

# **Professor Ailsa Henderson**

## **Legal mechanism for any independence referendum inquiry**

This briefing is drafted in my capacity as Professor of Political Science at the University of Edinburgh where I lead the Scottish Election Study and co-lead the State of the Union Survey. The SES is the ESRC-funded independent academic study of Scottish political attitudes and behaviours and I have led it since the 2016 election. Previously I led the 2014 Scottish Referendum Study and the Risk and Constitutional Attitudes survey, both ESRC-funded. I have co-led the Future of England Survey since 2011, which offers an analysis of English national identity, attitudes to English governance and the union, including Scotland's place within it. Since 2018 we have been running parallel surveys in Scotland, Wales and Northern Ireland to offer a 360 degree view of attitudes to the union. In 2023, this four-territory fieldwork provided the opinion evidence base for the Independent Commission on the Constitutional Future of Wales.

In addition to more than two decades researching Scottish attitudes and behaviours I have taught quantitative data analysis and research methods including survey design, at Edinburgh since 2007 and previously at universities in Canada. I am a fellow of the Royal Society of Edinburgh, the Academy of Social Sciences and hold Chartered Statistician status from the Royal Statistical Society. I am deputy chair of the Politics & International Studies sub-panel for the forthcoming Research Excellence Framework.

Across the different datasets we have a robust understanding of six areas of attitude research as they relate to Scottish independence. These include:

Attitudes to constitutional reform, including levels of support for different constitutional options, assessments of the other side's most compelling points, the distinction between principled and instrumental reasons for supporting constitutional change and attitudes to the UK-wide constitutional settlement, including attitudes to proportional representation, Lords reform and the Sewel convention

Predictors of support for constitutional options, including demographics (in which we tease apart age, period and cohort effects, for example), the role of socio-economic status, the role of identity, policy references, and attitudes to risk so as to explain the status quo bias. Risk attitudes also include assessments of economic risk and currency options

Attitudes to the process of constitutional change, including perceptions of who has a mandate to call a referendum, what the timing of a referendum should

be, and whether in an otherwise polarised field, we can detect a middle ground consensus option on process

The role of knowledge and the consistency of preferences around constitutional change, including knowledge of existing legislative competence and, at the time, knowledge of the independence white paper and Smith proposals. Under consistency, this includes attitudes to policy uniformity across the UK, attitudes to relations between a possible independent Scotland and the rest of the UK, attitudes in the rest of the UK to Scotland were it to leave the UK and the perceived impact of Brexit on constitutional change.

We have data that allows us to comment on the impact of constitutional preferences on political behaviour, including the wider relationship between SNP government approval, independence support and vote intention, the impact of the constitutional debate on affective and cognitive polarisation, and on intra family conflict, the relationship between constitutional references and tactical voting.

Last, we hold data on attitudes outside Scotland to constitutional change and Scotland's role in the union, attitudes to Scottish influence and access to resources including public spending. This includes data on whether Brexit supporters or those who wish immigration to decrease would see the departure of Scotland as a 'price worth paying' so as to achieve their policy preferences

In what follows I focus exclusively on issues of process, addressing timing, mandate and the appearance of any middle ground consensus on referendum process.

### Timing

Our data show that when presented with a range of possible referendum timings, the most popular option among those open to another referendum is typically a rolling five year window. The Yes-supporting electorate wants a referendum in five years and it has wanted one in five years for much of the period since the referendum in 2014. In the 2016 pre-election survey the SES found around one third of Yes supporters wanted a referendum within five years, compared to 10% who wanted one immediately and around one in five who wanted one on a longer timeframe. This is why we refer to it as a 'rolling five year window'. In this sense it is something of an Augustinian preference: Lord, make me independent - but not yet!

While this has been generally true since the referendum, we have seen more recently a polarisation of attitudes towards the 'never' and 'as soon as possible' camps.

In addition, we know that attitudes to the constitution structure attitudes to timing, with most Yes supporters now preferring a referendum as soon as possible, and most No supporters preferring a referendum never to be held again. A breakdown for all voters, Yes and No supporters is in table 1.

## Table 1: Attitudes to referendum timing by referendum preferences

	All	Yes supporters	No supporters
As soon as possible after the next election	18	39	2
Within the next two and a half years	12	26	1
Within the next five years	15	24	5
Sometime after the next five years	14	4	22
Never	31	1	65
Don't know	11	7	5
Number of respondents (n)	1204	494	537

Source: SES SCOOP June 2025. Results are column percentages.

### Mandate

When we ask Scots who they believe should be allowed to call for a referendum, the most popular response is that the Scottish Government should be able to call it. While the constitutional rules require a section 30 order for the Scottish Government to be able to do so, any description of this option receives low support from the Scottish electorate.

Over the years we have included a number of questions about what would provide a mandate to call a referendum, effectively creating an acceptable trigger for a Scottish Government to call for a referendum. In 2021, for example, the SES asked before the election whether a particular election result would deliver a mandate to hold a referendum. The results show 18% felt there already was a mandate for a referendum, 30% felt no election result would deliver a mandate, while 30% felt a mandate could result from a particular election result. Of those saying a particular result would deliver a mandate, almost two thirds (64%) said an SNP majority would deliver a mandate, while almost half (49%) said a majority for pro-independence parties would deliver a referendum mandate. Fewer than one in five (18%) said that if the SNP won more seats than any other party that would deliver a mandate to call a referendum.

In 2016, after the election we asked which political signs would be seen as effective triggers for a referendum. The question was posed to all those who had answered something other than 'never' when asked about a future referendum. The results are in table 2 below

## Table 2: Triggers for a second independence referendum

	%
If there is clear and sustained evidence that independence has become the preferred option of a majority of the Scottish people	39
If the UK votes to leave the European Union	27

If the UK government introduces policies that Scots don't support	8
If the SNP campaigns in the next Scottish Parliament to hold a referendum and forms another government	6
If there are other significant and material changes in economic or political circumstances	6
That the SNP has just won another election	5
If the Scottish economy grows strongly	3
Don't know	6
n	943

Source: SES 2016 post-election survey. Results are column percentages.

A follow up question sought to determine what 'clear and sustained evidence' would look like. The options were five polls showing 52% support, five polls showing 60% support, support for independence above 50% for six months or support above 50% for two years. The most popular response (31%) was five polls showing independence support above 60% followed by (29%) two years of majority independence support.

On the issue of whether UK General Elections can provide a de facto mandate for a referendum, our data from 2024 show that most Scots did not cast a ballot based on their desire to send a particular constitutional message (and to the extent that they did, more unionists sought to maximize the number of pro-union MPs in Westminster). Instead, the modal response in 2024 was that the UK General Election provided an opportunity to remove the Conservatives from office.

### Consensus

We know that attitudes to the constitution are polarised and know also that process attitudes are polarised. Borrowing from a body of work undertaken in Northern Ireland we have sought to determine whether we could identify a middle ground consensus option on constitutional process. Our premise is that any future referendum must be held according to widely accepted rules and timing so as to generate acceptance of any eventual result. Process evaluations are key to generating losers' consent after elections, an acceptance of the result by those on the losing side. To identify a middle ground we examined attitudes to timing and mandate, and the role of constitutional consent.

On the first issue of timing and mandate, we asked in our first SCOOP (Scottish Opinion monitor) survey in November 2021 whether people wanted another referendum soon, never, or whether they preferred one of two middle ground options:

I like the idea of another referendum but am not ready for it yet

I don't like the idea of another referendum but could be persuaded one should be held eventually

The results are 27% as soon as possible, 35% never, 16% want one but not yet, 14% don't want one but could be persuaded eventually.

In June 2025 we sought to determine whether No supporters could accept a future referendum and Yes supporters could accept a delay in any referendum. Yes supporters were asked to pick from the following options:

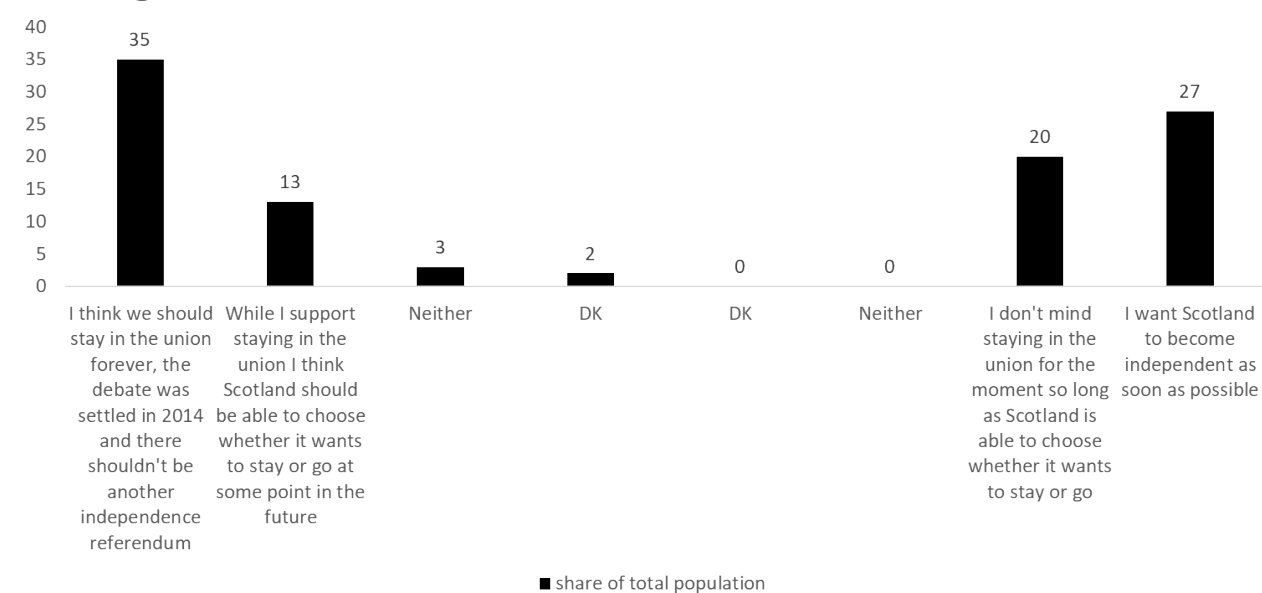
- I want Scotland to become independent as soon as possible
- I don't mind staying in the union for the moment so long as Scotland is able to choose whether it wants to stay or go
- Neither
- Don't Know

No supporters were asked to pick from the following options

- I think we should stay in the union forever, the debate was settled in 2014 and there shouldn't be another independence referendum
- While I support staying in the union, I think Scotland should be able to choose whether it wants to stay or go at some point in the future
- Neither
- Don't Know

The results are in Figure 1 below.

Figure 1: Attitudes to referendum mandate and timing



SOURCE: SCOOP June 2025

The results are remarkably consistent with the 2021 data, with almost identical proportions in the 'never' and 'as soon as possible' camps. They also show that the Scottish electorate can be divided,

roughly, into thirds: under 1/3 of the Scottish election want a referendum as soon as possible, 1/3 want one never again, but the remaining third are open to another in the future so long as it is Scotland’s right to choose. This suggests that the possibility of being able to call a future referendum is something acceptable to a portion of No voters, and limits impatience among Yes voters. Put another way, an acknowledgement of Scotland’s right to call a referendum at some point limits the number of Yes supporters who want one immediately.

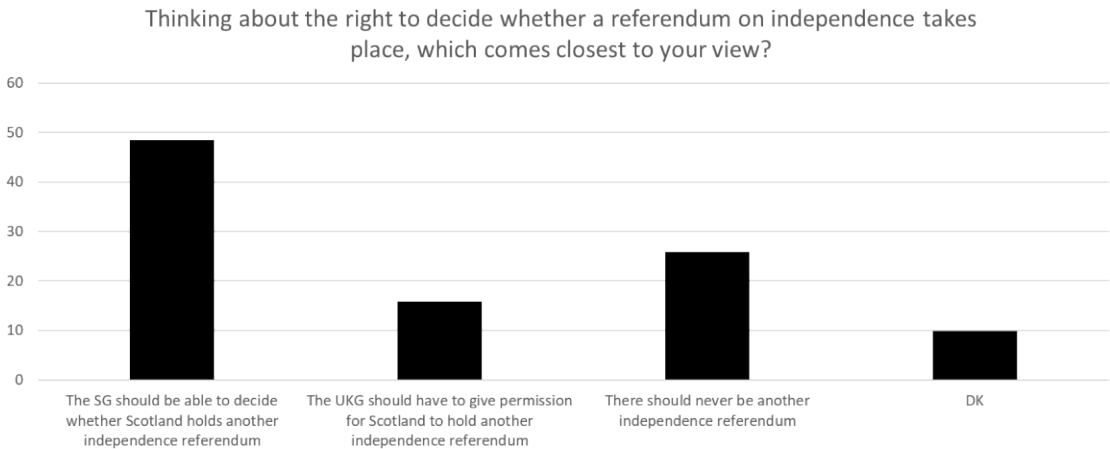
We know that, as a result of the Good Friday Agreement, the Secretary of State for Northern Ireland can call a future referendum in which residents can opt to remain part of the United Kingdom or to unite with the Republic of Ireland. The triggers for such a referendum are not identified in the agreement and there is currently a body of research seeking to identify what they might be. What is clear, though, is that this introduces the notion of a union of consent, in which one part may choose to leave in a future referendum.

We wanted to assess the impact of this framing on attitudes to a referendum in Scotland. To this end we split our sample in half and asked half the following question:

- Thinking about the right to decide whether a referendum on independence takes place, which comes closest to your view?
- The Scottish Government should be able to decide whether Scotland holds another independence referendum
- The UK Government should have to give permission for Scotland to hold another independence referendum
- There should never be another independence referendum
- Don’t know

The results in Figure 2 show that the most popular response is that the Scottish government should be able to call another referendum, followed by a view that another referendum should never take place. The view that the UK government should give permission (in other words the current constitutional status quo) is the least popular option.

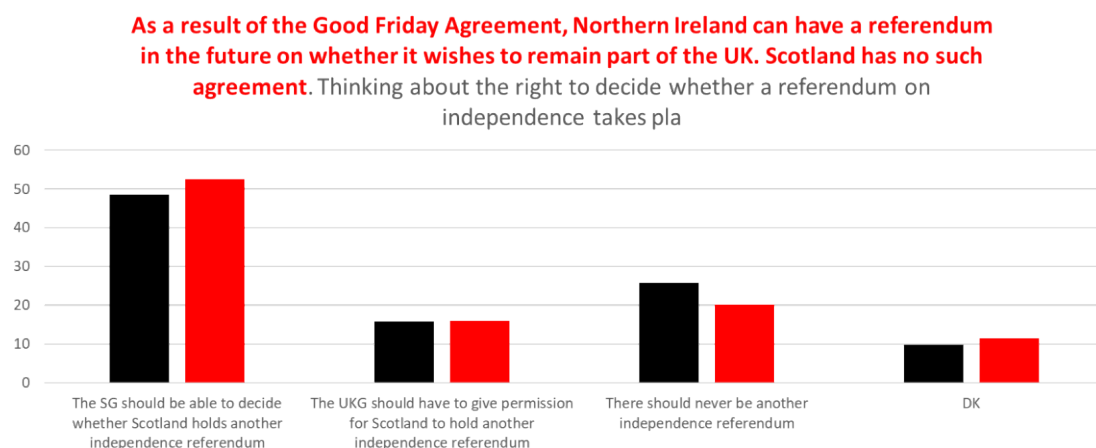
Figure 2: The right to decide - control



SOURCE: SES SCOOP June 2025

To the remainder of the sample, we asked a different question, explicitly referring to the possibility of a referendum in Northern Ireland. The results show a greater degree of support for the Scottish Government's mandate, not through a smaller proportion supporting a UK government mandate but through depressed support for the 'never again' option. When we disaggregate by the strength with which people associate with being a Yes or No supporter, the change is driven largely by the soft No cohort supporting a Scottish government mandate when reference is made to a Northern Ireland. In short, referencing, if implicitly, a union of consent, helps to identify a larger consensus of support for a Scottish mandate and reduces the level of polarisation around referendum process.

## Figure 2: The right to decide - treatment



SOURCE: SES SCOOP June 2025

### Conclusions

Attitudes to the timing of a future referendum process are heavily conditioned by constitutional preferences. Yes supporters want one soon, No supporters on balance do not want one at all. On mandate, the Scottish electorate as a whole believes that the Scottish Government should be able to call a future referendum and should not need to wait for permission, although No supporters are less likely to support such a stance. Such views are enhanced when reference is made to arrangements in the Good Friday Agreement for a Northern Ireland referendum. Acknowledging the Scottish Government's right to call a referendum at some point, and references to consent both serve to depolarise attitudes.

We are able to identify a sizeable portion of the electorate with nuanced views on both timing and mandate, embedded in the Scottish Government's right to call a future referendum. These are important findings, because a referendum process with broad support among the Scottish electorate will be a key determinant of losers' consent, and will ensure that any future referendum result, regardless of which particular side wins, would be accepted by the wider population.

### **The 1980 Referendum: The Gradualist Approach.**

The 1980 Québec referendum occurred in the context of significant socio-political change in the primarily French-speaking province. The so-called Quiet Revolution that started in the 1960s involved a transformation of nationalism in the province that featured a re-territorialization of the nation away from the pan-Canadian notion of French-Canada and towards the idea of a Québécois nation. It also involved efforts at accelerating economic development, and in particular at boosting the social-economic mobility of Francophones, in part through legislation on the use of French in the public sphere and at the workplace. For the PQ, such tasks involved Québec possessing all the powers of a sovereign state. After it formed a provincial government in 1976, the secessionist party sought to make good on its promise to hold a self-determination referendum in its first mandate.

The PQ's central concept was 'sovereignty-association.' Sovereignty was not an incorrect term to reflect the quality of statehood pursued by the PQ and it also had the advantage of being 'softer' and more palatable for greater number of Quebecers than 'independence'. The 'association' part was largely undefined but responded to the widely shared notion that a majority of Quebecers wanted to retain some type of link with Canada. It was also coherent with the so-called gradualist (étapiste) approach to self-determination. Indeed, the PQ government specified that its 1980 referendum would be, in the event of a 'yes' result, the first of a pair. In that first referendum, Quebecers were asked if they agreed to give the PQ government the mandate to negotiate 'sovereignty-association' with Canada. A second referendum would then be held for Quebecers to make a final determination on 'sovereignty-association' after having been presented with the results of these negotiations. The PQ government never consulted the federal government about the referendum process, the question asked, or the majority required for a declaration of independence to be put forward. It considered that Québec's parliament (the National Assembly) had the necessary authority and legitimacy to make all decisions in regard to the referendum. Interestingly, the federal government never challenged that position, perhaps in large part because the 'yes' camp was never expected to win and therefore contesting the Québec government's position might have been viewed as antagonistic by many Quebecers. In the end, the clear victory of the 'no'



camp (60% to 40%) seemed to end the debate over Québec's political and constitutional future for at least a generation.

### **The 1995 Referendum: Take Two.**

The second Quebec referendum came on the heels of failed constitutional negotiations aiming at meeting the demands of a Québec government formed in the 1980s and the early 1990s by the Québec Liberal Party. The failure of these negotiations was interpreted by secessionist forces as a rejection of Québec by the rest of Canada. In this context, the PQ government formed in 1994 promised to hold another referendum Québec's political and constitutional future. Consistent with the precedent of 1980, no thought was ever given by the PQ government to consult the federal government in any way shape or form on the parameters of the referendum. In contrast to 1980, the so-called gradualist approach was dropped; there would be only one vote, which could pave the way for a declaration of independence. The question, criticized by many for being overly long and complicated, referenced an offer of partnership to the rest of Canada following a hypothetical 'yes' victory (although such offer would not have been the subject of another referendum). This time again, the federal government did not object to the Québec National Assembly alone deciding on the question, timing, and majority deemed sufficient for independence being declared, perhaps in part because of the precedent of 1980 and also because it was once again expecting a fairly easy win by the 'no' side. This time, however, the 'no' side's victory was by the narrowest of margins (50.6% to 49.4%).

### **The Aftermath of a Close Result: Empowering the House of Commons.**

The federal government obviously did not like the close result of the 1995 referendum. The Canadian political class widely blamed what they argued was a confusing question for the strong support for 'yes'. Moreover, that political class was criticized for its apparent passivity in relation to the referendum. In order to clarify the constitutional implications of a referendum on independence, the federal government asked the Supreme Court of Canada questions on the legality of a secession declared unilaterally by Québec's National Assembly. In its famous 1998 Secession reference, the Supreme Court of Canada states that Québec does not have a 'right' to secession either under domestic or international law but that if Québec's National Assembly were to declare independence following the expression of a clear majority on a clear question, all the partners of the federation would have the responsibility to negotiate secession while respecting the principles of democracy, the rule of law, minority rights, and federalism. The court left it to politicians to decide what constituted both a clear majority and a clear question. Then, in 2000, the federal government passed legislation that use some of the elements of the Supreme Court of Canada reference in order to frame decision-making about the parameters of any other independence referendum in the country. The so-called Clarity Act conferred responsibility to the House of Commons for judging the clarity of both a referendum question and the majority required for independence. All Québec political parties opposed the Clarity Act and, more broadly, the idea that the federal government could have any input into the parameters of an independence referendum. In 2000,

the National Assembly adopted Bill 99 as a direct reply to the Clarity Act. This Bill, which states that no other parliament or government can constrain the democratic will of the Québec people, was found valid by the Québec Superior Court in 2018.

### **Towards a Third Québec Independence Referendum?**

In the last several years, polls on the question of independence in Québec show support roughly between 33% and 40%, at least 10 percentage points below the 'yes' side result from the 1995 referendum. In addition, until 2025, the PQ was struggling to show significant support in polls. In this context, much was made about the notion that the PQ was a generational party, supported primarily by Quebecers who had experienced at least the later years of the Quiet Revolution and the period of mega-constitutional politics but much less by the youth, while independence was no longer top of mind for most Quebecers, even for those sympathetic to the idea. Today, support for independence is still below 40% and polls suggest that most Quebecers do not want a third referendum on independence but the PQ, which has promised to hold such referendum if it were to form the next government, is leading in the polls with a provincial election less than one year away. Therefore, a third referendum on independence in Québec may very well happen and it is possible that the mechanism for triggering such a referendum would this time be more debated.

The key issue in this context is the Clarity Act. Would the House of Commons want to evaluate the clarity of the referendum question? Would it want to speak to the majority necessary for reaching independence? Would it feel compelled to do both of those things before the vote? In a situation where a Québec PQ government would, as is likely, choose to ignore the voice of the House of Commons if it were to make a pronouncement on the clarity of the question and of the majority, what would then happen? From a political and constitutional perspective, self-determination in Québec would enter a new terrain. A 2027 independence referendum would also involve a greater consideration of Indigenous self-determination than in the past. The plight of Indigenous peoples, who have been victims of colonial and assimilationist policies, has become a significant political issue in the last few decades. In this new context, the discourse of the PQ from 1995, consisting in saying that while Québec could secede from Canada Indigenous nations could not secede from Québec, would not be easily tenable. The new political context also involves greater ideological differences in the secessionist camp in comparison to 1995 as well as the end of free trade as we knew it resulting from the Trump presidency, which means that for the PQ the answer to the question about the eventual commercial partners of an independent Québec could not credibly be the United States. The recent announcement by the PQ that an independent Québec would create its own currency after a 10 year transition highlights that the contemporary secessionist project might look somewhat different from what was proposed in the past.

### **Key Takeaways**

1. The case of Québec and Canada represent an international precedent, albeit in a federation, for triggering an independence referendum without consulting the central government.
2. That case shows two different referendum processes: a gradualist approach consisting of two different votes in 1980 and a single vote in 1995.
3. In both Québec independence referenda, the question featured the concept of 'sovereignty' rather than 'independence', to which was added a qualifier to refer to some continued relationship with the rest of Canada ('association' in 1980 and 'partnership' in 1995).
4. In the event of another referendum in Québec, the federal government may invoke the Clarity Act to have the House of Commons speak to both the clarity of the question (most likely pushing for a short question that would use only the term 'independence') and the clarity of the result (perhaps requiring more than 50% + 1).
5. Since the Québec National Assembly views the Clarity Act as illegitimate, considering instead that the province's representative institutions alone can set the parameters for a self-determination consultation, a serious conflict around process is not to be excluded if there were to be a third independence referendum in Québec.