REFERENDUM (SCOTLAND) BILL

THE SCOTLAND ACT 1998 (MODIFICATION OF SCHEDULE 5) ORDER 2013
[draft]

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Introduction

1.1 The Committee has invited written evidence upon the draft Scotland Act 1998 (Modification of Schedule 5) Order 2013. These comments are submitted in response to that invitation.

1.2 My main comment is that, although the intended purpose and effect of the draft Order is to enable the Scottish Parliament to legislate for an independence referendum, another effect of the draft Order and of the Memorandum of Agreement ("MOA") is to constrain, in various ways, the provision which the Parliament can make about that referendum. The reasons for this view are explained in the following paragraphs. I also have comments upon the application and efficacy of Article 4.

Article 3

2.1 This Article enables the Scottish Parliament to legislate for an independence referendum, provided three requirements are met. These requirements are pre-conditions upon the Parliament having competence to legislate upon this matter and, to that extent, they constrain what the Parliament can provide so as to be able to comply with them. However, in contrast with the other constraints mentioned below, these requirements are legal requirements in the sense that, if they are not complied with, the Parliament does not have legislative competence. They are, however, all within the control of the Parliament which can ensure that these requirements can be met.

2.2 Accordingly, subject to compliance with these requirements, the Parliament would appear, prima facie, to have the competence to make whatever provision it likes about the referendum – always provided, of course, that such provision is within its other devolved powers.

2.3 However, it is important to look closely at what this Article actually provides. It inserts a new paragraph 5A into Part 1 of Schedule 5 to the Scotland Act 1998 which provides that the reservation of aspects of the constitution in paragraph 1 of that Schedule does not reserve “a referendum on the independence of Scotland from the rest of the United Kingdom” if three requirements are met. Subject to meeting these requirements, the Parliament will have the competence to provide for a referendum “on the independence of Scotland from the rest of the United Kingdom”. It may, therefore, be argued that the way in which this is expressed may pre-determine the wording of the referendum question in the Referendum (Scotland) Bill ("the Referendum Bill").
Article 4 – Legislative competence of the Parliament

3.1 The purpose of a section 30(2) Order is to modify the legislative competence of the Parliament but Article 4 does not do that.

3.2 What Article 4(1) does is to apply, with modifications, two provisions in Part 7 of the Political Parties, Elections and Referendums Act 2000 ("PPERA") to an independence referendum, namely section 127 (which makes provision for what "referendum campaign broadcasts" can be broadcast and defines that expression) and paragraph 1 of Schedule 12 (which provides for the sending of mail-shots free of charge).

3.3 Paragraph 17 of the MOA explains that the Order does this because it would be outside the Parliament’s legislative competence to make its own provision. However, so is authorising an independence referendum and Article 3 authorises the Parliament to do that. Why does not Article 4 follow Article 3 and enable the Parliament to make its own provision about such matters or, if that is not what is desired, simply enable the Parliament to apply those provisions of PPERA to an independence referendum?

3.4 If the draft Order had done so, the Parliament would then have had the freedom to decide whether or not to apply those provisions of PPERA. Article 4 deprives the Parliament of this freedom. It may be that this is the reason why Article 4 is framed as it is so that, if the Parliament makes provision for the holding of an independence referendum, Article 4 will have the automatic effect of applying section 127 of, and paragraph 1 of Schedule 12 to, PPERA, irrespective of whatever the Parliament might wish.

3.5 If this is the intended purpose and effect of Article 4, it is quite different from, and indeed contrary to, the stated purpose of the Order which is to empower the Scottish Parliament to legislate for an independence referendum. It is an automatic consequence of the Parliament making provision for the independence referendum. At best, it could be described as another condition upon the competence of the Parliament to legislate for such a referendum but one which is not expressed as such in Article 3 and one which is outside the control of the Parliament.

3.6 It will no doubt be argued that Article 4 can be justified as being a “supplementary provision” which is authorised by section 113(4)(a) of the Scotland Act. However, if the purpose and effect of Article 4 is contrary to the main purpose of the draft Order, this argument may be problematic.

3.7 Even if Article 4 is within the powers of section 113(4)(a), it could be criticised as being a highly unusual exercise of them. It does not authorise the Scottish Parliament to make any supplementary provision but instead makes such provision itself. This appears to be unprecedented. None of the previous section 30(2) orders, which have made modifications to Schedule 5 over the past 10 years, has made any similar provision – see SI 1999/1749, 2000/3252 2001/1456, 2002/1629, 2004/3329, 2005/865, 2005/866 and 2006/609.
3.8 In my view, therefore, Article 4 should be replaced either by a provision which empowers the Parliament to make its own provision about independence referendum broadcasts and free mail-shots or, if that is not what is desired, by a provision which empowers the Parliament to apply, with modifications, section 127 and paragraph 1 of Schedule 12 of PPERA. Of course, if it was desired to extend any provision made by the Parliament to the rest of the UK, it would be necessary, as is usual, for the UK Government to make a section 104 order.

Article 4 – Efficacy

4.1 Article 4(1) applies the definition of a “referendum campaign broadcast” in section 127(2) of PPERA to an independence reference. Paragraphs 18-20 of the MOA and the Policy Note consider that the effect of this is to “bring in other relevant broadcasting controls including the Communications Act 2003 [“the 2003 Act”] and the agreement between the Secretary of State for Culture, Media and Sport and the BBC (July 2006).”

4.2 Paragraph 20 of the MOA states “This will mean that Ofcom, the BBC and the Electoral Commission will have the same role in relation to an independence referendum as they would in relation to a PPERA referendum.”

4.3 It appears from paragraph 19 of the MOA that it may be thought that this would be so because, in both the 2003 Act and the BBC Agreement, “referendum campaign broadcast” has the same meaning as in section 127 of PPERA. Accordingly, the argument would run that, by applying that definition in section 127 to an independence referendum as Article 4 does, this would automatically extend the definition in the 2003 Act and in the BBC Agreement to include a reference to an independence referendum campaign broadcast.

4.4 However, it is far from clear whether this argument is correct in the case of the 2003 Act and it is definitely not correct in the case of the BBC Agreement. The following paragraphs contain the reasons for my view.

4.5 When section 333(6) of the 2003 Act refers to section 127 of PPERA, it is not clear that the reference to section 127 would include a reference to section 127, as applied by Article 4(1) of the draft Order, to an independence referendum. For this to happen, the reference to section 127 would require to be construed as being ambulatory – i.e. that it would include a reference to that section as amended, extended or applied not only by any enactment before the date when section 333(6) took effect (“the date of reference meaning”) but also at any time after then, as in the case of Article 4 of the draft Order. However, there is no express provision to this effect and section 20(2) of the Interpretation Act 1978 (“the 1978 Act”) is ambiguous upon the point. As far as I am aware, section 20(2) of the 1978 Act is usually taken as only having the date of reference meaning. This is in contrast to section 14 of the Interpretation and Legislative Reform (Scotland) Act 2010, which applies for the interpretation of ASPs and provides expressly that such references are ambulatory.

4.6 In the case of the BBC Agreement, there is no such dubiety. Section 20 of the Interpretation Act 1978 does not apply for the interpretation of this Agreement – see section 23(3) of that Act. This means that the Agreement has to make its own
express provision as to how it should be interpreted. Clause 48(4) of that Agreement defines a “referendum campaign broadcast” as having the same meaning as in section 127 of PPERA and clause 109(1) provides that “References to particular legislation should be read as referring to that legislation as amended or re-enacted from time to time”. No mention is made in clause 109(1) of what happens when that legislation is simply applied by another enactment. It would clearly follow that the reference to section 127 of PPERA in clause 48(4) would not refer to section 127 as applied by Article 4 of the draft Order to an independence referendum.

4.7 For these reasons, I do not think that it is at all clear that Article 4 has the effect, which the MOA and the Policy Note say it has, of applying the broadcasting controls in the 2003 Act to an independence referendum broadcast and it clearly does not bring in the controls in the BBC Agreement. Accordingly, if it is intended to achieve those results, Article 4 requires to be amended to do so.

Article 4(3) – Dis-application of provisions

5.1 This Article is also a consequence of Article 4(1) applying the definition of a “referendum campaign broadcast” in section 127(2) of PPERA to an independence referendum.

5.2 This means that, when section 112 of, and paragraph 1 of Schedule 13 to, PPERA make provision about expenses incurred in referendum campaign broadcasts, those provisions would apply to an independence referendum campaign broadcast.

5.3 As it is intended that the Scottish Parliament should make its own rules about such expenses, Article 4(3) provides that those provisions in PPERA do not apply to an independence campaign referendum broadcast. I agree that Article 4(3) is required for this purpose.

5.4 However, Article 4(3) goes further. It also assumes that, when paragraph 18 of Schedule 12 to the 2003 Act defines “referendum campaign broadcast” as having the same meaning as in section 127 of PPERA, that reference would be ambulatory and would, therefore, be construed as including a reference to section 127 as applied by Article 4(1) to an independence referendum campaign broadcast. As this would produce the absurd result of requiring the Welsh broadcasting services to screen Scottish referendum campaign broadcasts in Welsh, Article 4(3) provides that this provision does not apply to such broadcasts. However, for the reasons mentioned in paragraph 4.5 above, it is doubtful whether the references to section 127 in the 2003 Act would be construed as being ambulatory and, for this reason, it is doubted whether this part of Article 4(3) is required.

The Memorandum of Agreement (“MOA”)

6.1 As mentioned in paragraph 2.2 above, prima facie, Article 3 gives the Scottish Parliament legislative competence to make what provision it likes about the independence referendum, subject to compliance with the three requirements.
6.2 However, that competence is also constrained by what is set out in the MOA as having been agreed between the UK and Scottish Government. The MOA not only sets out the elements of that agreement which required to be put into the section 30 order but also the elements of what has been agreed between them on “a non-statutory basis” as paragraph 1 of the MOA puts it.

6.3 Most, if not all, of what has been agreed between those Governments on this “non-statutory basis” will pre-determine a lot of what has to go into the Referendum Bill as to how the referendum and the referendum campaign is to be conducted. The following are some examples of what has been agreed between those Governments on this “non-statutory basis” and which will involve some provision in the Bill:

- the Bill will include provision for the referendum rules, which will be based upon Part 7 of PPERA ( paras 3 and 16);

- the Bill will confer upon the Electoral Commission the same functions it has under PPERA in connection with a referendum, such as:
  - commenting on the wording of the referendum question;
  - registration of campaigners;
  - designating lead campaign organisations;
  - regulating campaign spending and donations;
  - publishing guidance for permitted participants;
  - reporting on the referendum process

with the exception of the conduct of the poll and the announcement of the result and the giving of grants to the leading campaign organisations (paras 13 and 14)

- the Bill will provide for the spending limits in the regulated period for the independence referendum and those limits will be set along similar rules and standards as set out in PPERA and after advice from the Electoral Commission (paras 25-27);

- the Bill will set out the restrictions that apply to the Scottish Government and devolved public bodies during the 28 day “purdah period” before the referendum (para 29).

6.4 What is contained in the MOA may not be expressed as being conditions upon the Parliament being given the competence to legislate for an independence referendum and they may not have the legal effect of being conditions, the breach of which would render the Bill outside the Parliament’s legislative competence. Nevertheless, they effectively operate as such at least in a political sense. These matters may be political rather than legal constraints upon the Parliament but they are nonetheless constraints for all that. In effect, therefore, these constraints will have the effect of pre-empting most of the provisions in the Bill.

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8 November 2012