introduced at the UK level. It was concerned that referendums rarely offer opportunities to discuss important matters of public policy seriously: they dichotomise debate and can become highly polarised. It also noted that such referendums have sometimes been used to suppress the rights of minorities – for example, by entrenching same-sex marriage bans – and can be used by small, vocal groups to advance a cause that is of little interest to the wider electorate.

32. Nevertheless, the Independent Commission was keen that ways of deepening opportunities for citizens to engage in policy-making processes should be

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developed. It said: ‘Instead of this mechanism, attention should be directed towards strengthening and improving existing mechanisms for public involvement in decision-making and piloting new methods of public engagement.’

33. One way to achieve this could be the introduction of citizen-initiated citizens’ assemblies. That is, citizens could be empowered to require the creation of a body of fellow citizens who would examine an issue or a specific proposal in depth. In one version of this, the assembly could decide whether a referendum on a proposal will be held. In another version, it could make a recommendation on the matter to the Scottish Parliament. This would enable the development of a much more inclusive and considered form of democratic innovation. It would genuinely be new: I am aware of nowhere that had implemented it, though it has been suggested by PACE, and a similar arrangement has been introduced this year in the city of Madrid. I would be happy to develop the idea further if the Committee is interested in it.

Information during the campaign

34. My recent report on Doing Democracy Better, co-authored with Michela Palese, argues for a transformation in how we think of information provision during election and referendum campaigns. This should put citizens rather than campaigners at the heart of how campaigns are conceived: rather than focusing just on enabling campaigners to press their messages upon voters, it should enable citizens to gain ready access to the information that they want before making their choice. We examine practice in a number of jurisdictions – notably, Ireland, New Zealand, and Oregon – where this is already done much better than in the UK, and we proposed ways of building further on that experience.

35. It is very welcome that one aspect of this approach – the use of citizens’ assemblies to explore the issues and make recommendations in advance of any decision to call a referendum – is already being pursued by the Scottish government in relation to the question of Scotland’s constitutional future.

36. Both the Independent Commission on Referendums and PACE have recommended that governments explore ways of using such mechanisms in the context of referendums. The Independent Commission proposed ‘that citizens’ assemblies should be piloted during future referendum campaigns, with an assembly held before the regulated referendum period begins’. PACE ‘encourages all member States to explore opportunities for citizen deliberation both prior to referendums and during the campaign, for instance through citizens’ assemblies’.

37. Given that the development of such approaches is still at an early stage, it is appropriate that the Bill should not require that they be used for future referendums

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16 Ibid., p. 79.
17 PACE, ‘Updating guidelines’, Resolution, para. 4.7.
in Scotland. Still, there is much to be said for introducing an enabling provision allowing Ministers to call a citizens’ assembly in the context of a referendum should they consider that desirable. Such an assembly could be asked, for example, to examine the arguments in the referendum and set out for their fellow citizens what issues they think need to be borne in mind or what questions they think still need to be answered. Including provision for such initiatives would help ensure that the opportunity the Bill creates for democratic deepening will not go unused.

The place of referendums in the process of decision-making

38. The Bill is silent as to the kinds of proposal that might be put to voters in a referendum or the status that referendum results might have in the overall process of decision-making.

39. It is common to distinguish between two types of referendum: pre- and post-legislative. Prelegislative referendums are referendums on a question of principle, where the details of how that principle might be applied have not yet been set down. The 1997 devolution referendums, the 2014 independence referendum, and the 2016 Brexit referendum all took this form. Postlegislative referendums are referendums on whether or not to bring a specific piece of law into force (or whether to repeal it). That was the form taken by the 1979 devolution referendums and the 2011 referendum on the Westminster voting system.

40. Most referendums around the democratic world are post-legislative. This gives voters the greatest possible clarity as to what they are voting on. By contrast, pre-legislative referendums can lead to uncertainty. The Brexit referendum is a clear case in point: voters were not (and could not be) offered clarity during the campaign as to what form Brexit might take; the UK parliament cannot know what form of Brexit voters wanted at the time or might now be willing to accept. The fact that voters were promised that the referendum result would be implemented has created a grave democratic quandary: on the one hand, failure to implement that result would break the promise; on the other hand, voters have not been allowed to make an informed choice as to whether to accept the form of Brexit that is actually on offer. There is no way out of this quandary that does not do great damage to the UK’s democracy. It would be folly for Scotland to repeat this mistake.

41. Any future decision to pursue Scottish independence would involve a pre-legislative referendum, and the dangers of becoming caught in this quandary are therefore very real. There is a serious danger that, following a Yes vote in such a referendum, Scottish politics would become mired in the same acrimony and gridlock as his consumed UK politics over the past three years. Avoiding such an outcome should be a high priority and requires careful thinking about process.

42. The dangers could be greatly reduced if the Scottish government produced a detailed plan for independence (as it did ahead of the 2014 vote) and if those plans were subject to rigorous public scrutiny through, for example, a citizens’ assembly. In the event of a vote for independence, this would allow the government to claim a mandate for its plan both before the Scottish Parliament and in the negotiations that would then ensue with the UK government.
43. But this would not remove the dangers if the deal agreed through the Scotland–UK negotiations differed in significant respects from the pre-referendum plan. In that case, the referendum result could not legitimately be regarded as binding Scottish voters to accept the outcome. With this kind of scenario in mind, the Independent Commission on Referendums proposed that, in some circumstances, a two-referendum process may be required. I will quote its recommendation in full, as the details are important:

Any legislation enabling a pre-legislative referendum should set out a process to be followed in the event of a vote for change.

If a government does not produce a detailed White Paper on the proposals for change, a second referendum would be triggered when the legislation or treaty implementing the result of the first referendum has passed through the relevant parliament or assembly.

In cases where a government does produce a White Paper detailing what form of change it expects to secure, the second referendum would be triggered only in the event that there is a ‘material adverse change’ in circumstances: that is, if the expectations set out in the government’s paper are not fulfilled. It would be for the parliament or assembly that called the referendum to determine whether such a ‘material adverse change’ had occurred.

The process to be followed should be specified in the legislation enabling the first referendum, so that the requirement for or possibility of a second referendum, and the reason for it, is clear to the electorate before the first vote takes place.20

44. While recognising that any such move would be politically sensitive, I recommend that the proposals of the Independent Commission on Referendums regarding two-referendum processes be followed. As I have argued elsewhere,21 it should not be thought that this would skew the result against independence. In the context of a two-referendum process, a majority for independence would be easier to win at the first vote, as many voters would think it worth while to see what deal might be on offer. That might build momentum for the second vote too, such that, overall, there is no predictable advantage for either side from adopting this approach. Would it would do is allow the people of Scotland to make a properly democratic choice and minimise the danger that the process becomes chaotic and disorderly.

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