The Referendums (Scotland) Bill written submission from The Electoral Management Board For Scotland (EMB)
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BACKGROUND

The Electoral Management Board for Scotland

The Electoral Management Board for Scotland (EMB) was established by the Local Electoral Administration (Scotland) Act 2011, which gave the Board “the general function of co-ordinating the administration of Local Government elections in Scotland.” The EMB’s prime focus is ensuring that the interests of the voter are kept at the centre of all electoral planning and administration. It operates through working closely with the community of electoral professionals in Scotland and seeks to work by consensus, wherever possible, rather than by formal direction. Leading and supporting Returning Officer (RO) and Electoral Registration Officer (ERO) colleagues the EMB assists the coordination of elections and referendums in Scotland to assist the delivery of results in which the voter can have full confidence.

While the EMB has a specific remit for local government elections, over recent years it has provided extensive guidance, support and and recommendations to the electoral community in Scotland for UK Parliamentary Elections, Scottish Parliament Elections, European Parliamentary Elections and other events. The previous Convener of the EMB was the Chief Counting Officer (CCO) for the Scottish Independence Referendum in 2014 delivering that event with the support of the Board and its officers. The Convener also led Scotland’s delivery of the European Parliamentary Elections in 2009, 2014 and 2019 as Regional Returning Officer. The Convener also delivered the AV Referendum in 2011 and the EU Referendum in 2016 as Regional Counting Officer (RCO) for both events.

Governments, politicians, the Electoral Commission, ROs and EROs now recognise the EMB as an expert professional body in Scotland integral to the successful delivery of electoral events through leadership and support of ROs, EROs and their teams.

The Referendums (Scotland) Bill

The Scottish Government introduced the Referendums (Scotland) Bill on 28 May 2019. The Bill proposes statutory provision for the holding of referendums throughout Scotland. It provides a legal framework for the holding of referendums on matters within the competence of the Scottish Parliament. The framework set out in the Bill covers technical aspects of holding referendums such as the franchise, rules for voting and how a poll should be conducted. It also provides for persons and organisations to become permitted participants and for the designation of official campaigns, sets out campaign rules and deals with the administration of, and limits upon, spending and donations to campaign participants. The rules are largely based on existing UK and Scottish legislation covering elections and referendums.
Finance and Constitution Committee: Call for Evidence

The Finance and Constitution Committee is the lead Committee for the Bill and to inform its scrutiny is seeking written evidence on all aspects of the Bill. In particular, the Committee is seeking views on:

- The policy objectives of the Bill;
- The regulatory framework;
- The conduct of polls and counts; and
- The campaign rules.

The EMB welcomes the opportunity to respond to the call for evidence. The material in this paper represents the views of the EMB and is the product of the Board’s own consideration of the topics and its engagement with ROs and EROs formally and informally since the introduction of the Bill.

The Board has also been asked to give oral evidence directly to the Committee on 18 September 2019 and looks forward to that session. It is expected that the written material offered in this paper would be the basis for discussions at that meeting, but the EMB representatives will be happy to discuss any aspect of the delivery of electoral events in the context of this new Bill.

The EMB would always be ready to meet Scottish Government officials or Ministers to discuss any of the points in this response more fully and to engage in broader discussions around the practical delivery of electoral events in Scotland.

In offering this written evidence, the EMB primarily addresses practical issues with respect to the delivery of electoral events, rather than issues of policy which are generally outwith its remit. However, where appropriate, the Board will make comment on the potential practical implications of the various policy positions set out in the Bill.

Earlier Scottish Government Consultation on a draft Referendum Bill

On 20 October 2016 the Scottish government launched a consultation on a draft Referendum Bill, inviting views on proposals for how a referendum on independence for Scotland would be run.

The EMB submitted a detailed response to that consultation which is included as Appendix 1 to this paper. Many of the points made in that response remain valid in any consideration of the issues raised in this current call for evidence on this draft Referendums (Scotland) Bill.
Before providing comments on the specific elements of the draft Referendums (Scotland) Bill there are a number of issues which the EMB considers to be important background context. These are:

- The need to rationalise and simplify electoral law;
- Scotland’s recent approach to electoral legislation;
- The experience of the 2014 Scottish Independence Referendum; and
- Best Practice with respect to the institutional governance of electoral events

These issues will only be touched on briefly here but the EMB would be happy to expand on the points more fully in the oral evidence session. However, they are key factors that inform the landscape in any consideration of new electoral legislation.

**The need to rationalise and simplify electoral law**

In the Law Commission’s recent interim report on their review of Electoral Law it was noted that “Electoral law in the UK has become complex, voluminous and fragmented. There is an enormous amount of primary and secondary legislative material governing elections and referendums.” This observation applies as much to the legislation that cover electoral law in Scotland, including the delivery of Referendums, as it does to the position in the rest of the UK.

For example, in considering referendums at a UK level, the Political Parties, Elections and Referendums Act 2000 (PPERA) sets out the rules underpinning the process for running a referendum, but not the rules for administration which accordingly require to be made through additional primary and secondary legislation. In Scotland the Scottish Independence Referendum Act 2013 and the Scottish Independence Referendum (Franchise) Act 2013 provided the rules and framework for the last Independence referendum. In effect therefore, each referendum requires a new bespoke suite of legislation.

The existence of various statutes and pieces of secondary legislation poses challenges for those delivering the events, for those campaigning and ultimately for the voters who must participate to provide a result. Inevitably, there is needless repetition, an increasing volume of material to master and a fresh set of rules and regulations to adopt and apply for each event.

The EMB has been a strong supporter of initiatives and proposals to consolidate and simplify the laws around electoral events. A well-conducted referendum, like any electoral event, must produce full confidence in the result. Such confidence is enhanced where the rules are consistent, clear and accessible, contributing to the transparency of the electoral process.
Rationalising existing laws to create a single, consistent framework governing referendums offers many benefits to the voter, to campaigners, the regulator and electoral administrators and to the extent that the draft Referendums (Scotland) Bill contributes to this objective, the EMB see this as a wholly positive policy direction.

**Scotland’s recent approach to electoral legislation**

The delivery of electoral events in Scotland in recent years can be understood in a number of ways, but one approach would be to see the experience of the combined Scottish Parliamentary Elections and Scottish Local Government Elections in 2007 as the source of a fresh approach to electoral administration.

On 3 May 2007, combined elections were held in Scotland, electing members to both the Scottish Parliament and all 32 of Scotland’s Councils. A number of specific problems were experienced at those elections including a large number of rejected ballots and issues with the electronic counting systems. Ron Gould CM was appointed to conduct an independent review with specific reference to the problems that had arisen during those electoral processes and his report in October 2007 initiated several developments in the institutional framework for the delivery of electoral events in Scotland. The creation of the EMB, the decoupling of elections and the adoption of daytime counts for local government elections can all be traced in large part to the recommendations of the Gould Report.

The policy direction indicated by the drafting of the Referendums (Scotland) Bill is also consistent with the recommendations of the Gould Report ("Gould"). Specifically, Gould proposed that a major initiative should be undertaken “to rationalise and consolidate the existing legislation”. In addition, he recommended that Scotland adopt a practice found in the electoral laws in other countries which provides “that electoral legislation cannot be applied to any election held within six months of the new provision coming into force.”

In legislating for electoral events in the years since Gould the Scottish Government has always sought to follow this “six-month rule” so that administrators, campaigners and electors have sufficient time to plan for the adoption of the new rules.

The EMB sees the policy direction of this new Bill to be consistent with the policy aims of Gould in these areas which the Board has supported; the Bill seeks to rationalise the fragmented set of legislation around referendums and in doing so should ensure that the rules are clear well in advance of any referendum.

**The experience of the 2014 Scottish Independence Referendum**

A referendum on Scottish Independence from the United Kingdom took place on Thursday 18 September 2014. Two pieces of legislation provided the rules and framework for the event, the Scottish Independence Referendum Act 2013 and the Scottish Independence Referendum (Franchise) Act 2013.
Under that legislation, the delivery of the referendum was the responsibility of the Chief Counting Officer, identified as the Convener of the EMB, working through 32 local Counting Officers who were the Returning Officers in each local authority. The CCO provided a suite of guidance and forms to support Counting Officers and EROs. The Electoral Commission regulated the campaigns, undertook public awareness activity and reported on the event.

The turnout of 84.6% was the highest ever recorded for an election or referendum in the United Kingdom since the introduction of universal suffrage in the UK. The result was immediately accepted by all campaigners.

The planning, infrastructure and delivery of the event were assessed very positively in subsequent reviews, with the current First Minister describing the 2014 event as achieving “the gold standard of democracy and fairness”. Others were similarly positive about the event, with the Electoral Commission concluding that “The referendum was well-run by the CCO and her CO and ERO colleagues because of careful planning (in part possible because of existing administrative structures in Scotland), sufficient resourcing and careful delivery of the administrative process through much hard work by all those involved.” The 2014 Referendum is still very recent and is widely viewed as a well-delivered event that was planned and run to the highest standards.

This draft Referendums (Scotland) Bill must take the lessons of 2014 in applying the key principles and approaches that made that event a success. These lessons include rules and structures defined in legislation, but the 2014 Referendum was also a well-resourced event in which the infrastructure for the event was in place in good time with access to adequate funds and expertise to ensure that the event was accessible, consistent, efficient and with structures to ensure high levels of integrity. The EMB would support the approach of this new Bill to the extent that it takes the lessons of 2014 both in terms of the rules and regulations but also the provision of adequate resource.

Best Practice with respect to the institutional governance of electoral events

In what is now often an environment of suspicion and an erosion of trust in the electoral process the entire institutional framework governing electoral events needs to be sound, transparent and designed to support and demonstrate the highest standards of integrity. There is increased scrutiny of electoral events with individual electors commenting on experiences at polls and with their postal votes. Comments spread quickly through social media and can grow into conspiracy theories which promote a public scepticism about the integrity of processes. Often these comments reveal an ignorance of the control systems that are built into the various processes. This scrutiny is in addition to the activity of campaigners, politicians, the media and official observers.
Confidence in the electoral systems requires a confidence in the institutional infrastructure and governance structures. Such an infrastructure requires the distinct roles of legislator, regulator and administrator need to be clearly defined and sharply demarcated. The rules need to be set by government; the administrators deliver the event according to those rules; and a regulator monitors the event and ensures that the rules are applied. This draft Bill anticipates such a division of roles and responsibilities and the EMB would support this policy direction.

The Policy Objectives of the Bill

The Bill provides a legal framework for the holding of referendums on matters that are within the competence of the Scottish Parliament. The Policy Memorandum explains that unlike the position for referendums held under Acts of the UK Parliament, there is no standing framework for devolved Scottish referendums. The Policy Memorandum states that the precedent for a standing framework of procedural rules for a referendum is Part 7 of the Political Parties, Elections and Referendums Act (PPERA). Since 2000, several UK referendums have been held under the framework set out in PPERA including the EU referendum in 2016.

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

While the EMB would not generally comment on policy, as these matters are outwith its remit, the EMB is supportive of the overall policy objectives of this Bill. As administrators of electoral events the EMB sees great value in a clear consistent framework that is in place well in advance of any referendum.

The Bill provides a legal framework for the holding of referendums on matters that are within the competence of the Scottish Parliament, establishing a standard framework for such referendums. Such a standing framework offers a series of benefits to voters, campaigners and electoral administrators. It would ensure that rules and structures are transparent, comprehensible and in place well in advance of the event. This would facilitate effective campaigns, comprehensive public awareness activities, well planned events and sound administrative management.

As noted in the introductory contextual comments above, electoral law in the UK has long been fragmented and piecemeal with new suites of primary and secondary legislation needed for each new event. The creation of a standard “off the shelf” template for referendums would be a positive development that the EMB would see as squarely in the interest of the voter. The ultimate objective is the delivery of a result in which the voter can have full confidence. Standard consistent rules that are well understood and in place ahead of each event support this objective. All understand the framework and infrastructure and the opportunity for government interference in the rules for partisan objectives should be eliminated.
For these reasons, the EMB would be supportive of the policy objective to put in place a generic framework for referendums that provides technical arrangements which can be applied for specific referendums.

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

Again, the EMB would not normally comment on matters of policy or the assessment of the quality of a Bill. However, the Counting Officers and Electoral Registration Officers (EROs) represented by the EMB have an explicit interest in holding electoral events that adhere to clear principles of good practice.

While not wishing to judge the quality of this Bill in achieving its aims the EMB would want to highlight some of the elements that contribute to the delivery of efficient referendums in which the voter can have full confidence. Specifically, the EMB would highlight the very recent experience of the 2014 Scottish Independence Referendum. That event was uniformly recognised by voters, campaigners, observers and the Electoral Commission as having been well-run and as meeting “the gold standard for democracy and fairness”.

To reflect good practice the Bill needs to learn from the lessons of 2014. The successful delivery of that event was predicated on a transparent set of rules, a clear institutional framework with well-demarcated roles, adequate resourcing for that infrastructure and clarity about rules and structures well in advance of the actual event. Importantly, good practice is not just about the framework of rules. That framework needs to be located within an infrastructure that has the resources to deliver the event.

Electoral events are complex projects made up of multiple workstreams that need to be coordinated to meet an immoveable deadline. Each separate event brings unique challenges such that public awareness activity and guidance material needs to be revised and tailored for each event.

While the creation of a standard template framework for referendums offers a series of benefits the EMB would also wish to draw attention to the “Gould principle”, which has been well accepted and applied since 2007, that the administrative framework of rules and regulations must still be in place at least six months ahead of any referendum. The Bill provides for Scottish Ministers to make regulations providing for the holding of a referendum, such regulations covering issues such as the date of the referendum, the form of the ballot paper and the referendum period. To achieve good practice the EMB would recommend that these regulations are made at least six months ahead of any referendum. Such a period would be needed to allow the CCO to put in place the resource need to manage and support the event, including resource to draft guidance.
THE REGULATORY FRAMEWORK

The Bill allows for Scottish Ministers to make regulations providing for the holding of a referendum throughout Scotland. The regulations must specify:

- the date on which the referendum will be held;
- the form of the ballot paper to be used, including the wording of the question or questions and the possible answers to it or them; and
- the referendum period.

The Electoral Commission must be consulted on these regulations before they are laid in the Parliament.

What are your views on these regulation-making powers?

Such regulations are integral to the administrative framework of the referendum. The generation of a template legislative framework for referendums is supported by the EMB as clearly in the interest of voters, campaigners and administrators. These additional regulations will be unique to each referendum. To meet the “Gould principle” these additional elements would need to be in place six months ahead of the date of the referendum.

With respect to these regulation-making powers the EMB would also highlight earlier comments regarding the need to promote and maintain a proper infrastructure for electoral events where there is clear demarcation between the role and remit of legislator, administrator and regulator. The administrator delivers the referendum according to the rules, which are made by the legislator, but the regulator needs to be able to comment to ensure that the structures and regulations support sound and well-run events.

Should the Bill provide for the possibility of citizen-initiative referendums?

This is a matter of policy which the EMB does not see as within its remit. COs and EROs will delivery referendum according to the rules as determined by Parliament. The nature of the initiation of such referendum is a matter for policy makers in Parliament.

THE CONDUCT OF POLLS AND COUNTS

The Bill sets out technical aspects of holding referendums and the Policy Memorandum explains that these are largely based on existing UK and Scottish
legislation covering elections and referendums. The Bill covers the franchise, rules for voting and how a poll should be conducted.

**What are your views on the Bill’s approach as to who is entitled to vote?**

The franchise is a matter of policy which the Board does not see as within its remit. As noted above the delivery of the Referendum in 2014 was widely regarded as being well planned and delivered and the model of the Scottish Independence Referendum (Franchise) Scotland Act 2013 should therefore be a source of useful lessons to government in considering the application of any particular franchise.

**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?**

The EMB has reviewed the provisions of the draft Bill and believes that in general they provide for referendum polls and counts to be run in an efficient, transparent and fair manner. The ultimate objective in any democratic referendum is that it delivers a result in which the voter can have full confidence. This requires a clear framework of rules and an adequately resourced infrastructure so that all voters can participate with the same information and that systems exist to assure the security and transparency of the polling and count processes.

Again, the Board would refer to the points made in its introductory comments. The principles for the delivery of successful electoral events in Scotland have been incorporated in legislation developed over many years. These principles include the basic democratic principles of a secret ballot, accessible polls, clear consistent information and transparent audit trails. In so far as the Bill reiterates the well-accepted, familiar and sound practices of electoral events in the UK – and in particular the principles and approach of the 2014 referendum – then it will be facilitating the delivery of efficient, transparent and fair referendums.

The conduct rules are covered in Sections 7-12 of the Bill and in Schedule 2, setting out the rules for the conduct of a referendum. These sections and the schedule almost completely mirror the process of the 2014 Independence Referendum through the provisions of the 2013 Act. Where changes are made they are updating processes to recognise what has become accepted standard practice such as the verification of 100% of postal vote identifiers. As noted elsewhere these rules allowed the delivery of an event in 2014 that was widely viewed as a benchmark for well-delivered referendums so the reiteration of the rules here should allow for the delivery of a similarly well-delivered future event.

As a caveat to that statement however, the EMB would wish to emphasise that successful electoral events are not solely the product of the rules and regulations in a Bill and its secondary legislation. They also rely on the various stakeholders – CCO, CO, EROs etc – being adequately resourced to allow them to deliver the event within the framework of rules and regulations.
THE CAMPAIGN RULES.

It also provides for persons and organisations to become permitted participants and for the designation of official campaigns, sets out campaign rules and deals with the administration of, and limits upon, spending and donations to campaign participants.

What are your views on whether the Bill will ensure that campaigns in support of a referendum outcome are conducted in a fair and transparent manner?

The CCO would have responsibility for the delivery of the referendum in terms of polling, postal voting and the count. The regulation of campaigners would be outwith the remit of the CCO for a future referendum on the basis of this draft bill, as it was in the 2014 Referendum.

The EMB therefore has no specific position with respect to the proposed changes to the rules on permissible participants. The CCO’s key concern would be a clarity with respect to the designation of permissible participants so that COs are able easily to engage with them as appropriate during the campaign then at events such as postal vote processing, polling and at the counts.

What are your views on the extent to which the provisions for franchise, conduct and campaigns within the Bill reflect lessons learned from previous referendums within Scotland and the UK?

The EMB believes that the provisions of the Bill – with respect to the elements on which it can most competently comment, primarily the conduct rules - do reflect to a degree the lessons from previous referendums across within both Scotland and the UK.

As noted in earlier answers, the EMB notes that the lessons of the 2014 Scottish Independence Referendum have been incorporated into this legislation. That event was broadly accepted as well-run, delivering a clear result that was accepted by all stakeholders. Also, as noted elsewhere in this evidence key to the success of the 2014 referendum was the adequate resourcing of the infrastructure – the work of CCO, COs and EROs. Provisions with respect to franchise, conduct and campaigns are clearly modelled on the 2014 legislation but as discussed below these can only succeed where there is an adequately funded infrastructure.

Beyond that, many of the lessons identified from the experience of recent referendums in Scotland and the UK are not primarily in the areas of conduct in which the EMB is directly involved. Both the 2014 Scottish Independence Referendum and the 2016 EU membership referendum prompted a number of comments and proposals particularly around the conduct of the campaign, the
opportunity for public deliberation of the issues at stake and the binding/advisory nature of the vote. These are areas outwith the scope of responsibility of the EMB.

The Board is concerned with the delivery of electoral events, according to the rules and in the interest of the vote. For both of those referendums there were few if any comments around the actual mechanics of delivery. As such the key lesson there is to repeat those successful structures and rules rather than introduce novel approaches.

THE FINANCIAL MEMORANDUM (FM) TO THE BILL

The Committee is also responsible for considering the Financial Memorandum (FM) to the Bill. The FM must set out the best estimates of the costs and savings to which the legislation would give rise, best estimates of the timescales over which such costs or savings would be expected to arise, and an indication of the margins of uncertainty in such estimates.

What are your views on whether the FM adequately identifies the financial implications of the Bill?

As a context for the EMB’s comments on the financial implications of the Bill and the way in which the FM addresses these the EMB would reiterate the points that were made in its response to the Scottish Government consultation on a draft Referendum Bill in 2016.

In that response it was noted that “governance structures alone do not provide for a sound, effective and accessible electoral event. Such an event requires adequate resource and sufficient time to plan for and procure the various elements that are needed in order to deliver such a major event which would undoubtedly be subject to intense scrutiny by electors, campaigners, the media and other stakeholders. Project Management, the collation of a national result, the drafting/publication of guidance and support materials and the promotion of a national count event are all workstreams that require sufficient funding and resource.” Those comments were originally made in reference to an independence referendum but apply equally to any referendum under this bill whatever the topic – scrutiny is always likely to be intense such that tailored guidance, support and public awareness activity are always going to be required.

In the delivery of the Scottish Independence Referendum in 2014 the resources required for these different workstreams were recognised and funded by the Scottish Government. This allowed the CCO, working closely with and through the EMB, to create sufficient specialist capacity to deliver all of these different workstreams.

A key workstream in 2014 was the drafting and publication of guidance to support the Counting Officers and Electoral Registration Officers coupled with a suite of forms and related materials. This was a specialist task that needed a clear
understanding of the rules and familiarity with the practical processes applied by Returning Officer teams.

The situation foreseen by this Referendum Bill anticipates the creation of template guidance that would be available for different referendums administered through this framework. The advantage of this approach is that it would allow generic guidance to be created for application to a range of future referendums. The EMB would be the appropriate body to draft such guidance. However as in 2014, the EMB would need to have at specialist resource allocation to ensure the necessary capacity to develop the guidance.

Also, the creation of guidance and indeed other materials would not be single “one-off” task. Even with generic guidance drafted, additional work would be needed to ensure guidance and forms were tailored to each specific future event. The media used for such guidance has also developed since 2014 from the static pdfs offered to more dynamic and interactive web-based materials. These would be easier to update and tailor to specific events but would also require new skills in order to create and maintain.

The EMB would also note that resource would also be required within the FM to ensure that all stakeholders involved in the delivery of a referendum were adequately resourced. This includes the costs of EROs. The FM implies that the current registration system with online registration and Individual Electoral Registration would limit the cost impact of additional registration activity ahead of a referendum through the automation of processes. However, any increase in registration activity, especially around postal vote or proxy vote processes would impose addition burdens on EROs and these would need to be adequately funded. Similarly, the EROs would need to undertake specific public awareness activity to support any referendum and this would need to be adequately resourced.

SUMMARY

As a summary of the issues offered in this written evidence the EMB would highlight the following points:

- The EMB’s comments are generally restricted to the conduct of the referendum; issues of policy and the regulation of the campaign are outwith its remit;
- The creation of a standard consistent template framework for referendums is supported as clearly in the interests of voters, campaigners and electoral administrators; the confusion and repetition flowing from multiple statutes and bespoke suites of legislation for each new referendum has been something that the electoral community has been calling to be addressed for many years;
- The conduct rules draw very heavily from the rules applied for both the Scottish Independence Referendum in 2014 and the EU Referendum in 2016, with minimal changes. Those events were viewed as fair and transparent, so
the reiteration of the rules is appropriate and should allow the delivery of sound, transparent and wellmanaged events; and

- A sound framework is necessary to the delivery of successful referendums but is not sufficient. In addition, there needs to be adequate resourcing of the infrastructure for each event. From the perspective of the EMB work around the drafting and supply of event-specific guidance, public awareness, and registration activity must all be adequately financed. Time is also a key resource. The “Gould principle” of the rules, regulations and guidance being in place at least 6 months ahead of any referendum must be allowed for.

APPENDIX 1: SCOTTISH GOVERNMENT CONSULTATION ON A DRAFT REFERENDUM BILL: A RESPONSE FROM THE ELECTORAL MANAGEMENT BOARD FOR SCOTLAND

INTRODUCTION / BACKGROUND

The Electoral Management Board for Scotland (EMB) was created by the Local Electoral Administration (Scotland) Act 2011, which gave the Board “the general function of coordinating the administration of Local Government elections in Scotland.” It has a key role in delivering major electoral events in Scotland. Through the Board, Returning Officers (ROs) and Electoral Registration Officers (EROs) drawn from across the country lead and support their colleagues to coordinate elections and referendums that produce results in which the voter can have full confidence.

In 2014 the EMB gave extensive support to its Convener, Mary Pitcaithly OBE, in her role as Chief Counting Officer (CCO) for the Scottish Independence Referendum, a role specifically designated to the Convener of the EMB by the Scottish Independence Referendum Act (2013).

This paper provides the EMB’s response to the Scottish Government’s consultation on a draft referendum bill, published on 20 October 2016. Each of the specific questions asked in the consultation paper are addressed with only a brief comment provided where the question concerns an area outwith the remit or experience of the EMB. This paper also makes some broader comments on the management of a future referendum and proposes that there would be value in a meeting to discuss some of these issues in more detail.

On the 24 November 2016 the Electoral Commission published their own response to the Scottish Government consultation. In general terms the EMB recognises and endorses the points made by Commission in their response.
THE SCOTTISH INDEPENDENCE REFERENDUM 2014

The Convener of the EMB had specific responsibilities as CCO for the delivery of the Scottish Independence Referendum in 2014. That Referendum on 18 September 2014 was the largest electoral event ever undertaken in Scotland in terms of its scale, the participation of the electors and its profile nationally and internationally. The electorate of 4,283,938 was Scotland’s largest ever. 792,621 of these voters, 18% of the electorate, were postal voters, more than at any previous poll.

The turnout for the referendum was unprecedented at 84.6% (3,623,344 votes counted), with 93.7% of postal voters returning their ballot papers (20% of all votes cast were postal votes.) There were very few rejected papers. Only 3,429 (0.095%) ballots were rejected at the count. There were no queues at Polling Places at the close of poll but polling was busy all day, with queues at 7am when the polls opened reflecting the engagement of the electorate. The final result was accepted by both campaigns and the delivery of the referendum was widely praised by campaigners, international observers and media. There were no challenges to the result or process.

The Electoral Commission’s Report on the Referendum, published in December 2014 recognised the role of the CCO, supported by the EMB and the broader electoral community in Scotland in the successful management of the referendum. The report noted that “The referendum was well-run by the CCO and her CO and ERO colleagues because of careful planning (in part possible because of existing administrative structures in Scotland), sufficient resourcing and careful delivery of the administrative process through much hard work by all those involved.”

As CCO for the Referendum the Convener of the EMB delivered the event as a carefully planned project with a clear governance structure, a number of discrete workstreams, a clear performance management framework and a robust set of contingency arrangements all designed to achieve a clear defined objective: that the Scottish Independence Referendum will deliver a result that will be trusted as accurate.

THE DRAFT REFERENDUM BILL – OVERALL STRUCTURES

In reviewing the draft referendum bill that has been offered for consultation, the EMB notes that it proposes a governance structure that repeats that applied in 2014. That is with the Convener of the EMB as CCO, the Electoral Commission taking responsibility for reporting and campaigners and the familiar arrangement of recognised Counting Officers (COs) and Electoral Registration Officers (EROs). These are well-established Scottish electoral structures which delivered the 2014 referendum so successfully.
QUESTION 1: WHAT ARE YOUR VIEWS ON THE PROPOSED ARRANGEMENTS FOR MANAGING THE REFERENDUM?

The consultation paper and draft Bill set out proposed arrangements for managing the referendum. These include the appointment of a Chief Counting Officer (CCO) and a specific role for the Electoral Commission in monitoring, regulating and reporting on the referendum.

While the selection of CCO for a referendum is a policy decision and outwith the direct remit of the EMB, the Board would note that this arrangement delivered a referendum in 2014 which was assessed as a successful event by all observers and by the Electoral Commission. As such the EMB would support these proposed management arrangements.

However, the EMB would also note that governance structures alone do not provide for a sound, effective and accessible electoral event. Such an event requires adequate resource and sufficient time to plan for and procure the various elements that are needed in order to deliver such a major event which would undoubtedly be subject to intense scrutiny by electors, campaigners, the media and other stakeholders. Project Management, the collation of a national result, the drafting/publication of guidance and support materials and the promotion of a national count event are all workstreams that require sufficient funding and resource.

QUESTION 2: WHAT ARE YOUR VIEWS ON THE PROPOSED TECHNICAL CHANGES TO POLLING AND COUNT ARRANGEMENTS?

The consultation paper proposes that the detailed rules governing the conduct of the poll would be based on those applying to the normal conduct of elections, subject to some specific technical changes.

The EMB endorses the Electoral Commission’s response to this question, agreeing that “the rules for the conduct of the referendum poll and count should be based on those applying to the conduct of elections. They should be updated to reflect changes to the conduct of elections which have been made since the 2014 referendum.”

Such consistency with normal regular electoral events offers a number of benefits primarily for the voter but also for those charged with planning and delivering the referendum. A consistency of approach in terms of timetable, polling, postal voting and count all help to avoid voter confusion and should promote the participation of an informed electorate. Electoral administrators would also benefit from an approach that, wherever possible, follows usual and familiar rules for the delivery of sound elections in Scotland, as it minimises the additional risk and work associated with novel processes.
QUESTION 3: WHAT ARE YOUR VIEWS ON THE PROPOSED CHANGES TO RULES ON PERMISSIBLE PARTICIPANTS?

The CCO would have responsibility for the delivery of the referendum in terms of polling, postal voting and the count. The regulation of campaigners would be outwith the remit of the CCO for a future referendum on the basis of this draft bill, as it was in the 2014 Referendum. The EMB therefore has no specific position with respect to the proposed changes to the rules on permissible participants.

In this area the CCO’s key concern would be a clarity with respect to the designation of permissible participants so that COs are able easily to engage with them as appropriate during the campaign at polling and at the counts.

The Board would however endorse the general comments of the Electoral Commission in this area as contained in their response of 24 November 2016.

QUESTION 4: WHAT ARE YOUR VIEWS ON THE PROPOSED CAMPAIGN RULES AND RULES ON SPENDING?

Again, the EMB has no specific observations with respect to the proposed campaign rules and spending rules. This area is outwith the remit and experience of the EMB and would be outwith the remit of the CCO.

The Board would however endorse the general comments of the Electoral Commission in this area as contained in their response of 24 November 2016, particularly noting the experience and challenges of the campaign in 2014 which has informed the rules proposed in the draft bill.

QUESTION 5: WHAT ARE YOUR VIEWS ON THE PROPOSED CHANGES TO THE RULES ON PERMISSIBLE PARTICIPANTS’ EXPENSES AND TRANSACTIONS BETWEEN QUALIFYING AND NON-QUALIFYING PERSONS?

Again, the EMB has no specific observations with respect to the proposed changes to the rules on permissible participants’ expenses and transactions between qualifying and nonqualifying persons. This area is outwith the remit and experience of the EMB and would be outwith the remit of the CCO.

The Board would however endorse the general comments of the Electoral Commission in this area as contained in their response of 24 November 2016, again being mindful of the experience of the 2014 referendum.

OTHER COMMENTS AND OBSERVATIONS

The CCO’s Approach to the Referendum

In 2014 the CCO appointed under the Scottish Independence Referendum Act (2013) was the Convener of the EMB. As such the CCO was embedded in and
familiar with the electoral structures of Scotland and those who play the key roles in supporting and delivering democracy in the country. She explicitly adopted an approach to that Referendum that had a clear objective: the Scottish Independence Referendum will deliver a result that will be trusted as accurate. This was supported by four explicit principles:

- **Accessibility** - there should be no barriers to any voter taking part;
- **Consistency** - voters should have the same experience wherever they are in Scotland;
- **Efficiency** - the referendum will be administered efficiently; and
- **Integrity** - the referendum will produce results that are accepted as accurate.

In working towards that objective and to those principles, the CCO supported by the EMB endeavoured to work on the basis of

- **Consensus**: where possible, building on experience and established relationships;
- **Guidance**: where needed, based on the familiar models usually provided by the Electoral Commission; and
- **Direction**: issued where appropriate and only following consultation with key stakeholders.

This concern with consistency, contingency and integrity was intended to promote a clear confidence in the process which would in turn promote a confidence in the result. If appointed as CCO for a future Referendum on Independence the Convener of the EMB would look to restate this objective, reiterate these principles and adopt the same overall approach again to promote confidence in the voters in what would again be a major event subject to extreme scrutiny and emotion.

**Timing of a Referendum**

There are no specific questions in the consultation with respect to the timing of a referendum. However, this is a fundamental concern in the delivery of a sound electoral event. The EMB would endorse the comments made by the Electoral Commission in their response to the consultation on the draft bill in terms of

- **Date** – ensuring that referendums are not normally be held on the same day as other significant or scheduled polls;
- **Legislation** – ensuring that legislation for future referendums (including any secondary legislation containing detailed rules for the administration of the referendum poll and regulatory controls) is clear at least six months before it is required to be implemented.

The first point helps to prevent voter confusion, promotes turnout and gives appropriate priority to the referendum and the issue it addresses, the second is a
practical concern that allows administrators carefully and comprehensively to plan and prepare for the event.

**Technical Issues with respect to Registration**

The EMB notes that the Electoral Registration Committee of the Scottish Assessors Association has made a separate response to this consultation. In it they welcome the overall proposals with respect to the management of a future referendum under this draft legislation. However they also highlight a number of technical issues particularly around registration which should be addressed in any final legislation. The EMB would endorse the position of the SAA in that the focus should be on applying a consistent set of registration rules to all electoral events including referendums. This would reduce voter confusion around rules and procedures and the danger of electors being unable to participate in a poll.

**Further discussion**

There are many lessons to be drawn from the experience of the 2014 Referendum and these should all inform the planning, resourcing and delivery of any future referendum. The Convener and other members of the EMB would be happy to meet with the Scottish Government to discuss any of those lessons in the context of this draft bill and the responses above to the specific questions in the consultation.