



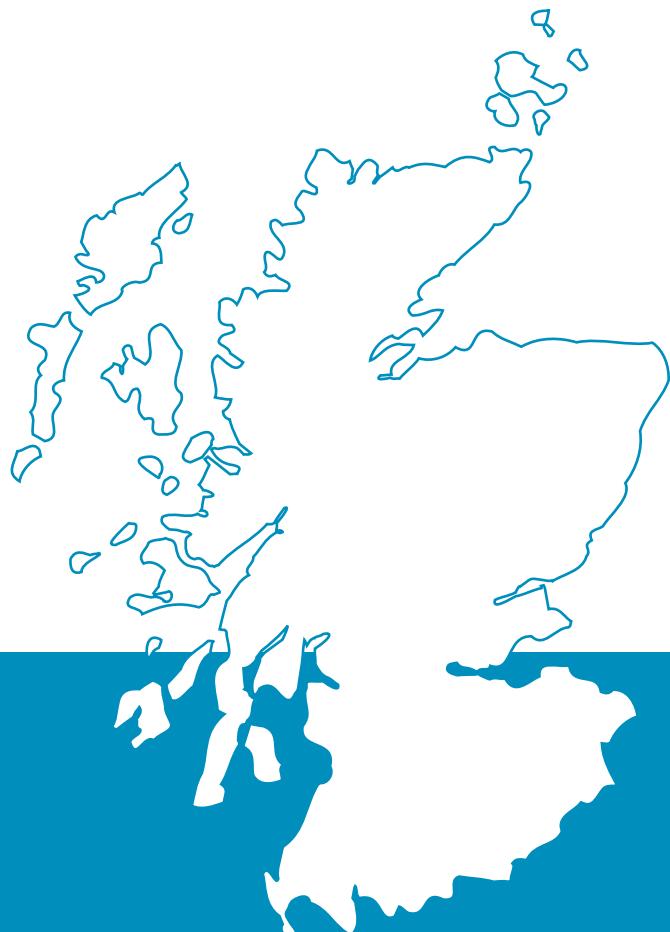
THE LAW SOCIETY  
of SCOTLAND

[www.lawscot.org.uk](http://www.lawscot.org.uk)

# Scotland's Constitutional Future

## Views, opinions and questions

The Law Society of Scotland's discussion paper  
August 2013



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## Foreword by the president of the Law Society of Scotland

In a little over a year's time, Scots will be asked to answer a question, described as the biggest for our nation in 300 years: should we become an independent country?

A question of such importance has inevitably created impassioned, heated - at times robust - discussion and we can expect that debate to become even more intense as we approach polling day next year.

For organisations like the Law Society of Scotland, the debate around Scotland's constitutional future has presented something of a challenge. We are proud to be a firmly non-partisan organisation. Whether it is our Council, our committees or our wider membership, we have people from across the political spectrum whose views on Scotland's future will be as varied as that of society as a whole.

So whilst we will not be taking a view either for or against independence, we are excited at the prospect of being part of the discussion which will take place across Scotland over the coming year. We want that debate to be reasoned, informed, informative and respectful, which is why, earlier this year, we started to consider and analyse key areas where we believed more information would be required.

I want to thank our constitutional working party, which has led this work. I also want to thank the many people - both for and against independence - who participated in our roundtable events, all of whom helped to give us context in putting this paper together. My thanks also to our various committees, all made up of volunteers, who once again provided us with their much valued insight and expertise.

What we have is a discussion paper which focuses on some critical areas: Scotland's membership of the European Union and other major international organisations; the economic question; whether Scotland should have a written constitution; and, the political and judicial restructuring which an independent Scotland would need.

Equally, there are questions for those who believe Scotland should remain part of the United Kingdom, especially around the possible devolution of further powers from Westminster to Holyrood. What powers should be devolved and against what timescale? How would a political consensus be developed to deliver those powers?

We hope this paper will help to inform and add value to the debate already underway. We will be using it to engage with our members and stakeholders before publishing a final document later in the year. In the meantime, there are details inside on how you can let us know what you think.

This is an exciting and potentially pivotal time for Scotland, with such a fundamentally important question to be answered in just over a year. We look forward - and are committed - to being part of that debate.

**Bruce Beveridge WS**

President

The Law Society of Scotland

# Introduction

## About the Law Society of Scotland

The Law Society of Scotland was established in 1949 to "promote the interests of the solicitors' profession in Scotland and the interests of the public in relation to that profession." This means the Society has an important and prominent role in civic Scotland and has an independent voice on fundamental issues such as the rule of law, constitutional and legal development and the fair and efficient operation of the law for all its citizens.

As the representative body of over 10,500 solicitors who collectively engage with millions of people and across a wide spectrum of issues, we are able to tap into a broad base of experience and expertise. Our Council and various committees are made up not just of legal practitioners but also non-solicitors, academics and other experts from outside the legal profession.

As the statutory regulator of the solicitor profession, we work to ensure the highest possible standards. We also have a duty of care to the public to ensure they are better aware of their rights and how they can access the Scottish justice system.

For these reasons, the Society has a particular interest in good government and the creation of law which is necessary, effective, clear, accessible and coherent. We respond to public consultations and recommend detailed amendments to political representatives during the passing of legislation. We enjoy a regular programme of engagement with MSPs, MPs, and peers from across the political divide and seek at all times to ensure political decision-makers understand the impact of the decisions they take, intended or otherwise.

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## About the referendum on Scottish independence

The Acts of Union which brought together Scotland and England in the United Kingdom of Great Britain in 1707 contain provisions which have been key in maintaining, amongst other things, a distinctive legal system in Scotland. This is undoubtedly a factor in the continued sense of national identity in Scotland even though the treaty on which the Acts are based is more than 300 years old. Scots law and the Scottish legal system are institutions which have served union and devolution. We believe that whatever Scotland's future, Scotland's law, legal system and legal profession must be at the centre of policy development.

The Scottish Independence Referendum Bill was referred to in the Scottish Government's legislative statement on 4 September 2012 and introduced into the Scottish Parliament on 21 March 2013. The referendum will be held, subject to parliamentary approval, on 18 September 2014. The vote will be on the single question of whether Scotland should be an independent country.

The Society has taken a close interest in Scotland's constitutional future for many years. In particular, we commented on the National Conversation, the consultations concerning the Calman Commission, the Scotland Act 1998 Section 30 Order, the Scottish Independence Referendum (Franchise) Bill and the Scottish Independence Referendum Bill.

We took a keen interest in the section 30 order because it provided the legal basis for the Scottish Parliament legislation. We commented on the UK and Scottish Government consultations and briefed peers, MPs and MSPs during the order's passage in both the UK and Scottish Parliaments.

The referendum will present the most significant constitutional issue to people in Scotland since the European Community referendum in 1975.

The question offered to the electorate is "should Scotland be an independent country?" If the vote is 'yes', the route to independence will begin. If the vote is 'no', the result will be the status quo. Perhaps more powers and further devolution will be considered but nothing is certain in that respect. Each of the main political parties which opposes independence has begun the process of considering Scotland's constitutional future in the event of a 'no' vote in the referendum. These proposals will be eagerly awaited by the electorate.

# Principles for Scotland's constitutional future

We believe that certain principles should underpin the debate concerning Scotland's constitutional future.

## **A debate conducted with mutual respect**

More unites the political parties and campaigns than divides them. All want a stable, successful Scotland whose people can live in peace and prosperity, with freedom to live their lives as they want in accordance with the law. Recognition of this shared community of interest should underpin the debate about Scotland's constitutional future and should allow that debate to take place in a mutually respectful way so that the electorate will vote having been fully informed on all the issues.

## **Rule of law and commitment to human rights**

In the event of independence, the rule of law must be paramount and form the basis of any new constitutional arrangements. Concomitant with that principle is a commitment to maintain the human rights of all people in Scotland, to respect liberty within the law and to ensure accountable government.

## **Legal certainty**

The need for legal certainty at the point of the independence referendum is key. In particular, voters will need to know the detail of the proposed relationship both between Scotland and the UK and between Scotland and the EU. That cannot depend on assertions as to what the legal position should be, as stated by only one party, when there is still contention as to that position. Both sides of the argument will need to clarify as much as possible those issues where there is currently contention.

## **Administrative continuity**

There will also be a need to ensure that there is administrative continuity in the event of independence as regards what are currently reserved areas of administration, particularly on the role and status of the civil service and other issues, for example, citizenship and immigration, social security, pensions, financial services, company law and equality law.

# How we produced this document

## The detail:

The Society's Scotland's Constitutional Future Working Group has embarked on a two-year plan in the run up to the Scottish independence referendum in September 2014.

The first stage of that plan involved a series of roundtable stakeholder events which we hosted in February and March 2013. These engagement events allowed us to hear from people outwith the solicitor profession, who informed and enhanced our understanding of the issues, opportunities and risks associated with Scottish independence. To ensure balance, we made a point of inviting representatives from both the Yes Scotland and Better Together campaigns to each event.

We also drew upon the considerable expertise within our various committees, which cover a broad range of areas, including tax law, pensions, employment and equalities. These committees include not just experienced solicitors with knowledge and experience but also non-solicitors from across civic Scotland.

We also held events at each of the four main political party conferences, which focused on the issues surrounding the referendum, Scottish independence and the prospect of remaining within the UK but with further devolution powers from Westminster.

Material from our roundtable events and committee discussions have been collated and used to feed into this discussion paper, which is split into the following subject areas:

- What would independence mean for Scotland's membership of the European Union and international organisations?
- What impact would there be for Scotland from a 'no' vote?
- What would independence mean for the economy and business?
- What would independence mean for judicial and parliamentary restructuring?

In each case, we describe the issues which were presented to us before providing some of our own commentary. We then asked questions which we believe need to be answered by either the Scottish or UK Government before the referendum.

## Next steps

We believe the debate on Scotland's constitutional future needs to be worthy of the question being asked in September 2014.

To that end, we hope this discussion paper will add value to the debate already under way. Our aim is to use this paper to engage with our members across Scotland but also with the Scottish and UK Governments, referendum campaigns, other organisations and the wider public.

If you have a comment about what we have said or wish to challenge some of what we have written then please contact us by Friday 27 September at:

The Law Society of Scotland  
26 Drumsheugh Gardens  
EDINBURGH  
EH3 7YR  
Email: [referendum@lawscot.org.uk](mailto:referendum@lawscot.org.uk)  
Twitter: [@lawscot](https://twitter.com/lawscot)



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- We will consider all the views we receive before publishing a final position paper later in the year.

# What would independence mean for Scotland's membership of the European Union (EU) and international organisations?

## What we heard

This discussion at our roundtable event focused on Scotland's membership of the EU, should it become an independent country.

EU membership in the event of Scotland voting for independence is one of the most vexed topics. It formed a significant part of the opinion by Professors Crawford and Boyle attached to the UK Government's first Scotland analysis paper, *Devolution and the Implications of Scottish Independence* (February 2013).

Views have been expressed that Scotland would automatically be entitled to EU membership on the same basis as the UK. The Scottish Government maintains that EU membership would be determined through issues negotiated from within the EU in the interim period between the independence vote on 18 September 2014 and final independence being secured by legislation before the Scottish Parliament elections in May 2016. The EU has coped with a number of changes over the years which included significant negotiation. Scottish independence would fit with that pattern.

Whether Scottish membership of the EU is on the basis of accession as a new state or through treaty changes, each approach requires unanimity amongst existing EU member states. Whether Scotland would remain or become a member of the EU, if it wanted to take advantage of the current UK arrangements for membership, eg UK opt-outs, UK position regarding the euro, the Schengen Agreement, or the UK budget rebate, these would be matters for negotiation with the EU Commission and the EU Council of Ministers. The UK, as a member state and one most affected by Scottish independence, would have a significant role to play in discussions between Scotland and the EU institutions and other member states. Negotiation of Scottish 'opt-outs' could make the negotiations more protracted.

The Scottish Government needs to detail what it would propose in the event that negotiations for admission were not concluded in the 16-month window between a 'yes' vote and "Independence Day". Would Independence Day be moved back to allow for a conclusion to negotiations or would Independence Day be a fixed date requiring Scotland to leave the EU and rejoin when the negotiations were concluded? Is there a middle way which would allow discussions on fundamental issues to be concluded prior to Independence Day, with other less significant matters being left until afterwards?

In relation to currency, if there was no treaty opt-out, perhaps Scotland could avoid joining the euro if the membership criteria were set in such a way that the position of Sweden was followed. It was acknowledged that the European Central Bank requires member states to nominate financial regulators and to take part in EU-wide exchange systems. The question was raised as to whether or not it would be possible for such organisations to be shared between more than one member state (including the issue of sharing a central bank). This discussion took place prior to the publication of the Scotland analysis paper by the United Kingdom Government entitled *Currency and Monetary Policy* (April 2013), which considered the issues arising from a formal sterling currency union, the use of sterling without formally joining a currency union, the euro or introducing a new Scottish currency.

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## The Society's commentary

The publication of legal advice (or the substance of that advice) on the legal issues surrounding EU membership and membership of international organisations may serve to provide further clarity and perhaps give more information to voters prior to the referendum.

It is a long-standing convention that successive UK and Scottish Governments have not disclosed the fact and substance Law Officers' advice other than in the most exceptional circumstances. Law Officers' legal advice has been disclosed by the UK Government in relation to a number of issues over the years in the context of judicial proceedings, most recently the draft legal advice provided to the Iraq Inquiry and by the then Scottish Executive in relation to the Mental Health (Public Safety and Appeals) (Scotland) Act 1999. That these issues were considered to be exceptional circumstances indicates that the referendum might also be considered exceptional. The referendum has after all been described on both sides of the argument as the most important question before Scots in 300 years. Whilst acknowledging the right of both the UK and Scottish Governments to withhold their legal advice on these issues, we believe both governments should be encouraged to make public the legal advice (or the substance of that advice) which they have received. We believe this would help produce greater clarity and inform the debate ahead of the referendum vote.

In discussion a number of general themes emerged:-

- a. The issue of Scottish independence presents the EU with completely uncharted and unlegislated territory.
- b. Politics in this matter will be more important than the formal legal position. The EU treaties have no provision for cases of secession; the rules which exist apply to accession to, or withdrawal from, the EU.
- c. There are different schools of thought about Scottish membership of the EU. According to some, after independence, the EU treaties will not apply to Scotland (article 52 TEU) and Scotland will need to apply for membership of the EU. According to others, Scotland will negotiate its membership of the EU from within the EU as part of an existing member state.
- d. Individuals matter in the EU as much as institutions. The dissolution of the UK single market and its replacement with the EU single market will be a significant change for individuals and requires further explanation by the respective campaigns and the respective governments.

The EU membership conditions are set out in article 49 TEU to which the Copenhagen criteria should be added.

Specifically, this means that:

- The candidate state needs to be a European state that respects and promotes the values of democracy, human rights and the rule of law.
- It should have stable institutions and a functioning market economy, which can cope with the market forces within the Union.
- It should be able to take on the obligations of membership and implement the EU acquis (all the EU laws, treaties, declarations and resolutions, international agreements and the decisions of the European Court of Justice, ie Europe as it is).

According to some, an accession treaty would be needed. Accession is effected by:

1. a unanimous decision of the Council;
2. a decision of the European Parliament taken by majority; and
3. the ratification of the accession treaty by national parliaments according to their respective constitutional requirements. In view of the above, Scotland will satisfy the legal, political and economic criteria of membership but admission could possibly be delayed by any of the three decision-making stages.

On the other hand, the EU membership issue has been commented on by the Rt Hon Sir David Edward QC, a former judge of the European Court of Justice and one of the foremost European lawyers in Scotland, as follows:

*"Since the situation would be unprecedented, and there is no express provision in the treaties to deal with it, one must look to the spirit and general scheme of the treaties."*

In developing his thoughts, Sir David makes the following assumptions:

1. *"a vote in favour of independence for Scotland would result (at some future date) in the existence of two states – Scotland and RoUK (assuming that England, Wales and Northern Ireland would be content to remain united);*
2. *separation would take place by consent and in a manner consistent with the constitutional traditions of the United Kingdom;*
3. *both Scotland and RoUK would wish to remain integral parts of the EU..."*

On those assumptions, Sir David's opinion is that, in accordance with *"their obligations of good faith, sincere cooperation and solidarity, the EU institutions and all the member states (including the UK as existing), would be obliged to enter into negotiations, before separation took effect, to determine the future relationship within the EU of the separate parts of the former UK and the other member states.*

*The outcome of such negotiations, unless they failed utterly, would be agreed amendment of the existing treaties, not a new accession treaty. The simplified revision procedure provided by article 48 TEU would not apply, so ratification of the amended treaties would be necessary.*

*The length and complexity of the negotiation and ratification process cannot be predicted in advance. In part, it would depend on the goodwill of those involved. In part, it would depend on the extent to which issues were raised beyond those strictly necessary to regulate the future legal relationship of Scotland, RoUK, the EU institutions and the other member states.*

*It would, of course, be necessary to decide how and by whom negotiations would be conducted. Formally speaking, until the moment of separation, the UK as existing would be the member state on which the obligation to negotiate would fall, and with which the EU institutions and the other member states would expect to negotiate. How this would be handled as between the constituent parts of the UK would itself be a matter for negotiation – equally in a spirit of good faith, sincere cooperation and respect for the concerns of other member states.*

*In short, in so far as we are entitled to look for legal certainty, all that is certain is that EU law would require all parties to negotiate in good faith and in a spirit of cooperation before separation took place. The results of such negotiation are hardly, if at all, a matter of law."*

Clarity on the route towards EU membership is a necessity in the context of Scotland's constitutional future and both the UK and Scottish Governments need to provide clear answers to the questions raised by the range of opinion on these issues.

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## Other international organisations and treaties

If Scotland became a state, Scotland would expect to become an active member of the international community by joining a number of international organisations. In order to join an international organisation, a state requires fulfilling the criteria laid down in the constitutive treaty or the criteria established by the organisation's practice.

### **United Nations**

The membership criteria for the UN are contained in article 4 of the UN Charter. Article 4 states that "membership in the United Nations is open to all other peace-loving states which accept the obligation contained in the present charter and in the judgment of the organisation are able and willing to carry out these obligations". Admission is effected by a decision of the General Assembly adopted by a two-thirds majority of present and voting members on a recommendation by the Security Council, which is subject to the veto of permanent members, according to article 27(3) of the UN Charter.

Upon independence, Scotland would submit an application to the secretary-general containing a declaration of acceptance of the obligations contained in the Charter. The application would be scrutinised by the Admission of New Members Committee. It would then be transmitted to the Security Council and, upon positive recommendation of the Security Council, it will be discussed by the General Assembly, which would make the final decision. There is no doubt that Scotland will fulfill the admission criteria and it is highly unlikely that any state will veto its application.

### **North Atlantic Treaty Organisation (NATO)**

Regarding membership of NATO, Scotland would probably be invited to begin accession talks. Following this, a membership action plan will be drawn up which will cover political, economic, defence, military, security as well as legal issues relating to its membership. Scotland should fulfil all conditions set out in the action plan in order to be admitted to NATO. The decision should be unanimous among member states. Although a NATO member state is subject to the obligations of the treaty including its strategic concept, which defines NATO as a nuclear alliance, there is some flexibility as to how a state participates in the alliance and that may assist in solving the question concerning the stationing of nuclear weapons on Scottish territory. This would be a matter of negotiation between NATO and Scotland. Whether (or on what terms) membership would be an option following expulsion of the nuclear deterrent would remain to be seen.

### **The European Free Trade Association (EFTA)**

EFTA (Norway, Iceland, Switzerland and Liechtenstein) is another organisation that Scotland may wish to join if EU membership is delayed. The EFTA convention regulates free trade among EFTA member states.

### **European Economic Area (EEA)**

The EEA is a separate and distinct organisation from EFTA.

Member states of the European Union are also contracting parties to the European Economic Area Agreement, individually and as EU member states. The provisions of the EEA Agreement relative to persons, services capital and establishment are the same as those of the Treaty on the Functioning of the European Union. The detailed single market laws set out in EU legislation (including in relation to procurement and state aid) are extended (sometimes in adapted form) to non-EU EEA states by EU EEA Joint Committee decisions and enforced in those states by the EFTA Surveillance Authority and the EFTA Court (which despite their names are institutions of the EEA not of EFTA).

Switzerland is a party to the convention that established the European Free Trade Association (EFTA), an organisation that is international but not supranational. Following a national referendum in 1992, it did not become a party to the Agreement on the European Economic Area (EEA). It is the only EFTA member that is not also an EEA state.

The EU and Switzerland have entered into a series of bilateral agreements and there is a framework for the interpretation and application of the agreements with the corresponding provisions of EU law.

The real key issue (apart from no Common Agricultural Policy and the Common Fisheries Policy) is that non-EU EEA members have no standing on whether the EU will adopt rules and this may make it harder for them to influence their content. However it is for the non-EU EEA states to decide by consensus whether or not to adopt any given single market law as part of the EEA legal order.

### Council of Europe

The Council of Europe as guardian of the European Convention on Human Rights would be an essential treaty organisation to join. This is examined in greater detail at page 15.

### Conclusions

1. Scotland would have, in the event of a 'yes' vote, the capacity to be recognised as an independent state.
2. Scotland, as part of the United Kingdom, complies with the European Union treaties and the EU acquis. Whether by way of accession or amendment to the treaties following negotiation, Scotland should be able to qualify, in legal terms, for EU membership in its own right.
3. Scotland would, as an independent state, be qualified to join other treaty organisations.

## Questions to be answered

We believe that the question of Scotland's membership of the EU and other major international organisations is, and will continue to be, central to Scotland's constitutional future. To that end, we believe the following questions should be answered:

### By the UK Government

Whilst acknowledging the right of the UK Government to withhold Law Officers' advice, will it disclose its advice (or the substance of that advice) on Scottish statehood acquisition, EU membership and membership of international organisations?

Would the UK Government support an application by an independent Scotland to join the EU and other international organisations?

### By the Scottish Government

Whilst acknowledging the right of the Scottish Government to withhold Law Officers' advice, will it disclose its advice (or the substance of that advice) on Scottish statehood acquisition, EU membership and membership of international organisations?

What will happen in the event that negotiations with the EU are not concluded before Independence Day? What contingencies does the Scottish Government propose?

# What would a 'no' vote mean for Scotland?

## What we heard

This discussion focused on the alternatives to independence, should a 'no' vote prevail in 2014.

The idea that each layer of government is responsible for its own taxation and spending provides government with a financial incentive and accountability. 'Devolution plus' is one of numerous middle options between a unitary state, such as the pre-1999 UK, through to full independence. Other options include devo max, and devo more. Devo plus proposals recommend a structure that will shift the responsibility for raising revenue to create a different balance between Holyrood and Westminster which gives both governments an incentive to act more responsibly within their respective areas of power. The aim of this proposal is, ultimately, to remove the need for a block grant.

At present, the Scottish Government is responsible for raising 7% of all tax income in Scotland, but is responsible for 60% of all expenditure (GERS 2011/12). Although the Scotland Act 2012 has allowed some additional taxes to be devolved to Scotland by 2015, this will see layers of government in Scotland raising around 20% of all tax income raised in Scotland. Under some concepts of enhanced devolution, Scotland would be responsible for raising 60% of the budget in terms of public expenditure, which would include income tax, some or all oil revenues and corporation tax.

In terms of welfare, spending amounted to the largest proportion of public expenditure at UK and Scottish level. Under the current arrangements, the UK Government raises the money for the welfare budget. Some of this, eg housing benefit, is spent in areas of devolved competence. Other analyses of enhanced devolution involved looking at the fiscal pact, the social pact and economic pact between citizen and government. The devolution of further powers for the Scottish Parliament should be done on a principled basis rather than simply trying to satisfy a preconceived objective of devolution to the Scottish Parliament. Some things are not and cannot easily be devolved. Any decisions on what further devolution there will be needs to be taken on the basis of stability, practicality and principle.

### Conclusion

Principles of further devolution which would require consideration include fiscal policy, welfare, and constitutional rights (including the allocation of funding from general taxation across the UK), the relationship between taxation and expenditure, representation and the role of Scottish MPs voting on purely English matters and how that constitutional position would be sustained in the future.

## The Society's commentary

The referendum will be on the simple question "should Scotland be an independent country?" This question does not allow for any consideration of more powers for the Scottish Parliament in the event of a 'no' vote. Whether there will be more powers for the Scottish Parliament other than tax powers already being advanced under the Scotland Act 2012 will depend on political considerations rather than legal issues.

The main parties who are opposed to independence have established commissions to consider what changes could be made to the existing constitutional settlement should the electorate vote to remain part of the United Kingdom.

These are:

1. The Liberal Democrat Home Rule and Community Rule Commission, who have produced *Federalism: the best future for Scotland*. This proposes that the Scottish Parliament would have new powers over:
  - a) income tax bands and rates
  - b) inheritance tax and capital gains tax
  - c) aggregates levy and air passenger duty
2. The Labour Party Devolution Commission, who have produced an interim report *Powers for a purpose – strengthening devolution*.
3. The Conservative Commission on Devolution, chaired by Lord Strathclyde and referred to in a speech by Ruth Davidson MSP on 26 March 2013. The Prime Minister has indicated that he will consider further powers for the Scottish Parliament in the event of a 'no' vote in the referendum.

The Political and Constitutional Reform Committee of the House of Commons recently published its report *Do we need a constitutional convention for the UK?* (25 March 2013 H.C.371). It suggested that the UK Government considers preparations for a constitutional convention. In the event of a 'no' vote, plans from the parties listed above, which include more powers for the Scottish Parliament, would clearly form part of any convention's review.

### Alternative ideas on further devolution

Devo more, proposed by the Institute for Public Policy Research, aims to develop a model of enhanced devolution for Scotland. It has published proposals that income tax should be fully devolved and that a large proportion of VAT should be assigned. The range of taxes which would be desirable to devolve include alcohol and tobacco duties, all land taxes, aggregates levy, air passenger duty and the practicalities of devolving capital gains tax on land transactions should be considered.

Devo max proposes the transfer of powers to the Scottish Parliament which would make it responsible for all taxation and spending. This would mean that social security, welfare, and various taxes would be devolved. VAT and pensions, however, would remain with the UK. The Scottish Government would pay a proportion to the UK Government for defence, foreign relations, the UK budget deficit and national debt and for other UK services.

Whatever the model, we know that devolution of powers from the UK Parliament to the Scottish Parliament has come about from consensus between political parties and with the involvement of civic society.

## Questions to be answered

As much as people in Scotland deserve to know the consequences of a 'yes' vote in the referendum, we believe the electorate deserve to know as far as possible the consequences of a 'no' vote. To that end, we would ask the following questions:

What powers would the Liberal Democrat, Conservative and Labour parties propose to devolve to the Scottish Parliament in the event of a 'no' vote?

What timescale for further devolution would be proposed by the Liberal Democrat, Conservative and Labour parties?

To what extent are the Liberal Democrat, Conservative and Labour parties prepared to agree a joint programme for additional powers? How would such additional powers be defined and delivered?

What changes would be needed to the devolved institutions in the event of further devolution?

# What would independence mean for the economy and business?

## What we heard

This discussion focused on the effect independence would have on Scotland's economic and business landscape.

The main issues in the economy are the currency, fiscal issues, tax, financial services, and defence.

In terms of currency, the options would be to retain the pound sterling (with or without the agreement of the UK Government), adopt the euro or to adopt a separate Scottish currency.

On fiscal issues, there are a number of questions to be asked of the UK Government dependent upon the currency decision. If the pound sterling is retained, would Scotland have representation on the Monetary Policy Committee? How would the Bank of England operate as a central bank for two separate member states? How would the currency relate to economic policy and what control would Scotland have over its fiscal position or economic policy in the final analysis. In respect of tax and independence, Scotland would be able to design its own tax structure, but the content of any future tax code and the relationship between income, capital taxes and corporation and minor taxes would have to be very clear.

In terms of financial services (where many of the providers of these services operate within Scotland and in other parts of the UK), if the vote is 'yes', would two regulators be required rather than one and how well would financial services regulation operate between the two jurisdictions and between two regulators?

Lastly, the defence industry and the energy sector are substantial employers in Scotland and there is a practical question about whether these industries would flourish in an independent Scotland. A number of business organisations have raised specific and more detailed questions on these points.

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## The Society's commentary

In addition to the roundtable, we have considered the UK Government Scotland's analysis paper on *Currency and Monetary policy* (April 2013) and the Scottish Government's response. This paper sets out four options for the currency of a future independent Scottish state:

- 1) formal sterling currency union;
- 2) use of sterling without agreement;
- 3) joining the euro; and
- 4) introducing a new Scottish currency.

The Fiscal Commission Working Group issued its report in February 2013 containing a series of recommendations for Scottish Ministers to consider. The working group considered the following currency options

- 1) Sterling
- 2) The euro
- 3) A Scottish currency pegged to sterling; and
- 4) A flexible Scottish currency

The Scottish Government considered that it made sense to retain sterling in a currency union with the rest of the UK.

In addition to currency considerations, the financial infrastructure, eg the central bank, financial and prudential regulation, taxation policy and consumer protection all need to be clearly identified in advance of the referendum.

There is little clarity about the division of assets and liabilities and how debt would be allocated. A number of debt division rules have been identified but there has been no specific agreement on what negotiations between the UK and Scottish Governments would produce. The UK Government takes the view that following independence, Scotland would be responsible for a share of the UK's liabilities. Debt sharing and debt management would also be important in this context.

All of these considerations have implications for fiscal policy, borrowing and credit rating. We believe that clarity on these issues is crucial in determining the impact of independence on individuals and companies in Scotland.

## Questions to be answered

### **By the Scottish Government**

How would the Scottish Government's preferred currency option (the pound) function in the light of the UK Government's stated position and what contingency plans exist if the UK Government does not agree?

What plans has the Scottish Government for financial infrastructure, financial regulation, taxation policy and consumer protection?

How will independence affect the legal system, those who use it and the legal profession?

What share of assets and liabilities does the Scottish Government believe it should assume?

### **By the UK Government**

What share of assets and liabilities would they want the Scottish Government to assume?

## What would independence mean for judicial and parliamentary restructuring?

### What we heard

This roundtable discussion focused on the potential need, or not, for judicial and parliamentary restructuring should Scotland become an independent country and on the issues for consideration in creating a constitution.

The debate over Scottish independence has turned recently to discussion of the post-referendum landscape. On 5 February 2013, the Scottish Government published *Scotland's Future: from the Referendum to Independence*, which spoke of a written constitution. This suggests a two-stage process would follow a majority 'yes' vote. From 18 September 2014 until March 2016, there would be constitutional negotiations with the UK Government culminating in the formal grant of independence by the UK Parliament following the Scottish Parliament elections in May 2016 and then a constitution framing process internal to Scotland would take place.

The paper *Scotland's Future* identifies that "the right time for a written constitution to be drafted is ... after independence, not before". It then goes on to identify some of the potential content of a new Scottish constitution, including that the constitution should be a written constitution, that the monarchy will continue and that there will be a Supreme Court of Scotland. Scotland's membership of the European Union and protection of ECHR rights will also be subject to constitutional provision.

The paper also identifies a number of social rights which could be protected under a Scottish constitution. These include public services and also the possibility of welfare, pensions, healthcare and education. Principles of climate change, the environment and sustainable use of Scotland's natural resources are also to be protected by the constitution and, lastly, the power to declare war should rest with the Scottish Government with a role for the Scottish Parliament in exerting the use of the power.

How a constitution will be made for Scotland is also touched on in the paper, which suggests the possibility of a constitutional convention convened by the newly elected independent Scottish Parliament with reference to a number of citizen-led assemblies, which have helped to form new constitutions in various jurisdictions throughout the world.

## The Society's commentary

Creating a constitution for an independent Scotland would be a multi-faceted project.

There are certain principles to guide the creation of responsible government.

- 1)** The government should be by the consent of the people.
- 2)** The constitution should respect the principle of the separation of powers and create a stable state.
- 3)** A new constitution should be written and formulated by a thorough process of consultation.
- 4)** There should be a broad-based constitutional convention comprising a range of interests to design the constitution.

The issue of the sovereignty of the people would have to be clarified in the context of retention of the monarch. The "constitutional platform" appears to be an "interim constitution". It would be helpful were the Scottish Government to confirm that this is correct and that the interim constitution would be subject to complete revision by the constitutional convention.

We believe separation of powers should define the powers of the executive, the legislature and the judiciary. The paper published by the Scottish Government only focuses on separation between the executive and the legislature. How the separate branches of government will operate is not detailed.

It would be necessary to know how the voting system for electing a parliament and government would work and what system of checks and balances would be adopted, eg would the new constitution provide for a qualified majority for certain types of legislation, would the parliament's power to legislate be constrained in any way by requiring compliance with ECHR or would it propose a second chamber? The paper does not make any proposals about the size of an independent Scottish Parliament. Does the Scottish Government believe that the current number of MSPs (129) would be enough to deal with all the new functions which will accrue to the parliament in the event of independence?

Although there is a reference in the *Scotland's Future* paper to a Scottish treasury function and the creation of Revenue Scotland, there is no detail about the position or role of the civil service. It will be important for the Scottish Government to detail what constitutional provisions will apply to ensure the independence of the civil service and also what added capacity would be needed to administer the new powers.

We believe that the independence of the judiciary must be entrenched in any constitution. There is a clear preference that the existing court structure comprising the High Court of Justiciary, the Court of Session and the sheriff court should remain, as should the independent legal professions.

The Scottish Government's paper indicates there would be a Supreme Court of Scotland. However, there is no definition of the powers of the Supreme Court, how its independence would be guaranteed or what powers the court would have to strike down legislation. This is key to the system of checks and balances. If the constitution provides that the parliament is constrained in what it can legislate and provides that the Scottish Supreme Court can strike down legislation which is unconstitutional, what legislation will be affected? Would the powers affect all Scottish Parliament legislation since 1999 or all Scottish Parliament legislation and all existing pre-independence UK Parliament legislation?

We believe that Scotland must in the event of independence accede to the European Convention on Human Rights (ECHR) and should consider becoming party to various human rights treaties. This will provide proof of good international citizenship as well as of Scotland's commitment to protecting and promoting human rights at home and abroad.

ECHR is the main treaty which protects human rights in Europe. Becoming party to ECHR depends on membership of the Council of Europe (CoE). Article 4 of the statute of the CoE provides that the Committee of Ministers should invite a new state to become a member of the CoE. However, ECHR could continue to apply uninterrupted following the declaration of independence and before Scotland becomes party to the CoE/ECHR. There are also 14 protocols additional to ECHR to which Scotland should become party. As party to ECHR, the European Court of Human Rights (ECtHR) will have automatic jurisdiction to entertain individual as well as inter-state complaints concerning possible violations of ECHR by Scotland. Scotland could also bring cases before the ECtHR against other states.

In addition to ECHR, there are other international, regional, general or specialised human rights treaties to which Scotland could consider becoming a party. These include the International Covenant on Civil and Political Rights (ICCPR/1966), the International Covenant on Economic Social Cultural Rights (ICESCR/1966), the European Social Charter (1961), the Convention Against Torture and other forms of cruel, inhuman and degrading treatment or punishment (1984), the International Convention on the Elimination of Racial Discrimination (1965), the International Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), the Framework Convention for the Protection of National Minorities (1995), the Genocide Convention (1949) and the European Charter for Regional or Minority Languages.

Joining international human rights treaties is important for the protection of human rights. But even more important for the effective protection of human rights is to grant individuals the right to petition international human rights bodies. As party to ECHR, Scotland will automatically recognise the right of individual petition. This right is discretionary as far as other conventions are concerned. For example, the UK is not a party to the Optional Protocol to the ICCPR or the Optional Protocol to the ICESCR, both of which recognise the right of individual petition.

Whether ECHR or other human rights treaties will apply directly within Scotland or will need to be incorporated into domestic law depends on how the Scottish constitution will deal with the relationship between international and domestic law. If international law treaties need to be incorporated, Scotland would need to enact legislation like the Human Rights Act 1998 in order to give effect to the treaties domestically.

Scotland must also become party to the International Criminal Court (ICC) by ratifying the Rome Statute of the International Criminal Court. The ICC exercises jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression but only if Scotland is unable or unwilling to exercise its jurisdiction over these crimes.

## Transitional and interim provisions

In the event of a 'yes' vote, transitional and interim provisions concerning Scottish and UK citizenship, the apparatus of the state including the head of state, executive, judicial and parliamentary competence, foreign affairs, defence and financial and fiscal arrangements will all be necessary. Clarity on these issues is needed in order to inform the electorate.

### Questions to be answered:

#### **By the UK Government**

What principles will govern its approach to negotiations for full legal independence in the event of a 'yes' vote?

#### **By the Scottish Government**

How will the Scottish Government avoid locking Scotland into de facto unchangeable constitutional arrangements in pre-independence negotiations, eg over cross-border arrangements?

Will the Scottish Government consult on the constitutional platform referred to in paragraph 2.10 of the paper *Scotland's Future* and, if so, how?

How will the Scottish Government ensure consistency between the constitutional platform (or interim constitution) referred to in paragraph 2.14 of *Scotland's Future* and the creation of a constitution through a constitutional convention which will operate a participative process where the people of Scotland will have a direct role in shaping the constitution? To what extent will provisions of the constitutional platform be subject to change by the constitutional convention?

What parliamentary system of checks and balances would be envisaged for an independent Scotland?

What powers would a Supreme Court have in an independent Scotland? Would it be able to strike down legislation passed by the Scottish Parliament or any applicable pre-independence UK Parliament legislation?

How would an independent Scotland enshrine international law treaties including those relating to human rights?