Referendums (Scotland) Bill written submission from Theresa Reidy, Department of Government and Politics, University College Cork.

Introduction
The Referendums (Scotland) Bill is focused on three aspects of referendums:
1. The framework;
2. Conduct of polls and counts;
3. Campaign rules.

Drawing from research on the practice of referendums in OECD countries, and particularly Ireland, this note will focus on point three and the relevant questions as laid out in the call for evidence.

The policy memorandum accompanying the proposed legislation notes that the provisions have been informed, in part, by the legislative framework for the conduct of referendums in the UK. The UK has one of the most tightly regulated referendum campaign environments in the OECD as can been seen in figure one below. (see Reidy and Suiter, 2015 for a more extended discussion). It has an independent electoral commission which oversees referendums, extensive finance provisions and campaign participation regulations covering who can participate as well as broadcast rules.

Figure 1: Referendum Campaign Regulation Index

Source: Reidy and Suiter, 2015
However, investigative journalism and research conducted after the Brexit referendum raises notable questions about the de jure/de facto nature of these regulations (Cadwalladr, 2017; Geoghegan, 2019). And as with many other states, legal lacunae have been revealed in the digital sphere with some regulations lagging developments in social media. The need for greater transparency in digital advertising, sanctions and strategies to address violations in the digital sphere which are initiated outside of the jurisdiction of the state and standards in relation to micro-targeting of voters are just some of the areas of recent controversy. Consequently reviewing and consolidating the legal framework for the conduct of referendums in Scotland appears to be a timely exercise.

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

Procedures for the conduct of direct democracy votes have been set out by a range of international organisations. Perhaps the most comprehensive have been presented by the Venice Commission of the Council of Europe which adopted a *Code of Good Practice on Referendums* in 2007 and in 2008 the International Institute for Democracy and Electoral Assistance (IIDEA) published a handbook on *Direct Democracy*. The overarching objective of regulating the conduct of referendums emerges from a normative belief that regulation leads to greater equality, and thus enhanced democracy.

The principle objective of this legislation to provide an enduring and stable framework for the conduct of referendums in Scotland is an important one and is consistent with core standards set out both by IIDEA and the Council of Europe. The provisions reflect good practice in many areas. But there are a small number of further additions which could be considered.

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

Citizens’ initiative is an umbrella term which refers to a series of different types of votes that allow voters to propose new policies, laws or constitutional amendments or to repeal existing legislation which is already on the statute books or new legislation which has been proposed. For a fuller explanation see Reidy (2018).

Initiative tools are available in a growing number of countries and they can be implemented at subnational, national and supranational levels. They are powerful tools which confer a great deal of influence on voters. But they are complex tools and subject to potential manipulation.

Switzerland, Canada and the United States of America have long experience of initiative votes. The initiative procedure is popular with voters and is increasingly being incorporated into the democratic framework of states. Many post-Soviet countries included provisions for initiatives in their democratic constitutions and initiative vote procedures were introduced in the Netherlands in 2006 and in Finland in 2012. The
Lisbon Treaty brought in a pan EU initiative procedure and in 2018, citizens at a national citizens’ assembly in Ireland voted overwhelmingly to recommend the introduction of initiative votes there.

However, enthusiasm for initiative votes must be tempered by evidence which shows that turnout is often quite low at these votes, and countries which adopt procedures often witness extensive debates about how they affect the nature of representative democracy within the state and the potential for a tyranny of the majority to restrict the rights and protections of minority communities. While the voting rules that might be adopted at an initiative vote are often similar to those of constitutional referendums, the procedures for triggering and managing the initiative process are complex and should be subject to extensive debate and discussion before implementation (see Reidy, 2018 for a short summary of the key considerations).

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. 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 the Bill’s approach as to who is entitled to vote?

The alignment of franchise rules with those of other electoral contests is an important provision. It will aid administration of referendum polls for example by minimising the need for multiple voting registers. It should also reduce the potential for uncertainty among voters about their franchise rights and the procedures involved in acquiring and exercising those rights. Standardisation is a strength in these regards.

The policy memorandum notes that prisoner voting rights will be considered in the context of other forthcoming legislation. Additionally, external (Scottish permanent or temporary emigrants’) voting rights might also be considered as relevant and subject to later discussion in light of any potential changes in legislation in this area.

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 provisions are clear and compatible with international standards.

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?

Referendums frequently address contentious issues and as a consequence, campaigns can be vigorous and robust. The regulations outlined provide a framework
which should deliver transparency and equality at these types of referendums. Requirements for campaign participants to register and guidelines for their roles are valuable. Transparency requirements in relation to referendum advertisements are important but the legislation is largely silent on dealing with violations which may occur in digital spaces that are outside the legal remit of Scotland and/or the United Kingdom. This is a complex problem and one which has yet to be addressed satisfactorily in many states.

A scenario that should be considered is that some referendums deal with questions that are not contentious. Indeed, they may garner little public interest. For this reason, among others, it is important that the relevant election management body is empowered to provide detailed information on the referendum question that is being asked. Regulations as they are presently outlined provide only a modest role for the electoral commission in providing direct information on the referendum question to voters, and the provision of information is at the discretion of the commission. Some consideration should be given to strengthening this provision.

If there is not an active campaign on both sides of a question, or indeed where some campaign groups provide inaccurate or misleading information, this may present a real challenge for voters to acquire the knowledge necessary to make an informed decision.

The international experience shows that there are many benefits to be derived from a non-partisan participant, such as an electoral commission or a referendum commission, providing objective information on a referendum question. This information should be detailed, circulated to each household and also provided through traditional and social media channels. It is important that a spokesperson for the commission is able to participate in media interviews and social media discourses to answer factual questions. Information must be accurate but also readily available for voters.

The availability of objective, non-partisan information ensures that, in so far as practicable, the parameters of the debate are clear. Campaigners on either side may also use this objective information to counter false and misleading information. As concerns about mis-information grow, it is likely that the role of independent electoral commissions will become more crucial in providing comprehensive information which can be trusted by voters. The evidence from international research points to the provision of quality information as the most effective strategy to deal with misinformation, as fact checking and other techniques can be more limited in their impact than is sometimes considered (Fridkin, 2015; Graves, 2018).

When campaigns are not active on a particular referendum question, broadcast debates may be quite limited. The availability of objective information becomes crucial in this scenario and radio and television channels can use the information to stimulate interest and encourage participation on referendum day.

Drawing from the Irish case, the Referendum Commission provides objective information on the referendum question. This information makes clear what is likely to
be affected by the referendum decision and what will not be. It is important to note that the commission does not participate directly in, or referee, debates, it provides accessible and objective information. Research over many years has shown that the Referendum Commission is highly trusted by voters and that voters find its information to be objective and influential (Suiter and Reidy, 2013; Marsh et al., 2012). Renwick and Palese (2019) provide a detailed evaluation of the Irish Referendum Commission and indeed they recommend the New Zealand Commission as being especially effective in their work.

It is not absolutely clear that the proposed role for the independent electoral commission envisaged in the legislation would address the points raised here.

The financial regulations provided for in the proposed legislation include limits on expenditure, provisions on campaign donations and enforcement sanctions. These regulations are appropriate and align with the international codes of best practice.

One point that might be considered is that there is no intention to provide financial support to campaign participants. While this is unlikely to be strictly necessary in the case of highly politicized and contentious referendum questions, the regulatory framework presented is designed to be enduring so it should be effective under a range of referendum scenarios. Consideration should be given to the provision of modest funding for each of the Yes and No campaigns at every referendum to ensure that a minimum level of debate will take place and that financial considerations do not result in specific strands of opinion being excluded from public discourse.

References

Cadwalladr, C., 2017. ‘The great British Brexit robbery: how our democracy was hijacked’. The Guardian. 


