

Scotland's constitutional future

A consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom



Scotland's constitutional future

Presented to Parliament
by the Secretary of State for Scotland
by Command of Her Majesty

January 2012

CM 8203

£8.75

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This publication is available for download at www.official-documents.gov.uk

This document is also available from our website at www.scotlandoffice.gov.uk

ISBN: 9780101820325

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID 22445678 01/12

Printed on paper containing 75% recycled fibre content minimum.

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PREFACE

We believe passionately in the United Kingdom and recognise the benefits it has brought to all of its citizens. For over 300 years the United Kingdom has brought people together in the most successful multi-national state the world has ever known.

We want to keep the United Kingdom together. But we recognise that the Scottish Government holds the opposite view. In May 2011, the Scottish National Party won a majority in the Scottish Parliament; this was a significant electoral victory, which the UK Government has openly acknowledged.

The Scottish National Party entered the May 2011 election with a manifesto pledge for a referendum on independence. They have campaigned consistently for independence, and while the UK Government does not believe this is in the interests of Scotland, or the rest of the United Kingdom, we will not stand in the way of a referendum on independence: the future of Scotland's place within the United Kingdom is for people in Scotland to vote on.

However, if there is to be a referendum, it must be legal, fair and decisive.

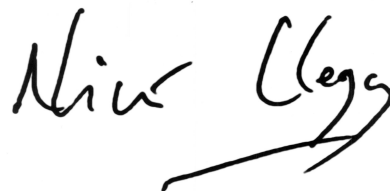
At the moment, there is great uncertainty about the Scottish Government's proposals for a referendum. We do not know when a referendum will happen, or what question will be asked. Most importantly, the UK Government has grave concerns that the Scottish Government's proposals for a referendum would not be lawful.

People in Scotland deserve clarity about how Scotland's future will be decided. That is why the UK Government is publishing this consultation today. This consultation sets out options by which the UK and Scottish Governments can remove the legal barriers to holding a referendum while ensuring that its question, conduct and outcome are fair to those on each side of the debate and to all Scottish voters.

The future of Scotland must not be worked out in secret, behind closed doors. We want to hear the views from people in Scotland on how a referendum should be delivered. Ending Scotland's place within the United Kingdom is not the policy of the UK Government, but we owe it to everyone in Scotland to ensure that the referendum is delivered in a legal, fair and decisive way.



Rt Hon. David Cameron MP
Prime Minister



Rt Hon. Nick Clegg MP
Deputy Prime Minister

FOREWORD

Scotland makes a huge contribution to the United Kingdom: culturally, economically and through the numerous Scots who have led the UK in the fields of politics, business, academia and sport. Scotland benefits enormously from being part of the United Kingdom: economic strength, international influence, shared security and through the pooling of resources and risk.

The Coalition Government is firmly committed to Scotland's ongoing place in the UK. In this commitment we are not alone, but others, particularly the Scottish Government, take a different view.

Following the Scottish Parliament elections in May last year, the Scottish Government has made clear its intention to hold a referendum on independence. To do so it is necessary for the Scottish Parliament to have the legal power to legislate, and authorise spending arrangements, for such a referendum. It is the view of the UK Government that the Scottish Parliament does not have that legal power. We have been asking the Scottish Government to explain its position since May last year, but the Scottish Government has not set out a formal view on the issue of legal competence nor come forward with any further proposals for a referendum.

By contrast, the UK Government is clear in its understanding that the Scottish Parliament does not have the legal authority to hold an independence referendum.

That is not to say that the UK Government wishes to put obstacles in the way of a referendum. Quite the reverse, we firmly believe that we must explore the appropriate ways in which we can put beyond doubt the legal authority to hold a referendum on independence. We want to assist people in Scotland, in all reasonable ways, to participate in a referendum "Made in Scotland", whose outcome is legal, fair and decisive.

A decision on whether or not Scotland should become independent is such an important one that it should be settled by people in Scotland. We think it is in nobody's interests (whether for or against independence) to have a referendum process subject to legal challenge with all of the delay and uncertainty that would entail, and we are optimistic that we can reach a conclusion that will be fair and legitimate to both sides of the debate and people in Scotland as a whole.

This consultation paper sets out the UK Government's views on the issues in the referendum process which need to be addressed, and offers proposals on how to address them. We look forward to a full public debate on these issues in the coming weeks, irrespective of our views on Scotland's future. People in Scotland can then get on with the main debate about Scotland's place in the United Kingdom, rather than remaining in limbo about the process for making that decision.



Rt. Hon Michael Moore MP
Secretary of State for Scotland

1. EXECUTIVE SUMMARY

This consultation document discusses how to deliver a referendum that is legal, fair and decisive. Information on how to respond to the consultation is set out in section 5.

Legal

The Scottish Government is aware of the limits of its powers. It acknowledged those limits in 2007. Since the Scottish National Party's success in May 2011, the Scottish Government has provided no new explanation of how it would deliver its manifesto commitment to hold a referendum, despite the limits to its power. In the absence of new information, the UK Government has considered the proposals put forward by the Scottish Government in February 2010.

Those proposals cannot be legally delivered by the Scottish Parliament. The Scottish Parliament only has power to legislate on matters that are devolved and has no power to legislate on matters that are reserved to the UK Parliament. The Union of the Kingdoms of Scotland and England is one of those reserved matters. In our view legislation for a referendum brought forward by the Scottish Government would likely be challenged in court and the Scottish Government would lose.

The UK Government does not believe that it is in Scotland's interests to have Scotland's constitutional future decided in court. The referendum must be legally watertight – there must be no doubt that it is lawful. That certainty can only be provided by legislation involving the UK Parliament; although as this paper sets out, this could be done in different ways and the UK Government could devolve power to the Scottish Parliament to enable it to deliver a fair and decisive referendum.

Fair

Legislation in the UK Parliament would provide a clear legal basis for the referendum. But as well as being legal, the referendum must be fair. For the referendum to be fair, the rules about the referendum and the oversight of the referendum must be manifestly and overtly above board. We cannot allow the possibility that the result of the referendum is questioned, because the rules were considered unfair. The referendum should be overseen by those who have both the demonstrable neutrality and proven expertise to inspire confidence in the fairness of the process.

Decisive

The referendum must also be decisive. It is the UK Government's view that for this to happen, there must be a single, straightforward question; and that question must be asked as soon as possible. We live in uncertain times, with the global economic situation creating challenges for increasing investment and jobs in Scotland. The question of Scotland's constitutional future is increasing that uncertainty. We can answer that question and at least on this one issue, end the uncertainty. It is irresponsible to allow this question to hang over Scotland, when it is in our power to end the doubts and allow Scotland to move forward with a clear constitutional future.

2. THE SCOTTISH GOVERNMENT'S PROPOSALS

Scotland's constitutional position within the United Kingdom has been debated for some time.

The Scottish National Party has won the last two Scottish Parliamentary elections. It was elected as a minority administration in 2007, and in 2011 it won a majority in the Scottish Parliament. The Scottish Government's proposals on independence have developed since 2007.

Scottish Government's proposals for a referendum 2007 – 2010

In 2007, the Scottish National Party's manifesto contained a commitment to publish a White Paper on independence and in August 2007 the Scottish Government published *Choosing Scotland's Future - A National Conversation*. This paper acknowledged the limits of the Scottish Parliament's legal power to hold a referendum:

At present the constitution is reserved, but it is arguable that the scope of this reservation does not include the competence of the Scottish Government to embark on negotiations for independence with the United Kingdom Government.¹

The Scottish Government also highlighted in this paper that:

Legislation for a referendum could also be passed by the United Kingdom Parliament, most likely consulting the Scottish Parliament for its views. The Act could make detailed provision for the holding of a referendum, setting out the question and other arrangements, or could give Scottish or United Kingdom Ministers powers to bring forward secondary legislation with these details at a later date.²

The Scottish Government continued to develop its own proposals, and published another White Paper *Your Scotland, Your Voice* in November 2009. This set out its intention to hold a referendum in November 2010, and raised the possibility of having a multi-option referendum, with a question about further devolution, as well as one about independence. On 25 February 2010, the Scottish Government published a draft Referendum Bill.

The Scottish Government consulted on the draft referendum proposals until 30 April 2010. It has published responses to the consultation, but up to now, it has not published its own response to that consultation. No referendum legislation was introduced into the Scottish Parliament in 2010.

Scottish Government's proposals for a referendum - 2011

The Scottish National Party's 2011 manifesto contained a pledge to hold a referendum on the question of independence "in this next Parliament", which will run until May 2016. In office the Scottish Government has not provided any further information on its intention to bring forward legislation for a referendum, or the date of a referendum.

¹ *Choosing Scotland's Future – A National Conversation*, p. 35

² *Choosing Scotland's Future – A National Conversation*, p. 33

The UK Government acknowledges that the Scottish National Party campaigned for and won the May 2011 election with a clear manifesto commitment to hold an independence referendum. However, as the Scottish Government's 2007 White Paper acknowledged, the constitution, including the issue of whether Scotland should be an independent state, is a reserved matter.

The UK Government's view is that it is outside the powers of the Scottish Parliament to legislate for a referendum on independence at present and that any such legislation would be declared unlawful by the courts. The next section explains the reason for this view and sets out proposals for how to deliver a referendum in a way that would be legal, fair and decisive.

3. DELIVERING A REFERENDUM

The UK Government believes that a referendum on whether Scotland should become independent must be legal, fair and decisive. This section looks at options for achieving each of those requirements and the different ways in which legislation for a referendum could be delivered.

A LEGAL REFERENDUM

In the United Kingdom, legislation is required before any referendum can be held. Legislation must provide the legal authority to hold a referendum, and should set out the detail of the referendum, including the question, the date and the rules governing the campaign. A referendum on the future of Scotland within the United Kingdom would need legislation before it could be held properly and legally.

The Scotland Act 1998 sets out how devolution in Scotland works.³ The 1998 Act contains a list of matters that are reserved to the UK Parliament. This includes aspects of the constitution, such as the Union of the Kingdoms of Scotland and England.⁴ The Scottish Parliament has powers to make laws (known as legislative competence) in relation to matters that are not reserved including health, education, transport, policing and justice, but it has no power to make laws that relate to reserved matters. It is the view of the UK Government that legislation providing for a referendum on independence plainly relates to the Union of the Kingdoms and is therefore outside of the Scottish Parliament's legislative competence.

The UK Government has reached this view having given careful consideration to the legal position. In terms of section 29 of the 1998 Act, whether a provision relates to reserved matters (and is therefore outside the legislative competence of the Scottish Parliament) is to be determined by reference to its purpose. In determining purpose, it is necessary to have regard to a range of factors including the effect of the provision in question.⁵

In its 2010 draft Referendum Bill consultation, the Scottish Government proposed a referendum question which would ask if voters agreed that:

The [Scottish] Parliament's powers should be extended to enable independence to be achieved

In that consultation, the Scottish Government set out its reasoning for proposing this question:

Scottish Parliament legislation must conform to the provisions of the Scotland Act 1998. The Scotland Act has in-built flexibility so that the Scottish Parliament's powers can be extended over time. The Scottish Parliament has a role in such processes, for example in relation to orders made under section 30 of the Act. It is therefore legitimate for a referendum

³ See section 29 (legislative competence) and Schedule 5 to the Scotland Act 1998

⁴ Part 1 of Schedule 5 to the Scotland Act 1998 lists among reserved matters: "(b) the Union of the Kingdoms of Scotland and England"

⁵ See section 29(3): "For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances."

*held under an Act of the Scottish Parliament to ask the people questions related to an extension of its powers insofar as this is within the framework of the Scotland Act.*⁶

However, while the proposed question asks about extending powers, it also makes reference to achieving independence. The same consultation paper makes clear that if the people of Scotland voted in favour of extending the Scottish Parliament's powers in the way described, independence would follow as a consequence. It is therefore the UK Government's conclusion that the Scottish Government's 2010 draft Bill plainly relates to the reserved matter of the Union of the Kingdoms. The Scottish Government's purpose in relation to the draft Bill is ultimately to further its aim of securing independence for Scotland. The intended effect is to secure a mandate for negotiating this. Both purpose and effect therefore relate directly to the reserved matter of the Union of the Kingdoms of Scotland and England.

In the Scottish Government's paper from 2007, *Choosing Scotland's Future*, it was stated that:

*The competence of the Scottish Parliament to legislate for a referendum would depend on the precise proposition in the referendum Bill, or any adjustments made to the competence of the Parliament before the Bill is introduced.*⁷

It might, for example, be suggested that a referendum which is described as "advisory" in that it only seeks views of the electorate and would not have the direct outcome of modifying the Union, would be within legislative competence. But given the legal test that applies, it is the UK Government's view that any Bill introduced in the Scottish Parliament providing for a referendum on independence would relate to the Union, because the underlying purpose would be to further the Scottish Government's aim of achieving independence, and would therefore be outside the existing powers of the Scottish Parliament.

Accordingly, it is the UK Government's view that any Bill introduced in the Scottish Parliament providing for a referendum on independence would be outside the powers of the Scottish Parliament and, if challenged, would be struck down by the courts.

The Scotland Act 1998 sets out how such legislation can be challenged. There are two main routes:

- If an individual, or group of individuals, believed that an Act of the Scottish Parliament was outside of legislative competence (whether in whole or in part) it is open to individuals to challenge the legislation in the courts. The individual must have sufficient interest to institute proceedings.
- It is also possible for the Law Officers to refer a Bill directly to the Supreme Court to seek a judgement on its legislative competence. This referral could be made by one or more of the Lord Advocate (the Scottish Law Officer) or the Advocate General and the Attorney General (the UK Law Officers). It is possible for referrals to be made jointly by UK and Scottish Law Officers.

Since the UK Government considers that the Scottish Parliament cannot legislate for a referendum on independence, it is also the UK Government's view that a legal challenge to the legislation would be very likely. Were the Scottish Government to request a joint referral to the Supreme Court we would of course consider that, but a better remedy to end uncertainty would be to ensure that the Scottish Parliament is given the powers to deliver the referendum in Scotland. Options for how we can legislate to remove this legal uncertainty are set out below.

⁶ *Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper*, p.16.

⁷ *Choosing Scotland's Future – A National Conversation*, p. 35

OPTIONS FOR LEGISLATION

The UK Government believes that any referendum on Scottish independence must be held legally. The Scottish Parliament is unable to legislate for a referendum on independence within its current powers; instead, the UK Parliament will need to legislate. There are two main ways in which the UK Parliament could deliver a legal referendum:

- Legislate to give the Scottish Parliament the power to deliver a referendum on Scottish independence; or
- Legislate directly in the UK Parliament for a referendum on Scottish independence

Legislate to give the Scottish Parliament the power to deliver a referendum

The Scottish Parliament does not currently have the power to pass legislation providing for a referendum on independence. It is possible to amend the Scotland Act 1998 to modify the powers of the Scottish Parliament. This can be done either by introducing a Bill in the UK Parliament, or by using an order making power under the Scotland Act 1998 itself.

Order making powers allow changes to be made to an Act of Parliament, without the need for a new Act. In the Scotland Act 1998, there are a set of order making powers that allow changes to be made to the devolution settlement. One of these order making powers (a “section 30 Order”⁸) allows the legislative competence of the Scottish Parliament to be modified. This could be used to modify the list of matters reserved to the UK Parliament so that the Scottish Parliament could legislate for a referendum on independence. A section 30 Order could also set parameters for a referendum, for instance it could ensure that a referendum would be subject to the normal rules on referendums set out in the Political Parties, Elections and Referendums Act 2000.

A section 30 Order to provide the Scottish Parliament with new powers would need to be agreed between the Scottish and UK Governments and approved by the Scottish Parliament and both Houses of the UK Parliament.

Following this legislative route would ensure that both Governments and Parliaments are given the opportunity to comment on the proposals and indicate their approval.

The UK Government believes that using this order making power presents a good way to deliver a legal referendum on independence. It is sensible to make provisions to allow for a Bill providing for a referendum to be brought forward by Scottish Ministers, as it is the Scottish Government that seeks to change Scotland’s constitutional status. And the UK Government believes that it would also be sensible for the Scottish Parliament to consider and approve the eventual referendum Bill – within the parameters of the powers devolved by the UK Parliament. Members of the UK Parliament will have a strong interest in the issue of independence – both because of its implications in Scotland, and because of its implications for the UK as a whole. The process of approving the Order would ensure that both Houses of Parliament debate and consider the powers to be devolved.

⁸ Section 30 (Legislative competence: supplementary), Scotland Act 1998

A draft Order is provided at Annex A. The UK Government welcomes comments on the draft Order, which would provide the Scottish Parliament with the power to legislate legally for a fair and decisive referendum.

What are your views on using the order making power provided in the Scotland Act 1998 to allow the Scottish Parliament to legislate for a legal referendum in an Act of the Scottish Parliament?

Legislate directly in the UK Parliament for a referendum on Scottish independence

The UK Parliament has the power to legislate legally for a referendum on independence. A Bill could be introduced into the UK Parliament to enable the UK Government to hold a referendum. A Bill could give the UK Government the power to set the date of a referendum and, in consultation with the Electoral Commission, the question to be asked.

A Bill introduced in the UK Parliament to provide for a referendum on Scottish independence would be subject to the normal rules on referendums set out in the Political Parties, Elections and Referendums Act 2000. The Electoral Commission would have responsibility for overseeing the conduct and regulation of the referendum, independently of Government. The Commission would be required to publish a statement of its views as to the intelligibility of the proposed wording of the referendum question. The Commission's views would be taken into account during the consideration of the Bill by the UK Parliament.

A Bill to provide for a referendum could either be a stand-alone Bill, introduced solely to deliver a referendum, or provisions could be included as part of a wider Bill. For example, the Scotland Bill currently being considered by the UK Parliament could be amended to include clauses to deliver a referendum.

What are your views on the UK Parliament legislating to deliver a referendum on independence?

The Scotland Bill

The Scotland Bill was introduced in the UK Parliament in November 2010 to deliver the recommendations of the Commission on Scottish Devolution.

The Scotland Bill will deliver the largest transfer of fiscal powers out of the UK Parliament since the Act of Union. The Bill will provide the Scottish Government with increased financial accountability and responsibility.

The Scotland Bill has already been through its detailed consideration in the House of Commons and has been considered by two Scottish Parliament Committees, prior to and after the May 2011 Scottish Parliament elections. The Bill is now in the House of Lords, and Lords Committee stage is due to begin at the end of January. The Scottish Government and Scottish Parliament have engaged closely with the Bill, and have proposed a number of changes to the Bill, which are being considered by the UK Government.

As set out above, the UK Government believes that a section 30 Order would provide an appropriate method of delivering a legal referendum. The UK Government believes that given the late stage of the Scotland Bill and the detailed scrutiny that it has already received, it would

be preferable to consider referendum proposals separately. However, the UK Government recognises that the Scotland Bill could provide an alternative means of delivering a referendum, which is available to use now.

Amendments to the Scotland Bill could be made before the current session of the UK Parliament ends. These amendments could either:

- Amend the Scotland Act 1998 to provide the Scottish Parliament with powers to legislate for a referendum; or
- Legislate directly for a referendum

To ensure that the option to amend the Scotland Bill can be fairly considered by respondents to the consultation, the UK Government has limited the period of this consultation to eight weeks. This would allow time to amend the Scotland Bill if as a result of the consultation this is judged to be the best course of action.

What are your views on whether the Scotland Bill should be used either to:
i) give the Scottish Parliament the power to legislate for a referendum; or
ii) directly deliver a referendum?

A FAIR REFERENDUM

The UK Government believes that any referendum taking place within the United Kingdom must be fair. Any referendum on Scottish independence would deal with a fundamental constitutional question with implications for the whole of the United Kingdom. Whilst the UK Government believes that it is right that the choice to remain part of the United Kingdom, or to become an independent state, is one for people in Scotland, the UK Government wants to ensure that this referendum is provided for, organised, regulated and conducted in a fair way.

The Political Parties, Elections and Referendums Act 2000

Following a series of referendums in the late 1990s, the UK Parliament passed the Political Parties, Elections and Referendums Act 2000 (PPERA). This enshrined in law a broad framework of rules to regulate for consistency and fairness in the conduct of any referendum held as a result of an Act of Parliament.

Whilst these rules apply to referendums held under an Act of the UK Parliament, the Scottish Government proposed in their draft 2010 Bill a campaign regulation regime for a referendum on independence that was “broadly based on the rules set out in PERA”.⁹

The UK Government welcomes the Scottish Government’s acknowledgment of the framework provided by PERA and agrees with the Scottish Government that a framework based as closely as possible on PERA should apply to a referendum on independence in Scotland.

The role of the Electoral Commission

PPERA established the Electoral Commission as an independent statutory body, and gave the Commission responsibility for guidance and advice on the conduct and regulation of referendums held under an Act of Parliament, independently of Government. The Electoral Commission has an office in Scotland and is responsible for the oversight of elections to the Scottish Parliament and elections to the UK Parliament and EU Parliament in Scotland. It also plays a role in local government elections in Scotland.

During a referendum, the Commission carries out a number of duties, designed to ensure a transparent, well-run vote and to ensure that people have confidence in the outcome. It consults on the intelligibility of the proposed question and reports to the UK Parliament.¹⁰ It produces guidance for administrators and was given the power to issue them with statutory ‘directions’ for the referendum on the voting system for the House of Commons. Any person or organisation planning to spend more than £10,000 campaigning during a referendum must register with the Commission, which publishes details of the donations campaigners receive and how they spend their money. The Commission also accepts applications from groups wishing to be designated as one of the lead campaigners, makes those designations, and provides each with additional funding for specified purposes. After the referendum, the Commission produces a report on how the poll was administered.

⁹ *Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper*, p.27.

¹⁰ An order under section 30 of the Scotland Act 1998 which devolves power to the Scottish Parliament to legislate for an independence referendum could also provide for PERA to be appropriately adapted. So, for example, it could allow for an order to be made that provides for the Electoral Commission to report to the Scottish Parliament rather than the UK Parliament once it has consulted on the intelligibility of the proposed referendum question.

Since its creation the Electoral Commission has overseen three referendums:

- A referendum on the establishment of a Regional Assembly (North East England only);
- A referendum on increasing the powers of the Welsh Assembly (Wales only); and
- A referendum on the voting system for the House of Commons (UK-wide).

The Scottish Government's draft Bill from the previous Parliament proposed the creation of a separate 'Scottish Referendum Commission', answerable to the Scottish Parliament. The Scottish Parliament would nominate three Commissioners, all without strong political affiliations over the last five years, and reimburse them from the Parliament's own funds.¹¹

The UK Government believes it is unnecessary to create a new Commission - with the additional time and cost that would require - when the Electoral Commission is already in place and has demonstrated its credibility in three referendums. The Electoral Commission is an independent and impartial body which has the necessary expertise and knowledge. The UK Government believes that it is appropriate for a referendum to be conducted by those who have both the demonstrable neutrality and proven expertise to inspire confidence in the fairness of the process, rather than creating a new body that would not have built up the same level of experience, knowledge and public trust.

The UK Government believes that the Electoral Commission should oversee any referendum on Scottish independence, and we have included provision in the draft section 30 Order (Annex A) to achieve this.¹² As an independent, well established and credible politically impartial body, the Electoral Commission has the right experience and expertise to ensure that the referendum is held according to well-established, tried and tested rules.

What are your views on the oversight arrangements for a referendum on Scottish independence?

Do you think the Electoral Commission should have a role in overseeing a referendum on Scottish independence?

Entitlement to vote

Entitlement to vote in elections in the United Kingdom varies slightly for different elections. The principal difference is that in UK Parliament elections, British, Irish and qualifying Commonwealth citizens resident in the UK can vote, along with British citizens who have been resident overseas for less than 15 years, but EU citizens resident in the UK cannot vote. In local government, Scottish Parliament, Northern Ireland Assembly and Welsh Assembly elections, British citizens resident overseas cannot vote, but EU citizens resident in the UK can, as well as British, Irish and qualifying Commonwealth citizens resident in the relevant areas.¹³ The group of people who can vote in a particular election is called the franchise.

Recent referendums in the United Kingdom have used either the UK Parliament franchise, or the devolved legislature and local government franchise. So, the franchise for the referendum

¹¹ *Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper*, pp. 27-28.

¹² See Article 3 of the draft Order, inserting new paragraph 5A(6) to Schedule 5 to the Scotland Act 1998. Supplementary provision would be required to fully apply Part 7 of PPERA to the referendum.

¹³ EU law requires EU citizens resident in the UK to have a right to vote in municipal and European elections in the member State in which they are resident

on the voting system for the House of Commons had its basis in the UK Parliament franchise, since it was considered appropriate that those entitled to vote in UK Parliamentary elections should also be entitled to have a say in the electoral system for those elections. Similarly, the referendum on increasing the powers of the Welsh Assembly used the same franchise as for Welsh Assembly elections.

It would be possible to create a new franchise, with different groups of people entitled to vote. However, the UK Government's view is that the existing Scottish Parliament franchise achieves the right balance of clarity, consistency, and transparency, and would be administratively straightforward to deliver. If a new franchise was created specifically for a Scottish independence referendum, it could lead to administrative complications and risk the perception that changes were being made to favour one or other outcome, and would enfranchise individuals currently ineligible to vote in Scottish Parliament elections.

In considering the two existing franchises, it is the UK Government's view that the devolved legislature and local government franchise would be most suitable. This is of course the franchise that elected the current Scottish Parliament and it was also used in 1997 for the referendum that established the Scottish Parliament. For this reason we have included provision in the draft section 30 Order (Annex A) to achieve this.¹⁴

What are your views on which people should be entitled to vote in a Scottish independence referendum?

¹⁴ See Article 3, inserting new paragraph 5A(5) to Schedule 5 to the Scotland Act 1998.

A DECISIVE REFERENDUM

Timing

In the Foreword to the Scottish Government's White Paper *Your Scotland, Your Voice* published in November 2009, the First Minister set out his intention to hold a referendum in November 2010.¹⁵ In the Scottish Government's consultation paper on a draft Referendum Bill, published in February 2010, the Scottish Government stated its preference that the referendum should be held as soon as possible. In the Scottish National Party manifesto for the 2010 UK Parliament elections, the party stated that "we are taking forward a Referendum Bill in the Scottish Parliament this year". The 2011 Scottish National Party manifesto pledged to bring forward a referendum but made no comment about timing.

Before a referendum can happen the legislation required to deliver a legal, fair and decisive poll must be in place. The UK Government's view is that a section 30 Order would be an appropriate method for delivering a legal referendum. An Order can be delivered relatively quickly; within a few weeks if early agreement is reached on the terms of the Order.

The Scottish Government would then need to draft a Bill and take that through the Scottish Parliament. Experience from the referendum on the voting system for the House of Commons has shown that a referendum can be successfully delivered within a year, from the introduction of legislation, through to the holding of the poll.

There are a number of elections due to be held in Scotland over the next four years:

- June 2014 - European Parliamentary elections
- May 2015 - UK Parliament General Election
- May 2016 - Scottish Parliament General Election

The UK Government's firm view is that the question of Scotland's constitutional status should be resolved sooner rather than later. The UK Government believes that the continuing uncertainty about Scotland's future is damaging to Scotland and that until this issue is resolved this uncertainty will remain and grow. The draft section 30 Order (Annex A) includes provision for a date by which the referendum should be held.¹⁶ This section is intentionally left blank; we have not set out a view on a specific date for a referendum in this paper and we welcome views on the date by which a referendum should be held.

What are your views on the timing of a referendum?

¹⁵ "It is now time for the voice of the people to be heard - in the referendum on Scotland's future we intend to hold in November 2010."

¹⁶ See Article 3, inserting new paragraph 5A(3) to Schedule 5 to the Scotland Act 1998.

Referendum question

The Scottish Government's 2010 consultation on a draft Referendum Bill contained proposals to ask two questions about Scotland's constitutional position; the first question would be on further devolution, the second question would relate to independence. The draft Bill set out the two proposals, with which voters would be asked to agree or disagree:

Proposal 1 – Increased powers and responsibilities for Scotland

The Scottish Parliament should have its powers and responsibilities extended as described [on the ballot paper].

Proposal 2 – Additional power to enable Scotland to become an independent country

The Scottish Government proposes that, in addition to the extension of the powers and responsibilities of the Scottish Parliament set out in Proposal 1, the Parliament's powers should also be extended to enable independence to be achieved.

The UK Government believes that the Scottish Government's proposition for two questions is not right for a number of reasons. These questions deal with two entirely separate constitutional issues: first whether more powers should be devolved to the Scottish Parliament within the United Kingdom; and second whether Scotland should become an independent country.

The Scottish Government has compared its proposal with the 1997 referendum, which asked first if there should be a Scottish Parliament, and second whether it should have tax raising powers. This comparison is not valid. In 1997, both questions related to devolution. While the Scottish Government's two proposals both call for the Scottish Parliament to be given new powers, the first would keep Scotland in the UK, and the second would lead to independence.

These are two different issues, and should be considered separately. If these two questions were asked together, there would be four possible outcomes, and potentially four different campaigns, each arguing for a different result. On an issue as important as whether Scotland remains part of the UK, the arguments must be presented clearly, to allow people in Scotland to make an informed decision. Having four different campaigns would not help to generate clarity.

The Scottish Government's second question refers to only giving the Scottish Parliament new powers to enable independence; this was done in an attempt to work around the Scottish Parliament's lack of competence to legislate for an independence referendum. However, as set out above, the UK Government's view is that any referendum that called for the Scottish Parliament to be given powers to enable independence to be achieved, is still a referendum about independence and so would be unlawful.

But as a consequence of the Scottish Government's attempt to work around the limits of its legal powers, the proposed questions are unnecessarily long and complex. The UK Government's view is that there should be a single, straightforward question. The proposal to use an Order to devolve the power to deliver a referendum would allow the Scottish Government to ask that simple question, in consultation with the Electoral Commission. For this reason we have included provision in the draft section 30 Order (Annex A) that would ensure a referendum asks a single question about whether Scotland should become independent from the rest of the United Kingdom.¹⁷

What are your views on the question or questions to be asked in a referendum?

¹⁷ See Article 3, inserting new paragraph 5A(4) to Schedule 5 to the Scotland Act 1998.

4. SUMMARY OF CONSULTATION QUESTIONS

A legal referendum

1. What are your views on using the order making power provided in the Scotland Act 1998 to allow the Scottish Parliament to legislate for a legal referendum in an Act of the Scottish Parliament?
2. What are your views on the UK Parliament legislating to deliver a referendum on independence?
3. What are your views on whether the Scotland Bill should be used either to:
 - i) give the Scottish Parliament the power to legislate for a referendum; or
 - ii) directly deliver a referendum?

A fair referendum

4. What are your views on the oversight arrangements for a referendum on Scottish independence?
5. Do you think the Electoral Commission should have a role in overseeing a referendum on Scottish independence?
6. What are your views on which people should be entitled to vote in a Scottish independence referendum?

A decisive referendum

7. What are your views on the timing of a referendum?
8. What are your views on the question or questions to be asked in a referendum?

The draft section 30 Order

9. What are your views on the draft section 30 Order?

5. CONSULTATION INFORMATION

How to respond to the consultation

We welcome your comments on any aspect of this document, particularly your responses to the questions set out in section 4.

The deadline for responses is **Friday 9 March 2012**. You can respond by letter or e-mail to:

Referendum Consultation
Scotland Office
1 Melville Crescent
Edinburgh
EH3 7HW

email: reply@scotlandoffice.gsi.gov.uk

Alternative formats

An electronic version of this document is available to view and download from the Scotland Office's website: www.scotlandoffice.gov.uk. Hard copies will be posted on request. Copies in various other formats, including large print, Braille, and audio may be made available on request.

Handling information

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding.

We will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Next steps

A summary of responses will be published on the Scotland Office website following completion of the consultation.

ANNEX A – A DRAFT ORDER

DRAFT STATUTORY INSTRUMENTS

2012 No.

DRAFT

Scotland Act 1998 (Modification of Schedule 5) Order 2012

Made - - - - *******

Coming into force - - *******

At the Court at Buckingham Palace, the ******* day of *******

Present,

The Queen's Most Excellent Majesty in Council

This order is made in exercise of the powers conferred by section 30(2) of the Scotland Act 1998⁽¹⁸⁾.

In accordance with section 115 of that Act and paragraphs 1 and 2 of Schedule 7 to that Act, a draft of this Order has been—

- (a) laid before and approved by a resolution of each House of Parliament, and
- (b) laid before and approved by a resolution of the Scottish Parliament.

Accordingly Her Majesty, by and with the advice of Her Privy Council, makes the following order:

Citation and commencement

1. This Order may be cited as the Scotland Act 1998 (Modification of Schedule 5) Order 2012.
2. This Order comes into force on *******.

Modification of Schedule 5 to the Scotland Act 1998

3. In Schedule 5 to the Scotland Act 1998 (reserved matters), after paragraph 5 insert—

“**5A.**—(1) Paragraph 1 does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if the following requirements are met.

(2) The date of the poll at the referendum must not be the date of the poll at any other referendum held under provision made by the Parliament.

(3) The date of the poll at the referendum must be no later than *******.

⁽¹⁸⁾ 1998 c. 46.

(4) There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses.

(5) The persons entitled to vote in the referendum must be the persons who would be entitled to vote in an election for membership of the Parliament—

(a) if one were held on the date of the poll at the referendum, or

(b) if one were held on that date but alterations made in a register of electors after a particular date were disregarded.

(6) The referendum and arrangements in connection with it must be in accordance with Part 7 of the Political Parties, Elections and Referendums Act 2000 (referendums) as if the referendum were within section 101(2) of that Act, subject to any modifications specified in subordinate legislation.”

Supplementary and consequential provision

[Supplementary and consequential provision will be added as required following the consultation]



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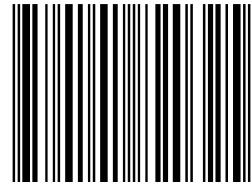
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