



A second independence referendum

When and how could Scotland vote again?

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The Scottish government is demanding a second independence referendum, but the UK prime minister, Boris Johnson, has ruled out giving consent for one. He has the legal right to do so – but if Scotland continues to vote for pro-independence parties, a second referendum may become all but impossible to resist. This paper considers when and how such a vote might take place and the factors that would make it seem more – or less – legitimate.

Summary

- The Conservatives won a large majority in the general election on 12 December 2019, but the Scottish National Party (SNP) was the second big winner of the night, taking 48 of 59 Scottish seats, on a manifesto calling for a second independence referendum and for Scotland to remain in the EU (or to rejoin it). This result sets Westminster and Holyrood on a collision course over the future of the Union.

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- Scotland's right to self-determination has been recognised by several previous UK governments. But this does not give Scotland an automatic right to secede or declare independence. The international consensus is that (except in extreme cases) questions relating to self-determination and independence must be resolved according to each state's internal constitutional arrangements.
 - Therefore, if Scotland is to vote again, this must follow a new agreement between the UK and Scottish governments, as for the first referendum in 2014.
 - If the Scottish government were to proceed with a referendum without Westminster's agreement, this would probably be ruled unlawful by the UK Supreme Court. Any such vote would lack legitimacy and could simply be ignored by the UK government.
 - So, while Johnson does have the power to refuse another referendum, and so hold the Union together for now, it may not be a sustainable strategy for the long run.
 - If the prime minister wants to preserve and strengthen the Union, he will have to develop a positive vision – going beyond a purely economic case – that persuades the people of Scotland that their interests lie within the UK.
 - This could include the devolution of additional powers to Edinburgh, new protections that prevent Westminster from legislating in devolved areas, or rights for the devolved institutions to be brought into international negotiations and the development of post-Brexit common frameworks.
 - If Westminster and Holyrood did eventually agree on the principle that a second referendum was justified (and opinion polls and the results of the 2021 election for the Scottish Parliament would play a big part in that), they would then have to consider carefully and agree the conditions for the vote. A referendum should only take place once voters can make an informed choice between clearly defined alternative constitutional futures.
 - The SNP has proposed that a referendum takes place in 2020. However, the UK and EU are unlikely to have agreed their future relationship by then, so voters would not be clear on what remaining in the UK would actually look like. It would also take time for the Scottish government to set out its vision for independence, and for the UK government to develop alternative proposals for a reformed Union and new powers for Scotland, if it chose to do so.
 - Important constitutional processes should not be rushed; the first referendum in 2014 was held more than three years after agreement was reached in principle that the vote could take place. This means that holding an independence referendum in 2020 would not be advisable.
 - The UK government might also wish to make the holding of any second referendum conditional on demonstration of substantial support for independence in the 2021 Scottish Parliament election, which could then be fought explicitly on the question of whether there should be another referendum. This would be in line with the 2014

precedent, where it was the SNP's majority at Holyrood that enabled it to claim a mandate for the first independence referendum.

- If agreement were reached that a second referendum could be held, then, following the 2014 precedent, the power to legislate for this should be devolved to Holyrood using a 'section 30 order' – a type of secondary legislation that can amend the powers of the Scottish Parliament and requires the consent of both the UK and Scottish Parliaments.
- The power to hold an independence referendum could be devolved on a temporary or permanent basis. If devolved permanently, the section 30 order should specify that a minimum period, such as 10 years, would have to pass before the power could be used again, to address concerns about repeated referendums.
- To ensure the details of the referendum were subject to sufficient scrutiny, it should also be legislated for in primary legislation, by way of an Act of the Scottish Parliament, which would specify the wording of the question and the date of the poll.
- The Electoral Commission should be required to test the proposed referendum question to ensure it was easy to understand and free from bias – even if the wording were the same as that used in the 2014 referendum.
- If a multi-option referendum were proposed – for example, with UK government proposals for a reformed Union with more powers for Scotland on the ballot paper alongside independence and the status quo – details of that 'middle' option should be set out in legislation beforehand, so it was clear to voters precisely what they were voting for. Careful consideration would need to be given to the voting system used as there is little precedent for multi-option votes of this kind.
- There is an argument that the entitlement to vote should be the same as that used for Scottish Parliament elections, to prevent a perception that the franchise had been changed to favour one outcome. Under current law, any change to the franchise (for instance to include some prisoners, as the Scottish government proposes), can only be made with a two-thirds majority in the Scottish Parliament, meaning cross-party agreement would be required.
- Following the 2016 EU referendum, there has been debate about whether major constitutional changes should take place where there is only a narrow majority in favour of them, because of the extent of disruption and the difficulty of protecting interests of the losing side. There might therefore be calls to impose a special threshold or 'supermajority' rule in a future independence referendum (such as a requirement that independence secures at least 55% of votes). But this could undermine the perceived legitimacy of the referendum amongst those in favour of independence. So, any such rule should ideally be based on cross-party agreement not simply mandated by Westminster.

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- In line with the precedent set in 2014, and given the importance of this issue, the official campaign period for a referendum should last at least 16 weeks.
 - Before any possible referendum takes place, there should be far more clarity on the Scottish government's proposals for an independent Scotland (including its future relationship with both the UK and the EU), on how post-referendum negotiations between Holyrood and Westminster would work in the event of a vote for independence, and on how the negotiated terms of independence would be ratified. Despite assertions by the SNP that the EU would welcome Scotland as a new member, that cannot be taken for granted.
 - If the Scottish and UK governments agreed a new referendum should go ahead they will need to begin work on these questions immediately. The Institute for Government would then also carry out further detailed analysis to inform the debate.

Introduction

The results of the 2019 general election have laid bare the divided state of the Union. The Conservatives secured a solid majority based on gains in England and Wales. In Scotland, meanwhile, the Scottish National Party (SNP) dominated, winning 48 of 59 Scottish seats, leaving just 11 Scottish unionist MPs in Westminster.

The question of Scottish independence was a key battleground in the election. The SNP placed the issue at the centre of its campaign, arguing that Scotland, which voted against Brexit by 62% to 38% in 2016, should have the chance to choose whether to leave the UK in order to remain within – or rejoin – the EU as an independent member state. The Scottish Conservatives also ran on a second referendum platform; their manifesto was entitled “No to Indyref2”. But the party lost over half its seats in Scotland, reducing its total number to six.

The morning after the election, Scottish first minister and SNP leader Nicola Sturgeon argued that the results sent a “clear message”, claiming that there was a “renewed, refreshed and strengthened mandate” for another vote.¹ The Scottish government argues that a second referendum should take place in 2020; a formal request for Westminster to devolve the power to hold it is imminent.²

The Conservative government is likely to refuse such a request. The prime minister, Boris Johnson, like his predecessor Theresa May, argues that the 2014 vote settled the independence question, and that no further vote should be held. And the Conservatives made opposition to a second vote on independence a central pillar of their campaign platform. The party's 2019 manifesto committed to strengthening the Union, which it describes as “the most successful political and economic union in history”.³

But pressure for a second referendum is unlikely to subside. In every parliamentary election (to both the House of Commons and Scottish Parliament) since 2011, pro-independence candidates have won an overall majority of Scottish seats.

If that pattern continues, simply continuing to refuse to engage with the possibility of a second referendum may become untenable.

If a second referendum on independence is to be held, it is of utmost importance that the process and result are perceived as legitimate from those on both sides of the debate. In this context, this paper considers the circumstances in which a referendum could take place and the process that should be followed.

We argue that the referendum should take place on a clear legal basis, based on agreement between the UK and Scottish governments. Drawing on the agreement that preceded the last independence referendum, in 2014, and political developments since, we look at the circumstances in which a second independence referendum would be justified, and consider what conditions should be attached to any agreement to devolve the power to hold a referendum to the Scottish Parliament – particularly regarding when the referendum should be held.

We then look at the conduct of the referendum itself and the principles that should guide the process. We consider what the legislative basis for the vote should be, how the question should be determined, who should have the right to vote in the poll, how the referendum campaign should be regulated, and whether any special thresholds should be required.

Finally, we discuss what further consideration would be needed both on proposals for independence and on the process that would follow a vote for independence.

Our aim is not to advocate for or against another referendum, or independence itself. But we do believe that if Scotland does vote again on its membership of the UK, it should do so on a sensible timetable and under conditions that have been carefully considered and agreed to by all sides. Until that moment arrives, the UK government should take the opportunity to make the positive case for the Union, and to seek to persuade the Scottish people that their interests are best served by remaining part of the UK, if necessary by developing proposals for further constitutional reform that strengthens the autonomy of the devolved institutions.⁴

How does the question of Scottish independence relate to wider thinking about self-determination?

The debate on Scottish independence is situated in wider, international debates about both the principle of self-determination and the right to secession.

The principle of self-determination – the right of people to “freely to determine... their political status”⁵ – has a long history in international law and the practice of international relations. It was formally recognised in the 1945 UN Charter, which was expressly based on respect for the self-determination of ‘peoples’, and which has since been invoked in further UN instruments as well as the jurisprudence of the International Court of Justice and national supreme courts.

However, there is ongoing debate as to whether the right to self-determination necessarily extends to the right to secession, meaning the right of a territory to declare independence from a larger sovereign state, irrespective of the wishes of the rest of that state. This is because a right to secession would inevitably come into conflict with the principle of territorial integrity, which is key in international relations. Territorial integrity is recognised in Article 4 of the EU's Lisbon Treaty as an "essential state function",⁶ and refers to the territorial "wholeness" of the political state and certainty of its borders.

Internationally, the right to secede and declare independence unilaterally is typically only recognised for peoples governed as part of a colonial empire or, more rarely, in cases of flagrant human rights violations or massive democratic under-representation.⁷

In some countries, secession is permitted because specific national constitutional arrangements allow for such a right. For example, in the case of Montenegro, which became independent following a referendum in May 2006, the option of secession was expressly outlined by the Constitutional Charter of Serbia and Montenegro. Article 60 provided for a three-year referendum-free period, and following that "member-states shall have the right to begin the process... to secede from the State Union of Serbia and Montenegro".⁸

The independent state of Montenegro was promptly recognised by the majority of the international community, including by the EU Council, which took a co-ordinated approach that led to all its member states recognising the country's independence in June 2006.⁹ Similarly, the Greenland Self-Government Act 2009 provided a process and conditions for Greenland to become independent from Denmark, starting with a decision made by the people of Greenland and followed by negotiations between the respective governments.¹⁰

The Canadian province of Quebec has also twice voted on independence, in 1980 and 1995, rejecting the proposal on both occasions. In 1998, three years after the second Quebec referendum, the Canadian Supreme Court acknowledged the province's constitutional right to secede:

A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.¹¹

The international community appears to be supportive of secession where this is consented to by the central government or provided for through the relevant state's constitution. Self-determination and independence debates are generally regarded as domestic affairs, as also articulated by the Canadian Supreme Court: "[In democratic societies] peoples are expected to achieve self-determination within the framework of their existing state".¹²

The UK has no written constitution or domestic legislation in which the principle of self-determination is explicitly recognised for Scotland, however it was acknowledged specifically for the "people of the island of Ireland" in the Good Friday Agreement

1998.¹³ The principle also has a long tradition within Scottish constitutional and legal debate, dating back to the 1707 Union between England and Scotland.¹⁴ The terms of the Union preserved many elements of Scotland's statehood, including its separate legal system, established church and education system. Scotland was never fully integrated into a unitary state governed from Westminster.

Scotland has a longstanding constitutional doctrine of 'popular sovereignty', which holds that the people of Scotland did not give up their nationhood by joining the Union with England, and therefore retained the right to determine their own form of government within the UK.* Devolution since 1999 was itself predicated on this idea, as expressed in the Claim of Right for Scotland, signed by the Labour and Liberal Democrat parties and various civil society organisations in 1989, and which asserted the "sovereign right of the Scottish people to determine the form of Government best suited to their needs".¹⁵

Scotland's right to self-determination, up to the point of securing independence from the UK, has also been recognised by several previous UK governments and prime ministers. The Cameron-led coalition government noted that:

Successive UK governments have said that, should a majority of people in any part of the multi-national UK express a clear desire to leave it through a fair and democratic process, the UK government would not seek to prevent that happening.¹⁶

In the foreword to a 1993 white paper on Scotland's place in the Union, then prime minister John Major asserted that "no nation could be held irrevocably in a Union against its will".¹⁷ Additionally, in her memoirs, Margaret Thatcher reflected on the Scottish people that "as a nation, they have an undoubted right to national self-determination [and] should they determine on independence no English party or politician would stand in their way".¹⁸

Nonetheless, the principle of self-determination does not create the right for Scotland to declare independence unilaterally. Any expression of self-determination must take place legally, within the UK's constitutional framework.

How could a second Scottish independence referendum legally take place?

Under the terms of the devolution settlement, the Scottish Parliament cannot pass legislation that relates to the Union between Scotland and England. The Scotland Act 1998 provides that:

The following aspects of the constitution are reserved matters, that is—

- a) the Crown, including succession to the Crown and a regency,
- b) the Union of the Kingdoms of Scotland and England.¹⁹

* This idea was reflected in the leading case of *MacCormick* in 1953, where the court of session observed that "the principle of unlimited sovereignty of Parliament is a distinctively English principle and has no counterpart in Scottish constitutional law". [*MacCormick v Lord Advocate* 1953, SC 396]

This is widely interpreted to mean that for the Scottish Parliament to be able to hold a referendum on independence, the UK Parliament would need to transfer the power to do so to Holyrood. Before the 2014 referendum, this was done through a 'section 30 order', a form of secondary legislation issued under the Scotland Act 1998 that amends the powers of the devolved institutions.

This instrument – the Scotland Act 1998 (Modification of Schedule 5) Order 2013 – amended the Scotland Act so that it no longer reserved a referendum on the independence of Scotland if certain requirements were met, including that it had to take place before the end of 2014, effectively making the transfer of power temporary.

There is some debate about whether the Scottish Parliament could legislate to hold a referendum on independence without agreement from Westminster. The argument is that such a referendum would be consultative (that is, non-legally binding) and as such a vote for independence would not in itself change the nature of the Union; it would instead simply give the Scottish government a mandate to negotiate independence with Westminster.²⁰ This was considered in a 2007 Scottish government paper, which noted that:

At present the constitution is reserved [a matter for the UK Parliament], but it is arguable that the scope of this reservation does not include the competence of the Scottish government to embark on negotiations for independence with the United Kingdom Government.²¹

However, a referendum of this kind would almost certainly be referred to the UK Supreme Court, where any legislation that enabled it could be struck down on the grounds that even a non-binding vote would “‘relate to’ the reserved matter of the Anglo-Scottish Union and would therefore go beyond the legislative competence of the Scottish Parliament.

The chances of such a conclusion being reached by the Supreme Court were arguably increased by its judgment in the 2017 *Miller* case. As Professor Stephen Tierney has noted, in that case the court “took a narrow approach to devolution, and also adopted a wide approach to constructing what ‘the effect’ of actions is”.²² This may make it more likely that a consultative referendum on independence would be viewed in light of its political purpose and the impact on the Union that a vote for independence could have, and would be judged to fall outside of the Scottish Parliament’s powers.

Even if it were ruled legal, a referendum held without Westminster’s authorisation would be likely to face a boycott from unionist parties and voters in Scotland, and a positive vote for independence could simply be disregarded by the UK government.

This is what happened when the Government of Catalonia proceeded first with a ‘consultative’ or ‘symbolic’ vote on independence from Spain, in 2014, and then with an attempt at a legally binding referendum in 2017. Both were conducted in defiance of the Constitutional Court of Spain, and resulted in civil unrest, the imprisonment of several leading Catalan politicians, and the imposition of direct rule from Madrid over the region.²³

The Scottish government has never formally conceded that it could only hold an independence referendum with backing from Westminster. The 2012 Edinburgh Agreement – in which the UK and Scottish governments agreed on the terms of the 2014 referendum – stated only that the section 30 order was needed to “put it beyond doubt” that the Scottish Parliament could legislate for the referendum.²⁴

However, the Scottish government has been clear that its preference is to proceed with its plans for independence on a clear legal basis, with Sturgeon stating that:

“The process by which we choose Scotland’s future must be capable of actually achieving independence. It must allow majority support to be expressed clearly and unambiguously. It must be legal.”²⁵

Leading SNP politicians have resisted calls from activists to proceed with their party’s plan for independence through any route other than a referendum held with the agreement of Westminster. Proposals for a ‘Plan B’ route to independence, in which a pro-independence majority at the next Holyrood election would serve as a mandate to begin independence negotiations with Westminster, were defeated in a floor vote at the 2019 SNP conference in October.²⁶

Sturgeon repeatedly refers to the legal process of the 2014 referendum as the “gold standard” and states that this is how a future result can “secure unquestioned legitimacy not just here at home but, crucially, within the EU and the wider international community”.²⁷

Any second independence referendum should take place on the basis of agreement between the UK and Scottish governments on terms and timing, to be both legally watertight and perceived as legitimate on all sides. The path to a second referendum must therefore almost certainly run via Westminster.

So, in what circumstances might agreement from the UK government be forthcoming? An obvious place to start is to consider how the first independence referendum took place.

What was the path to the first Scottish independence referendum?

The first independence referendum came about after the SNP won an outright majority, with 69 of the 129 Holyrood seats, in the 2011 Scottish Parliament election (see Figure 1, overleaf), on a manifesto that explicitly committed to “bring forward our Referendum Bill in this next Parliament”.²⁸

Immediately after that election, the then UK prime minister, David Cameron, accepted that the SNP’s “emphatic” victory justified a referendum, stating only that “if they want to hold a referendum, I will campaign to keep our United Kingdom together, with every single fibre that I have”.²⁹

Although Cameron’s immediate acceptance that Scotland had the right to leave the UK came as a surprise to some international observers,³⁰ his position was in fact in line with that of several previous prime ministers and with the idea that the UK is a “family of nations”, rather than a unitary state (as discussed above).

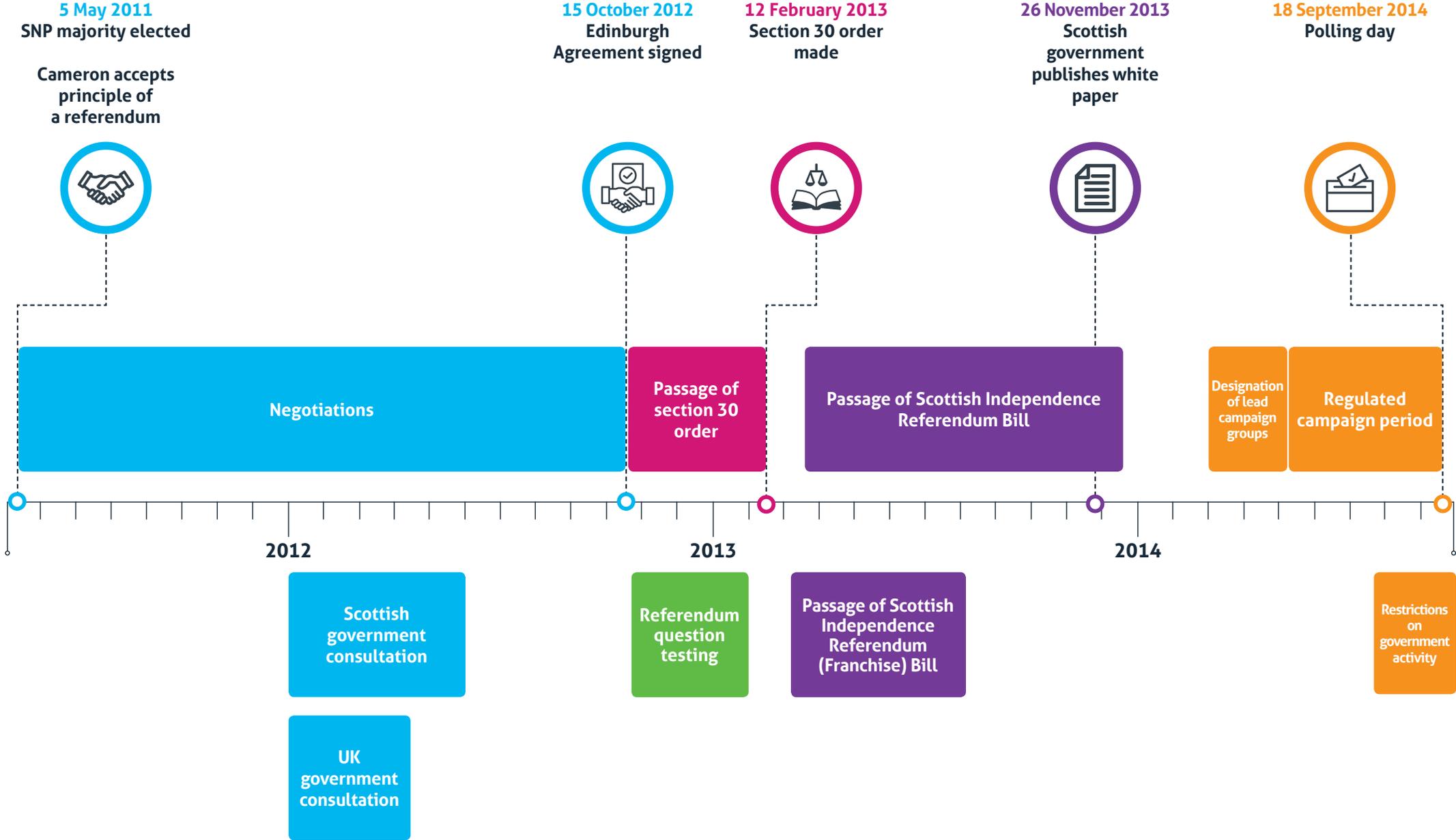
In 2011, Cameron’s acceptance of the mandate for a referendum was followed by negotiations between the UK and Scottish governments, which culminated in the Edinburgh Agreement in October 2012.³¹ Under this agreement, the UK government agreed to pass a section 30 order that would devolve the power to legislate for an independence referendum, and both governments agreed a set of principles and conditions for the vote, as discussed further below.

The section 30 order was passed in the two Houses of the UK Parliament and the Scottish Parliament between December 2012 and January 2013, coming into force on 13 February 2013. Subsequently, the Scottish Parliament passed the Scottish Independence Referendum Act 2013, which provided the legal basis for the vote, and set out the details of how the referendum would work. The bill became law on 17 December 2013.

In the referendum, held on 18 September 2014, Scotland voted by 55% to 45% to remain in the UK, with a turnout of 85%, the highest in any UK election or referendum in over 100 years.³² During the campaign, the referendum was described – including by the Scottish government in its pre-referendum white paper – as a “once-in-a-generation opportunity”³³ – and the result appeared at the time to have settled the issue.

This has not proven to be the case.

Figure 1: The path to the first Scottish independence referendum



Why is Scottish independence back on the agenda?

Despite the defeat for the 'Yes' campaign in 2014, the SNP cemented its position as the dominant party of Scottish politics, and this shows no immediate sign of coming to an end. The party saw a rapid rise in membership both during and after the referendum campaign: the party had 25,000 members in December 2013; it had 115,000 two years later.³⁴

The SNP has also had a series of electoral successes in Scotland. The party won an unprecedented landslide in the 2015 UK general election, taking 56 of 59 Westminster seats and wiping out Scottish Labour from its long-established heartlands in west and central Scotland. A year later, the party was comfortably returned to power in the 2016 Scottish Parliament election.

Including European and local elections, the SNP has topped the poll in every Scotland-wide vote since the 2010 UK general election. This dominance has ensured that independence has remained on the agenda.

But the big game-changer, at least from the Scottish government's point of view, was the 2016 EU referendum, in which 62% of Scottish voters backed Remain, in marked contrast to the UK-wide 52% majority for Leave. In light of this result, it declared that:

While the referendum resulted in a mandate for England and Wales to leave the EU, that was not the case for Scotland and Northern Ireland, nor did it provide a mandate for the terms of exit.³⁵

The then UK prime minister, Theresa May, rejected the idea that the referendum result created special circumstances for Scotland:

"Different constituencies [sic] voted in different ways. Scotland, Wales and Northern Ireland voted in different ways – Wales voted to leave; Scotland and Northern Ireland voted to remain – but the overall response of the United Kingdom was a vote to leave the European Union, and that is what we are putting into place."³⁶

Nonetheless, Scottish ministers have argued that the Scottish people should be given "the choice of following the UK out of the EU and single market... or becoming an independent country, able to chart our own course and build a genuine partnership of equals with the other nations of the UK".³⁷

In March 2017, the point at which the UK government formally notified the EU of its intention to withdraw under the Article 50 process, Nicola Sturgeon formally requested that the UK government should agree to introduce another section 30 order to allow the Scottish Parliament to legislate for a second referendum.

Sturgeon made the point that, contrary to commitments made by May in 2016,³⁸ the Article 50 notification was a unilateral decision by UK ministers rather than the product of agreement between Westminster and the devolved governments. The SNP's plan at that point was to legislate for a second referendum between autumn 2018 and spring 2019.

However, the section 30 order request was rejected by May, who declared that “now is not the time” for a second referendum on Scottish independence – although, notably, she did not argue that a second vote would *never* be justified.³⁹

This request was also firmly opposed by unionist parties at Holyrood, who cited both the lack of public demand for another vote and uncertainty surrounding Brexit as arguments against the Scottish government’s plans.

Kezia Dugdale, then Scottish Labour leader, said that “the people of Scotland do not want another divisive referendum”. Ruth Davidson, Scottish Conservative leader at the time, echoed this sentiment, arguing that “there should not be a referendum when there is no political or public consent for it”. She also objected to the Scottish government’s proposed timetable for a vote before spring 2019, saying: “There cannot be a referendum until the Brexit process is complete and people know what both the UK and independence look like.”

Shortly afterwards, the SNP lost 21 seats at the UK general election in July 2017, in a result widely seen as a setback for independence; however, the party still won a majority of seats in Scotland (35 of 59). Since then, the SNP has continued to outpoll all its rivals by a sizeable margin. For the first time, it won three out of six Scottish seats in the 2019 European Parliament. In December 2019, the party regained some of the ground lost in 2017, taking 48 out of 59 seats on 45% of the vote share.

In this context, the Scottish government has stepped up preparations for an eventual second referendum. In April 2019, Sturgeon confirmed her intention to put the question of independence back to the people before 2021, and shortly after, introduced a bill to regulate the conduct of any future referendum held on an issue within the competence of the Scottish Parliament.⁴⁰

In October 2019, Sturgeon confirmed that she would seek another section 30 order by the end of the year.⁴¹ Following the SNP’s success at the 2019 general election, Sturgeon said that Boris Johnson “must accept that I have a mandate to give Scotland a choice for an alternative future”. She also announced that the Scottish government would publish a detailed case for devolving the power to hold a referendum to the Scottish Parliament the following week.⁴²

In what circumstances could a second independence referendum be held?

The UK government has the power to refuse another referendum. However, while this approach might hold the Union together for now, it might not be a sustainable strategy for the long run if Scottish nationalists were able to demonstrate growing support for their cause. The perception that Westminster was preventing the Scotland from determining its own future could even boost support for independence.

If the prime minister wants to preserve and strengthen the Union, he will have to develop a positive vision – going beyond a purely economic case – that persuades the people of Scotland that their interests lie within the UK.

This could include the devolution of additional powers to Edinburgh, new protections that prevent Westminster from legislating in devolved areas, or rights for the devolved institutions to be involved in international negotiations and the development of post-Brexit 'common frameworks' to replace EU law in devolved areas.

If the UK government accepted in principle that Scotland did have the right to determine its own constitutional future, the question would then become in what circumstances should this take place. First, there should be clear support from the Scottish people for a second independence referendum, of a kind that would widely be taken as a legitimate mandate for having the poll. Second, the nature of the referendum, and the way in which the campaign was held, should meet certain conditions so that voters are able to make a well-founded choice between different constitutional futures.

The Scottish government's proposed timetable for a 2020 poll is based on the argument that it already has a "cast-iron mandate" for a second independence referendum, based on its results at the 2016 Scottish Parliament election and the SNP's gains in the 2019 UK general election.⁴³

In the SNP's 2016 Scottish Parliament manifesto, the party stated that:

We believe that the Scottish Parliament should have the right to hold another referendum if there is clear and sustained evidence that independence has become the preferred option of a majority of the Scottish people – or if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will.⁴⁴

However, not everyone accepts the claim that 2016 or 2019 provide a clear mandate for a second referendum. In May 2016, the first independence referendum had taken place just 18 months previously, so another vote on independence in the near future was not regarded as a likely prospect. According to Ipsos MORI data collected between January and June 2016, just 12% of Scottish voters mentioned devolution or Scottish independence as an important issue facing the country in that period.*

* With thanks to Michael Clemence of Ipsos MORI for providing this data.

Another survey, carried out by TNS six months before the 2016 Scottish Parliament election, similarly found that just 7% of voters regarded independence as the most important issue in determining who to vote for.⁴⁵

The SNP did not make independence a central part of its 2016 campaign; the statement cited above appeared on page 23 of the manifesto. The focus was instead on domestic policy and on what use should be made of the significant new powers that were to be devolved (including over taxation and welfare) under the Scotland Act 2016. This legislation, passed just weeks before the election, was the product of cross-party agreement reached after the first independence referendum.

It is true that Scotland does now face the prospect of being taken out of the EU against the preference of a majority of Scottish voters (as expressed in the 2016 EU referendum). However, during Scotland's 2016 election that was a hypothetical future scenario widely seen as improbable. In other words, it is debatable whether the prospect of another independence referendum was a prime motivating factor for many Scottish voters then.

In addition, the SNP did not actually win a majority in that election. The election did produce a pro-independence majority, consisting of the SNP and the Scottish Green Party. However, the latter had stood on a vaguer manifesto proposal that any second referendum should be the result of a citizens-led campaign, with "a petition signed by an appropriate number of voters" and should "not be driven by calculations of party political advantage". A vote for the Scottish Greens was not self-evidently a vote to reopen the question of independence.

In December 2019, the SNP won a strong victory in the UK general election, increasing its representation in the House of Commons from 35 to 48 MPs. This has emboldened the Scottish government in its push for a second section 30 order to bring about a referendum as soon as 2020.

However, there are reasons why a 2020 poll would not be advisable. The 2019 election took place with the outcome of Brexit still in the balance: it is now clear that the UK (including Scotland) will be leaving the EU at the end of January 2020. But an agreement on the UK's future relationship with the EU is unlikely to be finalised before December 2020 at the very earliest. Such an agreement will have a bearing on both arguments for and against independence. For instance, whether an independent Scotland that rejoined the EU would face the prospect of economic barriers on its border with England will depend on the details of the trade deal the UK secures.

In order to make an informed choice between two constitutional futures, voters will need clarity on what remaining in the UK, or what an independent Scotland, would actually look like. A 2020 poll would not allow for that.

In addition, important constitutional processes should not be rushed; the first independence referendum in 2014 was held more than three years after agreement was reached in principle that this vote could take place (as shown in Figure 1).

It will also take time for the Scottish government to set out its vision for independence, and for the UK government to develop alternative proposals for a reformed Union, if it chooses to do so. For these reasons, we conclude that holding an independence referendum in 2020 would not be advisable.

The UK government might also wish to make its consent for a second referendum conditional on – at a minimum – a strong show of support for pro-independence parties in the 2021 Scottish Parliament election. For instance, the UK government could set as a precondition (if not its only one) that the May 2021 poll delivers an outright majority for parties explicitly committed to a second referendum. The 2021 election could then be fought explicitly on the question of whether there should be another independence vote.

This would be in line with the 2014 precedent, where it was the SNP's majority at Holyrood, rather than its performance in the previous UK general election, that provided the claim of a mandate for the first referendum.

This appears to be in line with the position of some senior Scottish Conservatives. David Mundell, a former Scottish secretary, said that:

“If the 2021 Scottish Parliament election is fought on an explicit independence referendum basis then it is harder to push back against the idea that there isn't a mandate for that.”

The current Scottish secretary, Alistair Jack, has also conceded that “the democratic mandate for a Section 30 Order is a matter for 2021.” In his case, he has argued that the SNP would need to win a majority by itself and “not in collaboration with other parties, not in any alliances”.⁴⁶

However, this additional condition is harder to justify: the Scottish Parliament uses a form of proportional representation and Scotland has a multi-party political system. If parties that favour a second referendum won a majority of seats in an election defined by that issue, then this should arguably be given as much weight as a single-party SNP majority.

This timetable would ensure that before any possible second referendum, the UK government would have the opportunity to make the positive case for the Union, if it wanted to do so, to improve its approach to working in partnership with the devolved governments and potentially to propose other changes to the devolution settlements.

What conditions might the UK government place on the timing of any future independence referendum?

As noted, when the power to hold the 2014 independence referendum was devolved to the Scottish Parliament, it was subject to specified, negotiated conditions. The section 30 order amended the list of reservations in the Scotland Act 1998, so that the power to hold an independence referendum was not reserved if the following requirements were met:

- the poll was not held on the same day as any other poll

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- it took place before 31 December 2014
 - there was a single question, giving voters a choice between two options.⁴⁷

If agreement is eventually reached that the Scottish Parliament should be able to trigger another referendum, the UK government would want to impose conditions again. The Scottish Parliament would not be given complete freedom to set the terms.

The condition that the referendum should not be held on the same day as any other election in Scotland is likely to be uncontroversial. The Electoral Commission has repeatedly warned that if referendum campaigns (where campaigning takes place on a cross-party basis) are held at the same time as election campaigns (where the parties are campaigning against each other), it “has the potential to be confusing for voters and to place parties in a campaign context within which it would be extremely difficult to operate”.⁴⁸ Such a restriction on the date of the poll should be applied again.

In the case of the first independence referendum, the UK government wanted to ensure that the referendum took place before the end of 2014, but in the current context it might instead want to ensure any second referendum takes place *after* a specific point. This could be after a particular date, after a certain period of time has passed – for example, 12 months – following the Scottish Parliament elections, or after another date specified in law has passed, for example, the end of the Brexit transition period.

If this approach is taken, there will be no natural expiration date for the power to hold the referendum. This raises the question of whether such a power should be devolved on a permanent or temporary basis.

One option is for the power again to be granted on a one-off basis. Either the section 30 order could specify a specific window of time during which the referendum must be held, or it could be agreed that following the referendum, a subsequent section 30 order or other legislation could transfer the power back to Westminster.

However, if it is accepted that Scotland’s future should be for Scotland to decide, then there could be a case for a permanent transfer of the power – though concerns about the Scottish government repeatedly holding referendums until independence wins are likely to be raised by those in favour of the Union. One option to address this concern would be to place a restriction on how frequently such referendums can be held. A precedent of sorts comes from the Northern Ireland Act 1998, which states that any referendum on Irish reunification can only be repeated after a minimum of seven years.*

We therefore suggest that **if the power to hold a referendum is devolved permanently, any future section 30 order should specify that a minimum time period, such as 10 years, would have to pass before the power could be used again.** That would ensure that if a future Scottish government wished to hold another referendum, it could do so only after at least one more UK, and one Scottish, parliamentary election had taken place, giving voters the chance to vote for a different government.

* Northern Ireland Act 1998, Schedule 1, section 3, retrieved 15 November 2019, www.legislation.gov.uk/ukpga/1998/47/schedule/1. In this case, the power to call a ‘border poll’ on reunification rests with the secretary of state – it has not been devolved.

What principles should govern any future independence referendum?

If agreement is reached that the power to hold a second independence referendum is to be devolved, it is important that the UK and Scottish governments agree that it will take place according to agreed democratic principles, to ensure the legitimacy of the poll in all parts of the UK. This is what happened before the 2014 referendum.

In the 2012 Edinburgh Agreement, the UK and Scottish governments agreed that a referendum on Scottish independence should:

- have a clear legal base;
- be legislated for by the Scottish Parliament;
- be conducted so as to command the confidence of parliaments, governments and people; and
- deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.⁴⁹

In 2012, Scotland had no rules regulating the conduct of referendums enabled by the Scottish Parliament. As part of the Edinburgh Agreement, it was agreed that the referendums bill, which would provide the legal basis for the poll, would also apply a regulatory framework to the referendum process and campaign. The framework would be based on Part 7 of the Political Parties Elections and Referendums Act (PPERA) 2000, which regulates referendums mandated by Acts of the UK Parliament.

Since then, the Scottish government has introduced its own framework legislation to regulate all future referendums within the competence of the Scottish Parliament, the Referendums (Scotland) Bill. The bill is broadly consistent with PPERA and in some cases goes further in standards of transparency: for example, it extends imprint rules – which require published campaign materials to identify both the printer and the promoter – to online content.

Provided the bill passes, these rules would govern a second referendum on independence, but there are some issues on which agreement between the Scottish and UK governments may be necessary.

In any future independence referendum, the same principles agreed in 2012 should guide the conduct of the poll. The UK's regulatory framework is an appropriate baseline, and this is largely replicated in the Referendums (Scotland) Bill, but any further improvements in standards of fairness and transparency are welcome.

What would the legislative basis for any future independence referendum be?

In line with the precedent set in 2014, the Scottish Parliament is likely to be empowered to provide the legal basis for the poll itself. Referendums mandated by the UK Parliament require primary legislation, but the Scottish government proposed giving ministers the power to hold a referendum through secondary legislation.

The Referendums (Scotland) Bill, as introduced, contained powers for Scottish ministers to make regulations to provide for a nationwide referendum, specifying the referendum question, the date of the poll and the length of the regulated referendum period. Although such regulations would be subject to approval in Holyrood, there would be no opportunity for the Scottish Parliament to amend them – nor would the provisions be subject to the same level of scrutiny as if they had gone through the full legislative process.

Following concerns raised by the Institute for Government, the Constitution Unit (UCL) and the Law Society of Scotland, the Scottish Parliament Finance and Constitution Committee⁵⁰ – the body responsible for scrutinising the bill* – recommended it be amended so that referendums on constitutional issues require primary legislation.⁵¹ The Scottish government eventually accepted this recommendation, bringing forward an amendment to the bill removing the power to legislate for referendums on the basis of secondary legislation.

It is welcome that the Scottish government now accepts that primary legislation should provide the legal basis for any future Scottish independence referendum.

How should a referendum question be chosen?

Another important issue about any future referendum is how the precise question on the ballot paper would be decided upon, and by whom. The section 30 order passed in 2013 enabled the Scottish Parliament to legislate for the question for the first independence referendum, but specified that there could be only one ballot paper, offering the choice between two options. (Before this, there had been some debate about whether to offer Scottish voters a third choice of significantly greater devolved autonomy within the Union, though in the end the two governments agreed that this should be ruled out.)

Currently, there are few – if any – significant advocates of a multi-option referendum in Scotland and so a similar condition of a single, two-option question would be unlikely to raise any objections from the Scottish government or other advocates of independence if applied again.

* In the Scottish Parliament, standing parliamentary committees have a formal role in the legislative process, scrutinising all bills within their remit – unlike in the UK Parliament, where public bill committees are established specifically for the purpose of scrutinising a particular piece of legislation.

The Scottish government has suggested that it intends to propose the same question as used in 2014:

“Should Scotland be an independent country, Yes/No?”

However, there is a question as to whether a future UK government, rather than a Scottish one, might propose a multi-option vote. For example, a UK government might develop its own proposals for further devolution to Scotland, or for a new federal constitutional settlement. In this situation, the UK government might wish to offer voters a choice between the status quo, its own proposals for a reformed Union, and independence.

A multi-option referendum might appear to offer voters greater choice, but it would also bring additional complications. If a vote of this nature were seriously proposed, agreement would be needed on what electoral system should be used to determine the result – different systems have the potential to deliver contrasting outcomes, so this choice might be controversial in itself.⁵² Any third option for greater devolution should also be clearly defined, preferably in law, so that voters are clear on what options are on the table.

Following the precedent set in 2014, the Scottish Parliament would likely be responsible for determining the wording of the question put to voters in a second independence referendum. The 2012 Edinburgh Agreement also stated that the proposed wording of the question would be “subject to the Electoral Commission’s review process”.⁵³ This requirement was uncontentious at the time, but in any new agreement is likely to result in more significant discussion.

In line with the UK regulatory framework, the Referendums (Scotland) Bill gives the Electoral Commission a statutory duty to assess the ‘intelligibility’ of any referendum question, to ensure it is easy for voters to understand and free from bias. Question testing usually takes just 12 weeks and has a small cost relative to the cost of holding a poll.

However, the bill does provide an exemption for questions that have been tested before; this would apply to a future independence referendum. The proposed exemption has been criticised by the Electoral Commission who said it “firmly recommends” that it should be required to give its view on the wording of all referendum questions.⁵⁴ The Finance and Constitution Committee recommended that the Scottish government looks at the issue again, and debate in the Scottish Parliament is ongoing.

The Scottish government amended the bill to place a two-term limit on the lifespan of any question before it must be retested, but has continued to argue that the exemption should continue to apply.⁵⁵ The Scottish minister for the constitution, Michael Russell, has argued that changing the question would cause confusion:

**“If a question is both current and in current usage, why would we change it?
Doing so would be very confusing.”⁵⁶**

However, such considerations would be taken into account in the Electoral Commission assessment process, which involves qualitative research with members of the public and consultation with prospective referendum campaigners. The purpose of question testing is to ensure that the question is put as clearly as possible, and so if the Commission's research indicates that changing the question would cause confusion – as the Scottish government suggests – this would be noted.

There is a strong case that the question for a future independence referendum should be tested, even if it has been before. There will be more evidence to draw upon, including from the previous referendum and subsequent opinion polls, and new circumstances to consider.

Past experience has demonstrated that questions can be further improved, even if previously tested. The initially proposed wording of the question in the 2015 European Union Referendum Bill (which legislated for the 2016 EU referendum) was a 'Yes/No' question. This had previously been recommended by the Electoral Commission* – but following further testing and concerns raised by campaigners about this format, it recommended a further change of wording to offer voters the options of 'Leave' or 'Remain' instead.⁵⁷

A future independence referendum will be divisive. Confidence in the process is of utmost importance, and central to this is trust in the question. If the Scottish government is perceived to have bypassed democratic safeguards, this confidence could be undermined.

We believe the Scottish government should remove the question-testing exemption. If this does not happen, then the UK government should make it a requirement of a section 30 order that the Electoral Commission would test the question for a future independence referendum.

Who should have the right to vote in a referendum?

A further important question is who should have the right to vote in a future Scottish independence referendum.

The issue of the franchise was a point of contention during the negotiations on the rules for the first referendum in 2012. At the time, the electoral franchise was a reserved (as opposed to a devolved) matter. Both governments agreed that all those entitled to vote in Scottish parliamentary and local elections should be entitled to vote in the referendum. This included Commonwealth citizens, citizens of the Republic of Ireland and EU citizens resident in Scotland – but not Scots resident in other parts of the UK.

There were, however, disagreements around the Scottish government's proposal to extend the franchise to 16- and 17-year-olds – who at the time were not eligible to vote in any Scottish or UK elections. The UK government's consultation paper on the

* The recommendation was the result of Electoral Commission testing of a proposed referendum question in a 2013 private members' bill.

referendum initially proposed including a requirement for the franchise to be the same as the Scottish parliamentary franchise in the section 30 order;⁵⁸ the Scottish government's consultation – published at the same time – proposed reducing the voting age to 16.⁵⁹

It was conceded that this would be a matter for the Scottish government to decide, subject to parliamentary approval, and 16- and 17-year-olds were given the right to vote in the referendum.

In 2016, powers to determine the franchise for local and Scottish parliamentary elections were devolved to the Scottish Parliament, and the right to vote was later extended to 16- and 17-year-olds for both these types of election. The Referendums (Scotland) Bill provides for this same franchise to apply to all future referendums, so 16- and 17-year-olds would automatically have the right to vote in any future referendum. The bill also creates a power for ministers to amend the Act to reflect further changes to the franchise.

In June 2019, the Scottish government introduced a bill to extend the right to vote to citizens of all nationalities resident in Scotland and prisoners serving less than a 12-month sentence.⁶⁰ Therefore, there is the possibility that the franchise for a second independence referendum will be different from the first. This may raise concerns about the legitimacy of a referendum if a vote with a different franchise returns a result that overturns the previous vote – particularly if it appeared that changes to the franchise had been designed to obtain a particular outcome.

However, the proposed changes would extend the franchise to a small number of voters relative to the total size of the electorate: Scottish government estimates put it around 55,000, an increase of 1.3% on the 4.1 million people currently registered to vote in Scotland.⁶¹

This group of voters also do not appear closely aligned with one or other side of the Scottish independence debate – in contrast to similar proposals to extend the vote in a further Brexit referendum to EU citizens or 16- and 17-year-olds, both known to be disproportionately pro-Remain. This means that concerns that the changes are designed to boost votes for independence are unlikely to arise.

What is more, the extension will apply to all electoral events and so is less likely to be perceived as an attempt to manipulate the outcome of this specific referendum. Finally, under the terms of the Scotland Act 2016, any changes to the electoral franchise require the votes of two thirds of members of the Scottish Parliament (MSPs) meaning any changes will need cross-party support – including from at least one of the main unionist parties.

There is therefore an argument that, in order to strengthen perceptions of legitimacy, the franchise should be the same as that used for Scottish Parliament elections. Should the extension of the electoral franchise proposed by the Scottish government take effect by the time of the referendum, this should also apply to the referendum franchise.

How should a referendum campaign be regulated?

The aim of referendum campaign regulation is to create a framework in which voters can have the opportunity to hear both sides of the argument, and to ensure there is a level playing field between each outcome.

In line with the UK referendum regulatory framework, the Referendums (Scotland) Bill empowers the Electoral Commission to regulate the referendum campaign and provides for:

- the Electoral Commission to designate a lead campaigner for each outcome in the referendum who is entitled to certain benefits
- regulation of spending by referendum campaigners, including establishing spending limits, consistent with those in place for the 2014 referendum (based on the Electoral Commission recommendation for a 16-week referendum period)
- controls on donations to regulated referendum campaigners.

The bill provides a good basis for ensuring any campaign is fair and transparent, but there are a few further aspects of campaign regulation for any future Scottish independence referendum that would require further consideration.

Lead campaigners

In UK and Scottish referendum campaigns, campaign groups are the main source of information for voters. Designated lead campaigners have primary responsibility for making the case for their preferred outcome. Under PPERA, lead campaigners are entitled to higher spending limits, the use of public rooms (such as council buildings and schools), free referendum campaign broadcasts and free postage for a mailout to every household for promotional materials. While the first two benefits are provided for in the Referendums (Scotland) Bill, the latter two are reserved matters.

For the last independence referendum, the section 30 order made explicit provision for free referendum broadcasts and mailshots; these are an important source of information for voters, and so the UK government should ensure that it makes similar provision in any future section 30 order.

Restrictions on government(s)

Consistent with PPERA, the Referendums (Scotland) Bill places restrictions on Scotland's government, public bodies and local authorities during the final 28 days of the referendum campaign. No material related to the referendum or its subject matter may be published during this period, although there is an exemption if information is specifically requested.

The purpose of the restrictions is to prevent the Scottish government from spending public money to support one particular outcome in the referendum; however, Scottish legislation cannot place equivalent restrictions on the UK government. As the UK government would have a strong interest in any future referendum and its outcome, equivalent restrictions should apply.

In the 2012 Edinburgh Agreement, the UK government committed to abide by these restrictions – and it should do so again in any future agreement accompanying a section 30 order.

Referendum period

Another important question is how long any campaign period should last. The Referendums (Scotland) Bill provides for the period during which controls on spending and donations apply – known as the regulated referendum period – to be specified for each referendum.

The bill as originally introduced established a six-week period for the designation of lead campaigners before the start of the regulated period, but set out no minimum time for the period itself, creating the possibility that there could be very little time for the campaign. Following concerns raised by the Institute for Government, the Electoral Commission and the Finance and Constitution Committee, the Scottish government amended the bill to create a default period of 10 weeks.

The Scottish government has not indicated the length of regulated period it intends to propose for any future Scottish independence referendum. In 2014, it was 16 weeks – as proposed by the Scottish government – with designation taking place before the start of this period.

It is important that campaigners have plenty of time to make their case to the public, and that voters have enough time to consider the issues; this is of even greater importance if the vote is of such fundamental constitutional significance as to whether to become an independent country. **For any future referendum we recommend a minimum 16-week campaign period, consistent with past practice.**

Should there be special thresholds for any future referendum outcome to be considered valid?

After the narrow Leave victory in the EU referendum, a debate has emerged as to whether major constitutional change should take place on the basis of narrow margins or low turnouts, because of the extent of disruption and the difficulty of protecting interests of the losing side.⁶² Following the 2016 result, over four million people signed a petition calling for a second Brexit referendum, stating that the government should “implement a rule that if the Remain or Leave vote is less than 60% based on a turnout less than 75% there should be another referendum”.⁶³

Most referendums held in the UK have had a simple threshold of 50% + 1 of valid votes cast. But there are alternative approaches to determining the result of a referendum that could in principle be applied to any future Scottish independence referendum:

- **Turnout threshold** – to require that a specified percentage of those on the electoral register cast their vote for the result to be valid. The argument in favour of this model is that it would ensure that the result is not carried by small but

engaged minorities. This is used in Italy, where turnout must be at least 50% for the result of a citizen-initiated referendum to be valid.

- **Electorate threshold** – to require that a specified portion of the electorate vote in favour of independence. This can be used to ensure major constitutional changes have broad support among the electorate; in Denmark, the constitution may only be amended if 40% of the electorate vote in favour of the change.
- **Supermajority** – to require that the proportion of valid votes in favour of independence reaches a higher threshold than 50%. This is designed to ensure constitutional stability, and to prevent a major change from being overturned soon after it has been implemented; supermajority thresholds of 60% have been used in referendums on electoral reform at a provincial level in Canada.⁶⁴

But there are also strong arguments against the use of special thresholds for referendums. Turnout thresholds can have paradoxical effects; evidence from Italy shows that they can incentivise opponents of change to encourage abstention so that a proposal fails not because it is defeated but because the threshold is not met.⁶⁵

Electorate thresholds rely on the accuracy of the electoral register to calculate the percentage of the electorate in favour of the proposals. Inaccuracies – such as voters who have died, moved to a new house, or are registered in multiple locations – will essentially count as votes against the proposal. The Electoral Commission estimated that parliamentary electoral registers published in December 2018 were only 89% accurate, and the question of whether an electorate threshold has been met or not might be open to challenge on this basis.⁶⁶

Although supermajority thresholds are used in parliamentary votes in many countries,^{*} they are “strikingly rare in referendums”;⁶⁷ international guidelines of best practice in referendums recommend against the use of supermajority thresholds on the basis that this “risks involving [sic] a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold”.⁶⁸

There are also specific historical reasons why threshold requirements would be particularly problematic in Scotland. The 1979 referendums on devolution to Scotland and Wales required 40% of the electorate to vote in favour of the proposals for devolution to take place. The condition was the result of a backbench amendment proposed by George Cunningham, a Labour MP opposed to devolution. Although a majority of voters in Scotland (51.6%) voted in favour of the proposals, turnout was 63.3% so the electorate threshold was missed, and devolution did not take place until it was approved in a referendum requiring only a simple majority nearly two decades later.⁶⁹

The outcome of the 1979 referendum was controversial in Scotland, and the imposition of an electoral threshold was seen as a deliberate, and successful, attempt to prevent devolution. If the UK government were to impose any special threshold or supermajority rules as a condition for a future referendum (such as a requirement for independence to

* In the UK Parliament, for instance, a two-thirds majority is required for the House of Commons to vote for an early election under the Fixed-term Parliaments Act 2011.

secure 55% of votes), it would likewise be seen as an attempt to tip the scales against independence, weakening the legitimacy of the process.

Following the experience of the EU referendum, there might be calls for special thresholds or supermajorities to be used for a future independence referendum. But this could undermine the perceived legitimacy of the referendum amongst those in favour of independence. **Any such rule should ideally be based on cross-party agreement not simply mandated by Westminster.**

Further considerations before any second independence referendum takes place

This paper has discussed the 'terms and conditions' on which a future Scottish independence referendum could legitimately take place – but further consideration of the implications of independence itself is required.

Although the UK government seems set to refuse an immediate referendum, the question of a future referendum is likely to remain prominent if the Scottish people continue to vote for the SNP or other pro-independence parties in UK and Scottish elections.

However, a vote in favour of independence would not be the end of the matter. Such a result would just mark the start of a complicated, and lengthy, transition towards Scottish independence. At present, it is far from clear what independence would actually mean for Scotland, and for the rest of the UK, and what process would need to be followed to agree and ratify the terms of separation.

Far more consideration of these matters is required before any vote should take place, so that voters in a future referendum can head to the polls with as much clarity as possible on what they are voting for (or against).

The Scottish government has conducted a fair amount of work on its vision for independence. But there remain many unanswered questions about how independence would work in practice, and what relationship an independent Scotland would have with the rest of the UK and the EU. For instance, if an independent Scotland chose to rejoin the EU, as England and Wales leave the EU single market and customs union, then this would raise the prospect of barriers to economic activity on the Anglo–Scottish border.

There are also questions about what process would be followed if Scotland voted in favour of independence. There would need to be negotiations between Scotland and the rest of the UK about the terms of independence, covering a range of issues such as the division of assets and liabilities, citizens' rights and the future relationship between the two new states.

There are some parallels with UK–EU Brexit negotiations; before the EU referendum, Article 50 of the Treaty on European Union provided some guidance on the process by which the UK's terms of exit would be negotiated and ratified. By contrast, there has been little thought given to how Scottish–UK negotiations would work in the event of a future vote in favour of independence.

There are a range of issues that would need to be considered:

- **Timeframe** – on what timeframe might we expect negotiations to take place? Will there will be different phases? If it proved necessary to extend the agreed timeline, how would this be agreed? The Brexit process has demonstrated that hard deadlines are not always helpful, but voters would need a sense of when Scotland might become an independent country.
- **Negotiations** – what issues are to be discussed, and are there certain issues to be resolved before negotiations can move on to others? Who will negotiate on behalf of each government and what resources will they have available to them? How might negotiations affect other areas of intergovernmental working? Should the Welsh and Northern Ireland administrations be involved or consulted?
- **Parliamentary scrutiny** – what would the role of the UK and Scottish Parliaments be in the process? Would each respective legislature have a role in mandating the negotiation position? How would each scrutinise negotiations? What parliamentary process (in both) would be followed to approve the terms of the final deal?
- **Implementation** – how might the deal, once agreed, be implemented? Is it likely that some kind of transition period would be needed? If the deal differed significantly from proposals for an independent Scotland put forward by the Scottish government before the referendum, would there be a case for a further confirmatory referendum once the terms of exit had been negotiated? Or should ratification take place after the Scottish Parliament election in 2026, to ensure that the Scottish government secured a further mandate to implement the deal?

As much clarity as possible would be needed, on both the proposals for an independent Scotland and the post-result negotiations, before the referendum. This would ensure that voters have the information they need; that there is a clear mandate on which the UK and Scottish governments can implement the result; and that issues of process, as far as possible, do not become politicised in the wake of the result.

This is not to assume that Scotland would vote for independence in any further referendum. But the Brexit process has demonstrated the difficulties that can arise when insufficient thought is given to what follows a vote in favour of major constitutional change.

If a referendum is to be held, a responsible government should prepare for all outcomes, even those to which it is opposed.

Some aspects of the process could be agreed by the UK and Scottish governments at the time of a section 30 order; others may more appropriately be determined by the respective governments and Parliaments. If it were agreed that a second referendum on independence could take place, both governments should begin work on these issues right away.

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