1. The Electoral Reform Society (ERS) Scotland welcomes the agreement by the Scottish Government and the UK Government to draft a Section 30 Order, enabling the Scottish Parliament to hold a referendum which is clear, legal and avoids the possibility of a court challenge to the outcome.

2. It is unfortunate, however, that due to the nature of the Statutory Instrument and the affirmative procedure, the draft Section 30 Order, laid before the UK Parliament and the Scottish Parliament on 22 October 2012, is subject only to acceptance or rejection. This means that the draft order must be accepted in its entirety, or rejected outright. This restriction on the power of Parliament, reflecting the deal behind closed doors between the Scottish and UK Governments, is a far from perfect start to the referendum process. A more democratic method would have been to empower the Scottish Parliament to legislate for a referendum without attaching any politically motivated conditions.

3. It is also regrettable that of the conditions imposed by the draft Section 30 Order upon a referendum, included is that it comprises a single question with only two responses. There is sufficient polling evidence\(^1\) to suggest that the Scottish public would prefer a third option – that of “Devo-Max”, or an equivalent “middle” option between independence and the status quo – to be included in any referendum on Scotland’s constitutional future.

4. ERS Scotland believes that a format which does not allow all three main options to be considered during the one campaign risks an unsatisfactory outcome to the referendum. There is of course a risk that a multi option campaign will not be as clear as a Binary Poll, but this has to be set against the drawbacks of ‘off ballot’ paper issues effecting the vote i.e. a No vote really being a vote for something other than the Status Quo but less than full independence, and the difficulty of a high differential turnout of votes held at different times (if the two questions are asked on two different occasions).

\(^1\) An IPSOS-Mori poll in January 2012 saw 59% respond that they thought “the referendum should include a question on independence and a separate question on “devo-max”. (http://www.ipsos-mori.com/researchpublications/researcharchive/2928/Scots-back-inclusion-of-Devolution-Max-question-in-referendum.aspx). An IPSOS-Mori poll in June 2012 found support for “devo-max” at 41%, more popular than the status quo (29%) and independence (27%) (http://www.ipsos-mori.com/researchpublications/researcharchive/2995/Three-in-ten-may-change-their-vote-in-the-referendum-if-Devo-is-offered-in-advance.aspx). The 2012 edition of the Scottish Social Attitudes survey will also be available soon, and these views can be examined in more detail.
5. ERS Scotland note that the Draft Section 30 Order differs from the Scotland Office’s draft order (from January 2012’s *Scotland’s Constitutional Future* consultation paper) on the linkage of the upcoming referendum to Part 7 of the Political Parties, Elections and Referendums Act 2000 (PPERA). While the original draft established a clear legal link to the PPERA, ensuring that the referendum in its entirety would be held in accordance with the principles of the 2000 Act, the Draft Section 30 Order applies only the sections of PPERA that are outwith the Scottish Parliament’s competence.

6. ERS Scotland welcomes these exemptions to the Scottish Parliament’s acting in non-devolved matters (relating to broadcast campaign messages for the referendum and free mail-shots to the Scottish electorate during the campaign) but believes that this was an opportunity to provide a further clear legal framework for the arrangements of those campaigning in the referendum within the existing PPERA legislation.

7. ERS Scotland believes that the Memorandum of Agreement between the Scottish Government and the UK Government indicates that both Governments recognise a clear intent to abide by the PPERA legislation, though this is not clear from the Draft Section 30 Order. This agreement should be expressed clearly in the subsequent Referendum Bill, and the Referendum (Scotland) Bill Committee have a duty to ensure that the PPERA 2000 is adequately reflected applied in the forthcoming referendum legislation.

8. ERS Scotland notes that the UK Parliament is currently engaged in reforms with regards to Electoral Registration, while the Electoral Commission has recommended amendments to the PPERA 2000. The Scottish Government and the Scottish Parliament (and this Committee thereof) should ensure that the forthcoming referendum legislation and the conduct of the referendum campaign are compatible with these reforms.

9. The Referendum (Scotland) Bill Committee may wish to invite the Deputy First Minister to advise on discussions between the Scottish Government and the Cabinet Office regarding the Electoral Registration and Administration Bill and reform of the PPERA, and to advise how the Scottish Government plans to provide for these reforms in the forthcoming referendum legislation.

10. It is clear that there is some tension between what is laid out in the Draft Section 30 Order and that which has been set out in the Memorandum of Agreement between the Scottish Government and the UK Government. The Referendum (Scotland) Bill Committee may wish to consider advice as to whether the Memorandum of Agreement itself has any legal status.

11. For example, the Draft Section 30 Order does not include any reference to spending rules for the referendum, meaning the Scottish Parliament is free to set its own financing rules. However, the Memorandum of Agreement requires the referendum bill to be accompanied by a Policy Memorandum, detailing ‘the consultation process for setting spending limits and details of any alternative approaches to any of the issues considered. This will include
a statement of reasons if there is any departure from the Electoral Commission's advice on spending limits.'

12. The Draft Section 30 Order does not specify the electorate to be utilised for the referendum, though this is explicitly detailed in the Memorandum of Agreement to be (with the exception of the status of 16 and 17 year olds) the same franchise as that used for Scottish Parliamentary and local authority elections.

13. ERS Scotland recognises that the details included in the Memorandum of Agreement that are not mentioned in the Draft Section 30 order will be dealt with in the referendum legislation itself. Nevertheless, ERS Scotland would suggest it is important for the Referendum (Scotland) Bill Committee to begin to consider the aspects of the Memorandum of Agreement which are not explicitly covered by the Draft Section 30 Order.

14. Spending limits in a referendum of this nature are important to ensure a level playing field. Giving both sides of the debate the same levels of expenditure ensures that neither side can benefit excessively from large-scale spending to persuade voters of their case — in other words, ensuring that the result cannot be "bought".

15. ERS Scotland would recommend allowing up to £750,000 for lead organisations while political parties themselves would be limited to £250,000\(^2\). The Electoral Commission made recommendations that the limits should be slightly higher — and closer to the £1.5m available to parties for campaigning purposes at Scottish Parliamentary elections.\(^3\) The Scottish Government recommended a reduction in this figure based on the lack of constituency campaigning in referendum campaigns as compared to elections, and this is a view which ERS Scotland broadly shares. It is worth noting that the principle that the campaigns should bring the arguments to the voters and therefore should be well resourced to do so is only a partial one. Campaigns often misrepresent, mislead or distort arguments in their uncontested material. We do not therefore consider that funding the ‘Yes’ or ‘No’ campaigns or their representative political parties is the best or only way for voters to receive information. The most important source of information to voters should come through ‘challenged’ discussion or debate on broadcast media or through non-partisan explanation from journalists and commentators. It would be most surprising if this referendum debate was not fully covered by all the relevant media. It is vital therefore to ensure these channels of communication are properly resourced and responsible in covering the debate.

16. ERS Scotland also suggests that a set and equal grant is given to all lead organisations, but is available to use on any reasonable campaign spending (Freepost, leaflets, advertising and television and radio broadcasts) rather


than prescribed to office costs. A maximum of £500,000 for a UK referendum is a good benchmark figure, which could be applied for a Scottish referendum to an amount of £250,000.

17. ERS Scotland notes that the Scottish Government do not propose to allow “any grants of public money to those who wish to campaign”. ERS Scotland is extremely concerned that the precedent of not providing public funding will limit a level playing field being available both for this referendum and for future referendums. Providing public funding also limits the extent to which large donors could be seen to influence or curry favour with politicians and political parties. We would suggest the Referendum (Scotland) Bill Committee ask the Deputy First Minister why it was decided not to provide grants.

18. ERS Scotland would also recommend that the Electoral Commission in Scotland be given the authority to organise, manage and oversee the referendum. It is important that the Electoral Commission in Scotland has an enhanced line of accountability to the Scottish Parliament most sensibly through the Scottish Elections Management Board, and under the terms of PPERA.

19. The relationship of the Scottish Electoral Commission with the Scottish Elections Management Board and the Scottish Parliament, and the responsibility to report to both the Scottish Parliament and the UK Parliament at Westminster equally should be defined in primary legislation. It is regrettable that this is not set out fully in the Draft Section 30 Order.

20. ERS Scotland welcomes the agreement on the franchise for the referendum, both in terms of the use of the Scottish Parliament and local authority electoral registers, and the lack of restriction on extending the franchise to 16 and 17 years olds.

21. However, ERS Scotland has concerns with regards to how this extension to the franchise might be achieved. The way referendums are administrated at present means the franchise of any new referendum is set out in the referendum bill. The situation is more complicated if the voting age is lowered – as is the intention in this case – as a new electoral register needs to be collected.

22. There is also an issue of how much time the Electoral Commission in Scotland will have to complete the process of updating the electoral register (to include 16 and 17 year olds) after the Section 30 Order is approved and the appropriate registration legislation can be passed.

23. As a household canvass is due in early 2014, later in that year will be an ideal point to use an accurate and complete register. To hold the referendum prior to that canvass will result in using an out-of-date register which could lead to subsequent challenge and devalue the result of the referendum.

\[4\footnote{Scottish Government (2012), \textit{op. cit.} p.24.}\]
24. However, if the new “referendum register” is not available until April 2014 (which is entirely possible) and the referendum is due to be held in autumn 2014 (as numerous government statements have indicated) then the organising of this register – not to mention the cost of compiling it – might have an impact upon the timing of the referendum.

25. Alternatively, the time it will take to compile means that the time limit incorporated into the Draft Section 30 Order for the referendum could have an influence upon whether 16 and 17 year olds can vote in this referendum. Having tentatively agreed that 16 and 17 year olds should be able to vote in this referendum, then not allowing them to do so because of such a timing restriction is an outcome which should be avoided. The Referendum (Scotland) Bill Committee might wish to establish whether the Scottish Government has discussed these potential difficulties in formatting the new “referendum register” with the Electoral Commission or Election Returning Officers especially given their role in implementing Individual Electoral Registration.

26. Despite the caveats outlined in our evidence above, ERS Scotland recommends acceptance of the Draft Section 30 Order. ERS Scotland also recommends the publication – at the earliest opportunity – of legislation which will allow 16 and 17 year olds to vote in the referendum itself. This would allow full and detailed examination of the issues related to the extension of the franchise in this manner, and allow the legislative process to consider the issues arising from this proposal. We would also welcome early clarification of the spending rules.

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9 November 2012