THE DRAFT SCOTLAND ACT 1998 (MODIFICATION OF SCHEDULE 5) ORDER 2013

This paper was prepared for the Referendum (Scotland) Bill Committee's consideration of the draft Scotland Act 1998 (Modification of Schedule 5) Order. The order is a draft statutory instrument which was laid before the Scottish Parliament and the two Houses of the UK Parliament on 22 October 2012. It is subject to the affirmative procedure, which means that it cannot be made as an Order in Council until it has received the approval by resolution of the House of Commons, the House of Lords and the Scottish Parliament. As with other statutory instruments, it cannot be amended.

THE EDINBURGH AGREEMENT

In Edinburgh on 15 October 2012, the Prime Minister and the First Minister signed the Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland.

The Agreement, known as the ‘Edinburgh Agreement’, was the culmination of negotiations between the two governments on the holding of a referendum on independence for Scotland. In it, the governments agreed to work together on a referendum that would:

- have a clear legal base
- be legislated for by the Scottish Parliament
- be conducted so as to command the confidence of parliaments, governments and the people
- deliver a fair test and a decisive expression of the views of the people of Scotland and a result that everyone will respect.

The two governments also agreed that an Order in Council under section 30 of the Scotland Act 1998 should be laid in the United Kingdom and Scottish Parliaments to allow a single-question referendum on Scottish independence to be held before the end of 2014. The governments assert that the Order will put it beyond doubt that the Scottish Parliament can legislate for a referendum on independence for Scotland. A draft Order accompanied the Agreement along with a Memorandum of Agreement setting out the details of the Agreement.

1 The Edinburgh Agreement was also signed by the Secretary of State for Scotland and the Deputy First Minister.
The Agreement went on to state that it would be for the Scottish Government to introduce a Bill in the Scottish Parliament which would set out:

- the date of the referendum
- the franchise
- the wording of the question
- rules on campaign financing
- other rules for the conduct of the referendum.

The Agreement also confirmed that the referendum would be informed by consultation and independent expert advice. The accompanying Memorandum states that the referendum rules will be based on the provisions of Part 7 of the Political Parties, Elections and Referendums Act 2000 (PPERA), which covers the rules on campaign finance, referendum regulation, oversight and the conduct of referendums organised by the UK Government.

SECTION 30 ORDER

There had been a long-standing dispute between the Scottish and UK governments on whether the Scottish Parliament was competent to legislate for a referendum relating to independence.

The debate over the Scottish Parliament’s competence to legislate for a referendum on Scottish independence began in 2007 when the new minority SNP Scottish Government launched its ‘National Conversation’ (Scottish Government 2007). The new government accepted that there needed to be “due consideration of […] how a referendum could be initiated by the Scottish Parliament” (Scottish Executive 2007 p. vii).

The National Conversation, which ran from August 2007 to November 2009, culminated in a draft Referendum Bill which included proposed ballot papers for a two question referendum. The Scottish Government believed that it would be within the legislative competence of the Scottish Parliament to hold a referendum seeking the Scottish electorate’s agreement that Scottish Ministers open negotiations with the Government of the United Kingdom on terms for Scottish independence.

After it concluded its National Conversation, the Scottish Government produced a further draft Referendum Bill for consultation (Scottish Government 2010). This paper included draft ballot papers which set out to,

“consult people in Scotland on proposals to seek the transfer of more powers to the Parliament.”

In its 2012 consultation, launched after the 2011 Scottish Parliament elections which produced a majority SNP Government, the Scottish Government (2012a p. 4-5) stated that,

“A wide range of opinion has been expressed about whether or not the Scottish Parliament has the power to hold a referendum consulting the Scottish people about independence. The Scottish Government has previously published a referendum question asking whether the powers of the Scottish Parliament should be extended to enable independence to be achieved. That question was carefully phrased to
comply with the requirements of the Scotland Act 1998. Much independent legal opinion supports the Scottish Government’s view.

What is beyond any question is the ability of the Scottish Parliament to legislate for a referendum about changes to the powers of the Scottish Parliament within the framework of devolution. Legislation to hold a referendum on “devolution max”, for example, is clearly within the existing powers of the Scottish Parliament.”

In its 2012 consultation, the Scotland Office set out its legal concerns over any referendum which the Scottish Government could hold,

“The Scottish Government is aware of the limits of its powers. It acknowledged those limits in 2007. Since the Scottish National Party’s success in May 2011, the Scottish Government has provided no new explanation of how it would deliver its manifesto commitment to hold a referendum, despite the limits to its power. In the absence of new information, the UK Government has considered the proposals put forward by the Scottish Government in February 2010.

Those proposals cannot be legally delivered by the Scottish Parliament. The Scottish Parliament only has power to legislate on matters that are devolved and has no power to legislate on matters that are reserved to the UK Parliament. The Union of the Kingdoms of Scotland and England is one of those reserved matters. In our view legislation for a referendum brought forward by the Scottish Government would likely be challenged in court and the Scottish Government would lose.

The UK Government does not believe that it is in Scotland’s interests to have Scotland’s constitutional future decided in court. The referendum must be legally watertight – there must be no doubt that it is lawful. That certainty can only be provided by legislation involving the UK Parliament; although as this paper sets out, this could be done in different ways and the UK Government could devolve power to the Scottish Parliament to enable it to deliver a fair and decisive referendum.”

While the Scottish Government has not conceded that it does not already have the power to conduct such a referendum, it has agreed with the UK Government that the section 30 Order will put beyond dispute that the Parliament will have such competence.

The effect of article 3 of the draft Order will be to insert new paragraph 5A into Part 1 of Schedule 5 (reserved matters) to the Scotland Act 1998 and, by so doing, to provide an exception to the reservation of the constitution under paragraph 1 so that that paragraph does not reserve a referendum on the independence of Scotland (5A(1)). In other words, this modification makes it possible for the Scottish Parliament to legislate for a referendum in Scotland concerning the independence of Scotland from the rest of the United Kingdom otherwise reserved under Part 1 of Schedule 5.

However, the draft Order qualifies this modification of Schedule 5 by placing three conditions on the holding of an independence referendum. These are that the referendum:

- must not take place on the date of any other referendum which the Scottish Parliament may legislate for (5A(2))
- must take place before the end of 2014 (5A(3)), and
must have only one ballot paper which gives the voter the choice between two responses (5A(4)).

It may be noted that the draft Order is not concerned with the outcome of the referendum. The Memorandum, however, concludes by committing the two governments to work together constructively on the outcome of a referendum which they expect to be legal and fair and which will produce a decisive outcome which will be respected.

**DRAFT ORDER**

As previously stated, the Scotland Act 1998 (Modification of Schedule 5) Order 2013, was laid before the Scottish Parliament and the two Houses of the UK Parliament on 22 October 2012. It is a statutory instrument which is subject to the affirmative procedure, which means that it cannot be made until it has received the approval by resolution of the House of Commons, the House of Lords and the Scottish Parliament. As with other statutory instruments, it cannot be amended.

**Date of the Referendum**

Article 3 of the draft Order specifies an end date for the holding the referendum, namely 31 December 2014. This is in line with the Scottish Government’s preferred timescale, set out in its 2012 consultation paper (Scottish Government 2012a), to hold the referendum in Autumn 2014.

It will be for the Scottish Parliament to decide on the specific date, as long as it is not held on the same day as any other referendum which the Scottish Parliament has the powers to legislate for. This restriction would prevent the Scottish Government from, for example, legislating separately for a referendum on devo-max on the same day.

The Order does not indicate a day of the week on which the poll should be held. Neither is there is any mention in PPERA that a specific day may, or may not, be used for polls. It is customary, however, to hold polls, including referendums, on a Thursday but there is no requirement to do so and some UK by-elections have been held on a Tuesday.

In its consultation on the referendum (Scottish Government 2012a p. 20) the Scottish Government had asked,

“What are your views on the idea that the referendum could be held on a Saturday or on other ways which would make voting easier?”

The analysis of consultation responses found that,

“Of those respondents who commented on the issue of Saturday voting, 46% broadly agreed with holding the referendum on a Saturday and 32% did not; the remainder had unclear or mixed views.

[...] Those who broadly supported the idea of a Saturday vote frequently said that they would support the idea if it increased voter turnout.

Those who were opposed to Saturday voting suggested that voter turnout might actually be lower on a Saturday [...]
Some respondents were not opposed in principle to the idea of voting on a Saturday, but felt that it would not be appropriate to introduce this new practice for the first time in the referendum.”

(Scottish Government 2012b p.4)

Question

It may be worth highlighting differences in the wording around the question between the section 30 Order and the Memorandum of Agreement. While paragraph 6 of the Memorandum states that the

“Order enables the Scottish Parliament to legislate for a referendum with one question on independence.”

Article 3 of the draft Order actually states that,

"There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses."

It may be, however, that the wording of the Order is intended to avoid a presumption that there will be an actual question, but rather keep open the option of presenting voters with a statement or pair of propositions to choose from, for example, “Scotland should be an independent country - agree/disagree”. That said, there is a reference, in passing, in article 4(2) of the Order to, “…the question in the referendum”.

In line with Part 7 of PPERA, the two governments have agreed that the actual wording of the question, and any statement on the proposed ballot paper, will be reviewed by the Electoral Commission. The Scottish Government will, therefore, refer its proposed question to the Commission which will report on the intelligibility of the question. The Commission’s report will then be laid before the Scottish Parliament and the Scottish Government will respond to that report and to the Commission’s recommendations.

Referendum campaign regulation

Regarding the rules for the referendum campaign which will be included in the Bill, the two governments have agreed that those rules should ensure that the referendum is fair and commands the confidence of both sides of the debate. They also agreed that the rules should be based on the referendum rules set out in Part 7 of PPERA.

In addition, article 4(1) of the draft Order directly applies certain provisions of PPERA to the independence referendum (i.e. referendum campaign broadcasts and the sending of mail-shots free of charge) as those provisions would not otherwise apply to a referendum legislated for by an act of the Scottish Parliament as the Scottish Parliament has no competence to apply them itself (because broadcasting and the Royal Mail are reserved matters).

Referendum campaign broadcasts

According to the provisions of PPERA, only referendum campaign broadcasts made by, or on behalf of, the designated lead campaign organisations can be broadcast. The Communications Act 2003 provides that the regulator Ofcom must require those broadcasters which it licences to observe any rules set up relating to referendum campaign broadcasts.
Article 4(1)(a) of the draft Order will apply the provisions in section 127 of PPERA, relating to referendum campaign broadcasts, to the Scottish referendum. The role of Ofcom, the BBC and the Electoral Commission in the independence referendum will, therefore, be the same as their roles in relation to referendums set up under PPERA.

Article 4(3) of the draft Order will disapply some of the provisions in section 127 of PPERA, which article 4(1)(a) would otherwise apply to the Scottish Referendum.

Under the provisions of article 4(3)(a) section 112 of PPERA, which relates to notional referendum expenses, will not apply to the Scottish Referendum campaign broadcasts. So the value of any property, services and facilities provided for the use or benefit of an individual or body campaigning in a referendum, either free of charge or at a substantial discount, will not be treated as referendum expenses with respect to campaign broadcasts.

Under the provisions of article 4(3)(b), paragraph 1 of Schedule 13 to PPERA, which relate to expenses which qualify as campaign expenditure with regard to broadcasts, including agency fees, design costs and other costs incurred in preparing or producing the broadcasts, will also not apply to the Scottish Referendum campaign broadcasts.

Under the provisions of article 4(3)(c) of the draft Order the provisions of paragraph 18 of Schedule 12 to the Communications Act 2003, will not apply to the Scottish Referendum campaign broadcasts. This means that the Welsh broadcasting authority does not have to ensure the Scottish referendum broadcasts are included in their services.

**Free-of-charge mail-shot**

Designated campaign organisations, under provisions in paragraph 1 of Schedule 12 to PPERA, are entitled to one free mail-shot to every elector or household. The service is provided by the Royal Mail and funded by the UK Parliament through the Consolidated Fund.

Article 4(1) of the draft Order includes provisions to apply this part of PPERA to the Scottish referendum. Article 4(4) of the draft Order sets out that, in this instance, the Royal Mail will recover the costs from the Scottish Ministers.

**Designated organisations**

Under the provision of section 108 of PPERA, it is the responsibility of the Electoral Commission to designate permitted participants to whom assistance is available. However, article 4(2) of the draft Order provides that organisations to whom assistance is available will instead be designated in the Referendum Bill.

**OTHER ISSUES**

The Memorandum of Agreement covers a number of issues which are not set out in the draft Order.

**Oversight of the referendum**

Both governments have agreed that the referendum rules will take account of those bodies which have a role in Scottish elections, namely the Electoral Management Board and the Electoral Commission. The role of the Commission, with regard to this referendum, will be set out in the Bill.
The Electoral Commission is an independent body set up by the UK Parliament. It regulates party and election finance, sets standards for well-run elections and is responsible for the conduct and regulation of referendums held under PPERA.

The Local Electoral Administration (Scotland) Act 2011 established the Electoral Management Board for Scotland (EMB). The Board is responsible for co-ordinating the administration of local government elections in Scotland.

**Electoral Commission and the Electoral Management Board**

Both governments agreed on the importance of the referendum being overseen impartially by bodies which can command the confidence of both the Yes and No campaigners.

Given the responsibilities which PPERA assigns to the Electoral Commission with regard to UK initiated referendums, and its experience with the 2011 Welsh and UK referendums, both governments agreed that the Electoral Commission should fulfil these responsibilities for the Scottish referendum. This contrasts with the earlier position of the Scottish Government which was to establish a specific Scottish Referendum Commission.

The Electoral Commission’s referendum responsibilities include:

- registration of campaigners
- designating lead campaign organisations
- regulating campaign spending and donations
- publishing guidance for permitted participants
- promoting public awareness (this is not a duty under PPERA)
- reporting on the referendum process.

Although PPERA gives responsibility for the conduct of the poll and for the announcement of the result to the Commission, the Scottish Government has proposed that these roles should instead be given to the Electoral Management Board. This is in line with that body’s statutory responsibilities with regard to Scottish local elections, which it carried out for the first time in May 2012.

One further statutory responsibility of the Electoral Commission, which it will not be expected to carry out for the Scottish referendum, is the giving of grants to lead campaign organisations. The Commission will not be required to carry out this function because the Scottish Government does not plan to grant any public money to the lead campaign organisations.

**Campaign finance**

Both governments recognise that the issue of campaign funding will be an important one for campaigners, the Electoral Commission and for the people of Scotland. They, therefore, believe that it is vital that the rules are fair and provide a ‘level playing field’.

The Scottish Government’s forthcoming Referendum Bill will set the spending limits for the regulated period before the referendum poll, with both governments agreeing that the PPERA rules and standards will be the basis for setting those limits.
The Scottish Government has proposed that the regulated period for the referendum will be 16 weeks. It may be noted that PPERA does not specify a length of time for the regulated period. For comparison, the 1997 Scottish devolution referendum had a regulated period of 119 days (17 weeks).

The limits for sub-UK referendums are usually set by the Secretary of State, by secondary legislation, using a mechanism set out in PPERA. In setting the limits, the Secretary of State would consult the Electoral Commission, although the UK Government is not statutorily obliged to accept the Commission’s recommendations. If, however, the Secretary of State does not accept the Commission’s suggestions on limits, then he or she is required to lay a statement before Parliament explaining why.

The Memorandum of Agreement states that, in deciding the spending limits, the Scottish Government will take into account the responses to its consultation, which had proposed the following spending limits for different organisations:

<table>
<thead>
<tr>
<th>Type of Organisation</th>
<th>Proposed Spending Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Designated Organisation</td>
<td>£750,000</td>
</tr>
<tr>
<td>Political Party in Scottish Parliament</td>
<td>£250,000</td>
</tr>
<tr>
<td>Other Permitted Participants</td>
<td>£50,000</td>
</tr>
<tr>
<td>Individuals/Bodies, Not Permitted Participants</td>
<td>£5,000</td>
</tr>
</tbody>
</table>

The Scottish Government has also stated that it will consult with both existing campaigning bodies, which came into existence after the 2012 consultation closed, and will have regard to the Electoral Commission’s views on limits. The Scottish Government states that it will then set out its proposed spending limits, and the evidence base for them, before the Referendum Bill is considered by the Parliament.

The Government also confirms that the Policy Memorandum which will accompany the Bill, will, if necessary, explain any departure from the Commission’s advice on the limits.

As donations to registered political parties are already regulated under the provisions in Part 4 of PPERA, the two governments see no need to include any further rules for such parties with regard to the independence referendum. However, the Referendum Bill will expand the rules to cover other permitted participants, including minor parties not presently covered by PPERA. In line with PPERA these rules will not allow these participants to accept donations of over £500 from anonymous donors or donations from individuals or organisations from outside the UK.

**Franchise**

The two governments have agreed that the franchise for the referendum, which will be set out in the Bill, will be based on the existing franchise for the Scottish Parliament and Scottish local elections.

In addition, the Memorandum acknowledges that the Scottish Government has been consulting on the possible extension of that franchise to those aged 16 and 17 years who are eligible to be registered on the electoral register (Scottish Government 2012a p. 22). The draft Order is silent on any extension of the franchise and it will be the decision of the
Scottish Government whether to include an extension which would allow some, or all, 16 and 17-year olds to vote in 2014.

In her statement on the Edinburgh Agreement, on 23 October 2012, the Deputy First Minister, Nicola Sturgeon, told the Scottish Parliament that

“As the First Minister announced on Saturday, the Scottish Government will also introduce a paving bill to ensure that all 16 and 17-year-olds can register for and vote in the referendum, should that be the franchise agreed by this Parliament.”

(Official Report 23 October 2012 col 12406)

Ensuring impartiality of broadcasters

It has been acknowledged that, during the run-up to the referendum, the impartiality of broadcast coverage is especially important and broadcasters, Ofcom and the Electoral Commission will discuss the best way to achieve this. There already exists the Broadcasters’ Liaison Group, which is chaired by Ric Bailey, the BBC’s Chief Adviser on Politics. The Group comprises broadcasters who make airtime available to registered political parties to help them promote their manifestos to the electorate. In addition the Group have produced Referendum Production Guidelines, which are available on its website.

Government activity during the 28 days before the referendum

Section 125 of PPERA sets out the restrictions which apply to Ministers and public bodies, in the 28 day period preceding referendums. This 28 day period is treated in a way similar to the 28 day period prior to elections, when Ministers and public bodies refrain from publishing material which could have a bearing on the election.

The Referendum Bill will contain details of the restricted behaviours which the Scottish Government would expect from Scottish Ministers and devolved public bodies. The UK Government has also committed to abide by any rules which the Scottish Government introduce for that 28 day period.

SOURCES

Broadcasters' Liaison Group http://www.broadcastersliaisongroup.org.uk/

Broadcasters' Liaison Group Referendum Production Guidelines http://www.broadcastersliaisongroup.org.uk/referendum.html

Electoral Commission http://www.electoralcommission.org.uk/home

Future of Scotland http://www.futureofscotland.org/

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Scotland Act 1998 (Modification of Schedule 5) Order 2013: draft

Scotland Act 1998 (Modification of Schedule 5) Order 2013: draft explanatory memorandum

Scotland Act 1998 (Modification of Schedule 5) Order 2013: policy note
http://www.scottish.parliament.uk/S4_ReferendumScotlandBillCommittee/S30OrderPolicyNote.pdf

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Scottish Government (2012a) Your Scotland: your referendum: a consultation document

Scottish Government (2012b) Your Scotland, your referendum: an analysis of consultation responses

http://www.scotland.gov.uk/News/Releases/2012/07/process-for-referendum03072012