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Proposed Scottish Parliament Powers Referendum Act

A proposal to make provision for ascertaining the views of the people of Scotland on whether the Scottish Parliament should have the powers to negotiate and legislate for independence for Scotland.

**Pre Submission Consultation by Ash Regan MSP
ALBA PARTY Member of the Scottish Parliament**

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Foreword



The UK Supreme Court's decision to prohibit the democratically elected Scottish Parliament from directly consulting the Scottish people which elected it, and to whom they are accountable on the question of 'Should Scotland be an independent Country?' has not only blocked that particular question being asked but provoked a democratic crisis in Scotland.

No credible democrat can believe that this is a constitutional vision which is founded on principles of democracy. This is instead judicial overreach in that it appears to be an attempt at legal enforcement by the judges of what they themselves have determined is an essentially political constitution.

If you have a political constitution, then by definition it is for politics to resolve matters. As a result of the Supreme Court's Decision, it is now opportune for Scots to have a new conversation on what Powers their parliament should have.

ALBA propose that at each and every election political parties supporting independence should stand on an unambiguous mandate to negotiate independence from Westminster. If a majority of votes are achieved for independence then the Scottish Government should mobilise popular and international pressure to implement that mandate.

However, that does not prevent additional democratic action now in seeking the view of the people in extending the powers of the parliament. Thus, I want to ensure that the people of Scotland are able express their view, via a lawful Referendum on 19th September 2024, on whether or not their Scottish Parliament should have the powers to negotiate and legislate for independence for Scotland.

This would be on the question:

"Should the Scottish Parliament have the power to negotiate and legislate for Scottish independence?"

Ash Regan

30th November 2023

How the Consultation Process works

This pre submission consultation relates to a draft proposal I will then lodge as the first stage in the process of introducing a Member's Bill in the Scottish Parliament. That process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders which can be found on the Parliament's website at: [https://scottish4.sharepoint.com/:w:/r/sites/chamber-s6-ngbu/layouts/15/Doc.aspx?sourcedoc=%7B6489B3C7-4B29-4D06-98EC-3A248E14FDE3%7D&file=Consultation%20template%20\(non-NGBU\)%20%20March%202022.docx&action=default&mobileredirect=true](https://scottish4.sharepoint.com/:w:/r/sites/chamber-s6-ngbu/layouts/15/Doc.aspx?sourcedoc=%7B6489B3C7-4B29-4D06-98EC-3A248E14FDE3%7D&file=Consultation%20template%20(non-NGBU)%20%20March%202022.docx&action=default&mobileredirect=true)

At the end of the pre submission consultation period, all the responses will be analysed and to determine if there are any changes required before the formal lodging of the draft stage 1 proposal and the commencement of the formal consultation exercise. I then expect to lodge a final proposal in the Parliament along with a summary of those responses. If that final proposal secures the support of at least 18 other MSPs from at least half of the political parties or groups represented in the Parliamentary Bureau, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member's Bill. A number of months may be required to finalise the Bill and related documentation. Once introduced, a Member's Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act. At this stage, therefore, there is no Bill, only a draft proposal for the legislation. The purpose of this pre submission consultation is to commence a new conversation on the powers of the Scottish Parliament amongst the people of Scotland and to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, suggesting improvements, and generally refining and developing the policy so that any refinements that are required to achieve as broad of support as possible from across Parliament can be achieved when the Stage 1 process is commenced. Consultation, when done well, can play an important part in ensuring that legislation is fit for purpose. Details on how to respond to this consultation are provided at the end of the document. Additional copies of this paper can be requested by contacting me at: Ash Regan MSP **Contact@theReferendum.Scot** Enquiries about obtaining the consultation document in any language other than English or in alternative formats should also be sent to me. An on-line copy is available on the website at www.TheReferendum.Scot

Background & Aims of Proposed Bill

Background

The Scottish Government was elected in 2016 on a commitment that the Scottish Parliament should have the right to hold a referendum on independence for Scotland if there was a significant and material change in the circumstances that prevailed for the 2014 referendum, such as Scotland being taken out of the EU against the will of its people.

In the 2014 referendum, an Order in Council under section 30 of the Scotland Act 1998 was agreed by Westminster and the Scottish Parliament, recognising the mandate of the Scottish Government, and the support of the Scottish Parliament, for a referendum on independence. The Order put it beyond doubt that the Scottish Parliament could legislate for that referendum.

The current Scottish Parliament was established by a statute passed by this Union Parliament which expressly altered the original 1707 constitutional settlement between Scotland and England. Section 1(1) of the Scotland Act 1998 (SA) provides that “there shall be a Scottish Parliament” which, in Section 28 SA, was given power to “make laws, to be known as Acts of the Scottish Parliament” once they had been passed by the Parliament and received Royal Assent.

In the 2014 referendum the question was “Should Scotland be an independent country?” This was the same question that the Scottish Government wished to ask the people of Scotland on 19th October 2023.

Despite the clear mandates given by the electorate to date, the UK Government have refused to agree to a consented independence referendum using the mechanism of a Section 30 order to temporarily amend Schedule 5 of the Scotland Act as happened to put the independence referendum of 2014 beyond all legal challenge.

The Scottish Government was again elected in 2021 with a further mandate to hold a referendum on independence for Scotland.

After failing to have the UK Government agree to a referendum on Scottish independence, then First Minister Nicola Sturgeon had the Lord Advocate refer the issue of the competence of the Scottish Parliament to hold a referendum on Scottish independence to the United Kingdom Supreme Court.

In a unanimous judgment, the Supreme Court ruled that the Scottish Parliament does not have the power to legislate for a referendum on Scottish independence.

The Court accepted the Lord Advocate’s reference was a “devolution issue” as defined in Schedule 6 of the Scotland Act 1998 and therefore accepted it.

On the draft independence referendum Bill that the Scottish Government wanted to progress, the Court ruled that even if a referendum had “no immediate legal consequences” it would still “be a political event with important political consequences”:

The UK Supreme Court determined that if the UK Government and Parliament were unwilling to modify those reserved powers (as they did before the 2014 independence referendum) then “the Scottish Parliament does not have the power to legislate for a referendum on Scottish independence”.

Lord Reed, President of the Supreme Court, was clear that the Court had considered a legal question and “could not be asked to give a view on the distinct political question of whether Scotland should become independent from the rest of the United Kingdom”.

The UKSC held that the purpose of the Bill was to hold a lawful referendum on the question whether Scotland should become an independent country, which encompassed the questions whether the Union between Scotland and England should be terminated and whether Scotland should cease to be subject to the sovereignty of the Parliament of the United Kingdom.

The UK Supreme Court innovated on its previous case law. The fact that there would be no necessary legal effects in either the holding or the result of the referendum, did not mean that the Scottish Parliament had the power to legislate for it. It was instead what the UK Supreme Court considered to be the purely political consequences of holding any such referendum that were such as – in the view of the court - to put it beyond the Scottish Parliament’s legislative competence. The UK Supreme Court acknowledged that a clear outcome from the referendum would possess the authority of a democratic expression of the view of the Scottish electorate and depending on the result might either politically strengthen or weaken the democratic legitimacy of the Union.

The result of the UK Supreme Court’s decision is to prohibit the (democratically elected and legitimate) Scottish Parliament from directly consulting the Scottish people on which elected it, and to whom they are accountable, on the question of “Should Scotland be an independent country”.

The UKSC decision was that the Scottish Parliament does not have the power to legislate for a referendum on the question of whether or not Scotland should be an independent country. The decision did not prohibit the Scottish Parliament from holding referendums on matters that are within the competence of the Scottish Parliament.

I believe that seeking the view of the people on an extension of the powers of the Parliament is within competence.

The UK Supreme Court can only be required to face up to this judicial overreach by the Scottish Parliament exercising its democratically founded legitimacy by passing new referendum legislation with a newly worded question - such is the aim of that proposed in this consultation.

Before the 2014 independence referendum, the leaders of the parties in Scotland campaigning against independence made a joint statement supporting Scotland's right to choose. In a Joint statement by the leaders of the Scottish Conservatives, Scottish Labour Party and Scottish Liberal Democrats in June 2014 they said:

‘Power lies with the Scottish people and we believe it is for the Scottish people to decide how we are governed.’

The understanding of the constitutional position of the people of Scotland within the United Kingdom is not seriously disputed. It has long been accepted by successive UK Governments, and by the wider political community, that the people of Scotland have the right to determine Scotland's continued place in the UK. The Claim of Right for Scotland, signed in 1989 by a range of leading figures and organisations from across political and civic life in Scotland, begins by acknowledging- ***‘the sovereign right of the Scottish people to determine the form of Government best suited to their needs.’***

The Claim of Right has since been recognised and endorsed by both the Scottish Parliament on 26 January 2012 and the UK Parliament on 4th July 2018. Scotland's continuing participation in the

Union is based on the ongoing agreement and consent of the people that live in Scotland said then UK Prime Minister Theresa May on 4th July 2019.

This is because the United Kingdom is not a unitary nation-state; it is a Union state. It is a multi-national country whose constituent parts enjoy different constitutional settlements and rights. Even those that support Scotland's continuing place in the Union recognise Scotland's right to choose. Following the independence referendum in 2014, the Smith Commission brought together the political parties represented in the Scottish Parliament to agree proposals for further devolution. The Smith Commission took place in the context both of all participants accepting the outcome of the independence referendum, and of three of the five parties represented having campaigned for Scotland to stay part of the United Kingdom. Nevertheless, under its heads of agreement, the Commission concluded the following key point:

'It is agreed that nothing in this report prevents Scotland becoming an independent country in the future should the people of Scotland so choose.'

Aims of the Bill

The aim of the Bill is to make provision for ascertaining the views of the people of Scotland on whether the Scottish Parliament should have the powers to negotiate and legislate for independence for Scotland.

If the proposed Bill is enacted it would allow for a Referendum to take place on 19 September 2024 to ask the people of Scotland the Question:

“Should the Scottish Parliament have the power to negotiate and legislate for Scottish independence?”

Management of the referendum

The Electoral Commission viewed the 2014 independence Referendum as well run and commended those responsible for administering the referendum. Voters were also happy with their experience of the electoral process. 94% of people who voted in polling stations, and 98% of those who voted by post, reported that they were satisfied with the electoral process.

Accordingly, it is proposed that although the Draft Bill proposes a different question that the poll and the count would be managed in the same way as in 2014, by the returning officer (designated for the referendum as the “counting officer”) for each of Scotland’s 32 local government areas under the overall direction of a Chief Counting Officer.

The draft bill proposes that the Electoral Commission would also be responsible for regulating the referendum and would be responsible to the Scottish Parliament for the role that it will play.

The division of responsibilities outlined above mirrors precisely the system established for other elections in Scotland in response to the Gould Report, an independent review which made recommendations on improving the administration of elections following the problems experienced in 2007. Under this approach, guidance and regulatory functions are for the Electoral Commission while the operational role is for returning officers, electoral registration officers and their staff.

Eligibility to Vote

Eligibility to vote in the referendum will be the same as for Scottish local government and Scottish Parliament elections. The franchise for these elections most closely reflects residency in Scotland and has been chosen for that reason. The choice of this franchise reflects the internationally accepted principle that the franchise for constitutional referendums should be determined by residency and the view that sovereignty lies with the people of Scotland.

The Referendums (Scotland) Act 2020 applies for the purposes of determining entitlement to vote at the referendum, subject to the modifications set out in Section 3 of the Draft Act. 16 and 17 year-olds will, as was the case in the 2014 Scottish independence referendum, be able to vote in this referendum if they have reached the age of 16 by the day of the poll.

Date of Referendum

The proposed date of the Referendum in the Draft Act is Thursday 19th September 2024.

Referendum Rules

The accepted approach in the UK for running a referendum has its origins in the Fifth Report of the Committee on Standards in Public Life. That led to the Political Parties, Elections and Referendums Act 2000 (PPERA) that governs referendums held under legislation made by the Westminster Parliament.

It is essential that there are rules in place to ensure that the referendum campaigns are run in a fair and open manner.

The day of the referendum poll would be preceded by a “referendum period” during which the rules on campaign conduct and spending would apply. For the 2014 Scottish independence referendum,

the period was 16 weeks. For the 2016 EU referendum and the 2011 referendum on the Alternative Vote it was 10 weeks.

Financial Implications

Should the Scottish Government provide resources to facilitate the Referendum there would be an associated cost. There is no proposal to make this a part of the Bill, but to follow the precedent of earmarking a reserve in the Budget as was done for the proposed 19th October referendum.

Equalities implications

There are no identified implications on UK Equality Act 2010.

Responding to this Consultation

- This consultation is your opportunity to shape the referendum on the Powers of the Scottish Parliament. Responses should be made by **Wednesday January 25th 2024**.
- It would be helpful to have your response by email or using the electronic response form. The electronic response form can be accessed at the following website address: <https://theReferendum.scot> or via [this link – Surveylink](#) You can also email your response to the mailbox below:
Consult@theReferendum.Scot
- We are, of course, happy to receive written submissions too.

Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

Questions

About you (Note: Information entered in this pre submission consultation response “About You” section will not be published with your response.

1. Data protection declaration

I confirm that I have read and understood the **Privacy Notice** to this consultation which explains how my personal data will be used.

2. If you are under 16 and making a submission, we will need to contact you to ask your parent or guardian to confirm to us that they are happy for you to send us your views.

Please ONLY tick this box if you are UNDER 16 years of age.

3. Are you responding as: an individual – in which case go to Q4 on behalf of an organisation? – in which case go to Q5

4. Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose “Member of the public”.)

- Member of the Public
- Politician
- Political Organisation
- Academic
- Specialist with Expertise in Field

5. Please select the category which best describes your organisation:

- Public sector body (Scottish/UK Government or agency, local authority, NDPB)
- Commercial organisation (company, business)
- Representative organisation (trade union, professional association)
- Third sector (charitable, campaigning, social enterprise, voluntary, nonprofit)
- Other (e.g. clubs, local groups, groups of individuals, etc.)

Optional: You may wish to explain briefly what the organisation does, its experience and expertise in the subject-matter of the consultation, and how the view expressed in the response was arrived at (e.g. whether it is the view of particular office-holders or has been approved by the membership as a whole).

6. Please choose one of the following:

- I am content for this response to be published and attributed to me or my organisation

- I would like this response to be published anonymously
- I would like this response to be considered, but not published (“not for publication”)

7. Please provide your name or the name of your organisation. (Note: The name will not be published if you have asked for the response to be anonymous or “not for publication”.)

Name:

8. Please provide a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number. (Note: We will not publish these contact details.)

Email address:

Address:

9. **Your views on the proposal for a Bill to allow a Referendum on the powers of the Scottish Parliament to include the Power to negotiate for and legislate for independence**

Note: All answers to the questions in this section may be published (unless your response is “not for publication”)

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

10. What is your view of the proposal for the Scottish Parliament to have the power to negotiate and legislate for Scottish independence?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

11. What is your view on the franchise for the proposed Referendum to be as set out in the Referendums Act 2020?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

12. What is your view on the proposed date of the Referendum of 19th September 2024?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

13. Do you think there are other ways in which the Bill's aims could be achieved more effectively? YES/NO

Please elaborate on your response if you would like to:

14. Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses to earlier questions)?

How responses are handled

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that I would normally expect to publish all responses received (other than “not for publication” responses) on my website [<http://www.theReferendum.Scot>]. Published, responses (other than anonymous responses) will include the name of the respondent, but other personal data sent with the response (including signatures, addresses and contact details) will not be published. Where responses include content considered to be offensive, defamatory or irrelevant, I may contact you to agree changes to the content or may edit the content itself and publish a redacted version. I expect to prepare a summary of responses that will help inform the formal commencement of lodging the Bill (which is the required process of securing the right to introduce a Member’s Bill). The summary may cite, or quote from, your response (unless it is “not for publication”) and may name you as a respondent to the consultation (unless your response is anonymous).

Data Protection

I must comply with the requirements of the General Data Protection Regulation (GDPR) and other data protection legislation which places certain obligations on me when I process personal data. As stated above, I will normally publish your response in full, together with your name, unless you request anonymity or ask for your response not to be published. I will not publish your signature or personal contact information. Information on how I process your personal data is set out in my privacy notice, which can be found here [<http://www.theReferendum.scot/privacy-notice>]. Please confirm that you have read the privacy notice by ticking the box below.

[] I confirm that I have read and understood the privacy notice (referred to above) to this consultation which explains how my personal data will be used.

I may also edit any part of your response which I think could identify a third party, unless that person has provided consent for me to publish it. If you wish me to publish information that could identify a third party, you should obtain that person’s consent in writing and include it with your submission. If you consider that your response may raise any other issues under the GDPR or other data protection legislation and wish to discuss this further, please contact me before you submit your response. Further information about data protection can be found at: www.ico.gov.uk

