Referendums (Scotland) Bill written submission from the Institute for Government.

About the Institute for Government

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Key points

- We commend the bill’s intention to provide a standing regulatory framework for future referendums held on the authority of the Scottish Parliament, where previously there was none.
- The bill has been introduced in the context of the Scottish government’s commitment to a second independence referendum. Nonetheless, the committee and the Scottish Parliament should also take this as an opportunity to reflect on what other future referendums might be held under the terms of the bill.
- The bill is based on the UK’s regulatory framework for referendums and improves on it in a number of ways. It broadly reflects good practice, however, we believe there are several changes to the bill that should be considered. These include that:
  - clause 1 of the bill, which enables ministers to make provision for referendums by regulation, be removed and future referendums be enabled by primary, not secondary legislation
  - clause 7(3) of the bill, which disapplies the requirement for the Electoral Commission to publish a statement on the intelligibility of the referendum question if a question has previously been tested, be removed so that all proposed referendum questions are assessed by the Electoral Commission
  - the bill should specify a minimum referendum period.
- The committee may also want to consider whether the bill should include provision for public funding of designated campaign groups.

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

The overall policy objective of the bill—to provide a standing legal framework for holding referendums on matters within the devolved competence of the Scottish Parliament—is a good one. The UK’s regulatory framework, as set out in part 7 of the Political Parties, Elections and Referendums Act 2000 (PPERA), only applies to
referendums mandated by the UK Parliament. Therefore, there currently are no standing rules on the conduct or regulation of referendums that would automatically apply to a referendum mandated by the Scottish Parliament. It is right to seek to address this.

A regulatory framework is necessary to ensure that referendum campaigns are free, fair and can command widespread legitimacy. It would be possible to create or apply a regulatory framework for each referendum on a case-by-case basis, as was done for the 2014 referendum. However, standing legislation is preferable for the purposes of consistency and to prevent manipulation of the rules for specific referendums.

The political context in which the bill has been introduced—that in which the Scottish government intends to hold a further referendum on Scottish independence—must be acknowledged. Although we note that, based on the precedent of the 2014 independence referendum, for the status of a further referendum on the same subject to be put beyond legal doubt, a section 30 order would need to be agreed with the UK government.

This bill provides an opportunity for the committee, the Scottish Parliament and the public to reflect more widely on how referendums in Scotland might be used in future.

In the UK, a precedent has developed that referendums should be held on ‘constitutional’ issues such as devolution, membership of the European Union and voting reform, although other major constitutional changes (such as the Human Rights Act 1998 and House of Lords reform) have been made without recourse to referendums. In its 2010 report, the House of Lords Constitution Committee said that referendums were appropriate for deciding on “fundamental constitutional issues”\(^1\), a position that was endorsed by the House of Commons Public Administration and Constitutional Affairs Committee in their 2017 report.\(^2\)

Few “fundamental constitutional issues” are currently within the competence of the Scottish Parliament, the exception being electoral reform, which also requires a two-thirds majority vote in the Parliament. It may be that Scotland continues to follow the UK precedent, holding infrequent referendums on constitutional matters only. Alternatively, Scotland might decide to take a different approach, holding referendums on a wider range of issues such as ordinary questions of public policy as occurs in some other democracies, such as Switzerland.

In either case, it is important to establish principles to determine the circumstances in which referendums should be held—otherwise there is a risk that they will only be used when politically expedient, resulting in bad practice and posing a risk to trust in democracy.

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

Broadly speaking, the bill reflects good practice for holding referendums. The bill empowers the UK Electoral Commission to oversee the conduct of the poll and the regulation of campaigners; the Venice Commission’s *Code of Good Practice on Referendums* emphasises the importance of impartial oversight of referendums, and with the Electoral Commission’s experience of overseeing polls it appears best placed to fulfil this role.

The bill also improves on UK practice in some ways. It specifies the conduct rules for the poll in standing legislation; in the UK, provision is made for each individual referendum. This reflects a longstanding recommendation of the Electoral Commission which, it has claimed: “would remove ambiguity over the detailed rules for the conduct of referendums each time one of these polls is called.”

The bill also specifies the franchise for referendums, reflecting the franchise for Scottish Parliament elections. This will prevent questions about who has the right to vote being raised in the context of a specific referendum, and therefore avoid the risk that decisions on the franchise are perceived as having been taken to make a certain outcome more probable.

However, there are certain aspects of the bill which could be improved which we set out in this submission.

The provisions in the bill could be used to authorise a referendum on a question as fundamental as whether Scotland should remain part of the UK, should the power to do so be devolved. Therefore, it is imperative that the Scottish government avoid the perception that it is seeking to avoid full scrutiny of any future referendum proposal by intention, or as a consequence of a desire to fast-track the process. There are some clauses of the bill that could be perceived as such and are discussed in detail below. This could undermine the legitimacy of the legal basis of a future referendum, and therefore of the referendum itself.

*Question-testing exemption for questions that have been tested before*

We welcome the fact that the bill gives the Electoral Commission a statutory duty to consider the intelligibility of the question and publish a statement of its views. However, clause 7, subsection 3 of the bill removes that duty in cases where the Electoral Commission has previously recommended the wording of the question or published a statement of its views. As it stands, there is only one circumstance in which this exemption would apply—if the 2014 independence referendum question were put to voters again. This is one point on which the bill might be criticised because it might be perceived that the exemption was intended to avoid scrutiny of an independence referendum question.

Given the potentially divisive nature of referendums, it is of utmost importance that questions put to voters are perceived as fair and unbiased. If a question is tested

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multiple times, there will be more experience and more evidence for the Electoral Commission to draw on; past experience has demonstrated that previously tested questions can be further improved.

The wording of the question initially proposed in the 2015 European Union Referendum Bill was a yes/no question that had previously been recommended by the Electoral Commission. However, following further testing and concerns raised by campaigners about this format, the Electoral Commission recommended a further change of wording to instead offer voters the options of Leave or Remain.

Question testing usually takes just 12 weeks and has a small cost relative to the cost of holding a poll. We are not convinced previously tested questions should be exempt from further testing and recommend that this subsection is removed from the bill.

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

The regulation-making power in clause 1 of the bill deviates from standard UK practice. Referendums mandated by the UK Parliament require primary legislation which specifies the question and any deviations from the standard referendum period as set out in the PPERA, although the date of the poll is often specified in secondary legislation.

Under this bill, the minister would be able to determine the referendum question, the referendum period and the date of the poll using subordinate legislation. Although any draft regulations will need to be approved by the Scottish Parliament, the Parliament will have no opportunity to amend the regulations—only to accept or reject them. Using subordinate legislation means these provisions will not be subject to the same level of scrutiny as if they were determined through a full legislative process.

It is particularly problematic that there will be no opportunity for the Scottish Parliament to amend the proposed referendum question. Under the arrangements set out in the bill, approval of the principle of the referendum is bound up with the specific wording of the question—Members of the Scottish Parliament (MSPs) can only accept or reject both. This may pose difficulties for MSPs who believe that it is right that a referendum should be held, but object to the framing of the question proposed by the Scottish government; they may be forced to proceed with a question they believe is suboptimal, or risk having no referendum at all. We further note that using subordinate legislation, rather than an Act of the Scottish Parliament, to hold a referendum would mean there would be no statutory requirement for the Lord Advocate or the Presiding Officer of the Scottish Parliament to assess whether the proposed referendum would be within devolved legislative competence. Although the

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4 The recommendation was the result of Electoral Commission testing of a proposed referendum question in a 2013 private members’ bill.

5 The Institute for Government’s Parliamentary Monitor has highlighted the lack of scrutiny of subordinate legislation in Westminster. Although the Scottish procedure differs, similar arguments about its appropriate use given the curtailed process could also be made. See Lily A, White H, Haigh J, Parliamentary Monitor 2018, Institute for Government, September 2018, www.instituteforgovernment.org.uk/publications/parliamentary-monitor-2018
Delegated Powers and Law Reform Committee has a duty to consider whether an instrument raises “devolution issues”.

The Scottish government has said that the purpose of the regulation-making power is that it would provide more certainty on the timetable for a future referendum. But this is not an adequate justification for curtailing scrutiny. The regulation-making power should be removed from the bill, and primary legislation should provide the basis of any future referendums in Scotland, as has been the case for all previous UK-wide and Scottish referendums.

**Should the bill provide for the possibility of citizen-initiative referendums?**

Many other democracies such as Italy, Switzerland and New Zealand have provisions for citizen-initiated referendums, but practice varies greatly. If citizen-initiated referendums are to be used, it is important that they are carefully designed.

There are a number of considerations specific to these types of referendums that must be taken into account. These include: in what circumstances they can be triggered, e.g. to veto existing laws or to propose new ones; how they may be integrated into other democratic mechanisms, e.g. how will a proposal for change be developed; will Parliament consider them; and the appropriate signature thresholds for triggering them. If provision for citizen-initiated referendums were to be added to the bill, careful thought about all of these aspects would be needed.

**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 bill provides a comprehensive framework for the regulation of referendum campaigns to ensure that they are conducted in a fair and transparent manner. However, there are a number of points on which the bill deviates from the UK’s regulatory framework, which we believe deserve further consideration.

*Lack of minimum campaign period*

PPERA specifies a minimum regulated referendum period of 10 weeks, with at least four weeks required between the designation of lead campaigners and the date of the poll. In practice this period has often been significantly longer; the regulated referendum period for the 2014 independence referendum was 16 weeks.

Unlike PPERA, this bill contains no minimum time period between designation and polling day. This opens the possibility that this period of time could be very short; a particular risk as the referendum period would be specified in secondary, rather than primary, legislation.

If this were to happen, designated lead campaigners would have little, or no opportunity to put their case to the public. Essential democratic debate before voters make their choice would be stifled. A minimum campaign period should be included;
the Electoral Commission recommends at least 10 weeks between designation and polling day.\textsuperscript{6}

\textit{Lack of public funding for designated lead campaigners}

Unlike PPERA, the bill makes no provision for public funding for designated organisations. This is consistent with the 2014 independence referendum.

The absence of public funding did not cause any problems during the 2014 referendum as both designated campaign groups were able to attract significant donations. However, this bill would apply to any future referendum within the Scottish Parliament’s competence, some of which may not provoke the exceptional levels of public participation seen in the independence referendum.

It is foreseeable that in future referendums, designated campaign groups may find it more difficult to attract donations and therefore to put forward their arguments in a referendum debate. This would be of particular concern on a question where key actors—such as business, political parties and trade unions—were all aligned to one side of the debate. In this circumstance, there is a risk that the designated organisation on the opposing side may struggle to raise sufficient funds through donations to make its case to the public.

Therefore, the committee should consider whether provision for public funding for designated lead campaigners should be included in the bill.