

## OFFICIAL SENSITIVE

From: [redacted – s. 38(1)(b)]

CUKR

26 April 2017

### Minister for UK Negotiations on Scotland's Place in Europe

## REFERENDUM BILL – UPDATE ON CONSULTATION ANALYSIS AND PUBLICATION

### Introduction

1. We are meeting tomorrow to brief you on the analysis and publication of responses to the recent consultation on the draft Referendum Bill and to discuss next steps on preparation of the Bill.

### The consultation - background

2. The consultation comprised a series of open questions focussed on technical modifications to the referendum arrangements as per the Scottish Independence Referendum Act 2013. The consultation closed on 11 January. We received around 7,500 (of which around 40 were from organisations). These responses have now been independently analysed. We are committed under FOI to publish responses and the analysis by the 5<sup>th</sup> of June, although the expectation has been that we will do so well in advance of that.

3. Respondents used the opportunity of the consultation to raise a wide range of issues, some of which did not relate directly to the questions. We have supported the analysts to ensure they understand the technical detail and wider evidence base in order to properly contextualise the analysis and meet the commissioning brief more generally. Whilst the analysts have done a decent job of accurately reflecting the responses through acknowledging the range of matters raised and analysing those directly relevant to the questions, it has taken a considerable amount of time and effort to get to this point and we are not yet satisfied that the report is fit for publication.

### The consultation – analysis

4. The key points to highlight in the analysis cover –

- *security of the poll*, particularly about postal voting and oversight more generally, including comments about the operations and ‘independence’ of relevant bodies, notably the Electoral Commission. A range of familiar views and opinions about the 2014 poll were rehearsed.
- *franchise*, particularly about the decisions (we were not inviting views expressly on franchise) to maintain the current residency-based approach. Many agreed this approach but the most prevalent ask was from ‘expatriates’ that they be able to participate

## OFFICIAL SENSITIVE

- *regulation of the campaign*, a wide range of views both about who could participate in campaigning, how funding should be controlled and information provided to voters. Comments also covered civil service activity and role of broadcasters.

5. Significant matters not directly related to the consultation but raised by many respondents and therefore acknowledged in the analysis are –

- *Section 30 order*, with mixed views about who should have a say in determining whether a referendum should proceed and in overseeing policy in relation to it
- *Holding a referendum*, [redacted – s. 30(c)]

6. The consultation responses (particularly those from relevant organisations) have identified a range of areas for further policy development. Work is underway on these matters, some of these require Ministerial decision (see annex A on policy decisions required).

### **The consultation - points to discuss**

7. The independent analysis struggles to balance the ‘negative’ responses since respondents who agreed with the proposals tended not to give detailed answers. That gives us a presentational challenge, which we are continuing to discuss with the analysts.

8. The more negative responses reflect our understanding that some sections of the public either do not trust or do not like aspects of voting arrangements and are quick to give voice to that. [redacted – s. 30(c)]

9. The independent analysis is not able to challenge factually incorrect statements, ‘debunk’ accusations, or defend policy decisions. We therefore propose to publish a Government report to accompany publication of the responses and independent analysis. We propose to also work with the Electoral Commission and Electoral Management Board to ensure they are similarly able to respond to comments on their roles and activities.

10. A particular issue has been how to proportionately acknowledge the responses commenting on matters not directly related to the consultation. We will provide additional information on this issue in the meeting.

### **Draft Referendum Bill- background**

**Paragraphs 11 to 14:** [redacted – s. 29(1)(a)]

### **Recommendation**

15. That you note the work in hand and the points for discussion.

[redacted – s. 38(1)(b)]

**OFFICIAL SENSITIVE**

<b>Copy List:</b>	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Cabinet Secretary for Finance and the Constitution			X		

David Rogers  
Ian Davidson  
[redacted – s. 38(1)(b)]  
Ewan Crawford  
[redacted – s. 38(1)(b)]  
[redacted – s. 38(1)(b)]

**OFFICIAL SENSITIVE**

**Annex A:** [redacted – s. 29(1)(a)]

## OFFICIAL SENSITIVE

From: [redacted – s. 38(1)(b)]  
CUKR  
June 2017

### Minister for UK Negotiations on Scotland's Place in Europe

## REFERENDUM BILL – UPDATE ON CONSULTATION ANALYSIS AND PUBLICATION

### Introduction

1. To provide advice on the independent analysis of the consultation on draft Referendum Bill and next steps on the publication of the responses to the Bill.

### The consultation - background

2. The consultation comprised a series of open questions focussed on technical modifications to the referendum arrangements as per the Scottish Independence Referendum Act 2013. It took forward a Programme for Government commitment to consult on a Bill so that it would be ready should the Parliament decide to proceed to a referendum. The consultation was therefore clear that it covered relevant technical matters only and that matters such as the timing of a referendum would be for Parliament to consider. The consultation closed on 11 January.

3. We received 7,667 submissions. 469 of the responses received were removed prior to analysis because they did not include valid name and address details or were blank.

4. 42 responses were submitted by organisations or groups; the rest were submitted by individuals

### Analysis of the consultation responses

5. The analysis was independently conducted in line with the agreed brief, which was discussed with ministers before the procurement was undertaken. This is attached for reference. The draft report, which is also attached, is structured in order to separately draw out the conclusions of the relatively small number of organisations and those from individuals.

6. The former, in particular those with expertise in and responsibilities for electoral matters were generally supportive of the proposals, as noted below. In separate advice we have highlighted areas where we think the proposed legislation could be strengthened as a result.

7. Responses from individuals varied in their detail and engagement with the consultation questions and the technical proposals. It is not clear that respondents always understood the proposals or were familiar with the arrangements for the conduct of previous referendums.

## OFFICIAL SENSITIVE

8. Some respondents did engage directly with the questions. As summarised below, views ranged widely, so whilst there are some ideas which could usefully be pursued it is not possible to discern a consistent pattern. Responses are of course drawn from a very small and self-selecting sample and we need to be additionally cautious about drawing conclusions about public attitudes. They do though suggest scope to consider the need for strengthening current communications about the robustness of current and proposed arrangements. Further advice is set out below.

9. The analysis has highlighted a number of key themes in the public responses.

- *Role of the Electoral Commission.* Some respondents valued the Commission's work, and there were suggestions their powers should be extended and strengthened. Others expressed dissatisfaction and did not see the Commission as truly impartial. There were calls for an alternative organisation (often an international organisation) to take on the role of independent scrutiny and oversight of the referendum.
- *Conduct of the poll.* One of the most prevalent themes was concern about security and risk of electoral fraud. Respondents made suggestions about how they thought security arrangements could be tightened. There was a particular lack of confidence in postal voting. Respondents supported the proposal set out in the consultation paper requiring 100% checking of personal identifiers on all postal voting statements. There was also widespread agreement with the proposal in the consultation paper that the counting officer must not knowingly appoint or employ anyone who has been involved in campaigning during the referendum.
- *Franchise.* There was much comment about eligibility to vote and the decision to maintain the current residency-based approach. Many agreed this approach but the most prevalent ask was from 'expatriates' that they be able to participate. There were also comments about whether 16- and 17-year olds should be able to vote.
- *Other aspects of referendum arrangements.* Some participants commented on a section 30 order, mainly endorsing the approach or stating it should not be needed. There were conflicting views about the proposed question.
- *Campaign rules.* Among the few respondents who engaged with the technical detail of the campaign rules there was general support for the proposals. Other respondents engaged with the principles, and made specific suggestions e.g. on permitted participants or spending limits, or donations. Comments on campaign donations tended to focus on greater transparency and control of donations. There was also concern that public money should not be used to support campaigning. Some respondents thought access to fair, honest and accurate campaign information was important and expressed concern about the role of the media in reporting information.

10. The analysis found that some respondents to the consultation do not trust or do not support aspects of the current voting arrangements. Responses also included a number of "conspiracy theories" and misunderstandings of the process. The

## OFFICIAL SENSITIVE

independent analysis is not able to challenge factually incorrect statements, 'debunk' accusations, or defend policy decisions.

11. As noted above, separate analysis was undertaken of the responses from key organisational stakeholders. These organisations were generally supportive of the arrangements set out in the consultation document and made some suggestions for ways to improve the draft bill. **[redacted – s. 30(c)]**

12. Respondents also used the consultation to raise a wide range of issues, some of which did not relate directly to the questions. These fall into two main categories:

- Issues which relate to the draft bill or other legislation, including comments on a section 30 order and the referendum question. **[redacted – s. 30(c)]**
- Comments outwith the scope of the consultation, such as on the timing of a referendum. As agreed in the procurement specification, these have been acknowledged but not analysed in the final chapter of the report.

13. Although these issues have not been analysed in the independent report it is clear from even a cursory glance at the individual responses that there was a reasonable degree of interest in and comment upon these matters. Upon publication it is to be expected that others will prepare their own analyses of the responses and may comment on these matters.

### Consultation- Next Steps

14. We propose to publish the analysis report, alongside the consultation responses. Whilst we do not propose an official analysis or detailed response to accompany publication, it would be appropriate to prepare a short summary response reiterating the technical nature of the consultation and contextualising some of the assertions in some responses by restating the general integrity of current arrangements and acknowledging some of the opportunities as raised in the report. We will work with the Electoral Commission and Electoral Management Board to ensure they are similarly able to respond to comments on their roles and activities. A draft of this summary response is also attached.

### Recommendation

15. That you:

- note the conclusions in the draft independent analysis report
- agree to publication of the report together with the consultation responses
- clear the proposed Government summary response

It is some time since the consultation closed and there are occasional media enquiries about it. As a matter of good practice we should proceed to publish reasonably quickly. With your agreement we will work with Communications and others to agree an appropriate timeline for publication

**[redacted – s. 38(1)(b)]**

OFFICIAL SENSITIVE

CUKR

X[redacted – s. 38(1)(b)]

June 2017

Copy List:

First Minister  
Deputy First Minister and Cabinet Secretary for  
Education and Skills  
Cabinet Secretary for Finance & Constitution  
Minister for Parliamentary Business  
Lord Advocate  
Permanent Secretary  
DG Strategy & Operations  
Liz Lloyd  
Ewan Crawford  
David Rogers  
Ian Davidson  
Colin Troup  
**[redacted – s. 38(1)(b)]**  
Murray Sinclair  
Willie Ferrie  
Alison Coull

**[redacted – s. 38(1)(b)]**  
**[redacted – s. 38(1)(b)]**

Permanent Secretary  
29 March 2017

First Minister

Copy to: Deputy First Minister  
Cabinet Secretary for Finance and the Constitution

## THE INDEPENDENCE REFERENDUM

### *Purpose*

1. You announced on 13 March that the Government would seek the agreement of the Scottish Parliament to begin the process to secure the power for the Parliament to legislate to hold an independence referendum by Spring 2019 at the latest. On 28 March, Parliament voted in support of the Government's motion to seek that power.
2. The intention to hold an independence referendum is therefore now the settled policy of the Scottish Government. Scottish Ministers can expect the support of the civil service in the normal way to assist in the delivery of that objective, consistent with the terms of the civil service code.
3. This minute sets the context for this decision and some of the key considerations that we will take into account as we support Ministers.

### *Context*

4. The possibility of holding a referendum was set out in your party's manifesto for the Scottish Parliament elections in 2016, and particularly in the context of the risk of Scotland being taken out of the EU against its will. In light of the fact that in the EU referendum the people of Scotland voted on 23 June by a margin of 62% to 38% to remain within the EU, you said in your statement of 24 June that:

"Scotland does now face that prospect - it is a significant and material change in circumstances - and it is therefore a statement of the obvious that the option of a second [*independence*] referendum must be on the table. And it is on the table.

[...].

If Parliament judges that a second referendum is the best or only way to protect our place in Europe, it must have the option to hold one within that timescale.

That means we must act now to protect that position. I can therefore confirm today that in order to protect that position we will begin to prepare the legislation that would be required to enable a new independence referendum to take place if and when Parliament so decides."

5. In tandem with that preparatory work you indicated that the Scottish Government would consider all options to protect Scotland's interests in Europe. When you met the Prime Minister in Edinburgh on 15 July she committed to agree the UK's objectives with the Scottish Government and only to trigger Article 50 once a joint UK approach was in place.

6. Against that backdrop, Scottish Ministers and officials have sought to work co-operatively with their UK counterparts at a variety of levels, especially through the Joint Ministerial Committee structure.

7. In December 2016, the Scottish Government published *Scotland's Place in Europe*. This outlined a compromise position that recognised the result of the EU referendum, but argued for the UK to stay in the single market or, if that was not possible, for the UK to seek as part of its negotiation an outcome that would allow Scotland to do so. The paper also set out proposals for a rebalancing of power across the UK to provide that following the UK's departure different policy decisions could and should be taken within Scotland.

### **Process**

8. Having engaged with the UK Government in good faith, Scottish Ministers concluded that there is insufficient evidence to show that the UK Government has taken Scotland's interests into account in terms of the triggering of Article 50 or in the subsequent negotiating priorities. Ministers have also expressed concern that the approach being taken by the UK Government to the repatriation of powers from the EU may undermine substantively the current devolution settlement.

9. On this basis Scottish Ministers have decided that the people of Scotland should be offered the choice of whether independence is the best or only way to protect Scotland's interests. The Scottish Parliament agreed on 28 March to seek the power to legislate to hold a referendum in this regard.

### **Role of the Civil Service**

10. In preparing for the referendum Scottish Ministers will be entitled to expect the full support of the civil service in line with the normal rules and our statutory obligations. We will be guided by the experience of the 2014 referendum and the recognition by successive heads of the civil service that the job of the civil service is to support the elected government of the day, including on matters of significant constitutional change where the Governments within the UK have different policies. I have discussed this approach with Sir Jeremy Heywood.

11. In supporting you in these matters we will ensure that Ministers are provided with the necessary advice and support to allow you and your colleagues to take the decisions and actions necessary to develop and implement your policy in line with the Ministerial and Civil Service Codes. As part of this work, we will engage with [REDACTED] to ensure that all relevant legal issues are given full consideration. We will also seek to present Ministers with evidence and analysis, including on the wider implications that may arise from decisions and actions required to prepare for

a referendum, whether individually or in aggregate. That analysis will include offering a view about the impact that delivering the referendum, and preparing for its outcome, might have on the Government's wider programme of activity to deliver your Programme for Government commitments. However, we understand your strong commitment to delivery of the Government's wider priorities and to the continued focus on education as the Government's defining mission.

12. It will be important too for the civil service to develop robust plans to ensure our readiness to implement either outcome of the referendum. That work will include transitional planning for moving to an independent Scotland.

### ***Managing Constitutional Change***

13. Preparing for both the referendum and for the UK's departure from the EU will require focus and careful management. Work on a referendum will take place in parallel with work to prepare for the impact of exiting the European Union, following the Prime Minister's notification today of her intent to pursue that outcome. We will ensure that Ministers have the support that they need in order to exert the maximum influence in the UK/EU negotiations. In addition, Ministers, with the support of the civil service, will also have a key role in engaging with all sections of Scottish society to address any uncertainty that may arise from two concurrent constitutional processes. In this regard, an effective Government communications programme will be essential.

14. We will continue our work to ensure that we are using the resources of the civil service to maximum effect and to identify where we see scope for de-prioritisation of activity and essential augmentation of skills or capacity – which would be made necessary by Brexit, notwithstanding the decision on the referendum. My senior colleagues and I will also have an important leadership role to play among public sector leaders and our wider stakeholder community.

### ***Regularity and Propriety of Expenditure***

15. We will prepare, for your agreement, an assessment of the necessary budget provision that will be required to support the delivery of a referendum. In so doing, we will ensure that we will be able to demonstrate that expenditure is being made in line with the requirements of regularity and propriety.

16. As you will recall, as part of its audit of the SG's 2013-14 Annual report and accounts, Audit Scotland considered the expenditure on direct costs associated with the *White Paper Scotland's Future: Your Guide to an Independent Scotland*. The Auditor General concluded that:

"We are also required to consider aspects of propriety insofar as they relate to specific items of expenditure. Auditing standards recognise that propriety is not readily susceptible to objective verification. These issues therefore required careful consideration. Overall, we concluded that relevant propriety requirements for this expenditure had not been breached and there was no need to modify our regularity opinion."

17. As Principal Accountable Officer it will be my responsibility to ensure that all the necessary arrangements are in place with a view to achieving a further unqualified audit opinion generally, as well as in respect of expenditure associated with this policy.

**Conclusion**

18. You are invited to note the contents of this minute.

LE  
29 March 2017

RESTRICTED HANDLING

PRIVATE

First Minister

As previously discussed, I attach a minute on the Independence Referendum.

There have been minor changes to paragraph 11 – where I have added reference to the Ministerial and Civil Service codes and to paragraph 13 where I have made clear that work on Brexit and the referendum will take place in parallel.

I am, as ever, happy to discuss.

Leslie

Leslie Evans  
Permanent Secretary  
29 March 2017

