

Constitution, Europe, External Affairs and Culture Committee
Thursday 27 November 2025
31st Meeting, 2025 (Session 6)

Options for a legal mechanism for any independence referendum inquiry

1. The Committee will continue taking evidence in relation to its [Options for a legal mechanism for triggering any independence referendum inquiry](#).
2. The previous panel took place at the Committee's [meeting on 13 November 2025](#), the [papers for which can be found here](#).
3. We will be hearing this week from—
 - Professor Andrew Blick, Professor of Politics and Contemporary History, Kings College London
 - Professor Alan Renwick, Professor of Democratic Politics, University College London
 - Professor Nicola McEwen, Professor of Public Policy, University of Glasgow
 - Dr Elisenda Casanas Adam, Senior Lecturer in Public Law and Human Rights, University of Edinburgh
4. Written submissions from the witnesses can be found at **Annexe A** and **Annexe B**.

Clerks, November 2025

Annexe A

Professor Nicola McEwen

Legal mechanism for any independence referendum inquiry

The path to Scottish independence

1. There are only a handful of countries in the world that include a constitutional right to secession for part of their territory. Many more explicitly prohibit secession or, more commonly, make reference to the territorial 'indivisibility' of the state, while others are silent on the issue. With the exception of Northern Ireland, the constitution of the United Kingdom falls into the latter category. It neither explicitly permits secession nor prohibits it. The centrality of the doctrine of parliamentary sovereignty and the absence of a codified constitution can offer a pragmatic pathway in the face of a clear challenge to the territorial integrity of the United Kingdom. Evidently, the United Kingdom's borders can be, and have been, redrawn.
2. There is no route to Scottish independence, or to a referendum on independence, that does not go through the Westminster Parliament. The Supreme Court's judgment following the Lord Advocate's reference on whether the Scottish Parliament had the legal authority to legislate for an independence referendum made clear that such a law would be beyond devolved competence. This was because it would relate to both the status of the Union between Scotland and England, and whether Scotland should cease to be subject to the sovereignty of the UK Parliament, both of which are reserved matters under the Scotland Act (1998).
3. A unilateral declaration of independence - following a referendum or an election in which pro-independence parties emerged victorious, or where negotiations fail to secure an agreement either on the holding of a referendum or, following a Yes vote, on an independence agreement - would not be a meaningful path to independence. Such a declaration would lack political legitimacy, would not be accompanied by the legal underpinning upon which to build a new state, and would be extremely unlikely to secure recognition from the international community. Such recognition is critical to the ability to be independent, that is, to exercise the authority of an independent state. When the Catalan parliament declared independence in 2017, following an overwhelming majority in a referendum declared illegal by the Spanish authorities, the international community refused to recognise Catalan statehood, regarding the issue as an internal matter for Spain.

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4. The 2014 independence referendum was a lawful referendum, legislated by the Scottish Parliament and facilitated by the UK Parliament and Government, via a temporary transfer of power, following the Edinburgh Agreement. The Agreement was focused on the referendum itself; it said little about what would happen in the event of a Yes vote, other than committing the two governments 'to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom'¹. In the months preceding the vote, the two governments issued a joint statement, stating: "If more people vote 'Yes' than vote 'No' in the referendum, Scotland would become an independent country. This would not happen straight away. There would need to be negotiations between people representing Scotland and people representing the UK."
5. The Brexit process might shed some light on the steps that a lawful independence process would entail, albeit that the depth of integration between Scotland and the (rest of the) United Kingdom would suggest that the independence process may be longer and more complex. The first stage may involve negotiations to secure an agreement on Scottish independence, including the division of assets and liabilities, citizenship issues, and the state of shared institutions, laws and international obligations. Such an agreement would result in parallel legislation in the UK and Scottish Parliaments, setting a future date for the independence agreement to take effect and, in the former case, for the Act of Union to be repealed. A transitional phase would pave the way for second stage negotiations on the nature and scope of the future relationship between an independent Scotland and the (remaining) United Kingdom.

A referendum to determine the question of independence

6. Referenda are imperfect. They can reduce complex issues to apparently simple binaries, and force voters with a range of preferences into opposing camps. As a result, they can leave a legacy of polarisation. But in a democratic society, it is difficult to identify a better vehicle for determining preferences on a focused question of major import, or for lending democratic legitimacy to extraordinary change. Since the early 1970s, referenda have become an accepted tool for determining the public's support for constitutional change in the UK.
7. Although UK referendums generally pose a question offering a change option and a status quo option as a binary choice, there are other models that can elicit a broader range of preferences, either with a single question with

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https://assets.publishing.service.gov.uk/media/5a7eae5740f0b62305b827ce/scottish_referendum_agreement.pdf, para.30

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multiple options, or by posing more than one question. The 1997 Scottish referendum on devolution is an example of the latter, seeking, first, support for the Scottish Parliament, then, for that parliament to have tax-varying powers.

8. As a result of the constitutional doctrine that invests sovereignty in the Parliament of the United Kingdom, all referenda in the UK are advisory and have no direct legal effect. But they can carry significant political weight that, where the prevailing view expresses a desire for change, can lead to legal effect. In its judgment on the Lord Advocate's reference, the UK Supreme Court noted:

"A lawful referendum on the question envisaged by the Bill would undoubtedly be an important political event, even if its outcome had no immediate legal consequences, and even if the United Kingdom Government had not given any political commitment to act upon it. A clear outcome... would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate. The clear expression of its wish either to remain within the United Kingdom or to pursue secession would strengthen or weaken the democratic legitimacy of the Union, depending on which view prevailed, and support or undermine the democratic credentials of the independence movement. It would consequently have important political consequences relating to the Union and the United Kingdom Parliament."²

The question remains what would trigger such a referendum.

9. In 2011, following the election of a majority of SNP MSPs to the Scottish Parliament, the then Prime Minister, David Cameron, immediately accepted that the SNP had won a mandate to hold an independence referendum and that the UK Government would not stand in the way of this happening. That acceptance paved the way for the negotiations that led to the Edinburgh Agreement, leading in turn to Scottish Parliament referendum legislation and the 2014 referendum. There was no legal obligation for the Prime Minister to reach the decision he made. Nor does his decision place any obligation on a future leader to respond in a similar way, notwithstanding the political precedent. How the Prime Minister of the day responded to a parliamentary majority for the SNP, should that recur, or a majority for pro-independence parties, would be a matter of their own political judgment. If, faced with either of those scenarios, the prime minister of the day came to a different judgment to that of Mr Cameron, this could have political consequences. Whether it would have political consequences may depend upon the extent to which voters' electoral preferences were a result of pro-independence mobilization. When pro-independence parties secured parliamentary majorities in recent

² https://supremecourt.uk/uploads/uksc_2022_0098_judgment_5ca161fc9b.pdf, para.81

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Scottish Parliament elections, prime ministerial refusals to facilitate a new referendum on independence had little discernible direct political consequences.

10. Uniquely in the United Kingdom, the 1998 Belfast/Good Friday Agreement implicitly provided the conditions for a referendum, or border poll, on Irish unity. And 'if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland placed', it placed an obligation on the Secretary of State to lay proposals before Parliament to give effect to that wish. The Agreement defines the appropriate duration between referendums as at least seven years, but there remains much ambiguity with respect to the conditions that would trigger a border poll. The Agreement states simply that the process would be initiated by the Secretary of State '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'³. It is not clear what would constitute the empirical basis for assessing that likelihood, nor whether the Northern Ireland Assembly would have any role in this process.
11. It seems unlikely that a similar constitutional provision would be made for Scotland. The Belfast/Good Friday Agreement is an international treaty and the result of a long-running process intended to bring an end to armed conflict. It was also complemented by the commitment from the Irish Government to amend the Irish constitution to give up its territorial claim to Northern Ireland and enshrine the principle of consent in both jurisdictions on the island. Any similar provision made for Scotland would not have a basis in international agreement or in international law. And, since the doctrine of parliamentary sovereignty underlines that no parliament can bind its successors or be bound by its predecessors, any such provision could be amended by a future parliament. The alternative, however, is to leave matters to political chance, for example, in a scenario where a pro-independence party holds the balance of power in the Westminster parliament, or to the whims of a future prime minister when faced with a referendum demand.
12. Opinion polls suggest that Scots remain divided on the issue of independence and Union. Support for independence remains high, in historical terms, and higher than in the 2014 referendum. But it is far from representing what might be considered the 'settled will' of the people of Scotland. Moreover, tracking data from the Scottish Election Study suggests that the constitutional issue has declined in importance in recent years; fewer than one in five in the latest survey included Scotland's constitutional future among the three most important issues facing Scotland at the moment

³ <https://www.gov.uk/government/publications/the-belfast-agreement>, Schedule 1, para 2

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(compared to around half choosing the economy and health, and around one third choosing immigration).⁴

13. The low salience of independence currently presents an opportunity (after the election) for calm reflection and deliberation on the conditions that should generate a new referendum and what form it should take. To secure political legitimacy, any future referendum must be seen as fair by those on competing sides of the question. A civil society forum and/or a citizens' assembly can offer an opportunity for reflection and consensus-building that could help to nurture empathy and foster consensus among those with diverse views. Such a process could also support future parliamentary processes in Holyrood and Westminster should the issue become more salient again or when political circumstances generate concessions that lead to referendum legislation. In that event - and in light of the importance of the UK Parliament in enabling an independence referendum - inter-parliamentary engagement may also support parliamentary oversight and engagement in the pre-legislative process that, in the wake of the 2011 election, was dominated by behind-closed-doors negotiations between governments until the Edinburgh Agreement was reached.

⁴ <https://scottishelections.ac.uk/scoop-monitor/>

Professor Alan Renwick

Legal mechanism for any independence referendum inquiry

Is there a constitutional route to Scottish Independence

The committee has asked me to address three matters:

- International examples of mechanisms for reaching agreement on the question of sovereignty
- the UK constitution and how mechanisms for reaching agreement on the question of sovereignty fit within that constitutional framework
- contemporary political discourse, self-determination and accountability.

I write this submission after the committee has received written submissions and heard oral evidence from three eminent legal scholars: Professors Aileen McHarg, Stephen Tierney, and Adam Tomkins. They covered the first of these matters thoroughly, and I have little to add. Given the UK's 'political' constitution, the remaining two are strongly linked. My remarks here therefore focus on the nature of the UK constitution and options available within it. It draws on three UCL Constitution Unit projects:

- the Independent Commission on Referendums, which assessed how to improve the conduct of referendums in the UK ¹
- a report on how to improve discourse in election and referendum campaigns ²
- the Working Group on Unification Referendums on the Island of Ireland, which examined impartially how any referendums on the unification question in Northern Ireland and the Republic of Ireland might best be conducted. ³

The Union

It is widely agreed that the Union is voluntary, and that Scotland is entitled to independence if the people of Scotland wish it. That is amply demonstrated by the Scottish government's paper *Your Right to Decide*⁴ and by the previous witnesses' evidence. It is taken for granted in the constitutional debate over independence: it was presumed that a Yes majority in 2014 would lead to independence; subsequent

¹ UCL Constitution Unit, [Report of the Independent Commission on Referendums](#) (London: Constitution Unit, July 2018).

² Alan Renwick and Michela Palese, [Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?](#) (London: Constitution Unit, March 2019).

³ Working Group on Unification Referendums on the Island of Ireland, [Final Report](#) (London: Constitution Unit, May 2021).

⁴ Scottish Government, [Your Right to Decide](#) (Edinburgh: Scottish Government, September 2025).

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debate has presumed that a second referendum would have the same effect. Though dozens of polling questions have been asked on numerous aspects of the independence debate, I can find no recent poll that asks whether it is for the people of Scotland to decide Scotland's constitutional future, indicating that this point is taken for granted.⁵

Given that Scotland's constitutional future is a matter for the people of Scotland, it is problematic that no established mechanism exists for ensuring that, in appropriate circumstances, the wishes of the people of Scotland can be expressed. The difficulty with the current arrangement – where the UK government and parliament have complete freedom to decide whether a referendum may occur – is that there is little to stop the UK government from ignoring even manifest, sustained, and overwhelming majority support in Scotland for independence. On most matters, the ballot box provides a guardrail against anti-democratic behaviour by government and parliament: voters can dismiss a government that disregards their wishes. But there is a disjuncture in the case of Scottish independence: it is the 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. So the democratic mechanism may not work.

It would therefore be preferable to establish – in law or in a statement with cross-party backing – principles as to when a referendum may and/or must be called. It would remain possible for a future parliament to repeal any such law or for a future government to disavow any such statement. But at least the hurdles to ignoring the wishes of the people of Scotland would be raised.

Establishing a mechanism for a referendum to be called

This leads to the question of what the content of any such provision should be. Two approaches are available:

- The provision could stipulate circumstances in which the UK government must initiate a referendum process. This would be analogous to the arrangements for Northern Ireland, where the Belfast/Good Friday Agreement and the Northern Ireland Act provide that a referendum on the unification question must be called if at any time it appears likely to [the Secretary of State] 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.⁶

⁵ The closest I have found is a poll conducted by Norstat in June 2023, which asked, 'Do you think the best way of deciding whether or not Scotland should become an independent country is hold a referendum to see if a majority vote Yes, to hold a UK general election to see if a majority vote for parties in favour of independence, or hold a Scottish Parliament election to see if a majority vote for parties in favour of independence?'. The response options included 'None of the above', which was chosen by 26 per cent of respondents. Especially considering that these 26% will have included some people who were simply expressing their opposition to independence, and perhaps also some who thought the will of the Scottish people should be expressed in a different way, it is evident that the proportion who truly think that the Scottish people should *not* be able to decide this question is low. See the [What Scotland Thinks](#) website.

⁶ [Northern Ireland Act 1998, Schedule 1, paragraph 2.](#)

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- A triggering mechanism could be granted in some form to the Scottish Parliament or to the people of Scotland. One version of such a mechanism is proposed in the Scottish government's recent paper:

The Scottish Government's position is that it 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.⁷

The following paragraphs offer thoughts on each of these approaches.

Option 1: Stipulating rules for the UK government

Two aspects of the arrangements for Northern Ireland may be noted:

- It is for the UK government to call and run a referendum. No role is given to the Northern Ireland Assembly or Executive. This contrasts with the 2014 Scottish independence referendum, where the two governments worked together.
- While the Act states that the likelihood of a majority for unification is the test – a power that 'must be exercised honestly in the public interest with rigorous impartiality'⁸ – it gives no indication of how this likelihood is to be assessed.

There would be no merit in adopting the approach of the Northern Ireland Act on the first of these points. As set out powerfully by Professor Tierney in his evidence to the committee, one strength of the 2014 referendum was the way the two governments and the various parties in the Scottish Parliament worked collegially in developing the arrangements for the vote. Repeating this approach would be highly desirable in any future referendum. Legal provisions on their own cannot enforce a collegial ethos; but they can at least establish the principle that this is the approach that is expected.

The Working Group on Unification Referendums on the Island of Ireland looked at whether the UK government should clarify how it would assess the likelihood of majority support for unification. The Northern Ireland courts have ruled that there is no legal obligation to do so.⁹ The Working Group concluded that doing so would also be undesirable. The Secretary of State is legally obliged to take account of all relevant evidence; it would not be sensible to attempt to define in the abstract, without specific context, the weight that should be attached to each.¹⁰

Option 2: Establishing a Scottish trigger mechanism

⁷ *Your Right to Decide* (note 4), p. 16.

⁸ *McCord Court of Appeal case*, 2020, para. 67.

⁹ *Ibid.*, para. 101.

¹⁰ Working Group on Unification Referendums on the Island of Ireland, *Final Report* (note 3), chapter 8.

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The alternative is to create a referendum trigger within Scotland. The most radical version of this would give the Scottish Parliament an unfettered power to call a ballot at a time of its choosing. This would certainly solidify the principle that it is for the people of Scotland to decide. But it would be undesirable for the same reason as the approach of the Northern Ireland Act would be undesirable: it would make the process unilateral, whereas stability and ‘losers’ consent’ are more likely if the governments work together. Furthermore, the UK authorities do have a legitimate interest in the process: if, say, a vote were chaotic or its legitimacy were contested, or if referendums were called repeatedly at short intervals, that could be highly disruptive for the rest of the Union.

Thus, any process by which the Scottish Parliament could initiate a referendum would better lead to a discussion between the governments.

In a question at committee’s previous oral evidence session, Patrick Harvie asked whether there might be a direct democracy mechanism for the people of Scotland to trigger a referendum. I struggle, however, to see what such a mechanism could be:

- It would not be sensible to hold a referendum on whether to hold a referendum.
- An alternative would be to allow citizens to call a referendum by petition, as is permitted in some countries on some issues. The number of signatures would need to be very high for this to be legitimate, however. Furthermore, initiation of referendums by petition can be problematic if it removes any stage for careful scrutiny and deliberation from the process.
- Mr Harvie also floated a potential role for a citizens’ assembly. I strongly favour the use of such assemblies for some purposes in the context of a referendum (see below). But citizens’ assemblies typically contain only 50–150 members, so they are not best placed to clarify the state of opinion on a matter where the debate is polarized and the two sides may be finely balanced.

The relative merits of the two approaches

I do not see strong reasons in principle for favouring one or other of these two approaches. Protagonists on either side of the constitutional debate will presumably tend to have views on the matter that align with their constitutional preferences.

Threshold levels of support for triggering a referendum

Under either approach, the question arises of what level of support for independence (or for calling a referendum) would be required to trigger a vote. In Northern Ireland, the likelihood of a bare majority is enough. Similarly, the Scottish government’s paper envisages a bare majority in the Scottish Parliament as sufficient. On the other hand, Professor Tomkins, in his evidence to the committee, put forward the idea of a ‘settled will’, which might imply a higher threshold.

As was discussed in the committee’s previous oral evidence session, the concept of ‘settled will’ does not have a settled meaning. Two interpretations seem plausible:

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- 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.

We might be more confident that the first of these conditions is met where the majority is larger. On a polarized issue where many people have fixed views, however, even a very slender majority may satisfy the criterion of stability. For the second condition, a large majority – combined with an unimpeachably fair process – may enhance consent. But that does not help if settled will in this sense is absent. To say that a majority for change may not have its way until opponents of change are reconciled to it may skew the pitch unfairly in favour of the status quo, and may be a recipe for severe, legitimate dissent.

For these reasons, setting a supermajority threshold for triggering a referendum would be problematic. There would be a strong case, however, 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. Under the option of a trigger in the hands of the Scottish Parliament, for example, it could be that two parliamentary votes for a referendum would be needed, with an election taking place between them. This would be analogous to the procedure for constitutional amendment in Denmark, which requires two parliamentary votes, with an election between, followed by a referendum.

Other features of referendum process

If the UK and Scottish authorities agreed a process for calling referendums, other features of the referendum might also be agreed. Indeed, it would be desirable for many such features to be settled in advance, rather than left to ad hoc determination. These could include the following.

- The referendum franchise: The franchise for Scottish Parliament elections should be adopted without amendment. This is the accepted definition of ‘the people of Scotland’. Ad hoc franchise changes are always made with an eye to the results, and therefore harm legitimacy.
- The referendum threshold: For the same reasons as above, the threshold in any referendum should be a simple majority. There may, however, be a strong case for a two-referendum process. That is partly for the same reason as above: to clarify that majority support for change is stable – perhaps even ‘settled’. It would also open up the possibility highlighted in the next point.
- Stages of decision-making: As discussed in the committee’s previous evidence hearing, a referendum can be held on a principle, before detail has been worked out; or on a specific proposal, after detail has been agreed. In theory, the latter is clearly preferable: voters should be able to know what options they are choosing between. On a matter such as Scottish independence, however, that is not entirely possible: while some features of

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an independent Scotland could be decided in Scotland alone, and hence settled before a referendum, others could not: they would require negotiation with the UK government, the EU, and others, and these parties would not negotiate before a referendum. One solution could be to set out a two-referendum process: the first vote would be on whether in principle to pursue independence; the second would be on whether to confirm that decision once the detail had been decided. The Independent Commission on Referendums examined such an approach.¹¹

- Fostering informed discussion: Discussion in the course of a referendum campaign should, so far as possible, be informed and deliberative. That is getting harder to achieve in an era of rampant misinformation and declining trust in traditional sources of news. No matter what their position on the constitutional question, democrats should be horrified at the prospect of holding a referendum without better protections. Such protections could include: stronger campaign finance regulations; better regulation of online content; improved education on matters such as media literacy, critical thinking, and psychological biases; and use of deliberative processes such as citizens' assemblies to foster deliberative discussion in the course of the campaign.¹²

¹¹ [Report of the Independent Commission on Referendums](#) (note 1), p. 120.

¹² Many of these options are explored in [Doing Democracy Better](#) (note 2).

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