

A REFERENDUM ON INDEPENDENCE: a response to the UK and Scottish Governments' consultation papers

Summary

- *We are of the view that an Order made under section 30 of the Scotland Act 1998 is the preferable approach to legislation for a referendum as this would require prior approval by both Parliaments, and should remove doubt as to the power of the Scottish Parliament to legislate for the referendum. We are strongly of the view that the UK and Scottish Governments should make every effort to arrive at an agreement as to the terms of a section 30 Order.*
- *The Scottish Government has indicated that in the absence of agreement between the Governments for an adjustment of the legislative competence of the Scottish Parliament, it would have the option of a referendum, under legislation of the Scottish Parliament, asking “whether the powers of the Scottish Parliament should be extended to enable independence to be achieved”. However, it is not clear whether such a referendum would be one in which the electorate would be asked to make a decision to which effect would be given, or one which would merely seek the views of the electorate, in much the same way as an opinion poll. It would also be important to know precisely what is intended by the extended powers “to enable independence to be achieved” to allow for a more informed assessment of the Scottish Government’s claim that such a question is legally competent.*
- *It is very important that a referendum question is clear and fair. It should not suggest the answer. We are strongly of the view that provision should be made for independent advice on the appropriateness of the referendum question. Referendum legislation in the Scottish Parliament should include provision for the Electoral Commission providing advice to the Scottish Government in regard to the proposed question, and for the publication of that advice.*
- *In our view it is not possible to determine at this stage whether or not it would be appropriate to include an additional question on further devolution. Before that, the proponents of such a question would need to define, and explain to the electorate, the nature, extent and implications of the further devolution which they envisage.*
- *It is essential that voters have all the information they need to enable them to make an informed choice in the referendum. It is of critical importance that the full implications of the alternatives are clearly articulated before the referendum takes place. These considerations indicate that the argument for holding the referendum in the second half of the current session of the Scottish Parliament, to allow sufficient time for reflection, information and debate, is persuasive.*
- *We consider that a proposal to extend the age at which a person becomes eligible to vote should be considered on its own general and distinct merits rather than specifically for the purposes of the referendum.*
- *In our view, anything which makes voting easier and more attractive should be explored, while ensuring that appropriate safeguards are in place. The Scottish Government proposal for Saturday voting requires further investigation and there are a number of practical considerations which should be borne in mind. Voting on a Saturday would also affect the timing of the counts and the declaration of results.*
- *The Scottish Government proposes that the arrangements which are currently in place for the management of local elections in Scotland should be followed for the referendum. It would be advisable that the respective roles and responsibilities of the Electoral Management Board (EMB) and the Electoral Commission, and their interrelationship, is set out in the referendum legislation. It is also important to ensure that the EMB is adequately resourced so that it can fulfil the roles and responsibilities which are expected of it.*

Introduction

1 The Royal Society of Edinburgh (RSE), Scotland's National Academy, welcomes the opportunity to respond to the UK and Scottish Governments' Consultation Papers on proposals for a referendum on independence. The RSE is well placed to do so because of the multi-disciplinary breadth of its Fellowship which permits it to draw upon advice from relevant experts including those from the fields of constitutional law, political science and public policy. We are concerned with the practical aspects of the referendum process. Our comments may be of assistance in ensuring that it is fair, transparent, proper and conclusive. Our response should not be understood as indicating any view as to the merits of the case for an advance towards independence or further devolution, as to which the RSE's position is neutral. As the main issues raised by both consultation papers are broadly similar, this paper should be regarded as a response to both of them. Our comments have been organised under broad headings which are relevant to both consultation papers and, where it is appropriate to do so, they refer to the specific questions posed.

The Legal Basis for a Referendum

2 Of the options mentioned in Questions 1 – 3 of the UK Government's consultation paper, we are of the view that an Order by the Privy Council under section 30 of the Scotland Act 1998 (question 1) is the preferable approach to legislation for a referendum. Such an Order would require the prior approval by both Parliaments, and should remove doubt as to the power of the Scottish Parliament to legislate for the referendum. We are strongly of the view that both Governments should make every effort to arrive at an agreement as to the terms of a section 30 Order.

3 The alternative of the UK Parliament legislating directly for a referendum to be held by it (question 2) seems unsatisfactory in view of the limited role for the Scottish Parliament. The same applies to the alternative of amending the Scotland Bill for the same purpose (question 3(ii)). In any event, amendment of the Scotland Bill either for this purpose or to give the Scottish Parliament power to legislate for a referendum seems unrealistic in view of the advanced stage which that Bill has already reached.

4 We note that the Scottish Government has indicated, in paragraphs 1.5 and 1.12 of its Consultation Paper, that, in the absence of agreement between the Governments for an adjustment of the legislative competence of the Scottish Parliament, it would have the option of a referendum, under legislation of the Scottish Parliament, asking "whether the powers of the Scottish Parliament should be extended to enable

independence to be achieved", as was set out in *Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper* in 2010.

5 The nature of the referendum which the Scottish Government has envisaged is not clear. In particular it is not clear whether it would be one in which the electorate would be asked to make a decision to which effect would be given, or one which would merely seek the views of the electorate, in much the same way as an opinion poll. The statement by the Scottish Government in paragraph 1.5 that the question was carefully phrased to comply with the Scotland Act 1998 may suggest that it was the former. However, in that case it would be important, as a further clarification, to know precisely what is intended by the extended powers "to enable independence to be achieved" to which the question referred, as that would allow a more informed assessment of the Scottish Government's claim that such a question is legally competent.

The Referendum Question or Questions

6 It is very important that a referendum question is clear and fair. It should not suggest the answer. We note, by way of illustration, that some commentators have said that the question which the Scottish Government has proposed in paragraph 1.10 of its Consultation Paper (and in its first question), namely "Do you agree that Scotland should be an independent country?" could be construed as creating a bias towards an affirmative response.

7 We are strongly of the view that provision should be made for independent advice on the appropriateness of the referendum question.

8 The Political Parties, Elections and Referendums Act 2000 (PPERA) sets out the regulatory framework for the conduct of a referendum in the UK. The Electoral Commission is responsible for holding referendums under the rules of the PERA. Its responsibilities include providing an independent assessment on the intelligibility of the proposed referendum question. These provisions apply only where the UK Parliament has legislated directly for a referendum. In its consultation paper the Scottish Government proposes that the referendum should be regulated by the Electoral Commission. We welcome this statement, and consider that the referendum legislation in the Scottish Parliament should include provision for the Electoral Commission providing advice to the Scottish Government in regard to the proposed question, and for the publication of that advice. Provision should also be made to enable the Electoral Commission to be adequately resourced for this purpose, including any research which it considers to be appropriate.

Possible inclusion of an additional question

9 In its consultation paper the Scottish Government makes it clear (in paragraphs 1.25 and 1.26 and its question 3) that it is willing to include a question on further devolution in the referendum if there is sufficient support for this. In our view it is not possible to determine at this stage whether or not it would be appropriate to include an additional question. Before that, the proponents of such a question would need to define, and explain to the electorate, the nature, extent and implications of the further devolution which they envisage.

Timing and Timetable

10 It is essential that voters have all the information they need to enable them to make an informed choice in the referendum. It is of critical importance that the full implications of the alternatives are clearly articulated before the referendum takes place. These considerations indicate that the argument for holding the referendum in the second half of the current session of the Scottish Parliament, to allow sufficient time for reflection, information and debate, is persuasive.

Entitlement to Vote

- 11 The UK and Scottish Governments have concluded that the Scottish Parliament and Scottish local government franchise is the most appropriate for the referendum. We agree with this.
- 12 The Scottish Government has sought views on the extension of the franchise to those aged 16 and 17 who are eligible to be entered on the electoral register (its question 7). We note that in a report¹ the House of Lords Select Committee on the Constitution indicated that, in respect of any proposal for significant constitutional change (of which an extension to the franchise would be likely to be an example) there should be comprehensive pre-legislative and post-legislative parliamentary scrutiny. We consider that a proposal to extend the age at which a person becomes eligible to vote should be considered on its own general and distinct merits rather than specifically for the purposes of the referendum.

Turnout and Help

13 In our view, anything which makes voting easier and more attractive should be explored, while ensuring that appropriate safeguards are in place. This should include “advanced voting” i.e. voting at designated locations in each constituency for a number of days before polling day itself.

- 14 We have considered the proposal of the Scottish Government that the referendum could be held on a Saturday (its question 6). This requires further investigation as it is not clear that holding the referendum on a Saturday would necessarily result in a higher turnout of voters. We are aware that weekend voting was piloted in Watford Borough Council for the local council elections in 2000 and there were fewer votes cast over the weekend compared to the previous year where the vote took place on a Thursday as usual.
- 15 There are also a number of practical considerations which should be borne in mind, as follows:
- The public is used to voting on a Thursday.
 - Saturday polling might affect the availability of staff and sub-contractors (e.g. for transporting ballot boxes).
 - Saturday voting might make it easier to use schools as polling places but might mean other facilities (e.g. church halls) are less readily available.
- 16 Voting on a Saturday would also affect the timing of the counts and the declaration of results. Recruiting staff to count votes immediately after the close of the poll on a Saturday would present Returning Officers with considerable difficulties. Would the count take place on the Sunday or the Monday? Given that the Western Isles would decline to count votes on the Sabbath, the result for Scotland would not be declared until, say, midday on the Monday.
- 17 Recent media coverage indicates that Saturday 18th October 2014 is a possible date for the referendum. If a date in October is chosen it will be important to avoid the school half term holiday, so as to ensure that the maximum number of people is able to vote.
- 18 Clearly, all possible steps should be taken to assist people with disabilities. Returning Officers have done much to facilitate this in recent years and several of the measures set out in paragraph 2.17 of the Scottish Government Consultation Paper are already in place.

¹ *The Process of Constitutional Change*, 18 July 2011; 15th Report of Session 2010–12 <http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/177/177.pdf>

Management, Regulation and Oversight of the Referendum

- 19 The Scottish Government proposes that the arrangements which are currently in place for the management of local elections in Scotland should be followed for the referendum. This implies that the Electoral Management Board (EMB) for Scotland would coordinate the administration of the referendum, and the Electoral Commission would provide regulatory oversight.
- 20 We consider that it would be advisable that the respective roles and responsibilities of the EMB and the Electoral Commission, and their interrelationship, is set out in the referendum legislation. It is also important to ensure that the EMB is adequately resourced so that it can fulfil the roles and responsibilities which are expected of it.

Additional Information and References

Advice Papers are produced on behalf of RSE Council by an appropriately diverse working group in whose expertise and judgement the Council has confidence. This Advice Paper has been signed off by the General Secretary.

Any enquiries about this Advice Paper should be addressed to the RSE's Consultations Officer, Mr William Hardie (Email: evidenceadvice@royalsoced.org.uk)

Responses are published on the RSE website (www.royalsoced.org.uk).

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