

AGREEMENT

between the United Kingdom Government and the
Scottish Government on a referendum on independence
for Scotland

Edinburgh, 15 October 2012

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The United Kingdom Government and the Scottish Government have agreed to work together to ensure that a referendum on Scottish independence can take place.

The governments are agreed that the referendum should:

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

The governments have agreed to promote an Order in Council under Section 30 of the Scotland Act 1998 in the United Kingdom and Scottish Parliaments to allow a single-question referendum on Scottish independence to be held before the end of 2014. The Order will put it beyond doubt that the Scottish Parliament can legislate for that referendum.

It will then be for the Scottish Government to promote legislation in the Scottish Parliament for a referendum on independence. The governments are agreed that the referendum should meet the highest standards of fairness, transparency and propriety, informed by consultation and independent expert advice. The referendum legislation will set out:

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

The details of the agreement between the governments are set out in the following memorandum and draft Order, which form part of this agreement.

The Rt. Hon. David Cameron MP
Prime Minister

The Rt. Hon. Alex Salmond MSP
First Minister of Scotland

The Rt. Hon. Michael Moore MP
Secretary of State for Scotland

Nicola Sturgeon MSP
Deputy First Minister of Scotland

Edinburgh, 15 October 2012

MEMORANDUM OF AGREEMENT

Purpose of the memorandum

1. This memorandum sets out the elements of the agreement that require legislative provision in the section 30 Order¹ (“the Order”), the draft text of which is annexed to this memorandum, and the elements that have been agreed between the governments on a non-statutory basis.

Principles

2. Both governments agree that the principles underpinning the existing framework for referendums held under Acts of the UK Parliament – which aim to guarantee fairness – should apply to the Scottish independence referendum. Part 7 of the Political Parties, Elections and Referendums Act 2000 (PPERA), provides a framework for referendums delivered through Acts of Parliament, including rules about campaign finance, referendum regulation, oversight and conduct.²

3. Both governments agree that the referendum rules should be based on PERA, with particular Scottish circumstances, such as the establishment of the Electoral Management Board and subsequent role of the Electoral Commission, reflected in the Referendum Bill.

Timing

4. The Order enables the Scottish Parliament to legislate for a referendum that takes place at any point before the end of 2014. The date of the poll will be for the Scottish Parliament to determine and will be set out in the Referendum Bill to be introduced by the Scottish Government. The Order requires the poll for this referendum to be held on a day with no other poll provided for by legislation of the Scottish Parliament.

Question

5. Both governments agree that the referendum question must be fair, easy to understand and capable of producing a result that is accepted and commands confidence.

6. The Order enables the Scottish Parliament to legislate for a referendum with one question on independence. The wording of the question will be for the Scottish Parliament to determine and will be set out in the Referendum Bill to be introduced by the Scottish Government, subject to the Electoral Commission’s review process, as set out in the paragraphs which follow.

7. For referendums delivered by an Act of the UK Parliament, section 104 of PERA requires the Electoral Commission to review the proposed question and any statement that precedes the question and to report to the UK Parliament on the intelligibility of that

¹ An Order made under section 30(2) of the Scotland Act 1998 allows modifications to be made to Schedule 5 to the Scotland Act 1998, which lists those matters that are reserved to the UK Parliament, by either adding or removing reservations.

² Part 7 of PERA consists of four chapters setting out the framework for referendums held under an Act of the UK Parliament: I – Preliminary; II – Financial Controls; III – Controls on publications; and IV – Conduct of referendums.

question. Section 10 of PPERA also provides that the Electoral Commission can provide advice and assistance to the Scottish Parliament and Scottish Government.

8. Consistent with the provisions in PPERA, the Scottish Government will refer the proposed referendum question and any preceding statement to the Electoral Commission for review of its intelligibility. Interested parties will be able to submit their views on the proposed wording to the Electoral Commission as part of the Commission's review process, in the normal way. The Electoral Commission will report on the question and this report will be laid before the Scottish Parliament. In turn the Scottish Government will respond to the report, indicating its response to any recommendations that the Electoral Commission may make.

Franchise

9. The Referendum Bill introduced by the Scottish Government will create a franchise for the referendum. Both governments agree that all those entitled to vote in Scottish Parliamentary and local government elections should be able to vote in the referendum.³

10. The Scottish Government's consultation on the referendum also set out a proposal for extending the franchise to allow 16 and 17 year-olds to vote in the referendum. It will be for the Scottish Government to decide whether to propose extending the franchise for this referendum and how that should be done. It will be for the Scottish Parliament to approve the referendum franchise, as it would be for any referendum on devolved matters.

11. The Scottish Government's decision on what to propose to the Scottish Parliament will be informed by the analysis of responses to its consultation exercise and by practical considerations. The Order does not restrict the extension of the franchise in the case of this referendum.

Functions of the Electoral Commission and the Electoral Management Board

12. Both governments agree on the importance of the referendum being overseen in an impartial way by bodies that can command the confidence of both sides of the campaign. The Electoral Commission is responsible for overseeing referendums held under PPERA. PPERA gives the Electoral Commission responsibility for:

- commenting on the wording of the referendum question;
- registration of campaigners;
- designating lead campaign organisations;
- regulating campaign spending and donations;
- giving grants to lead campaign organisations;
- publishing guidance for permitted participants;
- reporting on the referendum process;
- the conduct of the poll; and
- the announcement of the result.

13. The Electoral Commission was also given responsibility for promoting public awareness for voters in the 2011 Welsh and UK referendums.

14. Both governments agree that the Electoral Commission should fulfil all these functions in respect of the independence referendum, with the exception of the conduct of the

³ The Scottish Parliamentary franchise enables British, Irish, qualifying Commonwealth citizens and European Union citizens resident in Scotland to vote.

poll and announcement of the result, and the giving of grants (the Scottish Government proposes that there will be no grants of public money to lead campaign organisations). In its role of regulating the campaign and campaign spending, the Electoral Commission will report to the Scottish Parliament.

15. The Scottish Government proposes that the conduct of the poll and the announcement of the result should reflect the arrangements for local and parliamentary elections in Scotland and will be consistent with Scotland's electoral management structure, co-ordinated by the Electoral Management Board. The poll and count will be managed in the same way as those elections, by local returning officers (designated for the referendum as "counting officers") and directed by a Chief Counting Officer (CCO). The Scottish Government proposes that the CCO should be the Convener of the Electoral Management Board.

Referendum campaign regulation

16. Both governments agree on the importance of ensuring that the referendum campaign is subject to regulation that ensures that the referendum is fair and commands the confidence of both sides of the debate. The Referendum Bill introduced into the Scottish Parliament by the Scottish Government will include provision for the referendum rules. The governments agree the regulations for the independence referendum campaign should be based on those set out in Part 7 of PPERA.

17. The Order contains specific provision applying some of the PPERA rules to an independence referendum where it would be outside the Scottish Parliament's legislative competence to make such provision. These provisions relate to referendum campaign broadcasts and the sending of mail-shots free of charge.

Referendum campaign broadcasts

18. PPERA provides that only referendum campaign broadcasts made by or on behalf of designated campaign organisations can be broadcast. The Communications Act 2003 requires Ofcom to impose licence conditions on broadcasters requiring them to observe rules set by Ofcom relating to referendum campaign broadcasts.

19. The agreement between the Secretary of State for Culture, Media and Sport and the BBC requires the BBC to broadcast referendum campaign broadcasts and provides that it is for the BBC Trust to determine the basis on which these are broadcast. Both Ofcom and the BBC are required to have regard to the views of the Electoral Commission when making provision in respect of referendum campaign broadcasts. In both the Communications Act 2003 and the agreement with the BBC "referendum campaign broadcast" has the same meaning as in PPERA.

20. The Order makes provision applying the provisions in PPERA relating to referendum campaign broadcasts to an independence referendum. This will mean that Ofcom, the BBC and the Electoral Commission will have the same role in relation to an independence referendum as they would in relation to a PPERA referendum.

Ensuring impartiality of broadcasters

21. The governments agree that it will be important to ensure that broadcast coverage of the Referendum is impartial. Broadcasters, Ofcom and the Electoral Commission will discuss the best way to achieve this.

Free-of-charge mail-shot

22. PPERA allows a designated campaign organisation to send one mail-shot free of charge to every elector or household. This service is provided by Royal Mail and funded by the UK Parliament through the Consolidated Fund.

23. The Order makes provision applying this provision of PPERA to an independence referendum. This will enable the designated campaign organisations to send out one mail-shot free of charge to every elector or household and for the Royal Mail to recover the cost of postage from the Scottish budget (the “Scottish Consolidated Fund”).

Campaign finance

24. Both governments recognise that campaign finance will be an important issue for those campaigning in the referendum, for the Electoral Commission in regulating the referendum, and for people in Scotland. It is important for each of these that the rules are fair and provide a level playing field.

25. The Referendum Bill to be introduced by the Scottish Government will provide for the spending limits in the regulated period for the independence referendum. Both governments agree that the rules and standards set out in PPERA provide the basis for setting the limits.

26. PPERA sets out spending limits for referendums held on a UK-wide basis and a mechanism for the Secretary of State to set the limits for sub-UK referendums by secondary legislation. In setting such limits, the Secretary of State must consult the Electoral Commission and have regard to its views. Whilst the UK Government is not statutorily required to accept the Commission’s recommendations, it regards the guidance of the Electoral Commission as a key consideration and has so far always followed the advice of the Electoral Commission when setting spending limits for referendums held under the PPERA framework. If the Secretary of State does not accept the views of the Commission on the appropriate limits, he or she is statutorily obliged to lay a statement before both Houses of Parliament explaining his or her reasons for departing from its recommendations.

27. The Scottish Government proposes that the regulated period for the independence referendum should be the 16 weeks ending on the date of the referendum. In setting the spending limits for the regulated period for the independence referendum, the Scottish Government will analyse and consider the responses to its consultation, consult with both existing referendum campaigns – neither of which was in existence during the Scottish Government’s consultation period – and have regard to the Electoral Commission’s views and will set out its proposals, and the evidence on which these are based, before the Referendum Bill is considered by the Scottish Parliament. The Referendum Bill, including the proposed spending limits, will be subject to the established Scottish Parliamentary procedures and scrutiny. The Bill, like any other Bill in the Scottish Parliament will, when introduced, be accompanied by a Policy Memorandum. The Policy Memorandum will set out details of the consultation process for setting spending limits and details of any alternative approaches to any of the issues considered. This will include a statement of reasons if there is any departure from the Electoral Commission’s advice on spending limits.

28. Donations to registered political parties are already subject to a regulatory regime established in Part 4 of PPERA. There is, therefore, no need to create an additional set of rules regulating donations to registered political parties solely for the purposes of the referendum. Political parties will not be the only bodies wishing to campaign for a particular

outcome at the referendum. The Referendum Bill to be introduced by the Scottish Government will deal with controls of donations to permitted participants that are not registered parties or are minor parties. As under PPERA, permitted participants will not be able to accept certain anonymous donations or certain donations from individuals or organisations from outside the UK.

Government activity during the 28 days before the referendum

29. It is customary for there to be a period before elections in the UK, during which Ministers and other public bodies refrain from publishing material that would have a bearing on the election. Section 125 of PPERA sets out the restrictions that apply to Ministers and public bodies in the 28 days preceding referendums held under that Act. Both governments recognise the importance of respecting the 28-day period prior to a referendum, in the same way that both governments already respect each other's pre-election period for Parliamentary elections. The Scottish Government will set out details of restricted behaviour for Scottish Ministers and devolved public bodies in the Referendum Bill to be introduced into the Scottish Parliament. These details will be based on the restrictions set out in PPERA. The UK Government has committed to act according to the same PPERA-based rules during the 28-day period.

Co-operation

30. The United Kingdom and Scottish Governments are committed, through the Memorandum of Understanding between them and others,⁴ to working together on matters of mutual interest and to the principles of good communication and mutual respect. The two governments have reached this agreement in that spirit. They look forward to a referendum that is legal and fair producing a decisive and respected outcome. The two governments are committed to continue 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.

⁴ *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee*, 2000, as updated in September 2012.

Draft text of Order to be laid before Parliament and the Scottish Parliament under section 115 of the Scotland Act 1998 and paragraphs 1 and 2 of Schedule 7 to that Act, for approval by resolution of each House of Parliament and of the Scottish Parliament.

DRAFT STATUTORY INSTRUMENTS

2013 No.

CONSTITUTIONAL LAW

DEVOLUTION, SCOTLAND

Scotland Act 1998 (Modification of Schedule 5) Order 2013

Made - - - - - ***

Coming into force in accordance with article 2

At the Court at Buckingham Palace, the *** day of ***

Present,

The Queen's Most Excellent Majesty in Council

This Order is made in exercise of the powers conferred by section 30(2) and (4) and 113(4)(a) of the Scotland Act 1998**(a)**.

In accordance with section 115 of, and paragraphs 1 and 2 of Schedule 7 to, that Act**(b)**, a draft of this Order has been—

- (a) laid before and approved by a resolution of each House of Parliament, and
- (b) laid before and approved by a resolution of the Scottish Parliament.

Accordingly Her Majesty, by and with the advice of Her Privy Council, makes the following Order:

Citation and commencement

1. This Order may be cited as the Scotland Act 1998 (Modification of Schedule 5) Order 2013.
2. This Order comes into force on the day after the day on which it is made.

(a) 1998 c. 46.

(b) Paragraphs 1 and 2 of Schedule 7 have been modified by paragraph 3(2) of schedule 4 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

Modification of Schedule 5 to the Scotland Act 1998

3. In Part 1 of Schedule 5 to the Scotland Act 1998 (general reservations), after paragraph 5 insert—

“5A.—(1) Paragraph 1 does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if the following requirements are met.

(2) The date of the poll at the referendum must not be the date of the poll at any other referendum held under provision made by the Parliament.

(3) The date of the poll at the referendum must be no later than 31 December 2014.

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

Supplementary provision

4.—(1) The following provisions of Part 7 of the Political Parties, Elections and Referendums Act 2000 (“the 2000 Act”)(a) apply to an independence referendum as if it were a referendum to which that Part applies—

(a) section 127 (referendum campaign broadcasts), and

(b) paragraph 1 of Schedule 12 (right to send referendum address post-free)(b).

(2) In those provisions as applied by this article, references, however expressed, to a person or body designated under section 108 are to be read as references to a person or body designated under an Act of the Scottish Parliament for the purposes of an independence referendum as representing those campaigning for a particular outcome in relation to the question in the referendum.

(3) The following (which apply to a referendum campaign broadcast within the meaning of section 127 of the 2000 Act) do not apply to such a broadcast within the meaning of that section as applied by this article—

(a) section 112 of the 2000 Act;

(b) paragraph 1 of Schedule 13 to that Act;

(c) paragraph 18 of Schedule 12 to the Communications Act 2003(c).

(4) Where paragraph 1(3) of Schedule 12 to the 2000 Act, as applied by this article, applies section 200A of the Representation of the People Act 1983(d) (remuneration for free postal services), the reference in that section to a sum being charged on and issued out of the Consolidated Fund is to be read as a reference to that sum being paid by the Scottish Ministers.

(5) In this article “independence referendum” means a referendum on the independence of Scotland from the rest of the United Kingdom, held in pursuance of provision made by or under an Act of the Scottish Parliament.

[Name]
Clerk of the Privy Council

EXPLANATORY NOTE

(This note is not part of the Order)

This Order modifies Schedule 5 to the Scotland Act 1998 (c.46). Schedule 5 defines reserved matters (matters which are outside the legislative competence of the Scottish Parliament) for the purposes of that Act. The Order provides an exception to the reservation of the Constitution under

(a) 2000 c. 41.

(b) Paragraph 1 is amended by paragraph 158 of Schedule 12 to the Postal Services Act 2011.

(c) 2003 c. 21.

(d) 1983 c. 2. Section 200A was inserted by paragraph 18 of Schedule 8 to the Postal Services Act 2000 (c.26).

paragraph 1 of Part 1 of Schedule 5 so that a referendum on the independence of Scotland from the rest of the United Kingdom is not a reserved matter if certain requirements are met.

The Order modifies the Political Parties, Elections and Referendums Act 2000 (c.41) to apply certain provisions relating to referendum campaign broadcasts and the sending of referendum addresses free of charge. The Order also makes consequential modifications to references to referendum campaign broadcasts, and to section 200A of the Representation of the People Act 1983 (c.2).