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Select Committee on the Constitution

7th Report of Session 2012–13

The Agreement on a referendum on independence for Scotland

Report

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The Agreement on a referendum on independence for Scotland

Introduction

1. In January 2012 the UK and Scottish Governments each published a consultation paper on their proposals for the delivery of a referendum on Scottish independence.¹ We published a report on the matter in February 2012.² The broader political background is summarised in paragraphs 1 to 5 of that report.
2. On 15 October 2012 the UK and Scottish Governments signed an Agreement on a Referendum on Independence for Scotland. Attached to the Agreement is a draft Order in Council which, under the terms of section 30 of the Scotland Act 1998, will devolve to the Scottish Parliament the competence to legislate for a referendum to be held before the end of 2014 on whether Scotland should become independent of the rest of the United Kingdom.
3. Given its subject matter, **the draft Order in Council is clearly of great constitutional significance. We therefore publish this report on the legal and constitutional matters arising from the draft Order in Council and accompanying Agreement, for the information of the House.** We wrote to the Electoral Commission and to the Electoral Management Board for Scotland for their views on what the Agreement says about the roles they are expected to play in the forthcoming referendum process. Their responses are published on our webpages. We are grateful to the Electoral Commission and to the Electoral Management Board for their speedy and helpful responses to our questions.

Our February 2012 report

4. Our February 2012 report dealt with two main issues in the light of the two Governments' consultation papers. First, on the question of legislative competence, we were firmly of the view that the UK Government's legal analysis was correct: namely, that the Scotland Act 1998 devolves no power to the Scottish Parliament to pass an Act purporting to authorise a referendum about independence.³ Given the need to satisfy the fundamental constitutional principle of the rule of law, and in recognition of the Scottish Government's political mandate, we welcomed the core proposal contained in *Scotland's Constitutional Future* that an Order be made under section 30 of

¹ See, respectively, *Scotland's Constitutional Future* (Cm 8203) and *Your Scotland, Your Referendum*. The former included a draft section 30 Order; the latter included a draft Referendum (Scotland) Bill. The UK Government's summary of responses to their consultation was published in April 2012 as Cm 8326; an analysis of the responses to the Scottish Government's consultation was published in October 2012.

² Constitution Committee, 24th report (2010–12): *Referendum on Scottish Independence* (HL Paper 263).

³ *ibid.*, para 30 (the matter is unaffected by the subsequent enactment of the Scotland Act 2012).

the Scotland Act 1998 to confer on the Scottish Parliament the competence to legislate for a referendum on Scottish independence.⁴

5. There were 1,400 responses to the UK Government’s consultation on this matter:⁵ 72% wanted the Scottish Parliament to be given the power to legislate for a referendum and, of these, 63% stated that they supported the use of a section 30 Order.⁶
6. Secondly, as regards the nature and design of the referendum question, we highlighted the twin constitutional imperatives that referendums must be—and must manifestly be seen to be—fair and clear-cut. The committee concluded that a single question should be asked on independence and that the Electoral Commission has a vital role to play in reviewing any proposed wording.⁷
7. Again, these views were supported by large majorities of the respondents to the UK Government’s consultation (namely, 75% of responses on whether there should be a single question on independence and 86% of responses on the role of the Electoral Commission). In the Scottish Government’s consultation exercise, 62% of relevant responses supported a single question on independence; a majority were in broad agreement with the proposed role(s) for the Electoral Commission and the Electoral Management Board.⁸
8. **We welcome the fact that the Agreement reached between the two Governments accords with our previous recommendations. The question of legislative competence is addressed, it is intended that the referendum will pose a single question on independence, and the Electoral Commission will play the lead role in advising on the referendum.**

The Agreement package

9. The Agreement between the UK Government and the Scottish Government on 15 October 2012 comprises three elements: a one-page Agreement signed by the Prime Minister and the Secretary of State and by the First and Deputy First Ministers of Scotland (“the Agreement”); a 30-paragraph Memorandum of Agreement (MoA); and the draft statutory instrument, now formally laid before Parliament, to be made under section 30 of the Scotland Act 1998 (“the draft section 30 Order”).
10. Section 30(2) of the Scotland Act 1998 provides that “Her Majesty may by Order in Council make any modifications of Schedule 4 or 5 which She considers necessary or expedient”. Schedule 5 to the Scotland Act 1998 lists the matters that are reserved to the United Kingdom Parliament. If the Scottish Parliament purports to legislate on a reserved matter, that legislation

⁴ *ibid.*, paras 13 and 31.

⁵ Altogether there were some 3,000 responses to the UK Government’s consultation and some 30,200 responses to the Scottish Government’s consultation (of which 26,200 formed the basis of the Scottish Government’s analysis: the remainder were removed for various reasons explained in that analysis).

⁶ The Scottish Government’s consultation exercise did not ask questions about legislative competence or about proceeding via a section 30 Order.

⁷ *op. cit.*, paras 37 and 52. We drew here on the findings of our earlier report on referendums: Constitution Committee, 12th report (2009–10): *Referendums in the United Kingdom* (HL Paper 99).

⁸ We consider the proposed roles of these bodies below.

is liable to be held by the courts not to be law (see section 29(1)). The Union is listed as a reserved matter in paragraph 1 of Part 1 of Schedule 5. Article 3 of the draft section 30 Order provides⁹—

“(1) Paragraph 1 [of Part 1 of Schedule 5 to the Scotland Act 1998] 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 31 December 2014.

(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.”

11. No section 30 Order may be made by Her Majesty in Council unless it has been approved by both Houses of the UK Parliament and by the Scottish Parliament.¹⁰ Ten Orders have been made under section 30(2).¹¹ Parliamentary consideration of the draft Order in Council is expected to take place during the period from November 2012 to January 2013. Subject to parliamentary approval, it is expected that the Order will be formally made at a meeting of the Privy Council in February 2013.¹² At that point it may be expected that the Scottish Government will introduce a Referendum (Scotland) Bill into the Scottish Parliament.
12. The one-page Agreement signed by Ministers confirms that the parties “will work together to ensure that a referendum on Scottish independence can take place”. **We welcome the commitment of both Governments that “the referendum should meet the highest standards of fairness, transparency and propriety, informed by consultation and independent expert advice”. Basic democratic principle demands nothing less.**
13. Running to 30 paragraphs, the MoA includes “elements that have been agreed by the governments on a non-statutory basis”.¹³ These include the franchise for the referendum, campaign finance and other matters of electoral regulation and administration. The MoA commits the two Governments “to continue to work together constructively in the light of the outcome [of the referendum], whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom”.¹⁴

⁹ Article 4 makes a number of supplementary provisions, concerning aspects of the referendum over which, without article 4, the Scottish Parliament would lack legislative competence. These include provisions about mail-shots and broadcasting.

¹⁰ Scotland Act 1998, section 115 and Schedule 7.

¹¹ The most recent was the Scotland Act 1998 (Modification of Schedule 4) Order 2009 (SI 2009/1380), which paved the way for the Scottish Parliament to enact the Convention Rights Proceedings (Amendment) (Scotland) Act 2009.

¹² See HL Deb, 15 October 2012, col 1311.

¹³ MoA, para 1.

¹⁴ *ibid.*, para 30.

14. The agreement package was the subject of a ministerial statement made in each House on 15 October.¹⁵ Members raised concerns about a range of constitutional matters, including the nature of the Order-making process, the design of the referendum question, the franchise, and the conduct and regulation of the referendum campaign.

Constitutional process and possible legal challenge

15. The draft section 30 Order is skeletal in nature. Much of the detail of the independence referendum will be for the Scottish Parliament to determine in legislation. The wording of the referendum question, the franchise, matters of campaign finance and the detailed roles of the Electoral Commission and other bodies are left for the Scottish Parliament. This reflects a key tenet of the Agreement that the referendum “should be legislated for by the Scottish Parliament”.
16. Of course, instead of a section 30 Order, the UK Parliament could pass primary legislation to ensure that a referendum on Scottish independence is lawful. This possibility was considered by the UK Government: at the time of the publication of the two Governments’ consultation papers in January the Scotland Bill was still before the House of Lords (the Scotland Act 2012 was enacted on 1 May 2012). Whether that Bill should have been used as a vehicle for the Westminster Parliament to legislate directly for an independence referendum was a matter canvassed in the UK Government’s consultation paper. The Government thought that it should not be, for a variety of reasons. This view was confirmed in the consultation exercise, in which only “a very small number of respondents supported the use of the Scotland Bill to provide power to the Scottish Parliament to legislate for a referendum”.¹⁶ The matter was debated in the House of Lords during the passage of the Scotland Bill. Members examined in some detail the Government’s preference for proceeding via a section 30 Order rather than via primary legislation.¹⁷
17. The matter is primarily one of political judgement. It is the Scottish Government (and not the UK Government) that was elected on a manifesto commitment to hold a referendum; it is the Scottish Government (and not the UK Government) that is pursuing independence for Scotland; and it is the view of both Governments that the decision on whether or not Scotland should become independent should be taken by the electorate in Scotland (and not by the electorate in the whole of the United Kingdom). For these reasons it has come to be seen, especially north of the border, that the referendum should be “made in Scotland”. Indeed, the Secretary of State acknowledged as much in his foreword to the UK Government’s consultation paper, when he wrote that “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”. The section 30 route allows for this: first, the section 30 Order itself may not be made without the

¹⁵ HL Deb, 15 October 2012, cols 1310–22; HC Deb, 15 October 2012, cols 64–80. See also HL Deb, 18 October 2012, cols 1557–9. The Deputy First Minister made a statement to the Scottish Parliament on 23 October 2012 (Official Report, cols 12406–19).

¹⁶ Cm 8326, *op. cit.*, p 10.

¹⁷ Notably, on the fifth day of the Bill’s committee stage and on the first day of its report stage: see HL Deb, 21 March 2012, cols 919 ff and HL Deb, 26 March 2012, cols 1187 ff.

approval of the Scottish Parliament and, secondly, the legislation to establish the referendum will be an Act of the Scottish Parliament.

18. Nonetheless, **the decision to proceed via the section 30 route rather than by enacting primary legislation at Westminster has a number of significant constitutional and legal consequences.** Two seem particularly important.
19. The first is that proceeding via the section 30 route significantly curtails the opportunity of the UK Parliament to have an effective input into the process. The Agreement was negotiated in private between the UK and Scottish Governments. In this respect, we note that in their preface to the UK Government's consultation paper, the Prime Minister and Deputy Prime Minister wrote that "the future of Scotland must not be worked out in secret, behind closed doors".
20. Neither the UK nor the Scottish Parliaments were able to make a direct contribution to that process of negotiation. The Agreement was not published in draft. There was no debate in either House of the UK Parliament on the Agreement until after it had been finalised. Furthermore, when it comes to the forthcoming parliamentary debates on the draft section 30 Order, neither the House of Commons, the House of Lords, nor the Scottish Parliament will be able to amend the Order. Legislators will only be able to vote on whether the draft Order as laid should be approved under an affirmative resolution procedure. Formally, the Government were bound to use this procedure: there is no provision in the Scotland Act 1998 for orders amending the list of reserved powers in Schedule 5 to be made subject to any form of super-affirmative procedure.¹⁸
21. **The House may consider that, despite the constitutional significance of the draft section 30 Order, the procedure makes it impossible to ensure fully effective scrutiny.**
22. In our report last year on *The Process of Constitutional Change*¹⁹ we recommended that proposals for significant constitutional change should be the subject of public consultation—and the extensive public consultation exercises undertaken by both Governments are to be welcomed—but we also stressed the importance of effective parliamentary scrutiny. **It is hard to avoid the conclusion that more could have been done to include the United Kingdom Parliament in this process.**
23. A second constitutional and legal consequence of adopting the section 30 route is that there can be no guarantee that this manner of proceeding precludes litigation. The two Governments are now agreed that the referendum should "have a clear legal base". In their consultation paper the UK Government were anxious to ensure that any Scottish independence referendum was clearly lawful. The Government stated that they did not "believe that it is in Scotland's interests to have Scotland's constitutional future decided in court".²⁰
24. Delegated legislation—including delegated legislation that is approved by Parliament—is, in principle, judicially reviewable. If a claimant (or, in

¹⁸ Such as that found in the Legislative and Regulatory Reform Act 2006 and the Public Bodies Act 2011, for example.

¹⁹ Constitution Committee, 15th report (2010–12), HL Paper 177, paras 46 and 90.

²⁰ Cm 8203, *op. cit.*, p 7.

Scotland, a petitioner) took the view that the section 30 Order was *ultra vires* the Scotland Act 1998, for example, he or she may be able to seek a judicial review. There would be a series of obstacles for such a claim (or petition) to overcome. The claimant or petitioner would have to show that he or she was “sufficiently interested” in the matter for the court to recognise his or her standing.²¹ The claim would have to show that the Order in Council was not “necessary or expedient” within the meaning of section 30(2) of the Scotland Act.²² And the court would have to be persuaded that the Order was unlawful even though it had been approved by both Houses of Parliament and by the Scottish Parliament.²³ These obstacles are considerable: we do not consider that any such claim or petition would be likely to succeed. But we cannot rule out the possibility that such a claim or petition might nonetheless be brought, with all the consequences of the potential for delay and disruption and for bringing the courts into the heart of the process that such an action may have.²⁴

25. For example, a challenge to the section 30 Order could conceivably be brought on *Padfield* grounds.²⁵ In *Padfield* (one of the leading cases on administrative law in the 20th century) the House of Lords held that statutory powers may be used only to promote—and not to frustrate—the policy and objects of the Act that conferred the powers in question. The policy and objects of an Act are a matter of law for the court to determine, bearing in mind the Act as a whole. If a statutory power is used to frustrate the policy and objects of the relevant Act, this may amount to an improper purpose, with the exercise of the power being held to be unlawful. It has been authoritatively said both in the Court of Session and in the UK Supreme Court that the purpose of the Scotland Act 1998—indeed, “the whole scheme of devolution”—is that “the redistribution of powers should not impair but improve the government of the United Kingdom as a whole”.²⁶ It might then be argued that it is an improper use of a devolution statute (such as the Scotland Act 1998) to arrange for a referendum on the different and separate issue of independence. A number of the Government’s own statements might be prayed in aid in support of such a contention. Their January 2012 consultation paper, in arguing against the notion that the referendum should contain two questions, one on independence and another on further devolution, stated that independence and devolution are “two different issues” each of which required to be “considered separately”²⁷ (a proposition with which we agreed).²⁸

²¹ The law of standing to seek judicial review in Scots law is in the process of being liberalised, to bring it into line with the already rather open law of standing found in English law: see *AXA General Insurance v HM Advocate* [2011] UKSC 46 and *Walton v Scottish Ministers* [2012] UKSC 44.

²² That Orders in Council may on occasion be held to be unlawful on this ground is illustrated in the recent decision of the Supreme Court in *Ahmed v HM Treasury* [2010] UKSC 2.

²³ That Orders may be held to be unlawful despite their having been approved by Parliament was confirmed by the Court of Appeal in *R (Faved) v Home Secretary* [2001] EWCA Civ 789, [2002] QB 129.

²⁴ Cf *R (Wheeler) v Prime Minister* [2008] EWHC 1409 (Admin).

²⁵ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

²⁶ *Martin and Miller v HM Advocate* [2010] UKSC 10, para 80 (Lord Rodger). Cf *Whaley v Watson* 2000 SLT 475, at 484 (Lord President Rodger).

²⁷ Cm 8203, *op. cit.*, p 19.

²⁸ The committee argued that independence and extended devolution were different constitutional outcomes that required distinct constitutional processes: *op. cit.*, para 44.

26. Furthermore, and although it clearly has the character of a political and administrative set of commitments, it is conceivable that the MoA could be brought before the courts. We note that, unlike the general memorandum of understanding on intergovernmental relations in the UK,²⁹ the MoA does not specifically deny the creation of legal obligations between the parties. Were one of the Governments to breach the Agreement, the possibility arises of legally actionable “legitimate expectations” either of a procedural or substantive nature.³⁰ This too might be at the suit of a third party in the guise of a “concerned citizen”.³¹
27. That said, the language of the MoA repays close attention. Some paragraphs record substantive matters on which the two Governments are agreed. Other paragraphs record agreement solely that certain matters are to be left to the Scottish Government and Parliament. An example is the Scottish Government’s proposal to allow 16 and 17 year-olds to vote in the referendum. The UK Government have agreed that this matter is for the Scottish Government and Parliament to decide, whilst making it clear that it is not the policy of the UK Government for the franchise to be extended to minors. Yet other paragraphs simply describe matters of law and practice in the UK (such as under the Political Parties, Elections and Referendums Act 2000 (PPERA)), stating that such UK practice is intended to provide the basis for future practice in Scotland. It may be, therefore, that irrespective of the legal status of the MoA as a whole, different provisions within the MoA are capable of generating different levels or different kinds of legal or constitutional obligations or expectations.
28. **It cannot safely be said that the arrangements proposed put the matter beyond all legal challenge.**

The referendum question

29. The draft section 30 Order stipulates that there should be a single question on independence. This is designed to rule out the possibility of there being a second question on further devolution of powers to Scotland. The Scottish Government had left this possibility open in their consultation paper;³² the UK Government were firmly against it;³³ and in our earlier report on the matter we supported the UK Government’s position.³⁴ As is noted above, both consultation exercises revealed large majorities in favour of having a single question on independence and no second question on “devo max”.³⁵

²⁹ Memorandum of Understanding and Supplementary Agreements between the United Kingdom, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (revised, September 2012), para 2.

³⁰ On the authority, for example, of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, respectively.

³¹ See *Wheeler, op. cit.* Again, in making these points, we do not suggest high prospects of success.

³² Although *Your Scotland, Your Referendum* advocated a single question, it held out the possibility of a second question in the referendum on “devolution max”: p 5 and para 1.26.

³³ Cm 8203, *op. cit.*, p 19.

³⁴ *op. cit.*, paras 38–45.

³⁵ “Devo max” is not a synonym for further devolution, but is a scheme for the maximum possible devolution of powers to Scotland short of full independence (this is sometimes called “full fiscal autonomy”). Such a scheme was outlined by the Scottish Government in November 2009 in a paper called *Your Scotland, Your Voice*. Other schemes of further devolution, which propose less extensive devolution than “devo max”, are sometimes referred to as “devo plus”: see, for example, the reports available at www.devoplus.com.

30. **We welcome the provision in the draft Order that “there must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses”.** Likewise, as a guard against “side-stepping” that requirement through a separate but simultaneous referendum on some form of enhanced devolution, **we welcome the further provision that “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”.**
31. Neither the draft section 30 Order nor any other part of the Agreement stipulates what the referendum question is to be. This will be a matter for the Scottish Government to propose and for the Scottish Parliament to determine.
32. It is easy to see that there may be real concerns about a particular wording.³⁶ The question proposed by the Scottish Government in *Your Scotland, Your Referendum* was: “Do you agree that Scotland should be an independent country?” At least four problems have been identified with this formulation: first, that it is a leading question;³⁷ secondly, that it asks a question about what Scotland is rather than about what Scotland should or should not become; thirdly, that it asks about whether Scotland should be an independent country rather than an independent state; and fourthly that it does not specify that the consequence of independence would be that Scotland would leave the United Kingdom. **We are concerned about whether a referendum on independence will be intelligible unless it specifies that the consequence of independence is Scotland leaving the United Kingdom.**
33. The consultation paper *Your Scotland, Your Referendum* did not specify that the Electoral Commission would perform the role it plays in respect of UK referendums of formally reviewing a proposed referendum question for intelligibility.³⁸ For reasons of independence, experience and expertise, our previous report identified “a compelling case” for having the Electoral Commission perform this role in respect of any referendum on Scottish independence.³⁹ The Electoral Commission’s review process considers whether referendum questions present the options to voters “clearly, simply and neutrally”.⁴⁰ In its written evidence to us the Commission elaborated on this, saying that it will look at whether the proposed question “is easy to understand, is to the point, is unambiguous, avoids encouraging voters to consider one response more favourably than another [and] avoids misleading voters”.⁴¹ **We welcome the commitment in the Memorandum of Agreement⁴² to read across the PPERA procedure, such that the Electoral Commission will consider whether the referendum question**

³⁶ For evidence that different wordings may lead to different results in opinion polls on Scottish independence, see M Keating, *The Independence of Scotland* (Oxford University Press, 2009), p 73.

³⁷ See House of Commons Scottish Affairs Committee, 8th report (2010–12): *Do you agree this is a biased question?* (HC 1492).

³⁸ See the PPERA, section 104.

³⁹ *op. cit.*, para 52.

⁴⁰ Electoral Commission, *Our approach to assessing the intelligibility of referendum questions*; available at: http://www.electoralcommission.org.uk/_data/assets/pdf_file/0005/82625/Referendum-Question-statement-final.pdf.

⁴¹ Para 1.2.

⁴² MoA, para 8.

proposed by the Scottish Government presents the options to voters clearly, simply and neutrally and will report accordingly to the Scottish Parliament (as the legislator of the Referendum Act).

34. We reiterate that expert and independent review of referendum questions is an important constitutional check on executive power, one that clearly facilitates proper parliamentary scrutiny.⁴³ **We trust and believe that the Electoral Commission will be rigorous in assessing the question and will give candid and fearless advice on the wording proposed by the Scottish Government.**
35. As would be the case for the UK Government and Parliament under PPERA, there is nothing in the MoA or in the draft section 30 Order to compel either the Scottish Government or the Scottish Parliament to accept any recommendations made by the Electoral Commission as to the “intelligibility” of the referendum question. As would be the case in Westminster, however, **we would expect any departure from the Electoral Commission’s recommendations on the wording of the referendum question to be robustly scrutinised. We hope that there will be no such departure. Following the advice of the Electoral Commission would be compatible with the commitment of the Scottish Government in the MoA that “the referendum should meet the highest standards of fairness, transparency and propriety, informed by consultation and independent expert advice.”**
36. We have two concerns in relation to the referendum question which we draw to the attention of the House. The first is that, while the draft section 30 Order provides that a referendum on “the independence of Scotland from the rest of the United Kingdom” is not a reserved matter,⁴⁴ the precise meaning of this phrase remains unclear.⁴⁵ Exactly what the Scottish Government mean by “independence” is unknown. The Scottish Government have undertaken to publish the equivalent of a white paper setting out their vision of independence in the autumn of 2013. On present timetables this will occur well after the Referendum (Scotland) Bill has been introduced into the Scottish Parliament and, more importantly perhaps, after the Electoral Commission will have assessed the referendum question for intelligibility. **It is hard to see how the Scottish Parliament and the Electoral Commission will be able to undertake their roles fully and effectively, given that they will learn what the Scottish Government mean by “independence” only much later in the process.**
37. Our second concern in relation to the referendum question arises from the specification in the draft section 30 Order that the independence referendum may not be held on the same day as any other referendum. As noted above, this means that there can be no independence referendum taking place alongside, most obviously, a referendum on “devo max”. Yet the draft section 30 Order, while it devolves competence to the Scottish Parliament to legislate for an independence referendum, devolves no competence to the Scottish Parliament to legislate for a referendum on “devo max”. Does this imply that the UK Government now agree with the assertions previously

⁴³ Constitution Committee, *op. cit.* n 2 above, para 48.

⁴⁴ As long as the referendum takes place before the end of 2014.

⁴⁵ See, for example, House of Commons Scottish Affairs Committee, 6th report (2010–12): *The Referendum on Separation for Scotland: Unanswered Questions* (HC 1806).

made by the Scottish Government⁴⁶ that the Scottish Parliament already possesses the legislative competence to pass an Act authorising a referendum on “devo max”⁴⁷ or on other schemes of extended devolution of powers to Scotland? **The House may wish to consider why the draft section 30 Order provides that the independence referendum must take place on a day on which no other referendum takes place if the Scottish Parliament does not have competence to legislate for a referendum on “devo max”.**

The franchise

38. Both Governments have agreed that all those entitled to vote in Scottish parliamentary and local elections should be able to vote in the referendum.⁴⁸ This is both a practical arrangement and one which reflects the view that “the future of Scotland’s place within the United Kingdom is for people in Scotland to vote on.”⁴⁹
39. The UK Government have agreed, however, that the Scottish Government may have the option of proposing an extension of the franchise to allow 16 and 17 year-olds to vote in the referendum. According to the MoA, the Scottish Government’s decision will be informed by the analysis of responses to its consultation paper and by “practical considerations”.⁵⁰ It will be for the Scottish Parliament to approve the referendum franchise, “as it would be for any referendum on devolved matters”.⁵¹
40. The Health Boards (Membership and Elections) (Scotland) Act 2009, an Act of the Scottish Parliament, provides for health boards to be elected on a pilot basis. The Act provides that 16 and 17 year-olds may vote in such elections. Two such elections took place in 2010. An interim report on them has been published,⁵² which notes that turnout in the two pilot elections was low (23% in Dumfries and Galloway and 14% in Fife) and even lower among 16 and 17 year-olds (13% in Dumfries and Galloway and 7% in Fife). A total of 625 16 and 17 year-olds voted in the two elections. Under the Crofting Commission (Elections) (Scotland) Regulations 2011, 16 and 17 year-olds may likewise vote in elections to the Crofting Commission, but only if (like any other voter in these elections) their name has been entered on the Register of Crofts. It is questionable whether these precedents are relevant to a referendum on independence.
41. In our report *The Process of Constitutional Change* we drew attention to the risks of anomaly and unintended consequence associated with an ad hoc and piecemeal approach to constitutional reform.⁵³ **The House may consider that the proposed extension of the franchise to 16 and 17 year-olds for the purpose of the referendum on independence illustrates such risks.**

⁴⁶ See, for example, *Your Scotland, Your Referendum*, *op. cit.*, para 1.6.

⁴⁷ The Scotland Act 1998, Schedule 5, Part II, section A1 reserves to the Westminster Parliament “fiscal, economic and monetary policy, including ... taxes and excise duties”.

⁴⁸ MoA, para 9.

⁴⁹ Cm 8203, *op. cit.*, preface.

⁵⁰ MoA, para 11.

⁵¹ *ibid.*, para 10.

⁵² Available at: <http://www.scotland.gov.uk/Resource/Doc/343289/0114206.pdf>.

⁵³ *op. cit.*, paras 27 to 29.

42. The problems of electoral registration posed by the proposed extension of the franchise to 16 and 17 year-olds were analysed by the Electoral Commission in its response to the two Governments' consultation papers.⁵⁴ The Commission noted that, were the provisions of the Draft Bill attached to the Scottish Government's consultation paper to be enacted, 17 year-olds would be eligible to be registered to vote, but 16 year-olds would be so eligible only if their birthday was on or after 30 November. Thus, the vast majority of 16 year-olds would be ineligible: one cannot vote unless one is lawfully on the register; and one cannot be placed lawfully on the register unless one is an adult or an attainer (that is, a person who will reach his or her 18th birthday within the coming 14 months). The Electoral Commission concluded that "it is unclear exactly how the Scottish Government's policy of lowering the voting age to 16 is intended to apply to the referendum".⁵⁵ The First Minister of Scotland indicated in his speech to the recent SNP Conference in Perth that the Scottish Government would introduce into the Scottish Parliament a paving bill, preparing for the extension of the franchise in the referendum to 16 and 17 year-olds.
43. **There may be a number of legal problems associated with the proposed extension of the franchise to 16 and 17 year-olds.** There may be data protection implications, for example, if minors are included on the register.⁵⁶ The register is a public document, which records the names and addresses of those registered. The edited register is made available for sale to commercial and charitable organisations.
44. We note that those responsible for electoral registration in Scotland will be preparing not only for the referendum on independence but also for the transition from household voter registration to individual voter registration (IER). The Electoral Registration and Administration Bill currently before Parliament makes provision for IER, which has been described by the Electoral Commission as "the biggest change to the voter registration process since the universal franchise".⁵⁷ In correspondence following our recent report on the Bill,⁵⁸ the Minister for Political and Constitutional Reform, Chloe Smith MP, wrote of "a phased change taking place over two years".⁵⁹ The Electoral Commission has emphasised to us that all relevant authorities, including the UK and Scottish Governments, must "consider carefully the wider implications of the introduction of IER for participation in the Scottish referendum". It appears that "special communications strategies" are likely to be required so that electors in Scotland understand what they need to do in order that they are registered and can vote in the independence referendum.⁶⁰ Appropriate resources for such communications will be for the Scottish Government and Scottish Parliament to provide.

⁵⁴ Electoral Commission, *The Scottish Referendum: Response to Consultations*, available at: http://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/146927/The-Scottish-referendum-Response-to-consultations.pdf.

⁵⁵ *ibid.*, para 8.10.

⁵⁶ We note that the Data Protection Act 1998 extends to Scotland and that it is a reserved matter under the Scotland Act 1998 (Schedule 5, Part II, section B2).

⁵⁷ Electoral Commission, Briefing on the Electoral Registration and Administration Bill, July 2012, p 2.

⁵⁸ Constitution Committee, 5th Report (2012–13): *Electoral Registration and Administration Bill* (HL Paper 51).

⁵⁹ Letter to the committee chairman, 29 October 2012, available on our webpages.

⁶⁰ Electoral Commission, written evidence, para 9.5.

45. In our report on the Electoral Registration and Administration Bill, we highlighted the fundamental constitutional importance of the right to vote. **If the decision is made to introduce voting for 16 and 17 year-olds for the independence referendum, the relevant authorities must ensure, in accordance with their constitutional responsibilities of fairness and equal treatment, that no such person is denied the right to vote by inadequate processes of or insufficient funding for electoral registration and administration.**

The Electoral Commission and the Electoral Management Board

46. The Electoral Commission is a UK-wide body. Created by PPERA, it has ten Commissioners, including one for Scotland (John McCormick) and one senior member of the Scottish National Party (Sir George Reid). The Electoral Management Board (EMB) is a Scottish body, formally established by the Local Electoral Administration (Scotland) Act 2011 (an Act of the Scottish Parliament). The Board comprises eight members, with a mix of Returning Officers and Electoral Registration Officers. These are appointed by a Convener who is in turn appointed by Scottish Ministers.
47. The MoA stipulates⁶¹ that oversight of the Scottish independence referendum should be shared between these bodies, as follows: the Electoral Commission will have responsibility for commenting on the wording of the referendum question, for the registration of campaigners, for designating the lead campaign organisation, for regulating campaign spending and donations, for giving grants to lead campaign organisations,⁶² for publishing guidance for permitted participants, and for reporting on the referendum process. These are all functions which the Electoral Commission already has in respect of UK referendums where PPERA applies. For the Scottish independence referendum the Electoral Commission will report to the Scottish Parliament (for PPERA referendums it reports to the UK Parliament). The EMB will have responsibility for the conduct of the poll and for the announcement of the result. For PPERA referendums these functions are carried out by the Electoral Commission, but the EMB already carries out these functions in respect of local government and parliamentary elections in Scotland. The Scottish Government propose that the Chief Counting Officer (CCO) for the referendum should be the Convener of the EMB.⁶³
48. As their written evidence to us makes clear, the Electoral Commission and the EMB have a close working relationship. The Commission confirms that the proposed division of responsibilities “worked well at the recent local government elections in Scotland”.⁶⁴ The EMB agrees: “a partnership exists in which both organisations are aware of their distinct roles but work well together.”⁶⁵ The Commission also refers to “areas of overlap where a joined up approach from the [two bodies] will be desirable”. For example, “it may

⁶¹ MoA, paras 12 to 15.

⁶² If applicable: the Scottish Government have proposed that there will be no grants of public money to lead campaign organisations: see *ibid.*, para 14.

⁶³ *ibid.*, para 15.

⁶⁴ Electoral Commission, written evidence, para 4.3.

⁶⁵ EMB, written evidence.

be beneficial to campaigners to have one set of guidance covering all aspects, as opposed to separate streams of guidance”.⁶⁶

49. The Electoral Commission and the EMB both highlight the EMB’s need for additional capacity and expertise. Whereas the EMB “currently operates with limited dedicated resource”,⁶⁷ the role of the EMB (and CCO) will clearly be magnified in the referendum on independence. **We welcome the Electoral Commission’s intention⁶⁸ of publishing in autumn 2013 an interim statement on preparedness for the referendum, including on the preparedness of the EMB.**
50. We note the Electoral Commission’s concern that the appointment of the CCO (the Convenor of the EMB) by Scottish Ministers may “risk compromising the perception of the CCO’s capacity to deliver her statutory responsibilities independently”.⁶⁹ The Commission recommends that “the CCO be appointed by and accountable to the Scottish Parliament as opposed to Ministers.”⁷⁰ **We agree.**

Campaign finance and the referendum rules

51. The detailed referendum rules, governing such matters as campaign finance, will be provided for by (or under the authority of) the Referendum (Scotland) Bill, once that measure has been passed by the Scottish Parliament. Two particular matters are dealt with in some detail in article 4 of the draft section 30 Order: broadcasting and free mail-shots. These appear in the draft Order because otherwise the Scottish Parliament would have no competence to legislate for them, regulation of broadcasting and postal services being reserved matters.
52. The MoA reveals how much in this area has been left open. For example, the MoA records that “both governments recognise that campaign finance will be an important issue”,⁷¹ not that both Governments agree that the rules as to campaign finance should be closely modelled on those set out in PPERA, or that the rules should come into force only after having been endorsed as fair and reasonable by the Electoral Commission, etc. The MoA sets out at some length what happens at UK level for PPERA referendums⁷² but, in terms of applying these practices to the Scottish independence referendum, it says no more than that the “rules and standards set out in PPERA” should “provide the basis” for setting the limits to campaign spending.⁷³
53. The precise meaning of the phrase “provide the basis” is not clear. The extent to which the Scottish Government remain free to make proposals that differ from the “rules and standards” set out in PPERA is not stipulated in any detail in the MoA and will, therefore, be a matter for the scrutiny of the Scottish Parliament.

⁶⁶ Electoral Commission, written evidence, para 4.5.

⁶⁷ EMB, written evidence.

⁶⁸ Electoral Commission, written evidence, para 5.3.

⁶⁹ *op. cit.*, para 6.13.

⁷⁰ Electoral Commission, written evidence, para 5.6.

⁷¹ MoA, para 24.

⁷² *ibid.*, para 26.

⁷³ *ibid.*, para 25.

54. In its response to the two Governments' consultation papers, the Electoral Commission was critical of a number of aspects of the Scottish Government's proposals in this area. In particular, the proposed limit of £750,000 for designated lead campaigners was thought to be too low; the proposal to limit party spending to £250,000 each was said to be misguided, with a better approach being to set different limits according to each party's electoral support; and the proposed limit of £50,000 for other (non-party) registered campaigners was said to be far too low, with the Electoral Commission arguing that it should be at least £100,000.⁷⁴ The Commission intends to consult prospective campaigners before publishing further advice on the spending limits.⁷⁵
55. The MoA notes that in setting such limits for PPERA referendums the Secretary of State is not bound by the Electoral Commission's recommendations (although he is bound to consult the Electoral Commission). Were the Secretary of State to elect not to follow the Electoral Commission's advice, he would be required to lay a statement before both Houses of Parliament explaining why.⁷⁶ The MoA likewise stipulates that, if there is any departure from the Electoral Commission's advice on spending limits, the policy memorandum accompanying the Referendum (Scotland) Bill will include a statement of the reasons for this.⁷⁷
56. Whereas the Electoral Commission was critical of a number of the Scottish Government's proposals as to campaign finance, it welcomed the Scottish Government's proposal that the regulated period for the referendum should be the 16 weeks ending with the date of the referendum.⁷⁸ To put this in context, the period of time between the signing of the Agreement and the date of the referendum is expected to be in the region of two years (just over 100 weeks).
57. **We draw to the attention of the House how little appears to have been agreed between the Governments on these important issues. It seems that Parliament is to be invited to approve the draft section 30 Order with few guarantees that the PPERA scheme governing the fairness of referendum campaigns will be made to apply in Scotland.**

Conclusion

58. **It is the Scottish Parliament that will play the vital constitutional role of providing full and effective scrutiny of the proposed arrangements for the referendum on independence. The Scottish Parliament will have available to it the expert analysis and input of the Electoral Commission, whose advice should be considered authoritative.**
59. There are important constitutional issues still to be addressed before the referendum is held in 2014. We will return to those issues in due course.

⁷⁴ *op. cit.*, paras 10.11 to 10.25.

⁷⁵ Written evidence, para 6.4.

⁷⁶ PPERA, Schedule 14, paragraph 2. To date this has not happened: the Secretary of State has always accepted the advice of the Electoral Commission on this matter.

⁷⁷ MoA, para 27.

⁷⁸ *op. cit.*, para 10.6.