

Annex 1- information

Extract from submission dated 24 January 2020 to Cabinet Secretary for Government Business and Constitutional Relations (document 1)

Legal Powers

10. SGLD advice is that on a similar basis to 2012 the Scottish Ministers have the power to ask the Electoral Commission to test the 2014 question.

11. Section 10 of the Political Parties, Elections and Referendums (2000) Act (PPERA) allows Scottish Ministers to request advice from the Electoral Commission. The request in 2012 to test the 2014 question made use of the section 10 powers. Enactment of the Referendums Bill does not affect the powers available through section 10 of PERA. When the request was made to the Commission in 2012, the section 30 Order was not yet law, although the Edinburgh Agreement was in place and the Order approved by Parliament. There was a risk in 2012 that, because there was not yet a transfer of competence the Commission could have taken the view it should not agree to test a referendum question which was not beyond challenge. That risk will have increased with the PM's response refusing a section 30 Order. However, it does not create additional underlying legal difficulties, as the situation is similar if not identical to in 2012 where the Commission agreed to the request before a transfer of competence.

12. Under the Referendums Bill, the Commission must report on the intelligibility of a question as soon as practicable after a "trigger" Bill is introduced. This would effectively compel the Commission to test the question. The constraints on timetabling mean we must request question testing before we are in a position to introduce any Bill so we cannot use this route to compel the Commission to test a question. However, the Commission will be aware that it would be required to test a question on introduction of a Bill.

19. SGLD's advice that there is a legal basis for Ministers to ask the Commission to undertake question testing

Extract from earlier draft of the above submission (document 8)

Legal Powers

10. SGLD advice is that on a similar basis to 2012 the Scottish Ministers have the power to ask the Electoral Commission to test the 2014 question ~~and this is exercisable within devolved competence.~~

Comment on paragraph 10: "This isn't quite right for technical reasons – the argument is the function is conferred by post devolution UK Act and/or implied under the Scotland Act".

11. Section 10 of the Political Parties, Elections and Referendums (2000) Act (PPERA) allows Scottish Ministers to request advice from the Electoral Commission. The request in 2012 to test the 2014 question made use of the section 10 powers. Enactment of the Referendums Bill does not affect the powers available through section 10 of PERA. When the request was made to the Commission in 2012, the section 30 Order was not yet law, although the Edinburgh Agreement was in place and the Order approved by Parliament. There was a risk in 2012 that, because there was not yet a transfer of competence the Commission could have taken the view it should not agree to test a referendum question which was not beyond challenge. That risk will have increased with the PM's response

refusing a section 30 Order. However, it does not create additional underlying legal difficulties, as the situation is similar if not identical to in 2012 where the Commission agreed to the request before a transfer of competence.

12. Under the Referendums Bill, the Commission must report on the intelligibility of a question as soon as practicable after a “trigger” Bill is introduced. This would effectively compel the Commission to test the question. The constraints on timetabling mean we must request question testing before we are in a position to introduce any Bill so we cannot use this route to compel the Commission to test a question. However, the Commission will be aware that it would be required to test a question on introduction of a Bill.

Extract from submission dated 26 February 2020 to Cabinet Secretary for the Constitution, Europe and External Affairs (document 4)

5. The Law Officers in their Opinion of 6 December 2019 confirmed Ministers can lawfully undertake policy development work preparing proposals for independence and in calling for a transfer of power.

Extract from email from Graham Fisher (Deputy Director, Scottish Government Legal Directorate) to the Lord Advocate and Solicitor General on 28 February 2020 @17:21. CC'ed to Legal Secretariat to the Lord Advocate; Solicitor to the Scottish Government: [redacted]; Chief Parliamentary Counsel; [redacted], (document 7)

In particular, we consider as noted at paragraph 5 that preparation of a Bill would be covered by the Law Officers' Opinion of 6 December 2019, confirming Ministers can lawfully undertake policy development work preparing proposals for independence, and in calling for a transfer of power.