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Pàrlamaid na h-Alba

Constitution, Europe, External Affairs and Culture Committee

Options for a legal mechanism for triggering any independence referendum

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Contents

Constitution, Europe, External Affairs and Culture Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) the Scottish Government's EU and external affairs policy;

(b) policy in relation to the UK's exit from the EU;

(c) the international activities of the Scottish Administration, including international development; and

(d) any other matter falling within the responsibility of the Cabinet Secretary for the Constitution, External Affairs and Culture and any matter relating to intergovernmental relations within the responsibility of the Deputy First Minister.


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Introduction

1. The Constitution, Europe, External Affairs and Culture Committee (“the Committee") has recently undertaken a short inquiry to examine the options for a legal mechanism for triggering any independence referendum.[i] The Committee explored options based on the principles of certainty and democratic consent within the UK constitutional context.

2. The Committee took evidence on the inquiry at its meetings on 13 November 2025, 27 November 2025 and 11 December 2025, before taking evidence from the Cabinet Secretary for the Constitution, External Affairs and Culture (“the Cabinet Secretary”) on 18 December 2025.

3. The Committee also received a number of written submissions to its inquiry, which are available online. Additionally, the Committee advisers provided a briefing to inform the Committee’s scrutiny. The Committee wishes to extend its thanks to its advisers and all those who provided written or oral evidence to inform its inquiry.

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[i] The Committee agreed to undertake the inquiry by division (For: Clare Adamson MSP, Keith Brown MSP, George Adam MSP, Patrick Harvie MSP; Against: Stephen Kerr MSP, Jamie Halcro Johnston MSP.)

International Law

4. The Committee advisers' briefing states that—

> It is fairly clear that an independent Scotland would be recognised by the international community of states as an independent state if independence from the United Kingdom occurred with the consent of the UK. If that consent however is not forthcoming, there is a question mark over whether international law provides for pathways towards a second independence referendum (and ultimately towards independence). That question is typically discussed under the broad heading of whether a territory that currently forms part of a larger state has a right to secession. Such a right would be based on the right to self-determination. [1]

5. The briefing outlines that, on its own, international law is unlikely to establish a unilateral democratic right for Scotland to unilaterally secede from the UK or to take unilateral democratic steps towards secession (including a referendum on independence). [1]

6. The briefing explains that a question regarding whether a territory which forms part of a larger state has the unilateral right to secede would be based on the right in international law to self-determination. It highlights Article 1(2) of the UN Charter which states that one of the UN's purposes is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". [1]

7. Professor Tierney's written submission to the Committee states that "there is no right under international law that would entitle the unilateral secession of Scotland". His submission highlights the Canadian Supreme Court case of 1998 relating to Quebec (discussed further below), which found that—

> the international law right to self-determination only generates, at best, a right to [i] external self-determination in situations of former colonies; [ii] where a people is oppressed, as for example under foreign military occupation; or [iii] where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. [2]

8. Professor Tierney states that Scotland does not meet conditions [i] or [ii] set out by the Canadian Supreme Court. Nor, he states, does it meet condition [iii], as devolution in Scotland "fully meets, or exceeds, any right of internal self-determination which Scotland as 'a people' under international law enjoys; as such, there can be no claim of a right to secede based upon its denial." [2]

9. Dr Raible's submission notes that "the existence of devolved institution is itself seen as evidence for the effective exercise of internal self-determination." She therefore asserts that, as a matter of international law, the people of Scotland do not have a right to unilaterally secede and that international law does not provide any rights to

exercise self-determination beyond the arrangements already in place for the people of Scotland. [3]

10. The Committee advisers' briefing notes that there exists a friction between the right to self-determination and territorial integrity, another "paramount principle" of international law. The briefing highlights that outwith the context of decolonisation, international law is reluctant to allow for interference with territorial integrity. [1] For example, after setting out the substance of self-determination, the UN General Assembly's 1970 Friendly Relations Declaration states that—

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour. [1]

11. As outlined by the Committee advisers' briefing, it is rare for constitutions to make explicit provisions for secession, with the vast majority either prohibiting secession or remaining silent or uncertain on the matter. [1]

12. Professor McHarg's submission highlights a 2018 study which found that, of the constitutions of 192 UN member states, seven expressly allowed for secession or a right to self-determination, 152 prohibited it either directly or indirectly, 28 were silent on the matter, and 5 were unclear. Professor McHarg notes that the constitutions that permit secession typically set high procedural hurdles for the exercise of the right or affirm the principle of self-determination without setting out a clear legal pathway. [4]

13. It is the view of Professor Tierney that neither international law nor the constitutions of comparable countries recognise a unilateral right to secede for component territories. His submission states that "any move towards secession in comparable countries […] would require the constitutional consent of the central authorities, and a formal process of constitutional amendment. [2]

14. Professor Skoutaris' submission explains that, due to the situation of international law, it is domestic constitutional frameworks which "play a central role in determining whether, when, and how a referendum on sovereignty may be triggered." [5]

International comparators

15. Throughout its inquiry, the Committee considered the constitutional arrangements of a number of international comparators.

16. The Committee advisers' briefing outlines several examples of constitutions that are permissive of secession. The relevant extract from the briefing is attached at Annexe A.

17. The briefing highlights the 1995 Ethiopian constitution, which establishes an

unconditional right to secession to a broad range of ethnic groups. This, the advisers explain, was thought to be necessary to induce loyalty to the state following the collapse of military rule in 1991. [1]

18. The advisers' briefing also outlines the constitutional reform which took place in Liechtenstein in 2003, which contained an express right to secession for communes. Further, the briefing notes the constitution of St Kitts and Nevis (a Commonwealth country made up of two islands), which establishes a right for Nevis to secede from the federation. [1]

19. The briefing notes that, in these examples—

> we see secession clauses being negotiated or drafted in order to induce loyalty to the state, not to facilitate its disintegration – where a secession clause is seen as a necessary pre-condition of the sub-units' continued membership of, and continued participation in the affairs of, the state. [1]

20. The briefing also discusses the Turks and Caicos Islands – a British Overseas Territory – for which a 2024 constitutional amendment passed by the UK Government includes an express provision for the legislature of the Islands to legislate for an independence referendum. [1]

21. Professor Tomkins' submission highlights the referendums on "sovereignty" that were held in Quebec in 1980 and 1995. Though the referendums were not recognised as legal or binding, the Canadian Government participated in the campaign and, following the 1995 referendum, the federal government referred the issue of the legality of secession to the Canadian Supreme Court. [6]

22. As Professor Tomkins explains, the Court ruled that even if a referendum on secession in one of the Canadian provinces was to yield a "yes" vote, this would not necessarily result in secession for the province. Instead, the provinces and the federal government would be under a duty to negotiate whether secession could be secured. [6] Professor Tierney notes that, "the Supreme Court of Canada did not consider Quebec to enjoy a unilateral right to secede." [2]

23. Professor McHarg's submission notes that the 2000 'Clarity Act' provided that the clarity of the referendum questions and of the result are questions for the Canadian Parliament to determine, with the possibility that a supermajority might be required. The Quebec Parliament responded to the Act by passing legislation that repudiated the right of any other body to set conditions on a secession referendum and provided for a simple majority vote. [4]

24. The Committee also heard examples of constitutions that prohibit secession. For example, the Spanish courts found that the Spanish constitution declares the indissoluble unity of the Spanish people and therefore does not permit secession. As such, no part of the Spanish state can secede unilaterally. [1] The courts found that sovereignty is vested in the Spanish people as a whole, and therefore no region may claim sovereignty for itself. [6]

25. Professor Tierney's submission notes that the European Commission accepted that the Catalan independence referendum was not legal under Spanish law. He cites a

spokesperson for the Commission who stated that "this is an internal matter for Spain that has to be dealt with in line with the constitutional order of Spain." [2]

26. Additionally, the Committee heard that, in 2016, the German Federal Constitutional Court rejected a claim for secession from individuals from Bavaria. Professor Tierney's submission explains that, under the German constitution, the power to change the constitutional order rests with the German people as a whole and no state is permitted to secede from the federal republic. [2]

27. Further, Professor Tomkin's submission highlights that in *Texas v White 74 US 700 (1868)*, the US Supreme Court ruled that the USA is an "indestructible" and "indissoluble" union. As such, there is no right to unilateral secession, meaning secession can only come about by consent or "extra-constitutionally". [6]

28. In evidence, Professor Tierney told the Committee that countries such as the US - which has "clear mechanisms" for amending the constitution - plainly distinguish constitutional change and the issue of secession, which the US Supreme Court judges to be a separate (and unlawful) issue. [7]

UK constitutional arrangements

29. The UK Government's written submission to the Committee notes that the UK's constitutional arrangements are founded on the 1706 Treaty of Union, enacted through the 1707 Acts of Union. It highlights that the Scotland Act "expressly reserves" the Union to the UK Parliament. [8]

30. In evidence, Professor Tierney explained that section 37 of the Scotland Act makes clear that the Acts of Union have effects "subject to the provisions of the Scotland Act" and that, as such, the "Acts of Union have therefore tended to pass out of discussion in a debate that is now really about the Parliament's competence within the Scotland Act 1998." [7]

31. Professor McHarg's submission explains that, though it is not currently explicitly recognised or regulated by law, it is legally possible for Scotland to become independent under the UK constitution. Professor McHarg's submission expresses the view "that the ability of Scotland to become independent follows from the sovereignty of the United Kingdom Parliament, which encompasses the ability to redraw the boundaries of the state, notwithstanding that the Acts of Union of 1707 declare that the Union between Scotland and England is to last 'forever', and provide no mechanism for dissolution." [4]

32. Professor Tomkins' submission agrees that the UK constitutional arrangements do offer a route to independence, explaining that the Scotland Act 1998 provides that—

> the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum. [6]

33. In 2022, the UK Supreme Court ruled on whether the Scottish Government could legislate for another referendum on Scottish independence. The Court found that secession is permitted under the UK constitution but that no part of the UK can unilaterally secede, nor can they hold a referendum on secession without the permission of the UK Parliament, even if such a referendum would only be advisory.

34. Dr Casanas Adam notes in her submission to the Committee that the UK constitution is based on the central principle of the sovereignty of the Westminster Parliament. [9] Moreover, Professor McEwan's submission explains that there is "no route to Scottish independence, or to a referendum on independence, that does not go through the Westminster Parliament." [10]

35. Dr Casanas Adam stated in evidence that, under current constitutional arrangements, legislation from Westminster would be required. However, there are constitutional principles of democracy, devolution, and protection of minorities that support establishing a clear legal framework for the Scottish people to exercise their recognised right to self-determination. [11]

36. Professor Tierney's submission explains that the UK Supreme Court ruling coupled with the principle of legislative supremacy of the UK Parliament means that—

> any move to achieve the independence/secession of Scotland from the United Kingdom would require the express authorisation of the UK Parliament. [2]

37. Professor McHarg outlines that what is formally required for Scotland to become independent is an Act of Parliament providing for Scotland to cease to be a part of the UK or transferring power to the Scottish Parliament to declare independence. She explains that, in order to hold another independence referendum—

> legislative competence would have to be transferred, either temporarily or permanently, to the Scottish Parliament using a s.30 Order or primary legislation, or the UK Parliament could legislate directly to authorise such a referendum itself. There is no mechanism whereby the Scottish Parliament can alter this position unilaterally, as the limits on its legislative competence are protected enactments, which it may not modify. [4]

38. The UK Government's submission states that the legal mechanism for the 2014 independence referendum was a specific and time-limited transfer of power under section 30 of the Scotland Act 1998. It notes that, though it is lawfully a matter for the UK Parliament to legislate for a referendum on Scottish independence, this transfer of power temporarily amended the Scotland Act to allow the Scottish Parliament to be the body to pass legislation providing for the details of the referendum. [8]

Comparison with international examples

39. Dr Casanas Adam's submission states that the UK constitutional framework stands in "stark contrast to that of other multinational states." [9] Professor Tomkins describes the UK's approach to secession as being "markedly more permissive" than some of the examples explored above, including the US, Spain and Canada. [6]

40. Professor Tomkins' submission highlights that in the UK, unlike in Spain, there is no constitutional rule vesting sovereignty in one place, noting that there is also the sovereignty of the Scottish and Northern Irish people. [6]

41. In evidence, Professor Tierney told the Committee that one reason why secession is so clearly prohibited in states such as the US and Germany is that these states have a conception of one people. He stated that—

> Rhetorically, politically and morally, we have continued to accept that the United Kingdom is a multinational union. On that basis, Scotland and the Scottish people are recognised as distinct. [7]

42. Professor Tomkins' submission [6] notes that the UK constitution differs from that of the US as there is no rule of law providing that the union(s) of the UK are "indissoluble".

43. Professor Tomkins' submission states that the Canadian position contrasts with the UK as, had the 2014 referendum resulted in a "yes" vote, it would have triggered independence. He explains that negotiations would have taken place around how to deliver independence, not about whether it should be delivered. [6]

44. Professor Tierney highlights that, in its ruling, the UK Supreme Court recognised that, according to the 1998 Canadian Supreme Court case relating to Quebec—

> the international law right to self-determination only generates, at best, a right to [i] external self-determination in situations of former colonies; [ii] where a people is oppressed, as for example under foreign military occupation; or [iii] where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. [2]

45. The UK Supreme Court went on to endorse the view of the Canadian Supreme Court that—

> A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally. [2]

46. The UK Supreme Court's view was that "these observations apply with equal force to the position of Scotland and the people of Scotland within the United Kingdom." [2] It also said: "There are insuperable obstacles in the path of the intervener's argument based on self-determination… the principle of self-determination is simply not in play here." [2]

47. However, as noted in the advisers' briefing, the UK Supreme Court did not comment on the aspect of the Canadian judgement that accepted that, should a clear majority in one Canadian province express support for secession in response to a clear question, the federal government and other provinces would be obliged to negotiate in good faith. [1]

The right to decide

48. The Scottish Government published its paper *Your Right to Decide* in September 2025. In the paper, the Scottish Government reiterated its view that the UK is a voluntary union, and that Scotland's place in the Union rests on "the ability of the people of Scotland to decide to exercise their right to decide again at any point in the future". The paper proposed that any failure to recognise this right would undermine the claim that the UK carries the consent of the people across each part of the Union. [1]

49. Professor Tomkins' submission states that the question of Scotland's constitutional

future is for the people of Scotland to decide, and that "this seems equally clear whether we look to political sources of the constitution (such as the Edinburgh Agreement) or legal sources". [6]

50. Further, Professor Renwick's submission notes that there is widespread agreement that the Union is voluntary and that, should the people of Scotland wish it, Scotland is entitled to independence. [12]

51. In evidence, the Cabinet Secretary highlighted publicly stated positions that it is the decision of the Scottish people to decide how they are governed, drawing attention to the 2014 Smith Commission which stated that "nothing in this report prevents Scotland becoming an independent country in the future should the people of Scotland so choose." [13]

Trigger mechanisms

52. Professor McHarg's submission notes that, though some arguments suggest that the legal recognition of a right to secede is destabilising, "the lack of a clear pathway to independence may itself be source of constitutional grievance." [4] She added in evidence that, international examples and the Northern Ireland arrangements indicate that "there is a real risk that clarification of the process would not be favourable to those seeking independence, because, from their perspective, it might put too many hurdles in the way of that process." [7]

53. Dr Raible asserts that regulations on when and how a referendum is triggered, and how such a vote should be run would be "beneficial". [3] Professor Renwick suggests that, given Scotland's constitutional future is a matter for the Scottish People, "it is problematic that no established mechanism exists for ensuring that, in appropriate circumstances, the wishes of the people of Scotland can be expressed." [12]

54. Professor Renwick states that, though on most matters elections provide a means for voters to remove governments that do not meet their wishes, there is a "disjuncture" when it comes to Scottish independence: "it is the UK electorate that choses those with the power to trigger a referendum, whereas the electorate whose wishes are to be respected is that of Scotland. So the democratic mechanism may not work." He states that it is therefore preferable to have in law or in a cross-party backed statement principles for when a referendum may and/or must be called. [12]

55. Professor McEwan stated that the establishment of any legal mechanism for triggering an independence referendum must be arrived at by consensus, noting that if it were to be devised by the UK Government alone, "it would probably be unlikely to take the issue away from the political arena." [11]

56. The Cabinet Secretary told the Committee that there is merit in seeking to formally establish the circumstances under which a referendum could take place. [13] The Cabinet Secretary further stated that—

> There must be a mechanism. […] The longer the current situation goes on, the more unsustainable and corrosive it gets for our democratic culture, because it is a roadblock on democratic decision making and a denial of a democratic right of self-determination. [13]

Statutory trigger mechanisms

57. As outlined by Professor Renwick, the "most radical" option for establishing a statutory mechanism for triggering an independence referendum would be to give the Scottish Parliament the power to call a ballot at the time of its choosing. [12]

58. He states that, though this arrangement would solidify that independence is the choice of the people of Scotland, it would be "undesirable" as it would make the process unilateral, whereas 'losers' consent' and stability could be more easily achieved if the Scottish and UK Governments work together. [12]

59. In evidence, Professor Blick highlighted that, in his view, the UK Government "would be very reluctant to do anything that would in effect hand over the control that the Supreme Court decided that it has to allow a referendum to happen." [11]

Northern Ireland arrangements

60. As explained in the briefing by the Committee advisers, the 1998 Good Friday Agreement "put the principles of self-determination and of majority consent into legal form which allows Northern Ireland to leave the United Kingdom". [1]

61. Section 1 and Schedule 1 of the Northern Ireland Act 1998 set out that Northern Ireland would cease to be part of the United Kingdom should a border poll show a majority consent for that to be so. The Act grants the Secretary of State the power to hold such a poll, though, as a ministerial order, the holding of a border poll would need to be approved in both houses of the UK Parliament. However, a border poll may not be held within seven years of a previous border poll. [1]

62. As set out in the advisers' briefing, a poll is triggered—

> if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland. [1]

63. The Secretary of State has a duty to exercise the power to hold a border poll should this condition be met. However, as noted in Professor McEwan's submission, it is unclear as to what the empirical basis would be for assessing the likelihood that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom. [10]

64. In evidence, Professor Henderson suggested that though public support would likely be evidenced by a combination of elections and opinion polls, "information on the amount and the degree—for example, whether there have to be five opinion polls or six and so on—is not there." [14]

65. The Re McCord case aimed to address this ambiguity by compelling the Secretary of State to establish a formal policy setting out the circumstances under which a border poll would be held, including what would be taken as evidence of a pro-unification majority. The Northern Ireland High Court and the Court of Appeal ruled that there was no legal requirement to do so, and that establishing such criteria could itself be destabilising or controversial.

66. Professor Renwick's submission suggests that arrangements for Scotland could be made that are analogous to those for Northern Ireland, whereby a provision is set out stipulating the circumstances which must trigger the UK Government to initiate a referendum process. [12]

67. Professor Renwick highlights however that, in the Northern Ireland arrangements, it is for the UK Government to call and run a referendum, and there is no formal role for the Northern Ireland Assembly or the Northern Ireland Executive. This, he states, contrasts with the 2014 referendum, where the Scottish and UK Governments worked together. Professor Renwick's view is that this aspect was a strength of the 2014 referendum, and repeating this approach in any future

referendums would be "highly desirable". [12]

68. In evidence, Professor McHarg noted that in the Re McCord case, the Northern Ireland Court of Appeal stated that the Secretary of State must exercise their functions impartially, in good faith and bearing in mind the right to self-determination of the people of Northern Ireland. She stated that—

> We could imagine similar arguments being made here at the political level—that it is not something where decisions should be taken on a partisan basis. [7]

69. In their 2024 paper *Scotland and the Constitution: Agreeing a way forward*, Kezia Dugdale and Stephen Noon emphasised the voluntary nature of the Union, and advocated for a "recognised, legal and fair process to test, when appropriate, whether the people who live in Scotland can determine whether they want the country to remain in the Union or to transition to independence." [15] The paper proposed—

- "That the existing trigger for a unification referendum in Northern Ireland should be the basis for this process;
- Therefore, that the test would be whether there would be a likely majority vote in favour of independence;
- That meeting this test should place upon the UK Government a legal duty to agree to a referendum and to transfer via a section 30 Order the necessary competences to the Scottish Parliament to legislate for a referendum;
- That the model for a referendum should be based on the 2012 Edinburgh Agreement;
- That the decision as to whether the test has been met should rest with the Secretary of State for Scotland within a set of criteria previously agreed between the Scottish and UK Governments;
- That the threshold should not create an insurmountable barrier to independence but should test the solidity of pro-independence support;
- That victory in the referendum would be on the basis of 50% plus one of the votes." [15]

70. Professor Henderson told the Committee that public opinion polling indicates that the most popular option (chosen by 40 per cent of the electorate) is that another independence referendum should be triggered "if there is clear and sustained evidence that independence is the preferred option." This would amount to a similar arrangement to that of Northern Ireland. Professor Henderson further explained that—

> When we ask the public what that clear and sustained evidence would look like, around a third say that it should be just five polls showing 60 per cent support for independence, and another third say that it should be at least two years of opinion polls showing majority support for independence. [14]

71. However, Professor McEwan's submission outlines that it is unlikely that similar provisions would be made for Scotland, as the Good Friday Agreement is an international treaty which was the result of a long-running process intended to bring about an end to armed conflict. As such, she suggests, a similar provision for Scotland would not have basis in international agreement or law. [10]

72. In evidence, the Cabinet Secretary acknowledged that the Northern Ireland context is not directly comparable with that of Scotland. However, he stated that "it is not sustainable that, although a mechanism exists for determining Northern Ireland's constitutional future, one does not exist here. That needs to change." [13]

Non-statutory trigger mechanisms

73. Professor Tierney states that, within the UK, "the legal position is now clear", and that it is "now a matter for political debate and persuasion": it is for those seeking a referendum to make a political claim and request that the UK Parliament provides the legal mechanism to allow a legal referendum. [2]

74. In evidence, Professor McHarg stated that—

> The existence of a legal route within the context of the UK constitution does not change the fact that it is, ultimately, a political matter and that things can be changed, but it does change the terms of political debate. That is one reason why there is a lot of searching around for some sort of legal route, because, although it would not provide guarantees, it would change the nature of the debate over the right of Scotland to become independent. [7]

75. Professor Tomkins outlined to the Committee that independence cannot occur without a legal instrument, but that the process by which a legal instrument might be arrived at is a political one. As such, the process of secession would require political campaigning and results alongside legal instruments. [7]

76. In 2022, Westminster's Scottish Affairs Committee heard from the then Secretary of State for Scotland that a second referendum could only take place if there was a "sustained majority and a clear consensus between [the UK and Scottish] governments, between the political parties, across civic society." [1] He stated that—

> It's the duck test. If it looks like a duck and it sounds like a duck and it waddles like a duck then it's probably a duck. People know when they've reached that point. They knew [in 2014] that they'd reached it. We don't believe we've reached it now. [1]

77. Professor Tomkins' written submission states that "were it to become the settled will of the Scottish people for Scotland to leave the UK and become an independent state, this is what would happen." [6]

78. Professor Renwick's submission outlines two potential interpretations of the meaning of "settled will":

> - that there is a stable majority in favour of a specific view, such that there is no significant prospect in the foreseeable future that the majority will flip
> - that there is wide agreement that a specific view reflects the will of the people as a whole, even among those who do not personally agree with it. [12]

79. Professor Tomkins described the settled will as "a reflection that momentum is now behind an idea, project, reform or change." Professor Tomkins explains that there is no single test to determine the settled will of the Scottish people, and that it is a matter of judgement. He states that "we cannot do much better than to say 'we will know when we know'". [7]

80. Professor McHarg agreed with this view, stating that "If it becomes impossible to deny that the people of Scotland want independence, I think that there will be a second referendum." [7] Professor McHarg also noted that devolution was understood to be the settled will at the time of the 1997 referendum because opinion polls consistently showed high support for it and there was cross-party support for it. [7]

81. In evidence, Professor Tomkins stated that—

> the way in which you persuade Westminster to grant that consent is a political process, not a legal process. It is a political process whereby those who want an independence referendum demonstrate that it has become the settled will of the Scottish people to pursue independence or at least to have an independence referendum. [7]

82. Professor Tomkins' view was that "any future independence referendum should be held to confirm what we already know (or strongly suspect) to be the settled will of the Scottish people: it should not be held to find out what the will of the Scottish people is on any particular day." [6]

83. Professor McHarg's view was that campaigners should not look for a legal route to independence, arguing that "if they want Scotland to be independent, they need to persuade a significant majority of Scottish people that that is the best constitutional route." [7] Professor Tomkins furthered this position, and stated that "any UK Government or Parliament that seeks to frustrate that settled will pay a significant political price." [7]

84. In his written submission, Professor Tomkins posits that, though Westminster would be "acting contrary to constitutional precedent and […] constitutional principle were it to withhold such consent in circumstances where it had become clear that the settled will of the Scottish people was to pursue independence." He therefore concludes that the constitutional route to independence is the ongoing party political and civic society debate about independence in Scotland. [6]

85. Professor Renwick's submission suggests that there a "strong case" for saying that "a majority in favour of independence (or in favour of a referendum) should be seen to endure for some time before a referendum is called." [12]

86. Professor Lecours told the Committee that—

> Scotland is divided on self-determination. That means it is unlikely that there will ever be enough of a majority to be called a settled will on a question such as that of independence. … After what is now almost 50 years of secessionist politics in Québec in one way or another, we have never seen the settled will, and I do not think that we ever will see it. I therefore think that it is unlikely to exist in Scotland on that question. [14]

87. In evidence, Professor Blick suggested that the concept of settled will may not be helpful, as it could lead to arguments about terminology as opposed to resulting in a legally enforceable instrument. [11] Professor McEwan asserted that settled will should not be a precondition for identifying a mechanism for triggering an independence referendum, as it is undefined and how it is to be measured is unclear. [11]

88. Professor Renwick stated that there is no guarantee that the UK Government would agree to a referendum, even if it is clear that support is strong in Scotland for a referendum and for independence. He noted however that "the element of settled will that is defensible as a criterion to be considered here is the stability of the majority for a particular position." He suggested that—

> You could also consider embedding stability in the mechanism if you had a mechanism for triggering a referendum. You could have a requirement that there should be evidence of a sufficient level of support for independence that extended over a defined length of time. [11]

89. Professor McEwan explained that Scottish election results or other demonstrations of public opinion could indicate whether a referendum ought to be facilitated in the context of the union being a voluntary one. [11]

90. Professor McEwan's submission notes that, following the majority of SNP MSPs elected in the 2011 Scottish Parliament elections, the then Prime Minister concluded that the SNP had won a mandate to hold a referendum on independence. She explains that there was no legal obligation for this decision, nor does the decision place any obligation on a future leader to respond similarly, notwithstanding the political precedent. [10]

91. Professor McEwan's submission does acknowledge that political consequences could arise if this precedent is not followed in the future, though this "may depend upon the extent to which voters' electoral preferences were a result of pro-independence mobilization." [10]

92. The Scottish Government's written submission outlines its view that 2011 set a precedent that it is for the people of Scotland to decide when a referendum should be held, and that it is up to the Scottish and UK Governments to facilitate that when they make such a decision. The submission states that—

> the Scottish Government secures a democratic mandate to negotiate with the UK Government a transfer of power for a lawful referendum whenever the people of Scotland, following a party's clear manifesto commitment to the holding of a referendum, return a Scottish Parliament that supports the holding of a referendum and a Scottish Government committed to delivering one. [16]

93. Professor McHarg's submission notes that it has been suggested that the 2012 Edinburgh Agreement created a legally enforceable precedent for power to be transferred to the Scottish Parliament to hold an independence referendum in the event that a pro-independence party wins an overall majority in a Scottish Parliament election. However, she highlights, there is nothing in the Agreement suggesting that it was intended to be anything other than a one-off. She states that—

> At the very most, the 2014 precedent would be one of a range of factors to be taken into account in deciding whether or not to respect a mandate for second referendum, and a court is likely to be highly deferential to ministerial judgment on such a politically sensitive matter. [4]

94. In evidence, Professor McHarg suggested that the SNP or another pro-independence party are not likely to win another overall majority in the Scottish Parliament and that it therefore "does not seem sensible" for those who want another referendum to set this requirement as the trigger mechanism. [7]

95. Professor Skoutaris' submission notes that—

> the responses of successive UK Governments since 2016 demonstrate that even a decisive electoral mandate for a party with a clear manifesto commitment to the holding of a referendum, is unlikely, on its own, to trigger another independence referendum. [5]

96. The advisers' briefing [1] notes that the current Secretary of State for Scotland, the Rt Hon Douglas Alexander MP, told the House of Commons that the UK Government would "take seriously any SNP majority" in the 2026 Scottish Parliament elections.

97. In its evidence-taking, the Committee asked whether there would be political consequences for the UK Government from sustained high levels of support for pro-independence or pro-referendum parties in elections. Dr Casanas Adam suggested that the importance of election results is sometimes underestimated, and that—

> the legitimacy and the continuity of the union are eroded if we see a clash between the will of the Scottish people, as expressed through elections, and the responses from the UK Parliament and the UK Government. [11]

98. In evidence, Professor Tomkins clarified that descriptions of the 2014 independence referendum as a "once in a generation" event constituted political rhetoric as opposed to a constitutional convention. Citing the two referendums that took place on the UK's EU membership and two on Scottish devolution, Professor Tomkins stated that it is not the case in the UK that, once you have a referendum on an issue you cannot have another on the same issue at a later date. [7]

99. The Cabinet Secretary told the Committee in evidence that public support for independence is at higher levels than was the case in 2011, when the UK Government agreed that the Scottish Government had won a mandate for a referendum. He stated that, to trigger another independence referendum—

> We have a precedent. Given that we have a precedent that we know was agreeable to the UK Government and given that we know the result would have been recognised internationally had Scotland voted yes in 2014, I am of the view that we should secure agreement through the ballot box and that that is exactly what should happen again if a majority of parliamentarians who support independence are returned to this Parliament. [13]

100. The Cabinet Secretary further stated that "when a party says in its manifesto that it is committed to, and that its MSPs will vote for, a referendum taking place, it is a mandate to have that choice." He clarified that, while his view is that there should be a referendum if the majority of parliamentarians elected to the Scottish Parliament wish for there be to be one, it may be a "a stronger case to exactly match the precedent and circumstances of 2011", when one pro-independence party won a majority. [13]

101. The Cabinet Secretary told the Committee in evidence that, when a party wins an election on a manifesto, it is "important for the democratic health of a country" that the losing side acknowledges the Government has a right to make progress on delivering its manifesto. [13]

Conclusions

102. **The Committee[ii] notes the broad consensus expressed by witnesses and by its advisers as to the current legal position in relation to any future independence referendum:**

- **That international law confers no legal right for Scotland unilaterally to secede from the United Kingdom nor unilaterally to hold a referendum on the question of Scottish independence;**
- **Therefore, that the question of Scottish independence must be answered in accordance with the United Kingdom's constitutional arrangements;**
- **That the multi-national character of the United Kingdom's constitution is reflected in the Acts of Union that created a new state, Great Britain, while preserving distinct Scottish national institutions in law, education, local government and religion;**
- **That while the Scottish constitutional tradition of the sovereignty of the people is widely accepted, the UK's constitutional arrangements vest legal sovereignty (i.e. the highest law-making authority) in the UK Parliament;**
- **Therefore, the primary route for Scotland to become independent is an Act of (the UK) Parliament providing directly for Scottish independence or enabling the Scottish Parliament to declare independence;**
- **That this is so notwithstanding that the Acts of Union make no provision for their dissolution and declare that the union between Scotland and England is to last "forever", nor the common perception that a voluntary Union entered into by two parties could reasonably and commonly be understood to imply a process for its dissolution;**
- **That the Scotland Act 1998 reserves both "the union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" to the United Kingdom Parliament and makes the Acts of Union subject to that Act;**
- **That the Supreme Court has determined that legislation authorising a referendum on Scottish independence would "relate to" these reserved matters and therefore would be outside of the Scottish Parliament's legislative competence;**
- **Therefore, that in order for the Scottish Parliament to legislate for an independence referendum this would require a transfer of legislative competence either by a section 30 order or by primary legislation made by the UK Parliament;**
- **That the 2014 referendum was legislated for by the Scottish Parliament**

on the basis of an agreement between the Scottish and UK Governments and a section 30 order that was approved by both the Scottish and UK Parliaments;

- **That this section 30 order established a time-limited power to provide for that specific referendum and was not intended to establish a legal precedent.**

103. **The Committee recognises that within the context of both international law and the UK constitution, Scotland has no *legal right* to unilaterally secede nor to unilaterally hold a referendum on the question of independence. But of equal importance, the people of Scotland have a *democratic right* to determine Scotland's constitutional future. Indeed, this is central to the Scottish constitutional principle of the sovereignty of the people. It is also implicit in the findings of the Smith Commission which stated that "nothing in this report prevents Scotland becoming an independent country in the future should the people of Scotland so choose". As Professor Renwick told us, "there is widespread agreement that the Union is voluntary and that, should the people of Scotland wish it, Scotland is entitled to independence."**

104. **The Committee also recognises that, where the UK Government agrees, there is a pathway for the people of Scotland to exercise their democratic right to determine Scotland's constitutional future; but that in the absence of that agreement there is no such pathway for the people of Scotland to exercise this right. Within the UK constitution this right is dependent on the agreement of Westminster. Whether or not that agreement would be forthcoming is essentially a political decision and therefore theoretically dependent on the levels of political support as expressed in a variety of ways. For example, through elections, parliamentary votes and public debate. Unlike the position in Northern Ireland, there is no legal mechanism by which a Scottish independence referendum can be triggered if that is what the people of Scotland so choose**.

105. **Within the United Kingdom's constitutional arrangements, formal democratic mandates have historically been established through elections and legislative processes. It is problematic that no established mechanism exists for ensuring that, in appropriate circumstances, the wishes of the people of Scotland can be expressed, and as we heard from Professor Renwick, this can be said to represent a democratic "disjuncture" whereby the "democratic mechanism may not work." As he also points out, "it is the**

[ii] **These conclusions (paragraphs 102-109) were agreed by division (For 4 (Clare Adamson MSP, George Adam MSP, Keith Brown MSP; Patrick Harvie MSP); Against 3 (Jamie Halcro Johnston MSP, Stephen Kerr MSP; Neil Bibby MSP); Abstentions 0)**

UK electorate that chooses those with the power to trigger a referendum, whereas the electorate whose wishes are to be respected is that of Scotland."

106. **The Committee's view is that this creates a democratic anomaly.**

107. **The Committee recommends, therefore, that steps should be taken to address this democratic anomaly. This should include the agreement, regardless of the UK's political priorities, of a trigger mechanism which would allow the people of Scotland to exercise their democratic right to determine Scotland's constitutional future if they so wish.**

108. **During its inquiry the Committee considered a range of statutory and non-statutory options from comparative constitutional practice, these included:**

- **An amendment to the Scotland Act that would give to the Scottish Parliament powers to legislate directly for a referendum if certain criteria are met (such as the referendum provisions in St Kitts and Nevis or in Liechtenstein) or that confers such a power more broadly (such as in the Turks and Caicos Islands);**
- **An amendment to the Scotland Act that would place a duty and/or confer a discretionary power to hold a referendum on the UK Government (or to transfer such a power to the Scottish Parliament) if certain criteria are met (such as the referendum provisions contained in the Northern Ireland Act or in the constitution of Ethiopia);**
- **Binding political agreement between the Scottish and UK Governments as to what measures – votes in devolved and/or UK elections; votes in the devolved legislature; quantitative and qualitative opinion polls; other forms of civic engagement such as citizens' assemblies – should determine the clear will of the people of Scotland to be asked and to answer the question of Scottish independence.**

109. **The Committee believes that the Scottish Government and the UK Government should negotiate a clear pathway to exercising Scotland's democratic right to determine its constitutional future as a matter of urgency. This should include consideration of the statutory and non-statutory options discussed in this report.**

Annexe A: extract from advisers' briefing

Are there international comparators that the committee might draw upon?

Constitutions which explicitly provide for a right to secede are rare. Of the handful currently in force, the most relevant examples are:

Ethiopia

Ethiopia is a landlocked country in the Horn of Africa region of East Africa. It shares borders with Eritrea, Djibouti, Somalia, Kenya, South Sudan and Sudan with a population of about 135 million people. Following the collapse of military rule in 1991, the 1995 Constitution of Ethiopia provided for a federal system of government comprised of nine ethnically based regions. There are more than 80 ethnic groups in Ethiopia. Two of those groups, the Omoro and the Amhara, make up around 60% of the population. The Tigraway, which makes up just 6% of the population, has been the dominant political group since 1991 on account of its military prowess. Article 39 of the 1995 Constitution provides that:

> (1) Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.
>
> … (4) The right to self-determination, including secession, of every Nation, Nationality and People shall come into effect:
>
> (a) When a demand for secession has been approved by a two-thirds majority of the legislative Council of the Nation, Nationality or People concerned;
>
> (b) When the Federal Government has organised a referendum which must take place within three years from the time it received the concerned council's decision for secession;
>
> (c) When the demand for secession is supported by a majority vote in the referendum;
>
> (d) When the Federal Government will have transferred its powers to the Council of the Nation, Nationality or People who has voted to secede; and
>
> (e) When the division of assets is effected in a manner prescribed by law.

For these purposes the constitution defines a "Nation, Nationality or People" as "a group of people who have or share a large measure of common culture or similar customs, mutual intelligibility of language, belief in a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory".[iii] On paper, then, the 1995 Constitution establishes an unconditional right to secession to a broad range of ethnic groups. This was thought necessary in order to induce loyalty to the state. In other words, following the collapse of military rule, it was thought that the Omoro, Somalis and Afar parties would refuse to join transitional arrangements towards a new constitution without explicit recognition of their right to secede – and therefore with the risk of relapse into civil war.

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iii Article 39(5). The 1995 Constitution is available at Constitution of the Federal Democratic Republic of Ethiopia | Refworld.

However, for political reasons it is thought unlikely that the clause will successfully be invoked. On the one hand, small-medium sized ethnic groups who are dispersed across different regional states are unlikely to find secession to be a viable or even to exercise the right afforded by the constitution. On another, federal police and soldiers are engaged in measures – and indeed in armed combat – against the larger Oromo Liberation Front which is fighting to secede.[iv]

Although Article 39 as yet to be tested – and despite the political realities on the ground that might prevent it from being tested – it retains a significant symbolic force.

For many ethnic groups the secession clause is a necessary condition for their continued membership in the Ethiopian state.

Liechtenstein

Liechtenstein is sovereign principality bordering Switzerland and Austria with a population of about 40,000 people. A hereditary monarchy, it is made up of 11 communes. Its constitution dates back to 1921 and was the subject of far-reaching reform in 2003.

The 2003 constitutional reform introduced Article 4 (2) into the Liechtenstein which reads as follows:

> Individual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a majority of the citizens residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotiations have been completed.[v]

The provision is probably globally unique in that it (a) contains an express right to secession; and (b) grants this right to communes (akin to civil parishes or council areas). A close reading reveals that the provision only gives communes a right to initiate a secession procedure; which – if successful – would need to be realised either by law or by treaty, in which case there would need to be another referendum on that particular secession treaty. Liechtenstein has so far not passed any legislation to define the procedure further.

The provision is also vague on what would happen to the seceding commune: whether it would become join Austria or Switzerland or become its own independent microstate. Secession of one or more communes would also call into question the continued viability of Liechtenstein as an independent state, particularly if the seceding commune was one of the bigger ones like the capital Vaduz.[vi]

It is perhaps interesting to note that there were no secessionist tendencies anywhere in Liechtenstein before the constitutional reform of 2003.[vii] In fact, nobody had called for the

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iv For an overview see A Habtu, “Multiethnic Feseralism in Ethiopia: A Study of the Secession Clause in the Constitution” (2005) (Spring) Publius 313.

v Translated by the Council of Europe’s Venice Commission, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2002)145-e

vi On all this see P M Schiess Rütimann, “The right of Liechtenstein municipalities to initiate a secession procedure”, available at http://www.dpceonline.it/index.php/dpceonline/article/view/1623.

vii Ibid.

inclusion of Article 4 (2), except the Prince, who introduced the provision with a very different rationale in mind. His concern was for the continued existence of Liechtenstein and the continued recognition of the self-determination of the Liechtenstein people, which he did not regard as guaranteed. In his reading, a right to self-determination was only guaranteed if the people exercising that right were different from their neighbours "in race religion, language and culture", which he considered Liechtensteiners not to be.[viii]

By thus enshrining a right to self-determination in the constitution, the Prince wished to influence (and ostensibly broaden) the development of self-determination under international law. However, the Venice Commission, which examined the proposals for constitutional reform, cast considerable doubt on whether the reform would achieve this, pointing out that the residents of individual communes cannot be considered different "peoples" for the purposes of international law.[ix]

St Kitts and Nevis

The Federation of St Kitts and Nevis is a Caribbean island country consisting of the two islands, St Kitts and Nevis. It is the smallest state in the Western Hemisphere with around 48,000 inhabitants. It is a Commonwealth country with King Charles III as its head of state. Until its secession in 1967 the union also included the British dependency of Anguilla. The Constitution of St Kitts and Nevis was adopted in 1983.

The constitution establishes a right on the part of Nevis to secede from the federation. There is no equivalent right for St Kitts to secede. The secession of Nevis is provided for in Article 113 of the constitution which states:

> (1) The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher and accordingly that this Constitution shall no longer have effect in the island of Nevis.

In order for secession legislation to validly be passed by the Nevis Island Assembly a number of conditions apply including super-majorities in the Assembly and in a secession referendum and detailed plans for Nevis's constitutional future being made available before the referendum:

> (2) …on its final reading the bill [must be] supported by the votes of not less than two-thirds of all the elected members of the Assembly and…shall not be submitted to the Governor-General for his or her assent unless
>
> a. There has been an interval of not less than ninety days between the introduction of the bill in the Assembly and the beginning of the proceedings in the Assembly on the second reading of the bill;
>
> b. After it has been passed by the Assembly, the bill has been approved on a referendum held in the island of Nevis by not less than two-thirds of all the votes validly cast on that referendum;
>
> c. Full and detailed proposals for the future constitution of the island of Nevis

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viii This argument is somewhat dubious as it is quite clear that the citizens of a sovereign state like Liechtenstein are a "people" for the purposes of the right to self-determination.

ix Venice Commission, Opinion 227/2002, para 37, available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)032-e.

> (whether as a separate state or as part of or in association with some other country) have been laid before the Assembly for at least six months before the holding of the referendum and those proposals, with adequate explanations of their significance, have been made available to the persons entitled to vote on the referendum at least ninety days before the holding of the referendum.

The secession clause was invoked in 1998 and it was largely expected that Nevis would vote to secede. However, the 62% majority in favour of secession at the referendum fell (just a few hundred votes short) of the two-thirds majority required to give effect to constitutional change. The then Premier of Nevis (it is said, reluctantly) triggered Article 113 on account of two local factors. The establishment of a federal office on Nevis was perceived in Nevis to be an attempt to undermine local governance. And, a bid from St Kitts, to centralise the management of financial services across the islands was seen in Nevis to undermine Nevis's economic strength in this area. The failure to meet the two-thirds majority threshold has been ascribed to a number of factor including low turnout (57%), deeply rooted familial and economic ties between the islands, international opposition and a failure to provide a compelling vision of ongoing relations between the islands in the event of secession. Whilst the secession question has not been revisited since 1998, and whilst there are some signs (eg in cultural attitudes of younger generations) that the appetite for secession is no longer so strong, constitutional change remains an open question vulnerable to local political and economic factors.[x]

Turks and Caicos Islands

The Turks and Caicos Islands are a British Overseas Territory situated in the Carribean with a population of around 51,000.[xi] The islands were annexed by the UK in 1799 and subsequently formed part of the colony of Jamaica. Following Jamaican independence they were governed by the governor of the Bahamas. After the Bahamas gained independence in 1973, the Turks and Caicos Islands remained a British dependency, now with their own governor.

In its relations with Overseas Territories in general, the UK Government is committed to the following five principles:

> a. devolution and democratic autonomy for the Overseas Territories, and consistency on the principles of partnership and engagement
>
> b. listening to the Overseas Territories, following the principle of "nothing about you without you"
>
> c. partnership with the Overseas Territories based on mutual respect and inclusion, applying to all UK Government departments - rights come with responsibilities, including the responsibility to uphold our common values

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x The St Kitts and Nevis Constitution is available here: constitution-of-st-kitts-and-nevis . For an overview of the political context see J Corbett and J Byron, "Secessionism in Nevis: Why Have Tensions Eased?" (2024) 19(1) Island Studies Journal, available at Secessionism in Nevis: Why Have Tensions Eased? | Published in Island Studies Journal.

xi For more details on the islands, including governance, economy, and social conditions, see United Nations General Assemby, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Working Paper of 5 March 2025, AC.109/2025/15.

d. good governance and ensuring proper democratic accountability and regulation

e. defending the Overseas Territories' security, autonomy and rights, including the right of self-determination.[xii]

These demonstrate a commitment to the Overseas Territories' self-governance and crucially to their right to self-determination. A 2024 amendment to the Turks and Caicos Islands' constitution – originally adopted in 2011[xiii] – reflects this commitment by including an express provision allowing the Turks and Caicos Islands legislature to legislate for a referendum on independence.[xiv] Article 62A of the constitution provides as follows:

Power to provide for a referendum

62A.—(1) A law enacted by the Legislature may make provision to hold a referendum amongst persons registered as electors in accordance with section 55 on a matter or matters of national importance.

(1) The question of whether the Turks and Caicos Islands should seek any amendment to this Constitution that may result in their independence shall be deemed to be a matter of national importance.

(2) A referendum may not be held where one or more of the options or proposals on which electors are asked to vote would, if implemented, contravene any provision of Part I[xv] of this Constitution.

(3) A law enacted by the Legislature authorising a referendum in accordance with subsection (1) shall specify— (a) whether its validity requires a specified minimum turnout of persons registered as electors in accordance with section 55; and (b) the proportion of votes that must be cast in favour of an option or proposal in order for it to be deemed as having been approved.

(4) In any case the result of any referendum under this section shall not be binding.".

The following observations may be of interest from a Scottish perspective.

First, the provision must be placed into the context of decolonization. The Turks and Caicos Islands are one of (relatively few) remaining British Overseas Territories, which are recognised to have a right to self-determination and ultimately to independence. Secondly, the provision itself grants the legislature the power to arrange a referendum by "law", i.e. by a majority of the votes in the legislature.[xvi] Thirdly, the constitution stipulates a requirement to make provision on whether there should be a quorum and for the majority

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xii 2024 UK and Overseas Territories Joint Ministerial Council communiqué, available here: https://www.gov.uk/government/publications/uk-and-overseas-territories-joint-ministerialcouncil- 2024-communique/2024-uk-and-overseas-territories-joint-ministerial-councilcommunique.

xiii The Turks and Caicos Islands Constitution Order 2011, available here: https://www.legislation.gov.uk/uksi/2011/1681/made.

xiv The Turks and Caicos Islands Constitution (Amendment) Order 2024, available here: https://www.legislation.gov.uk/uksi/2024/1128/article/16/made .

xv Part I contains fundamental rights guarantees.

xvi See Article 68 of the Constitution.

required. While it is open to the legislature to not require a quorum (minimum turnout) and to decree that a simple majority should suffice for a successful independence vote, it is equally open to it to stipulate more stringent requirements. Fourthly, the referendum result is expressly not legally binding. The constitution attaches no other legal consequences to a referendum vote – such as a duty to negotiate independence on part of the Turks and Caicos Islands government and/or the UK Government – attached to it either. Such a duty – as far as the Turks and Caicos Islands government is concerned – could, however, conceivably be included in the legislation arranging for a referendum. Fifthly, the constitution neither requires nor precludes the holding of a second referendum e.g. to approve the results of an independence negotiation; nor does it stipulate any restrictions on holding a further referendum if e.g. the result of the first referendum is undesired from the legislature's point of view. Like other referendum provisions examined in this paper, Article 62A of the Turks and Caicos Islands constitution is thus characterised by a degree vagueness, which opens up political margins for manoeuvre.

Conclusion

Whilst it is rare for constitutions to make explicit provision for secession – only a handful of those currently in force do whilst the vast majority either prohibit secession (such as in Spain) or are silent (or at least remain uncertain) on the matter (such as in Canada or in the United Kingdom as regards Scotland and Wales) – this paper highlights some of the design choices that have been faced where such provisions do exist. These include:

- To whom the right should be afforded (to all sub-units or only to some);
- The process by which the right might be triggered (by elections to the legislature; by votes in the legislature (and if so, by simple majority or by super-majority); by some other means, such as a majority vote of citizens in the sub-unit; measures of public opinion);
- by what form is the preference for secession to be measured (typically by a referendum in the sub-unit: by simple majority or by super-majority; by the sub-unit only or including votes by the whole nation);
- by what form is the preference for secession to be confirmed (by the conclusion of negotiations; by the passage of legislation or constitutional amendment; by a second – confirmatory – referendum on the terms of secession);
- what is the role of the national body (to decide if the threshold for support has been met; to decide if the process is fair and valid; to facilitate the referendum and/or its result; to participate actively in the decision; to enter into good faith negotiations if a referendum so directs); and,
- what ought to be the consequences of a vote for secession (to enter negotiations to give shape to secession (and should the result of these be subject to a subsequent referendum); to give effect to previously negotiated and published plans).

What is more, in each of the examples discussed above we see secession clauses being negotiated or drafted in order to induce loyalty to the state, not to facilitate its disintegration – where a secession clause is seen as a necessary pre-condition of the sub-units' continued membership of, and continued participation in the affairs of, the state.

In the context of the UK's uncodified constitution – and in the absence of a wider act of constitution-making – the establishment of such a trigger would require an Act of the UK

Parliament (which would be subject to the normal conditions of parliamentary sovereignty – including its vulnerability to repeal by a future parliament) and which would require the UK and Scottish (and Welsh?) governments to enter in good faith into a process that could produce agreement about these and other issues.

Annexe B: text disagreed by division

Stephen Kerr proposed that the conclusions (paragraphs 102-109) be deleted and replaced with the following[xvii]:

102. The Committee notes the broad consensus expressed by witnesses and by its advisers as to the current legal position in relation to any future independence referendum:

- **That international law confers no legal right for Scotland unilaterally to secede from the United Kingdom nor unilaterally to hold a referendum on the question of Scottish independence;**
- **Therefore, that the question of Scottish independence must be addressed in accordance with the United Kingdom's constitutional arrangements;**
- **That the multinational character of the United Kingdom is reflected in the Acts of Union, which created a single sovereign state while preserving distinct Scottish institutions within that state;**
- **That the United Kingdom's constitutional arrangements vest legal sovereignty - the ultimate law-making authority - in the United Kingdom Parliament;**
- **Therefore, that Scotland can become independent only through legislation enacted by the United Kingdom Parliament, either providing directly for independence or transferring the necessary powers to enable such a step to be taken lawfully;**
- **That this is so notwithstanding that the Acts of Union make no provision for their dissolution and declare that the union between Scotland and England is to last "forever";**
- **That the Scotland Act 1998 expressly reserves both "the union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" to the United Kingdom Parliament and makes the Acts of Union subject to that Act;**
- **That the Supreme Court has determined that legislation authorising a referendum on Scottish independence would "relate to" these reserved matters and therefore would be outside of the Scottish Parliament's legislative competence;**
- **Therefore, that in order for the Scottish Parliament to legislate for an independence referendum, legislative competence would require to be conferred by the United Kingdom Parliament, whether by a section 30 Order**

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xvii The amendment was disagreed by division (For 3 (Stephen Kerr MSP, Jamie Halcro Johnston MSP, Neil Bibby MSP); Against 4 (Clare Adamson MSP, George Adam MSP; Keith Brown MSP; Patrick Harvie MSP); Abstentions 0)

or by primary legislation;

- **That the 2014 referendum was legislated for by the Scottish Parliament on the basis of an agreement between the Scottish and United Kingdom Governments and a section 30 order that was approved by both the Scottish and United Kingdom Parliaments, and that this arrangement arose from political agreement rather than legal obligation.**

103. The Committee recognises that within the context of both international law and the UK constitution, Scotland has no legal right to unilaterally secede nor to unilaterally hold a referendum on the question of independence. The Committee further notes that, within the United Kingdom's constitutional framework, any change to Scotland's constitutional status must occur through lawful legislative process and with the consent of the United Kingdom Parliament.

104. The Committee also recognises that there is a pathway for the Scottish people to exercise their political aspiration to determine Scotland's constitutional future. Within the United Kingdom constitution, however, that pathway is dependent upon the agreement and authorisation of the United Kingdom Parliament. Whether or not that agreement would be forthcoming is a political decision and, therefore, dependent on levels of political support as expressed in a variety of ways, including through elections, parliamentary processes and public debate. There is currently no statutory mechanism by which such a referendum may be compelled without the consent of the United Kingdom Parliament.

105. Within the United Kingdom's constitutional arrangements, formal democratic mandates have historically been established through elections and legislative processes. But as Professor Renwick points out, "it is the UK electorate that choses those with the power to trigger a referendum, whereas the electorate whose wishes are to be respected is that of Scotland." The Committee notes that this reflects the structure of parliamentary sovereignty within the United Kingdom's constitutional order.

106. The Committee recognises that questions concerning the authorisation of a further referendum are matters for political deliberation between the Scottish and United Kingdom Governments and for the United Kingdom Parliament.

107. The Committee notes that questions concerning the authorisation of a further referendum fall within the competence of the United Kingdom Parliament and are matters for political deliberation. Any alteration to the current arrangements would require political agreement between the Scottish and United Kingdom Governments and legislation enacted by the United Kingdom

Parliament.

108. During its inquiry the Committee considered a range of statutory and non-statutory options from comparative constitutional practice. These included:

- **An amendment to the Scotland Act that would give to the Scottish Parliament powers to legislate directly for a referendum if certain criteria is met (such as the referendum provisions in St Kitts and Nevis or in Liechtenstein) or that confers such a power more broadly (such as in the Turks and Caicos Islands);**
- **An amendment to the Scotland Act that would place a duty and/or confer a discretionary power to hold a referendum on the UK Government (or to transfer such a power to the Scottish Parliament) if certain criteria is met (such as the referendum provisions contained in the Northern Ireland Act or in the constitution of Ethiopia);**
- **Political agreement between the Scottish and United Kingdom Governments as to what measures - votes in devolved and/or UK elections; votes in the devolved legislature; quantitative and qualitative opinion polls; other forms of civic engagement such as citizens' assemblies - should determine the clear will of the people of Scotland to be asked and to answer the question of Scottish independence.**

109. The Committee concludes that, under the current constitutional settlement, any future referendum on Scottish independence can occur only through political agreement and lawful legislative authorisation by the United Kingdom Parliament. The timing and circumstances of such authorisation are matters of political judgement rather than legal entitlement.

Annexe C: extracts from meeting minutes

Constitution, Europe, External Affairs and Culture Committee - meeting minutes - 23rd meeting 2025 - Thursday 18 September 2025

Work programme (In Private): The Committee considered its work programme including the following motions –

"That the Committee agrees to undertake an inquiry to examine the options for a legal mechanism for triggering any independence referendum based on principles of certainty and democratic consent within the UK constitutional context".

The motion was agreed by division (For: Clare Adamson MSP, Keith Brown MSP, George Adam MSP, Patrick Harvie MSP; Against: Stephen Kerr MSP, Jamie Halcro Johnston MSP.)

Constitution, Europe, External Affairs and Culture Committee - meeting minutes - 29th meeting 2025 - Thursday 13 November 2025

Legal mechanism for any independence referendum inquiry:

The Committee took evidence from—

Professor Adam Tomkins, John Millar Professor of Public Law, University of Glasgow;

Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh;

Professor Aileen McHarg, Professor of Public Law and Human Rights, Durham University.

Constitution, Europe, External Affairs and Culture Committee - meeting minutes - 31st meeting 2025 - Thursday 27 November 2025

Legal mechanism for any independence referendum inquiry:

The Committee took evidence from—

Professor Andrew Blick, Professor of Politics and Contemporary History , King's College London;

Professor Alan Renwick, Professor of Democratic Politics, University College London;

Professor Nicola McEwen, Professor of Public Policy and Governance, University of Glasgow;

Dr Elisenda Casanas Adam, Senior Lecturer in Public Law and Human Rights, University of Edinburgh.

Constitution, Europe, External Affairs and Culture Committee - meeting minutes -33rd meeting 2025 - Thursday 11 December 2025

Legal mechanism for any independence referendum inquiry:

The Committee took evidence from—

Professor Aoife O'Donoghue, School of Law, Queen's University Belfast;

Professor Nikos Skoutaris, Professor of European Constitutional Law, University of East Anglia;

Dr Lea Raible, School of Law, University of Glasgow;

Professor André Lecours, Professor of Political Studies, University of Ottawa;

Professor Ailsa Henderson, Professor of Political Science, University of Edinburgh.

Constitution, Europe, External Affairs and Culture Committee - meeting minutes -34th meeting 2025 - Thursday 18 December 2025

Legal mechanism for any independence referendum inquiry:

The Committee took evidence from—

Angus Robertson, Cabinet Secretary for Constitution, External Affairs and Culture and

Luke McBratney, Deputy Director, Elections and Constitutional Projects, Scottish Government.

Constitution, Europe, External Affairs and Culture Committee - meeting minutes - 6th meeting 2026 - Thursday 12 February 2026

Options for a legal mechanism for triggering any independence referendum inquiry (In Private):

The Committee considered a draft report on the options for a legal mechanism for triggering any independence referendum inquiry and agreed to consider a further draft at its meeting next week.

Constitution, Europe, External Affairs and Culture Committee - meeting minutes - 7th meeting 2026 - Thursday 19 February 2026

Options for a legal mechanism for triggering any independence referendum inquiry (In Private):

The Committee further considered a draft report on the options for a legal mechanism for triggering any independence referendum inquiry and agreed to consider a further draft at its meeting next week.

Constitution, Europe, External Affairs and Culture Committee - meeting minutes - 8th meeting 2026 - Thursday 26 February 2026

Options for a legal mechanism for triggering any independence referendum inquiry (In Private):

The Committee agreed a draft report on the options for a legal mechanism for triggering any independence referendum inquiry.

The conclusions (paragraphs 102-109) were agreed by division (For 4 (Clare Adamson MSP, George Adam MSP, Keith Brown MSP, Patrick Harvie MSP); Against 3 (Jamie Halcro Johnston MSP, Stephen Kerr MSP, Neil Bibby MSP); Abstentions 0).

Stephen Kerr proposed that the conclusions (paragraphs 102-109) be deleted and replaced with amended text which was disagreed by division (For 3 (Stephen Kerr MSP, Jamie Halcro Johnston MSP, Neil Bibby MSP); Against 4 (Clare Adamson MSP, George Adam MSP; Keith Brown MSP; Patrick Harvie MSP); Abstentions 0).

[1] Scottish Parliament. (2025). Democratic pathways to a second Scottish independence referendum: Committee advisers' briefing. Retrieved from chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/correspondence/2025/democratic-pathways-to-a-second-scottish-independence-referendum-advisers-briefing.pdf

[2] Scottish Parliament. (2025). Professor Stephen Tierney written submission. Retrieved from https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/correspondence/2025/stephen-tierney-legal-mechanism-for-triggering-any-independence-referendum.pdf

[3] Scottish Parliament. (2025). Dr Lea Raible written submission. Retrieved from https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/dr-lea-raible--options-for-a-legal-mechanism-for-any-independence-referendum-inquiry.pdf

[4] Scottish Parliament. (2025). Professor Aileen McHarg written submission. Retrieved from https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/correspondence/2025/aileen-mcharg-legal-mechanism-for-triggering-any-independence-referendum.pdf

[5] Scottish Parliament. (2025). Professor Nikos Skoutaris written submission. Retrieved from https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/professor-nikos-skoutaris--options-for-a-legal-mechanism-for-any-independence-referendum-inquiry.pdf

[6] Scottish Parliament. (2025). Professor Adam Tomkins written submission. Retrieved from https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/correspondence/2025/adam-tomkins-legal-mechanism-for-triggering-any-independence-referendum.pdf

[7] Scottish Parliament. (2025). Official Report, Constitution, Europe, External Affairs and Culture Committee meeting, 13 November 2025. Retrieved from https://www.parliament.scot/chamber-and-committees/committees/committee-official-reports/ceeac-13-11-2025?meeting=16688

[8] UK Government. (2025). Written submission. Retrieved from https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-constitution-europe-external-affairs-and-culture-committee/correspondence/2025/uk-government-options-for-a-legal-mechanism-for-triggering-any-independence-referendum

[9] Scottish Parliament. (2025). Dr Elisenda Casanas Adam written submission. Retrieved from https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/dr-elisenda-casanas.pdf

[10] Scottish Parliament. (2025). Professor Nicola McEwan written submission. Retrieved from https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/professor-nicola-mcewen.pdf

[11] Scottish Parliament. (2025). Official Report, Constitution, Europe, External Affairs and Culture Committee meeting, 27 November 2025. Retrieved from https://www.parliament.scot/chamber-and-committees/committees/committee-official-reports/ceeac-27-11-2025?meeting=16731

[12] Scottish Parliament. (2025). Professor Alan Renwick written submission. Retrieved from https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/professor-alan-renwick.pdf

[13] Scottish Parliament. (2025). Official Report, Constitution, Europe, External Affairs and Culture Committee meeting, 18 December 2025. Retrieved from https://www.parliament.scot/chamber-and-committees/committees/committee-official-reports/ceeac-18-12-2025?meeting=16774

[14] Scottish Parliament. (2025). Official Report, Constitution, Europe, External Affairs and Culture Committee meeting, 11 December 2025. Retrieved from https://www.parliament.scot/chamber-and-committees/committees/committee-official-reports/ceeac-11-12-2025?meeting=16753

[15] Professor Kezia Dugdale and Stephen Noon. (2024). Scotland and the Constitution: Agreeing a way forward. Retrieved from https://www.gla.ac.uk/explore/glasgowsocialscienceshub/resources/all/headline_1113259_en.html

[16] Scottish Government. (2025). Written submission. Retrieved from https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-constitution-europe-external-affairs-and-culture-committee/correspondence/2025/scottish-government-relating-to-legal-mechanism-for-triggering-any-independence-referendum