

**GOVERNMENT RESPONSE TO THE HOUSE OF LORDS SELECT COMMITTEE  
ON THE CONSTITUTION REPORT OF SESSION 2013-14, *SCOTTISH  
INDEPENDENCE: CONSTITUTIONAL IMPLICATIONS OF THE REFERENDUM  
(HL PAPER 188)***

**Introduction**

The Government is grateful to the Committee for its report which provides a valuable contribution to the consideration of the Scottish independence referendum and its implications, undertaken by this Committee and others within the UK Parliament.

The UK Government worked with the Scottish Government to ensure that there would be a legal, fair and decisive referendum in Scotland on the question of independence. The Agreement signed by the Prime Minister, Secretary of State for Scotland, First Minister and Deputy First Minister of Scotland on 15 October 2012 put in place the process which enabled the Scottish Parliament to legislate legally for a single question referendum on independence to be held, subject to the normal referendum rules, before the end of 2014.

Successive Governments have recognised that it should be for people in each part of the United Kingdom to determine whether or not they wish to remain part of it, and it is therefore right that Scotland's future will be decided by people who live in Scotland, as was the case in the 1997 Referendum which established devolution in Scotland. However, as the House of Lords Select Committee on the Constitution recognises in this report, there would be important constitutional implications for people across the United Kingdom if a majority were to vote in favour of independence in the referendum on 18<sup>th</sup> September.

The UK Government is committed to making the case for Scotland's place within the United Kingdom and has delivered the most detailed analysis ever undertaken of Scotland's contribution to the United Kingdom and the benefits that Scotland derives from being part of the United Kingdom. The Scotland analysis programme has been evidence based, robust and widely praised for its detailed assessment of the benefits that being part of the United Kingdom brings. The full set of analysis papers, including a summary paper drawing together the key conclusions of the series can be accessed here: <https://www.gov.uk/government/collections/scotland-analysis>

This paper responds to the conclusions and recommendations highlighted by the Committee.

## RESPONSES TO CONCLUSIONS AND RECOMMENDATIONS

### Principles governing independence

***The overwhelming view in the evidence we received was that after a "yes" vote the rest of the United Kingdom would continue as the same state: it would be the continuator state. Scotland would become a new, successor state. (Paragraph 16)***

***This would be the case because relevant precedents support that position; it would be consistent with the rest of the UK having the majority of the territory and population of the existing UK; and it would reflect the likely opinion of other countries. No realistic alternative case has been made. (Paragraph 17)***

***The fact that the rest of the UK would be the continuator state shapes discussion on the implications of independence; this report proceeds on that basis. (Paragraph 18)***

The UK Government agrees with the Committee's conclusions at paragraphs 16-18. The first paper in the Scotland analysis series, *Devolution and the implications of Scottish independence*, addressed the key legal questions about the constitutional status of both the UK and a separate Scottish state in the event of independence.

Our analysis was informed by independent legal opinion from two leading international experts: Professor James Crawford and Professor Alan Boyle. In recognition of the importance of this issue, we published their legal opinion as an annex to the analysis paper, and it can be read in full here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/79408/Annex\\_A.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf) .

In the event of Scottish independence, the United Kingdom would continue as before, retaining the rights and obligations of the UK as it currently stands. This is for four main reasons:

- the majority of international precedent suggests this would be the case;
- the continuing UK would retain most of the population (92 per cent) and territory (68 per cent) of the UK;
- other states would recognise the continuing UK as the same legal entity as before Scottish independence; and finally,
- on the rare occasions when one state is dissolved and two new states have been created, this tends to happen by mutual agreement. It is hard to envisage any scenario whereby the UK Parliament would ever have a mandate from the people of the rest of the UK to dissolve the UK by voting the state out of existence, and the UK would therefore assume the position of the continuing state.

Professors Crawford and Boyle, confirm that it is not legally possible for two new states to inherit the international personality of the former state. So if Scotland were to choose to leave the United Kingdom, it would become a new, separate state. This would have significant implications; for example, as a new state, an independent

Scotland would be required to apply to and negotiate to become a member of whichever international organisations it wished to join, including the European Union.

***In the event of Scottish secession, institutions of the UK would become institutions of the rest of the UK, as the continuator state. Fixed assets would belong to the state in which they are located. Other (non-fixed) assets and liabilities would be apportioned equitably. The exact division would be a matter for negotiations, and would be complicated. (Paragraph 28)***

The UK Government agrees with the Committee that in the event of independence, institutions of the UK would become institutions of the continuing UK

The UK Government also agrees that in the event of independence, the division of assets and liabilities would be the subject of negotiations between those representing a separate Scottish state and those representing the interests of the continuing United Kingdom.

The division of liabilities and assets would be a significant part of any negotiations to create a new state. There are some general principles of international law that could impact upon this matter but there is no clear consensus in international practice as to the precise allocation of national debt in circumstances of state separation or dissolution.

For particular fixed assets, such as government buildings, the territory in which they are situated would be a significant factor to be taken into consideration in the discussions. There would also be an expectation that an independent Scottish state would take on an equitable share of the UK's national debt. The UK Treasury has set out that the continuing UK Government would in all circumstances honour the contractual terms of the debt issued by the UK in the event of Scottish independence. Both the UK and Scottish Governments have said that an independent Scottish state would become responsible for a fair and proportionate share of the UK's current liabilities but the arrangements for splitting assets and liabilities would be one of many issues that would need to be discussed by representatives of the two governments in the event of a Yes vote.

However, both the UK Government and Scottish Government have said that there can be no 'pre-negotiations' in advance of the referendum. The UK Government acts in the interests of all parts of the United Kingdom and it would therefore not be appropriate to enter into any discussions or negotiations that would require the UK Government to act in the interests of just England, Wales and Northern Ireland until people in Scotland have had their say in the referendum.

### **Constitutional implications for the UK state**

***It would be important for any independence negotiations to have a clear legal basis. The evidence we received suggested that the UK Government are likely already to possess legal power to negotiate, but the Scottish Government may not. In the event of a "yes" vote, this should be put beyond doubt. In that event, soon after any such vote, a bill should be introduced to the UK Parliament which would establish the negotiating team for the rest of the UK***

***and devolve power to the Scottish Parliament to establish a negotiating team for Scotland. (Paragraph 37)***

Throughout the referendum debate, the UK Government has recognised and highlighted the importance of ensuring a legal, fair and decisive process. The UK Government reached agreement with the Scottish Government on the legislation required to enable the referendum to take place as we recognise that the law is central to this debate. Whatever the outcome in September, it is vital that the referendum is legally robust. In the event of a ‘yes’ vote it would be equally important to ensure that the process of negotiations were legally robust. Both the UK and Scottish Governments agree there would need to be negotiations in advance of a separate Scottish state being established; however consideration of the negotiation process - including any changes that would be required to existing legal arrangements – must not take place unless and until a majority of people in Scotland vote in favour of leaving the United Kingdom.

***UK legislation to facilitate Scottish secession from the Union may not need to be extensive. Its primary purpose would be to recognise independence for Scotland and the end of the UK Parliament's legislative competence over Scotland. However, it is likely that extensive consequential legislation, and legislation to implement any agreement reached between the two governments, would be necessary. (Paragraph 44)***

We note the Committee’s conclusion at paragraph 44. In the event of a ‘yes’ vote, legislation would be required for Scotland to leave the United Kingdom and to establish a new separate, independent state. However, the extent of the legislation required cannot be judged in advance. It would depend on the conclusions of negotiations between those representing an independent Scotland and those representing the continuing United Kingdom.

***The UK Government's apparent position—that they would cease to represent the interests of Scotland immediately after a "yes" vote was returned—may create a constitutional limbo for Scotland. Scotland would still be part of the United Kingdom, but the UK Government would cease to act in Scotland's interests. (Paragraph 56)***

***On international representation, we recommend that an agreement be reached between the two governments immediately following a "yes" vote to clarify the basis of such representation for Scotland in the period between that vote and independence day. (Paragraph 57) 126. On domestic governance, we recommend that, if Scotland votes for independence, the UK and Scottish Governments should agree how any transfer of powers prior to independence day should take place. In addition, an arrangement should operate between the referendum and independence day whereby the UK Government take long-term decisions on reserved matters relating primarily or solely to Scotland only after consulting the Scottish Government. (Paragraph 58)***

We note the Committee’s recommendation that the UK and Scottish Governments reach agreement on arrangements that would operate between the referendum and the date of independence, in the event of a ‘yes’ vote. Following a recommendation

from the Electoral Commission, the UK Government and Scottish Government have prepared a joint statement on what would happen following either a 'yes' or a 'no' vote. The draft leaflet – including the statement from the two Governments can be accessed here:

[http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0011/169058/SIR-booklet-interior-draft.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0011/169058/SIR-booklet-interior-draft.pdf)

The joint statement text relating to a 'yes' vote covers many of the issues raised by the Committee. It sets out that:

***If more people vote “Yes” than vote “No” in the referendum, Scotland would become an independent country. This would not happen straight away. There would need to be negotiations between people representing Scotland and people representing the rest of the United Kingdom.***

*During the negotiations, Scotland would still be part of the United Kingdom and public services would be delivered as they are now. The Scottish Government would continue to be responsible for health, education, justice, rural affairs, housing and transport in Scotland. The United Kingdom Government would continue to be responsible for defence, security, foreign affairs and constitution, most pensions, benefits and most tax powers up to the date Scotland becomes an independent country.*

*Laws which apply in Scotland now would still apply during the negotiations. During the negotiations, the two governments would continue to discuss any policies of either that affect the responsibilities of the other government. The current Scottish Government would carry on until the next general election to the Scottish Parliament, due to take place in May 2016.*

*The negotiations would include discussion about the allocation of assets and liabilities.*

*After the date of independence, the Scottish Government would become responsible for all aspects of government in Scotland.*

*After the date of independence, the Scottish Parliament would be able to amend or retain the laws that apply in Scotland now to reflect the new circumstances of an independent Scotland.*

***In the event of a "yes" vote, the status of MPs for Scottish constituencies in the period between the referendum and independence day should be resolved quickly, and certainly before the 2015 general election. (Paragraph 63)***

***The UK Government should make it clear as soon as possible after a "yes" vote when they propose that Scottish MPs would be removed from the House of Commons. MPs for Scottish constituencies should cease to sit in the House of Commons from the date on which Scotland secedes from the United Kingdom. Legislation to this effect would be necessary. The Government***

***should provide sufficient parliamentary time to enable the matter to be clearly resolved. (Paragraph 72)***

Laws passed by the UK Parliament set out the arrangements for elections in the United Kingdom.

As highlighted above, both Governments have made clear that there would need to be a process of negotiation between those representing Scotland and those representing the continuing UK, in the event of a majority voting in favour of independence in September.

The UK Government is clear that the current constitutional arrangements would remain in place during the negotiation process.

This means that until Scotland were to leave the United Kingdom formally, Scotland would continue to be represented in UK institutions, including the United Kingdom Parliament. However, from the date that an independent Scottish state was established, Scotland would no longer be part of the United Kingdom. This would mean that from the date of independence, Scotland would no longer be represented within the UK Parliament.

Laws passed by this Parliament set out the arrangements for elections to the United Kingdom Parliament. It would be a matter for Parliament to change the arrangements and the timing of any changes would have to be settled in the event of a vote for independence.

***As the law now stands, if Scotland were to leave the United Kingdom, members of the House of Lords who live in Scotland would have to be resident, ordinarily resident and domiciled in the rest of the UK for the purposes of certain taxes. If they did not want to pay tax in the rest of the UK, they would have to retire from the House. (Paragraph 76)***

***In the event of independence it would need to be decided whether peers of Scotland should be entitled to continue to be members of the House of Lords on the basis of a Scottish peerage alone. (Paragraph 78)***

We agree with the Committee's conclusions at paragraph 76 that, as the law now stands, members of the House of Lords must be treated as resident, ordinarily resident and domiciled in the UK for the purposes of certain taxes<sup>1</sup>. If a majority of people in Scotland vote to leave the UK, then after negotiations, Scotland would leave the United Kingdom. Peers who currently live in Scotland would either need to be treated as resident, ordinarily resident and domiciled in the continuing United Kingdom for the purposes of certain taxes, or choose to retire from the House<sup>2</sup>. The UK Government notes the comments made by the Committee relating to members of the House of Lords on the basis of a Scottish peerage.

---

<sup>1</sup> S. 41 (2) of the Constitutional Reform and Governance Act 2010

<sup>2</sup> Under the provisions set out in the House of Lords Reform Act 2014

***If an independent Scotland were to have its own supreme court, justices with experience of Scots law would no longer be appointed to the UK Supreme Court. However, given their UK-wide remit, serving justices with this experience should continue to sit on the Supreme Court until their scheduled date of retirement. (Paragraph 84)***

We note the Committee's conclusions at paragraph 84. The operation of the Supreme Court and role of justices with experience of Scots law would be one of many issues that would require discussion in the event of a majority vote in support of independence.

### **Negotiations**

***The best approach would be for the negotiating team to be composed solely of representatives of the UK Government. The team should be small and able to act quickly and with authority. It would also be important for it to be held fully to account by Parliament through established means. (Paragraph 97)***

***It would be desirable for there to be broad agreement on the scope and aims of the negotiations, and for any change of government in 2015 to cause as little disruption as possible. It would be important for the official opposition at Westminster to be fully consulted during negotiations. Similarly, given the interests of the devolved executives in Northern Ireland and Wales, it would be important to keep them closely involved. (Paragraph 98)***

We note the Committee's comments in relation to the negotiating teams that would be required in the event of a 'yes' vote. A negotiating team would be required to negotiate in the interests of a separate Scotland and a team would be required to negotiate in the interests of the continuing UK (England, Wales and Northern Ireland). The constitution of the respective teams is not a matter that can be considered in advance of the referendum. To do so would require those on the UK side to begin to act in the interests of just England, Wales and Northern Ireland. Both the UK Government and Scottish Government have said that there can be no 'pre-negotiations' in advance of the referendum.

We note the Committee's comments in relation to the 2015 General Election. The timings of UK General Elections are now set out in the Fixed Term Parliaments Act 2011. The Scottish Government chose the date of 18<sup>th</sup> September 2014 after the Royal Assent of the Fixed Term Parliaments Act and were therefore aware of the timescales between the referendum and the next General Election; including the possible impact this may have on negotiations in the event of a 'yes' vote.

***We recommend that MPs representing Scottish constituencies should not be on the negotiating team for the rest of the UK. Their duty as representatives of their constituents in Scotland would conflict with the objective of that negotiating team: to secure the best arrangements for England, Northern Ireland and Wales. (Paragraph 102)***

***We conclude that MPs for Scottish constituencies should not be involved in holding the negotiators for the rest of the UK to account, nor in voting on any***

***measure which ratifies the outcome of the negotiations. In the event of a "yes" vote, we recommend that the Government put before Parliament a proposal that would put this matter beyond doubt before the 2015 election. (Paragraph 109)***

The UK Government notes the Committee's recommendations at paragraphs 102 and 109. The constitution of the respective negotiating teams that would be required in the event of a majority vote in favour of independence would need to be determined after the referendum in September. However, the UK Government is clear that the teams would need to negotiate in the interests of those they represent. In the case of the team representing the continuing United Kingdom that means negotiating in the best interests of those from England, Wales and Northern Ireland.

***The Scottish Government have proposed a timetable of completing negotiations on independence by March 2016. There is no constitutional principle by which that timetable would bind the rest of the UK. The UK Government should not put the interests of the rest of the UK at risk by attempting to stick to that timetable. Any negotiations should take as long as necessary; they should not be foreshortened in order to meet a deadline set by one party to the negotiations. (Paragraph 117)***

The UK Government agrees with the Committee's conclusion at paragraph 117; negotiations should take as long as is required, rather than focussing on an artificial deadline.