The Committee will meet at 9.30 am in Committee Room 1.

1. **Declaration of interests:** Willie Rennie will be invited to declare any relevant interests.

2. **Decision on taking business in private:** The Committee will decide whether a decision on seeking the appointment of an adviser in connection with scrutiny of forthcoming Government Bills should be taken in private at a future meeting.

3. **Subordinate legislation:** The Committee will take evidence on the Scotland Act 1998 (Modification of Schedule 5) Order 2013 [draft] from—
   
   Dr Nicola McEwen, School of Social and Political Science, University of Edinburgh;

   Navraj Singh Ghaleigh, Lecturer in Public Law, Edinburgh Law School;

   and then from—

   Nicola Sturgeon, Deputy First Minister (Government strategy and the Constitution), Graham Fisher, Legal Directorate, and Stephen Sadler, Head of Elections Team, Scottish Government.

4. **Subordinate legislation:** Nicola Sturgeon (Deputy First Minister, Government strategy and the Constitution) to move S4M-04790—

   That the Referendum (Scotland) Bill Committee recommends that the Scotland Act 1998 (Modification of Schedule 5) Order 2013 [draft] be approved.
The papers for this meeting are as follows—

**Agenda item 2**

Note by SPICE  REF/S4/12/4/1

Paper by Dr Nicola McEwen  REF/S4/12/4/2

**Call for Evidence**

The written submissions received can be found at:

At its meeting on 8 November 2012, the Committee took evidence on the draft section 30 Order from the Secretary of State for Scotland, Michael Moore MP. In his evidence to the Committee, the Secretary of State said:

“The Electoral Commission is an important body that has, over the past decade or so, established proper authority and credibility for its role in elections and, particularly, referenda. It tests the question and sets such things as campaign finance limits. The body has always, rightly, had complete independence from Government, and Parliaments have always had the power to disregard its recommendations if they so choose. However, it is telling that at no stage since its existence has that been done with regard to referenda. On every occasion on which the Electoral Commission has offered advice on the referendum question or on campaign finance, that advice has been accepted.”¹


After the meeting, the Convener asked the clerks to look further into the question of whether Electoral Commission recommendations on referendum questions has always been followed. An example has been identified which appears to provide an exception, and this is set out in more detail in the attached note prepared by SPICe.

Note by SPICe

Background

The Memorandum of Agreement which, along with the draft Section 30 Order, forms part of the “Edinburgh Agreement” sets out that the Scottish Government, consistent with the provisions of the Political Parties, Elections and Referendums Act 2000 (PPERA), will refer the proposed referendum question and any preceding statement to the Electoral Commission.

PPERA, which created the Electoral Commission and set out its general functions, requires that the Electoral Commission is to be consulted by the Secretary of State on the wording of any referendum question and is required to comment on the intelligibility of UK national and regional referendum questions and some local government referendum questions (section 104 of the Act). The Act, however, does not compel the Secretary of State to follow the Electoral Commission’s advice.
Referendums on Council Tax in England

The Localism Act 2011 includes measures for local referendums to be held on a range of issues, including on proposed council tax increases in England which are in excess of a percentage threshold determined by the Secretary of State.

For referendums on excessive council tax increases, section 52ZQ(6) in Chapter 4ZA of Part 1 of the Local Government Finance Act 1992 (as inserted by section 72 of and Schedule 5 to the Localism Act 2011²) provides that "Before making any regulations under this section, the Secretary of State must consult the Electoral Commission."

UK Government's proposed question

On 30 September 2011, the UK Government wrote to the Electoral Commission to consult them on a proposed question to be used on ballot papers for local council tax referendums. Initially, the UK Government proposed the following question with options for yes or no answers to the Electoral Commission³:

[Name of Local Authority] has set a council tax increase of x% for the financial year beginning on 1 April 20xx. If voters do not approve the increase then the council tax will rise by y% instead.

Do you approve the increase of x%?

Electoral Commission’s response to initial question

In December 2011, the Electoral Commission replied proposing that the question should be redrafted to say:

Part of the Council Tax in your area goes to [blank space]. [blank space] wants to increase the amount it charges for the financial year beginning on 1 April 20xx by x%.

If most voters choose ‘yes’ the increase will be x%

If most voters choose ‘no’ the increase will be y% [zero]

Do you want [name of Local Authority] to increase the amount it charges by x%?

This question would also have a yes or no answer.

UK Government’s first revision of referendum question

On 13 December 2011, the UK Government responded to the Electoral Commission and proposed a further iteration of the referendum question. The UK Government’s new proposal stated:

- **Part of the Council Tax in your area goes to [blank space]**
- **For the financial year beginning on 1 April 20xx [name of Local Authority] has decided to increase the amount it charges by x%**
- **That decision is subject to the result of this referendum [and other referendums held [blank space] area].**
- **If most voters choose ‘yes’, the increase of x% will stand.**
- **If most voters choose ‘no’, the increase will be y% [zero] instead.**
- **Do you agree with [name of Local Authority] decision to increase the amount it charges by x%?**

As with previous proposals, the question would have a yes or no answer.

Electoral Commission’s response to revised question

The Electoral Commission responded on 16 December 2011 stating that,

“I understand that these changes have been suggested in order to address concern that the revised wording which we recommended in our response could be misleading. This is because it could suggest that the authority has not yet increased its council tax by an amount in excess of the principles established by the Secretary of State when in fact it has already made this decision and is seeking approval so it can continue to do so.

“Our original response and recommendations were informed by the results of research with voters and consultation with interested groups and individuals over a period of 10 weeks. We have not been able to carry out any further research or consultation on the changes that you have suggested. We have, however, considered whether any of the findings from our previous research and consultation could inform any assessment of the suggested changes.

“Having considered the revised question which you have provided and the evidence available from our research and consultation, we have concluded that we would not support making the changes you suggest. The additional question wording has not been tested with voters or plain language experts, and we are

---

concerned that it risks introducing an unknown level of complexity or potential bias.

“On balance, we are satisfied that the question wording which we recommended in our original response conveyed an appropriate level of information for voters to enable them to understand the context within which any referendum will take place.”

The Electoral Commission went on to set out some views on the UK Government’s newly worded question.

The Draft Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations 2012 – final wording of question

The Draft Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations 2012 were laid in Parliament in January 2012. In the Regulations the proposed wording for the referendum question (as set out in Schedule 1) mirrored the wording used by the UK Government in their final proposal to the Electoral Commission on 13 December 2011:

*Part of the council tax in your area goes to [insert name of authority in respect of which the referendum is held].*

*For the financial year beginning on 1st April [insert relevant financial year][insert name of authority in respect of which referendum is held] has decided to increase the amount it charges by [insert percentage change in relevant basic amount of council tax from the preceding financial year to the relevant financial year expressed to one decimal place].*

*That decision is subject to the result of a referendum.*

*If most voters in [insert name of authority in respect of which referendum is held]’s area choose ‘yes’, the increase will be [insert percentage change in the authority’s relevant basic amount of council tax from the preceding financial year to the relevant financial year expressed to one decimal place].*

*If most voters in [insert name of authority in respect of which referendum is held]’s area choose ‘no’, the increase will be [insert what the percentage change in the authority’s relevant basic amount of council tax from the preceding financial year to the relevant financial year expressed to one decimal place will be if the authority’s relevant basic amount of council tax is not approved].*

*Do you agree with [insert name of authority in respect of which referendum is held]’s decision to increase the amount it charges by [insert percentage change*
in authority’s relevant basic amount of council tax from the preceding financial year to the relevant financial year expressed to one decimal place)?\(^5\)

**Electoral Commission’s response to the draft regulations**

Ahead of consideration of the draft regulations by the UK Parliament, the Electoral Commission published a Parliamentary briefing in which it stated:

“On 13 December 2011 a further revised question was sent to the Commission for comment. We understand that the revised wording was suggested by the Government in order to address its concern that the wording which we recommended did not fully reflect the fact that any council tax increase would already have been set by the time a referendum is held.

“We considered the Government’s revised wording, but noted that a) it had not been subject to research with voters and b) did not meet our criteria for clear, simple and neutral questions. We concluded that the revised question which we had recommended in December should be used.

“The Commission has previously assessed proposed questions for referendums in 2011 on the powers of the National Assembly for Wales and the voting system for UK parliamentary elections, as well as the questions for referendums on local governance arrangements in England. Our recommendations have previously been accepted by the Government and fully reflected in legislation ….

“We recommend that Parliament does not approve the Draft Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations 2012.

“The question included in the draft Regulations is substantially different to the proposed question on which we were originally consulted. It includes new wording which has not been subject to research with voters or consultation with interested groups or individuals.”\(^6\)

**Parliamentary consideration of draft Regulations**

The draft Regulations were considered and approved by both the House of Commons and House of Lords. During the debate in the House of Lords the issue of going against Electoral Commission advice was raised by Lord Rennard who said:

“One of the areas of difficulty with referendums is the potential level of disagreement about the wording of any question, which is the matter that I particularly wish to address in the Committee this afternoon. The Political


Parties, Elections and Referendums Act 2000 established the Electoral Commission and gave it a role in considering questions to be put in referendums so that they are considered to be fair and intelligible. The Government followed the Electoral Commission's advice in relation to the referendum about the AV voting system last year. They changed the proposed question when the commission put forward a clearer and simpler alternative wording.

“Who sets a referendum question is currently a matter of major contention in relation to Scotland and the referendum on independence or an alternative form of further devolution. The Westminster Government have adopted the position that it is only proper legally for the Electoral Commission to be involved in framing that question, with the implication that the commission's view may prevail over that of the Scottish First Minister, who may want what many people consider to be a less clear, less fair and potentially loaded question. However, in relation to questions on this issue, the Government have not yet agreed that the view of the Electoral Commission on the question to be put should prevail. Indeed, they may defy the views of the Electoral Commission on this matter.”

(House of Lords Grand Committee Hansard Column 58)7

The draft Regulations were approved on 18 February 2012 and became The Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations 2012.

No Local Authority proposed a council tax increase for 2012-13 that would have triggered a referendum and no referendum has, therefore, taken place using the ballot paper wording prescribed in the Regulations.

Subsequent proposal by UK Government to revise referendum question

On 17 July 2012, the UK Government wrote again to the Electoral Commission and proposed new wording for the question to be asked in a council tax referendum. The letter (from Bob Neill MP) stated:

“I am writing following the undertaking given by my colleague Baroness Hanham in the House of Lords on 14 February that the Government intends to come forward with an updated proposal for the wording of the question to be asked in a council tax referendum. This followed views expressed by the Commission about the wording of the question included in The Local Authorities (Conduct of Referendums) (Council Tax Increases) (England) Regulations 2012 ("the Regulations") and which were raised in the House of Lords debate.8

The newly worded proposal stated:

*Part of the council tax in your area goes to [blank space]*

*For the financial year beginning on 1 April 20xx [name of Local Authority] has set an increase of x% in the amount it charges.*

*If most voters choose ‘yes’, the increase will be x%.*

*If most voters choose ‘no’, the increase will be [y%][zero] instead.*

*Do you want [name of Local Authority] to increase the amount it charges by x%?*

The proposed new wording from the UK Government is more in line with the wording originally proposed by the Electoral Commission in December 2011. The UK Government stated that they planned to lay regulations before both houses after the summer recess (of 2012) giving effect to the revised question in time for the 2013-14 round of local authority council tax setting.

**Electoral Commission’s response to revised wording**

On 31 July 2012, the Electoral Commission wrote to the UK Government and stated:

“On balance, we are satisfied that the revised question wording you have proposed (Annex A to your letter of 17 July) is likely to be intelligible for voters and we note that the Government has now taken account of almost all the recommendations made in our original assessment which we sent to you on 16 December 2011.

“I should note that we have not tested with voters the specific formulation of words in the second sentence of the proposed question ("For the financial year beginning on 1 April 20xx ________ has set an increase of x\% in the amount it charges"). However, although we do not therefore have direct evidence of the intelligibility of this specific formulation, we were able in our original voter research to test the same words presented in a different order. We found no significant issues with the language itself, and we therefore consider that the proposed change would be ‘low risk’. 

We have checked with colleagues at the UK Parliament and they have confirmed that the amendment to the Regulations has yet to be laid at Westminster.

Iain McIver
SPICe Research
13 November 2012

---

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