
**THE SCOTTISH
INDEPENDENCE BILL:**
A CONSULTATION ON AN INTERIM
CONSTITUTION FOR SCOTLAND

JUDICIARY SCOTTISH CIVIL SERVICE CITIZENSHIP INTERNATIONAL RELATIONS RATIFICATION OF INTERNATIONAL AGREEMENTS RULE OF LAW
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ISBN: 978-1-78412-545-5

ISBN: 978-1-78412-546-2 (EPUB)

ISBN: 978-1-78412-547-9 (MOBI)

Published by the Scottish Government, June 2014

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
DPPAS29629 (06/14)

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NICOLA STURGEON MSP
DEPUTY FIRST MINISTER



This draft Bill – the Scottish Independence Bill – provides the constitutional platform which would serve as the basis for the government of Scotland from Independence Day.

The fundamental principle underpinning the Bill is that, in Scotland, the people are sovereign. This core truth resonates throughout Scotland’s history and will be the foundation stone for Scotland as an independent country.

The simplicity of the statement contained in section 2 of the Bill – “In Scotland, the people are sovereign” – should not mask the radical, democratic and egalitarian nature of the principle. The people who have the biggest stake in a successful Scotland are those who live and work here. The Scottish Government believes we get better outcomes *for* Scotland when decisions *about* Scotland are made *in* Scotland *by* the people *of* Scotland. That is the essence and also the practical manifestation of embedding the sovereignty of the people within our laws. Sovereignty means the people of Scotland always getting the government we vote for to govern our country the way we want.

Independence is not an end in itself, but a means of building a better future for the people of Scotland. In *Scotland’s Future*, we said that a key responsibility of the first Parliament of an independent Scotland would be to put in place a process for preparing a written constitution to underpin the democratic gains of independence.

A written constitution is the basis of everyday life, setting out and protecting the rights and aspirations of the people of Scotland. It will be the highest and strongest of laws – a statement of the fundamental principles by which a country chooses to live, regardless of the political party in power.

This draft Bill provides for a permanent written constitution to be drawn up post-independence by a Constitutional Convention, entirely autonomous from the Scottish Government. That proposal reflects our strong belief that the process by which Scotland develops and adopts its written constitution will be as important as its content. It should be inclusive and participative, reflecting the fundamental constitutional principle that the people, rather than politicians or state institutions, are the sovereign authority in Scotland.

The Scottish Independence Bill would be introduced to the Scottish Parliament in the event of a vote for independence in the referendum. It would be accompanied by a renewed Scotland Act, fully revised and refreshed to operate for an independent country. Proposals for a revised Scotland Act are also summarised in this consultation paper. Together the Scottish Independence Bill and renewed Scotland Act would form the interim constitutional platform for an independent Scotland until the Constitutional Convention prepared the permanent constitution for Scotland.

The Scottish Independence Bill would be subject to the usual parliamentary procedures and enacted in the normal way as an Act of the Scottish Parliament. While respecting those parameters, it is a different type of legislation. The Scottish Independence Bill contains higher-level principles and values that are different from our usual, detailed, technical legislation. This is normal for that great majority of countries who have written constitutions.

In other countries, there is often a high level of public knowledge about the constitution in a way that might not apply to other types of law. To that end the Scottish Independence Bill has been drafted to be accessible, straightforward and concise. I hope that enables the Bill, and this consultation, to find a wide audience, so that the people of Scotland can see clearly the most important principles, rights and structures of government on which the Scottish Government believes an independent, democratic Scotland should be founded. The Scottish Government has an inherent belief in the ability of the people of Scotland to achieve and succeed. Our proposals, set out in this document, reflect that confidence.

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THE SCOTTISH INDEPENDENCE BILL



Scottish Independence Bill

[DRAFT - JUNE 2014]

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Scottish Independence Bill

[DRAFT - JUNE 2014]

An Act of the Scottish Parliament to provide for Scotland to become an independent State; to provide an interim constitution for Scotland to have effect from independence; to provide for the establishment of a Constitutional Convention to draw up a permanent constitution for Scotland; and for connected purposes.

PART 1

INDEPENDENCE

1 Independence

- (1) On Independence Day, Scotland becomes an independent State under the constitution set out in Part 2 of this Act.
- (2) “Independence Day” is a day to be specified by resolution of the Scottish Parliament.
- (3) From Independence Day, and subject to the constitution—
 - (a) the Scottish Parliament has full competence to make and modify the law of Scotland,
 - (b) the Scottish Government assumes full responsibility for the government of Scotland.

PART 2

CONSTITUTION

Sovereignty

2 Sovereignty of the people

In Scotland, the people are sovereign.

3 The nature of the people’s sovereignty

- (1) In Scotland, the people have the sovereign right to self-determination and to choose freely the form in which their State is to be constituted and how they are to be governed.
- (2) All State power and authority accordingly derives from, and is subject to, the sovereign will of the people, and those exercising State power and authority are accountable for it to the people.

- (3) The sovereign will of the people is expressed in the constitution and, in accordance with the constitution and laws made under it, through the people's elected representatives, at referendums and by other means provided by law.
- (4) The sovereign will of the people is limited only by the constitution and by the obligations flowing from international agreements to which Scotland is or becomes a party on the people's behalf, in accordance with the constitution and international law.

Interim constitution

4 Interim constitution for Scotland

- (1) Until a written constitution for the State is agreed by or on behalf of the people of Scotland in accordance with section 33, this Part is to have effect as the constitution for Scotland.
- (2) References in this Act to "the constitution" are references to this Part.

The State

5 Name of the State

- (1) The name of the State, by which it is to be known formally, is Scotland.
- (2) Scotland may enter into international agreements, and become a member of international organisations, in that name.

6 The territory of Scotland

In accordance with international law, the territory of Scotland continues to consist of all the land, islands, internal waters and territorial sea that formed the territory of Scotland immediately before Independence Day.

7 Form of State and government

- (1) Scotland is an independent, constitutional monarchy.
- (2) The form of government in Scotland is a parliamentary democracy.

8 National flag and anthem

- (1) The national flag of Scotland continues to be the Saltire or Saint Andrew's Cross.
- (2) The Scottish Parliament may choose, as it sees fit, a national anthem for Scotland.

Head of State

9 Head of State

- (1) Her Majesty Queen Elizabeth is to be Head of State, as Queen.
- (2) Her Majesty is to be succeeded as Head of State (and as Queen or, as the case may be, King) by Her heirs and successors to the Crown according to law.
- (3) Her Majesty, and Her successors to the Crown, continue to enjoy all the rights, powers and privileges which, according to law, attached to the Crown in Scotland immediately before Independence Day.

- (4) Subsection (3) is subject to—
 - (a) the constitution, and
 - (b) provision made by Act of the Scottish Parliament.

Legislature

10 Legislature

- (1) Legislative power to make and modify the law continues to be vested in the Scottish Parliament.
- (2) The Parliament's power is subject to the constitution.

Executive

11 Executive

- (1) Executive power to administer and govern continues to be vested in the Scottish Government.
- (2) The Government's power is subject to the constitution.

State accountability

12 State accountability to the people

- (1) The Scottish Parliament and its members, as the elected representatives of the people, are accountable to the people.
- (2) The Scottish Government and its members are accountable to the Scottish Parliament and, through the Parliament as their elected representatives, to the people.

Judicial

13 Independence of the judiciary

All members of the judiciary are to be independent, and free from any external influence or control, in carrying out their judicial functions.

14 Supreme Court

- (1) The Court of Session is the final court of appeal in civil matters.
- (2) The High Court of Justiciary is the final court of appeal in criminal matters.
- (3) Each of those Courts is, within its respective area of competence, the Supreme Court of Scotland.
- (4) Accordingly, no appeal lies against the decisions of the Supreme Court to any other court or tribunal, and the decisions of the Supreme Court are not subject to review by any other court or tribunal.
- (5) This section does not affect the jurisdiction of the Court of Justice of the European Union, the European Court of Human Rights or any other court or tribunal established under an international agreement to which Scotland is a party.

15 The rule of law

- (1) The principle of the rule of law continues to apply in Scotland.
- (2) Every person is accordingly subject to, and must act in accordance with, that principle.

*The civil service***16 The Scottish civil service**

- (1) There is to be a Scottish civil service.
- (2) All members of the Scottish civil service are to act with integrity, honesty, objectivity and impartiality.
- (3) Further provision about the Scottish civil service is to be made by Act of the Scottish Parliament.

*Local government***17 Local government**

- (1) There is to continue to be local government in Scotland.
- (2) Local government is to be administered by local councils which have autonomy over the carrying out of their functions.
- (3) Each local council is to represent and promote the interests of the people living within the local area.
- (4) The members of each local council are to be elected in accordance with law—
 - (a) directly by people living within the local area,
 - (b) at elections to be held at intervals of not more than 5 years.
- (5) In this section, “the local area” means the area for which the council is the local council.

*Citizenship***18 Scottish citizenship**

- (1) The following people automatically hold Scottish citizenship, namely—
 - (a) all those who, immediately before Independence Day, hold British citizenship and either—
 - (i) are habitually resident in Scotland at that time, or
 - (ii) are not habitually resident in Scotland at that time but were born in Scotland,
 - (b) any person born in Scotland on or after Independence Day if either of the person’s parents, at the time of the person’s birth—
 - (i) holds Scottish citizenship, or
 - (ii) has indefinite leave to remain in Scotland, and
 - (c) any person born outside Scotland on or after Independence Day if—
 - (i) either of the person’s parents, at the time of the person’s birth, holds Scottish citizenship, and

- (ii) the person's birth is registered in Scotland.
- (2) The following people are entitled to claim Scottish citizenship according to the prescribed procedures, namely—
 - (a) any person born in Scotland on or after Independence Day if either of the person's parents meets the prescribed requirements,
 - (b) any person with—
 - (i) a prescribed connection by descent with a person holding Scottish citizenship, or
 - (ii) any other prescribed connection with Scotland.
- (3) A person holding Scottish citizenship may also hold other nationalities or citizenships at the same time.
- (4) Further provision about entitlement to Scottish citizenship is to be made by Act of the Scottish Parliament, and "prescribed" means prescribed by or under such an Act.
- (5) Such an Act may, in particular, include provision supplementing, qualifying or modifying the provision in this section.

International relations

19 International relations and foreign policy

In conducting its international relations and in determining its foreign policy, Scotland will—

- (a) observe, and promote respect for, international law,
- (b) promote Scotland's values and best interests,
- (c) promote international peace, justice and security,
- (d) promote friendly relations among States and nations.

20 International organisations

The Scottish Government may take whatever steps it considers appropriate to secure that Scotland maintains membership of any international organisation.

21 Ratification of international agreements

- (1) International agreements to which Scotland becomes a signatory are not to be ratified on behalf of Scotland, or otherwise to bind Scotland, unless—
 - (a) the Scottish Government has laid a copy of the agreement before the Scottish Parliament, and
 - (b) the Parliament has approved the agreement in accordance with such procedure as the Parliament may determine.
- (2) That does not apply to any international agreement ratified in relation to Scotland before Independence Day and by which Scotland, as an independent State, continues to be bound on or after Independence Day in accordance with international law.

22 Incorporation of international agreements

- (1) International agreements to which Scotland is a party do not by themselves have direct effect in Scots law.
- (2) Such agreements take direct effect in Scots law only to the extent provided by Act of the Scottish Parliament.

*Nuclear disarmament***23 Nuclear disarmament**

The Scottish Government must pursue negotiations with a view to securing—

- (a) nuclear disarmament in accordance with international law, and
- (b) the safe and expeditious removal from the territory of Scotland of nuclear weapons based there.

*Europe***24 Incorporation of European law**

- (1) Directly effective EU law forms part of Scots law.
- (2) Scots law is of no effect so far as it is inconsistent with EU law.
- (3) In this section—
 - (a) “EU law” means—
 - (i) all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the EU Treaties, and
 - (ii) all those remedies and procedures from time to time provided for by or under those Treaties,
 - (b) EU law is directly effective if, in accordance with the EU Treaties, it is to be given legal effect or used in Scotland without further enactment.

25 European citizenship

A person holding Scottish citizenship is also, in accordance with Article 20.1 of the Treaty on the Functioning of the European Union, a citizen of the European Union.

*Rights***26 Respect for human rights**

- (1) Every person has the rights and fundamental freedoms set out in the European Convention on Human Rights.
- (2) Scots law is of no effect so far as it is incompatible with those rights and fundamental freedoms.
- (3) The Scottish Government and public authorities must, in carrying out their functions, respect and comply with those rights and freedoms.

27 References to the European Convention on Human Rights

- (1) The references in section 26 to the rights and fundamental freedoms set out in the European Convention on Human Rights are to the rights and fundamental freedoms set out in—
 - (a) Articles 2 to 12 and 14 of the Convention,
 - (b) Articles 1 to 3 of the First Protocol to the Convention, agreed at Paris on 20 March 1952,
 - (c) Article 1 of the Thirteenth Protocol to the Convention, agreed at Vilnius on 3 May 2001,as read with Articles 16 to 18 of the Convention.
- (2) Those rights and freedoms have effect for the purposes of this Act as they have effect for the time being in relation to Scotland.
- (3) In this section, “the Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4 November 1950.

28 Equality

- (1) Every person in Scotland is equal before the law and has equal entitlement to its protection and benefit.
- (2) Every person is entitled to be treated—
 - (a) with respect regardless of status or personal characteristics,
 - (b) without unfair discrimination on the basis of personal characteristics.
- (3) The Scottish Government and public authorities must, in carrying out their functions, seek to promote and secure equality of opportunity for every person in Scotland regardless of personal characteristics.
- (4) In this section, the references to personal characteristics include (as well as other characteristics)—
 - (a) age,
 - (b) disability,
 - (c) gender reassignment,
 - (d) marriage or civil partnership,
 - (e) pregnancy or maternity,
 - (f) race,
 - (g) religion or belief,
 - (h) sex,
 - (i) sexual orientation.

*Children***29 Children’s wellbeing**

- (1) The Scottish Government and public authorities must, in carrying out their functions, seek to safeguard, support and promote the wellbeing of the children of Scotland.
- (2) In subsection (1), “children” are people who have not attained the age of 18 years.

*Island communities***30 Island communities**

The Scottish Government must, in carrying out its functions, take account of the particular needs of island communities, having special regard to the distinctive geographical characteristics of each of the areas inhabited by those communities.

*Environmental matters***31 The environment**

- (1) Every person is entitled to live in a healthy environment.
- (2) Accordingly, and in recognition of the importance of the environment to the people of Scotland, the Scottish Government and public authorities must, in carrying out their functions, seek to protect and enhance the quality of the environment.
- (3) In particular, they must seek to promote—
 - (a) the conservation of biodiversity,
 - (b) measures to tackle climate change.

32 Natural resources

Scotland’s natural resources are to be used in a manner which is—

- (a) best calculated to be sustainable, and
- (b) of economic, social, environmental or other benefit to the people of Scotland.

*Permanent constitution***33 Provision for a permanent constitution**

- (1) The Scottish Parliament must, as soon as possible after Independence Day, make provision by Act of the Parliament for the establishment of an independent Constitutional Convention to be charged with the task of drawing up a written constitution for agreement by or on behalf of the people of Scotland.
- (2) The Act must include provision for the Convention to be established, and to begin its task, as soon as possible after the Act is enacted.
- (3) The Act must also include provision about—
 - (a) the membership of the Convention,
 - (b) the funding of, and administrative support for, the Convention,
 - (c) the time by which the Convention is to complete its task,

- (d) the procedures and processes to be followed by the Convention in carrying out its task,
 - (e) the procedure by which the written constitution prepared by the Convention is to be agreed by or on behalf of the people,
 - (f) the dissolution of the Convention on the completion of its task.
- (4) The Convention is “independent” if it, and its members and staff, are free from the direction or control of—
- (a) the Scottish Government or any of its members, and
 - (b) the Scottish Parliament or any of its members.

PART 3

TRANSITIONAL AND CONSEQUENTIAL

34 Continuity of laws

- (1) The laws that are in effect in Scotland immediately before Independence Day are to continue to have effect on and after Independence Day unless and until they are—
 - (a) repealed or modified by Act of the Scottish Parliament or subordinate legislation, or
 - (b) otherwise modified by operation of law.
- (2) That is subject to the constitution.
- (3) The laws referred to include any law, whether contained in a rule of law, an Act of the Scottish Parliament, an Act of the Parliament of the United Kingdom, an Act of the Parliaments of Scotland passed before or in 1707, subordinate legislation, a prerogative instrument or any other instrument or document having the effect of law.

35 Repeal of the Act of Union

The Union with England Act 1707 is repealed.

PART 4

GENERAL

36 Commencement

- (1) This section and sections 1, 18, 20, 34 and 37 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on Independence Day.

37 Short title

The short title of this Act is the Scottish Independence Act 2015.

2

PROCESS FOR THE SCOTTISH INDEPENDENCE BILL



PROCESS FOR THE SCOTTISH INDEPENDENCE BILL

Following a vote for independence in the referendum on 18 September 2014 the Scottish Government would engage in discussions with the UK Government about the process and mechanisms for the transition to independence. The Scottish Government would negotiate, in the spirit of the Edinburgh Agreement, a transfer of legal powers from Westminster to Holyrood to enable the Scottish Government and Scottish Parliament to take the lead in making preparations for independence. That would mean it would be the people of Scotland that shape and define an independent Scotland, not Westminster. Those preparations would include a range of administrative and legislative measures including introducing the draft Scottish Independence Bill to the Scottish Parliament.

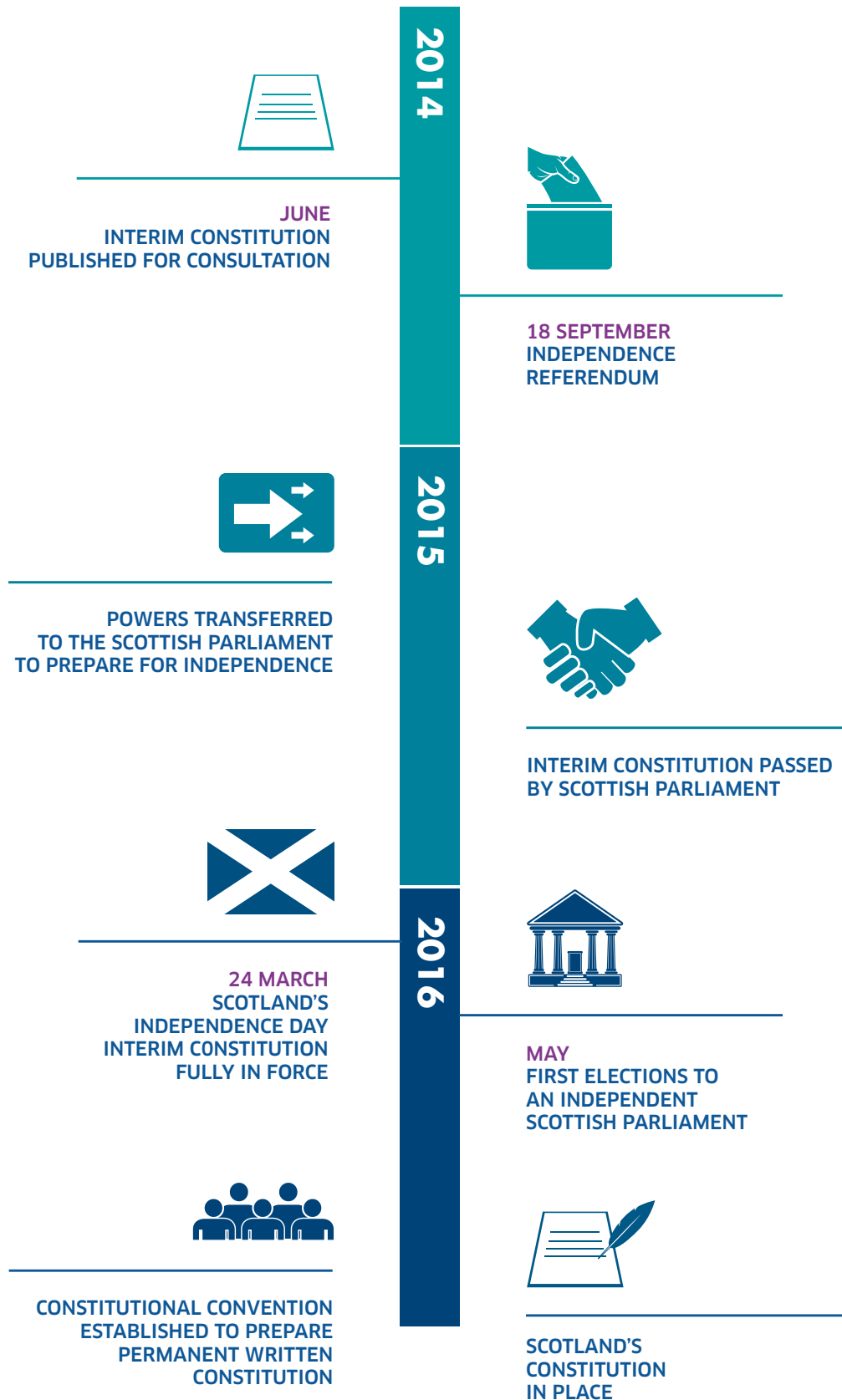
This draft Bill is therefore exactly that – a draft. It is to be considered and debated, during this consultation exercise, in advance of the referendum. That debate would continue prior to the Bill's introduction to the Scottish Parliament, in the event of a vote for independence, and throughout the Bill's parliamentary passage. The Bill would go through the normal 3 stages of parliamentary scrutiny, with the consequent opportunity for evidence-taking, debate and amendment.¹ The Scottish Government welcomes that debate and wants as wide a variety of voices as possible to contribute to it.

After enactment some of the Bill would come into force prior to independence, to assist with preparations, with the remainder coming into effect on Independence Day itself, Thursday 24 March 2016. Legislation would also be required at Westminster to make arrangements for independence, but there is a clear principle involved here – that the Scottish Parliament, wholly elected by the people of Scotland, should have the leading role in passing legislation to give effect to independence. As with the referendum itself, independence will be made in Scotland.

This draft Bill would not be the only legislation that would be enacted during the transition to independence. The Bill would sit alongside the existing Scotland Act 1998 which would be revised so that it could operate effectively in the context of an independent State. There will be substantial continuity from the existing Scotland Act because the institutions set up under that – the Scottish Parliament and Scottish Government – have served Scotland well since 1999. These robust and enduring institutions will be enhanced and built upon by the independence legislation so that they are ready to serve an independent country. A summary of what the revised Scotland Act would provide for is set out in Chapter 4.

¹ The transition to independence is discussed in *Scotland's Future* pages 337-350.

SCOTLAND'S TRANSITION TO INDEPENDENCE



The short title of the Bill is the Scottish Independence Bill. The long title provides that the Bill will be an Act of the Scottish Parliament having three key purposes:

- to provide for Scotland to become an independent State
- to provide an interim constitution for Scotland from Independence Day, and
- to provide for the establishment of a Constitutional Convention to draw up a permanent written constitution for an independent Scotland.

These three purposes are significant, individually and jointly. Together they set out a road map by which Scotland would arrive at a permanent written constitution. Virtually all states internationally, including every member state of the European Union and every Commonwealth state, except for the UK, have a written constitution or Constitution Act.

Firstly, the Bill provides the legislative mechanism by which, on 24 March 2016, Scotland would become independent. Secondly, it sets out the temporary constitution that would apply from that day. And thirdly, it details how Scotland would prepare a permanent written constitution fit for an independent state of which the people are sovereign.

Q1. What are your views on the proposed process for the Scottish Independence Bill, set out in Chapter 2?

3

EXPLANATORY NOTES



EXPLANATORY NOTES

This chapter provides a description of, and background to, the Government’s proposals for each section of the Scottish Independence Bill.

Your views are sought on any or all of the propositions set out in the Bill.

**PART 1
INDEPENDENCE**

SECTION 1

INDEPENDENCE

The opening section provides that on Independence Day Scotland becomes an independent State.

The constitution set out in Part 2 (sections 2 to 33) will come into force fully on that day and will be the basis for the governance of Scotland. The date for Independence Day will be specified by a resolution of the Scottish Parliament; the Scottish Government has stated that the intended date would be Thursday 24 March 2016. On Independence Day the existing Scottish Parliament and Scottish Government will continue and assume full powers and responsibility as the Parliament and Government of an independent State.

The transition to independence would, in many administrative respects, be a process from the referendum in September 2014 to Independence Day in March 2016. However in legislative terms and under international law, independence is an event. At the point of independence, the jurisdiction of Westminster and the UK Government over Scotland would cease. Under international law, on the day of independence Scotland would become a state and be recognised as such by other states. It is therefore necessary to specify that Scotland becomes a state on a particular day and section 1 provides the mechanism for that.

CONSTITUTION

In Scotland, the people are sovereign.

That sovereignty lies with the people will be the fundamental political, constitutional and legal organising principle of an independent Scotland. It is a principle charged with historical resonance, affirming the ancient Scots constitutional tradition that Monarchs and Parliaments are the servants of the people. Sovereignty of the people was clearly set out as early as the Declaration of Arbroath in 1320, refined in the writings of George Buchanan in the late 16th century, declared in Scotland's first Claim of Right in 1689 and proclaimed again for modern Scotland by the Constitutional Convention in 1989.

The position in the UK is that sovereignty lies with the Crown in Parliament. This leads to the doctrine of parliamentary sovereignty and is taken to mean that one Parliament cannot bind its successors. That, in turn, makes having a written constitution in the UK problematic, if not impossible. However this concept of parliament being sovereign has never fully been accepted in Scotland, and has always jarred with the Scots constitutional tradition of popular sovereignty. In more recent times scepticism about parliamentary sovereignty was most famously expressed by Lord President Cooper in the legal case of *MacCormick v Lord Advocate*² when he said:



The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey.

Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should be supposed that the new parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done.³



Section 2 will bring this long-running debate to a conclusion by ensuring that popular sovereignty will have its rightful place as the predominant constitutional principle in an independent Scotland.

² 1953 SC 396.

³ 1953 SC 396 at 411.

THE NATURE OF THE PEOPLE'S SOVEREIGNTY

Section 3 sets out the essential features and characteristics of popular sovereignty. There are four components to this:

- The right to self-determination and the ability of the people of Scotland to decide the form of government best suited to their needs
- That the authority of institutions such as the Scottish Parliament, Scottish Government and the Head of State derives from the people and they are accountable to the people
- That the sovereignty of the people is expressed through this Bill which establishes the constitution, through their democratically elected Members of the Scottish Parliament, in referendums and by other lawful means, and
- That popular sovereignty is limited only by the constitution and by international treaties which Scotland chooses freely to be a party to, on behalf of the people.

There are several noteworthy aspects to this characterisation of popular sovereignty. As noted, the Scots constitutional tradition of sovereignty is long-standing, but much of its substantive content – such as the ability of a people to decide their own form of government – is similar to the right to self-determination in section 3(1). Self-determination developed during the 20th century and has been codified in the fundamental and universal documents of the international system, such as the Charter of the United Nations in 1945 and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights of 1966.

The referendum, and becoming an independent country, would be an act of self-determination by the people of Scotland. However self-determination is permanent and that principle would continue to be respected following independence by the on-going democratic nature of government in Scotland.

Section 3(1) and (4) also reflects the concept that to be sovereign entails being autonomous from external control or interference and having the capacity to make decisions about your own society without being contradicted or having your decisions set aside. That authority is limited only by the sovereign power of the people to bind themselves by such agreements as they choose freely to enter into either between themselves, through a constitution, or with other States and international organisations, through treaties. Therefore the constitution is a manifestation of the people's sovereignty which, once it exists, sets parameters for the exercise of that sovereignty.

Section 3(2) ensures that popular sovereignty remains at the pinnacle of Scotland's constitutional arrangements. The State and all its institutions would be established and continued by virtue of the people's sovereignty; they exist to serve the people; and are always accountable to the people for all State power and authority they may exercise.

It is often argued that absolute sovereignty is much diminished in our modern, interdependent world. However, sovereignty remains pertinent and independence can be viewed as redefining relations between Scotland and the rest of the UK on the basis of the equality of statehood. An independent Scotland would also continue to have extensive relations with other states, such as through the European Union. Such associations with other states and international organisations, on the basis of equality and mutuality and, importantly, independent choice, *is* sovereignty in the modern world.

**PART 2
CONSTITUTION**

**INTERIM CONSTITUTION
FOR SCOTLAND
SECTION 4**

INTERIM CONSTITUTION FOR SCOTLAND

This section provides that Part 2 of the Bill (sections 2 to 33) is an interim constitution for Scotland to operate from Independence Day, until the Constitutional Convention – which must be appointed under section 33 – has drafted the permanent constitution. Section 33 provides that the permanent constitution would be agreed by, or on behalf of, the people of Scotland in what would be a manifestation of their sovereignty. The people of Scotland would express their sovereignty by choosing to give themselves a constitution.

**PART 2
CONSTITUTION**

**NAME OF THE STATE
SECTION 5**

NAME OF THE STATE

Section 5 simply provides that the name of the State will be Scotland. This will be the formal name of the State when it participates in international organisations and signs international treaties.

It is commonly thought that States may have an everyday name, as well as a somewhat different formal name. For many States that is the case with formal names such as the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, for Greece, or the Grand-Duchy of Luxembourg. But this is not a requirement. The formal name can be the same as the everyday name, such as in Article 4 of the Irish Constitution, which provides that: “The name of the State is...Ireland.”

Scotland, as an entity and as a people, is widely recognised across the world and the Scottish Government believes that it is appropriate and straightforward that the name by which our State will choose to call itself reflects that existing recognition – Scotland.

PART 2
CONSTITUTION

THE TERRITORY OF
SCOTLAND
SECTION 6

THE TERRITORY OF SCOTLAND

Section 6 ensures that there would be continuity between the territory and boundaries of Scotland, as part of the UK, and Scotland as an independent State. Scotland's territory, including all islands, internal waters and territorial sea, will remain exactly as it is at present. There is no question of any changes being made.

Scotland's territory and boundaries, unlike that of many countries, have been firmly settled and uncontested for many centuries, with very few adjustments. That the territorial position would remain the same on independence reflects international legal principles in this area. It is widely accepted – including by the UK in previous situations – that when there is a change in political jurisdiction involving the emergence of a State, the boundaries of that State will be the same as the previous internal boundaries of that territory prior to its independence. Therefore an independent Scotland will inherit the integrity of the territory which constitutes Scotland prior to Independence Day, but as an independent state.

As set out in Question 559 of *Scotland's Future*, an independent Scotland's maritime boundaries would be set according to international law. Academics from Aberdeen University have calculated that over 90% of current UK oil and gas revenues are from fields in Scottish waters, based on international legal principles.

PART 2
CONSTITUTION

FORM OF STATE AND
GOVERNMENT
SECTION 7

FORM OF STATE AND GOVERNMENT

This provision describes the type of State that Scotland will be – an independent State with a constitutional monarchy; and also the form which government in Scotland will take – representative, parliamentary democracy. Once again the decision to have this kind of State and form of government will be an expression of the sovereignty of the people of Scotland as characterised, in particular, by section 3(1).

PART 2
CONSTITUTION

NATIONAL FLAG AND
ANTHEM
SECTION 8

NATIONAL FLAG AND ANTHEM

As is common to the constitutions of independent States, section 8 makes arrangements for Scotland's national flag and official anthem. The draft Bill provides that the national flag of Scotland would continue to be the Saltire or Saint Andrew's Cross, which is thought to be one of the oldest flags in the world and is recognised across the globe. However, given the long-standing debate over Scotland's official national anthem the Scottish Government considers that it would not be appropriate to specify this in the Bill. Instead, section 8 gives the Scottish Parliament the power to choose an official national anthem for an independent Scotland. In doing this the Parliament may consult widely with the people of Scotland before making a decision.

HEAD OF STATE

Section 9 provides that Her Majesty Queen Elizabeth would be the Head of State of an independent Scotland.

Her Majesty will be succeeded as Head of State by Her heirs and successors to the Crown and the rights, powers and privileges which attach to the Crown at present would continue after independence, subject to the constitution in this Bill and any other Acts passed by the Scottish Parliament.

The Union of the Crowns of the independent States of England and Scotland came about in 1603 when Elizabeth I of England died childless and James VI of Scotland, the great-great-grandson of Henry VII of England, and the son of Mary, Queen of Scots, became King James I of England too.

What occurred in 1603 was a personal union of the Crowns, contingent on the different laws of succession to the separate thrones of Scotland and England. One writer has described the Union of the Crowns as follows:

“ The two crowns, and the power and authority symbolised thereby, were not united but had both become vested in the same person and his lineal successors.....The relationship between James’s two realms was limited to the fact that he was the king of each.⁴ ”

The Scottish Government’s position on the Union of the Crowns is very well established. In 2007 *Choosing Scotland’s Future* said:

“ On independence, Her Majesty The Queen would remain the Head of State in Scotland. The current parliamentary and political Union of Great Britain and Northern Ireland would become a Monarchical and social Union – United Kingdoms rather than a United Kingdom – maintaining a relationship first forged in 1603 by the Union of the Crowns.⁵ ”

The Government’s policy is for continuity of the Monarchy and for an independent Scotland to be a democratic, constitutional Monarchy. The Monarchy has been shared with England since 1603, under varying political arrangements between the two countries, and can continue to be shared in the context of an independent Scottish State. The Acts of Union would be repealed, partly by section 35 of the Scottish Independence Bill, and this would leave the regal union of 1603 untouched. Scotland would join those 16 other Commonwealth states that all have the Queen as Head of State. In the event of independence the Monarchy would continue to occupy a significant position, and play an important role, in Scottish public life.

⁴ Walker, DM (1996) *A Legal History of Scotland vol IV The Seventeenth Century* at page 30.

⁵ Paragraph 3.25.

PART 2
CONSTITUTION

LEGISLATURE
SECTION 10

LEGISLATURE

This section provides that the legislature of an independent Scotland would continue to be the existing Scottish Parliament which, from Independence Day and subject to the constitution, would have full competence and legislative power to make and modify the law of Scotland.

PART 2
CONSTITUTION

EXECUTIVE
SECTION 11

EXECUTIVE

Section 11 provides that executive power of government in an independent Scotland would continue to be vested in the Scottish Government which, from Independence Day and subject to the constitution, would assume full responsibility for the government of Scotland.

Sections 10 and 11 together ensure that the existing legal structures and internal workings of the Scottish Parliament and Scottish Government will continue largely as they are currently configured in the Scotland Act 1998 (further detail on this is set out in the summary of the renewed Scotland Act in Chapter 4). These institutions have served Scotland well since 1999, they have been robust and durable, and they can continue to develop and evolve in the context of independence.

This continuity of the Scottish Parliament and Scottish Government means that the existing legal status of the Scottish Ministers and Scottish Government remains essentially as it is in the Scotland Act 1998. Therefore, for example, contracts in the name of the Scottish Ministers will continue on as they are at present after independence. There is no need, and no benefit, to changing the existing Scottish Ministers and Scottish Government to some other legal entity. The Scottish Government will remain as it is, in terms of being a legal entity, and will have currently reserved functions transferred to it. It will assume its position as the Government of an independent Scotland.

STATE ACCOUNTABILITY TO THE PEOPLE

Section 12 proposes making explicit constitutional provision, for the first time, that the Parliament and its members collectively, as the elected representatives of the sovereign people of Scotland, are accountable to the people for their actions. It also provides that the Scottish Government and its members – the First Minister, Cabinet Secretaries and Law Officers – are accountable to the Scottish Parliament and, through the Parliament, to the sovereign people of Scotland.

The accountability provisions in section 12 are significant. That Government is accountable to Parliament and Parliament to the electorate is implicit within existing arrangements, but the Government believes that one of the advantages of moving to a written constitution is that such basic and fundamental democratic principles can, and should be, expressly stated. This provision is also a practical articulation of the sovereignty of the people – Parliament and Government are subject to the people and their authority derives from the people. Accountability was identified by the Consultative Steering Group, prior to the establishment of the Scottish Parliament in 1999, as one of the key principles on which the operational needs and working methods of the Scottish Parliament should be based, and it is appropriate this should be reflected in the constitution.

INDEPENDENCE OF THE JUDICIARY

Scotland's judiciary has been established for centuries, with a senior judiciary in existence formally since at least 1532.⁶ Guaranteeing judicial independence is a central part of any democratic society and provisions enshrining that impartiality are frequently contained in the constitutions of States. Section 13 therefore provides that all members of the judiciary will continue to be independent and free from external influence and control when conducting their judicial functions.

In this context members of the judiciary means the judiciary of any court established under the law of Scotland. In conducting judicial functions the judiciary must be free from influence from, amongst others, Government Ministers, the Law Officers and MSPs.

⁶ College of Justice Act 1532 (c. 2 APS) which remains in force.

SUPREME COURT

Section 14 of the draft Bill provides that the Supreme Court of Scotland would be, together, the Court of Session and the High Court of Justiciary as the final courts of appeal in civil and criminal matters respectively. Consequently, the jurisdiction of the UK Supreme Court in Scotland would cease. In practice it will be the Inner House of the Court of Session that will be the final appeal court in civil matters; for criminal matters it will be the High Court of Justiciary sitting as the Court of Criminal Appeal.

The decisions of the Supreme Court of Scotland will not be subject to review by any other court or tribunal and no appeal will lie against its decisions to any other court or tribunal. However this does not affect the jurisdiction of international courts such as the Court of Justice of the European Union in Luxembourg, which adjudicates on issues of EU law, or the European Court of Human Rights of the Council of Europe in Strasbourg, which adjudicates on ECHR issues. Their jurisdiction in Scotland will remain the same.

THE RULE OF LAW

Section 15 provides simply that the principle of the rule of law will continue to apply in an independent Scotland and that every person must respect that principle. There are several components to what is meant by the rule of law and these encompass the idea that all individuals and bodies in an independent Scotland will be subject to, and entitled to the benefit of, laws which:

- have been established in a transparent manner in accordance with accepted procedures, such as legislation enacted by a democratic, accountable parliament
- are administered by State bodies in ways that are fair, predictable, consistent and non-arbitrary, and
- are adjudicated upon by courts presided over by independent judges.

THE SCOTTISH CIVIL SERVICE

Section 16 makes high-level constitutional provision that, on independence, there would be a Scottish civil service. All members of the Scottish civil service must act with integrity, honesty, objectivity and impartiality. An Act of the Scottish Parliament will make further provision about the Scottish civil service.

At present, the “Civil Service of the State”, including that part of it within the Scottish Government, is a matter reserved to Westminster. The UK civil service is not fully regulated by legislation. The Prime Minister, as Minister for the Civil Service, exercises powers in relation to the civil service under the royal prerogative. The Northcote-Trevelyan report in 1854 recommended that the core values and principles of the civil service be enshrined in legislation, but this was not done until the Constitutional Reform and Governance Act 2010.

Given the importance of the civil service, and of its core values of objectivity and political impartiality, the Scottish Government considers that it is appropriate that such provision should be included in the Scottish Independence Bill. This emphasises, and provides reassurance, that an independent Scotland would expect high standards from its public service.

LOCAL GOVERNMENT

Section 17 provides that local government will continue in an independent Scotland, administered by democratically elected local councils acting autonomously of the Scottish Government. Councils are under a duty to represent and promote the interests of the people living within their local area.

The European Charter of Local Self-Government, adopted in 1985 under the auspices of the Council of Europe, has been in force for the UK since August 1998. The Charter is therefore an international legal obligation, binding on the UK. The Scottish Ministerial Code sets out the overarching duty on Ministers to comply with such obligations. An independent Scotland will continue to be a party to the Charter.

Article 2 of the Charter states that:

“The principle of local self-government shall be recognised in domestic legislation, and where practicable, in the constitution.”

The Explanatory Notes to the Charter further explain Article 2 saying:

“In view of the importance of the principle [of local self-government], it is further desirable that this should be achieved by including it in the fundamental text governing the organisation of the state, that is to say, the Constitution.”

Such a constitutional recognition is problematic within existing UK constitutional structures because of the doctrine of parliamentary sovereignty, including the norm that Parliament cannot bind its successors. However, independence and moving to a written constitution provide opportunities to elevate certain matters to having a constitutional status. In doing so Scotland would be emulating other countries, such as Germany, Denmark, Sweden and Ireland, which enshrine the position of local government within their national constitutions. The Scottish Government believes that the provision in section 17 will enhance the status of local government in Scotland and guarantee its continuation.

PART 2
CONSTITUTION

SCOTTISH CITIZENSHIP
SECTION 18

SCOTTISH CITIZENSHIP

The concept of, and criteria for, citizenship usually features in the constitutions of states because it is necessary to provide for who holds citizenship of the state. Section 18 aims to simplify the UK Government's system of defining citizenship and nationality by introducing a single definition of citizenship, which would be aligned to Scottish passport entitlement.

In line with Scottish Government policy, subsection (1) provides that all people who, prior to independence, hold British citizenship and are habitually resident⁷ in Scotland, or were born in Scotland, will automatically hold Scottish citizenship. That automatic citizenship would cover all British citizens living in Scotland and all Scottish-born British citizens currently living outwith Scotland. It also covers those people born in Scotland on or after independence, firstly, when a parent holds Scottish citizenship, or has indefinite leave to remain; and secondly, any person born outside Scotland with a parent who holds Scottish citizenship and the child's birth is registered in Scotland.

Subsection (2) specifies categories of people who are entitled to claim Scottish citizenship, so that it is not automatic but an entitlement that each individual coming within the category can choose to claim. Entitlement to claim extends to:

- any person born in Scotland, on or after independence, if either of their parents meets requirements set out in law
- any person, wherever that person is born, with a connection by descent from a person holding Scottish citizenship or another connection with Scotland as set out further in law.

Subsection (3) makes it explicit that citizens of Scotland will also be able to hold citizenships or nationalities of other States without that affecting their Scottish citizenship. The detail of citizenship can be a technical

⁷ "Habitually resident" is a term used in international law, including the European Convention on Nationality of 1997, and in domestic law. The term is similar to the term "ordinarily resident" currently used to define "settled in the UK" in the British Nationality Act 1981. The test for ordinary residence is satisfied where the person has habitually and normally resided for a settled purpose apart from temporary or occasional absences. Settled purpose is defined as one which has a sufficient degree of continuity to be properly described as settled.

area and so subsections (4) and (5) provide that Acts of the Scottish Parliament will make further provision in this area to supplement the essential criteria provided for here.

**PART 2
CONSTITUTION**

**INTERNATIONAL
RELATIONS AND
FOREIGN POLICY
SECTION 19**

INTERNATIONAL RELATIONS AND FOREIGN POLICY

Section 19 is the first of four sections dealing with the international relations of an independent Scotland. It provides that Scotland's foreign policy and international relations would: abide by international law; promote international peace, justice and security and friendly relations among peoples; and advance in the world Scotland's best interests and values – many of which are set out elsewhere in the constitution.

This provision ensures that Scotland must conduct its international relations and foreign policy in a legal manner, so as to be a good global citizen. Some of the wording of section 19 deliberately reflects Article 1 of the Charter of the United Nations which sets out the UN's purposes. The UN Charter, as well as being the founding instrument of the United Nations, is also a normal international multilateral treaty and is therefore already binding upon the UK, and Scotland as part of the UK, as an international obligation. Placing elements of it in the constitution will give it further domestic effect and achieve a degree of incorporation.

**PART 2
CONSTITUTION**

**INTERNATIONAL
ORGANISATIONS
SECTION 20**

INTERNATIONAL ORGANISATIONS

Section 20 enables the Scottish Government to take all necessary steps to ensure that Scotland maintains membership of international organisations which Scotland would want to participate in. As referenced in section 36, section 20 is one of the provisions in the Bill which will come into force prior to Independence Day itself, to assist with the transition to independence.

The substantive measures which might be taken under this power would be determined by the particular rules and procedures of different international organisations. Section 20 emphasises Scotland's willingness to become an engaged and active global citizen, and this will be achieved in part by continuing membership in a wide range of regional and global international organisations such as the EU, the UN, the Commonwealth, NATO, the IMF and World Bank Group, the OECD and WTO and many others.

RATIFICATION OF INTERNATIONAL AGREEMENTS

This provision ensures proper parliamentary accountability and scrutiny whenever the Scottish Government becomes a signatory to an international treaty or agreement. It does this by providing that any such agreement to which Scotland becomes a signatory – either bilateral or multilateral – can only be ratified, and therefore come into force, after it has been laid before the Scottish Parliament, and the Parliament has specifically approved it. Other arrangements will be made for agreements which are already in force in Scotland prior to Independence Day, and which Scotland will inherit upon independence, in accordance with recognised international procedures.

The democratic, transparent process envisaged by section 21 marks an advance from the current arrangements within the UK for the ratification of treaties. Prior to the Constitutional Reform and Governance Act 2010 there was no legal requirement in the UK for a treaty to be approved by Westminster before it was concluded by the UK Government. Any parliamentary scrutiny that did occur was based on a non-statutory convention – known as the Ponsonby Rule – which had emerged in the 1920s. This ‘Rule’ provided that some, but not all, treaties should be laid before both Houses of Parliament for 21 sitting days. However, it gave no legal effect to a resolution of either House that a treaty should not be ratified. The 2010 Act essentially put the Ponsonby convention into legislation by placing parliamentary scrutiny of treaty ratification on a statutory footing and giving some legal effect to a resolution of the House of Commons or Lords that a treaty should not be ratified.

However the 2010 Act remains light-touch in terms of parliamentary scrutiny because it allows treaties to proceed to ratification without any parliamentary discussion or vote, unless MPs or Peers actively move against that treaty. It is akin to negative procedure for secondary legislation.

Section 21 will ensure that the independent Scottish Parliament adopts a positive, affirmative form of oversight of new treaties whereby, prior to the Scottish Government ratifying a treaty, the Scottish Parliament must have actively approved the treaty rather than just not objected to it.

In addition, every new treaty to which Scotland signs, accedes to, or becomes party to, following independence, will be laid before the Scottish Parliament. This will give Parliament formal notification of new treaties, and allow it to comment if it wants. Parliament will therefore be engaged in the treaty process at an earlier stage rather than just when ratification is imminent.

INCORPORATION OF INTERNATIONAL AGREEMENTS

Section 22 provides that international agreements and treaties, to which Scotland is a party, will take direct effect in the domestic law of Scotland to the extent provided for by an Act of the Scottish Parliament, following parliamentary debate and discussion.

The Government believes that this provision will ensure a decisive parliamentary role in the domestic implementation and incorporation of agreements and treaties. It is the Scottish Parliament which will determine the degree to which international obligations apply in domestic law. Agreements will not be a direct source of rights and obligations, or justiciable in Scottish courts, until and unless effect has been given to them by legislation debated and passed by the Scottish Parliament.

NUCLEAR DISARMAMENT

It is the Scottish Government's priority, as a good global citizen, to support and promote nuclear disarmament, so far as that is within its powers. One aspect of that would be for an independent Scotland to accede to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) as a non-nuclear-weapons state. A total of 190 countries are party to the NPT, more than for any other arms limitation or disarmament agreement. And, as is made clear in *Scotland's Future*,⁸ the timing of Scotland's ratification of the NPT will not rely on the arrangements for securing the speediest safe withdrawal of Trident from Scotland following independence.

Section 23 provides that the Scottish Government must pursue negotiations with a view to securing nuclear disarmament in accordance with international law, and the safe and expeditious removal from Scotland of nuclear weapons based here. Placing a clear duty on the Scottish Government to pursue negotiations to secure the removal of nuclear weapons that are based on Scottish territory, is an explicit statement of Scotland's intended destination. The detailed process and timetable for removal of Trident would be a priority for negotiations, with a view to achieving removal within the first term of an independent Scottish Parliament.⁹

The Scottish Government would also propose, for the permanent constitution, a constitutional prohibition on nuclear weapons being based in Scotland.

⁸ Qs 312 and 313.

⁹ *Scotland's Future*, Q315.

PART 2
CONSTITUTION

INCORPORATION OF
EUROPEAN LAW
SECTION 24

INCORPORATION OF EUROPEAN LAW

Section 24 maintains the position of European Union law in an independent Scotland. It provides that directly effective EU law forms part of Scots law which, in turn, must not be inconsistent with EU law. This is the same as the position of Scotland at present as part of the UK and as part of the EU, and reflects the effect of the European Communities Act 1972. This section ensures that when Scotland, for Independence Day, changes its status within the EU from being part of a Member State to being a distinct Member State, the effect of EU law and all the rights, powers and obligations flowing from the EU Treaties will seamlessly carry on from Scotland as part of the UK to Scotland as a Member State of the EU.

PART 2
CONSTITUTION

EUROPEAN CITIZENSHIP
SECTION 25

EUROPEAN CITIZENSHIP

Section 25 matches Scottish citizenship, as set out in section 18, to provision in EU law for citizenship of the European Union. People in Scotland are already citizens of the European Union and have all the rights and privileges consequent on that. Article 20.1 of the Treaty on the Functioning of the EU states:

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”

Subsequent provisions of the Treaty set out the rights of citizenship including: the right to move and reside freely across the EU; the right to vote in European and local elections; the right to use the diplomatic and consular services of other Member States; and the right to petition some EU institutions. Section 25 of the Scottish Independence Bill ensures that those rights of European citizenship would continue to attach to all citizens of an independent Scotland.

PART 2
CONSTITUTION

RESPECT FOR HUMAN
RIGHTS
SECTION 26

RESPECT FOR HUMAN RIGHTS

Section 26 is the first of three sections dealing with human rights and equality. Most modern constitutions contain human rights and equality provisions which set out the fundamental rights and freedoms enjoyed by everyone in society. These provisions reflect universal principles established by the Universal Declaration of Human Rights of 1948 (UDHR) and further developed in subsequent treaties and conventions. The UDHR proceeds from the fundamental principle that all human beings are born free and equal in dignity and rights. Sections 26 to 28 of the Bill safeguard and guarantee Scotland's existing progressive approach to equality and human rights and place Scotland firmly within the mainstream of contemporary European constitutional thinking.

Section 26 provides that every person in an independent Scotland will have the rights and fundamental freedoms contained in the European Convention on Human Rights (ECHR). The ECHR was agreed to by the countries of Europe in 1950 following the Second World War as an expression of:

“ their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend.¹⁰ ”

Scots law cannot have an effect which is incompatible with those human rights and fundamental freedoms and the Scottish Government and other public authorities must respect and follow ECHR standards when conducting their activities. This section, together with provision in the renewed Scotland Act, will ensure that human rights standards will be protected and advanced by the constitution of an independent Scotland by providing that the same human rights system will apply across all devolved and currently reserved areas.

PART 2 CONSTITUTION

REFERENCES TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS SECTION 27

REFERENCES TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Section 27 sets out those provisions of the ECHR to which section 26 applies. These follow the Human Rights Act 1998¹¹ in covering the following human rights and fundamental freedoms:

■ Right to life	Article 2
■ Prohibition of torture	Article 3
■ Prohibition of slavery and forced labour	Article 4
■ Right to liberty and security	Article 5
■ Right to a fair trial	Article 6
■ No punishment without law	Article 7
■ Right to respect for private and family life	Article 8
■ Freedom of thought, conscience and religion	Article 9
■ Freedom of expression	Article 10
■ Freedom of assembly and association	Article 11
■ Right to marry	Article 12
■ Prohibition of discrimination	Article 14
■ Protection of Property	Protocol 1, Article 1
■ Right to education	Protocol 1, Article 2
■ Right to free elections	Protocol 1, Article 3
■ Abolition of the death penalty	Protocol 13, Article 1

Section 27(2) provides that the rights and freedoms listed above have effect for the purposes of the constitution subject to any derogations or reservations to the ECHR that apply in relation to Scotland.

¹⁰ Preamble to the ECHR.

¹¹ The Human Rights Act 1998 does not cover Article 1 and 13 of the ECHR because it was intended that the Act itself would give effect to these jurisdictional and effective remedy provisions.

EQUALITY

Section 28 of the draft Bill ensures that equality will be protected and advanced in an independent Scotland. It provides a commitment to equality for all the people of Scotland. Every person in an independent Scotland would be equal before the law and entitled to be treated with respect regardless of their status, and without unfair discrimination on the basis of their personal characteristics. The Scottish Government and other public authorities will continue to be under a positive duty to seek to advance and secure equality of opportunity for every person in Scotland regardless of their personal characteristics.

The idea of being equal before the law is best understood as following from the principle that an independent Scotland would be a democracy founded on respect for the rule of law, as opposed to the arbitrary, biased or irrational exercise of power. Where the law impacts on the lives of individuals, groups or communities, it should be applied without prejudice or discrimination. That does not however preclude the possibility that laws may intentionally set out to treat people differently, for example to ensure equality of opportunity, and that where they do so, such rules need to be applied in accordance with the general principle of respect for the rule of law. This recognises the impact of historic and structural inequality and the need, on occasion, to treat people differently to secure equality of opportunity. Equality does not always mean treating everyone the same. Personal characteristics in this provision include, as well as other characteristics, all of the following: age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex and sexual orientation.

Section 28 sets out some high-level principles designed to secure equality for everyone in society. Detailed legislation, including the Equality Act 2010, is consistent with these principles and will continue to apply. This includes the current duty of public authorities to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, advance equality of opportunity and foster good relations between people.

CHILDREN'S WELLBEING

Section 29 makes specific provision about children, as is common in modern state constitutions.¹² It provides that the Scottish Government and public authorities must, when conducting their functions seek to safeguard, support and promote the wellbeing of the children of Scotland. In this context children are people under 18 years of age.

There is much bespoke legislation about children's interests, wellbeing and rights such as the Children (Scotland) Act 1995 and legislation on children's hearings, adoption and fostering, education and additional

¹² According to UNICEF there are over 20 States that have constitutional provision about children. <http://www.unrol.org/article.aspx?n=unicef>

support needs. This has been supplemented recently with the enactment of the Children and Young People (Scotland) Act 2014. Section 29, rather than applying in a specific subject area alone, will make overarching provision applicable across all public functions. The Scottish Government considers that this will assist in mainstreaming consideration of the wellbeing of children.

**PART 2
CONSTITUTION**

**ISLAND COMMUNITIES
SECTION 30**

ISLAND COMMUNITIES

Section 30 places a duty on the Scottish Government, when conducting its functions, to take account of island communities' specific needs, having particular regard to their distinctive geographical character as islands. The provision gives constitutional recognition to the special circumstances of island communities and ensures that they will always be considered and valued during decision-making by the Government. This section applies to all of Scotland's island communities – and Scotland has 93 inhabited islands with a total population of over 103,000 – covering those within the three island council areas of Shetland, Orkney and Na h-Eileanan Siar and also those islands within other council areas.

**PART 2
CONSTITUTION**

**THE ENVIRONMENT
SECTION 31**

THE ENVIRONMENT

This section provides that every person in Scotland is entitled to live in a healthy environment. Accordingly, given the importance of the environment, the Scottish Government and public authorities must seek to protect and enhance the quality of the environment when conducting their functions. In particular the Scottish Government and public authorities must seek to promote the conservation of biodiversity¹³ and measures to address and mitigate climate change.

Scotland already has detailed environmental legislation such as the Climate Change (Scotland) Act 2009, the Nature Conservation (Scotland) Act 2004 and the recently enacted Regulatory Reform (Scotland) Act 2014, which will of course continue, but section 31 adds to this by making overarching provision concerning the high-level principles in this area.

In 1976 Portugal was the first country to include provision about a healthy environment in their constitution. Now, over 90 countries have granted similar status to the environment. In nearly all of these countries there is evidence that environmental laws have been strengthened, enforcement improved and public participation increased. Section 31 ensures that the entitlement to live in a healthy environment is built into an independent Scotland's foundations.

¹³ Biological diversity is defined in Article 2 of the United Nations Convention on Biological Diversity as meaning "...the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems."

PART 2
CONSTITUTION

NATURAL RESOURCES
SECTION 32

NATURAL RESOURCES

This section provides that Scotland's natural resources must be used in ways that are assessed to be sustainable and in ways which are of benefit – including economic, social or environmental benefit – to the people of Scotland. Many countries' constitutions make provision for the sustainable management and utilisation of their natural resources as a key responsibility of the state towards the people and future generations. The use of natural resources in a responsible, long-term, sustainable way for the common good can be seen as another manifestation of the sovereignty of the people.

PART 2
CONSTITUTION

PROVISION FOR A
PERMANENT
CONSTITUTION
SECTION 33

PROVISION FOR A PERMANENT CONSTITUTION

Part 2 of the Scottish Independence Bill sets out an interim constitution for an independent Scotland which would, largely, take effect from Independence Day. The final provision of this part, section 33, provides for the preparation of the permanent written constitution following independence. Once drafted and approved, it would supersede the interim constitution in this Bill.

Section 33 is therefore an extremely important provision. It provides that the first independent Scottish Parliament elected in May 2016 must, by primary legislation, establish a Constitutional Convention to draw up a permanent written constitution for agreement by, or on behalf of, the people of Scotland. The Scottish Parliament is therefore placed under a legally binding duty to legislate to establish the Convention as soon as possible after Independence Day. The legislation must itself provide that the Convention begins its work as soon as possible. These two duties – to legislate and to start work, as soon as possible – will ensure that the Convention's work begins expeditiously following independence. The autonomy of the Convention is an important matter guaranteed by ensuring that neither the Scottish Government nor the Scottish Parliament can direct or control the Convention and its members or staff.

The establishing Act must contain provision about the Constitutional Convention concerning: its membership and funding arrangements; the time it has to draw up the constitution; its working methods; the procedure by which the constitution is to be approved; and its dissolution having completed its work.

Section 33 means that the permanent written constitution for an independent Scotland can be drafted, not by the current or any future Government, nor by elected politicians, but through an inclusive and widely participative process involving many civic society groups such as trades unions, business interests, local councils, faith groups, community groups and – importantly – also extensively involving ordinary citizens. The current Scottish Government will be just one voice amongst many in this process. The Scottish Government would make proposals for some issues to be included in the constitution, as set out further in Chapter 5, but would not control the process or the content of the constitution. It will be open to all groups, and also individual citizens of an independent Scotland, to make proposals for the constitution that the independent Convention will consider and upon which it will decide.

TRANSITIONAL AND CONSEQUENTIAL

Part 3 of the draft Bill contains important transitional and consequential provisions that are necessary to ensure the effective functioning of Scotland from the point of independence. There would be other transitional and consequential provisions that would be taken forward in the renewed Scotland Act or in other legislation, such as that indicated in Question 406 of *Scotland's Future* to make arrangements to finalise Scottish cases already referred to the UK Supreme Court prior to independence.

CONTINUITY OF LAWS SECTION 34

CONTINUITY OF LAWS

Section 34 is a short provision but with widespread ramifications for the law of an independent Scotland. It provides, quite simply, that all the laws that are in effect before independence are to continue to have effect after independence and until such times as the independent Scottish Parliament might choose to change or repeal those laws.

This continuity of laws provision covers any law contained in any of the following:

- Acts of the Westminster Parliament, in both devolved and reserved areas (including provisions yet to be commenced) and irrespective of whether such Acts were passed before or after devolution in 1999
- Acts of the Scottish Parliament
- Acts of the pre-1707 Parliaments of Scotland, which remain in force
- all secondary legislation made under Acts of the Scottish Parliament or Westminster Acts including orders, regulations, and court and tribunal rules
- rules of law such as in court decisions and judicial precedents
- common law rules and norms
- Prerogative instruments, such as Royal Charters made by the Monarch
- EU law which was already part of Scots law
- International law which was already part of Scots law
- Any other instrument or document having the effect of law.

It has sometimes been suggested that legislation which currently operates in Scotland, especially in currently reserved areas such as tax law, employment law or welfare legislation would need to be entirely re-written in advance of independence. This is incorrect. Existing legislation in these areas is part of the corpus of Scots law and would continue to apply and operate as it does at present, subject to such modifications that might be necessary for that legislation to function effectively in the context of an independent Scotland. Powers would be taken to make such modifications, prior to independence.

This principle of continuity of laws is well-precedented in previous situations where territories and countries have become independent. It has featured in the independence legislation enacted by Westminster itself in relation to the UK's former colonial and overseas territories.¹⁴

This principle was also applied to the independence of the Irish Free State from the UK in 1922. The first Irish Constitution, enacted in the Constitution of the Irish Free State Act 1922, provided in Article 73, that:

“ Subject to this Constitution and to the extent to which they are not inconsistent herewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas. [Irish Parliament]

Although a continuity of laws provision is categorised as a transitional measure, it can also stand the test of time. There are Westminster statutes which were carried over to an independent Ireland and which remain in force in Ireland still, and which the *Dail Éireann*, even after over 90 years of independence, has never felt the need to entirely re-write.¹⁵

This illustrates that the continuity of laws principle – which basically rolls over laws to the new constitutional situation – has operated successfully in the past and can do so again for an independent Scotland. An independent Scotland would not need to re-write its existing statute book.

¹⁴ For example when the central American territory of Belize became independent from the UK, the Belize Act 1981, provided in section 3 (“Operation of existing law”), as follows:

“(1) ...all law to which this section applies, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, which is in force on Independence Day, or, having been passed or made before that day, comes into force thereafter, shall, unless and until provision to the contrary is made by Parliament [of Belize] or some other authority having power in that behalf, have the same operation in relation to Belize and persons and things belonging to or connected with Belize as it would have had apart from this subsection if there had been no change in the status of Belize.”

¹⁵ The Statute Law Revision Act 2007 (No. 28) was the largest single repealing statute in the history of the Irish State. The Act repealed all public general statutes enacted before independence on 6th December 1922 with the exception of a list of statutes that were specifically preserved – that list came to 1,364 statutes.

REPEAL OF THE ACT OF UNION

This section repeals the Union with England Act 1707.

The Treaty of Union between England and Scotland was constituted in law by separate Acts of the pre-Union Scots Parliament (the Union with England Act 1707) and the English Parliament (the Union with Scotland Act 1706). The English Parliament’s legislation came second; the discrepancy is explained by a subsequent calendar change.¹⁶ The Union was an international treaty between two independent States, expressed in legislative form. The 25 original Articles refer to the ‘Treaty’ of Union on 12 occasions; the ordinary usage title of ‘Act of Union’ is incomplete in that it refers to only one Act.

Both Acts will need to be repealed so far as they remain in force, from the day of independence. Section 35 would achieve that in respect of the pre-Union Scots Parliament Act of 1707. The Scottish Government considers it appropriate that Westminster should legislate to repeal the English Act of 1706. This would be in keeping with the principle underpinning the Edinburgh Agreement that independence would be a mutual and consensual process.

As mentioned in section 9 concerning the Head of State, the repeal of the two Acts of Union would not affect the Union of the Crowns.

¹⁶ The two Acts were given short titles retrospectively in the 19th century for ease of reference: “The Union with England Act 1707” and “The Union with Scotland Act 1706”. The 1707 Act was passed before the 1706 Act; the dating is because the English legal year began on 25 March. Not until 1752 did England catch up with Scotland and have the year beginning on 1 January.

PART 4
GENERAL

COMMENCEMENT
SECTION 36

COMMENCEMENT

Section 36 provides for the commencement of the Scottish Independence Bill once it has been enacted by the Scottish Parliament and received Royal Assent. The Bill would be enacted through the usual process set out in the Scotland Act 1998 and the Scottish Parliament's standing orders.

PART 4
GENERAL

SHORT TITLE
SECTION 37

SHORT TITLE

This section makes the usual provision for the short title. The Bill when enacted would be called the Scottish Independence Act 2015.

Q2. What are your views on the proposed content of the Scottish Independence Bill, set out in Chapter 1 and explained in Chapter 3?

4

A RENEWED SCOTLAND ACT FOR INDEPENDENCE



A RENEWED SCOTLAND ACT FOR INDEPENDENCE

Revising the Scotland Act

The Scottish Independence Bill would sit alongside a refreshed and re-written Scotland Act. The Scotland Act was enacted in 1998, following the 1997 referendum, and established the Scottish Parliament and Scottish Executive, now Scottish Government. The Scotland Act has never been set in stone and has been amended on several occasions, most notably by the Scotland Act 2012. Following a vote for independence in the referendum, the Scotland Act would be revised again.

Together with the enactment of the Scottish Independence Bill, the existing Scotland Act would be amended so that it can effectively function in the context of an independent Scotland. This would involve:

- the retention of many provisions which would continue on, such as the electoral system for the Scottish Parliament
- the amendment of some existing sections to ensure they operate for an independent Scotland, such as removing references to the Prime Minister and the UK Supreme Court
- the addition of some new sections, and
- the repeal of many provisions which were necessary for a devolved Parliament within the UK but would no longer be relevant to an independent State.

Most notably, Schedule 5 to the Scotland Act – which sets out all the matters reserved to Westminster and on which the Scottish Parliament is prevented from legislating – would be entirely repealed for independence.

This chapter sets out the main components of the existing Scotland Act, and seeks your views on the Government's proposals for what would be continued, amended or removed for independence. The renewed and revised Scotland Act, along with the Scottish Independence Bill, when enacted, would form the interim constitutional arrangements of Scotland only until the Constitutional Convention, post-independence, drafts the permanent constitution for an independent Scotland. Consequently, it will be open to the Constitutional Convention to re-open and re-consider any of the issues which the Scotland Act currently covers and which the Scottish Government does not intend to adjust in advance of independence.

The Scottish Parliament

Part I of the Scotland Act (sections 1 to 43) concerns arrangements for the Scottish Parliament.

The proportional representation voting system for the Scottish Parliament, based on first-past-the-post constituency seats and top-up regional voting lists, will remain the same, as will arrangements for the filling of vacancies when an MSP resigns or passes away. The Scottish Government does not propose to change the number of MSPs from the current 129 set out in the Scotland Act (Schedule 1), and considers that an appropriate number for a country of Scotland's size. However this may be a matter on which opinions will vary and which the post-independence Constitutional Convention might consider. In line with the Government's policy of extending the franchise in all elections to those aged over 16, as in the referendum, the current Scottish Parliament franchise will continue except that it will be extended to include 16 and 17 year olds. In addition, the Government proposes that the current guarantee of distinct parliamentary constituencies for both the Orkney Islands and the Shetland Islands will be extended to the Western Isles.

Sections 15 to 18 of the Scotland Act make provision for the disqualification of MSPs from the Parliament. These provisions are largely inherited from equivalent Westminster rules such as the House of Commons Disqualification Act 1975 and other legislation. When refreshing the Scotland Act the Scottish Government proposes taking the opportunity to review these provisions and consider if the criteria for disqualification should be updated.

The Government proposes that the overall structure of the Parliament will remain the same and this will include the existing arrangements for the Presiding Officer and the Scottish Parliamentary Corporate Body. The Parliament will continue to have wide powers to call for witnesses and documents to ensure high levels of oversight, accountability and scrutiny; the Parliament itself may want to assess its standing orders and consider whether any changes are necessary in the context of independence and in consequence of the amendments being made to the Scotland Act.

Section 37 of the Scotland Act, which provides that the Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to the Scotland Act, will be repealed. This is because the Acts of Union will themselves be repealed by section 35 of the Scottish Independence Bill, and parallel legislation at Westminster.

Certain legal provisions which protect freedom of speech in the Parliament by making specific provision relating to legal proceedings by or against Parliament, the law of defamation, and contempt of court rules, will continue. The Parliament – MSPs and staff – will continue to be subject to the long-standing rules against corrupt practices, and the system for recording and publishing the financial and other interests of MSPs, which have served the Scottish Parliament well, especially in comparison to procedures at Westminster, will also continue.

Legislative competence: removal of restrictions

Sections 28 to 36 of the Scotland Act contain important provision about legislation in the Scottish Parliament. Some significant changes will need to be made to these provisions in preparation for independence. Some parts of these sections limit the scope of the Scottish Parliament to currently devolved areas and also give the UK Government and UK Ministers a role in challenging or overriding Scottish Parliament legislation. On independence, Westminster's role in legislating for Scotland would come to an end and the Scottish Parliament would have full competence to make and modify the law of Scotland.

Section 28 provides for the Parliament to make laws known as Acts of the Scottish Parliament. Most of section 28 makes provision for the passage of Bills and the process of Royal Assent and can continue. Section 28(7) says:

“ This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland. ”

This provision is very significant in terms of the status of the devolved Scottish Parliament within the existing constitutional arrangements of the UK. It ensures that the Westminster Parliament remains legally sovereign over the Scottish Parliament, including in devolved areas. Because no UK Parliament can bind its successors, this means that the devolved Scottish Parliament could even be abolished by an Act of Westminster. During the passage of the Scotland Act in 1998 Lord Steel of Aikwood described this provision as:

“ ...provocative and, indeed, positively offensive because it almost invites this [UK] Parliament to meddle in the future in the law-making of Scotland....¹⁷ ”

Section 28(7) encapsulates the traditional theory of sovereignty resting with the Crown in Parliament; it conflicts with the Scottish constitutional tradition of sovereignty being vested in the people. Section 28(7) would be repealed.

Section 29 and 30 (and Schedules 4 and 5 which those sections introduce) provide for the legislative competence of the Scottish Parliament within the context of devolution. They provide, in part, that Acts of the Scottish Parliament are not law if they include any provision that relates to any of the matters reserved to Westminster by Schedule 5, or modifies the enactments in Schedule 4.¹⁸ It is these provisions that currently prevent the Scottish Parliament from legislating in all those important policy areas reserved to Westminster such as welfare, tax, defence and foreign affairs. This restriction would be removed.

¹⁷ Hansard H.L. 28th October 1998, vol. 593, col. 1947. The UK Government and Parliament follows the Sewel Convention whereby Westminster does not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. However this is a convention, rather than a binding statutory rule.

¹⁸ Such as provisions of the European Communities Act 1972 and all of the Human Rights Act 1998.

However the other aspects of section 29 which ensure that Scottish Parliament legislation must be compatible with ECHR standards and EU law will continue, as will the guarantee of the independent prosecutorial role of the Lord Advocate. These are important legislative safeguards that an independent Scotland would maintain and which, given their significance, are also reflected in sections 24 (EU law), 26 and 27 (ECHR) of the Scottish Independence Bill.

As is well known, Schedule 5 sets out, at some length and in considerable detail, all the reserved matters on which the Scottish Parliament cannot legislate. At least 75 different topics are listed ranging from the constitution, foreign affairs, defence, fiscal policy, financial services, currency, welfare, competition law, consumer protection, telecommunications, oil and gas, air transport, pensions and broadcasting to other matters such as the Lieutenancies Act 1997, weights and measures, xenotransplantation, time and the regulation of activities in outer space. All of these topics are reserved to Westminster and on independence the Scottish Parliament would have the opportunity to legislate on them. Together, Schedules 4 and 5, which operate as restrictions on the Scottish Parliament, occupy over one-fifth of the Scotland Act.¹⁹ They would be removed.

The certification process for Bills in advance of their introduction to the Parliament, as set out in section 31, will continue but, of course, it would no longer apply to the existing devolved/reserved split which will have been removed with independence. This will ensure that all Bills being introduced into an independent Scottish Parliament will have been considered in advance for their compatibility with ECHR standards and EU law.

Sections 32 to 34 provide for references to the UK Supreme Court by the Lord Advocate or the UK Government's Law Officers, the Attorney General and the Advocate General for Scotland, in respect of whether any Bill passed by the Scottish Parliament is within legislative competence. This power, which has never been used since devolution, can be employed prior to the Bill receiving Royal Assent. These provisions will be substantially amended to remove the UK Supreme Court, whose jurisdiction will come to an end in Scotland, and be replaced with the Court of Session, as part of the Supreme Court of Scotland. In addition, the UK Law Officers will be removed because they will not have any role in an independent Scotland. However the provision will continue in that the Lord Advocate could refer a Bill of the independent Scottish Parliament to the Court of Session for a decision on whether a provision of that Bill was compatible with, for example, ECHR or EU law.

¹⁹ In the Westlaw version of the Scotland Act Schedules 4 and 5 take up 53 of the 218 pages.

Section 35 allows the Westminster Government to make an order prohibiting a Scottish Parliament Bill from being submitted for Royal Assent if they think it would be incompatible with any international obligations, or in the interests of defence or national security, or if the UK believes that the Bill would have an adverse effect on any law reserved to Westminster. This section was controversial during the passage of the devolution legislation and it would not be relevant in an independent Scotland. It would be repealed entirely. There is a parallel provision in section 58 relating to subordinate legislation and actions of the Scottish Ministers; this too would be repealed.

The detail of the legislative process in the Scottish Parliament is largely contained in the Parliament's standing orders with section 36 of the Scotland Act providing a broad framework. The Government does not propose any change to the three stage process for primary legislation consisting of: a general debate on the Bill's principles; detailed consideration and amendment of the Bill by a committee; and a final plenary debate to pass or reject the Bill.

The changes proposed to the Scottish Parliament provisions of the Scotland Act will maintain and advance the Parliament's founding principles of sharing power, accountability, accessibility and equal opportunities. The Parliament would be ready to be the legislature and central forum for national debate of an independent State.

The Scottish Government

Provisions for the establishment and functions of the Scottish Government are contained in Part 2 of the Scotland Act 1998. As with the Scottish Parliament, many of these provisions will remain the same subject to amendments to reflect the transition from devolved government to the Scottish Government assuming full responsibility for the government of an independent Scotland. Many of the structures and workings of the existing Scottish Government can continue and, with the added powers of independence, would extend to cover the policy areas currently reserved to Westminster.

The process for appointment of the First Minister and other Ministers in the Scottish Government would continue to be subject to the agreement of the Parliament, which reflects section 12(2) of the Scottish Independence Bill on State accountability to the people. The Scottish Law Officers – the Lord Advocate and the Solicitor General for Scotland – are members of the Scottish Government but also have very specific roles on which the Scotland Act makes provision. These arrangements, such as their appointment process and their ability to participate (but not vote) in parliamentary proceedings even if they are not MSPs, would continue.

The Scottish Ministers would continue to exercise statutory functions and have additional functions conferred on them by the Parliament. Section 53 of the Scotland Act is an important provision that effected a general transfer of executive and prerogative functions from UK Government

Ministers to the Scottish Ministers in areas of devolved competence. On independence this transfer of functions would apply to all areas of government, both devolved and currently reserved. The restrictions on Ministers exercising functions within devolved competence only, such as in sections 54 and 58, would be removed.

The issue of prerogative law-making functions is technical, given its historical evolution and lack of codification. However the Scottish Independence Bill and renewed Scotland Act would set in train a process to modernise the prerogative in three ways and apply a higher degree of parliamentary accountability than at present.

Firstly, as above, section 53 of the Scotland Act would extend to cover all functions in section 53(2) and not just those within devolved competence, so those of Her Majesty's prerogative functions which are exercisable by UK Government Ministers would be exercisable by the Scottish Ministers accountable to the Scottish Parliament. Secondly, in some areas, bespoke legislation could be put in place which would displace or adjust prerogative powers. The Scotland Act itself did this to an extent by containing provisions about the election of the First Minister by the Scottish Parliament and the dissolution of Parliament. An example of a bespoke change is the increased parliamentary oversight given to the ratification of treaties by section 21 of the Scottish Independence Bill. Thirdly, the Constitutional Convention, post-independence, could consider further reforms of prerogative powers in the round.

Essentially, the executive and statutory powers currently held and exercised in relation to Scotland by, for example, the Secretary of State for Defence in the Westminster Government, would transfer to the Scottish Ministers. The Scottish Government would then exercise those functions as they already do in devolved areas such as education and the justice system. The nature and legal status of the Scottish Ministers as an entity would remain the same; what would change is the range and scope of their functions. The Scottish Government would assume the functions of the UK Government in Scotland and govern on behalf of the people.

Scotland Act: miscellaneous provisions

The financial and tax provisions of the Scotland Act, which were amended and added to by the Scotland Act 2012, would be further adjusted to provide a complete fiscal and tax platform for an independent Scotland. The Secretary of State in the UK Government would no longer have any role in deciding Scotland's financing. The Scottish Government would have the full powers of borrowing and lending held by other independent states.

Some other provisions would have amendments and repeals made to them that would be obvious in the context of an independent Scotland. The post of Advocate General for Scotland, a law officer on Scots law in the UK Government, would not be required in an independent Scotland, but abolition would be a matter for the UK Government to take forward. Similarly the Prime Minister would no longer have any role in certain senior judicial appointments in Scotland as he does at present.

Section 100 aims to co-ordinate the Scotland Act's approach to human rights with that contained in the Human Rights Act 1998. When revising the Scotland Act the Government proposes that the opportunity should be taken to bring these two approaches together within the renewed Scotland Act. Relevant provisions from the Human Rights Act 1998 will be included in the renewed Scotland Act so as to provide a single, more accessible regime for the application and enforcement of human rights in an independent Scotland.

This integration of the Human Rights Act into the renewed Scotland Act will end the current two-tier system depending on whether the legislation that is being assessed for human rights compliance is devolved or reserved. At present the Human Rights Act is subject to the perceived need to recognise the sovereignty of the Westminster Parliament. This means that a court, finding a breach of ECHR in primary legislation, makes a 'declaration of incompatibility' which Westminster may, or may not, decide to act upon by adjusting that legislation. However under the Scotland Act, if a court comes to a similar conclusion about legislation enacted by the Scottish Parliament, it declares it to have been 'not law' from the point at which it was made, with the consequence that the Scottish Government and Scottish Parliament must then decide how to respond.

In short the Scotland Act's human rights 'bite' is sharper than that of the Human Rights Act. The renewed Scotland Act will apply the higher threshold – that only applies to Scottish Parliament legislation at present – across all legislation, whether passed at Westminster or by the Scottish Parliament. This will advance the human rights position in Scotland. In addition the courts' existing power to strike down legislation and executive actions that breach human rights would apply across the statute book, instead of only in devolved areas of legislation passed by the Scottish Parliament.²⁰

The interpretative guidance, in section 101 of the Scotland Act, to reading Scottish Parliament legislation as narrowly as is required for it to be within competence, if such a reading is possible, will continue in relation to ECHR standards and EU law issues. The powers of the courts when deciding that the Scottish Parliament or Scottish Government have acted outwith their competence, such as to limit or suspend the effect of the court's decision, will remain available.

²⁰ As seen in *Salvesen and Riddell and another (Respondents) v. The Lord Advocate (Appellant) (Scotland)* [2013] UKSC 22.

The Scotland Act contains a number of secondary legislation powers that proved useful when making the transition to devolution. Some of these could be adjusted and added to as appropriate to operate in the context of the transition to independence. For example in some areas the continuity of laws principle in section 34 of the Scottish Independence Bill would need to be supplemented by making amendments to currently reserved legislation such as tax law or employment legislation so that they could function effectively for independence. Powers to make these changes by secondary legislation would be taken in legislation to transfer competence from Westminster to enable independence, or in a revised Scotland Act.

Q3. What are your views on the proposed adjustments to the Scotland Act 1998, set out in Chapter 4?

5

STATUS OF THE LEGISLATION AND THE CONSTITUTIONAL CONVENTION



STATUS OF THE LEGISLATION AND THE CONSTITUTIONAL CONVENTION

Amending formulas

A feature of most permanent constitutions is an amending formula. Because a constitution is normally regarded as a superior form of law to other legislation of the State, it usually attracts a more onerous amendment procedure than the normal legislative process. There is however no template in this area and there are perhaps as many different amending formulas as there are constitutions. Different countries adopt different approaches to fit with their own needs and circumstances, and that is what Scotland would do too.

For example, some federal States such as the USA, Canada and Australia have constitutional amending formulas based on combinations of the central legislatures and the constituent states or provinces approving constitutional amendments. This ensures geographical consensus but makes amendment very difficult to achieve in practice. Any amendment of the US Constitution needs two-thirds votes in both the Senate and the House of Representatives and then approval by the legislatures of three-quarters of the 50 states (and many states have legislatures consisting of upper and lower houses); there have been only two amendments to the US Constitution in the last 40 years.

The constitutions of some of the Nordic countries have variations on formulas which provide that an amendment passed by Parliament can only take effect if there is then a general election and after that the same amendment is passed again by the new Parliament; this provides reference to the people but means that any amendment takes a long time because it has to straddle a general election. In Ireland, only the people can amend the Constitution and any change requires to be approved by referendum. This has resulted in over 30 referendums since the Constitution was adopted in 1937; there were two in 2012 and one in 2013. These different approaches to amending a constitution all have benefits and disbenefits; what they have in common however, is that each of these countries have at some point considered this matter and decided what is best for themselves. An independent Scotland would do the same.

The Scottish Government proposes that the Scottish Independence Bill and renewed Scotland Act will not contain a bespoke amending formula or hard entrenchment provision. This is because they are inherently temporary and are a staging post on the way to the permanent written constitution which would be prepared following independence. An excessively onerous amending formula would be inappropriate for interim arrangements.

Constitutional status

However, the Scottish Independence Bill and renewed Scotland Act will have a distinct status as a constitutional statute – as the Scotland Act does at present. In addition, the Scottish Government proposes that particular arrangements will be put in place for any amendments that might be made to them, pending the preparation of the permanent written constitution by the Constitutional Convention after independence. The Scottish Government has stated in *Scotland's Future* that the Scottish Independence Bill and renewed Scotland Act:

“ will be the founding legislation of an independent Scotland and will not be subject to significant alteration pending the preparation of a permanent constitution by the constitutional convention.”²¹

The Constitutional Convention, as mentioned in Question 572 of *Scotland's Future*, would consider entrenchment and potential amending formulas for the permanent written constitution, and might look to international experience in this area.

The principle has been developed by the courts in recent years that, even in the absence of a formal written constitution in the UK, certain Acts have a status of ‘constitutional’ legislation rather than ‘ordinary’ legislation.²² What that entails is that if such an Act is repealed or amended that must be done explicitly and clearly in any subsequent Act. This would show that the legislators were fully intending to amend that constitutional legislation. The courts, including the UK Supreme Court, have recognised that they will not accept lightly the implied amendment or repeal of a constitutional enactment (implied amendment is when a subsequent Act amends or modifies a prior Act without expressly stating it).

The UK Supreme Court has said the following about the subsequent amendment of constitutional enactments:

“ It would perhaps have been open to [the UK] Parliament to override the provisions of section 57(2) [of the Scotland Act] so as to confer on [the Scottish Ministers] more ample powers than that subsection would permit in the exercise of their functions under the 2003 [Extradition] Act. But in my opinion only an express provision to that effect could be held to lead to such a result. This is **because of the fundamental constitutional nature of the settlement that was achieved by the Scotland Act. This in itself must be held to render it incapable of being altered otherwise than by an express enactment. Its provisions cannot be regarded as vulnerable to alteration by implication from some other enactment in which an intention to alter the Scotland Act is not set forth expressly on the face of the statute.**”²³

²¹ *Scotland's Future* page 341.

²² Originally suggested in the case of *Thoburn v Sunderland City Council* [2003] Q.B. 151.

²³ UKSC, Bench of 7 per Lord Hope, para 30 in *BH (AP) (Appellant) and another v the Lord Advocate and another (Respondents); KAS or H (AP) (Appellant) v the Lord Advocate and another (Respondents)* [2012] UKSC 24

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0210_Judgment.pdf

In the UK a wide range of Acts can be considered constitutional, including those that devolved powers to Scotland, Wales and Northern Ireland, such as the Scotland Act 1998.²⁴ The Scottish Independence Bill and renewed Scotland Act, enacted after the referendum in the event of a vote for independence, would also have that “fundamental constitutional nature” referred to by the Supreme Court above. This is reinforced by section 4 of the Bill which specifically provides for Part 2 of the Bill, sections 2 to 33, to be referred to as “the constitution”. This “fundamental constitutional nature” would mean that subsequent Acts would only be considered to amend the Scottish Independence Bill and renewed Scotland Act if they did so clearly and explicitly. The courts would be reluctant to accept that such an important Act – providing for Scotland’s independence and an interim constitution – could simply be impliedly amended by a subsequent Act. Any subsequent amendments to the Scottish Independence Bill and renewed Scotland Act would require to be, as per the Supreme Court’s comments above, “set forth expressly on the face of the statute.”²⁵

Certification procedure

As well as the Scottish Independence Bill and renewed Scotland Act having the status of a constitutional enactment which provides protection against anything other than express, unambiguous amendment, the Scottish Government would also seek to put in place special parliamentary arrangements that would apply before any changes could be made to it.

Scotland’s Future stated that the Scottish Independence Bill and renewed Scotland Act would not be subject to significant alteration. The Scottish Government would make similar statements in the Parliament during the passage of the legislation; the Government would then be held to account for these assurances. The other political parties in Parliament might consider doing likewise. Clear statements of this nature from not just Government Ministers but also other party leaders would carry a great deal of political weight.

The Scottish Government would also propose that the Scottish Parliament, on passing the Scottish Independence Bill and renewed Scotland Act, adopt a parliamentary resolution stating that they should not be subject to significant alteration until the permanent written constitution has been drafted by the Constitutional Convention. Such a parliamentary resolution would not be legally binding but again would carry significant weight as representing the intention of the legislators who enacted this legislation.

²⁴ The judge in *Thoburn v Sunderland City Council* referenced the Scotland Act as a constitutional statute even though it was not at direct issue in that case.

²⁵ Note that pre-independence decisions of the UK Supreme Court would continue to apply in Scotland post-independence under the continuity of laws provision in section 34 of the Scottish Independence Bill, until such times as the Supreme Court of Scotland might opine differently.

In addition the Scottish Government proposes putting in place a certification process so that any future Bills being introduced in the independent Scottish Parliament would be assessed in advance to see if their terms complied with the Constitution. This would be provided for through the renewed Scotland Act and in the Parliament's standing orders. The MSP or Minister introducing a Bill would state their view as to whether that Bill complies with the Constitution and would identify any such amendment or modification. The Presiding Officer would, separately, do likewise. This would mean that all MSPs and the public in general would know, in advance of the debate on a Bill commencing, if that Bill would, if enacted, affect the Scottish Independence Bill and renewed Scotland Act.

The Parliament would not be prohibited from passing such a Bill, but it could only do so in the full knowledge that it contained such an amendment or modification. Parliament would also bear in mind the Government statements and parliamentary resolution that significant alterations to the Scottish Independence Bill and renewed Scotland Act preferably should be avoided, pending the preparation of the permanent written constitution.

The Government believes that these three mechanisms – Government statement, Parliamentary resolution and advance certification – would give a significant degree of status and protection to the Scottish Independence Bill and renewed Scotland Act, whilst avoiding the rigidity of hard entrenchment, which is not appropriate for temporary arrangements pending the preparation of the permanent written constitution.

The corollary of the three mechanisms mentioned above is that the courts would not have the power to declare future legislation invalid if it was contrary to the Scottish Independence Bill and renewed Scotland Act (as they would continue to have if that future legislation was incompatible with EU law or ECHR). This is because Parliament will have known in advance that the legislation in question would be contrary to the Scottish Independence Bill and renewed Scotland Act and would have deliberately decided to proceed with it. The issues of a special amending formula and of a constitution being a supreme law, with the courts able to strike down any other law inconsistent with it, would be matters which the Constitutional Convention would be likely to consider when preparing the permanent constitution. Different factors might pertain to that consideration for a permanent constitution than apply to the interim arrangements set out here.

Constitutional Convention

Section 33 of the draft Scottish Independence Bill places a duty on the independent Scottish Parliament elected in May 2016 to establish, as soon as possible, a Constitutional Convention to draft the permanent constitution. The detail and thinking behind this provision has already been discussed in Chapter 3 and extensively set out in *Scotland's Future*, including information about some comparable conventions used elsewhere in the world, aspects of which might inform the Scottish Convention.²⁶

The Scottish Government has stated on numerous occasions that it would only be one voice amongst many in that debate; proposals and suggestions from across Scottish society would be welcome and encouraged. What is discussed here are:

- some of the proposals that the current Scottish Government would make for the permanent constitution
- some issues that others might want to suggest to the Convention, and
- firstly, the envisaged relationship between the Scottish Independence Bill and renewed Scotland Act and the permanent constitution.

The Scottish Independence Bill and renewed Scotland Act will not be the permanent constitution of an independent Scotland because they will have been enacted by the devolved Scottish Parliament, prior to independence, and when Scotland remained part of the UK. It is not therefore appropriate for that devolved Parliament to seek to confer a permanent constitution on the subsequent independent State.

The referendum is about the principle of independence as set out as a detailed proposition in *Scotland's Future*. It is not a referendum on a specific, permanent constitution. That is why the best time for Scotland to prepare its permanent constitution is after independence. At that point all the people of Scotland, irrespective of how they might have voted in the referendum, would come together to give themselves *their* Constitution.

The Constitutional Convention would give the people of Scotland the historic opportunity to create a truly home-grown, free-standing constitution for their State. That permanent constitution would replace the Scottish Independence Bill and renewed Scotland Act. That is not to say that there might not be continuity and similarities between the two. It may be the case that the Constitutional Convention would carry over some of the provisions in the Scottish Independence Bill and renewed Scotland Act to the permanent constitution, build on or extend others – perhaps in the area of socio-economic rights – whilst deciding not to carry over other provisions. The significant point is that decisions on these matters will be for the Constitutional Convention to take as it thinks fit. At the point at which the permanent constitution prepared by the Constitutional Convention is agreed by or on behalf of the people of Scotland, the Scottish Independence Bill and renewed Scotland Act would largely cease to have effect.

²⁶ *Scotland's Future* pages 351-353 and Questions 566 to 580; also *Scotland's Future: from the Referendum to Independence and a Written Constitution* February 2013.

The Scottish Government has set out some subjects that it would propose to the Constitutional Convention for inclusion in the permanent constitution. Many of these are new subjects that are not covered in the Scottish Independence Bill; others overlap with provisions of the Bill.

The Scottish Government would propose a constitutional prohibition on nuclear weapons being based in Scotland.²⁷

The Scottish Government would also propose that, unlike the existing situation in the UK, a written constitution would:

“ ...put in place safeguards to ensure that Scottish forces will only ever participate in military activity that is internationally recognised as lawful and in accordance with the principles of the UN Charter.²⁸ ”

In addition to abiding by UN principles the other components of this ‘triple lock’ on military deployments would require proper agreement by the Scottish Government and approval by the Scottish Parliament.²⁹ There are several benefits to making decisions to deploy armed forces abroad subject to parliamentary approval:

- it would increase the legitimacy of such deployments
- the use of armed force is a unique capability where the State authorises the use of lethal force with enormous consequences for its own service personnel and the territory where the deployment takes place and such decisions should therefore have a high level of accountability attached to them, and
- more transparent and legitimate decision-making would result in greater support and acceptance of deployment decisions among the public and serving troops, thus having a positive impact on military morale.

Many other countries such as Ireland, Denmark and the Netherlands (the latter two both members of NATO) place constitutional controls on the deployment of armed forces.

In addition to first-generation civil and political human rights – which apply to Scotland through the ECHR – there are some second and third generation human rights on social and economic matters which the Scottish Government would suggest for inclusion in the permanent constitution. These would cover areas such as the right to education for the benefit of individuals and society as a whole, the right to healthcare and protections for children. This would also cover the ‘Youth Guarantee’ as discussed in *Scotland’s Future*.³⁰ This would establish access to education, training or employment as constitutional rights for young people up to the age of 24.

²⁷ *Scotland’s Future* pages 22, 353 and Question 573.

²⁸ *Scotland’s Future* page 234.

²⁹ *Scotland’s Future* page 251.

³⁰ *Scotland’s Future* page 108.

Many independent countries have these, and other, socio-economic rights such as the right to work or the right to pensions or welfare support in their constitutions, and some individuals and groups may make similar proposals to the Constitutional Convention. For example Denmark's Constitution provides a right to work and to welfare support while South Africa's gives citizens the right to choose their trade, occupation or profession freely. Such socio-economic constitutional rights could, as *Scotland's Future* argues:

“...provide explicit guidance to future governments, of whatever political persuasion, about the needs and aspirations the people of Scotland expect to see prioritised. Social rights embedded in a constitution will put questions of social justice at the forefront of the work of Scotland's Parliament, government and public institutions.³¹”

This is not possible in our current unwritten constitutional arrangements but would become a clear opportunity with a written constitution in an independent Scotland.

Many constitutions contain provision about national and official languages and although there is no language provision in the Scottish Independence Bill the Constitutional Convention, as stated in Question 589 of *Scotland's Future*, could consider the constitutional status of Scotland's languages such as English, Gaelic, Scots and British Sign Language.

There are some provisions in the Scottish Independence Bill which many people and organisations might welcome such as those on local government, children's wellbeing, the environment and natural resources, but which they would like to recast so as to adjust their scope and extent. Proposals of this nature, to build on provisions already in the Bill, could also be made to the Constitutional Convention when preparing the permanent constitution.

Some constitutions contain a preamble setting out an aspiration or vision of the country and its people. Perhaps the most famous is that in the USA's Constitution:

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

³¹ *Scotland's Future* page 153.

The Scottish Independence Bill, as a temporary arrangement and subject to the normal rules about format and style of Acts of the current Scottish Parliament, does not contain a preamble. However the Constitutional Convention might want to consider a preamble for the permanent constitution and involve the people of Scotland in drafting or choosing it.

Conclusion

Preparing a constitution is not merely a matter of placing words in a document – important though the words are – but of the Constitutional Convention process being Scotland’s best opportunity to express our values, reflect our journey to this place, articulate our aspirations for future generations, engage our citizens, renew our institutions and methods of governance, and reinvigorate our democracy and civic society.

That journey continues with this consultation paper and the draft Scottish Independence Bill, which sets out in detail the Scottish Government’s proposals for the interim constitutional platform that would serve as the basis for the Government of Scotland from Independence Day, and for the process for the development and agreement of that permanent written constitution.

This is your opportunity to have your say on those proposals.

Q4. What are your views on the constitutional status of the Scottish Independence Bill and renewed Scotland Act, and on the certification procedure for subsequent Bills, set out in Chapter 5?

Q5. What are your views on the process for the development of a permanent written constitution by a Constitutional Convention, set out in section 33 of the Bill and explained in Chapter 5 (e.g. membership, working procedures, time needed to complete its task)?

Q6. Do you have any other comments about the proposals in the Scottish Independence Bill?

HOW TO RESPOND

Responses should be made by noon on Monday 20 October 2014.

It would be helpful to have your response using the electronic response form, which can be accessed at:

<https://consult.scotland.gov.uk>

You can also send your response (together with the Respondent Information Form) to:

ScottishIndependenceBill@scotland.gsi.gov.uk

Or

The Scottish Independence Bill Team
Area 2 West
St Andrews House
Edinburgh
EH1 3DG

We would be grateful if you would use the consultation questionnaire provided or clearly indicate in your response which questions or parts of the consultation paper you are responding to, as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at: www.scotland.gov.uk/consultations

HANDLING YOUR RESPONSE

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form on the following page which forms part of the consultation questionnaire as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential and treat it accordingly. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation.

NEXT STEPS

If you tell us we can make your response public, we will put it in the Scottish Government Library and on the Scottish Government consultation web pages. We will check all responses where agreement to publish has been given for any wording that might be harmful to others before putting them in the library or on the website. If you would like to see the responses please contact the Scottish Government Library on 0131 244 4556. Responses can be copied and sent to you, but a charge may be made for this service.

WHAT HAPPENS NEXT?

Following the closing date, all responses will be considered and the Scottish Government will issue a response on this consultation process which will be published on the Scottish Government's website at: <http://www.scotland.gov.uk/Publications/Recent>.



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Forename

2. Postal Address

<input type="text"/>		
<input type="text"/>		
<input type="text"/>		
Postcode	Phone	Email

3. Permissions - I am responding as...

Individual / Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

Yes No

OFFICIAL - SENSITIVE

Yes, make my response,
name and address all
available

or

Yes, make my response
available, but not my
name and address

or

Yes, make my response
and name available, but
not my address

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes **No**

CONSULTATION QUESTIONNAIRE

The purpose of the Bill and consultation paper is to facilitate as wide and open a debate on the constitution of an independent Scotland as possible. Views on any matter related to the constitution of an independent Scotland are welcome, whether they are topics specifically mentioned in this paper or not.

Q1. What are your views on the proposed process for the Scottish Independence Bill, set out in Chapter 2?

Q2. What are your views on the proposed content of the Scottish Independence Bill, set out in Chapter 1 and explained in Chapter 3?

Q3. What are your views on the proposed adjustments to the Scotland Act 1998, set out in Chapter 4?

Q4. What are your views on the constitutional status of the Scottish Independence Bill and renewed Scotland Act, and on the certification procedure for subsequent Bills, set out in Chapter 5?

Q5. What are your views on the process for the development of a permanent written constitution by a Constitutional Convention, set out in section 33 of the Bill and explained in Chapter 5 (e.g. membership, working procedures, time needed to complete its task)?

Q6. Do you have any other comments about the proposals in the Scottish Independence Bill?



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This document is also available on the Scottish Government Website:
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ISBN: 978-1-78412-545-5

ISBN: 978-1-78412-546-2 (EPUB)

ISBN: 978-1-78412-547-9 (MOBI)

Published by the Scottish Government, June 2014

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Produced for the Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
DPPAS29629 (06/14)