Submitted by Dr Nicola McEwen

The Agreement and draft s.30 Order

The 2011 Scottish parliamentary election gave the Scottish Government, with the consent of the Scottish Parliament, the political legitimacy to hold a referendum on Scotland’s constitutional future. The intergovernmental agreement and the draft section 30 order accompanying it largely recognise that legitimacy, by promising to lend authority to the Scottish Government and Parliament to determine the date (within limits) of the referendum, the franchise, the question wording, and other aspects related to the conduct of the referendum, albeit while imposing the restriction of only one ballot paper which gives voters a choice between only two options. That the section 30 order will also put the legal competence of the Scottish Parliament to legislate for such a referendum beyond doubt is welcome. The comments in this short paper relate in the main to issues relating to question wording.

Referendum Options

The most significant restriction within the Agreement and draft order relate to the question and options. There had been extensive debate prior to the Agreement over whether there should be one question only, or whether a further question should be incorporated to allow voters to express support for a strengthened form of devolution within the United Kingdom. The Agreement restricts the referendum to a single question with two options.

I had formally supported a two question referendum, mindful of the many academic and commercial surveys that have suggested that a stronger form of devolution within the UK has significant support among the Scottish electorate, and confident that such a referendum would produce clear, easily understood questions with clear and unambiguous outcomes. Indeed, a two question referendum could have produced a clearer and less ambiguous outcome than a single question referendum. In the latter case, both YES and NO vote counts are likely to include votes cast by a significant percentage of voters for whom these options are a second choice.

Single question referendums polarise debate for and against the proposal on the ballot paper. The debate and campaign should permit other voices to be heard, and both campaigns should be clear about options for strengthening devolution within the Union in the event of a NO vote. Postponing consideration of further constitutional reform until after the referendum prevents electors from making an informed choice in the referendum itself.

Referendum Question Wording

The Electoral Commission has now been asked to advise on the question first proposed in the Scottish Government’s referendum consultation. The proposed question - Do you agree that Scotland should be an independent country? - has the advantage of being clear and succinct, but it may give rise to a number of potential issues.

First, by inviting agreement, the question may be construed as leading voters toward a positive answer. It might thus be more fairly expressed if the phrase ‘do you agree’ was supplemented by the words ‘or disagree’, with the optional answers then phrased as ‘YES, I agree’ or ‘NO, I disagree’. Alternatively, a plain language alternative, requiring a more simple YES or NO answer, may be Should Scotland be an independent country?
Second, the term ‘country’ is not a legal entity. Some proposals have suggested replacing ‘independent country’ with ‘independent state’. While the concept of ‘state’ has more meaning in law and international relations, it has little public resonance, and may therefore not satisfy the requirement of being clear and easily understood. A possible alternative would be to omit the word ‘country’ and simply ask: ‘Do you agree or disagree that Scotland should be independent?’, though this may raise other issues.

Third, and perhaps most importantly, no question will be clear and meaningful unless and until there is sufficient explanation of what it means for Scotland to be ‘independent’ and what it means for Scots to reject the independence option. The Scottish Government will put forward a proposal in autumn 2013 which we can anticipate will be embedded within transnational frameworks in the British Isles, the European Union and beyond. Others will challenge this vision, and question the validity of independence with such continued associations. We are unlikely to have any clarity or agreement on these competing visions in advance of the referendum. Consequently, there will be a necessary ambiguity within the question, which adjustments to question wording cannot resolve. It may be helpful to provide a preamble to at least give clarity to the independence prospectus voters are being asked to decide upon, and it will be essential for an impartial body or bodies to inform debate on the prospects and process of negotiating independence in the event of a YES vote. The Agreement is notably silent on the actions that would be taken by both the Scottish Government and the UK Government in the event of a YES vote, and it would be desirable for some clarity regarding post-referendum processes.

The Role of the Electoral Commission and PPERA

The oversight arrangements for a Scottish independence referendum need to be recognised by the electorate as independent of any partisan viewpoint and capable of delivering an accurate count of voters’ preferences between the options presented on the ballot paper. The UK Electoral Commission is a robustly independent body with experience in overseeing referendums. In the absence of a Scottish Electoral Commission it is the most appropriate body to oversee and regulate the Scottish independence referendum, including giving advice and making recommendations with respect to the question wording, promoting public awareness of the options on the ballot, and issues relating to campaign spending and registration. It is also appropriate that the conduct of the poll be overseen by the Electoral Management Board, in light of its recent experience. The Agreement respects this division of responsibilities. With respect to the question wording, the Electoral Commission’s recommendations will, in light of its research, determine whether the question will be easy to understand, succinct, unambiguous and impartial, and it may test slight adjustments to the question suggested during the course of its research. The regulations set out in PPERA Part VII, section 104 do not extend to an expectation that the Commission would itself decide upon the question wording; this is rightly a matter for the Scottish Parliament.

Dr Nicola McEwen
Director of Public Policy
Academy of Government
University of Edinburgh

13 November 2012