

# SCOTTISH INDEPENDENCE REFERENDUM ACT 2013

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## EXPLANATORY NOTES

### COMMENTARY

#### *Monitoring and securing compliance with the campaign rules*

#### *Schedule 5: Campaign rules: investigatory powers of the Electoral Commission*

231. [Schedule 5](#), introduced by section 12(4), contains the investigatory powers afforded to the Electoral Commission in line with their powers under the Political Parties, Elections and Referendums Act 2000 to allow them to monitor and enforce compliance with the campaign rules.
232. [Paragraph 1](#) allows the Commission, after issuing a ‘disclosure notice’, to require a permitted participant or officer of a permitted participant, to produce or provide documents or an explanation in relation to income or expenditure where reasonably required by the Commission to carry out their functions. Sub-paragraph (4) obliges the person to comply with a requirement set out in a disclosure notice within a reasonable time.
233. [Paragraph 2](#) enables a person authorised by the Commission to enter premises at any reasonable time and inspect relevant documentation, to enable the Commission to carry out their functions. This power can only be exercised after the Commission have obtained a warrant from a sheriff or justice of the peace authorising entry of the specified premises and is restricted so that it can only be used in relation to permitted participants.
234. An inspection warrant will be valid for one month from the day on which it is issued and may not be used in connection with an investigation by the Commission of a suspected breach or offence.
235. [Paragraph 3](#) provides that where the Commission have reasonable grounds for suspecting that an offence under schedule 4 has been committed they may issue a notice to a person requiring that person to produce or provide any documents or explanation reasonably required for an investigation by them of the suspected offence or contravention. Sub-paragraph (4) obliges the person to comply with the notice within a reasonable time. This power is wider than that in paragraph 1 because it is not restricted to documentation or information relating to income or expenditure nor is it restricted to a list of specified individuals or bodies. Sub-paragraph (5) allows an investigator authorised by the Commission to require a person to come and answer in person any questions that the investigator reasonably considers relevant to the investigation.
236. The powers created by paragraph 3 can be used in relation to a person who is also covered by paragraph 1, albeit for a different purpose (i.e. that of investigating purported wrongdoing), and may be used against any other person who holds, or is thought to hold, information reasonably required for an investigation by the Commission. It follows that use of the power may be used in respect of the individual or body suspected by the

Commission of having committed an offence or contravention but is not limited to such an individual or body.

237. [Paragraph 4](#) applies where the Commission have given a notice under paragraph 3 requiring documents to be produced. Sub-paragraph (2) allows the Court of Session to issue a document disclosure order against a person following an application from the Commission if satisfied of four things. First, that there are reasonable grounds for believing that there has been an offence under, or other contravention of schedule 4. Second, that documents referred to in the notice under paragraph 3 have not been produced in response to that notice. Third, that the documents are in the custody of the person against whom the order is issued. Finally, that the documents are reasonably required for the purposes of an investigation. The order requires the person to whom it is given to deliver to the Commission documents referred to in the order within the timeframe set out in the order. A document is in a person's control if they have possession of it, or a right to possession of it. Sub-paragraph (5) stipulates that a person who fails to comply with the order may not be punished for both contempt of court and an offence under paragraph 12 of the schedule.
238. [Paragraph 5](#) applies where the Commission have given notice under paragraph 3 requiring any information or explanation to be produced. The Court of Session can issue an information disclosure order against a person on an application from the Commission if satisfied of the three things. First, that there are reasonable grounds to suspect a person has committed an offence or contravention under schedule 4. Second, that information or an explanation referred to the notice under paragraph 3 has not been provided and is reasonably required. Third, that the respondent is able to provide the information or explanation. The order requires the person to whom it is given to provide the Commission with information or explanation referred to in the order within the timeframe set out in the order. A person who fails to comply with the order may not be punished for both contempt of court, and an offence under paragraph 12(1) of the schedule.
239. [Paragraph 6](#) specifies that the Commission may retain documents delivered to them in compliance with an order under paragraph 4 for 3 months. However, if during that time any relevant criminal proceedings are begun, or notices are issued or penalties imposed under schedule 6 the documents may generally be retained until they are no longer required in relation to the proceedings or civil sanctions.
240. [Paragraph 7](#) provides that the Commission, or a person authorised by the Commission, may make copies or records of relevant information or explanations obtained under the Schedule.
241. [Paragraph 8](#) requires that any authorisation of a person by the Commission made under this Schedule must be in writing.
242. [Paragraph 9](#) deals with documents held in electronic form. Sub-paragraph (1)(a) gives the Commission a power to require such documents to be made available in a legible form. Sub-paragraph (1)(b) enables a person authorised to inspect documents to require any person on premises being searched to give reasonable assistance to allow the inspector to make legible copies of electronic documents, or records of information contained in them. Under this power such assistance may also be required by an inspector in order to enable him to inspect and check any computer or associated apparatus used in connection with the information.
243. [Paragraph 10](#) exempts information subject to confidentiality of communications from any requirement to produce information (in whatever form) under any power provided by this schedule. The appropriate test is whether a claim to confidentiality of communications could be maintained in legal proceedings in respect of the material in question.

244. [Paragraph 11](#) deals with the admissibility of statements provided under compulsion. A statement made in response to a requirement under the schedule may be used in any proceedings, provided that it complies with any other rules of evidence in those proceedings. But sub-paragraph (2) provides that the statement is not admissible against the maker of the statement in criminal proceedings unless evidence about the statement is relied on, or a question about it is asked, by the maker, or unless the proceedings are for an offence mentioned in sub-paragraphs (3) and (4). (These offences are similar to perjury).
245. [Paragraph 12](#) provides that it is an offence to fail to comply with any requirement imposed under schedule 5 (for example, to refuse to supply the Commission with information requested under paragraph 1 or 3); to obstruct intentionally somebody performing functions under the schedule; or knowingly or recklessly provide false information in response to a requirement imposed under the schedule.
246. [Paragraph 13](#) provides that guidance on the investigatory powers of the Commission published under paragraph 14 of Schedule 19B to the Political Parties, Elections and Referendums Act 2000 has effect, with any necessary modifications, at the referendum under the Act. The Commission may prepare additional guidance as required, which they must revise where appropriate and publish.
247. [Paragraph 14](#) requires the Commission to report on its use of the investigatory powers contained in schedule 5 in its report to the Scottish Parliament under section 27, in a separate report made as soon as possible thereafter, or in a combination of the two.
248. Sub-paragraph (2) explains what information the Commission must include in the report on the use of their investigatory powers. Sub-paragraph (3) exempts the Commission from having to report any information that, in their opinion, it would be inappropriate to include because it would be unlawful or because it would prejudice an ongoing investigation or proceedings.