

THE SCOTTISH INDEPENDENCE BILL:

A CONSULTATION ON AN INTERIM CONSTITUTION FOR SCOTLAND SUMMARY



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This consultation paper sets out proposals for a Scottish Independence Bill.

Independence is not an end in itself, but a means of building a better future for the people of Scotland. The draft Bill set out in **Chapter 1** provides the interim constitutional platform which would serve as the basis for Scotland's government from Independence Day until a permanent constitution for Scotland has been agreed. It provides for that permanent constitution to be drawn up as soon as possible post-independence by a Constitutional Convention, entirely autonomous from the Scottish Government. That proposal reflects the Government's strong belief that the process by which Scotland develops and adopts its written constitution will be as important as its content, and will underpin the democratic gains of independence.

The Scottish Independence Bill would be introduced to the Scottish Parliament following 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 summarised in **Chapter 4**.

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. It reflects the fact that the people who have the biggest stake in a successful Scotland are those who live and work here. Sovereignty means the people of Scotland always getting the government we vote for to govern our country the way we want.

The Bill provides:

- The legislative mechanism for Scotland to become an independent State on 24 March 2016;
- A temporary constitution for Scotland from Independence Day until the permanent written constitution is in place; and
- For the establishment of an independent Constitutional Convention to prepare a permanent constitution for an independent Scotland.

Together, these provide a road map for arriving 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.

CHAPTER 2 – PROCESS FOR THE SCOTTISH INDEPENDENCE BILL

Following a vote for independence 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. This would enable the Scottish Government and Scottish Parliament to take the lead in making preparations for independence, ensuring that independence is made in Scotland. Those preparations would include a range of administrative and legislative measures, including introducing the Scottish Independence Bill to the Scottish Parliament.

The Bill would follow normal Scottish Parliamentary process. Once enacted, some of its provisions would come into force before independence, to assist with preparations, with the remainder coming into effect on Independence Day itself, Thursday 24 March 2016.

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. **Chapter 4** summarises the revisions that would be made to the Scotland Act.

CHAPTER 3 – EXPLANATORY NOTES

Chapter 3 provides a commentary on each section of the Scottish Independence Bill.

Part 1, Section 1 of the draft Bill provides that, on Independence Day, Scotland becomes an independent State. Under international law, Scotland would become a state and be recognised as such by other states. **Section 1** also provides that the date for Independence Day will be specified by a resolution of the Scottish Parliament. On that 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 jurisdiction of Westminster and the UK Government over Scotland would cease.

Part 2, Sections 2 to 33 provides the interim constitution for Scotland, to operate from Independence Day, until the permanent written constitution has been agreed in accordance with **section 33**.

Sections 2 and 3 deal with the sovereignty of the people of Scotland. **Section 2** provides that, in keeping with the Scots constitutional tradition of popular sovereignty, in an independent Scotland the people are sovereign. That will be the fundamental political, constitutional and legal organising principle of an independent Scotland. **Section 3** sets out the essential features and characteristics of that popular sovereignty.

Sections 5 to 32 set out the detail of the interim constitution, containing provision in the following areas:

- The State (Name of the State, The territory of Scotland, Form of State and government, National flag and anthem)
- Head of State
- Legislature
- Executive
- State accountability to the people
- Juridical (Independence of the judiciary, Supreme Court, The rule of law)
- The Scottish civil service
- Local government
- Scottish citizenship
- International relations (International relations and foreign policy, International organisations, Ratification of international agreements, Incorporation of international agreements)
- Nuclear disarmament
- Europe (Incorporation of European law, European citizenship)
- Rights (Respect for human rights, References to the ECHR, Equality)
- Children's wellbeing
- Island communities
- Environmental matters (The environment, Natural resources)

The final provision in **Part 2, section 33**, provides for the preparation of a permanent written constitution after Independence Day by requiring the Scottish Parliament to legislate to establish a Constitutional Convention to draw one up for agreement by, or on behalf of, the people of Scotland. This would supersede the interim constitution set out in the Bill. The Act establishing the Convention would be one of the initial duties of the first independent Parliament elected in May 2016 and that Act would require the Convention to begin its work as soon as possible. The autonomy of the Convention is guaranteed by ensuring that neither the Scottish Government nor the Scottish Parliament can direct or control it.

Section 33 is a practical manifestation of the people's sovereignty.

It means that the permanent written constitution for an independent Scotland will be drafted through an inclusive and widely participative process involving many civic society groups and ordinary citizens. The Scottish Government will be just one voice among many in that process.

Part 3 of the draft Bill contains important transitional and consequential provisions that are necessary to ensure the effective functioning of an independent Scotland. Other necessary transitional and consequential provisions would be taken forward in the renewed Scotland Act or in other legislation.

In particular, **section 34** provides that all laws in effect before independence are to continue to have effect after independence unless and until the independent Scottish Parliament decides otherwise. It means that an independent Scotland would not need to re-write its existing statute book. This principle – of ‘continuity of laws’ – is well precedented in previous situations where territories and countries have become independent.

Both the Union with England Act 1707 and the Union with Scotland Act 1706 will need to be repealed from Independence Day. **Section 35** repeals the 1707 Act. The Scottish Government considers it appropriate that Westminster legislates in parallel 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. The repeal of the two Acts would not affect the Union of the Crowns.

CHAPTER 4 – A RENEWED SCOTLAND ACT FOR INDEPENDENCE

Following a vote for independence in the referendum, the Scotland Act 1998 – which established the Scottish Parliament and Scottish Executive (now Scottish Government) – would be refreshed and rewritten, so that it can function effectively in the context of an independent Scotland.

Chapter 4 considers the main components of the existing Scotland Act and explains what would be continued, amended or removed for independence. This would involve:

- The retention of many provisions which would continue on, such as the Scottish Parliament’s electoral system;
- The amendment of some existing sections to ensure they operate properly in an independent Scotland (e.g. removing references to the Prime Minister and UK Supreme Court);
- The addition of some new sections; and
- The repeal of many provisions which would no longer be relevant for an independent State, e.g. Schedule 5, which restricts the issues on which the Scottish Parliament can legislate.

The revised Scotland Act, along with the Scottish Independence Bill, when enacted, would form the interim constitutional arrangements for Scotland only until the Constitutional Convention drafts Scotland's permanent constitution. The Constitutional Convention can reconsider any of the issues currently dealt with in the Scotland Act.

CHAPTER 5 – STATUS OF THE LEGISLATION AND THE CONSTITUTIONAL CONVENTION

Amending formulas

A feature of most permanent constitutions is an amending formula, which is usually more onerous than the arrangements for amending normal legislation. The Scottish Government proposes that the Scottish Independence Bill and renewed Scotland Act will not contain a bespoke amending formula or hard entrenchment provision. An excessively onerous amending formula would not be appropriate for interim arrangements, ahead of the preparation of the permanent written constitution.

Constitutional Status and Certification Process

However, the legislation will have a distinct status as a constitutional statute, and particular arrangements will be put in place for any amendments that might be made, pending the preparation of the permanent written constitution by the Constitutional Convention. That means 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 Scottish Government would also seek to put in place special parliamentary arrangements that would apply before any changes could be made to this legislation.

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 Parliament during the passage of the legislation. Further, it would 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 would carry significant weight as representing the intention of the legislators who enacted the legislation.

In addition, the Scottish Government proposes putting in place a certification process so that any future Bills would be assessed before introduction into the Scottish Parliament for whether they complied with the Constitution.

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, while avoiding the rigidity of hard entrenchment which would not be appropriate for temporary arrangements ahead of the preparation of the permanent written constitution.

Constitutional Convention

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

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 take part in developing *their* Constitution. The Constitutional Convention will 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.

The Scottish Government has set out some subjects it would propose to the Convention for inclusion in the permanent constitution, i.e. a constitutional prohibition on nuclear weapons being based in Scotland, and putting in place safeguards to ensure that Scottish forces only participate in military activity internationally recognised as lawful and in accordance with UN principles (as well as being agreed by the Scottish Government and approved by the Scottish Parliament). In addition to first-generation civil and political human rights, the Scottish Government would also suggest including some second and third generation human rights on social and economic matters, such as the right to education, healthcare and protections for children. The consultation paper also suggests some areas others might wish to suggest for inclusion, for example in relation to national or official languages.

The Scottish Government views a written constitution as a significant opportunity which only comes with independence. Preparing a constitution is not merely a matter of placing words in a document, important though those words are. The Constitutional Convention process is 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 civil society. That journey continues with this consultation on the draft Bill and giving the opportunity to the people of Scotland to have your say on these proposals.

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

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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