Written submission from the Scottish Parliamentary Corporate Body (SPCB)

1. The SPCB makes the following observations to contribute to the Committee’s scrutiny of the Referendums (Scotland) Bill (“the Bill”).

2. The SPCB’s interest is in the following sections of the Bill:

   (1) sections 30 and 31, concerning the SPCB’s duties in relation to expenditure incurred by the Electoral Commission under the Bill; and

   (2) paragraph 27(3)(b) of schedule 3 of the Bill (“paragraph 27(3)(b)”), concerning the restrictions on referendum-related publications by the SPCB or Scottish Parliament in the 28 days ending with the date of the referendum.

Electoral Commission’s expenditure (sections 30 and 31)

3. Section 30(1) of the Bill provides:

   “The SPCB must reimburse the Electoral Commission for any expenditure incurred by the Commission that is attributable to the carrying out of the Commission’s functions under this Act.”

4. Section 31 provides:

   “(1) The Electoral Commission must, before the start of each financial year—

   (a) prepare an estimate of the Commission’s expenditure for the year that is attributable to the carrying out of their functions under this Act, and

   (b) send the estimate to the SPCB for approval.

   (2) The Commission may, in the course of a financial year, prepare a revised estimate for the remainder of the year and send it to the SPCB for approval.”

5. Under the Bill, the SPCB’s obligation to pay whatever expenditure the Commission incurs under s. 30(1) is absolute: there is no link between the estimate which the SPCB has approved and its obligation to pay.

6. This is out of step with the SPCB’s equivalent duties to fund other independent bodies. For those other bodies, the SPCB is required to pay all expenses properly incurred by them in the performance of their functions. However, where the expenses incurred exceed or are otherwise not covered by a budget or a revised budget that has been approved by the SPCB, the SPCB has the power but not the obligation to pay those expenses. An example is found in section 21 of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010.

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1 section 21 of the Scottish Parliamentary Commissions and Commissioners etc. Act provides:

“(1) The Parliamentary corporation is to—

… (b) pay any expenses properly incurred by the Commissioner in the performance of the Commissioner’s functions…"
7. The SPCB considers that it would be appropriate for its funding duties in relation to the Electoral Commission in this Bill to be in line with its similar duties for the other officeholders it funds, and suggests the arrangements under s. 21 of the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 as a model for the Committee’s consideration.

SPCB publications during the 28 day pre-referendum period

8. The SPCB accepts and endorses the fundamental importance of pre-referendum restrictions to ensure that the SPCB adheres to its obligation of strict impartiality and does nothing in the immediate run-up to a referendum that might influence the outcome of the vote.

9. The SPCB appreciates that the Bill recognises the particular role of the Parliament by providing that the restriction does not apply to material published:

   “(i) in a report of a committee, the Business Bulletin or the Official Report of the Scottish Parliament, in accordance with the Parliament’s Standing Orders,

   (ii) on the Scottish Parliament official website, or

   (iii) in relation to any meeting, debate, discussion or other Parliamentary event authorised by the SPCB and held in accordance with the SPCB’s rules and policies applicable during the relevant period” (schedule 3, paragraph 27(3)).

10. The CIB is conscious that a balance has to be struck between having exemptions which enable parliamentary business activity to go ahead unimpeded, and yet not casting the exemptions so wide that they negate the purpose of the publication restrictions (fairness, ensuring impartiality and not influencing the outcome of a referendum).

11. The SPCB considers the spirit of paragraph 27(3)(b) to be to permit the normal functioning of parliamentary business during the relevant period and notes that this provision is in the same terms as the equivalent provision in the Scottish Independence Referendum Act 2013, schedule 4, paragraph 26(3)(b). However, the practicalities relating to the publication of normal parliamentary business have moved on since 2013, particularly as a result of developments in technology. Consequently, paragraph 27(3)(b) does not accurately reflect how parliamentary business currently functions in the respects set out below. The SPCB considers that it would be appropriate:

   (1) To bring paragraph 27(3)(b) up to date, and

   (2) to adjust paragraph 27(3)(b) or provide a mechanism to ensure that it is sufficiently future-proof to encompass future developments relating to the

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(2) Subsection (1)(b) does not require the Parliamentary corporation to pay any expenses incurred by the Commissioner which exceed or are otherwise not covered by a budget or, as the case may be, a revised budget approved under section 20.

(3) However, the Parliamentary corporation may pay those expenses.”
publication of normal parliamentary business which are within the spirit of the provision.

12. A future-proofing element or mechanism is particularly important given that this is a framework bill which could apply to referendums held many years in the future.

13. Accordingly, while the spirit of the provision is very much welcome, the SPCB makes the following observations on the detail.

*Website*

14. The restriction does not apply to material published “on the Scottish Parliament official website” (paragraph 27(3)(b)(ii)).

15. The SPCB now has more than one single official website. In addition to the main website, [www.parliament.scot](http://www.parliament.scot), the Parliament has separate official sites for Scottish Parliament TV “SPTV,” for Visit Parliament, for subject-specific SPICe blogs, and many other microsites. Whether this provision applies to the SPCB’s channels on Facebook and YouTube is also unclear.

16. A possible solution could simply be to say “a” as opposed to “the” Scottish Parliament official website in paragraph 27(3)(b)(ii), or to use alternative wording to achieve the result of exempting material published on all official Parliament websites which are controlled by the SPCB and are therefore maintained in accordance with the SPCB’s duty of impartiality.

*Broadcasting and streaming of parliamentary proceedings*

17. It is unclear whether the provision in paragraph 27(3)(b) leaves sufficient room for the broadcasting and streaming of parliamentary proceedings and the making available of that output on online platforms (both live and subsequently).

18. The SPCB currently streams a live, uninterrupted feed of all public Committee and Chamber business on the SPTV website, and the feed is held on the SPTV website in an accessible archive after the livestream is finished. Since 2012, the SPCB has also uploaded all public meetings of the Committees and the Chamber onto the Scottish Parliament’s YouTube channel. The YouTube channel provides longer term access to the broadcast output and is considered to be more accessible for users. The SPCB also live-feeds a selection of Committee and Chamber business (e.g. FMQs, key debates in the Chamber) on social media channels, currently Twitter and Facebook. The media which is streamed in this way is immediately archived and available on those platforms after the livestream is finished. The SPCB considers it a

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2 https://www.scottishparliament.tv/
3 https://www.visitparliament.scot/
4 For example, the SPICe European Union Hub: https://scottishparliamentinformationcentre.org/
5 https://www.facebook.com/scottishparliament
6 https://www.youtube.com/user/ScottishParl
7 @ScotParl
8 https://www.facebook.com/scottishparliament
core business activity to make Parliamentary proceedings available to the public in this way.

19. Some broadcast activity might fall within the exemption for “material published... in relation to any meeting, debate, discussion or other parliamentary event authorised by the SPCB and held in accordance with the SPCB’s rules and policies...” (paragraph 27(3)(b)(iii)). However, in relation to broadcasts of meetings of the Parliament and its committees, these meetings are not “authorised by the SPCB and held in accordance with the SPCB’s rules” (paragraph 27(3)(b)(iii)) but rather are held “in accordance with the Parliament’s Standing Orders” (so closer to paragraph 27(3)(b)(i)). The SPCB therefore invites the Committee to consider whether it would be appropriate to adjust paragraph 27(3)(b) to ensure that it covers broadcast output of parliamentary meetings etc. held in accordance with the Standing Orders.

Social media

20. The Bill makes no reference to social media, although it is presumably caught by the wide definition of “publish”\(^9\). Like many other public bodies which engage with the public, the SPCB’s use of social media has developed very significantly since 2013.

21. As one example among many, the SPCB currently publicises committee reports by tweeting a link to the report. Publishing the report itself in a traditional way would be permissible during the relevant period, even though it contained referendum-related material, by virtue of paragraph 27(3)(b)(i). A tweet containing a link to the report, however, may be neither material published in a report of the committee in accordance with the Parliament’s Standing Orders (paragraph 27(3)(b)(i)), nor material published in relation to a meeting etc. authorised and held in accordance with the SPCB’s rules and policies. While it may be possible to ensure compliance with paragraph 27(3)(b) by declining to tweet committee reports during the relevant period, doing so has become standard practice for committees and is a key plank in public engagement with the work of the Parliament.

22. The social media aspect arose most recently in relation to publications in the run-up to the EU referendum in 2016, in the context of the provision from which paragraph 27 originated: s. 125 of the Political Parties, Elections and Referendums Act 2000. The House of Commons Public Administration and Constitutional Affairs Committee (“PACAC”) considered this in its Report on Lessons Learned from the EU Referendum, 7 March 2017. PACAC noted that s. 125 was originally drafted some 16 years previously and since that time, campaigning and publishing have both become increasingly digital in nature.\(^10\) PACAC recommended that s. 125 be reviewed and amended so as to be better reflect the increasingly digital nature of our democracy.\(^11\)

23. Given how quickly the use of social media has developed in recent years it is reasonable to assume that this technology will continue to develop at speed, and

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\(^9\) schedule 3, paragraph 27(4)  
\(^10\) paragraph 68 of the report  
\(^11\) PACAC also reported on the status of online publications and what constitutes "specifically seeking access" to materials in respect of online material available from government websites.
therefore the SPCB suggests terminology future-proofing the publications provisions in the Bill in so far as possible to allow for this.

Material published online before the relevant period

24. Common to all three issues above is the additional question of whether it is lawful for material which is published online or on social media before the relevant period begins to remain online during that period.

25. This issue was also considered in the PACAC report on the EU referendum (mentioned above)\(^{12}\). In the context of this specific issue, the Electoral Commission has said: “discussions around s.125 have raised some complex legal issues and matters of principle, concerning whether the legislation is drafted in the best way to achieve the underlying purpose behind the provision”.\(^{13}\) Clarity on this issue in the Bill would be particularly welcome.

Summary

26. For the reasons above the SPCB submits that, in its view:

(1) it would be appropriate for sections 30 and 31 of the Bill, concerning the SPCB’s obligation to fund the Electoral Commission’s expenditure, to be aligned with the SPCB’s obligations in respect of the other officeholders it funds.

(2) It would be appropriate for paragraph 27(3)(b) of schedule 3 to the Bill (i) to be brought up to date, and (ii) to be adjusted to ensure, or to provide a mechanism to ensure that the exemption for publications in the normal course of parliamentary business is sufficiently future-proof to allow for future developments which are within the spirit of the provision.

27. The SPCB would be happy to provide further evidence if helpful.

\(^{12}\) paragraphs 62-69

\(^{13}\) Letter from the Electoral Commission to PACAC, 27 May 2016