



House of Commons
Scottish Affairs Committee

The Referendum on Separation for Scotland: making the process legal

Second Report of Session 2012–13

Report, together with formal minutes

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The Scottish Affairs Committee

The Scottish Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Scotland Office (including (i) relations with the Scottish Parliament and (ii) administration and expenditure of the offices of the Advocate General for Scotland (but excluding individual cases and advice given within government by the Advocate General)).

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/scotaffcom. A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume.

Additional written evidence may be published on the internet only.

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Summary

Scotland can only separate from the UK if the Scottish people make that decision in a referendum. Any referendum must have an unchallengeable legal and moral basis.

The Scottish Parliament can legislate only on devolved matters, and the Union between Scotland and England is a reserved matter.

This is not just a legal technicality: quite the opposite. The present division of powers between the Scottish Parliament and the Parliament at Westminster was put clearly before the Scottish people in a referendum in 1997, and they decided by a large majority to devolve many important Scottish issues to Holyrood but to reserve constitutional issues to Westminster.

The overwhelming weight of evidence shows that the Scottish Parliament cannot presently legislate to hold a referendum on separation. The Scottish Government has argued that Holyrood is legally competent to set up a referendum; but it has provided no legal justification for this view.

It is also quite clear that any referendum would not simply be 'advisory'. The result of a referendum will decide Scotland's position in or out of the Union, and, as such, cannot simply be described as advisory. It will be a momentous decision for the future of our country.

Any attempt to conduct a referendum on a dubious legal basis would inevitably be challenged in the courts. This could take years to be resolved and would lead to even further and damaging uncertainty about Scotland's future. No-one should be allowed to use legal wrangles to put off a referendum even longer than is currently planned. It is vital both that any referendum must be conducted on a sound legal footing and that it takes place within an appropriate timescale.

The best way to ensure that there is a sound legal basis for the referendum is for the UK and Scottish Governments and Parliaments to agree the specific detail of an order under section 30 of the Scotland Act 1998 to give the Scottish Parliament power to legislate for a referendum.

We believe it is appropriate for there to be scrutiny of any proposed section 30 Order by this Committee and by all of Scotland's MPs before being taken further in the whole House of Commons.

It is obviously highly desirable that both Governments and both Parliaments should agree the legislative and organisational form of any referendum, so as to reduce the scope for either side of the argument to claim afterwards that the process was in any way improper or unfair, but this should not be used to allow those who anticipate being defeated to stall or derail the process.

1 Referendums in the UK

Introduction

1. In this Report, the third in our series on the Referendum on Separation for Scotland, we consider how referendums are used in the United Kingdom to determine constitutional questions, what their legal significance and basis are, and the implications for a proposed referendum on separation.¹

2. Many countries use referendums to decide on a range of day to day public policy questions. This has not been UK practice. Nevertheless since the 1970s, when used to decide constitutional questions, referendums have become an accepted part of British political life. The table below shows how often they have been used,² what constitutional questions they have decided, and what the legislative basis of each was.

1 See also Sixth Report of Session 2010-12, *The Referendum on Separation for Scotland: Unanswered questions*, HC 1806, and Eighth Report of Session 2010-12, *The Referendum on Separation for Scotland: Do you agree this is a biased question?*, HC 1492

2 Adapted from House of Lords, Twelfth Report of the Select Committee on the Constitution, Session 2009-10, *Referendums in the United Kingdom*, HL Paper 99

UK referendums (excluding local referendums) since 1973

Referendum	Question	Answer Format	Result	Legislative basis
"Border Northern Ireland March 1973 poll"	Do you want Northern Ireland to remain part of the United Kingdom? Or Do you want Northern Ireland to be joined with the Republic of Ireland outside the United Kingdom?	Tick box Tick box	Northern Ireland remained part of the United Kingdom.	Northern Ireland (Border Poll) Act 1972
Membership of the European Community UK June 1975	Do you think that the United Kingdom should stay in the European Community (the Common Market)?	Tick YES box or NO box	The UK remained in the European Community.	Referendum Act 1975
Devolution to Scotland March 1979	Do you want the provisions of the Scotland Act 1978 to be put into effect?	Tick YES box or NO box	Devolution did not proceed as the requirement that 40 per cent of the electorate had to vote "Yes" was not met	Scotland Act 1978
Devolution to Wales March 1979	Do you want the provisions of the Wales Act 1978 to be put into effect?	Tick YES box or NO box	Devolution did not proceed.	Wales Act 1978

Referendum	Question		Result	Legislative basis
Devolution Scotland September 1997	I agree that there should be a Scottish Parliament or I do not agree that there should be a Scottish Parliament.	Tick box Tick box	The Scottish Parliament was established.	Referendums (Scotland and Wales) Act 1997
	I agree that a Scottish Parliament should have tax-varying powers or I do not agree that a Scottish Parliament should have tax-varying powers.	Tick box Tick box	The Scottish Parliament was given tax-raising powers.	
Devolution Wales September 1997	I agree that there should be a Welsh Assembly or I do not agree that there should be a Welsh Assembly.	Tick box Tick box	The Welsh Assembly was established.	Referendums (Scotland and Wales) Act 1997
Greater London Authority London May 1998	Are you in favour of the Government's proposals for a Greater London Authority, made up of an elected mayor and a separately elected assembly	Tick YES box or NO box	The Greater London Authority was established.	Greater London Authority (Referendum) Act 1998

Referendum	Question	Tick YES box or NO box	Result	Legislative basis
Belfast Agreement Northern Ireland May 1998	Do you support the Agreement reached at the Multi-Party Talks in Northern Ireland and set out in Command Paper 3883?	Tick YES box or NO box	Community consent for continuation of the Northern Ireland peace process on the basis of the Belfast Agreement was given.	Northern Ireland (Entry to Negotiations etc) Act 1996
Elected Regional Assembly North East of England November 2004	Should there be an elected assembly for the North East region?	Tick YES box or NO box	The Elected Regional Assembly for the North East was not established.	Regional Assemblies (Preparations) Act 2003
Legislative powers of the Welsh Assembly March 2011	Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?	Tick YES box or NO box	The Assembly now has these powers	Government of Wales Act 2006
Electoral Reform May 2012	At present, the UK uses the "first past the post" system to elect MPs to the House of Commons. Should the "alternative vote" system be used instead?	Tick YES box or NO box	The parliamentary voting system was not changed	Parliamentary Voting System and Constituencies Act 2011

3. There is no legal rule about what issues should be the subject of referendums, and there has been criticism that Governments have resorted to calling referendums as a tactical device. Nevertheless the House of Lords Constitution Committee was able to conclude that: “if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues”.³ Among their examples of fundamental constitutional issues, that Committee included: “For any of the nations of the UK to secede from the Union”.⁴

4. The witnesses who appeared before us broadly agreed. Professor John Curtice, of Strathclyde University, thought there was a “*de facto* convention that any constitutional change in the UK requires to be legitimated by a referendum”.⁵ Professor Vernon Bogdanor’s view was that there was “a strong argument of principle for having referendums on these matters because the opinion of the people may not be the same as the parties which represent them.”⁶

5. Questions of separation and national status, such as devolution, are clearly often seen as suitable for referendums internationally. Dr Matt Qvortrup, of Cranfield University, referred in his evidence to “222 referendums since Napoleon dealing with national issues”.⁷ By “national issues”, he meant a question of separation or more autonomy.

6. No witness argued that Scotland should be able to separate from the UK without a referendum. **We agree that if Scotland is to separate from the UK it should only do so if that is the decision of the Scottish people in a referendum.**

The effect of a referendum

7. There was some confusion in the evidence we heard as to whether the result of a UK referendum was ‘advisory’ or ‘binding’. This distinction as explained by Professor Stephen Tierney, of the University of Edinburgh’s School of Law, was the difference between “a legal obligation to abide by the result and a political commitment.”⁸

8. Whether a referendum is formally legally binding in that sense will depend on the structure of the legislation which enables it. Professor Curtice gave the example of the Parliamentary Voting System and Constituencies Act 2011, which was legally binding in the sense that “the relevant clauses [on changing the voting system] [...] would come into effect if there was a positive vote in the referendum”.⁹ As Professor Tierney acknowledged, no referendum was ever wholly binding; Parliament could always repeal the legislation creating the obligation. By contrast the first referendum on European issues in 1975 had no direct legal effect, though the Government made clear that it would see itself as bound by

3 Twelfth Report of the Select Committee on the Constitution, Session 2009-10, *Referendums in the United Kingdom*, HL Paper 99, para 94

4 *Ibid.*

5 *The Referendum on Separation for Scotland: Oral and written evidence*, Session 2010-12, HC 1608, Q 259

6 *Ibid.*

7 HC 1608 Q 667

8 HC 1608 Q 198

9 HC 1608 Q 261

the result, and it was agreed by all concerned that the referendum was to decide whether the UK remained in the Common Market.

9. However, for present purposes, this is a distinction without a difference. All referendums are advisory in the sense that legislators could ignore the result or reverse the result by passing a law. But they do not: and none of our witnesses argued that governments would or should be able to ignore the outcome of a referendum because it was only ‘advisory’. As Professor Curtice put it, a referendum on independence would be “advisory in the technical sense but [...] both sides would regard it as binding on them politically.”¹⁰

10. Only Professor Bogdanor qualified this. He thought that Parliament might have some leeway to consider what should be done if a referendum produced a result only by a very small margin on a very low turnout.¹¹

11. A referendum decides the issues that Parliament (or the Scottish Parliament) has put to the people for decision. **We agree that a referendum vote should be decisive on whether or not Scotland remains part of the UK. A number of consequences, however, follow from this.**

12. **First, voters should be told clearly that if the vote is in favour of separation, Scotland will cease to be part of the United Kingdom. The referendum is not ‘consultative’ in the sense that separation might or might not follow. All previous referendums in the UK have decided the matter put to the voters, and so will this one.**

13. **Secondly, because a referendum will decide the matter, it is of the greatest importance that it is, and is seen to be, scrupulously fair and that the processes leading up to it are accepted by both sides of the constitutional argument. There must be no scope for either side to cry ‘foul’ after the result is announced. As we said in our previous Report on this subject, this is significant for the wording of the question to be put to the voters, but it affects other issues, to which we shall return in later Reports.**

10 *The Referendum on Separation for Scotland: Oral and written evidence*, Session 2010-12, HC 1608, Q 261

11 HC 1608 Q 262

2 The legislative competence to hold a referendum on separation

14. Any referendum requires a legislative basis, and every referendum held in the UK has been authorised by an Act of Parliament, as the table in Chapter 1 above shows. A referendum can also be held under an Act of the Scottish Parliament, provided that it deals with a matter which is within the powers of that Parliament. The promise in the SNP manifesto for the 2011 Scottish Parliament elections to hold a referendum on separation if the party was elected may give political legitimacy to their plan but does not confer any new legislative powers on the Parliament. Although SNP ministers have stated publicly that they are confident the Scottish Parliament can legislate for a referendum, they have not explained or justified this assertion in any detail, and it is far from clear that it is the correct view, or indeed that they still hold it. Certainly, the UK Government does not think it is correct. In its consultation paper, *Scotland's Constitutional Future*, published on 11 January 2012, it expressed a firm view: “The UK Government is clear in its understanding that the Scottish Parliament does not have the legal authority to hold an independence referendum”.¹²

15. It is important to realise that the question of legislative competence is not simply a technical legal consequence of the way in which the legislation setting up the Scottish Parliament was drafted. It was the clear policy intention of the Government, as it confirmed to Parliament during the passage of the legislation. More important, this intention was set out in the White Paper, *Scotland's Parliament*,¹³ published in 1997, on which the referendum to decide on devolution within the United Kingdom was based. The White Paper explained that many important domestic issues were to be devolved to the Scottish Parliament. It made equally clear, however, that the constitution of the UK was to be reserved to Westminster. The proposals in that referendum were overwhelmingly approved by the electorate: in a turnout of over 60%, three quarters of those voting supported this allocation of powers. Seeking to act to legislate beyond these powers, therefore, is not only illegal, but acting contrary to the clearly expressed decision of the Scottish people.

16. The Secretary of State for Scotland repeated the Government's view in an oral statement to the House of Commons on 11 January 2012. The reasoning behind the Government's view on legislative competence is set out in the consultation paper, and was amplified in a public lecture given by the Advocate General for Scotland, the Rt Hon Lord Wallace of Tankerness QC, at the University of Glasgow, on 20 January 2012. It is worth setting out the Government's position in some detail.

17. In the consultation paper, the Government noted that, since the 2011 election, Scottish Ministers had published no plans for a referendum, nor any proposed question; nor had they explained why they thought that the Scottish Parliament had the necessary legislative competence. The Government therefore looked at the draft referendum legislation which

12 Scotland Office, *Scotland's Constitutional future: A consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom*, Cm 8203, January 2012, p. 6

13 Scottish Office, *Scotland's Parliament*, Cm 3658, July 1997

SNP ministers had published in 2010. They had proposed to ask voters whether “the [Scottish] Parliament’s powers should be extended to enable independence to be achieved”.¹⁴

18. The Scottish Ministers at this time acknowledged that “Scottish Parliament legislation must conform to the provisions of the Scotland Act 1998. The Scotland Act has in-built flexibility so that the Scottish Parliament’s powers can be extended over time. The Scottish Parliament has a role in such processes [...] It is therefore legitimate for a referendum held under an Act of the Scottish Parliament to ask the people questions related to an extension of its powers insofar as this is within the framework of the Scotland Act.”¹⁵

19. It is clear that this question was drafted so as to try to circumvent the constraints on the Scottish Parliament’s legislative competence. The UK Government’s consultation paper explains why in its view even this construction is not within the Parliament’s legal powers.

20. The powers of the Scottish Parliament to legislate are set out in the Scotland Act 1998, and as we noted in paragraph 15 above those powers and the reservation of certain matters to Westminster, were endorsed by the Scottish people in a referendum.. The Scottish Parliament can legislate on any subject that is not a reserved matter. Any legislation which relates to a reserved matter is beyond its powers. The Union is a reserved matter. Whether a provision relates to reserved matters is to be determined by considering its purpose, which is determined by a range of factors including its effect. The purpose and effect of an independence referendum would be to decide whether or not the Union continued, and it would therefore not be within devolved powers.

21. In his Glasgow University speech, the Advocate General gave a very full explanation of the UK Government’s reasoning. He drew attention to the importance of the rule of law, under which all governments must operate so as to safeguard democracy. He recollected the parliamentary debates on the Scotland Act 1998, during which this question had arisen, and that the then-Government had made clear its intention that the Act should not empower the Scottish Parliament to hold a referendum on separation. He then went on to argue, by reference to the wording of the statute itself and to the decisions of the Court of Session and the Supreme Court about how it should be interpreted, that the Scotland Act had achieved the result which its drafters had intended: the law, as it stood, in his clear view prevented the Scottish Parliament from legislating for a referendum on separation.

22. The UK Government’s consultation paper proposed a possible solution to this problem: an Order under Section 30 of the Scotland Act 1998 to give the Scottish Parliament the legislative competence to pass a Bill to provide for referendum on separation. Such an Order can only be made with the agreement of the Scottish Parliament, as well as both Houses of Parliament at Westminster.

23. This galvanised the Scottish Government into action, and it produced its own paper on 20 January 2012. In it, it argued that the 2010 question had been carefully drafted to meet the constraints of the Scotland Act; but if the UK Government was, as it had indicated, willing to extend devolved powers, then there should be a simpler question:

14 Scottish Government, *Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper*, February 2010

15 *Ibid.*

“Do you agree that Scotland should be an independent country?”,

apparently acknowledging that this would not be within the Parliament’s legislative competence at present. It continued:

An adjustment of legislative competence under Section 30 of the Scotland Act 1998 would enable the Scottish Parliament to legislate for a referendum on the basis set out above. If the UK Government is unwilling to agree to such an adjustment without dictating unacceptable conditions, the Scottish Government will have the option of a referendum on the basis set out in paragraph 1.5. [i.e. a question like their 2010 draft which was designed to be within the limitations of existing legislative competence.]¹⁶

24. The Scottish Government, however, published no legal analysis, and the Lord Advocate, the Rt Hon Frank Mulholland QC—who is a member of the Scottish Government, and as its principal legal adviser will have advised his Ministerial colleagues on what their powers are—has made no contribution to debate on this issue. The Scottish Government nevertheless asserts that a referendum with a question about more devolution, or actually about separation but designed to look as if it were about extending the Scottish Parliament’s powers, would be within its legislative competence.

25. We find the silence of the Lord Advocate remarkable. It is well understood that Law Officers do not, save exceptionally, make their advice public, but, on a matter such as this, there is a very strong public interest in understanding the legal basis of the Scottish Government’s approach to a process which will determine the future of the country.

26. In the absence of any material from the Scottish Government, we have had to turn to other evidence on this issue. The question of legislative competence was examined by the House of Lords Constitution Committee in their Twenty-Fourth Report of Session 2010-12, *Referendum on Scottish Independence*, published on 15 February 2012. They found the views of the Advocate General persuasive:

The Advocate General has said that, in the UK Government's view, “a referendum ... *about* the Union would *relate to* the Union” and would therefore be “not law” within the meaning of section 29. This view seems to us to be plainly correct.¹⁷

27. The Constitution Committee analysed the case law on how the restrictions on the Scottish Parliament’s legislative competence have been interpreted by the courts. It drew particular attention to how the courts have said the ‘purpose’ of devolved legislation is to be ascertained, quoting Lord Reed in the Court of Session:

The focus is [...] primarily upon why the provision has been enacted rather than upon what it does, although the latter is also relevant. The submission [...] that

16 Scottish Government, *Your Scotland, Your Referendum—A consultation document*, January 2012

17 House of Lords, Twenty-Fourth Report of the Select Committee on the Constitution, *Referendum on Scottish Independence*, Session 2010-12, HL Paper 263, para 17

neither the motive nor the policy of the legislature in enacting the measure is a relevant consideration must therefore be rejected.¹⁸

The Committee concluded that, as the purpose of holding a referendum on separation was to determine the future of the Union, it was not within devolved powers.

28. The question was also explored in written and oral evidence in our inquiry. The evidence strongly supported the UK Government's position. Professor Adam Tomkins, of the University of Glasgow School of Law, said in his written evidence:

This is a question of law that requires to be answered [...] in accordance with the Scotland Act 1998. Legally, the answer [...] depends upon what the referendum question is (or questions are). If the question is "Should Scotland remain in the United Kingdom" that is a question on a reserved matter and should therefore be asked (if at all) by HM Government under the authority of an Act of Parliament. Were the Scottish Ministers to seek to ask such a question in a referendum held under the authority of an Act of the Scottish Parliament ("ASP"), there is (at the least) a very strong argument that the ASP would be outwith competence and therefore "not law" under s. 29 of the Scotland Act 1998 and that the Scottish Ministers would be acting outwith their devolved competence if they sought to exercise powers in pursuit of such an ASP [...] If the question is "Should the Scottish Government seek to renegotiate with HM Government the terms of the Union" my view would be the same: this is a reserved matter, even if the referendum question somehow made clear that the renegotiation was not intended to end the Union and that the proposal was not that Scotland should leave the United Kingdom.

The questions suggested by the Scottish Government in its February 2010 consultation paper [...] would also have been susceptible to challenge for want of competence [...] any affirmative answer to this question would require the modification of the Scotland Act 1998. Yet para 4 of Sched 4 to the Scotland Act 1998 provides that "An Act of the Scottish Parliament cannot modify ... this Act" [...] The ballot paper containing this question would have made clear that this proposal would entail the Scottish Parliament becoming responsible "for all laws, taxes and duties in Scotland", subject to limited exceptions. Yet the following are expressly listed as reserved matters: "fiscal, economic and monetary policy, including ... taxes and excise duties".¹⁹

29. In his written evidence, Professor Alan Page, of the University of Dundee School of Law, explained that an Act of the Scottish Parliament was outside competence if it related to a reserved matter:

Whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined by reference to the purpose of the provision, having regard

18 *Imperial Tobacco Ltd v The Lord Advocate* [2012] CSIH 9

19 *The Referendum on Separation for Scotland: Oral and written evidence*, Session 2010-12, HC 1608, Ev 155

(among other things) to its effect in all the circumstances. It is only when a provision is directed to a reserved matter that it is liable to be struck down by the courts.²⁰

He went on to say:

When regard is had to the effect of the legislation, including its effect on the reserved matter of the Union, that it becomes clear in my opinion that its true purpose is not to solicit the views of people in Scotland on a proposal about the way Scotland is governed, but to further the Scottish government's aim of achieving independence. A referendum is not a disinterested exercise in opinion gathering. It is embarked upon for a purpose—in this case to mobilise Scottish opinion in support of independence.²¹

30. In his oral evidence, he put the matter very simply:

[The Scottish Government] would have to demonstrate, and it would have to persuade a court, that the referendum, the legislation, was about something other than the Union between the two Kingdoms [...] having listened attentively to all that has been said [I] have yet to hear a convincing explanation of what this referendum would be about if it was not about the Union between the two Kingdoms. That is my basis for concluding it does not have the power.²²

31. Mr Aidan O'Neill QC, of Matrix Chambers, agreed. In his written evidence, he summarised his view thus:

Neither the Scottish Parliament nor the Scottish Ministers have the legal powers to hold a referendum on independence for Scotland under the Scotland Act 1998 in its current form [...] Similarly, neither the Scottish Parliament nor the Scottish Ministers have the legal powers to hold a referendum on further devolved powers short of independence for Scotland (“devo-max”).²³

32. Likewise, in oral evidence he said:

There can be little doubt that the Scottish Parliament under the Scotland Act as presently set up, does not have the power to call, organise and pay for a referendum relating to the Union of the Kingdoms of Scotland and England and/or relating to the Parliament of the United Kingdom, and independence clearly relates to both these matters.²⁴

33. One witness who gave oral evidence disagreed. Professor Tierney's view, and, he added, that of a number of his colleagues, was that a plausible case could be made that the Scottish Parliament did have the power to mount a referendum on separation on what he called an 'advisory' basis. In his view, the arguments above involved:

20 HC 1608 Ev 166

21 *The Referendum on Separation for Scotland: Oral and written evidence, Session 2010-12*, HC 1608, Ev 166

22 HC 1608 Q 188

23 HC 1608 Ev 168

24 HC 1608 Q 189

Failure to distinguish between the legal purpose of a Bill and the political purpose of a Bill. Certainly the political purpose of the Scottish Government is independence, but [one should not] elide the political aspiration [...]with the legal effect of what a Bill can actually do.²⁵

34. He maintained:

The intention of the Scottish Government in the draft Bill set out in January 2012 is to seek the views of the people of Scotland on a proposal about the way Scotland should be governed [...] the referendum is not intended to have any legal effect.²⁶

35. Professor Tierney argued a referendum, of itself, would not end the Union. A ‘yes’ vote would lead to negotiations but separation would require, it was agreed, an Act of Parliament. (If the people voted against separation nothing would change.) If they voted for separation, then it would be the UK Parliament which ended the Union, not the referendum. He seemed to be saying that a referendum on separation was little more than a big opinion poll.

36. Professor Page disagreed. He pointed out that “the court will look beyond the direct legal effects to inquire into the social and economic purposes the statute is trying to achieve.”²⁷ Mr O’Neill was of the same view: “Insofar as I could follow the argument I found it unconvincing”²⁸.

37. We find the argument made for legislative competence fanciful rather than plausible. As we explain above, referendums are a way of putting issues to the people for decision. That is what every other UK referendum has done, whether it is technically legally binding or not. The purpose of a separation referendum would be to *decide* whether the Union should be ended, and that would be its effect; that is clearly reserved, as is the power to change the powers of the Parliament.

38. In our view, the argument about legislative competence is, for a dispute among lawyers, a remarkably clear and simple one. While the UK Government has set out its argument very openly, it is striking that the Scottish Government has offered no legal analysis in support of its assertions. The Scottish people voted in 1997 to reserve to the UK legislation relating to the constitution, and so a referendum about the Union clearly relates to a reserved matter. This cannot be circumvented by drafting a contrived question—which pretends to be about something else but is still a referendum on separation. Nor do we find at all plausible or in the slightest convincing the argument (on which the Scottish Government themselves do not seem to rely) that a referendum is simply “advisory” with no real effect. The truth is quite the opposite. It would be a momentous decision about the future of our country.

39. It is also significant that the legal analysis we have heard relates not only to the question of separation, but to the question of more devolved powers. That too is a

25 HC 1608 Q 190

26 *The Referendum on Separation for Scotland: Oral and written evidence, Session 2010-12, HC 1608, Q 190*

27 HC 1608 Q 191

28 HC 1608 Q 193

constitutional matter which the Scottish people agreed should be reserved to Westminster. It is clear that a referendum under an Act of the Scottish Parliament cannot decide whether that Parliament should have more powers.

Implications of lack of legislative competence

40. The competence of any Act of the Scottish Parliament can be decided authoritatively only by the courts. The way in which that can be done is set out in the Scotland Act 1998. The UK Government's consultation paper explains that there are two main routes through which this might be done:

If an individual, or group of individuals, believed that an Act of the Scottish Parliament was outside of legislative competence (whether in whole or in part) it is open to individuals to challenge the legislation in the courts. The individual must have sufficient interest to institute proceedings.

It is also possible for the Law Officers to refer a Bill directly to the Supreme Court to seek a judgment on its legislative competence. This referral could be made by one or more of the Lord Advocate (the Scottish Law Officer) or the Advocate General and the Attorney General (the UK Law Officers). It is possible for referrals to be made jointly by UK and Scottish Law Officers.²⁹

41. Our witnesses agreed with this description, and that challenge was a very likely outcome if a referendum Bill were passed by the Scottish Parliament. Professor Page said in his written evidence:

Were the Scottish government to press ahead on the basis of its interpretation of the Scottish Parliament's powers there is no question it would face a legal challenge. The challenge might be brought by the United Kingdom Law Officers before the Referendum (Scotland) Bill is presented for the Royal Assent, or, in the event of the Bill not being challenged by the Law Officers, by an individual once the Act was on the statute book. As I have indicated such a challenge in my view would be likely to be successful.³⁰

42. Mr O'Neill noted that:

The decision of the Supreme Court in AXA [...] has opened up the previously rather narrow rules that allowed people to come to court to complain about the invalidity of Acts [...] certainly if this challenge were raised in England and Wales [...] there would be absolutely no problem about a member of the public, an NGO or an interest group of any sort raising it. I suspect the same would also now be the case in Scotland.³¹

43. Professor Tierney agreed. He said:

29 *Scotland's Constitutional Future*, p. 10

30 HC 1608 Ev 167

31 HC 1608 Q 241

It certainly could face legal challenge. There would be a decision, depending on the stage of the Bill, for the Law Officers to make on whether or not they wanted to challenge it. Of course, even were such a Bill to be passed, it would be open to a citizen to bring a challenge at any point. The interest has widened considerably since the AXA case.³²

44. When asked how long such a challenge by a private citizen would take, Mr O’Neill referred to the AXA case, “A challenge to the Damages (Asbestos Related Conditions) (Scotland) Act 2009. It took two and a half to three years to get a final resolution.”³³

The scope for a section 30 Order

45. No-one who gave evidence to us thought that resolving the question of competence in the courts was good idea. In this, they agreed with the UK Government. Its consultation paper suggested that the Scottish Parliament should be given powers to legislate for a referendum. This could be done by an Act of Parliament, but the UK Government favoured using an Order under section 30 of the Scotland Act to do so. Witnesses mostly agreed. Professor Page put it this way:

A section 30 order offers a number of advantages. The first is that it can be made at any time. It is not therefore subject to the same time pressures as an amendment to the Scotland Bill. It would therefore allow negotiations between the two governments to continue, at least until the results of the Scottish government’s consultations on the draft Referendum (Scotland) Bill were known.³⁴

46. In our view, the fact that there is any dispute—even if it were spurious—about the Scottish Parliament’s powers in this area means that there is enormous advantage in putting the matter beyond doubt. There are two reasons for this. The first and most important is the one given in the Government’s consultation paper: “The UK Government does not believe that it is in Scotland’s interests to have Scotland’s constitutional future decided in court.”³⁵

47. The second is, however, also important. We note from the Scottish Government’s consultation paper, quoted earlier, that it continues to assert its view that a referendum on the contrived question which it originally proposed is within the powers of the Parliament. We are satisfied that this is not so. As the Scottish Government has failed to produce any supporting legal analysis, we do not know what legal basis, if any, there is for this assertion. Those, however, who have publicly supported its position have at most been prepared to say, like Professor Tierney, that there is a ‘plausible’ and not just a fanciful argument to be made.

48. It is, therefore, clear that any competent legal adviser will have told the Scottish Ministers that their position will inevitably be challenged, and that they might well lose. That they are apparently prepared to contemplate proceeding in this way, knowing that a

32 HC 1608 Q 208

33 HC 1608 Q 244

34 HC 1608 Ev 167

35 *Scotland’s Constitutional Future*, p. 7

challenge by a concerned citizen might take as long as two or three years, suggests that they may regard this as an opportunity to put off a referendum even longer than they currently plan to, perhaps until after the next Scottish elections. It would in our view be quite wrong for the SNP to use such spurious legal proceedings as a way to avoid the verdict of the Scottish people on their proposals for separation.

49. For these reasons, we agree with the UK Government that any residual legal doubt should be removed, and although Westminster legislation is free of legal doubt we agree that a section 30 Order is the better way to do so, as it allows the Scottish Parliament as well as the UK Parliament a decisive say in the process. It is highly desirable that both Governments and Parliaments should agree the legislative basis for any referendum, so as to reduce the scope for either side of the argument to claim afterwards that the process was in any way unfair or unbalanced.

Conclusions and recommendations

Introduction

1. We agree that if Scotland is to separate from the UK it should only do so if that is the decision of the Scottish people in a referendum. (Paragraph 6)

The effect of a referendum

2. We agree that a referendum vote should be decisive on whether or not Scotland remains part of the UK. A number of consequences, however, follow from this. (Paragraph 11)
3. First, voters should be told clearly that if the vote is in favour of separation, Scotland will cease to be part of the United Kingdom. The referendum is not 'consultative' in the sense that separation might or might not follow. All previous referendums in the UK have decided the matter put to the voters, and so will this one. (Paragraph 12)
4. Secondly, because a referendum will decide the matter, it is of the greatest importance that it is, and is seen to be, scrupulously fair and that the processes leading up to it are accepted by both sides of the constitutional argument. There must be no scope for either side to cry 'foul' after the result is announced. As we said in our previous Report on this subject, this is significant for the wording of the question to be put to the voters, but it affects other issues, to which we shall return in later Reports. (Paragraph 13)

The Legislative competence to hold a referendum on separation

5. It is important to realise that the question of legislative competence is not simply a technical legal consequence of the way in which the legislation setting up the Scottish Parliament was drafted. It was the clear policy intention of the Government, as it confirmed to Parliament during the passage of the legislation. More important, this intention was set out in the White Paper, Scotland's Parliament, published in 1997, on which the referendum to decide on devolution within the United Kingdom was based. The White Paper explained that many important domestic issues were to be devolved to the Scottish Parliament. It made equally clear, however, that the constitution of the UK was to be reserved to Westminster. The proposals in that referendum were overwhelmingly approved by the electorate: in a turnout of over 60%, three quarters of those voting supported this allocation of powers. Seeking to act to legislate beyond these powers, therefore, is not only illegal, but acting contrary to the clearly expressed decision of the Scottish people. (Paragraph 15)
6. In our view, the argument about legislative competence is, for a dispute among lawyers, a remarkably clear and simple one. While the UK Government has set out its argument very openly, it is striking that the Scottish Government has offered no legal analysis in support of its assertions. The Scottish people voted in 1997 to reserve to the UK legislation relating to the constitution, and so a referendum about the Union clearly relates to a reserved matter. This cannot be circumvented by drafting a

contrived question—which pretends to be about something else but is still a referendum on separation. Nor do we find at all plausible or in the slightest convincing the argument (on which the Scottish Government themselves do not seem to rely) that a referendum is simply “advisory” with no real effect. The truth is quite the opposite. It would be a momentous decision about the future of our country. (Paragraph 38)

7. It is also significant that the legal analysis we have heard relates not only to the question of separation, but to the question of more devolved powers. That too is a constitutional matter which the Scottish people agreed should be reserved to Westminster. It is clear that a referendum under an Act of the Scottish Parliament cannot decide whether that Parliament should have more powers. (Paragraph 39)

The scope for a section 30 order

8. For these reasons, we agree with the UK Government that any residual legal doubt should be removed, and although Westminster legislation is free of legal doubt we agree that a section 30 Order is the better way to do so, as it allows the Scottish Parliament as well as the UK Parliament a decisive say in the process. It is highly desirable that both Governments and Parliaments should agree the legislative basis for any referendum, so as to reduce the scope for either side of the argument to claim afterwards that the process was in any way unfair or unbalanced. (Paragraph 49)

Formal Minutes

Tuesday 17 July 2012

Members present:

Mr Ian Davidson, in the Chair

Fiona Bruce
Jim McGovern
Iain McKenzie

Pamela Nash
Mr Alan Reid
Lindsay Roy

Draft Report (*The Referendum on Separation for Scotland: Making the process legal*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 49 read and agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned to a day and time to be fixed by the Chair]

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–12

First Report	Postal Services in Scotland	HC 669 (HC 884)
Second Report	Video Games Industry in Scotland	HC 500 (Cm 8067)
Third Report	UK Border Agency and Glasgow City Council	HC 733
Fourth Report	The Scotland Bill	HC 775
Fifth Report	Student Immigration System in Scotland	HC 912 (Cm 8192)
Sixth Report	The Referendum on Separation for Scotland: Unanswered Questions	HC 1806
Seventh Report	The Crown Estate in Scotland	HC 1117
Eighth Report	The Referendum on Separation for Scotland: Do you agree this is a biased question?	HC 1492

Session 2012-13

First Report	A Robust Grid for 21 st Century Scotland	HC 499
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