

SCOTTISH INDEPENDENCE REFERENDUM ACT 2013

EXPLANATORY NOTES

COMMENTARY

Monitoring and securing compliance with the campaign rules

226. [Section 12](#) of the Act gives the Electoral Commission responsibility for monitoring and securing compliance with the rules contained in schedule 4. It also gives the Commission power to issue guidance on how to comply with the regulations or restrictions. Schedules 5 and 6 replicate the Commission's usual investigatory powers and power to impose civil sanctions to help them fulfil their duties under section 12.
227. Under section 13, the Commission must make the register of declarations they hold under schedule 4, paragraph 5, the returns of referendum expenses that are publishable under paragraph 25 and the pre-poll donation and transaction reports publishable under paragraphs 44 and 62 of schedule 4, available for public inspection, either in their offices, by arrangement, or by providing a copy. The Commission are entitled to charge a reasonable fee for this service.
228. [Section 14](#) specifies that a person commits an offence by suppressing, concealing, destroying or falsifying any document to circumvent the campaign control provisions of the Act. It is also an offence to withhold information or to fail to provide information to the relevant person without a reasonable excuse, or to provide false information. Offences under this section carry a penalty of, depending on the offence, imprisonment or a fine.
229. [Section 15](#) states that summary proceedings under section 14 or schedules 4 to 6 may be taken in respect of a body at its place of business, and in the case of a person at any place where that person is for the time being. Subsection (2) allows criminal proceedings to be commenced at any time within 3 years after the offence is committed, or within 6 months of the prosecutor having knowledge of sufficient evidence to justify proceedings.
230. [Section 16](#) places an obligation on the courts to notify the Electoral Commission of any campaign offences under the Act as soon as possible after they arise.

[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.

Schedule 6: Campaign rules: civil sanctions

249. [Schedule 6](#) of the Act contains powers to impose civil sanctions enforceable by the Electoral Commission in respect of breaches of the provisions in schedule 4.

Part 1: Fixed monetary penalties

250. [Paragraph 1](#) allows the Electoral Commission to impose fixed monetary penalties where they are satisfied beyond reasonable doubt that a campaign offence listed in Part 7 of schedule 6 has been committed. The penalties can be imposed either on a person or on a permitted participant where the responsible person for that permitted participant has committed the offence, or where the requirements imposed by paragraphs 23(2), (3) or (4) of schedule 4 have been contravened. The amount of a fixed monetary penalty is set at £200.
251. [Paragraph 2](#) sets out the representations and appeals processes. The Commission can serve notice of an intention to impose a fixed monetary penalty on a person. This must offer the opportunity to discharge the penalty by paying £200. Alternatively, the person can opt to make written representations and objections to the Commission against the penalty. If the deadline for making representations and objections passes without the person having paid, the Commission must decide whether to impose the penalty and serve a further notice recording that on the relevant person (sub-paragraph (4)). Sub-paragraph (5) provides that if the person's representations have raised any matter that leads the Commission to no longer suspect the person of having committed an offence, the Commission may not impose the penalty. The person may appeal to the sheriff against the decision to impose the penalty on the grounds set out in sub-paragraph (6). Such an appeal must be made within 28 days of a decision notice being received, and the penalty is suspended until the appeal is determined or withdrawn.
252. [Paragraph 3](#) explains what information the Commission must include when giving notice of an intention to impose a fixed monetary penalty on a person or when giving notice of a subsequent decision to impose the penalty. This must include the grounds for imposition of the sanction, the right to make representations or appeals and the time periods in which these can be made.
253. [Paragraph 4](#) makes provision for the late payment of fixed monetary penalties. If the penalty is not paid within 28 days of the notice being received, the amount of the penalty is increased by 25%, and if it is not paid within 56 days, the amount is increased by 50%. Where a penalty is upheld on appeal, or such an appeal withdrawn, similar increases apply from the determination or withdrawal of the appeal.
254. [Paragraph 5](#) limits the criminal proceedings that can be taken against a person for a prescribed offence or other breach that may be dealt with by way of a fixed monetary penalty. If the Commission notify the person of their intention to impose a fixed monetary penalty for the breach, no criminal proceedings for the breach can be brought during the period when liability can be discharged under paragraph 2(2). This paragraph also precludes such proceedings being taken against a person who does discharge liability by making the payment. Finally, paragraph 5(2) precludes a person on whom the Commission imposes a fixed monetary penalty under paragraph 2(4) from being convicted of an offence for the breach.

Part 2: Discretionary requirements

255. [Paragraph 6](#) allows the Electoral Commission to impose a discretionary requirement on a person where they are satisfied, beyond reasonable doubt, that the person has committed a campaign offence listed in Part 7 of schedule 6. A discretionary requirement as a sanction can take the form of a monetary penalty (up to a maximum of £10,000) or alternatively an instruction to take certain actions designed to either prevent the recurrence of the offence or restore the position to what it would have been had the offence not occurred. The penalties can be imposed either on a person or on a permitted

participant where the responsible person for that permitted participant has committed the offence, or where the requirements imposed by paragraphs 23(2), (3) or (4) of schedule 4 have been contravened. Sub-paragraph (4) limits the use of discretionary requirements by preventing the Commission from imposing a discretionary requirement on a person more than once for the same act or omission. Sub-paragraph (6) sets the financial limit of a variable monetary penalty for offences which are triable summarily—where such offences are punishable by a fine, the variable monetary penalty must not be greater than the maximum fine.

- 256. [Paragraph 7\(1\)](#) requires that, where the Commission intend to impose a discretionary requirement on a person for a campaign offence, they must first notify the person of their intention. Sub-paragraph (2) allows the person to make written representations and objections to the Commission against the proposed penalty. If anything is raised which leads the Commission to no longer be satisfied that the offence took place, the Commission may not impose the penalty (sub-paragraph (4)). In all other cases, the Commission may proceed to serve on the person a notice formally imposing the discretionary requirement, which will specify what the requirement is (sub-paragraph (5)). The person may appeal to a sheriff against the decision to impose the discretionary requirement on the grounds specified in sub-paragraph (6). Such an appeal must be made within 28 days of a decision notice being received, and the discretionary requirement is suspended until the appeal is determined or withdrawn.
- 257. [Paragraph 8](#) explains what information the Commission must include when giving the initial notice of an intention to impose a discretionary requirement on a person. This includes the grounds for imposing the requirement and the period within which representations and objections may be made (no less than 28 days from the day on which the notice is received). Sub-paragraph (3) sets out the information that must be provided by the Commission when they are imposing a discretionary requirement, such as the grounds for the proposed discretionary requirement, details of any monetary penalty, rights of appeal and the consequences of non-compliance.
- 258. [Paragraph 9](#) limits the use of other sanctions against a person who has had a discretionary requirement imposed upon them. If a discretionary requirement is imposed on a person, that person cannot be convicted of a criminal offence arising from the same act or omission. However, this protection from future prosecution does not apply in cases where the discretionary requirement imposed was non-monetary, no variable monetary penalty was imposed, and the person failed to comply with the non-monetary discretionary requirement.
- 259. [Paragraph 10](#) provides that where the Commission are satisfied that a discretionary requirement has been complied with, they must issue a certificate confirming that this is the case. This causes the original requirement notice to cease to have effect. A person who has been served with a discretionary requirement notice may apply to the Commission for a compliance certificate and the Commission must decide whether to issue one within 28 days. If the Commission decides not to issue a certificate, the applicant may appeal to a sheriff within 28 days of receiving the Commission's decision.
- 260. [Paragraph 11](#) allows the Commission to impose by notice a “non-compliance penalty”, up to a maximum of £10,000, on a person who fails to comply with a non-monetary discretionary requirement. It also sets out the information which must be included in the notice and provides that where a person has complied with the related non-monetary discretionary requirement, the Commission may waive or reduce the penalty. It sets out the grounds of appeal to the sheriff against a non-compliance penalty (sub-paragraphs (3) and (4)).
- 261. [Paragraph 12](#) requires that a variable monetary penalty must be paid within 28 days of the relevant notice being received, or the amount of the penalty will increase by 25%. If the penalty is not paid within 56 days of the notice being received, it will increase

by 50%. Where a penalty is upheld on appeal, or such an appeal withdrawn, similar increases apply from the determination or withdrawal of the appeal.

Part 3: Stop notices

262. **Paragraph 13** provides that the Electoral Commission can impose a stop notice on a person in order to prevent them from continuing or repeating a particular activity which the Commission reasonably believe is (or is likely to be) a campaign offence listed in Part 7 of schedule 6 or where the Commission believe that a person's behaviour is likely to lead to them committing an offence. In both cases the Commission must believe that the activity, or potential activity, is seriously damaging to public confidence in the effectiveness of the controls in schedule 4, or significantly risks doing so.
263. **Paragraphs 14 to 17** set out the details and limitations of how the stop notice system operates. Paragraph 14 lists the information to be included in a stop notice—the grounds for imposition, rights of appeal and consequences of non-compliance. Paragraph 15 requires the Commission to issue a 'completion certificate' once they are satisfied that the person has taken the steps set out in the stop notice (at which point it will cease to have effect). The person upon whom a notice has been imposed may apply for a completion certificate at any time and the Commission must make a decision on the application within 14 days of receipt. An application must be accompanied by certain information and the Commission may revoke a completion notice if issued on the basis of inaccurate, incomplete or misleading information, which causes the stop notice to be reinstated. Paragraph 16 explains how a person may appeal against the imposition of a stop notice, or against a decision not to issue a completion certificate, and provides that any appeal will be heard by a sheriff. It also sets out the grounds for appeal in both circumstances. An appeal against a stop notice or against a decision not to issue a completion certificate must be made within 28 days of receipt of the notice or decision, and where an appeal is made, the stop notice continues to have effect unless suspended or varied on the order of the sheriff. Paragraph 17 provides that a person who does not comply with a stop notice is guilty of an offence.

Part 4: Enforcement undertakings

264. **Paragraph 18** outlines the powers of the Electoral Commission to accept an enforcement undertaking from a person whom the Commission have reasonable grounds for believing has committed a campaign offence listed in Part 7 of schedule 6. An enforcement undertaking may be offered by the person suspected of the offence and outlines the action they will take (within a specified period). The action may be with a view to preventing the recurrence of the offence or returning the position to what it would have been had the offence not taken place. Sub-paragraph (1)(d) states that the undertaking will take effect only if the Commission accept it. Sub-paragraph (2) provides that a person who has complied with the accepted undertaking will generally be exempt from other sanctions, including criminal proceedings, in relation to the acts or omissions on which the undertaking is based as long as the undertaking is complied with.
265. **Paragraph 19** makes provision about the form of enforcement undertakings and provides that they may be varied at the agreement of both the person who has entered into it and the Commission. It also permits the Commission to publish enforcement undertakings. Paragraph 20 sets out the process by which the Commission may issue a compliance certificate for an enforcement undertaking, and paragraph 21 provides for the grounds and time limit (28 days) for appeal against a decision not to issue a compliance certificate.

Part 5: General and supplemental

266. **Paragraph 22** limits the use of fixed monetary penalties, discretionary requirements and stop notices. It explains that a fixed monetary penalty may not be imposed on a

person if they are already subject to a discretionary requirement or stop notice for a breach. Additionally, if a person has had a fixed monetary penalty imposed on them for a breach, or has paid a sum to discharge liability for a fixed monetary penalty, they cannot be given a discretionary requirement or a stop notice in relation to the breach.

267. [Paragraph 23](#) allows the Commission to withdraw a fixed penalty notice, withdraw or vary notice of a discretionary requirement and withdraw a stop notice. If a stop notice is withdrawn, this does not prevent another stop notice in respect of the same activity.
268. [Paragraph 24](#) provides that, if someone is required under schedule 5 to make a statement as part of an investigation by the Electoral Commission, the Commission must not take account of that statement when deciding whether to impose a civil sanction on the person. The only exception is for the offence of providing false information set out in paragraph 12(3) of schedule 5.
269. [Paragraph 25](#) stipulates that any financial penalty imposed on an unincorporated association must be paid from its own funds.
270. [Paragraph 26](#) provides that guidance on civil sanctions published under paragraph 25 of Schedule 19C 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.
271. [Paragraph 27](#) enables the Commission to recover fixed monetary penalties, variable monetary penalties and non-compliance penalties as a civil debt. Any interest or financial penalty for late payment may also be recovered as a civil debt.
272. [Paragraph 28](#) stipulates that the monetary penalties paid to the Commission as a result of the imposition of civil sanctions under schedule 6 must be paid into the Scottish Consolidated Fund.
273. [Paragraph 29](#) requires the Commission to report on the use of its powers under this schedule, including a list of the cases (other than those where sanctions have been successfully appealed against) in which they have imposed fixed monetary penalties, discretionary notices or stop notices; cases in which liability for a fixed monetary penalty has been accepted through payment of a sum; and cases in which an enforcement undertaking has been accepted. Sub-paragraph (2) enables the Commission to exclude information if it might be unlawful for the report to include it or might adversely affect ongoing investigations or proceedings. The report may be included in the Commission's report under section 27, in a separate report made as soon as possible thereafter, or in a combination of the two.
274. [Paragraph 30](#) allows the Commission to request information from procurators fiscal or constables in Scotland when exercising the powers under the schedule. It will not enable disclosure where that would breach the Data Protection Act 1998 or Part 1 of the Regulation of Investigatory Powers Act 2000 or in relation to certain reserved enactments. It also provides that other powers of disclosure independent of this power are not affected by it.
275. [Paragraph 31](#) gives the sheriff powers to use on appeals against civil sanctions imposed by the Commission. If a person appeals a fixed monetary penalty, the sheriff may overturn or confirm the penalty. On an appeal against a discretionary requirement, non-compliance penalty or stop notice, the sheriff may overturn, confirm or vary the sanction. The sheriff also has the same powers as the Commission as to steps that may be taken in response to such an appeal, or can remit the decision regarding the requirement or notice, or matters relating to the decision, to the Commission. On an appeal against a decision by the Commission not to issue a compliance and restoration certificate for a discretionary requirement, a completion certificate for a stop notice, or a compliance certificate for an enforcement undertaking, the sheriff may order the Commission to issue the appropriate certificate.

*These notes relate to the Scottish Independence Referendum Act
2013 (asp 14) which received Royal Assent on 17 December 2013*

- 276. [Paragraph 32](#) sets out definitions of words and expressions used in the schedule.
- 277. [Part 7](#) lists the campaign offences for which civil sanctions may be imposed.