



House of Commons  
Scottish Affairs Committee

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**The Referendum on  
Separation for  
Scotland: The proposed  
section 30 Order—Can  
a player also be the  
referee?**

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**Sixth Report of Session 2012–13**





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# The Referendum on Separation for Scotland: The proposed section 30 Order—Can a player also be the referee?

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**Sixth Report of Session 2012–13**

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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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### Publication

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](http://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.

### Committee staff

The current staff of the Committee are Eliot Wilson (Clerk), Duma Langton (Inquiry Manager), Gabrielle Hill (Senior Committee Assistant) and Ravi Abhayaratne (Committee Support Assistant).

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## Summary

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We welcome the recent agreement between the UK and Scottish Governments on a section 30 Order to allow the Scottish Parliament to hold a referendum on whether Scotland should remain part of the United Kingdom or not. The Secretary of State and his team are to be congratulated on their willingness to compromise and reach a consensus with the Scottish Government so that the referendum can be held on a basis to which all can consent.

It is of the highest importance that both sides of the argument will be willing to accept the result of the referendum, whatever it is, and that the losing side should not be able to claim that the process was biased or illegitimate. We agree, for that reason, that it is right for the referendum legislation to be passed in the Scottish Parliament and that it should therefore be given the legislative competence to do so.

A heavy responsibility therefore devolves on the Scottish Parliament to act in the same way, for the same reasons. The referendum bill must be built on the widest possible consensus in the Scottish Parliament, so that the result will be accepted by all, and by Scotland as a whole.

In a number of aspects of the process however we see that the Scottish Government appears to be minded to pursue partisan advantage, rather than seek consensus. In our earlier Report, *Do you agree this is a biased question?*, we drew attention to the unsatisfactory nature of the question proposed, but the Scottish Government is persisting with it. Despite the real difficulties caused by prolonged delay it insists on holding the referendum as late as possible, apparently in the hope of advantage from the anniversary of Bannockburn. Despite agreeing to the impartial oversight of the Electoral Commission, it has itself refused to commit to be bound by the decisions of this neutral referee. It is hard to escape the suspicion that it is following the mantra of British cycling of the ‘aggregation of marginal gains’. The challenge for the SNP is to lay that approach aside and legislate for a referendum that all will agree is completely fair and as neutral as possible. This approach of reaching consensus and compromise applies to such matters as donations and spending limits, and, in the absence of consensus, in our view the verdict of the neutral Electoral Commission must be accepted, not disputed.



# 1 Introduction

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1. In this Report we look at the draft Order which is being proposed by the Government to give the Scottish Parliament power to legislate for a referendum on separation for Scotland. It is to be made under section 30 of the Scotland Act 1998, which provides for an Order in Council to make amendments to the legislative competence of the Scottish Parliament, if a draft has been approved by Affirmative Resolution of both Houses of Parliament, and by the Scottish Parliament also. This Report is intended to contribute to the debates which are to be held in both Houses on the draft Order.

## Background

2. It is clear from the evidence to our inquiries into the referendum on separation for Scotland that the Scottish Parliament does not have the power itself to hold such a referendum. In our Report, *The Referendum on Separation for Scotland: making the process legal*, we noted the strong support which the evidence we received gave to this position.<sup>1</sup> Professor Adam Tomkins of the University of Glasgow School of Law told us that an Act of the Scottish Parliament to legislate for a referendum:

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 Act of the Scottish Parliament].<sup>2</sup>

Mr Aidan O’Neill QC, of Matrix Chambers, said that: “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”.<sup>3</sup>

3. The Scottish Government has never been willing to acknowledge this openly; instead it has prevaricated with claims about the possibility of holding a referendum on more powers for the Scottish Parliament. This has served to delay both this Order and the legislation which will be made under it, and so the referendum itself. It is now clear, however, that the Scottish Government accepts that this is a subject reserved to the UK Parliament at Westminster, and that the Scottish Parliament can only legislate on a referendum to dissolve the United Kingdom if the necessary powers are conferred on it.

4. After discussion with the Scottish Government, the UK Government has proposed to confer these powers using an Order under section 30 of the Scotland Act. Such Orders are an important part of the structure of the devolution settlement, and have been used to alter the powers of the Scottish Parliament on a number of occasions (or the powers of the Scottish Ministers, using the parallel section 63), always, as the statute requires, with agreement. None, however, has been remotely as significant as this proposed Order, which invites Parliament to delegate the legislative power to hold a referendum on whether there

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1 Second Report of Session 2012-13, *The Referendum on Separation for Scotland: making the process legal*, HC 542

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

3 HC 1608 Ev 168

should be an end to the United Kingdom. It therefore merits exceptionally close scrutiny. As the Constitution Committee of the House of Lords has noted, in common with almost all other secondary legislation, there is no scope for Parliament to amend the Order, merely to approve it, or not.<sup>4</sup> This makes it of the greatest importance that Parliament should be satisfied that it is right for the Scottish Parliament to pass the necessary legislation for, and so determine the detail of, the proposed referendum, and be satisfied that these powers will be used in accordance with the agreement between the Governments which is associated with the Order.

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4 Seventh Report of the Select Committee on the Constitution, Session 2012-13, The Agreement on a referendum on independence for Scotland, HL Paper 62

## 2 The proposed section 30 Order

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### The Order and the associated agreement

5. The Secretary of State has laid before Parliament not only a draft Order, but also an agreement between the two Governments, and an associated memorandum of understanding. Only the Order has any legislative force, but the agreement and the memorandum set out what are said to be the intentions of the two Governments and, in the case of the Scottish Government, some detail of its plans to use the powers which the Order confers. These are therefore important documents: even if they might not be legally binding, they still have strong political force.

6. The Order is, in the phrase used by the House of Lords Constitution Committee, “skeletal”<sup>5</sup>, but it nevertheless contains provisions touching on all the key issues. It proceeds by adjusting the reservation relating to the Union of the Kingdoms, in the part of schedule 5 of the Scotland Act 1998 dealing with the constitution, to make clear that a referendum on whether to dissolve the Union is, given certain binding conditions, not a reserved matter. The conditions are important. The referendum must be held no later than the end of 2014. The referendum is to contain only a single question. There is to be only one referendum, so that there is no opportunity for a separate referendum to be held on the same day. This question is to be about separation for Scotland and should offer the voters a choice between two options only—in essence, should Scotland leave the United Kingdom or not?

7. The agreement says a little more than this. The Governments commit to work together to make the referendum happen, and express the view that it should meet the “highest standards of fairness transparency and propriety, informed by consultation and independent expert advice”.<sup>6</sup> The memorandum of understanding is rather longer, and deals with elements which have been agreed between the Governments, with no statutory backing. It discusses the franchise for the referendum, campaign finance and electoral regulation and administration. Many of these matters are left to the Scottish Parliament, though the memorandum gives some indication of the Scottish Government’s intentions.

8. The Order does not provide for the wording of the referendum question, a matter about which we have expressed concern. The memorandum however states that “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.”<sup>7</sup> It goes on to note that in a UK referendum the Electoral Commission would review the proposed question and that it should discharge the same role in relation to the question in this referendum. And the Governments have agreed that “Interested parties will be able to

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5 HL Paper 62, para 15

6 Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, 15 October 2012

7 *ibid.*

submit their views on the proposed wording to the Electoral Commission as part of the Commission’s review process.”<sup>8</sup>

9. More generally, the memorandum proposes that the rest of the regulatory framework in the Political Parties Elections and Referendums Act 2000 (PPERA) should be applied, with some modifications to suit detailed Scottish circumstances, to the referendum on separation for Scotland. It says “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.”<sup>9</sup> The objective, it is said, is to ensure that “the referendum is fair and commands the confidence of both sides of the debate”.<sup>10</sup>

10. In order to make this possible, the draft Order contains specific provision applying some of the PERPA 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.

11. The Order will allow the Scottish Parliament to decide on other matters relating to the referendum, notably campaign spending limits. Here again there is provision for the Electoral Commission to give advice, as it does for referendums held under Acts of Parliament. The memorandum notes that:

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 PERPA framework.<sup>11</sup>

12. The memorandum, however, makes clear that the Order applies the same rules to Scottish Ministers as to UK Ministers. So the Order does not oblige the Scottish Government to follow the advice of the Electoral Commission. The memorandum of understanding says that the policy memorandum for the Referendum Bill “will include a statement of reasons if there is any departure from the Electoral Commission’s advice on spending limits.”<sup>12</sup> An implication can be drawn from this statement in the memorandum and comments from Scottish Ministers that the Scottish Government may not in practice accept the Electoral Commission’s judgement. We discuss this further below.

13. Finally, the memorandum and agreement commit both 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”.<sup>13</sup>

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8 Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, 15 October 2012

9 *ibid.*

10 *ibid.*

11 *ibid.*

12 *ibid.*

13 *ibid.*

## The case for holding a referendum

14. **There is now a widespread expectation that a referendum will take place. We agree that one should, and therefore we welcome the steps to bring it about.** The Scottish people have now twice returned a separatist administration to office in the devolved parliament, so it is right to ask them whether or not they support separation from the United Kingdom. **We agree that this is, in the end, a decision which only the Scottish people can take, and that, whatever their views on the matter, it is a decision which the rest of the United Kingdom should be prepared to accept. It would be wrong to seek to hold Scotland to the Union if the Scottish people voted for separation. Conversely, if the Scottish people confirm that they wish to remain part of the United Kingdom, then the question of separation should be regarded as firmly settled for a generation or more.**

## Should the referendum be ‘made in Scotland’?

15. The Secretary of State was at great pains to point out that the route which he had chosen, using a section 30 Order which gives wide discretion to the Scottish Parliament on the management of the referendum, would ensure that the referendum was ‘made in Scotland’. The legislation would be passed in the Scottish Parliament, the timing would be determined by the Scottish Parliament, the franchise would be chosen by the Scottish Parliament and, subject to the involvement of the Electoral Commission, the wording of the question and the administration of the referendum would be decided by the Scottish Parliament.

16. Given that the constitution and the Union are matters which were reserved to Westminster in the 1998 devolution settlement, this is not, constitutionally, the obvious route to take. There would have been no legal difficulty in passing referendum legislation in Westminster, or alternatively it would have been possible for the Secretary of State to agree with the Scottish Government much more of the detail of the referendum scheme than he has chosen to do, before either legislating or conferring legislative competence.

17. We do not accept the self-serving argument made by the SNP that only the Scottish Parliament has the authority to decide on this. That flies in the face both of the legal position, and the constitutional settlement approved by the Scottish people in the 1997 referendum. Nevertheless, we can see the argument for legislating on this matter in Holyrood. The referendum will be a decision of great moment, and it is of the highest importance that the result is accepted by all concerned. That is why it has to conform to the highest standards of transparency, propriety and fairness. There is a risk that nationalists and separatists would have been unwilling to accept the result of a referendum legislated for at Westminster even if it adopted the highest standards. Any decision must be such as to secure ‘losers’ consent’.

18. **It may be seen as disappointing that a referendum which would have been subject to no legal uncertainty, and which could have been perfectly easily legislated for at Westminster might attract unjustified criticism that it was not ‘made in Scotland’: but the aim of getting a result to which all will assent seems to us to be an overriding one, and we are therefore prepared to agree to the section 30 Order approach, and to discretion being given to the Scottish Parliament under that to arrange a referendum.**

Consequences, however, follow. A high responsibility now devolves onto the Scottish Parliament to ensure that the terms of the referendum are indeed compliant with the highest standards, so that the process will command the assent of both sides. It will be important that the Scottish Parliament ensures the Scottish Government fulfils the terms of its agreement with the UK Government, and in particular follows the independent and neutral advice of the Electoral Commission where they are obliged, or have agreed, to seek it.

19. We believe there will be huge temptation for the Scottish Government to follow the mantra of British cycling and pursue the ‘aggregation of marginal gains’ and to seek to gain partisan advantage from every element of the referendum process. We recognise that the Scottish Government, controlled by a party committed to separation, will be in the position of being both a player in the game as well as trying to exercise the role of neutral referee.

20. It is thus our view that two principles will be essential if the proposed referendum is to meet the highest standards of fairness. The first is that decisions in the Scottish Parliament should be on the basis of wide consensus, rather than a majority being used to ram through partisan choices. The second is that the decisions of an impartial third party, in this case the Electoral Commission, should be accepted (unless an alternative consensus exists). The people of Scotland may have voted for a referendum to be held—but they were never asked to approve a biased, rigged or gerrymandered vote.

### The timing of the referendum

21. The draft section 30 Order requires that the referendum is held before the end of 2014. Delaying the referendum until 2014 has clearly been an aim of the Scottish Government. At an earlier stage of this process, the UK Government issued a timetable which demonstrated how it would have been possible to hold a referendum in 2013. Indeed, the present Scottish Ministers have been promoting a referendum on independence since 2007. They failed to introduce a referendum Bill in the Scottish Parliament between 2007 and 2011. Although they were elected with an overall majority in May 2011, they showed no interest in promoting their core policy until the United Kingdom Government issued its own consultation document in January 2012. Since then, they have taken every opportunity for delay so that the referendum may not now be held until 2014.

22. We can see no reason for this delay except perceived partisan advantage. Nationalists might think that allowing the anniversary of the Battle of Bannockburn to be celebrated and the Glasgow Commonwealth Games to be held before the vote takes place will strengthen their position and that the politics of identity and ethnicity will give some advantage to their case—but we believe the people of Scotland have more sense. What is undeniable is the continued uncertainty that unnecessary postponement has caused to business in general and for investment decisions in particular. A future Report, on the impact of separation on Clyde shipbuilding, will give an example of the difficulties caused by this procrastination.

23. Given that this deferral seems to be imposed purely for partisan advantage, the Secretary of State has been remarkably tolerant of this strategy of delay. **In our view, it would have been better for the people of Scotland, and the rest of the United Kingdom,**

for the legislative issues to have been settled before now so that a referendum could have been held earlier, and given the Scottish people a more timely opportunity to make their decision. What is important now is that there is no further slippage by the Scottish Government, and we welcome that fact that there is a firm end date in the Order. There can be no question of delay beyond 2014.

### **The responsibility on the Scottish Government**

24. As a result of the structure of the section 30 Order, a very high responsibility lies upon the Scottish Government, in drafting and promoting the necessary legislation and making the referendum arrangements, and on the Scottish Parliament in overseeing them and agreeing the legislation. The Scottish Government's approach must be scrutinised with care, because, so far, it has not been such as to command respect for its disinterestedness, or attention to legal propriety. In the evidence we have received, we have seen areas where its approach should be subject to detailed examination in the Scottish Parliament, and, if need be, elsewhere. These are the wording of the question, the obligation to follow the advice of the Electoral Commission, the franchise and the regulation of the campaign itself. In each case we have concerns about the extent to which the Scottish Government may seek to use its majority power in the Scottish Parliament to tilt the playing field.

## 3 Administering the referendum

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### The franchise

25. The franchise which will be used at the referendum is by virtue of the Order a matter for the Scottish Parliament, but both Governments have agreed that they wish the local government franchise to be the basis for it. A good argument can be made for this, though it is not necessarily the only option which would be available. The local government franchise was used in the referendum of 1997 which provided for the creation of the Scottish Parliament, and is used in the UK for other non-national elections. There are nevertheless difficulties with it. The first is that it includes EU nationals who are resident in Scotland and on the local electoral register, but are not British citizens. They would be unable to vote in a UK general election, but will be able to vote whether or not to break up the UK. We remain uncomfortable with this.

26. The second issue is more organisational. At the moment, the local government franchise, like the general election franchise, includes persons over the age of 18. The Scottish Government has indicated that it wishes to add persons aged 16 and 17 to the franchise for the referendum. The age at which people should be able to vote is a question of interest and general debate. But whether it should be 21, 18 or 16, there is no obvious reason for it to differ from one election to another, or for one electoral purpose or another. It is not clear what the motivation of the Scottish National Party is in this matter. It may be that they take the view that in general the franchise should be extended to persons between 16 and 18, and, having an election under their jurisdiction, they wish to take the opportunity to extend the franchise. Alternatively, it may be that they believe that younger persons are more likely to vote for separation, and might even tip the balance of the outcome. It is unfortunate that the behaviour of the SNP in relation to the referendum has not been such as to avoid the suspicion that this is its purpose. Leaving aside the question of principle, there are, however, some serious practical issues which the Scottish Government will have to address.

27. At the moment, only a proportion of under-18s are listed on the electoral register as so-called “attainers”. It seems that the Scottish Government thought it would be appropriate to extend the franchise to under-18s simply by allowing attainers to vote. But it would not be acceptable for the franchise to be extended to only a proportion of people of the relevant age, based on the accident of whether their families had registered them in advance of their becoming 18. Access to the franchise must be on a wholly equal basis and it must not, for example, take the risk that children of better off families are registered—perhaps because their families are more likely to respond to the canvass. We note that the approach of allowing attainers to vote has been used by the Scottish Government to extend the franchise in the elections it has promoted to Health Boards. It was not an approach based on principle in that case and would be unacceptable in the referendum. It will therefore be necessary for the Scottish Government to promote a whole new canvass to ensure that persons between 16 and 18 are added to the Register. This will mean adding under-16s to the electoral register before 2014. Depending on how this exercise is conducted, it could mean the collection of data on 14-year-olds. The legislation to secure this will, we are told,

be introduced in Holyrood, but we have yet to see its content, and a number of detailed but important issues will have to be resolved:

- Can this be done while the electoral registration officers are coping with the planned shift from household to individual registration?
- How will individual registration impact on persons who are presently 15 years of age, but who will be 16 by the time of the referendum?
- What will the cost of this exercise be, and what will its effect be on other electoral registration processes?
- What arrangements will be made to deal with the difficulties, such as data protection legislation, which could arise from the publication on the electoral register of the names and addresses of children aged under 16?

28. It is disappointing that, despite the fact that they have had a number of years to develop their policy on this matter, the Scottish Ministers have not yet set out in detail their plans. It seems that they were prepared to acknowledge the unacceptability of their previous approach only once it had been pointed out to them.

29. Many Scots are not presently living in Scotland, and a number have expressed the desire to vote in the referendum. For example, we understand, that of the 11 Scottish Olympic medallists, only one is reported by Team GB to be resident in Scotland. We understand and sympathise with them: the future of their country is to be decided, perhaps while they are working for a few years in England or abroad. There are, however, real practical problems about devising a way to allow them to do so. Nevertheless, it is disappointing that Scots who are temporarily excluded from voting, due, for example, to work outwith Scotland, and who intend to return, will not be allowed to vote, and we would much prefer that a suitable mechanism could be found.

30. There is one particular group of Scots for whom provision ought to be considered very carefully: that is Scottish Service personnel who have been posted outside of Scotland for a tour of duty—for example, when a regiment has been stationed for a period in England or abroad. The provision that is made for Service personnel to vote is complex: they may register as an ordinary voter, an overseas voter (if applicable) or a Service voter. The first group simply register at their permanent address. However, Service voters can register at their current address in the UK, at an address where they would be living if they were not in the Armed Forces, or an address at which they have lived in the past. This last could be a parent's address, or a previous private or Service residence. Service personnel posted within the UK but furth of Scotland are treated differently from those who are posted outwith the UK. Such an anomaly may be acceptable for a general or European Parliament election, in which all categories will have the opportunity to vote, but it is not acceptable for a referendum on Scottish separation as proposed since some Service personnel will be disqualified due to accidents of posting.

31. If Scotland were to become a separate state, these Service personnel might be expected to serve in its armed forces (or be given the option to do so): they should be able to take part in the decision about its future. **The Scottish Government has not yet made clear what it plans in this area, and the extent to which existing electoral arrangements will**

permit servicemen and women to vote or whether special provision will need to be made for them. It should do so at the earliest opportunity. We believe that all Service personnel who will be eligible to transfer out of the British Armed Forces into their equivalent in a separate Scotland should be entitled to vote. Those who may, in future, be asked to risk their lives for a separate Scotland should be able to vote for or against its establishment.

### The wording of the question

32. It is disappointing that the precise wording of the referendum question is not yet known. There has been plenty of time for wording to be devised, tested, and confirmed. The SNP have, after all, been in office for more than five years, and as a majority administration for more than 18 months. In our Report, *The Referendum on Separation for Scotland: Do you agree this is a biased question?*, we pointed out the flaws in the question proposed by the Scottish Ministers, “Do you agree that Scotland should be an independent country?”<sup>14</sup> Most significantly, beginning a question “Do you agree...” is clearly, and deliberately, intended to elicit the answer “yes”. No disinterested professional would use such wording. The evidence we heard was comprehensive and compelling on this point. Nevertheless, the Scottish Government appears to persist in the view that its question is the right one.

33. Additionally, as has been pointed out, there are issues which have to be considered about other elements of the question as well. What does being “an independent country” mean, and what does it convey to voters who are asked to make the decision? Is it sufficiently clear that “being an independent country” means no longer being part of the United Kingdom? (The House of Lords Constitution Committee have made the interesting point that the Electoral Commission will be testing people’s understanding of what “independence” means before the Scottish Government has set out what it thinks it will mean.<sup>15</sup>) Does the wording convey with sufficient clarity that this would be a change in the present situation? Is “country” the right word, rather than “state”, since Scotland is already a country?

34. These issues matter: the question must be as clear, neutral and comprehensible as possible. That is because it will have some influence on voters’ choices, and because there must be no scope afterwards for the losing side to complain that the question was misleading or biased, and so dispute the validity of the result. Allowing the Scottish Parliament discretion over this matter will certainly reduce the risk that a vote in favour of remaining within the United Kingdom will have its validity called into question by nationalists. But, equally, a vote which brought about the end of the Union would only be seen to be valid if its wording is not subject to challenges of this kind.

35. There are two sides in the argument about separation, and each may have a different view on the issue. In these circumstances, one can only appeal to the verdict of an independent and neutral referee. Although the Scottish Government had originally

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14 Eighth Report of Session 2010-12, *The Referendum on Separation for Scotland: Do you agree this is a biased question?*, HC 1492

15 HL Paper 62, para 36

proposed to create its own referee, the agreement between the Governments provides for the Electoral Commission to make an independent judgement on the wording of the question. The Scottish Government, having agreed that the Electoral Commission should have this role, has now, finally, referred its proposed wording to them for scrutiny and testing. Two issues arise from this.

**36. First, it is in our view important that the Electoral Commission carries out comprehensive testing of the Scottish Government’s proposed question, addresses all of the challenges which have been made to it, and considers all of the alternatives which have been offered, before recommending the question wording which it considers to be the most clear and neutral. Only in that way will it secure the confidence of all involved in the process.** The Commission has experience of examining referendum questions in this way. Additionally, it has undertaken to us in correspondence to publish in full the details of the scrutiny process as well as its results.

**37. Secondly, it is therefore very disappointing that the Scottish Government has not said that it will guarantee to abide by the verdict of the Electoral Commission on the wording of the question. It insists that this will be a matter for the Scottish Parliament—which of course it controls. While it is formally true that the Parliament will have to agree the wording, there is nothing whatsoever to prevent the Scottish Government from giving the unequivocal commitment that it—as a government—will, in promoting the legislation, accept without hesitation the judgement of the Electoral Commission. We can see no reason for it not to do this, and invite the Secretary of State, who has expressed the same hope, to give the Scottish Government a further opportunity to make such a commitment. If it is unwilling to do so, the only deduction which can be made is that it wishes to retain the capacity to amend the question so as to affect the result.**

## The role of the Electoral Commission

38. The Electoral Commission has, of course, a wider role in regulating the campaign, as the section 30 Order and associated agreements make clear. It is important, again, that both sides in the campaign agreed to be bound by the recommendations of the Commission. It was disappointing—though regrettably wholly consistent with the approach of the SNP—that the “Yes” campaign, in evidence to us, prevaricated on this matter. Mr Blair Jenkins, Chief Executive of the “Yes Scotland” campaign, told us that he did not expect that the Electoral Commission would produce results which his side would find unacceptable, but added as a proviso:

I imagine there is a reason why their role is advisory rather than their having a mandatory or compulsory overview for Governments to accept. There is always room left to disagree.<sup>16</sup>

39. As we go on to discuss in the next section, This is of particular importance in relation to spending limits. The spending limits which will apply during the regulated period of the referendum will be set out in the legislation and they must be limits which have been

determined not by one side or the other in the argument but by an independent referee. **Once again, the Scottish Government, as opposed to the Parliament, should give a clear and unequivocal commitment that it will accept the advice and recommendations of the Electoral Commission on spending limits and other matters relating to the administration of the referendum. The Secretary of State should give the Scottish Government another opportunity to make such a statement, and if it does not, it will cement the concern that it wishes to retain the capacity to alter the rules so as to get the result which it favours.**

## Spending limits

40. This referendum will be the most significant decision which Scotland has taken since 1707. It will be taken by the people, and they must have the fullest information about the arguments for and against so that they can make up their minds. That is the function of campaigns: in making the case for and against the change, the two sides will each make their case and test the arguments of their opponents, and bring the issues to the attention of the public directly and through the media. This is a critical part of the democratic process. In most referendum campaigns, there has been public funding for campaign organisations on each side, in addition to funds they raise themselves. The Scottish Government has indicated that it does not plan to provide any public funding for campaigns in this referendum. This policy will undoubtedly favour whichever side has already accumulated the larger war chest. Scottish voters will be aware of which side of the argument this is and draw their own conclusions as to motivation. Unless a fairer policy is introduced, the campaigns will therefore be funded solely by donations.

41. Each campaign will be able to spend up to limits set in the referendum legislation. What those limits should be has been the subject of much debate. So far as the limits applying to the campaigns themselves are concerned, they must be big enough to allow the campaigns to do their job of informing the public, but should not be so large as to allow one side the opportunity to outspend the other hugely and so distort the debate. The Scottish Government has proposed limits of £750,000 for each side during the regulated period. These proposals have been criticised as too small to enable the campaigns to give out sufficient information. As we heard in evidence, even the paper and printing costs of one leaflet, to include in the free mailshot to 2½ million households, could consume a significant proportion of the limit. Comparisons with the 1997 referendum are also instructive. In evidence, Mr Blair MacDougall of the “Better Together” campaign drew attention to a paper by Mr Nigel Smith, who had been Chief Executive of the “Yes” campaign in the 1997 referendum. In it he pointed out that the limits in PPERA had been based on that campaign but had not been uprated for inflation since then, and that as a result they had in effect halved in value.<sup>17</sup> This campaign will be of greater significance than the 1997 one, and will last longer (a regulated period of 16 weeks, as we discuss below) and so the spending limits ought to be greater. £750,000 works out at 1p per voter per week of the campaign period.

42. This is an area where the Electoral Commission is in a position to advise, and has experience of doing so. It has now proposed larger limits for the campaigns and indeed for

other regulated participants. Even these will constrain the ability of the campaigns to get their messages across. In evidence to us, the “Better Together” campaign agreed to accept whatever advice the Commission gave, but Mr Jenkins of the “Yes Scotland” campaign was unwilling to give a promise to do so. He wanted to know what the advice was first. As we note above, the Scottish Government is in a similar position: it is unwilling to give a commitment to promote legislation which accepts the Electoral Commission’s advice. It has given no convincing reason for this. The people of Scotland deserve better than that. **Having agreed to the appointment of the referee, the Scottish Government should undertake to abide by its rulings—before they are made, and not only once they are known.**

## Donations

43. The two campaigns will be funded, therefore, to the extent that this is permitted, by donations. **During the regulated period, there are legal constraints in PPERA on what donations may be accepted, and how they should be accounted for. By virtue of the Order and agreement these provisions will carry across into the Scottish legislation, and the Scottish Government has agreed in the discussions with the UK Government that it will broadly follow the PPERA framework. We welcome this, but wish to be reassured that any variations from it were fully and openly justified.**

44. Under PPERA, donations of over £7,500 must be recorded and declared publicly. Donations may be accepted from persons on the UK electoral register, from companies incorporated in the UK and various other bodies. In general, persons and companies outside the United Kingdom cannot make donations to UK elections or referendums. Donations of under £500, for administrative reasons, are not subject to the same scrutiny.

45. The fact that donations under £500 are effectively unregulated should not necessarily be taken to mean that they are unimportant. Although Mr Jenkins of the “Yes Scotland” campaign played down the cumulative impact of sums under £500<sup>18</sup>, the “True Wales” campaign, which campaigned against further powers in the March 2011 Welsh referendum, told us, “We raised [...] money through subscriptions and small donations”<sup>19</sup>. We are also aware of the focus upon small donations in certain campaigns in the United States, where these practices are most highly developed.

46. The issue of foreign donations is an important one. A number of high-profile participants in the Scottish independence debate are in fact domiciled abroad. In our view, neither of the two campaigns should accept foreign donations. In evidence to us, Blair McDougall of the “Better Together” campaign agreed: in his view, only donations from those who could contribute to the UK election campaigns should be accepted, and the campaign made a point of asking those who made even small donations, under the £500 threshold, to confirm that they were eligible to donate, and were not from abroad.<sup>20</sup> Blair Jenkins of the “Yes Scotland” campaign took a different view. Although he did not expect many donations from abroad, he was prepared to accept them, if they were under the £500

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18 Qq 1827-29

19 Ev 203

20 Q 1825

limit (and so not subject to the same rigorous PPERA framework as bigger donations). He indicated that there was an organisation in the United States of America which encouraged proponents of Scottish independence there to support the campaign.<sup>21</sup> The existence of such a front organisation gives us further concern about the extent to which foreign money could distort the referendum campaign.

**47. In our view, foreign donations should not be allowed. The referendum will be about the future of Scotland and the UK, and donations from outwith the UK should not be permitted.**

### The length of the regulated period

48. In most referendums in the United Kingdom, the campaign is relatively short. In recent examples the campaigns have been only a matter of weeks long. There has, therefore, been no problem about ensuring that the whole campaign period has been regulated. This was true in the referendum on legislative powers for the Welsh Assembly, and on the Alternative Vote. This referendum, however, is still about two years away, and the campaign has already in substance started. (We were able to take evidence from the chief executive of each campaign organisation.) The regulated period, during which the Electoral Commission will have formal powers to control certain aspects of the campaign, will however be determined by the Scottish Parliament legislation authorising the referendum. We understand that the Scottish Government plans—in accordance with Electoral Commission advice, we are pleased to note—that the regulated period should be 16 weeks long only. The unregulated period, therefore, will be something like five times longer than the regulated period.

49. This cannot now be prevented, and in evidence to us, the Electoral Commission proposed a mechanism for voluntary disclosure of donations so that the two campaigns could be wholly transparent about their funding, and where it came from, even though there is no legislative requirement for them to do so.<sup>22</sup> We were therefore pleased when, in evidence to us, both campaigns agreed that they would proceed in this way.<sup>23</sup> We also believe that, if there are to be rules governing income during the unregulated period, then so there should also be rules governing expenditure. For consistency, we believe the Electoral Commission should offer guidance, and the two campaigns, and other participants, should accept it.

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21 Qq 1823 and 1828

22 Qq 858-60

23 Qq 1819-20

## 4 Conclusion

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50. The section 30 Order proposed by the UK Government is one of the most significant pieces of secondary legislation ever to be considered by Parliament. It will enable a referendum to be held which will decide on the future of the Union and Scotland's place in the United Kingdom. It therefore merits very careful scrutiny.

51. **We welcome the fact that there is to be a referendum. The question of Scotland's future does need to be decided, and a referendum is the only authoritative way to do so. The referendum therefore needs, as the UK Government has repeatedly emphasised, to be legal, fair and decisive. Providing in the Order that there should only be one question, and that it should determine the question of separation, will ensure that the outcome is decisive, and not confused by the Scottish Government's previous aspirations to muddy the waters with an additional question.**

52. Proceeding by a section 30 Order ensures that there is a sound legal basis for the legislation in Holyrood. That could have been achieved by legislation that Westminster as there is no doubt about Westminster's powers in this matter. **But we accept that there is an overriding aim that the result of the referendum should be accepted by all, and allowing the legislation to be made in the Scottish Parliament, with its SNP majority, will mean that supporters of separation cannot blame the legislative process for a result which is unwelcome to them. It will have been, as the Secretary of State has emphasised, 'made in Scotland'. It must also be able to secure 'losers' consent'.**

53. This theme underpins all our conclusions: the result, whatever it is, has to be accepted by both sides and it is therefore of the highest importance that the referendum should be fair, and seen by all to be fair. Applying the provisions of the Political Parties, Elections and Referendums Act 2000 to the referendum will go a considerable way to ensuring this. **The involvement of the Electoral Commission is important in this respect. It is an unbiased referee, and it is important that the campaigners and the Governments agree to abide by its recommendations. We are, however, concerned that the Scottish Government has not committed to do this. We have seen, in its proposed referendum question, that it adopts an approach which does not appear to be neutral. Similarly, we are concerned about the possibility of its disregarding the Electoral Commission's advice on spending limits. It would be better for the Scottish Government—and for the Scottish people—if it agreed now to follow all the advice of the Electoral Commission on this and the other regulated and relevant matters. If it does not do so, it will leave a suspicion that it is prepared to look for what scope it can to fix the referendum rules so as to increase the chances of a "yes" vote. This would be the 'aggregation of marginal gains' used by the British cycling team to gain competitive advantage. However we believe that such an approach would be self-defeating: a "yes" vote obtained in that way would be subject to charges of illegitimacy. The result of this referendum must be accepted by all involved. The challenge for the Scottish Government, and the heavy responsibility for the Scottish Parliament in scrutinising its proposals, is to behave in a way which ensures that "the referendum is fair and commands the confidence of both sides of the debate".**

## Conclusions and recommendations

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### The case for holding a referendum

1. There is now a widespread expectation that a referendum will take place. We agree that one should, and therefore we welcome the steps to bring it about. (Paragraph 14)
2. We agree that this is, in the end, a decision which only the Scottish people can take, and that, whatever their views on the matter, it is a decision which the rest of the United Kingdom should be prepared to accept. It would be wrong to seek to hold Scotland to the Union if the Scottish people voted for separation. Conversely, if the Scottish people confirm that the wish to remain part of the United Kingdom, then the question of separation should be regarded as firmly settled for a generation or more. (Paragraph 14)

### Should the referendum be ‘made in Scotland’?

3. It may be seen as disappointing that a referendum which would have been subject to no legal uncertainty, and which could have been perfectly easily legislated for at Westminster might attract unjustified criticism that it was not ‘made in Scotland’: but the aim of getting a result to which all will assent seems to us to be an overriding one, and we are therefore prepared to agree to the section 30 Order approach, and to discretion being given to the Scottish Parliament under that to arrange a referendum. Consequences, however, follow. A high responsibility now devolves onto the Scottish Parliament to ensure that the terms of the referendum are indeed compliant with the highest standards, so that the process will command the assent of both sides. It will be important that the Scottish Parliament ensures the Scottish Government fulfils the terms of its agreement with the UK Government, and in particular follows the independent and neutral advice of the Electoral Commission where they are obliged, or have agreed, to seek it. (Paragraph 18)
4. We believe there will be huge temptation for the Scottish Government to follow the mantra of British cycling and pursue the ‘aggregation of marginal gains’ and to seek to gain partisan advantage from every element of the referendum process. We recognise that the Scottish Government, controlled by a party committed to separation, will be in the position of being both a player in the game as well as trying to exercise the role of neutral referee. (Paragraph 19)
5. It is thus our view that two principles will be essential if the proposed referendum is to meet the highest standards of fairness. The first is that decisions in the Scottish Parliament should be on the basis of wide consensus, rather than a majority being used to ram through partisan choices. The second is that the decisions of an impartial third party, in this case the Electoral Commission, should be accepted (unless an alternative consensus exists). The people of Scotland may have voted for a referendum to be held—but they were never asked to approve a biased, rigged or gerrymandered vote. (Paragraph 20)

### The timing of the referendum

6. In our view, it would have been better for the people of Scotland, and the rest of the United Kingdom, for the legislative issues to have been settled before now so that a referendum could have been held earlier, and given the Scottish people a more timely opportunity to make their decision. What is important now is that there is no further slippage by the Scottish Government, and we welcome that fact that there is a firm end date in the Order. There can be no question of delay beyond 2014. (Paragraph 23)

### The franchise

7. The Scottish Government has not yet made clear what it plans in this area, and the extent to which existing electoral arrangements will permit servicemen and women to vote or whether special provision will need to be made for them. It should do so at the earliest opportunity. We believe that all Service personnel who will be eligible to transfer out of the British Armed Forces into their equivalent in a separate Scotland should be entitled to vote. Those who may, in future, be asked to risk their lives for a separate Scotland should be able to vote for or against its establishment. (Paragraph 31)

### The wording of the question

8. First, it is in our view important that the Electoral Commission carries out comprehensive testing of the Scottish Government's proposed question, addresses all of the challenges which have been made to it, and considers all of the alternatives which have been offered, before recommending the question wording which it considers to be the most clear and neutral. Only in that way will it secure the confidence of all involved in the process. (Paragraph 36)
9. Secondly, it is therefore very disappointing that the Scottish Government has not said that it will guarantee to abide by the verdict of the Electoral Commission on the wording of the question. It insists that this will be a matter for the Scottish Parliament—which of course it controls. While it is formally true that the Parliament will have to agree the wording, there is nothing whatsoever to prevent the Scottish Government from giving the unequivocal commitment that it—as a government—will, in promoting the legislation, accept without hesitation the judgement of the Electoral Commission. We can see no reason for it not to do this, and invite the Secretary of State, who has expressed the same hope, to give the Scottish Government a further opportunity to make such a commitment. If it is unwilling to do so, the only deduction which can be made is that it wishes to retain the capacity to amend the question so as to affect the result. (Paragraph 37)

### The role of the Electoral Commission

10. Once again, the Scottish Government, as opposed to the Parliament, should give a clear and unequivocal commitment that it will accept the advice and recommendations of the Electoral Commission on spending limits and other matters relating to the administration of the referendum. The Secretary of State should give

the Scottish Government another opportunity to make such a statement, and if it does not, it will cement the concern that it wishes to retain the capacity to alter the rules so as to get the result which it favours. (Paragraph 39)

11. Having agreed to the appointment of the referee, the Scottish Government should undertake to abide by its rulings—before they are made, and not only once they are known. (Paragraph 42)

## Donations

12. During the regulated period, there are legal constraints in PPERA on what donations may be accepted, and how they should be accounted for. By virtue of the Order and agreement these provisions will carry across into the Scottish legislation, and the Scottish Government has agreed in the discussions with the UK Government that it will broadly follow the PPERA framework. We welcome this, but wish to be reassured that any variations from it were fully and openly justified. (Paragraph 43)
13. In our view, foreign donations should not be allowed. The referendum will be about the future of Scotland and the UK, and donations from outwith the UK should not be permitted. (Paragraph 47)

## Conclusion

14. We welcome the fact that there is to be a referendum. The question of Scotland's future does need to be decided, and a referendum is the only authoritative way to do so. The referendum therefore needs, as the UK Government has repeatedly emphasised, to be legal, fair and decisive. Providing in the Order that there should only be one question, and that it should determine the question of separation, will ensure that the outcome is decisive, and not confused by the Scottish Government's previous aspirations to muddy the waters with an additional question. (Paragraph 51)
15. But we accept that there is an overriding aim that the result of the referendum should be accepted by all, and allowing the legislation to be made in the Scottish Parliament, with its SNP majority, will mean that supporters of separation cannot blame the legislative process for a result which is unwelcome to them. It will have been, as the Secretary of State has emphasised, 'made in Scotland'. It must also be able to secure 'losers' consent'. (Paragraph 52)
16. The involvement of the Electoral Commission is important in this respect. It is an unbiased referee, and it is important that the campaigners and the Governments agree to abide by its recommendations. We are, however, concerned that the Scottish Government has not committed to do this. We have seen, in its proposed referendum question, that it adopts an approach which does not appear to be neutral. Similarly, we are concerned about the possibility of its disregarding the Electoral Commission's advice on spending limits. It would be better for the Scottish Government—and for the Scottish people—if it agreed now to follow all the advice of the Electoral Commission on this and the other regulated and relevant matters. If it does not do so, it will leave a suspicion that it is prepared to look for what scope it

can to fix the referendum rules so as to increase the chances of a “yes” vote. This would be the ‘aggregation of marginal gains’ used by the British cycling team to gain competitive advantage. However we believe that such an approach would be self-defeating: a “yes” vote obtained in that way would be subject to charges of illegitimacy. The result of this referendum must be accepted by all involved. The challenge for the Scottish Government, and the heavy responsibility for the Scottish Parliament in scrutinising its proposals, is to behave in a way which ensures that “the referendum is fair and commands the confidence of both sides of the debate”. (Paragraph 53)

## 5 Formal Minutes

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**Wednesday 9 January 2013**

Members present:

Mr Ian Davidson, in the Chair

Mike Crockart

Jim McGovern

Iain McKenzie

Pamela Nash

Mr Alan Reid

Lindsay Roy

Draft Report (*The Referendum on Separation for Scotland: The proposed section 30 Order—Can a player also be the referee?*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 53 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Sixth 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 till Tuesday 15 January at 9.30 am

# List of Reports from the Committee during the current Parliament

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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 1942

## Session 2012–13

First Report	A Robust Grid for 21 <sup>st</sup> Century Scotland	HC 499
Second Report	The Referendum on Separation for Scotland: making the process legal	HC 542
Third Report	The Referendum on Separation for Scotland: a multi-option question?	HC 543
Fourth Report	The Referendum on Separation for Scotland: Terminating Trident—Days or Decades?	HC 676 (HC 861)
Fifth Report	The Future of HM Coastguard in Scotland	HC 583