



## In Focus

### Scottish Independence Referendum Procedure: Section 30 Orders

#### Call for a Second Scottish Independence Referendum

On 13 March 2017, Nicola Sturgeon, the First Minister of Scotland, confirmed that she would ask the Scottish Parliament for permission to ask the Prime Minister for an agreement to hold a second referendum on the issue of Scottish independence.<sup>1</sup> Following this announcement, Ms Sturgeon put forward a motion ([S5M-04710](#)) to be debated by the Scottish Parliament. On 28 March 2017, an amended version of the motion (put forward by the Scottish Green Party) was approved by 69 votes to 59, which stated:

That the Parliament acknowledges the sovereign right of the Scottish people to determine the form of government best suited to their needs and therefore mandates the Scottish Government to take forward discussions with the UK Government on the details of an order under section 30 of the Scotland Act 1998 to ensure that the Scottish Parliament can legislate for a referendum to be held that will give the people of Scotland a choice over the future direction and governance of their country at a time, and with a question and franchise, determined by the Scottish Parliament, which would most appropriately be between the autumn of 2018, when there is clarity over the outcome of the Brexit negotiations, and around the point at which the UK leaves the EU in spring 2019; believes that this gives people in Scotland a choice at a time when there is both the most information and most opportunity to act; further believes that 16 and 17-year-olds and EU citizens, who were excluded from the EU referendum, should be entitled to vote, and considers that this referendum is necessary given the Prime Minister's decision to negotiate a hard exit from the EU, including leaving the single market, which conflicts with assurances given by the UK Government and prominent Leave campaigners, and which takes no account of the overwhelming Remain vote in Scotland.<sup>2</sup>

Following the vote, Nicola Sturgeon sent a letter to the Prime Minister, Theresa May, formally calling for negotiations over a second independence referendum to begin.<sup>3</sup> Ms Sturgeon has also stated that should the UK Government reject a second referendum, she would set out her Government's next steps after the Easter recess.<sup>4</sup>

In response to the initial announcement, Theresa May, writing in the *Times*, stated that:

I do not agree with the Scottish National Party (SNP) that now is the time to be talking about a second independence referendum. To do so now, while all our energies should be directed towards the negotiations with Europe, would make it more difficult to get the right deal for Scotland and the right deal for the UK as a whole.<sup>5</sup>

Later, responding to the vote in the Scottish Parliament, Mrs May reaffirmed this position, commenting that "now is not the time to be talking about a second independence referendum".<sup>6</sup>

Supporting Mrs May's stance, David Mundell, the Secretary of State for Scotland, specified that "we will not be entering into discussions or negotiations about a section 30 agreement and any request at this time will be declined".<sup>7</sup> Also commenting, the Leader of the Scottish Conservatives, Ruth Davidson, responded to Ms Sturgeon's proposed timing of the referendum, stating that Scotland should be able to "examine the UK's new relationship with the European Union once it is up and running", before voting on independence.<sup>8</sup>

Jeremy Corbyn, Leader of the Labour Party, commented that "Labour believes it would be wrong to hold another [referendum] so soon and Scottish Labour will oppose it in the Scottish Parliament".<sup>9</sup> However, Mr Corbyn also stated that "if, however, the Scottish Parliament votes for one [a second referendum], Labour will not block that democratic decision at Westminster".<sup>10</sup> Kezia Dugdale, the Leader of the Scottish Labour Party argued that Scotland was "already divided enough" and that "we do not want to be divided again, but that is exactly what another independence referendum would do".<sup>11</sup>

The Co-convener of the Scottish Green Party, Patrick Harvie, however welcomed Ms Sturgeon's announcement, commenting that "the people of Scotland deserve a choice between hard Brexit Britain and putting our own future in our own hands".<sup>12</sup> This show of support was shown in the vote in the Scottish Parliament, with the Green Party supporting the SNP to provide a majority to pass the motion.

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### What is a Section 30 Order?

Under the current system of devolution, the Scottish Parliament is unable to legislate on reserved matters, such as defence and the constitution, as they are the responsibility of the UK Parliament alone. The section 30 order proposed by Ms Sturgeon is a type of subordinate legislation (an [Order in Council](#)) which would transfer power to the Scottish Parliament to enable it to legislate on what would otherwise be a reserved matter.

Section 30 of the Scotland Act 1998 focuses on the legislative competence of the Scottish Parliament and section 30(2) provides for certain alterations to be made to this area through the amendment of schedules 4 and 5 of the Act by an Order in Council. Schedule 5 concerns the aspects of the constitution which are 'reserved matters', where the decision making power is held by the Westminster Parliament. Paragraph 2 of schedule 4 also concerns 'reserved matters', stating that "an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters".

To gain approval for a second referendum using a section 30 order, a draft of the order proposed by Ms Sturgeon would need to be approved by affirmative resolution in the House of Commons, the House of Lords and the Scottish Parliament, in order to meet the procedural criteria laid out in schedule 7, paragraph 2 (Types of Procedure) of the Scotland Act 1998:

**Type A:** No recommendation to make the legislation is to be made to Her Majesty in Council unless a draft of the instrument—

- (a) has been laid before, and approved by resolution of, each House of Parliament, and
- (b) has been laid before, and approved by resolution of, the Parliament.

Once this criteria has been met, the draft would be approved by the Queen, with the advice of her Privy Council, and would become an Order in Council. This would enable schedule 5 of the Scotland Act 1998 to then be amended. However, the contents of the order itself would be for agreement between the Scottish and UK governments.

Paragraph 1(b) of schedule 5 is also of note in relation to the issue of independence. It states that “the Union of the Kingdoms of Scotland and England” is a reserved matter, thereby meaning that the Scottish Parliament cannot declare Scotland independent, as it does not have the legislative competence to do so. However, there is uncertainty as to what this means in regards to the calling of an advisory referendum on the issue of Scottish independence.<sup>13</sup>

Some constitutional commentators have made the case that the Scottish Parliament may have the power to call an advisory referendum. They argue that the issue was not solved before the previous referendum, as the Scottish and UK governments avoided the issue by signing the [Edinburgh Agreement](#) in October 2012, which laid out the rules for the referendum.<sup>14</sup> In a blog post, Ewan Smith (a lecturer at Hertford College, Oxford) and Alison Young (a Professor of Public Law at the same College) describe the issue:

In 2012, before the 2014 Referendum was announced, lawyers prepared arguments on whether the Scottish Government, or the Scottish Parliament had the power to call a referendum. Many of us were relieved when the Edinburgh Agreement found a way to call the referendum that satisfied all parties. But it is important to remember that the Agreement did not settle the debate about the powers of the Scottish Parliament and Government. It postponed it.<sup>15</sup>

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## Process Followed for 2014 Referendum

### Section 30 Order:

In 2012, a memorandum of agreement released with the Edinburgh Agreement set out the elements which required legislative provision in the section 30 order, and included a draft text of the order.<sup>16</sup> It included the insertion of paragraph 5A to schedule 5 of the Scotland Act 1998, which allowed the Scottish Parliament to hold a referendum on the issue of independence, if the following requirements were met:

- (1) Paragraph 1 does not reserve a referendum on the independence of Scotland from the rest of the United Kingdom if the following requirements are met.
- (2) The date of the poll at the referendum must not be the date of the poll at any other referendum held under provision made by the Parliament.
- (3) The date of the poll at the referendum must be no later than 31st December 2014.
- (4) There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses.

The draft of the order was considered by the Scottish Parliament’s Referendum (Scotland) Bill Committee and was laid before both Houses of the UK Parliament and the Scottish Parliament. The final agreed draft was made an Order (Scotland Act 1998 (Modification of Schedule 5) Order 2013) by the Queen on the advice of Her Privy Council. Following this, the Scottish Government introduced a Bill (Scottish Independence Referendum Bill), setting out the wording of the referendum question, the date of the poll and the campaign rules, all of which was for the Scottish Parliament alone to consider.

Commenting on the use of a section 30 order in 2012, the House of Lords Constitution Committee report, [The Agreement on a Referendum on Independence for Scotland](#), argued that the use “significantly curtails the opportunity of the UK Parliament to have an effective input into the process”, as like other

secondary legislation, it was not amendable.<sup>17</sup> The Committee also argued that the Order was open to challenge before the Courts:

A challenge to the section 30 order could conceivably be brought on *Padfield* grounds. In *Padfield* (one of the leading cases on administrative law in the 20th century) the House of Lords held that statutory powers may be used only to promote—and not to frustrate—the policy and objects of the Act that conferred the powers in question. The policy and objects of an Act are a matter of law for the court to determine, bearing in mind the Act as a whole. If a statutory power is used to frustrate the policy and objects of the relevant Act, this may amount to an improper purpose, with the exercise of the power being held to be unlawful.<sup>18</sup>

However, the Committee concluded that although they did not consider it likely that such a case would succeed, it could cause a delay.<sup>19</sup>

### Timeline:

- **10 January 2012:** The Secretary of State for Scotland, Michael Moore, made a statement to the House of Commons announcing a consultation paper, *Scotland's Constitutional Future*, which proposed that the powers for a referendum could be devolved “under the section 30 order-making provisions in the Scotland Act 1998, which is our preferred approach”.<sup>20</sup> The same day the Scottish Cabinet signed off the consultation paper and the First Minister for Scotland, Alex Salmond, announced the referendum would be held in autumn 2014.<sup>21</sup>
- **15 October 2012:** Ministers from the UK and Scottish governments signed the Edinburgh Agreement, which included a draft section 30 order, approving the method to enable the Scottish Parliament to hold a referendum based on a single yes/no question in autumn 2014.<sup>22</sup>
- **22 October 2012:** The section 30 order was laid before the UK Parliament.<sup>23</sup>
- **5 December 2012:** The Scottish Parliament approved the section 30 order.<sup>24</sup>
- **15 January 2013:** The House of Commons debated and approved the section 30 order.<sup>25</sup>
- **16 January 2013:** The House of Lords debated and approved the section 30 order.<sup>26</sup>
- **7 August 2013:** The [Scottish Independence Referendum \(Franchise\) Bill](#) passed in the Scottish Parliament and received royal assent, setting the franchise for the referendum.<sup>27</sup>
- **17 December 2013:** [Scottish Independence Referendum Bill](#) passed in the Scottish Parliament and received royal assent, setting out the rules for the referendum.<sup>28</sup>
- **18 September 2014:** The referendum was held.
- **19 September 2014:** Results of the referendum were announced, with 55.3 percent voting ‘no’ and 44.7 percent voting ‘yes’, meaning that Scotland remained as part of the UK.<sup>29</sup>

<sup>1</sup> BBC News, [‘Scottish Independence: Nicola Sturgeon to Seek Second Referendum’](#), 13 March 2017.

<sup>2</sup> [‘Motion S5M-07410: Nicola Sturgeon’](#), Scottish Parliament, 20 March 2017.

<sup>3</sup> Mure Dickie, [‘Sturgeon Sends Official Letter to May Seeking Scottish Referendum’](#), *Financial Times* (£), 31 March 2017.

<sup>4</sup> Mure Dickie, [‘Scottish Parliament Backs Second Independence Referendum’](#), *Financial Times* (£), 28 March 2017.

<sup>5</sup> Theresa May, [‘We Can Build a Stronger, Fairer Britain’](#), *Times* (£), 17 March 2017.

<sup>6</sup> [HC Hansard, 29 March 2017, col 244.](#)

<sup>7</sup> Francis Elliott and Lindsay McIntosh, [‘No Independence Vote for Scotland Before Brexit’](#), *Times* (£), 17 March 2017.

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- <sup>8</sup> Francis Elliott and Lindsay McIntosh, '[No Independence Vote for Scotland Before Brexit](#)', *Times (£)*, 17 March 2017.
- <sup>9</sup> BBC News, '[Scottish Independence: Nicola Sturgeon to Seek Second Referendum](#)', 13 March 2017.
- <sup>10</sup> *ibid.*
- <sup>11</sup> *ibid.*
- <sup>12</sup> *ibid.*
- <sup>13</sup> Ewan Smith and Alison Young, '[That's How It Worked in 2014, and How It Would Have to Work Again](#)', UK Constitutional Law Association Blog, 15 March 2017.
- <sup>14</sup> Stephen Tierney, '[A Second Independence Referendum in Scotland: The Legal Issues](#)', Constitution Unit Blog, 14 March 2017.
- <sup>15</sup> Ewan Smith and Alison Young, '[That's How It Worked in 2014, and How It Would Have to Work Again](#)', UK Constitutional Law Association Blog, 15 March 2017.
- <sup>16</sup> HM Government and the Scottish Government, '[Agreement Between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland](#)', 15 October 2012.
- <sup>17</sup> House of Lords Constitution Committee, '[The Agreement on a Referendum on Independence for Scotland](#)', 13 November 2012, HL Paper 62 of session 2012–13, p 7.
- <sup>18</sup> *ibid.*, p 8.
- <sup>19</sup> *ibid.*, p 8.
- <sup>20</sup> [HC Hansard, 10 January 2012, col 52.](#)
- <sup>21</sup> BBC News, '[Timeline: Scottish Independence Referendum](#)', 15 October 2012.
- <sup>22</sup> *ibid.*
- <sup>23</sup> House of Commons Library, '[Referendum on Scottish Independence](#)', 15 January 2013, p 1.
- <sup>24</sup> *ibid.*, p 1.
- <sup>25</sup> [HC Hansard, 15 January 2013, cols 742–840.](#)
- <sup>26</sup> [HL Hansard, 16 January 2013, cols 695–756.](#)
- <sup>27</sup> House of Commons Library, '[Scotland the Referendum and Devolution: Selected Timeline](#)', 12 November 2014, p 4.
- <sup>28</sup> BBC News, '[Scottish Independence: MSPs Pass Scottish Referendum Bill](#)', 14 November 2013.
- <sup>29</sup> BBC News, '[Scotland Votes No](#)', 19 September 2014.

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