

EXPLANATORY MEMORANDUM TO
THE SCOTLAND ACT 1998 (MODIFICATION OF SCHEDULE 5) ORDER 2013

2013 No. 242

1. This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this Order is to amend Schedule 5 to the Scotland Act 1998 to devolve power to the Scottish Parliament to legislate for an independence referendum provided that certain requirements are met. These requirements relate to the date by which a poll can be held and the ballot paper to be used at an independence referendum. The order also applies existing provision relating to referendum campaign broadcasts and referendum mailshots to an independence referendum.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Schedule 5 to the Scotland Act 1998 lists the matters that are reserved to the UK Parliament. Paragraph 1 of Part 1 of Schedule 5 reserves aspects of the constitution including the Union of the Kingdoms of Scotland and England.

4.2 Section 29 of the Scotland Act 1998 provides that a provision of an Act of the Scottish Parliament is outwith the competence of the Scottish Parliament, and so not law, if it relates to reserved matters. The UK Government considers that an Act of the Scottish Parliament that made provision for an independence referendum would relate to the Union of the Kingdoms of Scotland and England and so would be outwith the competence of the Scottish Parliament.

4.3 The Order amends Part 1 of Schedule 5 to make an exception to the reservation so that an independence referendum that meets certain requirements will not be a reserved matter. This will mean that it will be within the competence of the Scottish Parliament to legislate for an independence referendum that meets certain requirements.

4.4 The Political Parties, Elections and Referendums Act 2000 (“PPERA”) regulates certain referendums provided for by or under an Act of Parliament. Section 127 of PERA provides a definition of “referendum campaign broadcast” and also provides that the only referendum campaign broadcasts that can be broadcast are those made by or on behalf of the campaign organisations that have been designated by the Electoral

Commission as representing those campaigning for a particular outcome of the referendum (“designated campaign organisation”). The Communications Act 2003 and the agreement between the Secretary of State for Culture, Media and Sport and the BBC contain provisions regarding the regulation of referendum campaign broadcasts and both use the definition of referendum campaign broadcast contained in section 127 of PPERA.

4.5 Paragraph 1 of Schedule 12 to PPERA entitles the designated campaign organisations to send a referendum mailshot to every elector or household free of charge. The Royal Mail is entitled to recover the cost of postage from the Consolidated Fund.

4.6 Schedule 5 to the Scotland Act 1998 reserves certain aspects of broadcasting (section K1) and the Post Office, posts and postal services (section C11). Though the Order devolves power to the Scottish Parliament to legislate for an independence referendum this would not be sufficient to allow the Scottish Parliament to legislate to replicate section 127 of, and paragraph 1 of Schedule 12 to, PPERA. The Order therefore applies these provisions of PPERA to an independence referendum. In relation to mailshots, provision is made for the Royal Mail to recover the cost of postage from the Scottish Ministers.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Secretary of State for Scotland has made the following statement regarding Human Rights:

In my view the provisions of the Scotland Act 1998 (Modification of Schedule 5) Order 2013 are compatible with the Convention rights.

7. Policy background

7.1 The United Kingdom Government and the Scottish Government have agreed to work together to ensure that a referendum on Scottish independence can take place.

7.2 The governments are agreed that the referendum should:

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

7.3 The governments have agreed to promote an Order in Council under section 30 of the Scotland Act 1998 in the United Kingdom and Scottish Parliaments to allow a single-question referendum on Scottish independence to be held before the end of

2014. The Order will put it beyond doubt that the Scottish Parliament can legislate for that referendum.

- 7.4 The Order sets out the parameters for the legislation that the Scottish Parliament can promote for an independence referendum:
- there must be a single ballot paper that offers a choice of two responses;
 - the referendum poll cannot be held on the same day as any other referendum provided for by the Scottish Parliament; and
 - the referendum must be held no later than 31 December 2014.
- 7.5 The Order also applies provisions relating to referendum campaign broadcasts and free mail-shots to an independence referendum, that would otherwise be outside of the Scottish Parliament's competence.
- 7.6 The governments are agreed that the referendum should meet the highest standards of fairness, transparency and propriety, informed by consultation and independent expert advice. A memorandum of agreement published alongside the draft Order sets out the agreement reached between the two governments on the wider referendum rules and regulation that will be set out in the legislation to be introduced by the Scottish Government in the Scottish Parliament.

8. Consultation outcome

- 8.1 On 10th January 2012 the UK Government launched a consultation on Scotland's constitutional future which sought views on how to facilitate a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom. The consultation document enclosed a draft order devolving power to the Scottish Parliament to legislate for an independence referendum if certain requirements were met. The closing date for consultation responses was 9th March 2012.
- 8.2 The consultation received 2,857 responses and a summary of responses was published on 4th April 2012. The response document set out the key findings of the consultation, including that 75% of those who expressed a view on the question supported a single question, that 70% felt the referendum should be sooner rather than later, 86% wanted the Electoral Commission to have a role in overseeing the referendum, 71% thought those resident in Scotland should be able to vote, 72% wanted to the Scottish Parliament to be given the power to legislate for a referendum on independence and of those who wanted the Scottish Parliament to be given the power, 63% thought this should be done through a section 30 Order. The document also set out the Government's response to the consultation, including its intention to seek discussions with the Scottish Government to agree a section 30 Order to enable the Scottish Parliament to legislate for a legal, fair and decisive referendum on independence.
- 8.3 On 25th January 2012 the Scottish Government launched a consultation on its proposal for a referendum on independence including a draft Bill making

provision for a referendum. The closing date for consultation responses was 11th May 2012.

9. Guidance

9.1 No additional guidance is required for this Order.

10. Impact

10.1 A Regulatory Impact Assessment has not been prepared for this Order, as it has no impact on business, charities or voluntary bodies. This is a constitutional measure that concerns a transfer of legislative competence to the Scottish Parliament.

10.2 There is no impact on the public sector.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 This Order provides the Scottish Parliament with the competence to legislate for an independence referendum. It is for the Scottish Parliament to consider how best to monitor and review legislation within its legislative competence.

13. Contact

Laura Crawford at the Scotland Office, tel: 020 7270 6802 or email: laura.crawford@scotlandoffice.gsi.gov.uk, can answer any queries regarding the instrument.

POLICY NOTE
THE SCOTLAND ACT 1998 (MODIFICATION OF SCHEDULE 5) ORDER 2013.

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The above instrument is proposed to be made under sections 30(2) and (4) and 113(4)(a) of the Scotland Act 1998. Section 30(2) orders provide a mechanism whereby Schedule 4 or Schedule 5 to that Act can be modified by Order in Council. By virtue of section 115 of, and paragraphs 1 and 2 of Schedule 7 to, the Scotland Act 1998, this Order is subject to affirmative resolution procedures in both Houses of the United Kingdom Parliament and the Scottish Parliament.

Policy objectives

The purpose of this Order is to amend Schedule 5 to the Scotland Act 1998 to enable the Scottish Parliament to legislate for an independence referendum that takes place at any point before the end of 2014. The Order requires the poll for this referendum to be held on a day with no other referendum poll provided for by legislation of the Scottish Parliament. It requires that the referendum will ask one question on independence.

The Order also applies existing provision set out in Part 7 of the Political Parties, Elections and Referendums Act 2000 (PPERA), relating to referendum campaign broadcasts and referendum mailshots, to an independence referendum.

The United Kingdom and Scottish Governments are agreed that the referendum should meet the highest standards of fairness, transparency and propriety, informed by consultation and independent expert advice. A memorandum published alongside the Order sets out the agreement reached between the two Governments on the wider referendum rules and regulation that will be set out in the legislation to be introduced in the Scottish Parliament by the Scottish Government.¹

Effect of Instrument

Article 3 of the Order amends Part 1 of Schedule 5 to make an exception to the reservation of aspects of the constitution of the United Kingdom to enable an independence referendum that meets certain requirements.

These requirements are that:

- The date of the poll at the referendum may not be the date of the poll at any other referendum held under provision made by the Parliament;
- The date of the poll at the referendum must be no later than 31 December 2014;
- There must be only one ballot paper at the referendum, and the ballot paper must give the voter a choice between only two responses.

Section 127 of PERA provides a definition of “referendum campaign broadcast” and also provides that only referendum broadcasts made by or on behalf of designated campaign organisations can be broadcast. Article 4 of the Order makes provision applying the provisions in PERA to an independence referendum, meaning that Ofcom, the BBC and the

¹ <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>

Electoral Commission will have the same role in relation to referendum campaign broadcasts at an independence referendum as they would in relation to a PPERA referendum.

Adapting the definition in section 127 of PPERA brings in other relevant broadcasting controls including the Communications Act 2003 and the agreement between the Secretary of State for Culture, Media and Sport and the BBC (July 2006). Article 4(3)(a) and (b) accordingly removes the application of PPERA rules on campaign spending on broadcasts so that the Scottish Parliament can make its own provision in the legislation for the referendum. Article 4(3)(c) removes the requirement in the Communications Act 2003 for the Welsh broadcasting Authority's services, including the Welsh language public broadcaster, S4C, to screen Scottish referendum campaign broadcasts.

Paragraph 1 of Schedule 12 to PPERA entitles the designated campaign organisations to send a referendum mailshot to every elector or household free of charge. Article 4 of the Order applies these provisions to an independence referendum. Provision is made for the Royal Mail to recover the cost of postage from the Scottish Ministers.

Article 2 provides that the Order will come into force the day after it is made.

The United Kingdom Government has agreed to this proposed course of action, and to the laying the draft instrument before both Houses of Parliament at Westminster for approval, as required by section 115 of, and paragraphs 1 and 2 of Schedule 7 to, the Scotland Act 1998.

Consultation

On 25 January 2012 the Scottish Government launched a consultation setting out its proposals for the running of an independence referendum, including a draft Referendum Bill.² The consultation document stated that the Scottish Government would be willing to work with the United Kingdom Government to agree a clarification of the Scotland Act 1998 that would remove their doubts about the competence of the Scottish Parliament to legislate for an independence referendum. The closing date for responses was 11 May 2012.

Over 26,000 responses were received. The independent analysis of these responses will be published in October 2012 and will inform the development of specific proposals about the running of the referendum, which will be set out in the legislation to be introduced in the Scottish Parliament by the Scottish Government.

The United Kingdom Government launched a consultation on 10 January 2012 which sought views on how to facilitate a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom. The consultation document set out a draft section 30 Order. The closing date for responses was 9 March 2012 and the United Kingdom Government published its response to this consultation on 4 April 2012.

Financial Effects

The instrument has no financial effect.

² <http://www.scotland.gov.uk/Resource/0038/00386122.pdf>

Scottish Government
October 2012