

# **Towards a Democratic and Deliberative Referendum?: Analysing the Scottish Independence Referendum Bill and the Scottish Independence Referendum (Franchise) Bill**

Report by Stephen Tierney<sup>1</sup> and Silvia Suteu<sup>2</sup>

21 August 2013

## **Background**

This is the report of proceedings of a one day workshop organised by the Edinburgh Centre for Constitutional Law at Edinburgh Law School on 5 April 2013. It is part of a research project undertaken by Professor Stephen Tierney titled: ‘The Scottish Independence Referendum: A Democratic Audit’. As part of this project Professor Tierney is tracking the legislative process leading to a statute-based regulatory regime for the referendum scheduled for 2014.<sup>3</sup> The Workshop marks the beginning of this work. The project is funded by the ESRC’s major investment in Senior Research Fellowships to study: ‘the broad range of issues and policy areas affected by the Scotland independence debate and the longer term future of the UK and Scotland.’ Professor Stephen Tierney was awarded a fellowship for 12 months from March 2013.

In the course of the Workshop five presentations were offered by experts in United Kingdom referendum law and practice. The Workshop engaged in plenary discussion of these papers and of the draft Scottish Independence Referendum Bill and the Scottish Independence Referendum (Franchise) Bill. A wide range of participants took part, including civil servants from the Scottish Government, the United Kingdom Government, the Scottish Parliament, representatives of the two main campaign organisations (Yes Scotland and Better Together), a number of academics from law and political science, and representatives from civil society.

The event was conducted under the Chatham House rule; in this Report neither the identity nor the affiliation of any speaker, nor that of any other participant, is revealed.

## **Objective and Aims**

The Scottish Government has announced that the referendum on independence will take place on 18 September 2014. At the time of the Workshop the Scottish Independence Referendum (Franchise) Bill was approaching the end of Stage 1 and the Stage 1 Report was published a week later on 7 May.<sup>4</sup> The Scottish Independence Referendum Bill was introduced to Parliament on 21 March and its Stage 1 report is expected in September.

The Scottish Government in its Policy Memorandum which accompanied the Scottish Independence Referendum Bill declared the main policy objective of the referendum to be ‘a fair, open and truly democratic process which is conducted and regulated to the highest

---

<sup>1</sup> Professor of Constitutional Theory and Director, Edinburgh Centre for Constitutional Law.

<sup>2</sup> PhD student, University of Edinburgh.

<sup>3</sup> He is assisted in this work by two researchers: Katie Boyle, who trained as a solicitor with the Government Legal Service for Scotland and is now a part-time lecturer at the University of Limerick, and Silvia Suteu.

<sup>4</sup> [http://www.scottish.parliament.uk/S4\\_ReferendumScotlandBillCommittee/rbR-13-01w.pdf](http://www.scottish.parliament.uk/S4_ReferendumScotlandBillCommittee/rbR-13-01w.pdf)

international standards.’<sup>5</sup> This offers a benchmark with which to assess the draft legislation. The key objective of the Workshop was to analyse the two Referendum Bills against these criteria.

The legislation before the Scottish Parliament does indeed offer an opportunity to fashion a process that meets the highest democratic standards. The Scottish Government announced its intention to hold a referendum in January 2012. This meant a period of over two and half years within which to facilitate the informed deliberation by citizens over the choice they will face. The time available in advance of the referendum also allows the Scottish Parliament the occasion to perform its scrutinising function effectively in relation to the two Bills before it, in order to help create the legislative conditions for a fair and transparent process.

The specific aims of the Workshop were:

- To identify benchmarks for good referendum practice;
- To analyse the statutory framework underpinning the two Bills, drawing out the key elements of the draft legislation and assessing the content of both Bills in light of benchmarks for good practice;
- To discover any lessons for the Scottish process from other recent referendums held in the UK: the AV referendum and the Welsh referendum of 2011.

## **I. Benchmarks for Good Referendum Practice**

Referendums are paradoxical. On the one hand they are often presented as an ideal vehicle for democracy. The voters are called upon to speak as one unified people, deciding on an issue directly, without the mediation of politicians. But it is also the case that referendums are stigmatised as undemocratic because of the ways in which they have been abused in the past, in some cases being deployed by elites in patently manipulative ways. However, key findings of Stephen Tierney’s research show that objections to referendums stem principally from defects in practice and that these can be overcome by legal regulations and the instantiation of meaningful opportunities for both elite and popular deliberation within the process.<sup>6</sup> International standards now exist which offer guidance on good referendum practice. Most notably, the European Commission for Democracy through Law (Venice Commission) was established in 1990 to advise the Council of Europe on constitutional matters. A short set of guidelines particular to ‘constitutional referendums’ was issued by the Commission in July 2001 (‘the 2001 Guidelines’).<sup>7</sup> The subsequent Code of Good Practice on Referendums (‘the 2007 Code of Practice’), adopted in March 2007,<sup>8</sup> has become the main guide to good practice in referendum democracy within Europe, and illustrates the extent to which the Council of Europe views the referendum not as a self-standing or exceptional constitutional

---

<sup>5</sup> [http://www.scottish.parliament.uk/S4\\_Bills/Scottish%20Independence%20Referendum%20Bill/b25s4-introd-pm-rev.pdf](http://www.scottish.parliament.uk/S4_Bills/Scottish%20Independence%20Referendum%20Bill/b25s4-introd-pm-rev.pdf)

<sup>6</sup> S Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, (OUP, 2012).

<sup>7</sup> European Commission for Democracy Through Law (Venice Commission), ‘Guidelines for Constitutional Referendums at National Level’ (11 July 2001) COE Doc CDL-INF(2001)10, I.

<sup>8</sup> Venice Commission, ‘Code of Good Practice on Referendums’ Study No 371/2006 (20 January 2009) COE Doc CDL-AD(2007)008rev.

mechanism, but as an increasingly normalised form of electoral practice which should in general be governed by the same norms and principles applicable to representative elections.

Within political theory there are three main objections to referendums:

**i Elite control syndrome:** it is argued that referendums lend themselves by definition to elite control and hence to manipulation by the organisers of the referendum. This suggests that referendums tend towards unlimited, or inadequately limited, discretion open mainly to the executive to set the rules for the referendum, without much in the way of oversight or control by the legislature.

**ii Deliberation deficit:** the second main criticism of referendums is that there is an in-built tendency of the referendum process merely to aggregate pre-formed opinions rather than to foster meaningful deliberation. In other words, referendums engage the voters simply as ballot box fodder, leading them to vote unreflectively without real reflection or collective discussion of the issues.

**iii Majoritarian danger:** a third criticism of referendums is that they consolidate simple majoritarian decision-making at the expense of minority and individual interests. Of course, it is widely held that the point of democracy is not simply to give expression to the will of the majority, but also to protect individual rights, and where possible to arrive at decisions that enjoy the broadest levels of support (or at least acquiescence) possible.

In the opening presentation to the Workshop it was argued that each of these could be overcome by effective regulation and effective institutional design. It was also suggested that it is possible to identify certain principles which should also form the background to discussion of the Bills:

**Popular participation:** a referendum reminds us more than any other type of electoral event that the fundamental point of democracy is a determining role for the people. It seems that a key aim for any referendum statute should be to maximise popular participation not only in terms of voter turnout but also in terms of awareness-raising and engagement with the issues.

**Public reasoning:** another key question for any democratic referendum can be framed as follows: is the referendum conducted in such a way that it provides a meaningful environment for reflection and discussion? This is important first at the elite level: do we see referendum rules being framed in a deliberative way, facilitating a fair debate between elites over the substantive issues? And secondly, do we see it fostered at the level of the citizen in a meaningful attempt to engage individuals and civil society throughout the campaign? There is also a role here for civil society, and in particular the media. To what extent do private actors seek to inform and enlighten public debate, rather than take an overtly partisan line?

**Inclusion and parity of esteem:** is the referendum process inclusive? Are the franchise rules fair? Are efforts being made to maximise both voter registration and turn-out? Do ordinary citizens, including marginalised groups and minorities, feel they have a voice and are being listened to?

**Consent in collective decision-making:** does the referendum lead to a result that reflects public opinion? Can it be said to be, in the end, a satisfactory exercise in collective decision-making? Is the process fair and democratic, so that the result is one which even the losing side can agree to, if not with?

## II. Statutory Framework for the Referendum

Significantly, the power of the Scottish Government and Parliament to hold a referendum was contested and the ensuing period resulting in the Edinburgh Agreement and the s30 Order in Council<sup>9</sup> has led to a complex regime of regulation encompassing three distinct elements. First, the primary role of the Scottish Government and Scottish Parliament. The former put forward the two key bills: the Scottish Independence (Franchise) Bill ('the Franchise Bill') and the Scottish Independence Referendum Bill ('the Referendum Bill') which were introduced to the Scottish Parliament in, respectively, March and April of 2013. The second is the Scotland Act 1998 which sets out the powers of the Scottish Government and Scottish Parliament but which is itself silent on referendums and so, until the Edinburgh Agreement, left open to debate whether or not the Scottish Parliament could legislate to hold even a consultative referendum on independence. The third is a combination of the Edinburgh Agreement and the s30 Order in Council, with the latter, for the avoidance of any doubt, transferring any necessary powers to the Scottish Parliament to organise a referendum. Notably, the Political Parties, Elections and Referendums Act 2000 ('PPERA') only applies to referendums organised by the Westminster Parliament and so does not regulate the proposed referendum in Scotland. However, its terms have been an important benchmark for the Scottish Government in drafting the Franchise and Referendum Bills, and for the Scottish Parliament deliberating upon these. For example, the Scottish Government has already been willing to refer to the Electoral Commission for advice and to defer to its judgment.<sup>10</sup>

In relation to the referendum process, the Scottish Government has stated:

"The main objective is to provide for a referendum that is (and is seen to be) a fair, open and truly democratic process, conducted and regulated to the highest international standards. In particular the aim is to ensure public confidence in the result on a par with national elections."<sup>11</sup>

Bruce Crawford MSP, Convener of the Referendum Bill Committee, has further stated in relation to the Scottish Independence Referendum Bill:

"All members of this committee are acutely aware of the historic significance of this Bill. We want to ensure that the legislation when passed secures not only the support of Parliament, but commands the confidence of the Scottish people."<sup>12</sup>

This latter comment acts as a reminder that the referendum is also of great interest beyond the United Kingdom, both to academics and to political actors. Can a referendum process be

---

<sup>9</sup> Scotland Act 1998 (Modification of Schedule 5) Order 2013.

<sup>10</sup> Electoral Commission, 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question', 30 January 2013: [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/153691/Referendum-on-independence-for-Scotland-our-advice-on-referendum-question.pdf); 'Electoral Commission advice on spending limits for the referendum on independence for Scotland', published 30 January 2013: [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0004/153697/Report-on-spending-limits-for-the-referendum-on-independence-for-Scotland.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/153697/Report-on-spending-limits-for-the-referendum-on-independence-for-Scotland.pdf)

<sup>11</sup> Scottish Independence Referendum Bill - Business and Regulatory Impact Assessment, <http://www.scotland.gov.uk/Publications/2013/04/5007/1>

<sup>12</sup> 'Committee calls for evidence on Referendum Bill', 21 March 2103, <http://www.scottish.parliament.uk/newsandmediacentre/61454.asparticipant>

constructed in Scotland that commands the confidence of the Scottish people, regardless of their positions on the substantive issues at stake, and in doing so reflecting the highest international standards for democracy and deliberation? These are key questions for those designing referendums elsewhere on the most fundamental and often highly contested issues, and for those seeking to improve the levels of citizen engagement and deliberation in political processes.

The following areas covered by the two Bills were addressed during the Workshop:

- **Franchise**
- **Question**
- **Information to citizens/Participation by citizens**
- **Referendum Period**
- **Moratorium/Restriction on publication etc. of promotional material by central and local government etc.**
- **Funding and Spending rules**
- **Designated Organisations**
- **Disclosure and reporting rules**
- **Sanctions and Penalties**

### **Franchise**

Both governments agreed in the Edinburgh Agreement that it was for the Scottish Government to propose - and the Scottish Parliament to determine - what the franchise for a referendum on Scottish independence should be. The Referendum Bill (section 2) provides that details of who can vote in the referendum are as contained in the Franchise Bill. The latter, which is now enacted, contains detailed provisions and provides that in general the franchise for the referendum is the same as for Scottish Parliament elections and local government elections. This, it was argued, is uncontroversial since it mirrors 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, even though they will not be able to vote in elections to the UK Parliament which follow. One participant raised this issue and asked if it was fair. Another participant took the view that the general principle of the franchise for the referendum should be one of residence. People who live in Scotland should have the vote.

One major difference from the 1997 franchise is the provision in the Franchise Bill extending the vote to 16 and 17 year olds. One participant suggested that this is justified with reference to the principle of maximizing participation. Others questioned the rationale behind this extension and wanted to hear more by way of justification for this extension of the franchise.

Another notable provision is Section 3 of Franchise Bill which excludes convicted persons from voting for the period during which they are detained in a penal institution. This was

discussed during the Workshop in the context of human rights. One participant outlined how the European Convention on Human Rights Article 3 of Protocol 1, upon which the *Hirst (No.2)*<sup>13</sup> case turned, only ensures the free expression of the opinion of the people in the choice of the legislature. It was also mentioned that the Venice Commission permits limits to universal suffrage in referendums if these are proportionate and provided for by law. In particular, deprivation may be justified for ‘serious’ criminal offences.<sup>14</sup> Another relevant international instrument is the ICCPR. The Article 25 provision on voting includes referendums and provides that every citizen has the right to vote ‘without unreasonable restrictions’.

There was no further discussion of the lawfulness of this provision under the Scotland Act 1998. Different views were, however, expressed upon the policy of denying prisoners the vote. One participant commented that leaving aside the lawfulness of such a provision in the context of the ECHR, there is a good argument to say that persons convicted of a crime should lose electoral rights for a given period. But another participant asked, since this is possibly a once in a lifetime opportunity to change the nature of the state, is it right to exclude prisoners? Other views were expressed in support of both positions.

### **The Question**

The Referendum Bill contains the question to be set in the referendum:

- s. 1
  1. Referendum on Scottish independence
    - (1) A referendum is to be held in Scotland on a question about the independence of Scotland.
    - (2) The question is—  
— “Should Scotland be an independent country?”.

One participant analysed the question against two benchmarks. First, the Venice Commission Code of Good Practice provisions on question-setting. In particular, the guideline that:

‘The question put to the vote must be clear; it must not be misleading; it must not suggest an answer; electors must be informed of the effects of the referendum; voters must be able to answer the questions asked solely by yes, no or a blank vote.’<sup>15</sup>

And secondly, the commitment made within the Scottish Government’s Policy Memorandum itself where it stated that ‘the question posed on the ballot paper [must be] clear, intelligible and neutral’.

---

<sup>13</sup> *Hirst v the United Kingdom (No 2)* [2005] ECHR 681.

<sup>14</sup> European Commission for Democracy through Law (Venice Commission) Guidelines on the Holding of Referendums CDL-AD(2007)008rev, para 1, 1.1, d iv.

<sup>15</sup> *Ibid.* para 3, 3.1 c.

There was discussion of how the question was arrived at. The Scottish Government had originally proposed this question in a White Paper (Your Scotland, Your Referendum), published in January 2012: ‘Do you agree that Scotland should be an independent country?’. The story of how this was changed and the final version of the question, published in the Referendum Bill, was arrived at, is also the story of how independent oversight was brought into the process.

The regime for independent assessment of referendum questions in the UK is set out in s104 of PPERA. Where a bill is introduced into Parliament which provides for the holding of a referendum, and this bill specifies the wording of the referendum question, the Commission ‘shall consider the wording of the referendum question, and shall publish a statement of any views of the Commission as to the intelligibility of that question’.<sup>16</sup> Notably the Electoral Commission goes about its task of assessing intelligibility by addressing what people really understand, convening focus groups etc. to test the question empirically, assessing how well it is understood by people etc.<sup>17</sup>

However, initially the regulatory regime in relation to the independence referendum was not clear. PPERA does not apply to referendums organised by the Scottish Parliament. Despite the fact that PPERA does not regulate the Scottish process, and therefore the Electoral Commission has no legally guaranteed role in relation to the 2014 referendum, the Scottish Government decided to send its proposed question for review to the Electoral Commission. This process was concluded quickly and the Commission reported back suggesting a change to the question.<sup>18</sup> This has been accepted by the Scottish Government and this new question is the version contained in the Referendum Bill.

During discussion of the question and of how it was arrived at, no participant voiced the view that the question failed to meet the Venice Commission or Scottish Government criteria. One participant said that, following the Electoral Commission recommendation for the question, it is now exactly clear what voters are being asked to vote on. It was also noted by one participant that the question is also subject to scrutiny by the Scottish Parliament since it is published in the Bill.

Two other issues did arise however. First, it was asked if the right question had been arrived at. There was discussion of the two option model and whether including a third option of further devolution in the referendum would have given voters an option which a plurality of citizens seems to support. One participant questioned the question-framing process in this context, and in particular the issue of losers’ consent. It was argued that at the end of the referendum process the legitimacy of the question, and its binary nature, may be tested by the extent to which those on the losing side are prepared to assent to the outcome. Secondly, there was also discussion of the meaning of ‘independence’, a conversation that led to

---

<sup>16</sup> PPERA section 104(2).

<sup>17</sup> Electoral Commission, ‘Referendum on the UK Parliamentary Voting System: Report of views of the Electoral Commission on the proposed referendum question’, (The Electoral Commission 2010), [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0006/102696/PVSC-Bill-QA-Report.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/102696/PVSC-Bill-QA-Report.pdf); Electoral Commission, Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question, above.

<sup>18</sup> The Electoral Commission took the view that ‘based on our research and taking into account what we heard from people and organisations who submitted their views on the question, we consider that the proposed question is not neutral because the phrase ‘Do you agree ...?’ could lead people towards voting ‘yes’.’ They therefore recommended the following question: ‘Should Scotland be an independent country? Yes/No.’

broader discussion of citizen understanding of the question. These discussions are addressed in the next section below.

### **Information to citizens/Participation by citizens**

The Referendum Bill provides:

Section 21 Information for voters:

“The Electoral Commission must take such steps as they consider appropriate to promote public awareness and understanding in Scotland about—

- (a) the referendum,
- (b) the referendum question, and
- (c) voting in the referendum.”

The Scottish Parliament Referendum Bill Committee has analysed this provision. On 21 March 2013, John McCormick (Electoral Commissioner for Scotland) and Andy O’Neill (Head of Office Scotland for the Electoral Commission) provided evidence to the Bill Committee on this provision and fielded questions from Committee members on how to target young voters, such as those outside the education system; whether there should be an information campaign, such as through social media; and how to prevent apathy among minority groups.<sup>19</sup>

One participant at the Workshop expressed the view that there should be help for voters to understand what the choice before them actually means. Another participant linked the issue of citizen participation to the limited range of options now available to voters. He suggested that citizens can be engaged actively or passively in a referendum process. In a sense, an opportunity was missed to engage active participation because the multi-choice referendum is no longer on the table; a fuller range of options could have involved processes of deliberation, engaging directly with citizens to determine which options should have been included on the ballot and how these might be framed. Instead citizens are now left to engage in a more passive way: reacting to the choices put before them rather than helping to inform the framing of these choices. Another participant suggested that in this context academics have a role to help citizens understand these options, but the biggest role is for the two campaign groups to set out what they understand by independence and how a Yes vote would be given effect to. There is a real duty for political actors to make this clearer to voters and in particular for both the UK and Scottish governments to clarify how they intend to act in the event of a Yes vote, and also a No vote.

The Venice Commission requires that ‘the authorities must provide objective information’ and a balanced report of the viewpoints of both sides.<sup>20</sup> It was asked, is this a task for the Electoral Commission or is the provision of such information in a neutral way practically impossible? The role of the Electoral Commission was discussed. One participant asked if it was possible for law to regulate the content of the campaign literature and could this be tried.

Another participant argued that the Electoral Commission’s recommendations relating to the provision of information in its report to the Scottish Government<sup>21</sup> can be summarised as

---

<sup>19</sup> Scottish Parliament Referendum Bill Committee 7th Meeting 2013, Session 4, 21 March 2013. <http://www.scottish.parliament.uk/parliamentarybusiness/28862.asparticipant?r=8048&mode=pdf>

<sup>20</sup> Para 3.1 d.

<sup>21</sup> ‘Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question’.

follows: 1. The two sides should try as hard as possible to provide objective information and 2. They should try to come to an agreement/common ground on what the implications of a Yes vote would be.<sup>22</sup> The aim here is clearly that voters be provided with information that is not simply partisan propaganda. Another participant asked however whether expecting the two governments to agree on a description of a post-Yes vote process was realistic. Another asked why not, arguing that this would indeed be in the best interests of voters.

One contributor to the debate suggested that the issue is about preference formation, not just information. He did not think the moment of preference formation had passed because we do not know in detail what the Yes option means: we will not know until we have the White Paper which the Scottish Government intends to publish in November 2013, and indeed the picture would not be entirely clear until independence is in fact implemented should there be a Yes majority vote. We also will not know what No means until we know what the unionist parties intend to do following such a result. In short, there is and will remain a high level of indeterminacy. So even if one stage in the active deliberation process has passed, more are to come. Another participant also suggested that the big challenge ahead is to clarify what the implications of both a Yes or a No vote will be, and to some extent the post-referendum framework will remain reasonably unknowable. One reason for this is that each political party is working on different models of possible constitutional change. It was suggested that a No vote may well lead to a change in the status quo, but what that means is unknown.

Another participant pointed to the AV referendum and argued that the information provided by the Electoral Commission was inadequate and essentially pointed voters to the two designated organisations for more information, but he also conceded that it was difficult to see how a body like the Commission could go further.

The discussion turned to the provision of 'objective' information. One participant suggested it would be desirable to try to find some objective information for citizens and asked whether there is a role for an independent arbiter on many of the substantive issues at stake e.g. about membership of the EU. Here participants discussed the role of academics. It was pointed out that there are a range of current ESRC research projects looking at the various issues at stake, but how far can that research go in identifying what Yes/No mean? There are both legal and political aspects to so many of the issues that even a 'correct' legal reading of a particular issue may not be the full story in light of the accompanying political context.

Another participant suggested that popular participation is the key, engaging citizens to make sense of the issues for themselves and to get beyond a belief that the independence question comes down to a series of technical issues to be decided by remote experts. Citizens can be left feeling disempowered if the debate is all about competing experts who never agree. One participant mentioned the work of the Electoral Reform Society, especially around the aspects of deliberation and participation. People will start feeling alienated from the whole conversation, as with politics more generally if they do not feel engaged. People should be encouraged to think about their aspirations more broadly, and then challenge the campaigns to answer how those aspirations might be met in their future scenarios. This adds force to the Electoral Commission's recommendations that both campaigns should attempt to move beyond this, to agree on what the post-referendum terrain would look like, at least in respect of issues where this is achievable.

---

<sup>22</sup> 'Referendum on independence for Scotland: Advice of the Electoral Commission on the proposed referendum question', paras 5.41-5.42.

Others issues discussed included the length of the referendum period (112 days) and moratorium/purdah (28 days) and whether or not this is adequate time for citizens to reflect in an informed way and to access adequate information. It was also noted that the Referendum Bill contains safeguards in regulating the provision of information, e.g. publications must contain identity of promoter and publisher.

One participant raised the issue of the internet. The Web is one area which is very difficult for political actors to control. This is important because it offers an opportunity to get beyond bipartisanship, the narrowness of views within the print media in Scotland etc. Civil society organisations do much of their work through virtual forums, so it will be important to examine the extent to which the Internet is used and how people access information from it.

Finally, the point was made that there is a role for academics and those with other expertise to elucidate what the two campaigns are trying to say to the public.

### **Referendum Period**

The regulatory period for the referendum and the funding and spending rules were also discussed. One view was critical of the use of PPERA as a framework. It was argued that there is an opportunity, given the legislative freedom that the Scottish Parliament has been given, to set a regulatory framework that would overcome some of the defects of the PPERA model and, in doing so, better reflect international standards.

The same participant commented that the regulation of the referendum is largely irrelevant. The referendum was, at the time of the Workshop, still 18 months away and there are only 16 weeks for regulation. This raises the question whether a longer regulatory period is in fact needed. It was even suggested by another participant that the referendum campaign has already started and should be regulated as money is already being spent on it. Other participants also took the view that the 16 week referendum period is too short since, for the very long period before this commences, there is no regulatory control on spending by permitted participants. Another participant argued that since campaigning can begin before the regulatory period, this could lead to a lack of transparency and the possibility of foreign donations playing a significant role. It was also argued that there was no reason why regulation should not start the day after the Referendum Act comes into force, other than administrative convenience. But another participant noted that one reason why the 16 week period works is that this commences shortly after the European parliamentary elections and it would not be practical to have two regulated periods operating at the same time in relation to different electoral processes. It would in practice be very difficult to regulate the referendum before the 16 week date.

### **Moratorium/Restriction on publication etc. of promotional material by central and local government etc.**

Under PPERA there is to be no promotional activity by government, local authorities or public bodies during the 28 day 'relevant period' prior to the poll. This provision is largely replicated in the Referendum Bill (Schedule 4, Part 4, para 25) in relation to central and local government. One participant argued that the Referendum Bill provisions are narrower than PPERA and does not include charities or voluntary organisations resourced from public funds.

## **Funding and Spending rules**

### **Funding**

One notable feature of the Referendum Bill is that there is to be no public funding for the two Designated Organisations. This is a conscious departure from PPERA. One participant suggested that this decision was presumably taken because both campaigns can expect to be amply funded.

The Edinburgh Agreement contains references to funding and expenditure.<sup>23</sup> Building on this the Referendum Bill contains detailed provisions on a range of funding issues:

- ‘Campaign Rules’ (Section 10 and Schedule 4): these provisions create a regulatory regime through which funding, spending and reporting will be administered. The view was expressed by one speaker that this framework largely reflects what is already contained in PPERA and also reflects the Electoral Commission’s guidelines on this.
- ‘Control of Donations’ (Schedule 4, Part 5, paras 28-33): indicates what is allowed and what constitutes a ‘permissible donor’. Under these provisions an application must be made for this status.
- What is meant by donation? This is cast broadly to include property, services facilities and sponsorship. It does not include use of public rooms, a free mail shot for designated organisations, transmission of allocated campaign broadcasts, donations under £500, and the work of volunteers.
- Reporting requirement in relation to funding and transactions: Reports must be prepared for every 4 week period during the referendum period and must include details of donations received of more than £7,500 or a declaration that no donations exceeding this amount have been received (Schedule 4, para 41); similar reports are required for transactions over £7,500 (Schedule 4, para.57).

### **Spending Limits**

Within the Referendum Bill there are four categories of actors entitled to spend money during the campaign period: designated organisations; political parties as permitted participants; other permitted participants; and others spending less than £10,000 which means they do not require to register as permitted participants.

Each Designated Organisation, if registered as such, can spend £1,500,000 (Schedule 4, para 18(1)).

Permitted participants who are registered political parties and for whom constituency and regional votes were cast in the election for the Scottish Parliament held in 2011 will have a spending limit of either £3,000,000 multiplied by their percentage share of the vote in that 2011 election, or a minimum of £150,000. Other registered campaigners as permitted participants have a spending limit of £150,000 (Schedule 4, para 18(1)). By the formula for political parties the distribution between political parties represented in the Scottish Parliament is as follows:

Scottish National Party: £1,344,000

Scottish Labour Party: £834,000

---

<sup>23</sup> Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, Edinburgh, 15 October 2012, paras 24-29

Scottish Conservative & Unionist Party: £396,000  
Scottish Liberal Democrats: £201,000  
Scottish Green Party: £150,000

For others, the threshold for registration is the intention to spend more than £10,000 in the campaign (Schedule 4, para 17).

The Bill also defines ‘campaign expenses’ (see Schedule 4, paras 9&10). 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.

The Electoral Commission has a power to issue guidance on the different kinds of expenses that qualify as referendum expenses. Schedule 4, para 10 requires the Commission to provide a copy of this guidance to Scottish Ministers, who will lay a copy before the Scottish Parliament.

The regime of regulation and the spending limits themselves were discussed in the Workshop. One participant suggested that these safeguards go a considerable way to offset the danger of elite control, particularly by dispersing the power to participate in the legislative process and by dispersing the regulatory power in relation to overseeing the implementation and maintenance of the regulations.

One participant again raised the point that the spending limits only apply for the 16 weeks before the referendum which in his view limited their effectiveness. Another participant noted that unlike PPERA elections where the relevant elections are UK general elections, for the referendum, electoral support in the 2011 Scottish Parliament elections is being used. Clearly, depending on the elections referred to one would get a completely different level of thresholds. Another participant suggested that basing limits upon Scottish parliamentary elections was the most logical for a Scottish referendum. Another participant pointed out that the Electoral Commission has reviewed the proposed spending limits and their recommendations were very similar to those proposed by the Scottish Government. Another participant suggested that the key was a level playing field and the proposals go a considerable way to achieving this.

### **Designated Organisations**

The issue of designated organisations was discussed. One participant argued that a major issue from the Welsh referendum in 2011 was ‘gaming’. Here one campaign group, True Wales, in his view decided not to apply for designation in order to prevent the other campaign group from doing so and thereby from enjoying the benefits of designation.

Unlike PPERA which does not permit the Electoral Commission to designate only one campaign organisation, the Referendum Bill however allows for designation by one side alone (Referendum Bill Schedule 4, para 5(3)), thereby avoiding this problem.

## Disclosure and reporting rules

### *Reporting*

Some of the key provisions in the Referendum Bill are:

- The reporting of expenditure rules: set out in Schedule 4, paras. 20-24.
- The report (“return”) provisions require each permitted participant to provide a report to the Electoral Commission.
- Designated organisations which have spent over £250,000 are to submit an auditor’s report on their financial return to the Electoral Commission.
- Returns to the Commission and auditor’s reports are to be made within 6 months of the date when the referendum took place. Returns that do not need an auditor’s report are to be made within 3 months.
- Those spending less than £10,000 do not need to submit a return but must submit a declaration within 3 months.
- The Commission must make a copy of the returns available for public inspection.

It was observed by one participant that there is no disclosure requirement prior to a referendum under PPERA and that this is different from general elections where, particularly in the 4 weeks before elections, weekly disclosure is required. It was argued that this was an inadequate model of regulation. In particular, citizens should be informed ahead of the referendum who is donating to which campaign. One participant argued that funding transparency is not there if you only have to report *after* the poll closes.

Another participant connected with one of the referendum campaigns said both campaign organisations intend for there to be disclosure before the polls. Another participant also stated that both campaigns have confirmed that they will voluntarily make available information on donations received.

The participant who criticised the disclosure rules also expressed the view that a disclosure threshold of £10000 was much too high. This is significantly higher than a number of international comparators. This participant took the view that overall international standards are completely disregarded and that the process is path dependent on a sub-standard UK regime (PPERA).

It was also suggested that foreign donations are more complicated and potentially problematic than the Bill would seem to suggest. The Electoral Commission has also asked for legislative clarification on what exactly would count as a foreign donation. There was also discussion of spending outside of Scotland and how this could possibly be regulated, for example, spending on websites based overseas.

Others challenged these views. It was asked for example whether any closer regulation of donations would be too administratively onerous to be practicable. Another participant thought that finding people to be voluntary treasurers in the framework of PPERA would be difficult. But the former participant responded by suggesting that an organisation could easily report on £500 donations; there is training guidance for political parties on this. The only difference for disclosure purposes is that you have to also tell the Electoral Commission.

There was also a debate about the principle of anonymous donations. One participant noted that one view is that donations should be anonymous and that transparency breaches privacy. Also there could be a chilling-effect with people afraid to make donations if these are to be

made public. Another participant suggested that many people in the Scottish context seem to be reluctant to stick their heads out because they do not want to be so obviously on the wrong side once the result has been announced. But the counterview was that transparency is intended to improve public participation. Another participant opined that if you want to participate in public life to such an extent that your donations could have a large impact in your community (for example, funding hundreds of thousands of leaflets), this constitutes an intervention into the democratic contest which could have a determinative effect. Such a public engagement is not the same as a conversation between two people. In a democratic world, you should have the courage of your convictions and there should be transparency.

One participant noted that these draft provisions on funding and spending have been reviewed and approved by the Electoral Commission. However, it is also clear that we will need to see how these rules work in practice and how well the campaigns voluntarily reveal donations etc.

### **Sanctions and Penalties**

The Bill provides for these:

- Schedule 6 – Civil sanctions:
  - fixed monetary penalties, discretionary requirements and stop notices for campaign offences. These are imposed by the Electoral Commission (on a test of beyond reasonable doubt). The Electoral Commission must give notice and provide opportunity to make representations. There is also scope for appeal to the Sheriff Court.
- Schedule 7 – Offences related to voting
  - These include: personation, imitation poll cards, breach of official duty, tampering with ballot papers, secrecy, publication of exit polls, paying to display support, ‘treating’, undue influence, bribery, and corrupt and illegal practices (criminal offences subject to fine, not imprisonment).
  - There is again much taken from PPERA here although there has been a revision of the language used to designate these offences.
- Section 13 – General offences
- Other sanctions are dispersed throughout the bill

## **III. Lessons for the Scottish process from other recent referendums held in the UK**

### **Welsh referendum 2011**

A paper was presented on the Welsh referendum in 2011. This paper, in the view of the speaker, served to highlight the differences between this referendum and the Scottish process. The Welsh process it was argued:

- was a referendum on a constitutionally arcane issue, set up for party management reasons, rather than reasons of principle.

- the organisation was shambolic/last minute (Electoral Commission announced that it could not appoint designated lead campaigns on 28 January 2011, the referendum was on 3 March).
- the campaign was very one-sided and had almost no impact/effect (the No campaign could not raise more than £5,000 across Wales).
- the result was a foregone conclusion (Yes 63.5%).
- the turnout was very low (36.5%).

As noted above, the Electoral Commission in Wales ended up not designating any groups as lead campaigns. This had an impact in terms of information to the public. In the speaker's view the Electoral Commission was however reluctant to offer information itself because it was concerned that this would compromise its neutrality.

The speaker took the view that lessons for Scotland are few and far between. The context is clearly very different. Scotland 2014 will focus on an issue that is clearly substantive and hugely consequential. In fact there has also been very little reflection on the Welsh referendum after the fact, and this is also true about the AV referendum. So, not many lessons can be drawn for the Scottish process from the Welsh experience.

### **AV referendum 2011**

One participant compared the Scottish referendum process favourably to that for the AV referendum. It was argued that the decision to hold the AV referendum was a bargain born of political expediency. The AV was a little-loved form of electoral reform and there was little in the way of broader consultation about this.

Secondly, the legislation was an 'extraordinary form of double-lock'. Unless the Order in Council giving effect to new constituency boundaries were made to reduce the size of the House of Commons, the electoral system would not have changed even if there had been a positive outcome of the referendum (Parliamentary Voting System and Constituencies Act section 8). Also, the information campaign was short and ineffective and the overall process was too quick.

One other notable feature of the AV referendum is that it is an example of a post-legislative referendum, since all details of the AV system had already been decided. Again, therefore, it was suggested that it was of limited precedential value for the Scottish referendum.

### **Media/civil society**

Another point was raised about the role of the media in the referendum campaign. It was pointed out that everything which will appear in the media, other than advertising, will be unregulated, and as such the issue of partisanship *is* significant. One participant explained that she thought that the problem of lack of objective information was not just a problem about the referendum, but also about politics and the media more broadly, with high levels of distrust among the public as to the truth of information they are being given. Another participant offered the view that the 'chilling effect' seems to be reversed now: we used to be concerned only with the government silencing the media, now the media by distorting the message can make it difficult for the public to get an impartial account of what political actors are saying. This also dissuades experts from speaking since people are often

immediately pigeon-holed as being in favour of one side or the other, and what they say is often oversimplified or distorted.

The duty of the BBC to offer equal air-time to both campaigns was discussed and considered to be very important but difficult to do given that in the lead up to the referendum so much of political discourse will involve referendum issues.

#### **IV. Miscellaneous Matters**

A final paper offered some overall reflections. The speaker thought firstly that we need to be wary of comparative work. Which comparators are relevant and what methods should we use? He also said that while acknowledging the extent to which the process should be regulated, trying to regulate further what people say about the campaign and what they predict about the post-referendum landscape can only be extraordinarily elusive. Perhaps it would be better not to try to tie down what is meant by the different options but just leave it to the voters to make up their own minds.

It was also mentioned that we should not forget the potential role for the courts. The possibility of judicial review is always there. However, another participant said that it would be regrettable were the courts to be too involved; the process should be about politics. A key aim of the Edinburgh Agreement is to put all legal concerns to one side and to arrive at an agreed political process. Another participant noted that looking for example to Spain and the difficulties in reaching any agreement on the right of Catalan nationalists to hold a referendum, the Scottish process may well be seen to be highly legitimate.

There is also the issue of constitutional process as whole. It was asked what distinguishes this referendum process on high constitutional matters from ordinary politics which we encounter in other electoral processes. One difference is that a major referendum can have abrupt consequences, and for citizens the risk of getting things wrong is significant. So constitutional matters need to be dealt with carefully and this is why the process is so important.

It was also pointed out that previous referendums held in the UK have in a number of cases been characterised by low turnout, with the exception of Northern Ireland 1998, and indeed there has been no PPERA referendum with a turnout over 50%. A number of participants suggested that the Scottish 2014 referendum will be very different: the issue has high salience and on that basis a high turnout can be expected; in this sense it is likely to be unprecedented. For all of these reasons the legitimacy of the process is crucial.

#### **V. Assessing the Bills**

The process which is being designed in the Franchise and Referendum Bills can be assessed against the four principles set out above.

**Popular participation:** do the Bills contain adequate provision to help maximise popular participation, not only in terms of voter turnout but also by way of awareness-raising and engagement with the issues?

The Franchise Bill has been passed well ahead of the referendum with a key aim being to maximise voter registration. We will need to wait to see how well this is achieved.

There are different views on extending the franchise to younger voters. One argument in its favour is that it should serve to increase participation. Another issue is the exclusion of those detained in penal institutions from voting. Those who object to this do so on basis of the purported right of these people to participate, particularly in such a fundamental decision; others argue that they have forfeited this right by committing serious offences.

Another important area of the Referendum Bill concerns how citizens are provided with information and the extent to which this is objective and informative. Again we will wait to see how the Electoral Commission performs its statutory role, but also how well the two campaign groups, political parties, civil society organisations and media serve to enlighten rather than distort public debate.

Technical issues are also important in terms of encouraging and facilitating turnout, making the ballot paper intelligible, making voting stations both conveniently located and fully accessible. Again this can be assessed as the administrative arrangements are put in place.

The principle of popular participation reminds us that the fundamental point of democracy is a determining role for the people. Each of the provisions discussed above, and how they are implemented, will be central to any final assessment of whether or not the 2014 referendum an event that gives the Scottish people a meaningful role in determining their own future.

**Public reasoning:** will the referendum process provide a meaningful environment for reflection and discussion?

A central issue here is the question. In many referendums the question is the subject of much controversy. It would appear that this is not the case in advance of the 2014 referendum since the wording of the question has been approved by the Electoral Commission and has been accepted by both campaigns.

There is a lingering issue about the inclusion of only two options on the ballot paper. But this was agreed in the Edinburgh Agreement. It remains to be seen if strong feelings about this re-emerge after the referendum. This can be tested by measuring losers' assent to the result and perhaps also the appetite for any renewed process of constitutional change.

Another important issue is how well people understand the options before them. The Electoral Commission has called for both governments to explain what process they anticipate following a Yes vote. Certainly any measures to explain what would happen following a Yes or No majority vote would seem to be of the highest importance in helping voters deliberate about the options before them.

**Inclusion and parity of esteem:** Is the process inclusive? This question takes on particular importance in divided societies. Scotland is not a divided society but a sense of inclusion will still be central to maximisation of losers' assent. The general franchise rule which is the same as for Scottish Parliament and local government elections would seem to ensure satisfaction here. There do not seem to be any particular issues raised about including particular minorities.

Funding and spending rules are central here. There can be a danger in referendums if one side significantly outspends the other that the latter will feel marginalised and may even question the legitimacy of the result, particularly if it is close. The Referendum Bill sets out detailed funding and spending rules covering donation, disclosure, reporting and spending limits and these have been approved by the Electoral Commission. There was a general sense in the

Workshop that these rules should help ensure some kind of level playing field in terms of expenditure. There was, however, dissatisfaction voiced in the Workshop particularly over the disclosure arrangements. There is considerable onus on both sides to report on donations etc. fully and in a timely fashion. We will again require to assess how well these various provisions work in practice. Another issue will be how much is spent before the 16 week period begins and whether there are major differentials between the two campaigns. Again we will need to assess this both closer to and after the referendum to see whether the funding and spending rules have worked well to prevent a distortion of the debate or a marginalisation of one of the two campaigns.

**Consent and collective decision-making:** The referendum will be decided by a simple majority. This could of course lead to a narrow result with one side achieving a small majority percentage above 50%. A fair, efficient, professional and transparent process is therefore of great importance to ensure the broadest acceptance of the result whatever that might be. The general sense of the Workshop was that the draft legislative regime offers an opportunity for such a process, but much will depend upon the goodwill of the two campaigns, the responsible behaviour of the media and civil society, and the effective oversight function of the Electoral Commission and others.