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Stephen Tierney: Towards a Fair and Democratic Process? Regulating the Referendum on Scottish Independence



The referendum on independence is still a year away and already attention is focused on major substantive issues such as economic relations between an independent Scotland and the United Kingdom, and the ease or difficulty with which an independent Scotland would achieve membership of the European Union. What is often overlooked is that the credibility of the outcome of

the vote on 18 September 2014, whatever that might be, will depend greatly on the legitimacy of the referendum process itself.

Already the procedural rules for the referendum have been taking shape, with one bill now enacted and the other before the Scottish Parliament. The

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franchise rules for the referendum are set out in the [Scottish Independence Referendum \(Franchise\) Act](#) ('the Franchise Act'), introduced into the Scottish Parliament on 11 March, and enacted on 7 August. This Bill required to pass through the Scottish Parliament quickly to facilitate the registration of voters, particularly new voters since the franchise for the referendum is extended to 16 and 17 year olds. [The Scottish Independence Referendum Bill](#) ('the Referendum Bill') was introduced into the Parliament on 21 March 2013 and is expected to be passed in November.

The legislation was preceded by the [Edinburgh Agreement](#) signed by the United Kingdom and Scottish Governments on 15 October 2012. This, and the associated 'memorandum of agreement', provided that the referendum should have a clear legal base; be legislated for by the Scottish Parliament; be conducted so as to command the confidence of parliaments, governments and people; and deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect. This has been formalised by an [Order in Council](#) (per section 30 Scotland Act 1998) which devolves to the Scottish Parliament the competence to legislate for a referendum on independence which must be held before the end of 2014 (Order in Council, para 3).

In this post I will summarise some of the main points to come out of this legislation: the franchise rules for the referendum, the question that will be asked, the role for the Electoral Commission, the Referendum Period, and the parameters for other important process issues, in particular, the funding and expenditure rules.

Franchise

The general franchise demarcation set out in the Franchise Act is uncontroversial. The franchise for the referendum is to be the same as for Scottish Parliament elections and local government elections (Franchise Act, section 2), mirroring the franchise used in the Scottish devolution referendum in 1997. One consequence is that EU citizens who are resident in Scotland will be able to vote in the independence referendum.

One major difference from the 1997 franchise, however, is the provision in the Franchise Act extending the vote to those aged 16 and 17 (Franchise Act, section 2(1)(a)). This is a radical departure; never before have people under the age of 18 been entitled to vote in a major British election or referendum (the age of 18 as the threshold for UK elections is set out in the Representation of the People Act 1983, section 1(d)). Another notable provision of the Franchise Act excludes convicted persons from voting in the referendum if they are detained in a penal institution (Franchise Act,

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Section 3). This exclusion will apply even if the current ban on prisoners voting is modified in relation to elections prior to the date of the referendum. This has been a controversial topic in the United Kingdom ever since the European Court of Human Rights ruled that the blanket ban on prisoner voting in UK elections violated Article 3 of Protocol 1 of the European Convention on Human Rights (*Hirst v the United Kingdom (No 2)* [2005] ECHR 681). It would seem, however, that section 3 of the Franchise Act does not violate the Convention since A3P1 guarantees ‘the free expression of the opinion of the people in *the choice of the legislature*’ (emphasis added), which is [generally taken to refer exclusively to parliamentary elections and to exclude referendums](#).

The Question

The Referendum Bill contains a raft of important provisions which, *inter alia*, frame the question to be put to voters. The question as originally proposed by the Scottish Government has been changed. The formulation set out in the White Paper ‘Your Scotland, Your Referendum’, published in January 2012, was: ‘Do you agree that Scotland should be an independent country?’ Following conclusion of the Edinburgh Agreement, the Scottish Government decided to send its proposed question for review to the Electoral Commission. [The Commission in its subsequent report](#) took issue with the phrase ‘do you agree’, suggesting it could lead people to vote Yes. It therefore suggested a change to the question. This has been accepted by the Scottish Government and the new question is now contained in the Referendum Bill: ‘Should Scotland be an independent country?’ (Referendum Bill, section 1(2)).

Electoral Commission

The Referendum Bill also formalises a more general oversight role for the Electoral Commission. Among a number of statutory duties the Commission is given the task of promoting public awareness and understanding in Scotland about the referendum, the referendum question, and voting in the referendum (Referendum Bill, section 21). This is likely to be a challenging role, particularly in explaining the referendum question. There is already a heated debate between the UK and Scottish Governments as to what ‘independence’ will mean for Scotland. It is hard to see how the Electoral Commission can attempt to produce an objective account of a number of highly technical and fiercely contested issues, concerning not only international relations but also defence, economic relations, the question of a currency union, the disentanglement of the welfare state, national debt etc., particularly when so many features of the post-referendum landscape

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would be contingent upon negotiations between the two governments in the event of a majority Yes vote. And indeed in [evidence to the Committee](#) in May John McCormick, the Electoral Commissioner for Scotland, said that the Commission would ‘not seek to explain to voters what independence means’ but would offer information ‘aimed at ensuring that all eligible electors are registered and know how to cast their vote.’

Referendum Period

The Referendum Bill sets a regulated period of 16 weeks before the referendum within which the statutory regime of campaign regulation will take effect, including for example, limits on campaign expenditure (Referendum Bill, Schedule 4, Part 3). Since the referendum will still be the best part of a year away by the time the Referendum Bill is passed, this leaves a lengthy period within which the two main referendum campaigns will not be subject to these detailed provisions. Another set of regulations introduce what is known as a ‘purdah’ period. This is common in UK elections. Under PPERA there is to be no promotional activity by government, local authorities or public bodies during the 28 day ‘relevant period’ prior to an election poll. This provision is largely replicated in the Referendum Bill (section 10 and Schedule 4, para 25) in relation to the Scottish Government and a wide range of other public bodies which must not engage in promotional activity in the four weeks prior to the referendum. The UK Government also committed to be bound by equivalent restrictions in the Edinburgh Agreement (for comment on this by Deputy First Minister Nicola Sturgeon see Scottish Parliament Referendum (Scotland) Bill Committee, 13 June 2013, Official Report, cols 554 and 560).

Funding and Spending Rules

Efforts are made within the Referendum Bill to ensure equality of arms between the two campaign groups. Each side in the campaign can apply to the Electoral Commission to be appointed as one of two ‘Designated Organisations’, and both the Yes Scotland and Better Together campaign groups have intimated their respective intention to do so. One notable feature of the Referendum Bill is that there is to be no public funding for any designated organisation. This is a conscious departure from PPERA which does offer public funding for referendums. The decision not to fund the 2014 referendum was a political one taken by the Scottish Government. It has not resulted in any significant disagreement, presumably because both campaigns expect to be amply funded by private donors.

The Edinburgh Agreement (paras 24-29) also covers funding and expenditure issues. Building on this, the Referendum Bill contains detailed

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provisions on a range of funding issues. A 'Campaign Rules' provision creates a regulatory regime through which funding, spending and reporting will be administered (section 10 and Schedule 4). This is generally in line with standard PPERA rules. A 'Control of Donations' provision (Schedule 4, Part 5) indicates what types of donations are allowed and what constitutes a 'permissible donor' (Schedule 4, para 1(2)). Under these provisions an application must be made for this status. There are also reporting requirements which mean that reports on donations received will require to be prepared every four weeks during the referendum period (Schedule 4, para 41). These rules will all be overseen by the Electoral Commission.

Spending Limits

Within the Referendum Bill there are four categories of actor entitled to spend money during the campaign period: Designated Organisations (which can each spend up to £1,500,000) (Schedule 4, para 18(1)); political parties as 'permitted participants' (see below) (Schedule 4, para 18(1)); other 'permitted participants' who may spend up to £150,000 (Schedule 4, para 18(1)); and any other participants spending less than £10,000, which means they do not require to register as permitted participants.

Political parties as 'permitted participants' have a spending limit of either £3,000,000 multiplied by their percentage share of the vote in the Scottish Parliament election of 2011, or £150,000 (whichever is greater). By this formula the spending limits for political parties represented in the Scottish Parliament is as follows:

- Scottish National Party: £1,344,000
- Scottish Labour Party: £834,000
- Scottish Conservative & Unionist Party: £396,000
- Scottish Liberal Democrats: £201,000
- Scottish Green Party: £150,000

The Referendum Bill also defines 'campaign expenses'. These include campaign broadcasts, advertising, material addressed to voters, market research or canvassing, press conferences or media relations, transport, rallies, public meetings or other events. This also extends to notional expenses such as use of/sum of property, services or facilities etc. (Schedule 4, paras 9 &10). There are also detailed rules on reporting of expenditure (Referendum Bill, Schedule 4, paras. 20-24. The Electoral Commission has a power to issue guidance on the different kinds of expenses that qualify as campaign expenses: Schedule 4, para 10).

It seems that these rules will lead to a generally level playing field in terms of

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expenditure within the Regulatory Period. For example, the total spending limit for the two pro-independence parties (SNP and Greens) is almost equal to that for the three unionist parties – Labour, Conservative and Liberal Democrat. But given that these spending limits only apply in the 16 weeks before the referendum, this does leave the possibility of spending differentials between the two campaigns before this period begins. It should be observed, however, that these rules reflect the spending limits [recommended by the independent Electoral Commission](#).

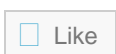
Finally, the Referendum Bill provides for civil sanctions (Schedule 6) and criminal offences (Schedule 7) in relation to various categories of electoral malpractice; and the Electoral Commission is given an important role in enforcing the former.

The Referendum Bill is approaching the end of its Stage 1 process and still has some way to go in its passage through the Scottish Parliament. But it is an instrument which, in building upon the Edinburgh Agreement principles, should set the conditions for a fair, lawful and democratic referendum. A significant task for the Electoral Commission, and for academic and other observers over the next year, will be to monitor how well the legislation in the Referendum Bill and Franchise Act is implemented and how responsibly all of those engaged in referendum campaigning behave. Compliance with the letter and the spirit of the legislation will be essential if the voting public is to have the best chance to participate in the referendum in an informed way and if the process as a whole is to live up to the aspirations of the Edinburgh Agreement.

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