REFERENDUM (SCOTLAND) BILL COMMITTEE

Memorandum by Alan Trench

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The ‘Edinburgh Agreement’ and the section 30 order for the independence referendum

1. This memorandum is written to help the Referendum Bill (Scotland) Committee in considering the section 30 order made by the UK Secretary of State for Scotland, in order to facilitate the referendum on Scottish independence. The order was agreed as part of the ‘Edinburgh Agreement’ between UK and Scottish Governments, on 15 October 2012 and now requires the approval of both Houses of the UK Parliament as well as of the Scottish Parliament before it can come into effect.

2. I welcome the making of the section 30 order, which I consider the right way to enable the Scottish Parliament – which has a mandate to call a referendum, following the SNP’s election victory in May 2011 – to do so. In my view, the Parliament did not have legislative power to legislate for a referendum on the subject of independence without some extension of the Parliament’s legislative competence, due to reservations of ‘The Union of the Kingdoms of Scotland and England’ and ‘the Parliament of the United Kingdom’ in Part 1 of Schedule 5 to the Scotland Act 1998. A referendum touching on those matters would have been beyond the Parliament’s legislative competence, whether it was supposedly advisory or not. The effect of any referendum on independence, given the requirement under the 1998 Act for the courts to consider ‘the effect [of the provision] in all the circumstances’ under section 29(3) of the Act (a form of what lawyers know as a ‘pith and substance’ test), makes this clear in my view. The ‘reading-down’ provision in section 101, requiring the courts to read a provision ‘as narrowly as is required for [the provision] to be within competence, if such a reading is possible’, does not provide material assistance in such a case. This view was shared by the House of Commons Scottish Affairs Committee, reflecting the view of many of the expert witnesses who gave evidence to that committee.¹

3. The procedure for extending the Parliament’s legislative competence under section 30 of the 1998 Act has always seemed to me the appropriate means to enable the Scottish Parliament to call an independence referendum, given that it had the mandate but not the powers to do so. I believe I was the first person publicly to suggest this way forward, in an article entitled ‘We need ceasefire in Scots cold war’ in the Scotsman on 27 June 2011.² I understood at that time that such an approach

² Available at http://www.scotsman.com/news/alan-trench-we-need-ceasefire-in-scots-cold-war-1-1714116
was being considered within each government, but not being discussed between them, and wanted to help the process of agreeing such an order proceed with due despatch.

4. Extending the Parliament’s legislative competence by means of section 30 orders has been a relatively widely used procedure, which formed part of the wider pattern of flexibility in managing the division of powers between devolved and UK tiers of government that characterised the early years of devolution. Eight orders were made amending Schedule 5 between 1999 and 2006 (though none have been made since then). Another two orders have been made using the same power and procedure to amend Schedule 4 to the Act, which protects certain specified enactments from modification by Holyrood. The most recent of those, from 2009, dealt with limitation periods for claims for damages for ‘slopping out’ in prisons arising under the Human Rights Act 1998 following the ‘Somerville’ judgment, and again formed part of an agreement between the Scottish and UK Governments to resolve an intricate legal problem.

5. Section 30 orders amending Schedule 5 both extended the scope of both reserved and devolved (non-reserved) matters, and were part of the flexibility regarding the boundary of devolution that formed part of the first phase of devolution. They have generally been uncontroversial and largely technical in nature, certainly as far as parliamentary consideration of them has been concerned. (In this respect, they may be contrasted with the controversy that attended the making of a number of so-called ‘legislative competence’ orders for the National Assembly for Wales, under section 95 of the Government of Wales Act 2006, for which a superficially similar procedure applied.) They have not been used on their own for significant additions to devolved responsibilities, such as operation of the ‘Scotrail’ franchise, which – partly because of its greater complexity – required primary legislation at Westminster, the Railways Act 2005 (itself approved at Holyrood by a legislative consent motion), as well as amendment of Schedule 5 using the section 30(2) mechanism. Rather, they have been used for relatively minor alterations to the limits of reserved competence.

6. The UK and Scottish Governments have set different standards for a Scottish independence referendum. The UK Government has insisted a referendum be ‘legal, clear, fair and decisive’. The Scottish Government has accepted those criteria, but also sought to ensure that a referendum was ‘made in Scotland’. Given the limited devolved powers to call an independence referendum, a referendum

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6 A joint statement by the UK Secretary of State and Scottish First Minister can be found at http://www.scotlandoffice.gov.uk/scotlandoffice/11541.html
could never have been wholly ‘made in Scotland’. The section 30 order agreed between the two governments on 15 October makes provision to devolve power to the Scottish Parliament to hold a referendum. This will enable the referendum to satisfy the criterion of being both legal and ‘made in Scotland’. It contains limited and appropriate provisions on the holding of the referendum, which will also ensure that the outcome can be accepted as ‘clear, fair and decisive’.

7. The main way by which clarity, fairness and decisiveness will be established – other than by the vote itself – is through the involvement of the Electoral Commission in regulating the referendum and advising on the referendum question. The proposal made by the Scottish Government for an ad hoc commission to regulate the referendum may have arisen because there was no power for the Electoral Commission to undertake this, absent a section 30 order.\(^8\) This was also a serious source of concern to the UK Government as well as many Westminster Parliamentarians, however. The involvement of the Electoral Commission clearly reassures the UK Government and others (within and outwith Scotland) of the fairness of the process. The Commission’s involvement also provides reassurance about the wording of the referendum question, through its role in advising on the ‘intelligibility’ of the question, in accordance with section 104 of the Political Parties, Elections and Referendums Act 2000. Members of the committee will be aware that the Commission’s advice about intelligibility goes beyond simply considering whether the words used are comprehensible by an ordinary voter or not, but extends to considering whether ‘the question ... present[s] the options to voters clearly, simply and neutrally.’\(^9\)

8. The Electoral Commission is not mentioned in the section 30 order as such, but rather in the intergovernmental agreement which incorporated a draft of the order. This does raise a wider question about the extent to which the Parliament will indeed be master of the referendum bill. While it would be open to the Parliament to pass a bill that was not in compliance with what the UK and Scottish Governments have agreed, doing so would raise numerous risks. These include not only breaking the terms of that agreement, but also risking the authority of the referendum and its outcome. That seems to me an extremely powerful reason for a referendum to be held in accordance with the agreement, and for the Electoral Commission’s involvement. The consequences of a referendum whose outcome is not regarded as fair will be adverse, profound and long-term, whatever that outcome might be.

9. As the order means that the holding of a referendum will be within the powers of the Scottish Parliament, it falls to the Parliament to determine other matters relating to it, notably whether those aged under 18 on the polling day can vote. The issues

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regarding whether such people should be able to vote will therefore be political and practical in nature, rather than legal.

10. However, as the powers of the Parliament are limited to legislating for Scotland (by section 29(2)(a) of the Scotland Act 1998), it would be impossible for those claiming Scottish birth, descent or other connection but who live outwith Scotland to vote in a referendum called by Holyrood in any event. Only those resident in Scotland will be able to vote as a result.

11. A further constraint is that the power to hold a referendum is valid only if the referendum held on or before 31 December 2014. There is no power to hold a referendum later than that date. There is no date before which a referendum may not be held, once the order is made.

12. A key provision of the agreement and the section 30 order is that it provides for only one question, relating to independence, to be put to voters at the referendum. It does this by requiring there to be only ballot paper and only one question on that ballot paper – so it would be beyond the Parliament’s competence either to require there to be two questions, or to hold two separate polls on the same day, using the same polling place and register of voters. (In my view, a referendum on options short of independence that did not affect the Union of Scotland and England would probably be within legislative competence, depending on the question asked.)

13. This limitation of choice has been a disappointment to many, as there is strong evidence that some form of enhanced devolution would be the preferred option of many (perhaps most) Scottish voters. There are major difficulties with including such a ‘third option’ on the ballot for a decisive referendum, though on the level of mechanics these may not be insuperable.\(^{10}\) Perhaps more serious is the lack of clarity or consensus about what such a ‘third option’ might be, and finding a body to campaign for it. Regrettably, there is a conflict between a ‘clear’ or ‘decisive’ referendum in this instance, and one that enables the views of the people of Scotland to be fully reflected at the poll. In that regard, one can only note that the referendum is a blunt instrument for resolving such open-ended, and complex issues, for which the processes of representative democracy are in my view better suited.

Alan Trench
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\(^{10}\) The best, if not only, way to do this would be that suggested by John Curtice; a ‘gateway’ question asking whether Scotland should become an independent state or not, followed by a second question asking whether, if Scotland were to remain part of the UK, devolution should be extended. The questions would have to be put in that order to achieve clarity about voters’ intentions.